

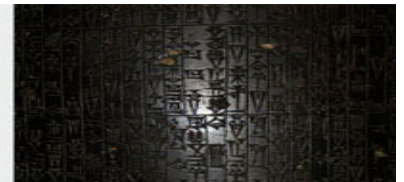
Non-discrimination, reasonable accommodation & the burden of proof in disability proceedings – EU Law & beyond

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Disability non-discrimination law in context

- Non-discrimination law (the prohibition of discrimination) – **just one element** of an effective disability policy.
 - Note, in particular, disability assistance & insurance programmes at a national level.
- The **material scope** of the prohibition – variations exist depending on the legal system.
- The **qualitative scope** of the prohibition - variations exist depending on the legal system.

Disability non-discrimination law in context: the **material scope**

- **National system** - varied material scope but a **common minimum** of coverage exists among EU Member States, driven by their EU obligations (see next bullet point).
- **EU system** - *explicitly* applying to the context of employment & occupation (Directive 2000/78/EC). But note:
 - potential judicial expansion via general principles & the EU Charter of Fundamental Rights.
 - COM (2008) 426 proposal (Goods, Facilities, Services) + possibility of a European Accessibility Act.
 - potential expansion of EU disability law flowing from the EU's commitments under the UNCRPD.

Disability non-discrimination law: the **material scope** cont.

- **Global international system** - a material scope that is as *extensive* as the UNCRPD.
 - reaching beyond the common minimum of the EU Member States to encompass equality of access to, and enjoyment of, a full range of public and private goods and services.

Disability non-discrimination law: **qualitative scope**

- **National system** - *varied* but:
 - The ‘**equal treatment**’ objective forms a **common minimum standard** among EU Member States in the context of employment & occupation (driven by their EU obligations).
 - Beyond employment & occupation, EU Member States enjoy discretion subject to their commitments under the ECHR & the UNCRPD. But note the potential expansion of EU disability law flowing from the EU’ s commitments under the UNCRPD.

Disability non-discrimination law: **qualitative scope cont. (a)**

- **EU system** - demands *effective remedies* at Member State level to realise the 'equal treatment' objective in the context of employment & occupation. Note also:
 - A higher level of protection is permitted in this context and arguably as far as 'positive discrimination' (Art. 7(2) of Directive 2000/78/EC).
 - Beyond that context, the concept of disability discrimination is yet to be formally articulated either by the EU legislator or by the CJEU.

Disability non-discrimination law: **qualitative scope cont. (b)**

- **Global international system** - UNCRPD requires signatories (nation States & the EU) to implement:
 - a conception of the '**equal treatment**' objective (Articles 3e & 5) that was arguably intended by the drafters of the disability provisions in Directive 2000/78/EC.
 - a conception of '**accessibility**' (Articles 3f & 9) that logically assumes an anticipatory duty and applies to both civil & political and socio-economic type rights

The 'equal treatment' objective

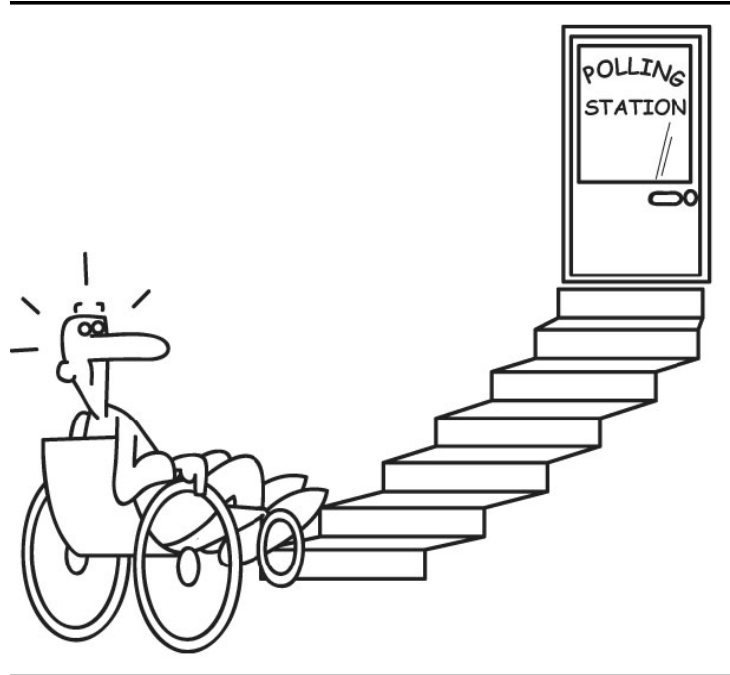
- **Directive 2000/78/EC** (the framework directive)
 - Direct discrimination
 - Indirect discrimination
 - The Reasonable Accommodation duty (final slide)
 - Harrassment
 - Victimisation

Whittle, R. (2002) 'The Framework Directive for equal treatment in employment and occupation: an analysis from a **disability rights** perspective' 27 *European Law Review* 303

The central component: the 'duty'

- Synonymous with disability
- New to the majority of EU Member States
- Seen as a 'specialist' issue
- Attracting an uncertain & inconsistent interpretation within and among the Member States
 - threatens to undermine the policy value (and consequently the success) of the prohibition in the context of disability
- Ultimately - is the duty an integral part of the equal treatment objective or an exception to it?

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 (not 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
- Only applies to an 'otherwise qualified' individual
- Once 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.

The purpose of the prohibition & the 'duty'

- Removing *irrelevant* considerations from the decision making process:
 - 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 objective justified*.
 - Must work on Fridays (application of the 'duty' – religious discrimination) – *retention of general rule but adaptation to the individual where 'reasonable'*.

The 'opening stages' of a discrimination claim

- Burden of proof – its reversal in discrimination claims:
 - Article 10 of Directive 2000/78/EC (two stage test)
 - Burden of proof shifts where there are facts supporting an inference of discrimination
 - Case C-415/10 *Meister v SDCS*
- The prohibited ground of 'disability'
 - Article 1 of Directive 2000/78/EC (“...on grounds of...”)
 - Case C-13/05 *Chacón Navas*
 - Case C-303/06 *Coleman v Attridge Law*

‘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

Non-discrimination, disability & EU Law: the future impact of the UNCRPD

- Realising the intended **qualitative scope** of the prohibition
 - E.g. of the ECtHR: *Glor v Switzerland* (App No. 13444/04)
 - Securing an appropriate definition of disability?
 - Failure to accommodate = discrimination (Article 2 UNCRPD)
- Expanding the **material scope** of the prohibition
 - The general principle of equality: Case C-555-07 *Seda Kucukdeveci* and Case C-236/09 *Test-Achats*
 - ‘Accessibility’ (Articles 3f & 9 UNCRPD)
- Extra leverage
 - National level leverage - Articles 4 & 33 of the UNCRPD.
 - The CRPD Committee (General Comments; Reviews & Recommendations and the Optional Protocol).
 - International leverage - Articles 32 & 40 UNCRPD.

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 'duty' and its 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.