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Published version

WHITTLE, R. (2001). The concept of disability discrimination and its legal construction. In: 'Discrimination and affirmative action on the labour market - legal perspectives' (in preparation of the Swedish Presidency of the European Union), National Institute for Working Life, Sweden, 6-7 November 2001.

THE CONCEPT OF DISABILITY DISCRIMINATION AND ITS LEGAL CONSTRUCTION

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Introduction

The purpose of this paper is to examine the key issues surrounding the legal construction of the concept of discrimination based on disability. This paper examines these issues in the context of the European Community's framework directive on equal treatment in employment and occupation[1], in order to highlight the particular needs which must be addressed in developing laws to combat such discrimination. Where relevant, the paper contrasts the approach necessary for disability based discrimination with the traditional approach in relation to sex and race discrimination.

The paper therefore examines the following areas: (i) the purpose of enacting non-discrimination laws in the context of disability; (ii) the definition of 'disability' as a ground of discrimination; (iii) the concepts of direct and indirect discrimination; and (iv) the duty to provide reasonable accommodations.

(1) The purpose of non-discrimination laws in relation to disability

The need to understand the purpose behind these laws

It is important to understand the purpose of enacting laws to prohibit discrimination on grounds of disability, because only with this purpose in mind can we can fully appreciate the requirements of their legal construction. Moreover, failure to keep sight of this purpose in the implementation of such laws can result in the marginalisation of the very people that they are designed to protect. Such a failure is evident in the recent jurisprudence of the US courts relating to the definition of disability under the Americans with Disabilities Act 1990 (ADA); jurisprudence excluding from the protective remit of the ADA a large number of the disabled population intended to come within its personal scope.

The civil rights approach to disability

The call to enact non-discrimination laws in relation to disability arose from the recognition that disability policy is as much an issue pertaining to civil rights as one of welfare and rehabilitation. This recognition was achieved primarily through the disability movement questioning the traditional assumption that the 'problem' of disability arises

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[1] At the time of writing, the framework Directive had not been formally adopted. For this reason, reference to framework Directive should be taken as meaning the Commission's proposed draft published on 25 November, COM (1999) 565, unless otherwise stated.

solely from the physical or mental impairments of the individual. In developing the 'social model' of disability, the disability movement has highlighted the interaction between an individual's impairment and his social and physical surroundings. By so doing, it has demonstrated how society has imposed, and continues to impose, significant physical and attitudinal barriers preventing the full participation of disabled people in everyday life.

The social dimension to disability

Through an understanding of the social model of disability, society is beginning to appreciate that while an individual's impairment is a relevant factor in the construction of disability, it is clearly *not the only factor*. Such recognition leads to an increasing acceptance that an individual's impairment may not, in itself, be the physical barrier to their participation and likewise may be an irrelevant and unjustified consideration in the drawing of a distinction, exclusion or preference to the disadvantage of that individual. By way of example, the inability of a wheelchair user to access a building will more than likely be due to the absence of a lift or ramp, rather than his dependence on the wheelchair itself. Likewise an employer's fear, prejudice, or simple misunderstanding as to the nature and severity of an individuals impairment, rather than the impairment itself, is often the greatest, if not only, barrier to employment for many job applicants with impairments.

Thus, we can see that there exists a *social dimension* to disability - a dimension that arises, not from the existence of mental or physical impairments, but from ignorance, prejudice and fear, and a failure to take the needs of disabled people into account in the way society is built and organised. As such, this dimension is a social construct that has been imposed on individuals; a construct that has erected barriers at both an attitudinal and physical level to their participation as equal members of society. As the responsibility for these barriers lies not with the individual but with society at large, it is society that has a duty to make the necessary changes to accommodate the needs of disabled people, rather than forcing disabled people to adapt to society or accept a life of segregation. These barriers, which prevent the effective participation of a large number of people in society, must be removed. A failure to do so would amount to discrimination.

The purpose of non-discrimination laws is to remove social barriers

Non-discrimination laws in the context of disability, therefore, have as their purpose the removal of these barriers. For this reason, their aim is to protect and promote the right of human dignity, respect for human difference, and equality. *They should not be confused with laws that have as their purpose the provision of 'special measures' for a so called 'deserving class'*. Disability non-discrimination laws are no different in their purpose to other non-discrimination laws - such as those relating to race or sex. Their purpose is the prohibition of discrimination based on a particular characteristic (*i.e.* impairments - real

or perceived) and their protection should extend to anyone suffering discrimination based on that particular characteristic (unless otherwise justified by the law).[2]

In light of this purpose, the key issues pertaining to the legal construction of non-discrimination laws in the context of disability will be examined.

(2) The definition of disability in non-discrimination laws

Common/recurring focus on impairment

In contrast to laws prohibiting discrimination on other grounds, those prohibiting discrimination based on disability tend to place great emphasis on defining their intended beneficiaries, *i.e.* the 'protected class'. A survey of such laws will show a number of different legal definitions of disability, but a dominant theme amongst them is a focus on the concept of impairment. This focus is illustrated by reference to what has been described as the landmark statutory protection for people with disabilities, the ADA, where the definition of disability has three elements:

(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(b) a record of such impairment; or
(c) being regarded as having such an impairment.

The ADA is generally perceived as offering the most advanced statutory protection against discrimination based on disability. As such, it has greatly influenced, and continues to influence, legislators at both a national and international level in the development of laws to combat discrimination on this ground.[3] It is perhaps partly due to this influence that there also exists a focus on impairment – for the purpose of defining disability - in the majority of other laws prohibiting such discrimination.

The "protected class mentality"

The legislative focus on impairment in the definition of disability under the ADA has resulted in a judicial obsession that centres around an individual's impairment and the extent of their 'functional limitations'. A pre-occupation has emerged as to whether or not an individual's functional limitations are *substantial* enough to warrant classification as a 'true' disability and, as a result, worthy of protection under the law. This pre-occupation has been described as the 'protected class mentality'.[4] It is a mentality that ignores the social dimension of disability and by so doing betrays the very purpose of

[2] Like other grounds of discrimination, disability discrimination may be objectively justified in certain situations, or the law may provide exemption from its coverage in certain instances, or (as discussed below) the required accommodation for a disabled individual may not be considered 'reasonable'.
[3] In the context of the European Union, for example, Resolution B3-0580/93 of the European Parliament called on the Commission to set up a forum consisting of disabled persons from the Member States with a view to investigating the possibility of introducing anti-discrimination laws based on the US model.
[4] See for example, Burgdorf, R. ""Substantially limited" Protection from disability discrimination: the special treatment model and misconceptions of the definition of disability." (1997) *Villanova Law Review* 42 345.

laws (such as the ADA) that are designed to combat discrimination on this ground. Moreover, it is a mentality that is equally capable of 'infecting' other disability non-discrimination laws where a similar focus on impairment exists.[5]

In the context of employment, the 'protected class mentality' has resulted in serious and unintended limitations to the protection afforded by the ADA:

First, case law has shown that individuals alleging discrimination are faced with a 'catch-22' situation in that they are required, on the one hand, to show that they have substantial functional limitations in respect of a major life activity and, on the other, to prove that – despite these limitations – they are able to perform the requisite job tasks.

Second, a focus on the mitigation and management of an impairment has logically followed from the above. In the *Sutton* case, it was held that any medicine or devices used to mitigate the effects of an impairment must be taken into account when determining whether an individual's impairment is 'substantial' for the purposes of the ADA.[6] The inevitable, although clearly inequitable, result of this decision is that many individuals with impairments who would ordinarily be classified as 'disabled' (such as those with cancer, diabetes or a dependency on an artificial limb, for example) may now fall outside the protective remit of the ADA if - through the use of such methods - they are able to mitigate the effects of their impairment.

No checks and balances have resulted from the 2nd and 3rd prongs of the definition

Contrary to the clear intention of the legislator and a previous decision of the Supreme Court[7], the second and third prongs to the definition of disability under the ADA (*i.e.* 'having a *record of*, or being *regarded as*, having such an impairment'), are currently being interpreted in a strict, literal manner. As a result, they now impose the same evidentiary burden on the applicant as the first prong, *i.e.* a showing by an individual that they either 'had' or are 'perceived as having' an impairment that *substantially limits a major life activity*.[8] This has effectively reduced the ability of these provisions to counter the effects of the 'protected class mentality'. A focus is again placed on the impairment (perceived or otherwise) and the perceived effects of that impairment on an individual's level of functioning.

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[5] In the context of Europe, for example, similar trends in respect of the definition of disability can already be found in the UKs equivalent legislation, the Disability Discrimination Act 1995. While it is too early to make such a determination in respect of the Irish Employment Equality Act 1998 and Equal Status Act 2000, Italian Law No. 68, (1999) on Rules for the Working Rights of Disabled People, and Sweden's Law prohibiting discrimination in working life on grounds of disability 1999, it is suggested that a similar phenomena will result.

[6] *Sutton v. United Airlines, Inc.* 119 S. Ct. 2139 (1999),see also *Murphy v. United Parcel Service, Inc.* (119 S Ct. 2133 (1999), and *Albertson's, Inc. v. Kirkingburg* (119 S. Ct. 2162 (1999)).

[7] *School Board of Nassau County v. Arline* 480 S. Ct. 273 (1987).

[8] See in this respect cases discussed in Burgdorf, R, (1997) *supra* and Feldblum, C. "Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And what can we do about it?" (2000) 21 Berkeley J. Employment & Lab. L. 91.

Again, this significantly limits the protective remit of the ADA and is aptly demonstrated in the context of employment. For example, a facial disfigurement - like a number of other impairments - may not necessarily result in a 'substantial limitation on a major life activity', but may nonetheless attract a negative reaction from an employer; a reaction that should arguably be prohibited by anti-discrimination law. However, an individual with such an impairment would not able to meet the evidentiary burden under the 2nd or 3rd prongs of the definition for the same reason as they could not fulfil the requirements of the 1st – they have not had or are not perceived as having a *substantial limitation on a major life activity*. For this reason, he would not receive protection under the ADA. The point remains, however, that he has suffered discrimination on the basis of his impairment - because of the attitude of the prospective employer.

The focus on impairment ignores the social dimension of disability

Unfortunately, as shown above, the ADA's focus on the concept of impairment (and the consequent protected class mentality) results in the social dimension of disability being effectively ignored. This is patently illogical given that it is this dimension of disability (and the injustice it causes) that has provided the catalyst for the civil rights approach to disability and is the very purpose behind the enactment of laws such as the ADA. In this way, we can see that a focus on impairment for the purposes of defining disability is contradictory.

The correct legislative focus must be on societal responses to impairments

This focus on impairment when defining disability in the context of non-discrimination laws would appear to stem from (and be confused with) the approach taken by laws that provide special benefits or rights to disabled people under welfare or affirmative action programmes.[9] Arguably, the concept of impairment *should* be determinative in such laws because their purpose is to decide who should be entitled to disability benefits derived from finite public resources, or what criteria should be used assess compliance with an employment quota in favour of individuals with impairments.[10] As such, these laws grant special rights and benefits to a particular or 'deserving' class of people which others are not entitled to. However, the protection against discrimination is a general right that should be available to everyone. It does not require the implementation of special measures for a 'particular class'. Accordingly, the existence or otherwise of an impairment should not act as gatekeeper to this protection. The true focus for a non-discrimination law in the context of disability should lie - not on the impairment as such, or any associated functional limitations - but on the problematic response or lack of response of the alleged discriminator to the impairment (perceived or otherwise).[11] In

[9] The legislative history of the definition of disability in the ADA is instructive in this regard as it was taken word for word from the Rehabilitation Act which has the dual purpose of providing affirmative action measures for disabled people (hence the first prong of the definition) and non-discrimination based on disability (hence the second and third prongs).

[10] Given that such programmes deviate from the concept of equality it would seem reasonable that the population group targeted as beneficiaries should be narrowly defined.

[11] This approach was recently adopted by the Canadian Supreme Court in *Granovsky v. Canada* [2000] 1 S.C.R 703 in interpreting an omnibus non-discrimination provision under s.15(1) of the Canadian Charter of Rights and Freedoms; an approach which the Court described as the "true focus" of the s.15(1) disability analysis. See also, *Montreal v. Quebec* [2000] Can SC, 8 B.H.R.C 277, where the court adopted a similar

other words, the focus should be on the social dimension of disability. It is by focusing on this dimension of disability that the barriers to equal participation can be eradicated and the purpose behind disability non-discrimination laws (as previously identified) can be achieved.[12]

The framework directive does not define "disability"

"Disability" as a ground of discrimination is not defined within the framework directive. As a result, the definition of disability will be left to the determination of the Member States, with the Court of Justice acting as final arbitrator. Given that the dominant focus within the Member States that have already adopted disability non-discrimination laws is, like the ADA, on the concept of impairment, it would seem that the Court of Justice will have to adopt a bold approach to defining disability if it is to ensure that purpose of non-discrimination law on this ground is not thwarted.

(3) The concepts of direct and indirect discrimination: a disability perspective

In the context of disability, it is necessary to adopt a broad approach when defining direct and indirect forms of discrimination. In certain respects, such an approach will require a departure from that employed under the traditional grounds of discrimination such as race or sex. The following discussion examines each form of discrimination in turn.

(i) Direct discrimination based on disability

The need for a comparator

Like other grounds of discrimination, a showing of direct discrimination based on disability requires a comparison to be drawn between the individual alleging discrimination and another individual (*i.e.*, the 'comparator').

Situations where no obvious comparator exists

Typically the comparator will be the individual that actually received better treatment. However, it is not always possible to identify such a person. For example, the less favourable treatment may take place in an employment context which is not an immediately competitive one. As such, no other individual may actually have received better treatment and therefore no comparator will be found. This situation, which can arise in relation to all grounds of discrimination, must be taken into account when formulating the concept of direct discrimination on grounds of disability.

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approach to interpreting "disability" as a ground of discrimination under Article 10 of the Quebec Charter of Human Rights and Freedoms. It is interesting to note in this respect that the term "disability" is not further defined within either Charter and so it was open to the Courts to have taken a similar focus on impairment as the American and British courts under their respective disability non-discrimination laws.

[12] That is not to dismiss the relevance of an individual's impairment to a claim of discrimination based on disability, but to stress that it should not have such a focus at this stage. Clearly, the impairment and the associated functional limitation will be relevant later in the action in identifying what, if any, reasonable accommodations are necessary and/or whether or not the provision, criterion or practice adversely affecting the individual can be objectively justified (see below).

One way to overcome this problem would be to allow a comparison to be drawn with a comparator that was either *previously* in the same situation and received better treatment, or *would have* received better treatment had they been in that situation (*i.e.* a hypothetical comparator). The framework directive has adopted this approach in Article 2(2)(a) where the test for discrimination includes the words: "…one person is treated less favourably than another is, *has been* or *would be* treated…" (Emphasis added)

Disability discrimination may involve a further comparison

Unlike other grounds of discrimination, disability offers an additional level of comparison. Thus, in the context of race or sex discrimination (for example) a comparison is drawn between a person of one race or one sex and a person of a different race or sex. In the context of disability, however, a comparison can be drawn not only between a disabled person and a non-disabled person (the most obvious comparison) but also between individuals with different disabilities.[13]

Legislators must therefore ensure that the legal definition of direct discrimination does not prevent such a comparison being made. This could be achieved (for example) by simply referring to the comparator as "another" - the method used by the framework directive. The point here is to avoid the use of words such as "to whom that ground does not apply" within the definition of direct discrimination, since that would restrict the comparison to those who would not be considered as "disabled".

(ii) Indirect Discrimination based on disability

The need for a flexible approach

The prohibition of indirect forms of discrimination based on disability is clearly an essential tool to achieving equality of opportunity for disabled people. However, as with direct discrimination, there are certain aspects relating to disability (as a ground of discrimination) that require a departure from the traditional formula used in defining indirect discrimination as a legal concept. A more flexible formula is needed if disabled individuals are to able to demonstrate a *disparate or adverse impact* resulting from an apparently neutral provision, criterion or practice.

Requirement to establish a disparate impact on a statistical basis

Reliance on the use of statistical data to establish such an impact is inappropriate in the context of disability. The use of statistical data is a traditional tool and is typically required to prove indirect discrimination on grounds of sex. Under Community law, for example, the burden on the individual is to establish that the apparently neutral provision, criterion or practice "disadvantages a *substantially higher proportion* of the members of one sex".[14] Clearly this is a difficult requirement to fulfil even in relation to

[13] A practical example is provided by the recent decision of the Canadian Supreme Court in *Granovsky v. Canada* [2000] supra.

[14] See, for example, Article 2 (2) of the Burden of Proof Directive (97/80/EC, O.J. [1998] L 14/6).

sex discrimination, where statistics are commonplace. In respect of disability, however, it would be a very onerous burden as the statistical data is unlikely to be available.[15]

The framework directive has fortunately not followed this traditional formula.[16] Instead, the Commission has relied on the less stringent test developed by the Court of Justice in the prohibition of indirect discrimination based on nationality.[17] Thus, instead of the words "substantially higher proportion", the test relies on the phrase "*liable to adversely affect*". This avoids the difficulty identified above in requiring statistical evidence of a claim of indirect discrimination. It should be noted that the latest revisions (proposed by the Member States) have substituted the word "would" for "liable to". While this arguably requires a greater degree of certainty or probability, the need for statistical evidence has not been re-imposed. Thus, even in its amended form, this aspect of the test for indirect discrimination clearly remains more suitable to grounds such as disability, than its counterpart in relation to sex discrimination.

Requirement to identify a relevant group or class

To date, the concept of indirect discrimination has - in Europe at least - applied only to a situation where one can establish an adverse impact on a *group* or *class of persons*. This poses no problems for the traditionally protected grounds of discrimination (*i.e.*, sex, race, nationality and religion), which can easily be classified into clearly defined groups. It is not so easy, however, to classify disabilities in this manner because many different forms of disability exist, each demonstrating large variations as to their nature and severity; a phenomenon that is further complicated by the existence of multiple disabilities.[18] As a result, some disabled people would have great difficulty in identifying a particular group that is disadvantaged by the relevant provision, criterion or practice in the same manner and to the same extent as they are.

The ADA acknowledged this difficulty by incorporating the phrase "an *individual with a disability* or a class of individuals with disabilities" into its test for indirect discrimination.[19] The Commission also distinguished between individuals and groups in the framework directive, by its use of the words "liable to affect adversely a *person or persons*".[20] However, the latest revisions to the framework directive seem to have taken a step back in this regard by removing the reference to "a person". Instead, a disabled individual must show that a criterion, provision or practice "would put: [ ] (ii) *persons with a particular disability* [ ] at a *particular disadvantage* compared with other persons …".(Emphasis added) Nonetheless, while this wording does not explicitly allow a claim

[15] This difficulty will also be encountered in respect of discrimination based on sexual orientation.
[16] See in this respect in Article 2(2)(b) of the framework directive.
[17] See in this respect, Case C-35/97 *Commission v France* [1998] ECR I 5325, where the court stated that indirect discrimination may exist where the practice is "*intrinsically liable to affect* migrant workers more than national workers and if there is a *consequent risk* that it will place the former at a *particular disadvantage*", paragraph 38 (emphasis added).
[18] Therefore, differences will exist between disabled people, even those with the same or similar disabilities.
[19] See Section 12112, (b)6 and the EEOC's "A Technical Assistance Manual on Employment Provisions (Title I) of the Americans with Disabilities Act ", January 28, 1992, section 4.3(2).
[20] See first part of Article 2(2)(b).

to be based on the adverse effects experienced by a particular *individual*, it does clearly acknowledge the existence of sub-groups within the larger ground of "disability". The use of very tightly defined sub-groups will go some way towards alleviating the difficulty faced by disabled persons in meeting the requirements of the test. Furthermore, the ability to rely on a "particular disadvantage" will be easier to comply with than the need to establish an overall or general disadvantage. Finally, one may also speculate that the inclusion of the words "…*would* put…" (in the revised draft of the directive) will allow an individual to establish himself within a hypothetical group. In theory, this would effectively reinstate the "person" test, by removing the need for an individual to identify an actual group, or sub-group (however small) of persons similarly affected. Whether this effect was intended, or would actually be interpreted in this manner by the Court of Justice, is another matter.

(iii) Justification defence

The need for a justification defence in relation to indirect discrimination

As with other grounds of discrimination, laws prohibiting discrimination based on disability invariably encompass a justification defence. This defence enables what would otherwise constitute a discriminatory act/omission to be justified under limited circumstances. Again, like the other grounds - and for the same reasons - this defence should exist only in respect of indirect forms of discrimination based on disability.

However, during the negotiations surrounding the framework directive it was argued by the UK delegation that the justification defence should also be available in respect of direct discrimination on grounds of disability. The reasoning behind the UK's argument was that, unlike the other grounds, disability may be relevant to an individual's ability to perform a job. This is of course true - a wheelchair user, for example, would be unable to perform the essential functions of being a fire-fighter. However, this does not mean that a refusal to employ a wheelchair user as a fire-fighter constitutes *direct* discrimination. Such a refusal is *not* based directly on his disability but rather on his lack of qualification for the job (being able to climb ladders, for example, is an essential requirement of being a fire-fighter). This is equivalent to refusing an untrained person the position of heart surgeon. Neither of these refusals constitutes direct discrimination - they are merely a recognition that the successful applicant must be able to meet the requirements of the job.

Nonetheless, the inability of the wheelchair user to meet the job requirements is *related to* his disability, and for this reason, other wheelchair users will be similarly affected. The job requirement therefore has an adverse impact on this group and *indirectly* discriminates against them. It is at this stage (once a claim of indirect discrimination is established) that the justification defence should come into play.[21]

[21] Arguably the need to apply a justification defence to the concept of direct discrimination under the UK's Disability Discrimination Act 1995 stems from its peculiar definition of discrimination. This definition arguably conflates both direct and indirect forms of discrimination within the same provision. In the context of employment, for example, s.5(1), provides: "An employer discriminates against a disabled

The test must be an objective one
Disability discrimination - like discrimination on the other grounds - is often the result of fears, prejudices and misconceptions. To adequately address these issues, a justification defence must be based on an objective test. To do otherwise, and allow subjective criteria to be taken into account, would defeat the object of prohibiting discrimination based on those elements and would simply result in the continuation of such prejudices.

For this reason, it is submitted that the UK's DDA has taken the wrong approach by allowing a subjective element into its test for indirect discrimination in relation to service provision.[22] The UK's reasoning - that service providers will often have to make a quick and possibly less informed decision when serving an individual - is arguably not cogent enough to allow the continuation of the very attitudes which the legislation is designed to eliminate.

Reasonable accommodation is an element of the justification defence
One final point to note when considering the objective justification defence in the context of disability is that it must be considered in light of the duty to provide "reasonable accommodation" (discussed below). Where this concept is relevant to a given ground of discrimination, a person seeking to rely on the justification defence must show that, even with reasonable accommodation, the relevant criterion or practice (and its resulting adverse effects) can still be objectively justified.

(4) The duty to provide reasonable accommodations

The aim and scope of reasonable accommodation
The purpose of this duty is to identify and remove barriers to participation where it is equitable to do so. In the context of disability,[23] it requires an equitable (reasonable) compromise between the need for accommodations arising from the disability and the freedom of the employer or service provider to treat everybody in a superficially equal manner. The goal of reasonable accommodation is to provide disabled people with an equal opportunity to participate in areas such as employment and the provision of goods and services. It is important to note, therefore, that it does not aim to achieve identical results for disabled people as compared to non-disabled people, but to ensure that people with disabilities are afforded an *equal opportunity* to achieve those results.[24]

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person if, *for a reason which relates to a person's disability*, he treats the disabled person less favourably than he would treat a person to whom the reason does not apply and he cannot show that the treatment is justified." (Emphasis added).

[22] See in this respect, s.20(3) of the DDA

[23] It should be noted that the concept of reasonable accommodation was first applied in the context of religion. Therefore it is not restricted to disability as a ground of discrimination and can apply equally to other grounds where a physical difference or difference based on custom exists.

[24] For example, a restaurant need not provide Braille menus for blind patrons if it provides a waiter or other employee to read the menu.

In the context of employment, this duty may require adaptations to the work place or work arrangements, policies and practices to meet the needs of a disabled worker. In the context of services, it may require modifications to the manner in which services are provided, the design of the products themselves, or the provision of auxiliary aids or services to facilitate the use of such products.

Society is continuously making accommodations aimed at the "ideal user" – the duty to accommodate simply requires 'human difference' to be taken into account

Making accommodations for people is not a new social concept. Employers and service providers continually expend a great deal of money and energy to accommodate their employees and the users of their services. For example, the provision of artificial lighting in buildings, restrooms, seating, escalators, air conditioning, lunch breaks and working schedules are all accommodations made by employers and service providers to facilitate the comfort (and efficiency) of employees and service recipients. These accommodations are often overlooked as simply part of the normal scheme of things.

However, these routine, and often unnoticed, accommodations can be ineffective for, and may even hinder, the participation of disabled persons in the social and physical environment because this environment, and the manner in which it operates, is based on an able-bodied norm – the "ideal user". In reality, however, only a small proportion of the population will actually meet this idealised norm. While the majority can adapt to the physical and attitudinal environment which society has created, a large number of people are either prevented from, or experience difficulty in, adapting to it and, as a consequence, are "disabled" by it.

The duty to provide reasonable accommodations simply requires the modification of the social and physical environment (where reasonable) in order to take into account, and alleviate, these difficulties. For this reason, the duty does not require anything that goes beyond the bounds of what has already been provided to other members of society under the "ideal user" concept - it merely requires adaptations to be made which cater for the actual needs of disabled persons. As such, this duty essentially requires the recognition of human difference. In this way, the duty to provide reasonable accommodations is an effective tool for removing societal barriers and thus eliminating discrimination based on disability.

Reasonable accommodation should not be equated with affirmative action

The duty does not, for the reasons outlined above, aim to provide a 'special' protected class with something that other persons are not entitled to. The accommodations it requires are merely what is necessary to allow the effective participation of all persons in society. The benefits arising from such accommodations can be shared with and enjoyed by all.[25] In this way, the duty to accommodate is a necessary device in achieving equality - rather than seeking to deviate from it. For this reason, it should not be confused with affirmative action measures (which have such deviation, albeit positive, as their purpose).

[25] For example, a ramp added to enable wheelchair users to access a building will similarly benefit the old, those with young children in prams and anyone wishing to bring a bicycle or shopping cart into/out of the building.

As a legal concept, therefore, the duty is properly located within the principle of non-discrimination.

What is "reasonable" accommodation?

The question of what is reasonable is one of fact and degree. In any given situation, what will be regarded as reasonable will depend upon the circumstances of the particular employer or service provider, the cost of the accommodation and the extent of the benefit to be gained (not only for the individual alleging discrimination but also for other workers or customers). It is difficult to identify the limits of what is 'reasonable' as variations exist among those jurisdictions applying this duty. What is common to all, however, is that reasonable accommodation does not need to be the best accommodation and that it will not be reasonable to require an accommodation that would involve significant difficulty or expense.[26]

Reasonable accommodation should not be seen as a defence to discrimination

The essence of the duty to accommodate is that it *is* a duty - it is not a defence. The fact that, in a given situation, it may not be reasonable to demand an accommodation should be seen as the exception to the rule - the focus is on the duty, not the possible extenuating circumstances. For this reason, the legislative construction of the duty should be positive rather than negative and should not be seen as being just another defence to discrimination.[27]

Duty to accommodate must apply to both direct and indirect forms of discrimination

It is imperative that the duty applies to both direct and indirect forms of discrimination as to hold otherwise would result in the retention of some barriers to participation. In some jurisdictions, however, the duty to accommodate is seen as applying only to indirect discrimination. The difficulty in this approach is aptly demonstrated in the context of employment. For example, we have seen that a finding of direct discrimination will not occur where an applicant is rejected because he cannot fulfil the requirements of the job. However, absent a duty to accommodate under the concept direct discrimination, an individual who *can* perform the requirements of a job - *but only with reasonable accommodations* - will not be granted the opportunity to meet the job criteria and will be regarded as unqualified. As a result, the barriers to that individual's participation in the employment market will remain.

Reasonable accommodation in the framework directive

The framework directive has adopted a standard approach in the construction of this duty. As the duty is limited to the material scope of the directive, it applies only in the context of employment. Presumably this is the reason for the use of the words "…where needed

[26] Under the ADA, the limit of 'reasonableness' is expressed in the legislative concept of 'undue hardship' and specific guidance as to this concept is provided within statutory guidance. Note also that a similar use has been made of this concept in the construction of the framework directive.

[27] In this respect, the phrasing of the duty under US and UK is to be preferred over that in New Zealand, which provides "*Nothing in … this Act shall prevent different treatment* based on disability where the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is *not reasonable to expect* the employer to provide those services or facilities.". (emphasis added)

in a concrete case…", as – in this context – the duty should only arise in relation to the actual needs of an individual. An employer, therefore, will not be under a normative duty to make the workplace accessible for all potential employees with disabilities. A logical consequence of this is that the employer must have knowledge of the disability before the duty can be triggered. Whether such knowledge needs to be express or may be constructively attributed to the employer is unclear. Beyond this issue, which will need further clarification, the legislative construction of the duty is such that it complies with each of the critical points identified above and should therefore be effective in its application.

Conclusion

As the foregoing demonstrates, there are a number of features which are particular to disability based discrimination and must be taken into account in formulating the legislative construction of a non-discrimination law on this ground. However, this should not detract from the fact that non-discrimination laws in relation to disability are essentially the same as all other non-discrimination laws. They share a common purpose, *i.e.,* the elimination of social barriers to participation and the promotion of equality. Remaining loyal to this purpose is the key to creating an effective law prohibiting discrimination on any ground, *including disability*.