

THE POSITIVE IMPACT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A CASE STUDY ON THE SOUTH PACIFIC AND LESSONS FROM THE U.S. EXPERIENCE

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I. INTRODUCTION

The personal integrity of persons with disabilities has been systematically violated for centuries. In 2006, the United Nations, recognizing the vulnerability of persons with disabilities, adopted the Convention on the Rights of Persons with Disabilities (CRPD).¹ The CRPD was developed with the support of hundreds of disabled people's organizations, interest groups, and non-governmental organizations; it has been approved unanimously by the United Nations General Assembly; and it has eighty-two ratifications and 144 signatories.² The rigor that led to the creation of the CRPD provides the articles of this Convention particular credibility.

Many of the States that ratified or signed the CRPD now are in the process of drafting disability-rights legislation. The CRPD provides one model for the legislative protection necessary for persons with disabilities to enjoy their human rights. The United States, which has had a disability-rights statute since 1991, offers a similar model for legislation.

This article will analyze the positive impact the CRPD is having in stimulating and guiding legislative protections in developing States. It will briefly consider legislative protection in South Pacific States,³ and will then

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1. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/61/611 (May 3, 2008) [hereinafter CRPD]; Tracy R. Justesen & Troy R. Justesen, *Perspectives on the UN Convention on the Rights of Persons with Disabilities: An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses to Sign This UN Convention*, 14 HUM. RTS. BRIEF 36, 36, 38-39 (2007); Tara J. Melish, *Perspectives on the UN Convention on the Rights of Persons with Disabilities: The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37 (2007).

2. The Secretary-General, *Status of the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto*, ¶ 3, delivered to the General Assembly, U.N. Doc. A/64/128, (July 7, 2009), available at <http://www.mineaction.org/downloads/1/A64128.pdf>; see also UN Enable, Promoting the Rights of Persons with Disabilities, <http://www.un.org/disabilities/index.asp> (last visited Mar. 16, 2010).

3. See *infra* Part III.A.

analyze policy and pending legislative reforms in Vanuatu, the first Pacific Island State to ratify the CRPD.⁴ This article will compare the recently released Vanuatu National Disability Policy and Plan of Action 2008-2012 to the provisions of the CRPD and provide recommendations based upon experiences from U.S. laws.⁵

II. THE RIGHTS OF PERSONS WITH DISABILITIES AND THE EMERGENCE OF THE CRPD

A. *The Problem*

"Disabled people have been discriminated against, marginalized, and segregated from society for most of human history."⁶ Disability discrimination and lack of accommodation affects millions of people in the Australasia-Pacific region. The United Nations Economic and Social Commission for Asia and the Pacific estimates that more than 400 million persons with disabilities live in the Asia/Pacific region.⁷ The Papua New Guinea government estimates that about ten to fifteen percent of the individuals of that State, or about 520,000 people, have a disability.⁸

The preamble to the CRPD explains that the United Nations adopted the CRPD based on twenty-five key facts. One of these is "that the majority of persons with disabilities live in conditions of poverty," thus creating a "critical need to address the negative impact of poverty on persons with disabilities."⁹ The World Bank estimates that persons with disabilities make up twenty percent of the world's poorest people.¹⁰ The United Nations Economic and Social Commission for Asia and the Pacific has observed that "[t]he Asian and Pacific region has by far the largest number of people with disabilities in the world. Most of them are poor, their concerns unknown and their rights overlooked."¹¹

4. See *infra* Part III.B.

5. See *infra* Part III.B.

6. Einat Hurvitz, *Disability Rights and United States Foreign Assistance Policy - A New Framework*, 18 AM. U. INT'L L. REV. 1189, 1190 (2003).

7. The U. N. Econ. & Soc. Comm'n for Asia & Pacific, Social Policy and Population Section, Disability Programme, <http://www.unescap.org/esid/psis/disability/> (last visited Mar. 16, 2010).

8. Department for Community Development Government of Papua New Guinea, *Papua New Guinea National Policy on Disability*, at iv (2005), available at <http://www.dfcd.gov.pg/human/files/disability/Papua%20New%20Guinea%20National%20Policy%20on%20Disability%202.doc>.

9. CRPD, *supra* note 1, at Preamble(t).

10. Jeanine Braithwaite & Daniel Mont, *Disability and Poverty: A Survey of World Bank Poverty Assessments and Implications*, at 1 (2008), <http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172608138489/WBPovertyAssessments.pdf>.

11. U.N. Econ. & Soc. Comm'n for Asia & Pacific, Asian and Pacific Decade of Disabled Persons 1993-2002, <http://www.unescap.org/esid/psis/disability/decade/index.asp> (last visited Mar. 16, 2010).

Economic and cultural factors constrain the ability of persons with disabilities to exercise their economic rights, such as access to gainful employment.¹² The United Nations Economic and Social Commission for Asia and the Pacific Review in 2002 claimed there was need for coordination between non-governmental organizations and public bodies, legislative protection, access to buildings and schools for persons with disabilities, education for persons with disabilities, and education of the public.¹³ The 2003 United Nations Economic and Social Commission for Asia and the Pacific Review observed that these reforms have only reached a very small percentage of persons with disabilities.¹⁴

Unlike other groups requiring special protection, persons with disabilities historically have not received any specific protection under international laws. Following World War II, the community of nations posited the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁵ These instruments specifically protect the rights of minority groups but do not specifically protect persons with disabilities. For example, Article 2 of the UDHR states: “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁶

Similarly, Article 2 of the ICCPR and Article 2 of the ICESCR require States to enforce the rights under these conventions, without distinction or discrimination of any kind on such basis as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁷ Philip Alston has observed that “the relevant norms were in fact

12. Paul Harpur, *Sexism and Racism, Why Not Ableism? Calling for a Cultural Shift in the Approach to Disability Discrimination*, 34 ALTERNATIVE L.J. 163 (2009) (Austl.); U.N. Econ. & Soc. Comm’n for Asia & Pacific [UNESCAP], *Working Paper: Impact of Living or Working Environments on Persons with Disabilities*, 19-21, U.N. Doc. WP/07/03 (July 2007) (prepared by Wei Liu), available at http://www.unescap.org/pdd/publications/workingpaper/wp_07_03.pdf.

13. U.N. Econ. & Soc. Council [ECOSOC], Special Body on Pacific Island Developing Countries, *Participation of Persons with Disabilities in Pacific Island Countries in the Context of the Asian and Pacific Decade of Disabled Persons, 1993-2002, and Beyond*, U.N. Doc. E/ESCAP/SB/PIDC(7)/1 (Apr. 2, 2002), available at www.unescap.org/LDCCU/SBPIC7_Item%204-1E.doc.

14. See Mr. Kim Hak-Su, United Nations Under-Secretary-General and Executive Secretary, UNESCAP, Opening Statement at the High-level Intergovernmental Meeting to Conclude the Asian and Pacific Decade of Disabled Persons, 1993-2002, Otsu City, Shiga, Japan (Oct. 25-28, 2002) (transcript available at <http://www.unescap.org/oes/state/st021025.pdf>).

15. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

16. Universal Declaration of Human Rights, *supra* note 15, art. 2.

17. The ICCPR uses the term “distinction” where the ICESCR uses the term “discrimination.” See International Covenant on Civil and Political Rights, *supra* note 15, art. 2; International Covenant on Economic, Social and Cultural Rights, *supra* note 15, art. 2.

interpreted and applied for many years in a way which tended to overlook or even entirely ignore [disabled persons].”¹⁸

While no specialized convention was historically adopted, the United Nations has made declarations to provide persons with disabilities limited protection under international law. The United Nations proclaimed via General Assembly resolution 2856 (XXVI) of December 20, 1971, the Declaration on the Rights of Mentally Retarded Persons (1971).¹⁹ This Declaration provided a guide about how States should treat members of this group.²⁰ The intent of this Declaration can be evinced by Article 1, which states: “The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.”²¹ Following this Declaration, the Declaration on the Rights of Disabled Persons was proclaimed by General Assembly resolution 3447 (XXX) on December 9, 1975.²² The thirteen articles of this Declaration are not binding and provide a general indication of how the rights of persons with disabilities should be protected.²³

In 1993, the United Nations adopted a more dynamic Declaration in the Standard Rules on Equalization of Opportunities for Persons with Disabilities.²⁴ Even though this Declaration was non-binding, this instrument was the first international law that expressly recognized that persons with disabilities are entitled to enjoy all human rights in the same way as other members of the community.

18. Philip Alston, *Disability and the International Covenant on Economic, Social and Cultural Rights*, in HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 94, 98 (Theresia Degener & Yolan Koster-Dreese eds., 1995). For a more recent discussion of this neglect, see Aaron A. Dhir, *Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT’L L. 181 (2005).

19. Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), U.N. Doc. A/8429 (Dec. 20, 1971).

20. *Id.*

21. *Id.* art. 1.

22. Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), at 88, 30 U.N. GAOR Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975); see generally Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 469 (2002).

23. Declaration on the Rights of Disabled Persons, *supra* note 22. For a discussion of the non-binding nature of these Declarations, see generally Curtis A. Bradley & Jack L. Goldsmith, III, *Symposium: Human Rights on the Eve of the Next Century: UN Human Rights Standards & U.S. Law: The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Theresia Degener, *International Disability Law - A New Legal Subject on the Rise: The Interregional Experts’ Meeting in Hong Kong, December 13-17, 1999*, 18 BERKELEY J. INT’L L. 180, 187-89 (2000).

24. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, at 202, U.N. GAOR, 48th Sess., 85th plen. mtg., Supp. No. 627, U.N. Doc. A/RES/48/96 (Dec. 20, 1993).

B. Introducing the CRPD

In 2001, the United Nations General Assembly established an Ad Hoc Committee to report on the possibility of the United Nations adopting a disability-specific, human rights convention.²⁵ Ultimately, this process resulted in the CRPD being presented to the General Assembly on December 5, 2006.²⁶ On December 13, 2006, the United Nations General Assembly unanimously adopted the CRPD.²⁷ The adoption of this Convention followed five years of transparent negotiations, which involved States and non-governmental actors, from the global north and south. The CRPD is the first general human rights convention to protect persons with disabilities.

The adoption of the CRPD represents a paradigm shift from the medical model to an environmental model to a social justice model of disability. Under the medical model, persons with disabilities were treated as second class citizens who had a medical condition preventing their full enjoyment of human rights.²⁸ It was generally assumed that there was a baseline of minimal abilities needed to function “normally” in society, often predicated on an assumption of the biological inferiority of individuals who did not measure up.²⁹ This model was invoked, at best, for arguments that society had an obligation to provide welfare support and to assist persons with disabilities to manage their disabilities.³⁰ At worst, the model was used to justify segregating, institutionalizing, sterilizing, denying medical treatment to, or otherwise excluding disabled individuals from society.³¹

Beginning in the 1980s, the medical model of disability began to give way to an environmental model. Environmentalists argue that disability is socially constructed.³² Environments are not fixed and immutable, but can be changed so they require greater or lesser degrees of individual ability.³³ If the environment

25. Comprehensive & Integral International Convention to Promote & Protect the Rights & Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N. GAOR, 56th Sess., 88th plen. mtg., Supp. No. 168, U.N. Doc. A/RES/56/168 (Dec. 19, 2001); Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 83 (2007).

26. Jurist Legal News & Research, Annotation: The United Nations Convention on the Rights of Persons with Disabilities (Oct. 5, 2007), <http://jurist.law.pitt.edu/annotationsy/2007/10/united-nations-convention-on-rights-of.php>.

27. Melish, *supra* note 1, at 37.

28. Harlan Hahn, *Introduction: Disability Policy and the Problem of Discrimination*, 28 AM. BEHAV. SCIENTIST 293, 296, 304 (1985).

29. CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* 1 (1988).

30. Editorial, *Disability: Beyond the Medical Model*, 374 THE LANCET 1793 (2009) (Issue 9704).

31. Richard Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 1993 DETROIT C. L. REV. 1163, 1191 (1993).

32. LIACHOWITZ, *supra* note 29.

33. Hahn, *supra* note 28.

is changed (e.g., by altering physical environments and job descriptions) to require a lesser degree of ability, fewer people would be disabled.

More recently, the environmental model of disability has given way to a social justice model. Under the social justice model, the underlying principle is that disability should be regarded as an aspect of social diversity.³⁴ Marilyn Howard has explained the differences between these models, noting that “[t]he medical model emphasises impairment as the main barrier; the social model, society’s need to adjust.”³⁵ To explain the importance of the shift from the medical model to the social justice model, Stein stated that “most societies have historically assumed disabled persons are less capable than nondisabled persons. The social model underscores the manner in which disability is culturally constructed.”³⁶

Tara Melish has observed that “[r]atification of the Convention will . . . require States to think strategically about accessibility and reasonable accommodation for persons with disabilities in all . . . areas of life.”³⁷ Under this paradigm shift, persons with disabilities are regarded as being entitled to the same human rights as people without disabilities. Disability is not regarded as a medical condition but an aspect of social diversity.

Article 3 of the CRPD emphasizes “[r]espect for inherent dignity,”³⁸ “[n]on-discrimination,”³⁹ “[e]quality of opportunity,”⁴⁰ and “[a]ccessibility.”⁴¹ These fundamental principles are only achieved where there is substantive equality for persons with disabilities. Laws should empower persons with disabilities to exercise “[f]ull and effective participation and inclusion in society.”⁴² In addition, laws must respect differences and accept “persons with disabilities as part of human diversity and humanity.”⁴³

The social justice model can be conceived as forming part of a comprehensive civil rights policy to ensure equality. The CRPD does not provide detailed implementing steps with specific standards or benchmarks. Instead, it provides overarching principles and rights, which must be protected in

34. Lisa Waddington & Matthew Dillern, *Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* (Mary Lou Breslin & Silvia Yee eds., 2002), available at http://www.dredf.org/international/papers_w-d.html.

35. Marilyn Howard, An ‘Interactionist’ Perspective on Barriers and Bridges to Work for Disabled People, 12 (2003), <http://www.ssab.gov/DisabilityForum/MarilynHowardPaper.pdf>.

36. Stein, *supra* note 25, at 86-87.

37. Melish, *supra* note 1, at 45. See also Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494 (2008).

38. CRPD, *supra* note 1, art. 3(a).

39. CRPD, *supra* note 1, art. 3(b).

40. CRPD, *supra* note 1, art. 3(e).

41. CRPD, *supra* note 1, art. 3(f).

42. CRPD, *supra* note 1, art. 3(c).

43. CRPD, *supra* note 1, art. 3(d).

domestic laws.⁴⁴ The CRPD drafters adopted this approach “precisely to ensure that the Convention’s text would remain relevant and vital over time and space, capable of responding to new challenges and modes of abuse as they arose, as well as the vastly different challenges faced by States at different levels of development.”⁴⁵

The first two articles of the CRPD are introductory articles, which describe the Convention as a rights-based instrument. Article 1 provides that the purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁴⁶ The United Nations Department of Economic and Social Affairs has observed:

The . . . [CRPD] is a human rights instrument with an explicit social development dimension. It reaffirms that *all* persons with *all* types of disabilities must enjoy *all* human rights and fundamental freedoms on an equal basis with others. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights, where their rights have been violated, and where protection of rights must be reinforced.⁴⁷

The CRPD provides a broad definition of the physical and mental conditions that qualify for protection. Article 1 defines persons with disabilities to “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁴⁸ This section of the CRPD defining individuals protected by the CRPD can be distilled into three key principles: (1) a list of impairments that qualify as disabling should be non-exclusive; (2) disabling impairments should include at least physical, mental, intellectual, and sensory impairments; and (3) there should be a low threshold for an impairment to be legally protected.⁴⁹

Persons with disabilities are protected by rights found in CRPD Articles 3 to 9, which include universal rights, and Articles 10 to 30, which include substantive rights.⁵⁰ These rights often restate existing rights, but some of the rights are included to ensure that the well-established rights can be realized. For

44. CRPD, *supra* note 1, art. 3(d).

45. Melish, *supra* note 1, at 45.

46. CRPD, *supra* note 1, art. 1.

47. UN Enable, Relationship between Development and Human Rights, <http://www.un.org/disabilities/default.asp?id=33> (last visited Mar. 17, 2010).

48. CRPD, *supra* note 1, art. 1.

49. Ulrike Buschbacher Connelly, *Disability Rights in Cambodia: Using the Convention on the Rights of People with Disabilities to Expose Human Rights Violations*, 18 PAC. RIM L. & POL’Y J. 123, 131 (2009).

50. CRPD, *supra* note 1, arts. 3-30.

example, the right to equality and non-discrimination is well established.⁵¹ To realize this right, the CRPD includes a right to access buildings, schools, programs, and public transport;⁵² a right to live independently and to be included in the community;⁵³ a right to personal mobility;⁵⁴ freedom of expression and opinion and access to information;⁵⁵ a right to have privacy protected;⁵⁶ a right to participate in political life;⁵⁷ and a right to participate in cultural life, recreation, leisure, and sport.⁵⁸ Further, the right to life⁵⁹ and to be free from torture or cruel, inhuman, or degrading treatment or punishment are well-established rights.⁶⁰ To ensure these rights, the CRPD includes rights that are primarily relevant to persons with disabilities such as the rights to respect for home and the family,⁶¹ to health care,⁶² to habitation and rehabilitation,⁶³ to work, and to an adequate standard of living and social protection.⁶⁴ Finally, CRPD Articles thirty-one to forty establish implementation and monitoring schemes, and Articles 41 to 50 provide rules governing the operation of the CRPD.⁶⁵

To protect persons with disabilities, the CRPD provides that States should have robust domestic legislation to protect the rights of persons with disabilities, and that this legislation must be enforced.⁶⁶ Article 4(1) requires States to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities.”⁶⁷ To achieve this end, Article 4 requires States, among other things:

- To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention [CRPD];⁶⁸
- To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;⁶⁹

51. CRPD, *supra* note 1, art. 5.

52. CRPD, *supra* note 1, art. 9.

53. CRPD, *supra* note 1, art. 19.

54. CRPD, *supra* note 1, art. 20.

55. CRPD, *supra* note 1, art. 21.

56. CRPD, *supra* note 1, art. 22.

57. CRPD, *supra* note 1, art. 29.

58. CRPD, *supra* note 1, art. 30.

59. CRPD, *supra* note 1, art. 10.

60. CRPD, *supra* note 1, art. 15.

61. CRPD, *supra* note 1, art. 23.

62. CRPD, *supra* note 1, art. 25.

63. CRPD, *supra* note 1, art. 26.

64. CRPD, *supra* note 1, arts. 27-28.

65. CRPD, *supra* note 1, arts. 31-50.

66. CRPD, *supra* note 1, arts. 31-50.

67. CRPD, *supra* note 1, art. 4(1).

68. CRPD, *supra* note 1, art. 4(1)(a).

- To take into account the protection and promotion of the human rights of persons with disabilities in all public policies and programmes;⁷⁰ [and]

- To refrain from engaging in any act or practice that is inconsistent with the present Convention [CRPD] and to ensure that public authorities and institutions act in conformity with the present Convention [CRPD].⁷¹

To give full effect to the CRPD, “implementing legislation will usually still be required” even if a State has ratified and introduced the CRPD into domestic law.⁷²

III. DO LAWS IN PACIFIC ISLAND STATES ADEQUATELY PROTECT PERSONS WITH DISABILITIES?

A. How the CRPD Approaches Social and Economic Rights in Less Developed States

The process of consulting with stakeholders, drafting legislation, and implementing effective laws that comply with the CRPD could be beyond the financial means of less-developed States. Article 4(2) anticipates the financial burden of implementing the CRPD.⁷³ Article 4(2) provides:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.⁷⁴

To meet the level of protection anticipated by the CRPD, Pacific Island States must at least have robust domestic anti-discrimination laws that are enforced. As will be explored below, except for Fiji, and to a lesser extent Papua New Guinea, Palau, and Vanuatu, there is an acute regulatory hole in Pacific Island States’ protection of the rights of persons with disabilities. Fiji is

69. CRPD, *supra* note 1, art. 4(1)(b).

70. CRPD, *supra* note 1, art. 4(1)(c).

71. CRPD, *supra* note 1, art. 4(1)(d).

72. ANDREW BYRNES ET AL., FROM EXCLUSION TO EQUALITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES: HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION FOR THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL 54 (2007) (this is the official United Nations Handbook to the CRPD).

73. CRPD, *supra* note 1, art. 4(2).

74. CRPD, *supra* note 1, art. 4(2).

the only South Pacific Island State to expressly protect the rights of persons with disabilities in its Constitution. Chapter 4 of the Constitution of the Republic of the Fiji Islands 1997 contains the Bill of Rights.⁷⁵

Article 38 of the Fiji Constitution provides for equality before the law. Article 38(2) prohibits discrimination, stating:

A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth,⁷⁶ primary language, economic status, age or disability⁷⁶

Fiji enforces these constitutional rights through the Fiji Human Rights Commission. The Human Rights Commission Act 1999 expressly defines where discrimination is prohibited and states that affirmative action to achieve “social justice” is permitted.⁷⁷

In addition, Fiji has enacted the Fiji National Council for Disabled Persons Act 1994.⁷⁸ This enactment establishes the Fiji National Council for Disabled Persons, which is the national coordinating body on disability policies, and has advisory committees on health, legal services, housing, transport, employment, and sports and recreation.⁷⁹ Fiji has attempted to promote the education and employment of persons with disabilities through affirmative action programs for persons with disabilities under the Social Justice Act 2001.⁸⁰ Based upon this constitutional and legislative protection, it is possible to conclude tentatively that there is a reasonable degree of formal legislative protection of persons with disabilities in Fiji. A search of Fiji cases and reports did not identify any significant action to protect the legal rights of persons with disabilities.

The protection afforded to persons with disabilities in Palau is less extensive than in Fiji. Palau has no general laws protecting the human rights of persons with disabilities, but Palau has enacted the Equal Employment Opportunities Act 1993, which prevents discrimination based upon disability in employment relationships.⁸¹ Palau also has passed the Accessibility Act 1997, which

75. For discussion, see Fiji Human Rights Commission, *Constitution of the Republic of the Fiji Islands 1997 Bill of Rights: International Legal Analysis* (2004).

76. Fiji Islands Constitution Amendment Act 1997, c. 4, § 38(2), available at http://www.paclii.org/fj/legis/num_act/ca1997268/.

77. Human Rights Commission Act 1999, § 21 (Fiji), available at http://www.paclii.org/fj/legis/num_act/hrca1999267/.

78. Fiji National Council for Disabled Persons Act, 1994, available at http://www.fnmdp.org/docs/FNCDP_Act1994.pdf.

79. *Id.*

80. Social Justice Act 2001 (Fiji), available at http://www.paclii.org/fj/legis/num_act/sja2001154/.

81. Equal Employment Opportunities Act (1993) (Palau) (on file with author) (this source will become available at http://www.paclii.org/pw/legis/consol_act/).

provides a minimal financial allowance to families with children who both are under the age of twenty-one and have disabilities requiring twenty-four-hour care.⁸²

Where the Fiji and Palau laws purport to provide some protection of the rights of persons with disabilities, some Pacific Island States provide no legislative protection against disability discrimination at all. For example, in the Cook Islands, Tonga, Federated States of Micronesia, Nauru, and Niue, there are no general anti-discrimination laws to protect persons with disabilities, although some of these States do specifically protect other groups in society from discrimination. For example, the Cook Islands Constitution provides: "It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms"⁸³ The Cook Islands prohibit racial discrimination through the Race Relations Act 1972.⁸⁴ Disability protection, however, is not protected by its own statute or by the Cook Islands Industrial and Labour Ordinance 1964 or the amendments to this statute.⁸⁵

Similarly to the Cook Islands, the Constitution of Kiribati 1979, the Constitution of Tuvalu 1978, and the Constitution of the Solomon Islands 1968 prohibit discrimination on grounds including race, places of origin, political belief, or religion.⁸⁶ Disability is not mentioned. There are no general anti-discrimination laws to protect persons with disabilities in Kiribati, Solomon Islands, or Tuvalu.⁸⁷

Even where constitutions empower parliaments to protect persons with disabilities, this power has not always been exercised. For example, the

82. Accessibility Act (1997) (Palau) (on file with author) (this source will become available at http://www.paclii.org/pw/legis/consol_act/).

83. COOK ISLANDS CONSTITUTION art. 64, *available at* http://www.paclii.org/ck/legis/num_act/cotci327/.

84. Race Relations Act 1972 (Cook Islands), *available at* http://www.paclii.org/ck/legis/num_act/rra1972148/.

85. Industrial and Labour Ordinance Amendment Act 1973-1974 (Cook Islands), *available at* http://www.paclii.org/ck/legis/num_act/ialoaa19731974371/; Industrial and Labour Ordinance Amendment Act 1978 (Cook Islands), *available at* http://www.paclii.org/ck/legis/num_act/ialoaa1978371/; Cook Islands Industrial and Labour Ordinance Amendment Act 2002, *available at* http://www.paclii.org/ck/legis/num_act/ciialoaa2002482/.

86. CONSTITUTION OF KIRIBATI art. 15, *available at* http://www.paclii.org/ki/legis/consol_act/cok257/; CONSTITUTION OF TUVALU art. 27, *available at* http://www.paclii.org/tv/legis/consol_act/cot277/; CONSTITUTION OF THE SOLOMON ISLANDS art. 15, *available at* http://www.paclii.org/sb/legis/consol_act/c1978167/.

87. *E.g.*, Industrial Relations Code [Cap 85] (1974) (Tuvalu), *available at* http://www.paclii.org/tv/legis/consol_act/irc244/ (showing that Tuvalu's Industrial Relation Code does not prohibit any form of discrimination); Employment Act [Cap 30], § 33 (1977) (Kiribati), *available at* http://www.paclii.org/ki/legis/consol_act/ea149/ (showing that to encourage the employment of persons with disabilities the Employment Ordinance § 33 enables employers to make an application to the courts to pay persons with disabilities below the minimum wage).

Constitution of Samoa 1962 has a general equality clause in Section 15 which reads, “[a]ll persons are equal before the law and entitled to equal protection under the law.”⁸⁸ Although there is no specific protection against disability discrimination, Section 15(3) does empower the Parliament to make laws for the “protection or advancement of . . . any socially or educationally retarded class of persons.”⁸⁹ To date, no general anti-discrimination laws have been enacted. The only disability protection in Samoa is the Komesina O Sulufaiga (Ombudsman) Act 1988.⁹⁰ Under this enactment, complaints of disability discrimination by the government can be lodged with the Ombudsman.⁹¹ The Ombudsman can investigate complaints and report to Parliament.⁹²

There are two Pacific Island jurisdictions that have made moves to introduce general anti-discrimination laws to protect the rights of persons with disabilities. In Papua New Guinea, the Constitution of the Independent State of Papua New Guinea⁹³ established a body specifically designed to protect human rights.⁹⁴ Article 218 of Papua New Guinea’s Constitution provides general discrimination protection through the Ombudsman Commission.⁹⁵ The Ombudsman Commission serves to “help in the improvement of the work of governmental bodies and the elimination of unfairness and discrimination by them.”⁹⁶ Article 219 empowers the Ombudsman Commission to “investigate . . . any case of an alleged or suspected discriminatory practice within the meaning of a law prohibiting such practices.”⁹⁷ The primary law prohibiting discrimination in Papua New Guinea is the Discriminatory Practices Act 1963.⁹⁸ This Act prohibits discrimination “of another person or group of persons for reasons only of colour, race or ethnic, tribal or national origin.”⁹⁹ There is no protection for persons with disabilities.¹⁰⁰

Papua New Guinea has introduced disability protection laws as part of a broader policy to improve the lives of persons with HIV and AIDS. The

88. CONSTITUTION OF THE INDEPENDENT STATE OF SAMOA 1960 § 15, *available at* http://www.paclii.org/ws/legis/consol_act/cotisos1960438/.

89. *Id.* § 15(3).

90. Komesina O Sulufaiga (Ombudsman) Act (1988) (W. Samoa), *available at* http://www.paclii.org/ws/legis/consol_act/kosa1988295.

91. *Id.* § 11(1)-(2).

92. *Id.* §§ 11(1), 19(4).

93. CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA, *available at* http://www.paclii.org/pg/legis/consol_act/cotisopng534/.

94. *See id.* arts. 217-20.

95. *Id.* art. 218.

96. *Id.* art. 218(b).

97. *Id.* art. 219(1)(a)(iv)(B)(c).

98. Discriminatory Practices Act 1963 (Papua N.G.), *available at* http://www.paclii.org/pg/legis/consol_act/dpa1963269/.

99. *Id.* § (1).

100. *See id.*

HIV/AIDS Management and Prevention Act 2003¹⁰¹ introduces a national management scheme to fight the problems associated with HIV/AIDS.¹⁰² It is now unlawful to discriminate against or stigmatize a person on the grounds that the person is infected with or affected by HIV/AIDS.¹⁰³ The statute prohibits discrimination on the basis of HIV/AIDS status in employment, partnerships, professional or sporting organizations, education, provision of accommodation or housing, and provision of or access to goods, services, and public facilities.¹⁰⁴ A person discriminated against in these ways can apply to the national or district court for relief.¹⁰⁵ Such relief may include, but is not limited to, a declaration that the conduct is unlawful, an injunction, an order for apology, and damages for losses incurred and/or pain and suffering.¹⁰⁶

Providing this enactment is enforced, the HIV/AIDS Management and Prevention Act 2003 clearly meets the legislative standards anticipated by Article 4 of the CRPD,¹⁰⁷ but only with respect to discrimination based on HIV/AIDS status. There is no general anti-disability-discrimination act in Papua New Guinea. Comprehensive disability legislation has been considered in Papua New Guinea, but has not been laid before Parliament. In 1995, the National Board and the National Department of Community Development completed a draft Disability Act, but this draft bill has not been advanced in over a decade.¹⁰⁸

The most extensive protection for persons with disabilities in Vanuatu is in education. Section Eight of the Education Act No. 21 of 2001¹⁰⁹ provides that children must not be refused admission to education based upon gender, religion, nationality, race, language, or disability.¹¹⁰ However, this non-discrimination provision does not guarantee that students with disabilities will receive appropriate educational opportunities. For example, even if a deaf student using sign language is permitted to attend class with his or her peers, the quality of that

101. HIV/AIDS Management & Prevention Act 2003 (Papua N.G.), available at http://www.paclii.org/pg/legis/consol_act/hmapa2003313.

102. See *id.* § (6); see also Devon Peavoy, *Understanding Papua New Guinea's HIV/AIDS Management & Prevention Act 2003*, 2006 PAC. ISLAND AIDS FOUND. 1, available at <http://74.125.155.132/search?q=cache%3A0BigEA6uezIJ%3Awww.pacificaid.org%2Fgrafix%2FUnderstandingPNGlaw.pdf+Devon+Peavoy%2C+Understanding+Papua+New+Guinea%E2%80%99s+HIV%2FAIDS+Management+%26+Prevention+Act+2003%2C+2006+PAC.+ISLAND+AIDS+FOUND.+1&hl=en&gl=au>.

103. HIV/AIDS Management & Prevention Act, *supra* note 101, § (6)(1).

104. HIV/AIDS Management & Prevention Act, *supra* note 101, § (7)(a)-(h).

105. HIV/AIDS Management & Prevention Act, *supra* note 101, § 28(1).

106. HIV/AIDS Management & Prevention Act, *supra* note 101, § 28(3).

107. CRPD, *supra* note 1, art. 4(1)(b) (calling on States Parties to enact legislation to eradicate discrimination against disabled persons).

108. See Pacific Islands Forum Secretariat, PNG, Disability Country Profile (2010), <http://www.forumsec.org/pages.cfm/sustainable-development/social-policy/disability/country-profiles/png-disability-country-profile.html> (on file with author).

109. Education Act No. 21 of 2001 (Vanuatu), available at http://www.paclii.org/vu/legis/consol_act/ea104/.

110. *Id.* § (8)(1).

student's education would be substandard if there is no lip-reading training or sign language provided in the classroom.

Other Vanuatu laws provide persons with disabilities no significant protection. The Constitution of the Republic of Vanuatu prohibits discrimination in Article 5, but fails to specifically protect against disability discrimination:

The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health¹¹¹

Vanuatu has other antidiscrimination laws, but like the Constitution, these laws do not always protect persons with disabilities. For example, Section Eight of the Employment Act¹¹² prohibits sex discrimination in employment,¹¹³ but there is no equivalent provision for persons with disabilities in this statute.

It appears that, except for Fiji and, to a lesser extent, Palau, Papua New Guinea and Vanuatu, none of the above Pacific Island States have laws reflecting the standards posited by the CRPD. The CRPD requires States to enact and enforce robust legislative protection.¹¹⁴ To date, a number of Pacific Island States fail to provide adequate legislative protection to ensure that persons with disabilities can exercise their human rights.

B. How Can Vanuatu Achieve the Objects of the CRPD?

Vanuatu has a strong commitment to the CRPD. Vanuatu was the first South Pacific State to sign the CRPD on May 17, 2007.¹¹⁵ The Vanuatu legislature then unanimously ratified the CRPD on June 23, 2008, through enacting the Convention on the Rights of Persons with Disabilities (Ratification) Act 2008.¹¹⁶ On October 23, 2008, Vanuatu deposited its ratification of the CRPD with the

111. CONSTITUTION OF THE REPUBLIC OF VANUATU, art. 5, available at http://www.paclii.org/vu/legis/consol_act/cotrov406/.

112. Employment Act (2001) (Vanuatu), available at http://www.paclii.org/vu/legis/consol_act/e128/.

113. *Id.* § (8).

114. See CRPD, *supra* note 1, art. 4.

115. U.N. Office of the High Comm'r for Human Rights, Convention on the Rights of Persons with Disabilities, Ratifications and Reservations: Vanuatu, <http://www.unhchr.ch/TBS/doc.nsf/22b020de61f10ba0c1256a2a0027ba1e/1880cc26dc29f442c12572c9003640ab> [hereinafter High Comm'r].

116. Convention on the Rights of Persons with Disabilities (Ratification) Act, No. 25 (2008) (Vanuatu).

United Nations, and, on November 22, 2008, the CRPD became effective in Vanuatu.¹¹⁷

The Convention on the Rights of Persons with Disabilities does not create any actionable rights in itself.¹¹⁸ As previously mentioned, adopting States must enact their own enforcement provisions.¹¹⁹ To this end, Vanuatu has launched a National Disability Policy and Plan of Action 2008-2015.¹²⁰

As discussed in Part II.B, the CRPD prohibits disability discrimination in a wide variety of contexts, such as education and public transportation. The Vanuatu National Disability Policy prohibits disability discrimination in a similarly wide variety of contexts.¹²¹ For purposes of illustration, this article will focus upon how the CRPD and the Vanuatu National Disability Policy ensure disabled individuals the right to work.

Article 27 of the CRPD requires States to remove barriers that impede individuals with disabilities from exercising their right to work.¹²² Article 27(1) requires States to introduce laws to:

- (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;

117. High Comm'r, *supra* note 115.

118. See Convention on the Rights of Persons with Disabilities (Ratification) Act, *supra* note 116, §§ (1)-(2) (ratifying the CRPD but making no dispositive provisions as enforcement of rights).

119. See International Labour Office, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines*, 2004 CORNELL U. ILR SCH. 2 (2004), available at <http://digitalcommons.ilr.cornell.edu/gladnetcollect/164> (stating that States need to adopt a national strategy to achieve the goals laid out in treaties).

120. Government of the Republic of Vanuatu, Ministry of Justice & Social Welfare and the National Disability Committee, National Disability Policy & Plan of Action 2008-2015 (2009) [hereinafter National Disability Policy] (on file with author) (this source will become available at http://www.pacii.org/pw/legis/consol_act/). Despite the plan commencing in 2008, the plan was not finalized and published until 2009.

121. National Disability Policy, *supra* note 120, § 1 (stating that the policy directives are focused on the following areas: education, training, employment, and access to built environment and public transport).

122. CRPD, *supra* note 1, art. 27(1).

- (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.¹²³

These eleven clauses reflect the social inclusion model discussed in Part II.B of this article and require signatories to reduce systematic barriers in society. These clauses can be divided into two groups. Clauses (a), (b), (c) and (d) require the State to prevent people in society from excluding people with disabilities.¹²⁴ These clauses focus on ensuring a person is not excluded from work due to his or her disabilities. The remaining clauses¹²⁵ require more proactive interventions to ensure inclusion. These proactive duties require signatories to enact laws and policies that will remove the barriers to social inclusion and assist people with disabilities to reach their full potential in the labour market.¹²⁶

The National Disability Policy adopts various strategies to increase the ability of persons with disabilities to exercise their right to work.¹²⁷ These measures can be broadly grouped into implementing general anti-discrimination legislation, measures to increase educational opportunities for persons with disabilities, legislative support for universal design, and measures to directly increase the representation of persons with disabilities in the workforce.¹²⁸

123. CRPD, *supra* note 1, art. 27(1).

124. CRPD, *supra* note 1, art. 27(1).

125. CRPD, *supra* note 1, art. 27(1)(e)-(h).

126. *See* CRPD, *supra* note 1, art. 27(1)(e)-(h).

127. National Disability Policy, *supra* note 120, § 8.4.

128. National Disability Policy, *supra* note 120, § 8.

1. Introduction of Anti-Discrimination Legislation into Vanuatu

To implement CRPD Article 27, the National Disability Policy aims to “[a]mend Article 5(1) of the Constitution to include disability as a ground for non-discrimination”¹²⁹ and to “[e]xamine and/or enact anti-discriminatory legislation, where appropriate, that protects the rights of workers with disabilities. . . .”¹³⁰ The anti-discrimination legislation adopts the broad definitions of “persons with disability” and “discrimination” from the CRPD.¹³¹

While adopting the definitions directly from the CRPD is an extremely positive step, to ensure that persons with disabilities receive the protection intended by the CRPD and Vanuatu legislature, it is necessary to provide additional guidance beyond just using the definitions provided by the CRPD.¹³² CRPD Article 2 defines “discrimination on the basis of disability” to mean “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.”¹³³ Denial of reasonable accommodation is included as a form of discrimination.¹³⁴ If Vanuatu had simply adopted the definition in CRPD Article 2, then Vanuatu likely would have confronted difficulties in implementation.

The operation of the United States’ Americans with Disabilities Act (ADA)¹³⁵ provides an example of the problems that can occur when a judiciary must interpret anti-discrimination legislation. The original Americans with Disabilities Act of 1990 was intended to protect the rights of individuals with disabilities and to “assure equality of opportunity,”¹³⁶ much like the intended purpose of the CRPD.¹³⁷ In 2009, the United States Congress enacted the Americans with Disabilities Act Amendments Act of 2008,¹³⁸ emphasizing the intention of the original act.¹³⁹ These amendments operate to clarify the

129. National Disability Policy, *supra* note 120, § 8.1.2.

130. National Disability Policy, *supra* note 120, § 8.4.2.

131. See National Disability Policy, *supra* note 120, § 8.1.2.

132. See International Labour Office, *supra* note 119, at 30 (“The law should define closely what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.”).

133. CRPD, *supra* note 1, art. 2.

134. CRPD, *supra* note 1, art. 2.

135. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12113 (2006), *as amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

136. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a)(8), 104 Stat. 327, 329 (1990) (amended 2008).

137. See CRPD, *supra* note 1, art. 1.

138. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) [hereinafter ADA Amendments Act].

139. *Id.* § 12101(b)(1), 122 Stat. at 3554.

definition of disability and extend protection to a broader group of disabled individuals.¹⁴⁰

When enacting the Americans with Disabilities Act of 1990, the 101st Congress found that disabled individuals face significant difficulties in the areas of employment and that steps should be taken to provide this group of people with the means to gain equal footing in the workplace and daily life.¹⁴¹ After years of coverage under the Americans with Disabilities Act, many individuals with disabilities were still missing out on the protections intended to be provided by the Act.¹⁴² The amendments to the ADA were intended to expand coverage by more clearly defining disability and by rejecting several Supreme Court cases that narrowly construed the application of the ADA.¹⁴³ The amendments specifically state that courts had too narrowly interpreted the standards by which an individual would qualify as disabled, and that the purpose of the ADA Amendments Act was to extend protection to more people with disabilities.¹⁴⁴

Under the ADA, employers must provide reasonable accommodations to individuals with disabilities.¹⁴⁵ The term “reasonable accommodation” is a key element of the ADA because it imposes a requirement on employers, and is used for determining whether an individual is a “qualified individual” for purposes of the Act.¹⁴⁶ A person is a “qualified individual” if she or he “can perform the essential functions of the job with or without reasonable accommodation.”¹⁴⁷ Providing a “reasonable accommodation” means changing existing facilities to make them accessible and useable by disabled individuals, as well as restructuring job descriptions (such as adjusting work schedules, reassigning employees, or providing interpreters or readers, among other things).¹⁴⁸ The need for reasonable accommodations permeates every aspect of a work day, from receiving transportation to actually getting to work, to performing a job.¹⁴⁹ Reasonable accommodations are meant to help disabled individuals succeed in

140. *Id.* § 12101(a)(3), 122 Stat. at 3553.

141. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a)(8), 104 Stat. 327, 329 (1990) (amended 2008).

142. ADA Amendments Act, § 12101(a)(4), 122 Stat. at 3553.

143. *Id.* § 12101(a)(4)-(8), 122 Stat. at 3553-54 (overriding *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) because the U.S. Supreme Court had “narrowed the broad scope of protection intended to be afforded by the ADA” in those cases).

144. *Id.*

145. 42 U.S.C.A. § 12112(b)(5) (West 2009); see also Carrie Griffin Basas, *Back Rooms, Board Rooms - Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMPL. & LAB. L. 59, 66 (2008); Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and their Coworkers*, 34 FLA. ST. U. L. REV. 313, 316-17 (2007); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L. J. 79, 81 (2003).

146. See Basas, *supra* note 145, at 66-67.

147. Basas, *supra* note 145, at 67; see also 42 U.S.C.A. § 12111(8) (West 2009).

148. 42 U.S.C.A. § 12111(9).

149. See Basas, *supra* note 145, at 80-95.

the work environment, and failure to properly accommodate a disabled employee is the equivalent of discrimination under the ADA.¹⁵⁰

The United States Equal Employment Opportunity Commission (EEOC) determines on a case-by-case basis what constitutes a reasonable accommodation, basing the decision on the particular needs of a disabled individual.¹⁵¹ However, just as there are problems defining who is protected by the statute, there also are problems defining the limits of what an employer must do to accommodate individuals who are protected.¹⁵² Under the ADA, employers must provide only accommodations that are “reasonable” and need not provide accommodations that would impose an “undue hardship” on the employer.¹⁵³ This hardship is evaluated based on financial burden, the nature of the accommodation,¹⁵⁴ the size of the employer’s workforce, and the effect the expense of the accommodation has on the facility in question.¹⁵⁵ Employers have not been shy about claiming that proposed accommodations are unreasonable or impose undue hardship, and, prior to the enactment of the ADA Amendments Act, courts often agreed with employers.¹⁵⁶

American courts, thus, have long had difficulty defining critical provisions of the ADA, particularly the provisions specifying who is protected by the statute and the limits the statute places on the duty of employers to offer accommodations.¹⁵⁷ The American experience illustrates the difficulties Vanuatu likely would have faced if it chose simply to adopt wholesale the language used by the CRPD without providing employers more precise direction.

150. 42 U.S.C.A. § 12112(b)(5) (West 2009) (for a more complete description of what constitutes discrimination under the ADA, see § 12112 in its entirety).

151. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630 (2000) (Background); see also Basas, *supra* note 145, at 67-69.

152. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (addressing the circuit split over whether employers are required to reassign a disabled employee to a position over another qualified non-disabled employee, under reasonable accommodation mandates).

153. See 29 C.F.R. app. § 1630 (Background).

154. See Porter, *supra* note 145, at 317-18.

155. 42 U.S.C.A. § 12111(10) (West 2009).

156. See Basas, *supra* note 145, at 112 (“The language of reasonableness was never intended to preclude creativity and effort, even though its interpretation by jurists and employers has been rigid.”). For examples of how employers resist making reasonable accommodations, see *id.* at 113-115. See also John E. Matejkovic & Margaret E. Matejkovic, *What is Reasonable Accommodation under the ADA? Not an Easy Answer; Rather a Plethora of Questions*, 28 MISS. C. L. REV. 67, 69 (2009) (“According to surveys conducted by the American Bar Association, employers won 98% of the ADA employment cases resolved in 2003 and nearly 95% in 2002.”).

157. Stephen F. Befort, *Reasonable Accommodation and Reassignment under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions after U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 932-34 (2003) (stating that most ADA litigation has involved issues regarding the scope of the disability definition and the extent that employers are required to make reasonable accommodations for qualified individuals).

2. Educational Amendments

To improve the educational opportunities of persons with disabilities, the Vanuatu National Disability Policy¹⁵⁸ proposes to “[a]mend the Education Act to incorporate ‘inclusive’ and ‘special’ education and amend the Act to prohibit discrimination on the grounds of chronological age as a pre-condition to entering schools.”¹⁵⁹ Through the implementation of this policy, by 2012, thirty percent of vocational training courses should include persons with disabilities.¹⁶⁰ The National Disability Policy and Plan of Action claims that “[t]he overall goal of inclusive education is a school where all children are participating and treated equally.”¹⁶¹ It is important, however, for any educational policy to distinguish between formal and substantive equality.¹⁶²

The National Disability Policy¹⁶³ includes several policy objectives but no extensive legislative interventions. For example, the policy includes a public education campaign, which makes it the “responsibility of the school to accommodate differences in learners;” ensures there is “[a]dequate budgetary allocation specifically for the education of children with disabilities;” and enables teachers to have training and access to appropriate teaching materials.¹⁶⁴ While these policy objectives are admirable, they fall short of the legislative protection required to ensure persons with disabilities can exercise their rights to education.

To enable persons with disabilities to exercise their rights to education, CRPD Article 24(2) requires State Parties to ensure that:

- (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

158. National Disability Policy, *supra* note 120.

159. National Disability Policy, *supra* note 120, § 8.1.2.

160. National Disability Policy, *supra* note 120, § 8.4.2.

161. National Disability Policy, *supra* note 120, § 8.4.1.

162. See Elizabeth Dickson, *Disability Standards for Education and the Obligation of Reasonable Adjustment*, 11 AUSTL. & N.Z. J.L. & EDUC. 23, 24-25 (2006) (noting the difference between substantive equality and formal equality); see also Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 799-800 (2006) (stating that substantive equality is a factor to consider when creating structural remedies); Deborah Mabbett, *Some Are More Equal than Others: Definitions of Disability in Social Policy and Discrimination Law in Europe*, 34 J. SOC. POL’Y 215, 217-21 (2005).

163. National Disability Policy, *supra* note 120.

164. National Disability Policy, *supra* note 120, § 8.4.1

- (c) Reasonable accommodation of the individual's requirements is provided;
- (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
- (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.¹⁶⁵

The United States provides a good example of the level of legislation required to ensure that persons with disabilities can exercise their right to education. The Individuals with Disabilities Education Act (IDEA),¹⁶⁶ originally passed in 1990 and reauthorized in 2004, requires that children with disabilities must receive a "free appropriate public education" and that these children and their families' rights should be protected.¹⁶⁷ In accordance with the purpose of the ADA,¹⁶⁸ IDEA also emphasizes that proper rights to education should be provided so that disabled children are prepared to enter society as productive adults.¹⁶⁹

Children ages preschool through twenty-one are covered under the Act¹⁷⁰ if they meet the definition of disability and require specialized education.¹⁷¹ Schools must provide each qualified student with an individualized education program (IEP), as well as other related services.¹⁷² A team to design the IEP is comprised of the student's parents, regular and special education teachers, and specialists with information on the child's specific disability.¹⁷³ An IEP is required to contain specifics on the school's plan for specialized education, including the frequency of testing (if any), progress reports, and services provided to the child to meet the needs of her or his disability.¹⁷⁴ Schools also

165. CRPD, *supra* note 1, art. 24(2).

166. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006) (amended by Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004)).

167. 20 U.S.C. § 1400(d)(1)(A)-(B).

168. 42 U.S.C.A. §§ 12101-12113 (West 2009).

169. *See* 20 U.S.C. § 1400(d)(1)(A).

170. 20 U.S.C. § 1412(a).

171. *Id.* § 1401(3)(A) (listing the following as qualifying disabilities: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities).

172. *Id.* § 1414(d); *see also* Ann K. Wooster, *What Constitutes Services that Must Be Provided by Federally Assisted Schools under the Individuals with Disabilities Education Act (IDEA)* (20 U.S.C.A. §§ 1400 *et seq.*), 161 A.L.R. FED. 1, § 1[a] (2000).

173. *Id.* § 1414(d)(B). For further discussion of IEPs, *see* William H. Hurd and Stephen C. Piepgrass, *In Memoriam: Robert E. Shepherd, Jr.: Special Education Law*, 44 U. RICH. L. REV. 17, 17 (2009).

174. 20 U.S.C. § 1414(d)(1)(A)(i).

may also be required, under the IDEA, to provide other related services,¹⁷⁵ such as specialized transportation services to accommodate physical disabilities,¹⁷⁶ accommodations such as interpreters and speech therapy services,¹⁷⁷ and related services.¹⁷⁸

Reauthorized in 2004 as the Individuals with Disabilities Education Improvement Act,¹⁷⁹ the IDEIA imposes the same restrictions and mandates as the IDEA, but aligns the act with the No Child Left Behind Act of 2001 (NCLB),¹⁸⁰ a legislative act requiring schools to conduct standards-based testing as a prerequisite to receiving federal funding.¹⁸¹ This change primarily focused on how disability programs would be funded and allowed certain states to experiment with three-year IEPs for students instead of the traditional year-by-year development of these plans.¹⁸² Amended multiple times since its original inception, IDEA provides an example of how heavily legislated disabilities in education must be. The United States requires strict compliance with the rules laid out in IDEA, IDEIA and NCLB in order for states to receive funding for their school systems.¹⁸³ Non-compliance with the rules laid out in these laws subjects schools to enforcement actions, and may under some circumstances be considered discriminatory.¹⁸⁴ The objectives and requirements set forth in IDEA and its subsequent amendments meet the standards set forth by the CRPD¹⁸⁵ in providing disabled individuals with equal opportunity for an education, and as

175. See 20 U.S.C. § 1414(d)(1)(A).

176. Wooster, *supra* note 172, § 20[a].

177. Wooster, *supra* note 172, §§ 28[a], 29-35.

178. 20 U.S.C. § 1401(26)(A) (defining "related services").

179. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§1400-1482 (2006)).

180. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

181. See Pub. L. No. 107-110, § 1111, 115 Stat. 1425, 1444-51.

182. Pub. L. No. 108-446, § 614, 118 Stat. 2647, 2701-14.

183. See *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 520 (2007) (explaining that as a condition of receiving federal funds under the IDEA, the school district must comply with IDEA's mandates); *Sch. Dist. of Pontiac v. Sec'y of U.S. Dept. of Educ.*, 584 F.3d 253, 262 (6th Cir. 2009) (stating that the Secretary of the Department of Education has interpreted NCLB as requiring states to "implement the [NCLB] law in its entirety" if it receives federal funding under the NCLB) (quoting Rodney Paige, Sec'y, U.S. Dep't of Educ., Remarks to National Urban League (Mar. 25, 2004)).

184. See 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). To prevail on a discrimination claim against a school, under the ADA, for failing to provide a free appropriate education, the following elements must be met: (1) student must be "disabled" as defined by the Act; (2) the student must be "otherwise qualified" to participate in school activities; (3) the student must have been "excluded from participation in, denied the benefits of, or subject to discrimination at the school"; and (4) "the school or the board of education knew or should be reasonably expected to know of his disability." See *Ind. Area Sch. Dist. v. H.H.*, 428 F. Supp. 2d 361, 363 (W.D. Pa. 2006).

185. CRPD, *supra* note 1.

such is a positive model for Vanuatu in implementing anti-discriminatory educational legislation.

3. Access to Buildings and Public Transport

With respect to access to public facilities and transportation by disabled individuals, Vanuatu's National Disability Policy includes the following aim:

[E]nsure that barrier-free features are incorporated as a standard requirement in designs and plans for all new constructions, renovations and expansion of buildings and facilities used by members of the public, including transport, public offices and buildings, educational facilities and housing facilities, and to incorporate these provisions into existing building laws where they exist and where they do not exist, to enact new legislation.¹⁸⁶

The National Disability Policy explains the types of access that buildings should make available and requires that new public buildings and transport systems be made accessible,¹⁸⁷ but it does not explicitly require the retrofitting of existing buildings.

Although Vanuatu's creation of building-accessibility standards is a big step in the right direction, it is crucial that Vanuatu also ensure that these standards are implemented and enforced. The CRPD requires States to develop specific enforcement mechanisms.¹⁸⁸ Article 9 of the CRPD asserts that States must ensure that persons with disabilities have "access, on an equal basis with others, to the physical environment . . . and to other facilities and services open or provided to the public, both in urban and rural areas."¹⁸⁹ Implementing accessibility standards will require political will and significant resources. CRPD Article 9 provides no additional support, nor technical assistance specifying which building elements and features must be accessible, or how and by when member States should meet such standards.¹⁹⁰ Likewise, there is no objective, standardized means for measuring a member State's progress or lack thereof in this regard.¹⁹¹ While Article 9 does not provide for specific standards, Article 9(2) does provide for steps to "[d]evelop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public."¹⁹²

186. National Disability Act, *supra* note 120, § 1. For a discussion of the policy regarding public access to facilities and transportation in full, see § 8.5.

187. *See id.* § 8.5 (indicating that entrances, exits, stairs, doors, corridors and rest rooms will be required to be made accessible to the disabled).

188. CRPD, *supra* note 1, art. 4(1)(a) (urging States Parties to adopt legislative and administrative measures to ensure equality of human rights).

189. CRPD, *supra* note 1, art. 9(1).

190. CRPD, *supra* note 1, art. 9.

191. *See* CRPD, *supra* note 1, art. 9.

192. CRPD, *supra* note 1, art. 9(2)(a).

4. Specific Measures on Right to Work

As discussed above in Part III.B.1 of this article, the Vanuatu National Disability Policy advances the notion that the law must forbid employers from discriminating on the basis of disability.¹⁹³ The National Disability Policy also contains other measures designed to increase the employment of persons with disabilities.¹⁹⁴ Examples include providing support to nongovernmental organizations (NGOs) that help disabled individuals find jobs, setting a quota requiring that at least 0.4% of the public sector workforce be comprised of individuals with a disability by 2009, and establishing an employer-of-the-year award.¹⁹⁵ The National Disability Policy does not specify the level of financial support that will be provided to NGOs, nor does it require that disabled individuals be proportionally represented at each level of the public sector workforce.¹⁹⁶ If Vanuatu adopts a quota, it is crucial for the quota to have enforcement measures¹⁹⁷ and for the regime to ensure that persons with disabilities are represented at all levels of the government.¹⁹⁸ The quota will be of little use if disabled individuals are hired only for unskilled positions, such as janitors.¹⁹⁹

To encourage employers to employ people with disabilities, laws must:

- address the belief that employers' hiring and retention practices relating to people with disabilities are efficient;
- find ways to rebut the assumption that people with disabilities are less productive than their able bodied counterparts; and
- rebut the presumption that the existing labor market is equitable.²⁰⁰

As Vanuatu and the rest of the Southern Pacific States move forward in implementing disability protection legislation, they can look to United States' legislation for guidance as to how to effectively enact laws created to achieve equality in the workplace. And in looking to these legislative models, the South Pacific also should evaluate the conflicts between disabled employees and employers that have arisen as a result of disability legislation. The inherent belief that disabled individuals are not as productive as non-disabled individuals

193. National Disability Policy, *supra* note 120, § 8.4.2.

194. See National Disability Policy, *supra* note 120, § 8.4.2.

195. National Disability Policy, *supra* note 120, § 8.4.2.

196. See National Disability Policy, *supra* note 120, § 8.4.2.

197. See International Labour Office, *supra* note 119, at 39 (stating that the impact of a quota in Thailand has been limited because no enforcement mechanisms exist).

198. See Paul Harpur, *Developments in Chinese Labour Laws: Enforcing People with Disabilities' Right to Work?*, LAWASIA J., 2009, at 26, 31-32.

199. See *id.*

200. Stein, *supra* note 145, at 85. In this article, although the author challenges the presumptions, he recognizes that these are the "three baseline presumptions adopted by scholars who have written on the topic."

is an initial obstacle, but it is only one of many problems facing disability legislation.

The United States provides excellent examples of the conflicts that arise in the workplace as a result of compliance with disability laws. Because it is the burden of the employer to provide a "reasonable accommodation" under the ADA,²⁰¹ conflicts arise between employers, disabled employees, and employees who are not disabled but suffer from the burden imposed by the accommodation.²⁰² For example, job reassignment to a vacant position is considered a form of reasonable accommodation.²⁰³ However, problems arise when a disabled individual, as part of an accommodation, is assigned to a desirable vacant position, and qualified non-disabled individuals are passed over for that position.²⁰⁴ Reasonable accommodations for disabled employees may impose a heavier workload on non-disabled employees, often in increased hours or increased demand for physical labor to make up for the excused work of the disabled employee.²⁰⁵ The United States Supreme Court has addressed the issue of employee reassignment conflict by allowing employers to uphold systems of seniority, meaning that senior employees are not passed over for vacant positions by disabled, less-senior employees.²⁰⁶

These issues of conflict illustrate the constant struggle to provide opportunity to disabled individuals in order to promote equality, while not placing undue burdens or limitations on those who do not suffer from disability. The United States' ADA and the amendments to the ADA show that the burden of providing these accommodations should be placed on the employer; however, the employer's obligation of providing these accommodations should be limited so as not to produce an undue hardship, thereby alleviating burdens on the employer and possible resentment on the part of non-disabled employees.²⁰⁷

IV. CONCLUSION

Millions of persons with disabilities across the globe confront systematic discrimination that prevents them from exercising their human rights. To address this problem the United Nations adopted the CRPD.²⁰⁸ This article has

201. 42 U.S.C. § 12112(b)(5).

202. Porter, *supra* note 145, at 318-21.

203. See 29 C.F.R. app. § 1630.2(o).

204. Porter, *supra* note 145, at 314, 319.

205. Porter, *supra* note 145, at 319.

206. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 403-06 (2001) (holding that the ADA ordinarily does not require the assignment if it would violate the rules of seniority, but that the assignment may be appropriate if the plaintiff proves that the assignment is reasonable).

207. See Porter, *supra* note 145, at 322-27 (referring to the implications of *Barnett*, 535 U.S. 391).

208. CRPD, *supra* note 1.

analyzed how the CRPD can assist persons in developing States through guiding and stimulating legislative reform.

This paper began by reviewing what the CRPD requires from State Parties. States that have ratified the CRPD are required to ensure that their domestic laws and policies comply with prescribed overarching principles.²⁰⁹ These principles provide a framework for ensuring that fundamental rights are protected and that the Convention remains relevant. To test the extent to which the principles in the CRPD are being implemented, this paper has focused upon States in the South Pacific.

Most South Pacific States substantially fail to realize the overarching principles posited in the CRPD. Nonetheless, the CRPD is having a positive impact. The first State in the South Pacific to ratify the CRPD was Vanuatu.²¹⁰ Following the ratification of the CRPD, Vanuatu adopted a National Disability Policy to reform domestic laws and policies to comply with the CRPD.²¹¹ The final part of this paper analyzed Vanuatu's National Disability Policy to determine the extent to which it will enable persons with disabilities to exercise their right to work. This paper identified potential legislative and policy pitfalls that Vanuatu will need to avoid and offered recommendations to improve the reforms. While the reforms in Vanuatu are not perfect, the way in which the CRPD has stimulated such wide-ranging reforms in a jurisdiction, which until now has had virtually no anti-discrimination laws to protect persons with disabilities, is an extremely positive outcome.

209. *See supra* part II.B.

210. High Comm'r, *supra* note 115.

211. National Disability Act, *supra* note 120.