

**Health and safety law and the right to non-discrimination  
on grounds of disability – the EU Dimension**

WHITTLE, R.

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***'Health and safety law and the right to non-discrimination on grounds of disability – the EU Dimension'***

**Issues Paper**

**By Richard Whittle**

**To be presented at the seminar of the EC Legal Expert Group on combating discrimination on grounds of disability, 29 March 2003**

## Introduction

The purpose of this study is to examine the inter-relationship between health and safety and disability non-discrimination laws, and in particular, the potential for conflict between these two legal regimes. The impetus behind the study is the adoption of the Framework Directive *establishing a general framework for equal treatment in employment and occupation* (the Framework Directive).<sup>1</sup> The Framework Directive will require, *inter alia*, the prohibition of disability discrimination in the context of employment by all Member States by the close of 2006 at the latest. For many Member States, the deadline for transposition of the Directive's provisions, and thus the prohibition of disability discrimination at national level, is the close of this year. It is therefore reasonable to expect that case law on the Framework Directive will start to develop in the near future with test cases on disability possibly reaching the Court of Justice by 2004/5. As such, it is imperative that the potential for conflict between health and safety and disability non-discrimination laws is considered in the light of this Directive.<sup>2</sup>

In principle, there is much that is complementary between these two legal regimes. For example, the purpose of health and safety law is to ensure a safe and healthy environment. In the context of employment, however, the design of the environment (both from a physical and organisational perspective) can sometimes have a negative impact on the physical and mental well-being of workers. It is significant, therefore, that physical and organisational adaptations to this environment mandated by disability non-discrimination laws may alleviate, if not eradicate, such health and safety concerns for disabled employees, and that the principle behind these accommodations (if not the accommodations themselves) may benefit non-disabled employees as well.

Similarly, whilst the purpose of disability non-discrimination laws in the context of employment is concerned with, *inter alia*, the removal of barriers in the workplace for people with disabilities, it is important to recognise that certain obligations under health and safety law can also contribute to the realisation of this purpose. For example, health and safety law will impose on employers a duty to conduct 'risk assessments' - a duty necessitating consultation with all employees, including those with disabilities. This consultation obligation facilitates an exchange of information between the disabled worker and the employer as to the nature of actual and/or potential barriers, the relationship between the barriers and the 'risk', and the impact that any accommodation might have on that relationship. In addition, obligations may exist under health and safety law that require 'specific' alterations to the working environment for the benefit of disabled workers.<sup>3</sup> Furthermore, 'general' obligations under health and safety law, such as the obligation to reduce 'risk', would arguably

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<sup>1</sup> Council Directive 2000/78/E.C. of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation* [2000] O.J. L303/16.

<sup>2</sup> Given the material scope of the Framework Directive, it is suggested that the focus of this project should primarily be concerned with the employment scenario. It is likely, however, that many of the issues raised in the project will have equal relevance to scenarios outside this context (such as the provision and receipt of good and services).

<sup>3</sup> See for example, Annex 1.20 of Directive 89/654, [1989] O.J. L393/1 concerning the minimum safety and health requirements for the workplace, where it is stated that 'Workplaces must be organised to take account of handicapped workers, if necessary. This provisions applies in particular to the doors, passageways, staircases, showers, washbasins, lavatories and workstations used or occupied directly by handicapped persons.'

require employers to make accommodations for workers with disabilities where such accommodations are necessary in order to reduce that risk. Significantly, both the 'specific' and 'general' obligations in this regard operate independently of any corresponding duty under disability non-discrimination laws, and they therefore have the potential to complement and (most importantly) supplement this duty.

In practice, however, the complementary nature of the two regimes is yet to be fully realised. The potential (overlapping) benefits identified above in relation to health and safety laws and the right to non-discrimination will only apply to those individuals that are actually in employment and will have no direct relevance to job applicants with disabilities. As such, much will depend on the success of disability non-discrimination laws in removing barriers encountered by disabled people in accessing the labour market. The difficulty here, however, is that only three Member States had introduced such laws by the time of the Framework Directive's adoption and the oldest, that is the British Disability Discrimination Act 1995, has recently encountered difficulties in combating unnecessary barriers based on health and safety issues.

High expectations are therefore placed on the Framework Directive to satisfactorily address these difficulties and remove the unnecessary barriers to participation resulting from health and safety concerns. It should be stressed, however, that these difficulties have plagued, not just the British DDA, but also the Americans with Disabilities Act 1990 (ADA) – legislation that influenced the Directive's construction in the context of disability. As such, one should not underestimate the challenges that lie ahead.

### **A high level of priority accorded to health and safety at work**

Since the late 1970s, employers within the European Union have had to comply with a common set of minimum obligations under Community law in the context of health and safety.<sup>4</sup> From its inception, Community health and safety legislation has sought to complement and support rather than unify national health and safety laws. Whilst numerous directives have been issued at Community level with a view to upgrading and harmonising national laws on particular (often technical) aspects of health and safety, such measures have sought 'minimum' harmonisation only - with many key terms and concepts being left to the interpretation of the national authorities. As such, one can reasonably expect significant differences as to the nature and level of health and safety protection amongst the Member States.

However, common to both Community and national health and safety laws is that they are grounded in principles of protectionism. In basic terms, the obligations arising from such laws are concerned with avoiding or limiting risks to employees and third parties. In Great Britain (for example), Community law complements obligations

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<sup>4</sup> See, for example, Directive 77/576 EEC on the provision of safety signs at work [1977] O.J. L22912; Directive 78/610/EEC on protection from risks related to exposure to vinyl chloride monomer [1978] O.J. L197/12; the first 'Framework' Directive 80/1107/EEC on the protection of workers from risks related to exposure to chemical, physical and biological agents at work [1980] O.J. L327/8 (Repealed and replaced by Directive 98/24/EC [1998] O.J. 1131/11); the second 'Framework' Directive 89/391/EEC of 12 June 1989 *on the introduction of measures to encourage improvements in the safety and health of workers at work (the Framework Health and Safety Directive)*; and the subsequent 'daughter' directives emanating from the first and second Framework Directives.

arising from a common law and statutory duty to provide a safe system of work. Under common law, an employer will be liable in negligence for accidents/injuries pertaining to reasonably foreseeable health and safety risks. Under the statutory regime, liability is strict (subject only to reasonable practicability) with sanctions framed in criminal law.<sup>5</sup> Understandably, therefore, employers (at least in Great Britain) are very sensitive to their health and safety obligations. Presumably, a similar level of priority (if not level of protection) is accorded to health and safety issues in the other Member States.

- *Please provide an outline of the health and safety regime in your jurisdiction as well as a brief explanation of how it works and the institutional actors involved (including their remit of operation).*

This level of sensitivity and protection at national level is certainly not misplaced. A survey conducted by the British Health and Safety Executive during the late 1990s indicates that over two million people in Great Britain are suffering from illnesses thought to be caused by work.<sup>6</sup> As Davies and Davies note, '[g]iven the well-documented association between work and ill-health or injury, elimination of workplace risks, or control of those which cannot be eradicated, enjoys a deservedly high place on the legislative agenda'.<sup>7</sup> The public interest in maintaining a rigorous health and safety regime at work is therefore undeniable, not least because of the human cost from such injuries and illness, but also because of the high associated economic costs to the health service, employers and society at large.<sup>8</sup>

- *Has any equivalent data been collated in your jurisdiction? If so, please provide the relevant information.*

A key purpose of health and safety law, therefore, is to protect employees and third parties from unscrupulous employers who might otherwise accord a low priority to health and safety considerations. Undoubtedly, this purpose must remain high on the health and safety agenda. However, health and safety law (at least in Great Britain and at EU level) does not, in itself, provide a facility for a claimant to challenge a decision to their detriment that was taken on the basis of a perceived health and safety risk

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<sup>5</sup> See s.2 and 3 of Health and Safety at Work Act 1974.

<sup>6</sup> Davies, J. and W. Davies (2000). "Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State." *Industrial Law Journal* 29: 347-377 at n 18 referring to 'Developing an Occupational Health Strategy for Great Britain, Discussion Document, Why a New Strategy', HSE at para 7.

<sup>7</sup> Davies, J. and W. Davies (2000), above at 351

<sup>8</sup> In addition to human and social costs arising from inadequate health and safety protection and the better ability to regulate certain major risks at supranational level, economic integration (by reducing variable health and safety costs among the Member States) as well as productivity and better industrial relations have been identified as the key justifications for Community action in this field. See Neal, A. 'Promoting Occupational Safety and Health in the European Union' in Neal, A. and S. Forn (eds) *Developing the Social Dimension in an Enlarged European Union* (Scandinavian University Press, Oslo, 1995) 80-89 at 82. Notably, whilst the British Government had pursued a general policy of blocking Community legislation in the social field during this era, it was the economic imperative presented by the existence of a strong history of health and safety protection in Great Britain, and a fear that other Member States would gain a competitive advantage through lower standards in this field, that prompted British agreement to a significant range of Community measures and the creation of a specific legal basis on health and safety, namely (what was then) Article 118a EEC, now slightly reformulated in Article 137(1)(a) EC.

(arising from their impairment) to others and/or to themselves. Whilst dismissal of an employee on grounds of incapability due to health considerations absent proper medical advice is likely to give rise to claims of unfair dismissal in Great Britain, this facility provides an unsatisfactory level of protection to those remaining in employment, and affords no protection whatsoever to job applicants.

- *Beyond the right to non-discrimination, please identify what (if any) facilities exist in your jurisdiction to challenge an employer's decision to dismiss or to not employ/promote an individual for reasons of health and safety?*

Whilst it is undeniable that impairments are capable of giving rise to health and safety considerations, the application of health and safety law has (to date) encouraged the unnecessary removal of disabled people from, or prevented their access to, the workplace on the basis of perceived risks to others and/or themselves. To put it bluntly, employers have traditionally found it easier, and cheaper, to simply refuse disabled people employment, continued employment, or promotion, rather than expend time and money on individualised risk assessments and/or run the risk of incurring liability under the health and safety regime. Possibilities of adapting the working environment to fit the worker (at least in the context of disability) and to reduce, if not eliminate, health and safety risks, were considerations alien to most employers under this approach and remain so today even in the more 'enlightened' Member States. Worryingly, recent research conducted in Great Britain demonstrates that, despite the operation of the British Disability Discrimination Act (DDA) since 1995, health and safety law remains a prominent and often unnecessary barrier to employment for people with disabilities.<sup>9</sup> Moreover, according to research undertaken in 1993, these barriers apply to whole categories of disabled people, in particular, those with epilepsy, allergies and mental impairments.<sup>10</sup>

- *Have related studies/surveys been undertaken in your jurisdiction and, if yes, please provide a summary of the findings.*

### **A new disability policy and an old Health and Safety regime**

With the increasing strain on the European Social Model, Member States (and subsequently the EU institutions) were encouraged to introduce a number of initiatives from the mid-1990s with a view to increasing the available labour pool and reducing the ever-increasing burden on the working population. National disability policies featured heavily in these new initiatives. Revised eligibility criteria for those on social assistance and insurances programmes due to long-term ill health and/or 'disability' were essentially designed to reduce the number of beneficiaries from such programmes (and their associated costs) and to encourage those individuals, now 're-branded' as being capable of work, to participate in the open labour market, and contribute to the national economy through the payment of taxes. Coincidentally, a paradigm shift was also taking place during this period in some Member States as to the perception of barriers encountered by people with disabilities. This shift culminated in the adoption of the British DDA (1995), the first comprehensive

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<sup>9</sup> "The Extent of Use of Health and Safety as a 'False Excuse' for not Employing Disabled People" a project commissioned by the British Health and Safety Executive and the British Disability Rights Commission. Publication expected summer 2003.

<sup>10</sup> Honey, S. Meager, N and M. Williams, (1993) Employers' Attitudes Towards People with Disabilities (Institute of Manpower Studies, Report 245).

disability non-discrimination law at Member State level. This paradigm shift provided national policy makers in the context of disability with a further justification for the move away from dependence on social assistance and insurance programmes for people with disabilities to the independence of paid work. Thus, by the late 1990s, the economic imperative, together with the necessary legal momentum, existed within key Member States for a push towards an equal opportunities approach to disability policy at EU level, with a view to ensuring that a similar approach would be reflected in all Member States.

A key development from this approach was the inclusion of disability as a protected ground of discrimination in the Framework Directive. The existence of this directive and its implementation at national level will play a key role in ensuring that those people with disabilities now 're-branded' as being capable of work are afforded equal access to the labour market. However, along with a number of other variables, the prohibition of disability discrimination must work harmoniously with other legal regimes to be successful, and this is particularly the case as regards the regime pertaining to health and safety (hence this study). Ignorance, fear and prejudice in the context of disability, and in particular its relationship with health and safety, will not evaporate with the mere adoption of the Framework Directive, and much will depend on the success of its implementation at national level as well as its interpretation and application by national courts/tribunals and eventually the Court of Justice. Failure in this regard will heighten the social exclusion of those people with disabilities that now have to make the transition from a dependence on social assistance and insurance programmes to paid employment.

Certainly, the 'traditional' approach of employers in the context of health and safety and disability (identified above) will conflict with the protection afforded by the Framework Directive. The institutionalised nature of this approach, and perhaps even the role that is played by the enforcement bodies and other key actors under the health and safety regime (such as the British Health and Safety Executive and occupational health advisors) will need to be considered in the light of the Framework Directive and its obligations.<sup>11</sup> The recent difficulties encountered in respect of the DDA and its inability to adequately deal with the 'traditional' approach (by employers and occupational health advisors alike) to health and safety and disability, could similarly arise as regards the Framework Directive. It is imperative therefore that the lessons learned from the operation of existing disability non-discrimination laws (laws such as the British DDA) are heeded for the purposes of this Directive, its implementation, and subsequent judicial interpretation.

Whilst the relationship and potential conflict between disability non-discrimination and health and safety laws is further considered below, it is important to recognise at this juncture that other initiatives recently adopted at EU level could also have an impact on this relationship; an impact that is likely to be positive in nature. Decisions by employers on health and safety issues that are incompatible with disability non-discrimination laws may result not just from prejudice but also from a

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<sup>11</sup> A recent Conference organised by the British Health and Safety Executive and the Disability Rights Commission, showcasing the first project on which these organisations had worked together, identified a number of these issues. See, 'Health, Safety and Disability: are there conflicts at work?' 12 December 2002, Holiday Inn Bloomsbury, London. The conference report is soon to be placed on the Securing Health Together website for the Government's long-term occupational health strategy.

misunderstanding and a lack of awareness. Information and awareness raising campaigns in the context of disability and health and safety will therefore play an important part in securing fair access to employment for people with disabilities. Such campaigns may have been stimulated by the European Year of People with Disabilities and/or the facilities under the Community Action Programme on Combating Discrimination.

- *Have information campaigns on disability and its relationship to health and safety been undertaken within your jurisdiction? If yes, please describe such campaigns and identify whether they have been successful and, if so, why.*

Additionally, health and safety concerns in the context of disability and the workplace may be mixed with other (related) issues, such as concerns about poor performance and attendance, workplace misconduct and violence. Recent EU initiatives as regards the coordination of national employment and social inclusion policies (through the development of EU guidelines and the receipt of annual National Action Plans) are therefore also likely to have a (positive) bearing on the interaction between health and safety obligations and disability. In particular, the development and use of 'preventative' and 'activation' type measures are likely to enhance fair access to work for people with disabilities and assist in overcoming, *inter alia*, health and safety barriers to employment. In essence, these measures can be described as forms of 'positive action' and can include state assistance such as financial incentives for employers, and the provision of 'job coaches' for people with disabilities. Similarly, the provision of training and advice for employers and employees alike on disability related issues in the workplace might be available.<sup>12</sup> Each of these measures could supplement the right to non-discrimination (in particular the duty to provide reasonable accommodations) under disability non-discrimination laws and enhance the impact of such laws in overcoming disability related barriers emanating from health and safety obligations.<sup>13</sup>

- *To what extent do the recent initiatives emanating from National Action Plans on employment and social inclusion within your jurisdiction provide an actual and potential contribution to the realisation of a safe working environment for people with disabilities?*

### **The Framework Directive and health and safety considerations**

As mentioned earlier in this paper, the adoption of the Framework Directive means that a right to equal treatment on grounds of, *inter alia*, disability will have been implemented in the context of employment and occupation in all Member States. Included within this Directive, but limited to disability as a ground of discrimination, is the duty to provide reasonable accommodations (the duty to accommodate). Located in Article 5 of the Framework Directive, this duty represents no more than a specific expression of the principle of equal treatment – applying, it is argued, to both

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<sup>12</sup> In Great Britain (for example) it might be possible for employers to seek help from Job Centre Plus, who have staff trained to advise on such issues.

<sup>13</sup> In Great Britain (for example), such initiatives include the 'New Deal' and 'Access to Work' schemes.

direct and indirect forms of disability discrimination.<sup>14</sup> Whilst it is important for the successful operation of this duty to ensure that it is neither viewed nor applied as demanding positive or affirmative type action in favour of people with disabilities (action essentially seeking equality of results), it is also important to recognise and facilitate the vital role played by the duty to accommodate in removing barriers to participation for people with disabilities. Certainly, in the context of this paper, it should be stressed that compliance with this duty will in many cases achieve effective compliance with health and safety obligations.<sup>15</sup>

In essence, the mechanics of the Framework Directive demands that (where possible and reasonable) the workplace is opened up for people with disabilities by, if necessary, adjusting the physical and organisational working environment to fit the disabled worker. As such, the successful implementation and operation of this Directive can ensure that the complementary benefits between health and safety and disability non-discrimination laws (some of which have been identified above) are realised.

It is important to stress, however, that health and safety concerns are capable of providing defences to claims of direct and indirect forms of disability discrimination under the Framework Directive. Because these concerns (and their associated defences) are capable of giving rise to unnecessary barriers to participation for people with disabilities - and thus conflicting with the purpose behind disability non-discrimination laws - these defences and their surrounding issues are considered below in relation to each of the possible venues for conflict under the Framework Directive:

***Direct discrimination:*** An employer's refusal to employ/promote an individual due to an alleged health and safety risk (to self and/or others) emanating from that individual's impairment (actual or perceived) is, *prima facie*, 'less favourable treatment' on grounds of that person's disability. Where substantiated, a claim of less favourable treatment will give rise to a finding of direct discrimination under Article 2(2)(a) of the Framework Directive. Whilst *prima facie* direct discrimination cannot be 'objectively justified' under Community law in the same way that *prima facie* indirect discrimination can (with the exception of age discrimination under the Framework Directive),<sup>16</sup> a defendant may nonetheless defeat such a claim by demonstrating (i) that the claimant is not qualified for the job or promotion,<sup>17</sup> or (ii) that their decision was based on matters falling within specific and limited exceptions to the prohibition.

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<sup>14</sup> See, Whittle, R. (2002). "The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective." *European Law Review* 27(3): 303 at ?

<sup>15</sup> See Davies, W. and J. Davies, Briefing Paper No 7: Health & Safety and the DDA (Employers' Forum on Disability, 1998).

<sup>16</sup> Article 6 of the Framework Directive, enables Member States to stipulate that both direct and indirect forms of age discrimination can be 'objectively justified'. Note also that the inclusion of the word 'reasonably' within the text of Article 6(1) is arguably concerned with avoiding the high level of scrutiny that has been afforded to the assessment of proportionality under Community law (such as that conducted in Case 171/88 *Rinner-Kühn* [1989] ECR 2743).

<sup>17</sup> In the context of disability, the employer will have to demonstrate that the disabled applicant, even with reasonable accommodations, is unqualified to perform the job in question. Note, however, that the qualification standards themselves may be open to a claim of indirect discrimination under Article 2(2)(b) of the Framework Directive (discussed below). ?

Under the Framework Directive, the exceptions to the principle of equal treatment can be divided into two main types, namely, ‘horizontal’ exceptions (exceptions that apply to all of the protected grounds) and ‘vertical’ exceptions (exceptions that apply to particular grounds only). Whilst both types of exceptions are capable of excusing direct and indirect forms of discrimination as defined by the Directive, it is the ‘horizontal’ exceptions that are relevant for the focus of this paper. These exceptions are contained in Article 2(5) ‘exceptions necessary in a democratic society’, Article 4 ‘genuine occupational requirements’, and Article 7 ‘positive action’.<sup>18</sup> The first two exceptions, that is, the exceptions provided by Articles 2(5) and 4, are of particular concern here. While the exception pertaining to positive action under Article 7 is certainly capable of negatively impacting on disability in the context of health and safety, this impact is most likely to be of an indirect nature arising by virtue of the paternalistic phrasing in the relevant text of this provision (in particular, Article 7(2)) and the negative influence that the facility afforded by this provision could have on the application of the first two ‘horizontal’ exceptions.

*Article 2(5) ‘exceptions necessary in a democratic society’.* This provision lists (in an exhaustive manner) broad policy aims that are capable of giving rise to exceptions to the principal of equal treatment under the Framework Directive.<sup>19</sup> The facility afforded by Article 2(5), however, pertains to measures that have been ‘...laid down by national law [and] which, in a democratic society, are necessary...’ for the realisation of those policy aims. Included within its remit of application are national laws ‘necessary in a democratic society...for the *protection of health* and for the *protection of the rights and freedoms of others*’ (emphasis added). Both of these areas, that is, the ‘protection of health’ and ‘the protection of the rights and freedoms of others’, are arguably capable of facilitating a defence to a claim of disability discrimination for reasons pertaining to national health and safety laws.<sup>20</sup>

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<sup>18</sup> ‘Vertical’ exceptions to the principle of equal treatment exist for each of the protected grounds in the Framework Directive. In the context of disability and age, Article 3(4) enables Member States to impose a blanket exemption as regards employment within the armed forces. For ‘religion or belief’, Article 15 provides a ‘territorial’ exception in relation to the recruitment to the police service and school teachers in Northern Ireland (but only where the otherwise discriminatory action is expressly authorised by national legislation). Similarly, Article 4(2) accords a more generous application of the defence of genuine occupational requirements (GOR – discussed below) where national legislation in force or practices existing at the Directive’s adoption concern occupational activities within churches and other public and private organisations the ethos of which is based on ‘religion or belief’ - a provision that may have negative implications for other protected grounds. For concerns in relation to sexual orientation discrimination, see Bell, ‘Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union’ in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart, 2001, 653, at 663-664. In the context of age discrimination, Article 6(2) effectively affords Member States an exemption in the setting of ages for admission or entitlement to retirement or invalidity benefits. Similarly, Recital 14 to the Framework Directive enables Member States to fix retirement ages free from claim of discrimination under the Directive. Finally, in the context of sexual orientation, Recital 22 stipulates that the protection afforded by the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

<sup>19</sup> Whilst these exceptions are exhaustively listed in Article 2(5), one should not underestimate their potential for a broad interpretation.

<sup>20</sup> In terms of the reference to the ‘protection of health’ the connection with health and safety law is readily apparent. In terms of the ‘protection of the rights and freedoms of others’ a defendant could (for example) argue that the rights of others include the right to a safe place of work, public space, and so on.

The reference in Article 2(5) to national laws that, ‘in a democratic society, are necessary for ...’ is a formulation that has exported from the European Convention on Human Rights;<sup>21</sup> a formulation regularly interpreted as incorporating the principle of proportionality. Thus, as with the horizontal exception in Article 4 (pertaining to genuine occupational requirements) and the ‘objective justification’ defence in the context of indirect discrimination under Article 2(2)(b)(i) - defences considered in more detail below - the facility under Article 2(5) also incorporates a requirement of justification. However, in contrast to the genuine occupational requirement under Article 4 and the ‘objective justification’ defence under Article 2(2)(b)(i) of the Framework Directive, the assessment as to proportionality under Article 2(5) is concerned, not with the application of the relevant law to scenarios presented by individual cases, but with the wider issue of justifying the national law itself. As such, whilst this formulation is clearly of normative value, the application of the principle of proportionality under Article 2(5) is unlikely to have a significant impact in mitigating the potentially negative consequences of this provision as regards the issues raised in this paper.

The significance of the exceptions under Article 2(5) cannot be overstated. Whilst Article 16(a) of the Framework Directive requires Member States to take the necessary measures to ensure that ‘any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished’, Article 2(5) arguably creates a ‘primacy provision’ in favour of national laws falling within its remit of application. Specifically, Article 2(5) provides that the Framework Directive ‘shall be without prejudice’ to such laws. Whilst the precise extent of this provision is yet to be determined by the Court of Justice, it would appear that, as a minimum, the utility of the equality principle in the Framework Directive will be obscured when applied to matters falling within the operational remit of Article 2(5). Presumably, in cases of conflict, such matters will be accorded priority over the Directive’s principle of equal treatment.

In the context of disability and for the purposes of this paper, a particularly important question is whether Article 2(5), whilst according priority to national health and safety laws, accords that priority before or after employers have discharged their obligations under the duty to accommodate? As mentioned above, this duty is key to the successful operation of disability non-discrimination laws and is particularly important in reducing, if not completely removing, risks to health and safety. A negative interpretation of Article 2(5) in this regard would therefore severely limit the protection afforded by the Framework Directive.

It is for this reason that Article 2(5) should, in my view, receive an interpretation in line with that accorded to a similar provision under the British DDA, namely, s.59(1) DDA.<sup>22</sup> This provision has been interpreted by the Employment Code of Practice (supporting the DDA) as meaning that: whilst employers are not required to make adjustments (accommodations) or do anything under the DDA that would result in a breach of statutory obligations, they are nonetheless required to do that which would

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<sup>21</sup> In particular, Articles 8(2), 9(2), 10(2) and 11(2) of the Convention. The relevant text of these provisions read: ‘prescribed by law and are necessary in a democratic society in the interests of...’.

<sup>22</sup> The relevant text of s.59 provides that: ‘Nothing in this Act makes unlawful any act done – (a) in pursuance of any enactment...’.

not.<sup>23</sup> A requirement, therefore, that would include the provision of reasonable accommodations where appropriate and needed in a particular case.

Nonetheless, on a literal interpretation of Article 2(5), the primacy of this provision would arguably apply before the duty to accommodate is taken into account. Moreover, defendants are in any event likely to plead that discriminatory acts in response to health and safety concerns are rendered lawful by this provision. It is significant, therefore, that ... UKs 'in pursuance of' interpretation – see doyle for explanation?

As such, this issue is far from being settled. Moreover, whilst this interpretation exists no guarantee that it will be employed in context of Art.2(5)... The adoption of necessary guidance to encourage a suitable interpretation of Article 2(5) is therefore recommended.

Arguably, in cases where an exception based on health and safety concerns is satisfied, the claimant can, in effect, be considered unqualified for the job/promotion. Thus, on occasion, the individual's lack of qualifications for the job/promotion may overlap with the specified exceptions to the prohibition of discrimination.

- *Are there equivalent primacy provisions in your jurisdiction in relation to disability and/or other non-discrimination laws? If so, have these provisions been used to limit the application of the non-discrimination norm? What lessons can be learned from the relationship between disability and health and safety in this regard?*
- *Please identify the national laws in your jurisdiction that could be relied on in this manner to defend a claim of direct discrimination on grounds of disability.*

***Genuine occupational requirements:*** In terms of direct and indirect forms of disability discrimination (and the defences thereto) the overarching concern that has been raised in this paper is the same, namely, that health and safety obligations will be used to justify employers' decisions that are based on fear, ignorance and prejudice. It is suggested that similar concerns should be raised in the context of Article 4 of the Framework Directive. This provision enables Member States to stipulate that certain differences of treatment based on characteristics relating to, *inter alia*, disability, shall not constitute discrimination but instead 'genuine occupational requirements' – a facility that may be used to justify differences of treatment (to the disadvantage of people with disabilities) based on health and safety considerations

Article 4 of the Framework Directive allows Member States to 'provide that a difference of treatment based on a characteristic *related* to any of the protected grounds shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried

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<sup>23</sup> Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability at para 4.65.

out, such a characteristic constitutes a genuine and determining occupational requirement...’.

Note that in Case C-203/03 *Commission v Austria* (concerning the general prohibitions on employment of women in mining underground, compressed air and diving work in Austria) it was made clear by the ECJ that whilst mining is physically and mentally extremely demanding it is not a form of employment that can be carried out only by men. The gender of the worker is not a genuine and determining factor. The dangers that women are exposed to are, in essence, the same as men. The dangers do not justify different treatment. The argument that women generally have a weaker constitution was not accepted. It cannot rule out that there are female workers for whom employment in mining underground is less oppressive than a comparable male worker with a lesser physical constitution. (This has only limited application to disability – whilst it knocks generalisations on the head it offers little where there is a difference that can be reasonably accommodated).

As mentioned above, this exception can be used as a defence to claims of both direct and indirect forms of discrimination.

*Whilst, in the main, this provision is likely to operate to the benefit of the protected groups, it does have the potential to be used to their disadvantage.* I have emphasised the word ‘related’ in Article 4 because, in my view, it has a potentially wide application in the context of disability – a potential that certainly encompasses characteristics pertaining to physical and mental ability and could be utilised in both a positive and negative manner. The possibility exists, therefore, whereby Member States might utilise this provision (and establish occupational requirements) in a manner that disadvantages a group or groups of disabled people for reasons founded on health and safety considerations. This is particularly worrying in the light of Article 7(2) of the Framework Directive (pertaining to positive action, and thus an exception to the principle of equal treatment) and its specific and overly paternalistic reference to disabled persons and the ability of Member States to, *inter alia*, ‘...maintain or adopt provisions on the protection of health and safety at work...’. The phrasing of this provision is such that one can reasonably read it to mean that the principle of equal treatment in the context of disability is without prejudice to the right of Member States to protect workers (disabled and non-disabled alike) from the risks posed by individuals with disabilities.<sup>24</sup>

Whilst the facility provided by Article 4 requires Member States to demonstrate that the objective behind the occupational requirement is ‘legitimate’ and that the requirement itself is ‘proportionate’,<sup>25</sup> this provision does not require an individualised inquiry into the ability of claimants to perform the essential functions of a post or undergo the relevant training in light of the employer’s duty to

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<sup>24</sup> A similar interpretation has been accorded to Article 7(2) in Skidmore, P. (2001). “EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?” ILJ 30: 126 at 131.

<sup>25</sup> It is likely that the requirement will have to be reviewed periodically, as have the requirements adopted in the context of gender equality. For case law concerning an equivalent provision in the context of gender discrimination see Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; [1986] 3 CMLR 240 and Case C-273/97 *Sirdar v. Army Board* [1999] ECR I-7403; [1999] 3 CMLR 559.

accommodate. Article 4 does not, therefore, demand the same individualised inquiry that should emanate from a defence to claims of direct and indirect disability discrimination under the Framework Directive where the facility afforded by Article 4 is irrelevant to the case at hand.

As such, considerations as to reasonable accommodations are not expressly included within the mechanics of Article 4 and can arguably be avoided in the designation of ‘occupational requirements’ by the Member States. Given that, as noted above, the duty to accommodate plays a key role in ensuring that health and safety concerns are not unnecessarily raised as a defence to a claim of disability discrimination, the significance of this observation is readily apparent. Put simply, the application of Article 4 is open to abuse in the context of health and safety and disability.<sup>26</sup>

- *Does your jurisdiction recognise ‘genuine occupational requirements’ on grounds of disability? If not, does experience in your jurisdiction on grounds of gender signal potential problems as regards the use of these requirements in the context of disability and health and safety?*

Finally, the overarching concern raised in this section as regards direct and indirect forms of discrimination, as well as the defence of genuine occupational requirements, is arguably heightened in light of the primacy provision under Article 2(5) of the Framework Directive. This provision has been referred to (above) in the context of direct discrimination. It is suggested in this regard that Article 2(5) is capable of according additional weight to a defendant’s argument based on health and safety considerations.

**Indirect discrimination:** Employment related provisions, criteria and practices based on health and safety considerations may place persons with a particular disability at a particular disadvantage. This disadvantage will give rise to a *prima facie* claim of indirect discrimination under Article 2(2)(b) of the Framework Directive. Such provisions, criteria and practices will constitute indirect discrimination unless the defendant can (i) ‘objectively justify’ them,<sup>27</sup> (ii) satisfy the requirements of the ‘second unless’ clause,<sup>28</sup> or (iii) rely on the specific and limited exceptions listed in the Directive.

It is the ‘objective justification’ defence that is most relevant at this juncture. To succeed under this defence, an employer must demonstrate that the provision,

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<sup>26</sup> Arguably, the principle of proportionality is open to adaptation by the Court of Justice (at least in disability cases) to incorporate an assessment (albeit on a normative level) as to whether the requirement by the Member State is sufficiently flexible to allow for the operation of the duty to accommodate. Nonetheless, case law from the Court of Justice on an equivalent provision in the context of gender equality demonstrates that one should not be overly confident in this regard. Where the Court has previously assumed the responsibility for performing the necessary proportionality test itself, as opposed to directing the national courts to do so, it has made determinations without fully appraising itself of the facts. See, the *Sirdar* case (*ibid*) concerning combat effectiveness and the justification for excluding female soldiers in the Royal Marines and the observation in O’Leary, S. (2002). ‘Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes’, Hart, at 89.

<sup>27</sup> See, Article 2(2)(b)(i) of the Framework Directive.

<sup>28</sup> See, Article 2(2)(b)(ii) of the Framework Directive.

criterion or practice giving rise to the disadvantage has a legitimate aim, and that the means of achieving that aim are appropriate and necessary. National case law implementing an equivalent provision in the context of gender equality (at least in Great Britain) demonstrates that subjective considerations of the employer, no matter how genuine in nature, are irrelevant considerations under this defence.<sup>29</sup> Such an approach has been affirmed by jurisprudence emanating from the Court of Justice.<sup>30</sup> On this basis, therefore, health and safety considerations negatively impacting on disability that are not in themselves objectively justifiable will not afford an acceptable foundation for provisions, criteria or practices under the Framework Directive.

It would appear, therefore, that recent jurisprudence from British courts and tribunals on the justification defence under s.5(3) of the DDA is incompatible with the its equivalent under the Framework Directive.<sup>31</sup> In essence, the jurisprudence in question excuses employers 'disability-related' decisions where those decisions can be said to fall within a range of responses open to the reasonable 'decision maker'. Rather than 'objectively' assessing the basis or reason for the employer's decision, this jurisprudence places the response of the employer (as opposed to the basis for that response) under examination, and measures that response against a standard of reasonableness. Given that reasonableness reflects standards of normal behaviour, and that normal behaviour for many employers includes prejudice and stereotyping, the problems that are likely to emanate from this test are readily apparent.<sup>32</sup>

It should be noted, however, that the two key cases giving rise to this jurisprudence were based on facts that, under the Framework Directive, would have given rise to claims of direct discrimination. The legislative construction of the DDA is such that the concepts of direct and indirect disability discrimination are conflated within its prohibition. In effect, the DDA currently permits direct forms of discrimination to be justified in the same manner as it does indirect forms of discrimination.<sup>33</sup> Thus, in *Jones v Post Office* (2001) and *Surrey Police v. Marshall* (2002),<sup>34</sup> the employer made decisions to the detriment of the disabled claimants on the basis of reports from their occupational health advisors (in my view, *prima facie* less favourable treatment on grounds of disability). In both cases, the validity of the employer's advice was challenged by independent medical expert reports. On the basis of these independent reports, the employers' decisions could not be substantiated and the claimants'

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<sup>29</sup> See for example, *Hurley v. Mustoe* [1981] ICR 490, [1981] IRLR 208 EAT, where the employer's policy of not employing women with young children on the basis of a subjective concern as to reliability was held to be indirectly discriminatory on grounds of marital status under the British Sex Discrimination Act 1975.

<sup>30</sup> See, for example, Case 171/88 *Rinner Kühn* [1989] ECR 2743 and Case C-243/95 *Hill* [1998] ECR I-3739, where the Court of Justice required the factual basis for the provision, criterion, or practice utilised by the employer to be made out – mere generalisations about certain categories of workers will not satisfy the objective justification defence under Community law.

<sup>31</sup> See, *Jones v. the Post Office* [2001] I.R.L.R. 384 and *Surrey Police v. Marshall* [2002] IRLR 843. For an examination of these cases and the difficulty posed by s.5(3) under the DDA, see Davies, J. (2003) *A cuckoo in the nest? A 'range of reasonable responses', justification and the Disability Discrimination Act 1995*, (currently a working paper).

<sup>32</sup> An observation made by Davies, J. (2003) *ibid* at 17.

<sup>33</sup> See, the 'for a reason which relates to' test in s.5(1)(a) of the DDA.

<sup>34</sup> See n. 20 above.

impairments should have been held as irrelevant considerations – a scenario, in my view, giving rise to a claim of direct disability discrimination.

However, the Court of Appeal in *Jones*, and the Employment Appeal Tribunal in *Marshall*, focused - not on whether the claimants' impairments were in fact relevant considerations for the job – but instead on whether recourse to their health advisor's reports could be justified. This (incorrect) focus was undoubtedly encouraged by the concept of discrimination under the DDA and its conflation of direct and indirect forms of discrimination within its legislative construction. In my view, it is the inappropriate venue of the justification defence for the type of scenarios presented by *Jones* and *Marshall* (scenarios that I shall return to later) that has given rise to the difficulties currently plaguing this defence under the DDA. The point for now, however, is that the current jurisprudence in respect of the DDAs justification defence (where applied to indirect forms of discrimination properly so-called) is incompatible with the 'objective justification' defence under the Framework Directive.

- *Please identify how the 'objective justification' defence to indirect disability discrimination has been implemented (if at all) in your jurisdiction. Where relevant, please draw on comparable jurisprudence within your jurisdiction on pre-existing grounds of discrimination (particularly gender).*
- *In your view, is the 'objective justification' defence (as applied in your jurisdiction) capable of dealing with the scenarios raised by Jones and Marshall (above) in a satisfactory manner?*

Beyond the difficulties raised by *Jones* and *Marshall*, it should be noted that the case law under the DDA has consistently attributed a low threshold for the satisfaction of its justification defence. The reference to 'substantial' in this defence has been interpreted as meaning 'not just trivial or minor'.<sup>35</sup> The difficulty here (for the purposes of our study) is that the lower the threshold as regards the justification defence, the greater the likelihood that the existence of a risk (even nominal risks) will justify a particular disadvantage posed by a provision, criterion or practice.

It is therefore significant that the 'objective justification' defence to indirect discrimination under the Framework Directive arguably demands the satisfaction of a higher threshold before this defence can be triggered. According to jurisprudence from the Court of Justice on an equivalent test in the context of EU gender equality, a defendant will have to demonstrate that the provision criterion or practice: (i) corresponds to a *real need* of the enterprise, (ii) is *appropriate* for achieving the objective pursued, and (iii) is *necessary* for the purpose of that objective.<sup>36</sup> Moreover, according to the explanatory memorandum supporting the Framework Directive, the stated aim used to justify the criteria or practice 'must *deserve protection* and must be *sufficiently substantial* to justify it taking precedence over the principle of equal treatment.' (Emphasis added).<sup>37</sup>

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<sup>35</sup> See, *Heinz v. Kenrick* [2000] IRLR 144 at para 40. The justification defence in s.5(3) of the DDA reads '...treatment is justified if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.'

<sup>36</sup> See, Case 170/84, *Bilka-Kaufhaus* [1986] ECR 1607 at para. 36.

<sup>37</sup> See, COM (1999) 565 at p.8.

- *Has the threshold to the ‘objective justification’ defence been interpreted in a comparable context in your jurisdiction? If so, please identify whether it conforms to the test envisaged by the Framework Directive or whether a lower threshold has been imposed.*

### **The ‘direct threat’ defence and the concerns as to its misapplication**

The concerns that are raised above in relation to direct and indirect disability discrimination and the exceptions and justifications thereto relate the potential misapplication of what is commonly referred to as the ‘direct threat’ defence in the context of disability non-discrimination laws. This defence is concerned with the health and safety ‘risk’ that may arise from a person’s disability to themselves and/or others.

To clarify, two specific concerns as to the potential misapplication of the ‘direct threat’ defence have so far been raised in this paper:

- (i) the concern that risk assessments, which should be based purely on ‘objective’ criteria founded on medical expertise, will incorporate ‘subjective’ elements and thereby reintroduce the very prejudices that the non-discrimination law is seeking to remove.
- (ii) the concern that the threshold for the test of ‘objective justification’ will be set at an inappropriate level.

Both of these concerns are well founded.

*The first concern:* has been illustrated by the British cases of *Jones* and *Marshall* under the DDA (discussed above).<sup>38</sup> The leading judgment of the Court of Appeal in *Jones* (by Phil LJ) introduced what can be described (at best) as a semi-subjective test of justification by having recourse to the reasonableness of the employer’s action with reference to that which would have been taken by his/her peers. Even more controversial, however, was the supporting judgment by Arden LJ, which indicated that, irrespective of the employer’s peers, if he/she genuinely believed that their action was justifiable (a purely subjective assessment) then, provided that the reason for action met the low threshold for ‘substantial’, the defence of justification under the DDA would be satisfied.<sup>39</sup>

Clearly, the test for justification in cases of indirect discrimination must be an objective one. Recourse to the subjective considerations of employers (whether as individuals or as a group) will perpetuate the very fear, ignorance and prejudice that the non-discrimination norm seeks to remove. For the purposes of our study, recourse should in my view be made to the health and safety law itself (and the objective assessment it requires in the context of risk) when considering defences of justification to claims of *prima facie* indirect discrimination. Crucially, however, this assessment must take into account any reasonable accommodations that might be

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<sup>38</sup> In the section concerned with indirect discrimination, pages 8-9.

<sup>39</sup> For an examination of these cases, see Davies, J. (2003) above at n.20.

mandated by the non-discrimination law and any adjustments that should be made in line with the obligations emanating from the health and safety regime.

**The second concern:** namely the threshold for satisfying the justification defence, is also illustrated by British case law under the DDA. It is crucial in this regard that the threshold is set high. In the context of health and safety, if the threshold is low then low levels of risk, even nominal risk, may justify the existence of unnecessary barriers to participation for people with disabilities. It should be noted in this regard that the notion of ‘direct threat’ under the ADA is defined as meaning ‘significant risk’ that cannot be eliminated by reasonable accommodation.<sup>40</sup> In any event, much will depend on the nature of the risk assessment under health and safety law and its interaction with the non-discrimination norm - in particular, the duty to perform an individualised assessment, the level of risk permitted by the health and safety regime, and the possibility of reducing risks through the duty to accommodate.

- *Please explain the ‘risk’ assessment process under the health and safety regime in your jurisdiction? At what stage does genuine ‘risk’ exceed the ‘limit values’, or in other words, trigger the protective mechanisms under this regime? Please illustrate with real life examples in the context of disability, where possible.*

**An additional concern:** as to the operation of the ‘direct threat’ defence relates to the evidentiary responsibilities that come with it – in other words, the allocation of its associated burden of proof. Specifically, the concern in this regard is that: what should be a defence to a claim of disability discrimination (the evidentiary burden correctly falling on the defendant) will become part of the complainants *prima facie* case, and in particular, their obligation to show that they fall within the protected class.

It is important to note in this regard that the allocation of evidentiary responsibilities on any aspect of discrimination law affects issues pertaining to strategy, the costs of the case, willingness to settle, and even the willingness of practitioners to support a claimants case. For present purposes, it should be highlighted that this observation is particularly acute in the context of the ‘direct threat’ defence. The relocation of the burden of proof as regards ‘direct threat’ considerations away from the defendant (where the ‘direct threat’ argument is available only as a defence) to the imposition of an additional requirement on the complainants showing of a *prima facie* case, will have enormous practical significance for the claimant’s chances of success. Put simply, the allocation of the burden of proof in this regard will place claimants at a significant disadvantage.<sup>41</sup> As such, the importance of this issue should not be underestimated.

The relevance of this concern is illustrated by the potential application of the ‘direct threat’ defence under the Americans with Disabilities Act 1990, as indicated by the United States Supreme Court decision in *Chevron v. Echazabal* (2002).<sup>42</sup>

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<sup>40</sup> See, section 12111(3) ADA.

<sup>41</sup> As Blanck has observed, ‘one US Court of Appeals recently upheld the ending of a case summarily when an employer showed that an employee with a disability could not “safely get along with other workers” and did not reach the accommodation issues’ email correspondence with author (15.04.2003).

<sup>42</sup> 122 S. Ct. 2045 (2002).

**Comments on Chevron:** Blanck observes that ‘[a]fter *Chevron*, a trial court in an ADA Title I case may find in favour of a defendant employer on summary judgment (i.e., without a trial) based only on the potential existence of a direct threat.’<sup>43</sup> This observation is borne out in subsequent cases where trial courts have summarily dismissed a claim on the basis of a ‘direct threat’ without fully exploring the health and safety issues and the relevance of the duty to accommodate. It should be noted, however, that this problem is in part due to the manner in which cases are handled by the claimants legal team (and their failure to appropriately direct the Court) rather than the law itself<sup>44</sup> – although the practical realities at the opening stages of the case and the need to address these issues in presenting a *prima facie* case undoubtedly exasperates the situation (as noted above).

In addressing the problem raised by the evidentiary burden in terms of ‘direct threat’, Blanck focuses on the legislative concept of ‘qualified individual’ under the ADA. He is correct to do so. ‘Qualified individual’ is a part of the evidentiary burden that falls on the claimant in establishing a *prima facie* case under the ADA. Due to the legislative construction of this statute, a claimant must show that they are a ‘qualified individual with a disability’ to fall within the protected class. Thus, together with satisfying the definition of disability under the ADA, as well as establishing facts from which a Court can infer discriminatory conduct, the claimant must show that they are ‘qualified’ to perform the essential functions of the job (with or without reasonable accommodations) to establish a *prima facie* case.

Whilst the U.S. Supreme Court in *Chevron* did not determine whether the ADA incorporates issues pertaining to ‘direct threat’ within the claimant’s evidentiary burden at the opening stages of a case, such a determination is likely to be made in future case law because of the manner in which the ADA is legislatively constructed. As explained above, such a determination will place a significant disadvantage on claimants under the ADA. For this reason, Blanck valiantly attempts to pre-empt such a determination by arguing that health and safety factors should not be part of the assessment as to whether a person is a ‘qualified individual’.<sup>45</sup> Absent an amendment to the legislative construction of the ADA, this is the only argument that can realistically be made. Nonetheless, I find it difficult to logically divorce health and safety issues from considerations as to qualification.<sup>46</sup> As the Australian High Court commented on the application of the Australian Disability Discrimination Act 1992 (Cth):

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<sup>43</sup> National Council on Disability, Policy Brief Series: Righting the ADA No. 9 *Chevron v. Echazabal: The ADA’s “Direct Threat to Self” Defense*. February 28, 2003 at 4 (authored by Blanck). See, <http://www.ncd.gov/newsroom/publications/directthreat.html>

<sup>44</sup> As the Supreme Court in *Chevron* observed, Echazabal did not argue for the purpose of the summary-judgment motion that Chevron could have made a ‘reasonable accommodation’ (at footnote 2 of the decision).

<sup>45</sup> See above n.35 at 13 *et seq.*

<sup>46</sup> In my view, there is nothing in the construction of either the ADA or the accompanying EEOC regulations that would indicate otherwise. In fact, I respectfully suggest that 29 CFR §1630.(2)r (2001), its context, and the text quoted from this part of the regulations by the Supreme Court in *Chevron* (at page 12), in particular the connection between the direct threat defence and essential functions, support such a view. Cf. Blanck, above at n.35, in text surrounding footnote 61 to that paper.

‘It would be extremely artificial to draw a distinction between a physical capability to perform a task and the safety factors relevant to that task in determining the inherent requirements of any particular employment. That is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment.’<sup>47</sup>

The problem, therefore, is not whether issues pertaining to 'direct threat' should be associated with the test for 'qualified individual', but whether this test (that is, 'qualified individual') should itself be a matter for the claimant to satisfy in their *prima facie* case. In other words, the problem lies with the legislative construction of the ADA. The claimant's *prima facie* case should require no more than a showing that (i) they fall within the definition of disability and that (ii) facts exist from which an inference of discrimination on grounds of disability can be made. I have identified elsewhere what the core elements to an appropriate definition of disability should be for the purposes of non-discrimination laws.<sup>48</sup> In essence, these core elements reflect the current (three pronged) definition of disability in the ADA<sup>49</sup> but with the crucial omission of phraseology concerning the extent of an individual's functional limitations (phraseology such as, 'substantial limitations' and 'major life activities'). Thereafter, the non-discrimination law should be constructed to ensure that questions associated with 'qualified individual', 'essential functions', 'direct threat', 'disproportionate burden', and so forth, are used to delineate what conduct is to be considered discriminatory and what defences are to be available to the defendant.<sup>50</sup>

It is significant, therefore, that this formulation is possible in respect of the Framework Directive and its implementation at national level - a possibility that is evidenced by two observations. First, the absence of a definition of disability in the Directive, and in particular the open-ended reference in Article 1 to discrimination 'on grounds of ... disability', facilitates the adoption of a suitable definition in this regard.<sup>51</sup> Second, Recital 17 to the Framework Directive arguably facilitates both the avoidance of an unfair allocation as to the burden of proof, and a legislative construction of the non-discrimination norm, to ensure that the above questions in respect of, *inter alia*, 'qualified individual', are presented to the Court in a manner in line with the approach recommended above. Note in particular, its negative (and thus defensive) emphasis, and its implicit connection with the concept of discrimination under Article 2, thus:

‘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

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<sup>47</sup> *X v The Commonwealth* [1999] HCA 63 (2 December 1999) at para 33.

<sup>48</sup> Whittle, R. (2002). "The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective." *European Law Review* 27(3): 303 at 323.

<sup>49</sup> That is, (i) physical or mental impairment (ii) record of physical or mental impairment (iii) perceived physical or mental impairment.

<sup>50</sup> Many thanks to Robert Burgdorf (DC, School of Law, United States) for invaluable discussions on this and related issues.

<sup>51</sup> See Whittle, R. (2002), above, at 321-322.

undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.’

Nonetheless, these provisions in the Framework Directive merely facilitate an appropriate interpretation of the non-discrimination norm in the context of disability - they do not guarantee such an interpretation. It is therefore important to note that the realisation of this concern will arguably increase the likelihood of the first two concerns becoming relevant and heighten the difficulties associated therewith and the unnecessary barriers that may result.<sup>52</sup>

- *How has the burden of proof in the context of disability been allocated in your jurisdiction? Please place a particular emphasis on the concept of ‘direct threat’ in this regard in the light of the observations made above.*

### **Barriers arising from health and safety concerns - three main types**

Davies and Davies,<sup>53</sup> have identified three main types of barriers confronting people with disabilities in the context of health and safety, namely:

- (i) barriers arising from scenarios where there is no actual breach of health and safety obligations, yet the defendant bases his/her decision on perceived risks that are themselves grounded on ill-founded fears, ignorance and/or prejudice.
- (ii) barriers arising from genuine risks, but where such risks are reasonably reducible to acceptable levels given the will and statutory imperative to do so.
- (iii) barriers arising from scenarios where ‘residual’ genuine risks (that is, risks after all reasonable efforts have been made to reduce them) remain.

For each of the barriers identified above, the concerns raised earlier in this paper in respect of the priority provision in Article 2(5) of the Framework Directive, as well as the facility accorded to Member States under Article 4, should not be ignored.

***The first type of barriers:*** will give rise to direct forms of disability discrimination under the Framework Directive and should be prohibited as such. The protection afforded by the Framework Directive in this context is therefore dependent on the successful application of Article 2(2)(a) (that is, the prohibition of direct discrimination), as well as an appropriate interpretation of the primacy provision under Article 2(5).

In terms of Article 2(5), this provision should not (in my view) be triggered by scenarios falling within the first type of barriers - irrespective of whether a literal or purposive interpretation is accorded to it. Put simply, the health and safety concerns of the defendant in scenarios arising under the first type of barriers constitute

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<sup>52</sup> It is recommended that further work be undertaken as regards the definition of disability and the legislative construction of disability discrimination under the Framework Directive, in particular, the interaction between the concepts of direct and indirect disability discrimination and the duty to accommodate.

<sup>53</sup> Davies, J. and W. Davies (2000). “Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State.” *Industrial Law Journal* 29: 347-377.

unwarranted and irrelevant considerations. As such, Article 2(5) should also be viewed as an irrelevant consideration in this context.

The facts supporting the decisions in *Jones* and *Marshall* provide a useful vehicle for considering this issue further. In each case, the employer relied on the report of his/her occupational health advisor (as regards the claimant's impairment and its interaction with the health and safety regime) to the detriment of the claimant. As such, both cases gave rise to a *prima facie* claim of less favourable treatment on grounds of disability (and thus, a *prima facie* claim of direct disability discrimination). In each case, the opinion relied on by the employer was contested by the claimant on the basis of an independent expert medical assessment. In my view, the focus of the courts should therefore have been on determining which medical assessment was correct (with the burden of proof favouring the claimant). Instead, the underlying focus of the Courts was on whether it was fair to penalise the employer for genuinely relying on the medical advice they had procured - irrespective of whether that advice was consistent with up-to date expert opinion. Similarly, on remand to the Ninth Circuit, Chevron argued that 'employers must be able to rely on the facially reasonable opinions of competent physicians ..'. To proceed beyond this review process, they continued, is inconsistent with the ADAs requirements and practical realities.<sup>54</sup> The conclusion from the leading judgment of the Court of Appeal in *Jones* was that: only irrational decisions by the employer (that is, decisions taken without proper risk assessment, or in the absence of a competent, suitably qualified medical opinion) should be open to review.

But surely the Courts in these cases have missed the point? If the defendant feels that the claimant poses a health and safety risk, then why should the courts be prevented from requiring the employer to 'objectively' demonstrate that risk? In so doing, the employer must be in a position to demonstrate that this risk exists; that the risk is 'significant' enough to exceed the limit values of the health and safety law, and that it remains 'significant' after an individualised risk assessment has been conducted and the duty to accommodate (under the non-discrimination norm) and any corresponding obligations under health and safety regime have been taken into account. This might require changes to the competence of employment tribunals and/or relevant courts, and may require changes to the respective laws and codes of practice, but the need for such changes should not preclude the protection intended by disability non-discrimination laws.

***The second type of barriers:*** are capable of existing in respect of both direct and indirect forms of disability discrimination under the Framework Directive. The starting point in relation to these barriers should be that the principle behind health and safety laws is to remove the risk, not the disabled person. As such, it is imperative that the relevant obligations under both disability non-discrimination and health and safety laws are fully complied with. As already mentioned, these obligations encompass: the provision of an individualised assessment (which should involve all relevant parties affected by the risk and specialist advice from experts familiar with the particular disability);<sup>55</sup> compliance with the duty to accommodate (which will

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<sup>54</sup> See Blanck above, n. 35, at nn 85 and 86 to that paper.

<sup>55</sup> See the Ontario Human Rights Commission's Policy Guidelines on Disability and the Duty to Accommodate (2000) for further elaboration of the duty to accommodate and the provision of individualised assessments, available at: [http:// www.ohrc.on.ca](http://www.ohrc.on.ca)

raise questions of ‘disproportionate burden), and compliance with ‘specific’ and ‘general’ obligations under health and safety laws (and the possibility of these obligations, and additional provision beyond health and safety laws, supplementing the duty to accommodate).

- *How far can the ‘general’ obligation under health and safety laws in your jurisdiction to reduce risk be extended in the context of disability? In other words, to what extent can this obligation act as a ‘top up’ in the provision of adjustments or accommodations for workers with disabilities?*<sup>56</sup>

**The third type of barriers:** are again capable of existing in respect of both direct and indirect forms of disability discrimination under the Framework Directive. The issue here, however, is to what extent people with disabilities should be able to accept risks ‘to self’ beyond that considered acceptable by health and safety legislation. The dilemma presented by this issue is aptly demonstrated by the *Chevron* case recently considered by the U.S. Supreme Court under the ADA.<sup>57</sup>

From the outset, it should be recognised that there are instances of health and safety law, affecting other population groups, where coercive measures/prohibitions have also been imposed against risks to self. In the context of Community health and safety legislation (for example), coercive measures of this nature have been adopted in respect of young workers and pregnant women.<sup>58</sup> Thus, on this basis, one may contend that the dilemma presented by scenarios such as that in *Chevron* does not represent the particular challenge to disability rights that it might first appear.

Nonetheless, these examples are (in the main) qualitatively different to the issues raised under the third type of barriers for people with disabilities. Whilst coercive action is taken in these examples, most would agree (including the target groups themselves) that such action is of benefit to the protected class. Significantly, in those instances where Member States have crossed the line (such as the general ban in the 1990s against women performing night work) the Court of Justice has found such measures contrary to the principle of equal treatment.<sup>59</sup>

A key question, therefore, is whether a similarly progressive approach will be taken under Community law in the context of disability and risk to self. Notably, the existence of a health and safety directive that would arguably permit a repetition of

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<sup>56</sup> Note that Davies and Davies (2000), above n.6 at 358 *et seq* consider this issue in the context of the British Health and Safety at Work Act 1974. Can this reasoning be applied to your jurisdiction?

<sup>57</sup> See Blanck, above n.35.

<sup>58</sup> In respect of young people coercive measures have been introduced in terms of working time, working conditions, and night work, see Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work (*Official Journal L 2, 20/08/1994, p. 12*). In respect of pregnancy and maternity, note that at least two weeks of the maternity leave is determined according to coercive protective reasons, rather than personal choice of woman concerned – see, Directive 92/85/EEC, on Pregnancy and Maternity [1992] O.J.L.348/1.

<sup>59</sup> See, the Case C-345/89, *Ministere Public v. Stoeckel* [1991] ECR I-4047 and the application of the equal treatment directive (76/207/EEC) to this scenario. See more recently, Case C-203/03 *Commission v Austria* and the general prohibitions on employment of women in mining underground, compressed air and diving work. These general prohibitions were held contrary to the principle of equal treatment under Articles 2 and 3 of Directive 76/207/EEC.

the scenario recently explored in *Chevron*, is one example of how the Court of Justice could be presented with an opportunity to realise such an approach.<sup>60</sup>

Arguably, there are reasonable limits to which any person (irrespective of disability) can accept work, and perform it safely. However, the difficulty presented by third type of barriers is deciding where the line should be drawn and who should draw it. One should note in this regard that there are numerous activities where disabled and able-bodied people alike participate on a regular basis and voluntarily accept a level of risk – activities such as smoking, drinking alcohol, participating in sports, etc. Common to all these activities is the exercise of choice. It is important to ensure, therefore, that people with disabilities are not denied the same element (and thus dignity) of choice in the context of employment. As a minimum, scenarios involving risks to self in the context of employment must not result in unilateral decisions by employers.<sup>61</sup> Instead, decisions should be made with due regard for the wishes of the individual taking the risks and the benefits that may arise (for that individual) in accepting them. To provide a balanced assessment, reference could be made, for example, to the risks already tolerated by society (as evidenced by law or custom).

- *In your view, can (and should) risks to self, as opposed to risk to others, be accorded different weight in the risk assessment under health and safety laws?*
- *Views/feedback on the issues raised in the above section would be most welcome.*

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<sup>60</sup> See, Council Directive 90/394/EEC of 28 June 1990 *on the protection of workers from the risks related to exposure to carcinogens at work*, and in particular Article 3(4), which provides that: ‘When the assessment referred to in paragraph 2 is carried out, employers shall give particular attention to any effects concerning the health or safety of workers *at particular risk* and shall, inter alia, take account of the desirability of not employing such workers in areas where they may come into contact with carcinogens.’

<sup>61</sup> It should be noted that, as a minimum, the jurisprudence in *Chevron* does not discourage unilateral decisions by employers.