

The concepts of 'disability' & 'reasonable accommodation'

Richard Whittle, Sheffield Hallam
University, UK

Locating the concepts at EU-level

- * Directive 2000/78/EC – anti-discrimination law; one component of disability policy
- **‘disability’** - Article 1 (“...on grounds of ...”) – ‘Gatekeeper’ to the protection under the directive, operates at the opening stage of the claim
- **Reasonable Accommodation** (the ‘duty’) - Articles 2(2)(b)(ii) and **5**, Recitals **16**, **17**, **20** and **21**
 - Intended to operate at the ‘merits’ stage of the legal analysis and thus later in the claim

‘disability’: a problematic term

WHO’s International Classification of Functioning, Disability & Health (ICF, 2001) employs ‘disability’ as an umbrella term for:

- **Impairment** (deviation or loss in terms of body function and/or structure)
- **Activity limitation** (person level impact of such deviation or loss)
- **Participation restrictions** (barriers to participation in the social and built environment)

Asking for trouble?: the Americans with Disabilities Act (ADA, 1990)

- Prior to the ADA Amendment Act (effective January 2009), the ADA defined **disability** as:
 - A physical or mental impairment that *substantially limits* one or more of the *major life activities* of such an individual;
 - A record of *such* impairment; or
 - Being regarded as having *such* an impairment
- * many types of impairments - including epilepsy, diabetes, multiple sclerosis, intellectual disabilities , major depression, and bipolar disorder were excluded by the Courts

Australian Disability Discrimination Act (Cth) 1992

disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

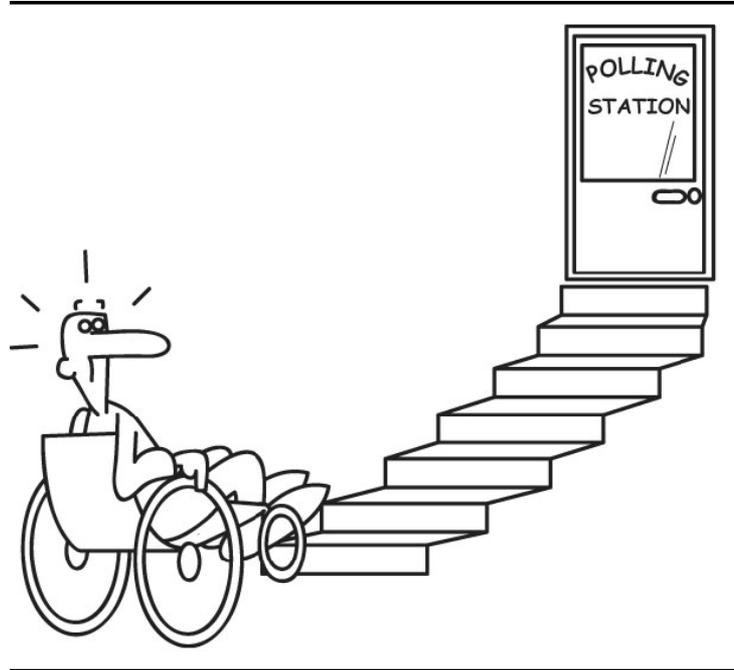
and includes a disability that:

- (h) presently exists; or (i) previously existed but no longer exists; or (j) may exist in the future; or (k) is imputed to a person.

The **purpose** of the prohibition & the duty

- Removing *irrelevant* considerations from the decision-making process (typically within a market driven context)
 - No white people (e.g. of ‘direct’ race discrimination) - *removal of rule*
 - No beards (e.g. of ‘indirect’ race/religious discrimination) - *removal of rule unless objectively justified*
 - Must work on Friday’s (application of ‘the duty’ – Religious discrimination)
 - *Retention of general rule but adaptation to the individual where ‘reasonable’*
- Extension of ‘the duty’ to the disability ground (USA; AUS; NZ; UK; IRE; EU Employment Framework Directive)

The challenge with the duty: changing mindsets



Securing a better fit between the individual, their physical & organisational environments as well as the products & services they interact with ('design for all')

The operation of the 'duty'

- 'Reasonable'?
 - Need only be an 'effective' accommodation (does not have to be the 'best')
 - Must not: (i) impose an undue/disproportionate burden on the respondent (ii) change the nature or purpose of the job or service sought
- Procedural as well as substantive elements to be followed
- Reactive in nature but can have anticipatory effects
- Only applies to an 'otherwise qualified' individual
- Once the substantive element is triggered, the duty renders what might appear to be a 'relevant' consideration 'irrelevant'
 - recognising that the barrier to participation exists because of poor design which, in turn, results in less favourable treatment (discrimination). A failure to recognise human difference (where reasonable) in a new design or to remove an existing barrier is itself discrimination.

Test cases & influential sources

- Court of Justice
 - Case C-13/05, *Chacón Navas*
 - Case C-303/06 *Coleman v Attridge Law*
- UN Convention on the Rights of PwDs (2006):
 - “...include those who have *long-term* physical, mental, intellectual or sensory impairments ...”
- Prior references to ‘*serious* disabilities’ at EU-level (HELIOS).
- The British Supreme Court & the ‘duty’
 - *Archibald v. Fife Council* [2004] UKHL 32

The legislative provisions: Directive 2000/78/EC

- **Article 5:** to guarantee compliance with the principle of *equal treatment*; employers shall take *appropriate* measures (where needed in a particular case); unless such measures would impose a *disproportionate burden*; it will not be disproportionate when sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned
- **Recital 17:** This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the *essential functions* of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.
- **Recital 20:** Appropriate measures; i.e. effective and practical measures to adapt the workplace to the disability, for example, adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.
- **Recital 21:** (disproportionate burden) account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.