

# UN Convention on Rights of Persons with Disabilities

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## **Introduction:**

1. It is estimated that approximately 10% of the world's population have a disability. The participation rates of such individuals in the workforce are very low. Therefore in practical terms as those engaged in representing employees with disabilities, there is much scope for litigation for the very real and detrimental barriers faced by persons with disabilities in the context of employment and occupation.
2. It is axiomatic to state that individuals with disabilities are at a significant disadvantage when it comes to employment and participation in the labour market. In the past, persons with disabilities have faced stigma, prejudice and exclusion in the labour market. This is evident from participation rates of individuals with disabilities in employment in Ireland which are unjustifiably low.<sup>1</sup>
3. Employers often concentrate on the disability of the individual, ignoring the individual's abilities. It is still the case today that many employers perceive individuals with disabilities as less capable of participating in the labour market and this attitudinal bias has been difficult to circumvent. Often, there is no rational basis for this generalised assumption, however, it still operates on the minds of employers hereby causing another barrier to disabled individuals and their quest to become part

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<sup>1</sup> In 2004 , only 37% of persons with disabilities were in employment. Central Statistics Office, *Quarterly National Household Survey, Special Module on Disability*, (CSO, 2004). The 2011 census figures show that the labour market participation rate amongst the general public in 2011 was 61.9% whereas only 112,502 persons with a disability out of a total of 595,335 persons with a disability in Ireland were employed. These figures do not omit persons aged under 15 so the precise figures are not yet know. However, these figures provide a very strong basis for showing that the participation rates of persons with disabilities in the Irish labour market are significantly lower than non-disabled persons. See Central Statistics Office, *This is Ireland: Highlights from Census 2011, Part 1*, (Dublin: Stationary Office, 2012) at p. 10 and 43. See also B. Gannon and B. Nolan, 'Disability and Social Inclusion in Ireland' in L. Bond, F. McGinnity and H. Russell, *Making Equality Count: Irish and International Research Measuring Equality and Diversity*, (Dublin: Liffey Press, 2010), pp. 158-174.

of society. Quinn acknowledges the role of unexamined presuppositions in particular in the employment sphere and therefore argues that:

*“one of the main tasks of non-discrimination law in the context of disability is to separate fact from fiction-to place a spotlight on the person behind the disability and, in the employment context, to get employers to focus much more rationally on what the individual has to offer as distinct from what the proxies suggest he has to offer.”*<sup>2</sup>

4. This paper will set the scene for the development of disability discrimination legislation in the EU/Ireland and will consider the key legislative provisions and concepts involved. Case law of relevance will also be discussed and the import of the UNCRPD will be highlighted.

### **Background to the Framework Directive and overview:**

5. In spite of a lofty and aspirational recommendation emanating from the Commission as far back as 1986 which asserted that disabled persons have the same right as all other workers to equal opportunity in training and employment, there was no basis for any legislation to be provided.<sup>3</sup> Prior to the inclusion of Article 13 in the EC Treaty (now Article 19 TFEU) by virtue of an amendment provided by the Treaty of Amsterdam, European law did not provide any legal protection against discrimination on grounds of disability. Prior to Article 19 and the Framework Directive, the measures in place at EU level to the employment of individuals with disabilities were based on the charity or welfare model which regarded individuals as dependent on assistance and care from the state.<sup>4</sup> This welfare approach regarded individuals with disabilities *‘not as subjects with legal rights, but as objects of welfare, health and charity programs.’*<sup>5</sup>
6. The introduction of Article 13 (now Article 19 TFEU) provided a legal basis for the introduction of measures designed to combat discrimination on a number of grounds,

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<sup>2</sup> G. Quinn, ‘Disability Discrimination Law in the EU’ in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge: Cambridge University Press, 2007) at p. 245.

<sup>3</sup> Council Recommendation 86/379/EEC.

<sup>4</sup> E.g. Council Recommendation 86/379/EEC (OJ [1986] L225/43) which included policies relating to sheltered employment, vocational rehabilitation and training and providing incentives to employers to assist with the special costs incurred when employing a disabled worker.

<sup>5</sup> G. Quinn and T. Degener, ‘A Survey of international, Comparative and Regional Disability Law Reform’ in M. Breslin and S. Yee (eds), *Disability Rights Law and Policy : International and national Perspectives* (Ardsley, New York: Transnational Publishers, 2002) at p. 5. See also G. Quinn, ‘Disability discrimination law in the European Union’ in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge: Cambridge University Press, 2007), at p. 236.

including that of disability as the competence of the EU in the area of equality was significantly broadened. Article 19 provides very clearly that the principle of equality is a fundamental principle of EU law.

7. In 2000 the European Council introduced the Framework Directive<sup>6</sup> for equality in employment and occupation covering the ground of inter alia disability.<sup>7</sup> It provides substantive legally enforceable rights for persons with disabilities in the area of employment and occupation and is designed to prohibit any discrimination, inter alia, on grounds of disability. It is based on the human rights based approach which focusses on the removal and prevention of barriers which denied equal access to persons with disabilities to the labour market and participation in the labour market.
8. The Directive pertains to the areas of access to employment including selection criteria, recruitment conditions, promotion, retraining, employment and working conditions, including dismissals and pay.<sup>8</sup> It also puts within its scope all areas of vocational training and membership of an organisation of workers. The areas of social security and social protection schemes are expressly beyond the coverage of the Directive. It provides for prohibits on direct discrimination, indirect discrimination, harassment, victimisation and instructions to discrimination. Significantly the Directive provides for the concept of reasonable accommodation which is solely applicable to the disability ground. There are a number of exceptions to the general principle of non-discrimination on grounds of disability. The Directive also provides for elements of positive action specifically for the disability ground in particular *“provisions on the protection of health and safety at work or to measures aimed at*

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<sup>6</sup> Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and education.

<sup>7</sup> For background to the development of the EC policy on anti discrimination on grounds of disability prior to the Framework Directive see C. Barnard, *EC Employment Law* 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2006) at pp. 391-393. For more detail for the implication of the Framework Directive from a disability point of view see R. Whittle, The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective, [2002] 27(3) E.L.R. 303, L. Waddington “Implementing the Disability Provisions of the Framework Employment Directive : Room for Exercising National Discretion” in A. Lawson and C. Gooding (ed), *Disability Rights in Europe: Essays in European Law*, (Oxford: Hart Publishing, 2005) pp 107-134 and A. Hendriks, ‘Promoting Disability Equality after the Treaty of Amsterdam: New Legal Directions and Practical Expansion Strategies’ in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: Essays in European Law*, (Oxford: Hart Publishing, 2005) pp 187-195.

<sup>8</sup> Article 3(1).

*creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”<sup>9</sup>*

### **Overview UNCRPD:**

9. The CRPD melds civil and political rights with economic, social and cultural rights. Paragraph (e) in the preamble to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities (3) ('the UN Convention') recognises that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. Adopted by UN General Assembly – 13 December 2007 and ratified by EU in 2010. The Convention is a legally binding instrument that sets minimum standards for the protection and safeguarding of a full range of civil, political, social, economic and cultural rights and fundamental freedoms of persons with disabilities. It is also the first comprehensive human rights Convention to which the EU as an entity is a signatory. The Convention aims to ensure that people with disabilities can enjoy their rights on an equal basis with all other citizens. Respect for disabled peoples' rights is thus a matter of law as well as social welfare.

10. Persons with Disabilities have traditionally been addressed through:

- ☐ Charity
- ☐ Paternalism and
- ☐ Social Policy
- ☐ The underlying presumption within the UN

CRPD is on ensuring respect for human rights, regardless of the difference of disability.

11. It explicitly provides for a prohibition on all discrimination on the basis of disability and the right of persons with disabilities to work, on an equal basis with others. It sets out as its explicit purpose to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity". Article 3 of the UNCRPD sets out its general obligations and this includes respect for individual dignity, autonomy and independence, respect for difference and acceptance of

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<sup>9</sup> Article 7(2).

disability as human diversity, non discrimination, equal opportunity , complete and meaningful social participation and accessibility.

12. Article 4 requires State parties to undertake measures to ensure full promotion and full realisation of all human rights and fundamental rights under the UNCRPD for all persons with disabilities. These are as follows:

- To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
- To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
- To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
- To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;
- g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;
- To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

- To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

### **Definition of disability:**

13. In order to place the concept of disability within context, it is important to consider the two primary theories of disability which are common in the various jurisdictions which provide for anti-discrimination legislation. The dominant and most common theory of disability is the medical model. According to the medical/individual model of disability the problems disabled person face in their daily life are mainly caused by their impairment, either physical or mental, and these impairments inhibit the ability of such individuals to participate in the workforce. The role of employment in anti discrimination legislation under the medical model is to provide a list of the conditions or broad definitions of impairments which will be encompassed in a definition of disability and which therefore attract the protection of anti discrimination legislation.<sup>10</sup>

14. By contrast the second model of disability, the social model, locates the problems in societal and environmental barriers such as attitudes, policies and the physical environment outside of the individual disabled person which have operated to exclude or marginalize individuals with disabilities.<sup>11</sup> The social model of disability aims to integrate individuals with disabilities into the work force by recognizing that changes are required by society as opposed to the individual concerned, for example by setting out the rights of individuals with disabilities to participate in the labour market. The social model of disability underpins the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and this should allow for an expansive definition of disability to develop.

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<sup>10</sup> For more detail on the medical definition of disability see M. Oliver, *Understanding Disability : From Theory to Practice*, (Basingstoke: Macmillan, 1996), and C. Barnes and G. Mercer, *Disability*, (Cambridge: Polity Press, 2003).

<sup>11</sup> C. Barnes, 'A Working Social Model? Disability Work and Disability Politics in the 21<sup>st</sup> Century' (2000) 20 *Critical Social Policy* 441. See also L. Waddington, 'Case note Chacón Navas' (2007) 44 *C.M.L.R.* 487 at P. 491.

15. The definition of disability contained in the *Employment Equality Acts 1998-2008*<sup>12</sup> (incidentally which was not amended by the *Equality Act 2004* and there was no requirement to do so given the absence of a definition of disability in the Framework Directive) initially appears to be based on the medical definition of disability as it sets out a list of broad categories of impairments within the definition. In addition, inclusion of the final paragraph within the definition is significant:

*shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person ;*

16. This moves the definition away from a medical model into the social model of disability by recognizing that persons who have disabilities at present, have past disabilities (such as mental health disabilities) , will have disabilities in the future (for example a genetic predisposition to a particular disability) or and by including actual or presumed impairments for example an intellectual disability to a claimant who is in a wheelchair). It has been commented that the Irish model toward disability “*reflects the social manifestations of disability, reflecting the actual experience of impairment but also its imputation that may also cause prejudice and disadvantage.*”<sup>13</sup>

17. The Framework Directive prohibits discrimination “on grounds of disability”<sup>14</sup> but does not provide any definition of disability and does not provide any guidance on who is protected from such discrimination. This is a common approach within EU anti discrimination legislation for example the Recast Gender Directive prohibits discrimination on grounds of sex but no further detail is provided.<sup>15</sup> In some member states, a threshold of severity for the condition or impairment to meet the definition is

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<sup>12</sup> Section 2(1) of the Employment Equality Acts 1998-2011. This definition is based on the definition of disability contained in the Australian Disability Discrimination Act 1992. For more detail on the Australian definition see G. Quinn, M. McDonagh and C. Kimber, *Disability Discrimination Law in the United States, Australia and Canada*, (Dublin, Oak Tree Press, 1993) , pp 124-128.

<sup>13</sup> K. Monaghan, *Equality Law*, (Oxford: OUP, 2007) at 233.

<sup>14</sup> Article 1 of the Framework Directive.

<sup>15</sup> Recast Directive 2006/54/EC.

required.<sup>16</sup> The former approach on the UK was to exclude certain conditions from the definition though this has been amended by its more recent legislation.<sup>17</sup> The definition of disability in the Irish equality legislation includes situations where the disability exists, existed in the past, may exist in the future or is imputed to the person concerned thereby fully reflecting the social model of disability.<sup>18</sup> This definition has led to the temporary disabilities and imputed disabilities being protected by the Irish legislation.

18. In *Chácon Navas v. Eurest Colectividades SA*<sup>19</sup> the Court of Justice was asked to consider the parameters of the definition of disability for the purposes of the Framework Directive given that there was no express definition contained within it.<sup>20</sup> This was the first occasion on which the Court of Justice was asked to examine the Framework Directive on the grounds of disability and has been described as an “*unwelcome start by the ECJ in the disability equality field*”.<sup>21</sup> The applicant in this case challenged her dismissal as discriminatory as she had been on leave of absence and temporarily unfit for work for 8 months. The Spanish Court asked the Court of Justice for its view on the relationship between sickness and disability and whether sickness was subsumed into disability for the purposes of the Framework Directive.

19. The Court of Justice adopted a restrained interpretation of ‘disability’ perhaps due to the economic consequences which might flow from claims by disabled persons.<sup>22</sup> It took the view that the concept of disability must be understood to refer to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life<sup>23</sup> and that by using the concept of disability in Article 1 of the Directive which provides the aim

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<sup>16</sup> UK Equality Act 2010 provides that the disability must have a threshold of “*a substantial and long-term adverse effect*” for it to be sufficient to come within the disability. Section 6 of the Equality act 2010. For its predecessor see section 1 of the Disability Discrimination Act 1995. The term ‘long term’ is further defined by the first Schedule as either the effect has lasted for 12 months, has not yet lasted but is expected to last 12 months or is likely to last for the rest of the person’s life.

<sup>17</sup> Alcoholism, drug addition, tendency to set fires, voyeurism and hayfever were all excluded. Disability Discrimination (Meaning of Disability) Regulations 1996

<sup>18</sup> Section 2 of the Employment Equality Acts 1998-2011.

<sup>19</sup> (C-13/05), [2006] E.C.R. I-0667, [2006] I.R.L.R. 706.

<sup>20</sup> See also D. Hoskins, ‘A High Bar for EU Disability Rights’ [2007] 36(2) I.L.J. 228 and Waddington, ‘Case note Chacón Navas’ (2007) 44 C.M.L.R. 487.

<sup>21</sup> O. Smith, *Disability Discrimination Law*, (Dublin: Roundhall, 2010) at p. 172.

<sup>22</sup> This was expressly cited a reason by the Advocate General as a reason for adopting a restrictive definition of disability in his Opinion.

<sup>23</sup> (C-13/05), [2006] E.C.R. I-0667, [2006] I.R.L.R. 706. (paragraph 43).



of the Directive is to combat certain types of discrimination (including disability) as regards employment and occupation the legislature deliberately chose a term which differs from sickness. Therefore the Directive does not protect workers with illnesses. The Court also stated:

*“The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time.”*<sup>24</sup>

20. The judgment has been criticised as putting forward a firmly medical model of disability by focussing on the impairment as opposed to the social model. In this regard the judgment has been stated to be firmly out of step with the requirements of the UNCRDP.<sup>25</sup> It raises questions as to whether a person is disabled only if their participating in professional life is hindered. In the UK for example the person must show that the impairment has more than a minor effect on their ability to carry out day to day activities.<sup>26</sup>

21. There is no definition of disability within the UNCRDP but its purpose clause states that persons with disabilities “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with the various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>27</sup>

22. A recent decision of the Court of Justice in *Ring v Dansk Almennyttigt Boligselskab DAB*<sup>28</sup> has further considered (and refined) the definition of disability within the Framework Directive. The reference from Denmark to the Court of Justice asked it to

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<sup>24</sup> Paragraph 45 of the judgment.

<sup>25</sup> C. Bruton and S. Quinlivan, ‘Disability, EU law and the CRPD: A New Dawn?’ in G. Quinn and C. O’Mahony (eds) *The UN Convention on the Rights of Persons with Disabilities: Thematic, Comparative and Regional Perspectives Intersecting* (forthcoming).

<sup>26</sup> Section 6 of the Equality Act 2010 (UK).

<sup>27</sup> Article 1 of the UNCRPD.

<sup>28</sup> (C-335/11), Opinion of Advocate General Kokott 6 December 2012. Judgment from the Court of Justice is awaited at the time of preparation of this paper.

consider the parameters of the definition of disability along very similar lines to those initially referred in *Chácon Navas*. For example amongst the questions raised is whether a “condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?” Clarification on the judgment of Chacon Navas and its practical application was sought. As the EU had ratified the UNCRPD, the Court of Justice had regard for its provisions. The Court confirmed that Directive 2000/78 must be interpreted, as far as possible, in conformity with the UN Convention. Pursuant to Article 216(2) TFEU, international agreements concluded by the European Union are binding on its institutions. They consequently must prevail over EU acts.

23. The referral was concerned with two employees who were dismissed with a reduced notice period contained in Danish law which allowed for reduced periods of notice to be provided to employees where employees were absent for periods of more than 120 days due to illness and a number of questions were posed.
24. In dealing with the definition of disability, the Court of Justice had express regard for the provisions of the UNCRPD and stated that in some instances the definition propounded by the Court of Justice in *Chacon Navas* represents a step backwards in comparison with the definition in the UNCRPD (mainly the social definition of disability contained in the UNCRPD). On that basis the Court expressed the view that there is cause to interpret it in accordance with international law. Drawing on the UN Convention, the Court acknowledged that disability must be understood as ‘an evolving concept’. In the specific context of Directive 2000/78, that concept refers to ‘a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’. While the cause of the disability (congenital, accident or illness) is irrelevant, the impairment must be ‘long-term’. The Court took a nuanced approach to the Chacon Navas judgment and stated that it is necessary to distinguish between the illness as a possible cause of disability and the resulting disability. It took the view that permanent limitations resulting from an illness and an obstacle in professional life

also falls under the protection of the Directive<sup>29</sup> and further if the impairment is due to illness, the decision criterion is whether the restriction is lengthy.<sup>30</sup> It held that the requirement (devised in *Chácon Navas*) that the limitation probably be long duration was in similar terms to the reference to disability being “long term” within the UNCRPD. Finally and very significantly, the Court found that a long term disability does not require the use of special equipment and a person who is not able to work full time is also included within the concept of disability provided there is an obstacle to participation in professional life. CJEU reviewed its earlier decision in *Chacon Navas* on the ground of the EU’s accession to the UN CRPD. Instead of a purely medical approach to the concept of a disability, the Court now adopts an integrated medical and social approach, in which for the answer whether there is an ‘impairment’ a combination of personal (mental, physical and psychological) factors and social factors is decisive; together these factors determine whether there is a ‘limitation’ to fully and effectively participate. No matter how important the inclusion of the CRPD definition in EU law may be, it is a bit disappointing that the Court only uses the Convention as regards the definition question and not also as regard the second and third issue at stake, i.e. when determining the scope of the concept of a reasonable accommodation and when determining whether it may be allowed to dismiss a disabled person on shorter notice than a non-disabled person.

25. The issue of the relevance of the UNCRPD to interpretation of the Framework Directive was also raised in a recent referral from the Irish Equality Tribunal: *Z* (C-363/12) which poses the question as to whether the UNCRPD is capable of being relied upon for the purposes of interpreting and or challenging the validity of the Framework Directive. This question is posed as an alternative to the primary question which is concerned with whether potential discrimination arises in terms of the Recast Gender Directive where a woman whose genetic child has been born through a surrogacy arrangement is refused paid leave from employment to maternity leave and or adoptive leave. The AG Opinion was issued a few weeks but did not determine this issue.

### **Direct Discrimination:**

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<sup>29</sup> Paragraph 33.

<sup>30</sup> Paragraph 46.

26. Direct discrimination is the classic exponent of formal equality and is based on treating one person less favourably on grounds of their disability than another person in a similar situation. Article 2 of the Framework Directive provides that direct discrimination is prohibited where “*one person is treated less favourably than another is, has been or would be treated in a comparable situation*”. This requires consideration of a comparator, actual or hypothetical.
27. Article 2 of the Framework Directive prohibits any direct discrimination (and indirect discrimination) “whatsoever” so clearly applies to unconscious or cover discrimination.
28. In order to successfully allege direct discrimination on grounds of disability the following elements must be proven:
- Less favourable treatment;
  - An actual or hypothetical comparator;
  - Comparable circumstances between the claimant and the comparator; and
  - Causation.
29. Less favourable treatment may be past, present or hypothetical treatment provided it is less favourable. The relevant circumstances of the claimant and comparator must be the same or not materially different. This has caused issues in the disability context as a person persistently absent from work due to illness will often result in the same treatment as a person persistently absent due to disability: i.e. termination of employment. It is for this reason that the UK legislation has a separate cause of action of “discrimination arising from disability/disability related discrimination” which prohibits discrimination due to something which arises from the disability or in consequence of his or her disability.<sup>31</sup> This is subject to a justification defence being invoked by an employer
30. The UNCRPD takes an expansive definition to discrimination and prohibits discrimination “on the basis of that disability” and includes “any distinction, exclusion or restriction on the basis of disability” that “has the purpose of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of

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<sup>31</sup> Section 15 of the Equality Act 2010.

all human rights and fundamental freedom”. Therefore likely to cover individuals perceived as disabled as well as disabled persons associated with the disabled person. means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation

### **Discrimination by Association:**

31. Of particular importance to the protected ground of disability, though in practice this has not come before the Equality Tribunal or Labour Court with any degree of frequency, is the express prohibition on discrimination by association within the Employment Equality Acts 1998-2011.<sup>32</sup> Ireland was a rare member State to provide discrimination by association within its non discrimination legislation.<sup>33</sup> The *Employment Equality Acts 1998-2011* include discrimination by association on any of the protected classes within the meaning of discrimination.<sup>34</sup> It is provided as a subset of direct discrimination. The reasoning provided in the explanatory memorandum accompanying the Equality Bill 2004 was in order that the definition of discrimination in the Employment Equality Act be amended to match that in the *Equal Status Act 2000* which includes discrimination by association within its definition of discrimination. The subsection was inserted by the *Equality Act 2004* but as there is no reference to such discrimination in the Framework Directive it was not necessitated by that Directive. Of course since the decision of the Court of Justice in *Coleman*<sup>35</sup> which establishes that discrimination and harassment by association with a disabled person comes within the ambit of the Framework Directive all member states are required to amend their legislation accordingly.

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<sup>32</sup> Section 6(1)(b) of the Employment Equality Acts 1998-2011. See also the decision of the Court of Justice in discussed below *Coleman v Attridge Law* (C-303/06) [2008] E.C.R. I-05603, [2008] I.C.R. 1128, [2008] I.R.L.R. 722..

<sup>33</sup> Sweden also included it as a form of discrimination. L.Waddington, ‘Case Note: Coleman v. Attridge Law’, [2009] 46 C.M.L.R. 665 at p. 679.

<sup>34</sup> Section 6(1)(b) of the *Employment Equality Acts 1998-2011*.

<sup>35</sup> *Coleman v Attridge Law* (C-303/06) [2008] E.C.R. I-05603, [2008] I.C.R. 1128, [2008] I.R.L.R. 722.

32. Whilst the Framework Directive clearly covers direct and indirect discrimination on grounds of disability including harassment within the definition of discrimination), there was no express reference to discrimination or harassment by association within the Framework Directive. The prohibited conduct or reason for the conduct alleged will usually relate to the personal circumstances of the complainant. However that is not always the case. Discrimination by association refers to a situation where an individual is subjected to less favourable treatment not because they are a member of a particular protected class but rather due to their connection, relationship or association to a person who is. In other words effectively the discriminatory treatment is transferred to the individual who is not possessed with the relevant characteristic of the protected class. It is particularly useful in the disability context due to the increased responsibilities connected with caring with individuals with disabilities.
33. The issue of whether discrimination and harassment is the type of conduct prohibited by the Framework Directive was considered by the Court of Justice in 2008 in the much publicised case of *Coleman v. Attridge Law*.<sup>36</sup> The Employment Tribunal in the UK asked the Court of Justice for guidance as to whether Ms Coleman, a non-disabled person, was protected from discrimination and harassment due to her association with her disabled son. The facts of this case are extreme to say the least; the behaviour alleged of the employer was described by one commentator as “*crude and unpleasant*”.<sup>37</sup> Ms Coleman worked in a firm of solicitors in London as a legal secretary from January 2001. In 2002, she gave birth to a disabled child whose health condition required specialized care which was primarily provided by Ms Coleman. On 5 March 2005, Ms Coleman accepted voluntary redundancy from her employment which brought her contract of employment with her employer to an end. On 30 August 2005 she lodged a claim with the South London Employment Tribunal claiming that she had been constructively dismissed from her employment and treated less favourably than her fellow employees as she was the primary carer for her disabled son. She claimed she had been the subject of discrimination and harassment during her employment and relied on in particular her employer’s refusal to allow her return to her previous job on her return from maternity leave, the refusal to allow

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<sup>36</sup> (C-303/06) [2008] E.C.R. I-05603, [2008] I.C.R. 1128, [2008] I.R.L.R. 722.

<sup>37</sup> L. Waddington, ‘Case Note: *Coleman v. Attridge Law*’, [2009] 46 C.M.L.R. 665 at p. 665.

flexibility as regards working hours and abusive and insulting comments made about her and her child.

34. The Court of Justice expressed the view that if an interpretation limiting the application of the Directive to people who are themselves disabled was given to the Directive, this would deprive the Directive of a vital element of its effectiveness and to reduce the protection which it is intended to guarantee.

35. The Court concluded that, Articles 1 and 2(1) and (2)(a) of the Council Directive 2000/78/EC<sup>38</sup>

*“must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).”*

36. The Court of Justice also concluded that the Directive outlawed harassment by reason of association or connection with a disabled person.

37. The UNCRPD takes an expansive definition to discrimination and prohibits discrimination “on the basis of that disability” and includes “any distinction, exclusion or restriction on the basis of disability” that “has the purpose of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedom”. Therefore likely to cover individuals perceived as disabled as well as disabled persons associated with the disabled person.

### **Indirect discrimination:**

38. Indirect discrimination is far more sophisticated than direct discrimination as it is sensitive to differences which apply in practice between different categories of people. The concept of indirect discrimination is contained in Article 2(2) of the

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<sup>38</sup> 2000/78/EC

Framework Directive and is defined as occurring where a neutral provision, criterion or practice would put persons having a particular disability at a particular disadvantage compared with other persons. The reference to “would” in Article 2(2) in the definition means that it is likely that it is possible to challenge a particular practice, etc which clearly have a discriminatory effect without waiting for their application in a particular case. The reference to “particular disadvantage” within Article 2(2) emanates from European law on free movement of workers and was designed to obviate the need for complex statistical proof.<sup>39</sup> Instead what is required to show is that there is a disadvantage to the individuals in the group. Finally given the reference to particular disability within the definition of indirect discrimination, it is likely that the concept of indirect discrimination by association would not be captured as a prohibited form of conduct within the Directive.

39. There are two defences available within the Directive to justify indirect discrimination: the first is the traditional defence of objective justification where an employer can demonstrate that a particular “*provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*”.<sup>40</sup>

40. The so called justification defence is a difficult hurdle for an employer to overcome and requires that it be demonstrated that the practice, etc corresponds to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end.<sup>41</sup>

41. The second defence, which is specific to disability, links reasonable accommodation and indirect discrimination which permits liability on the part of an employer to be avoided where indirect discrimination arises and the reasonable accommodation requirement is adhered to by an employer in order to eliminate the disadvantages entailed by the *prima facie* indirectly discriminatory practice, criterion or practice.<sup>42</sup>

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<sup>39</sup> *O’Flynn v Adjudication Officer* (C-237/94) [1996] E.C.R. I-2617.

<sup>40</sup> Article 2(2)(i).

<sup>41</sup> *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* (C-170/84), [1986] E.C.R. 01607 at paragraph 33.

<sup>42</sup> Article 2(2)(ii). The view was adopted in the UK prior to the introduction of the Equality Act 2010 this section allowed Member States to omit indirect discrimination from its legislation concerning individuals with disabilities in the employment realm provided that the legislation provided for appropriate measures in line with



The section seems suggest that indirect discrimination will arise unless it is dealt with by way of the provision of reasonable accommodation and therefore that the provision of reasonable accommodation is a sufficient answer to claims of indirect discrimination as many of the obstacles which arise for cases of indirect discrimination on grounds of disability can be removed by the obligation to provide reasonable accommodation.<sup>43</sup> If there is reasonable accommodation which can be made then there will be a less discriminatory means of achieving the legitimate aim (carrying on the job with the benefit of reasonable accommodation). On the other hand where an employer has carried out all of the steps of reasonable accommodation, it does not have to justify the use of the particular provision, criterion or practice.

42. The issue of indirect discrimination on grounds of disability was considered in the recent Court of Justice *Ring v Dansk Almennyttigt Boligselskab DAB*.<sup>44</sup> The Court expressed the view that the reduction of a period of notice for employees who are absent for more than 120 days due to illness constituted potential indirect discrimination as it indirectly disadvantaged disabled workers as compared to workers who are disabled (it applies to all workers who are absent by reason of illness including those who would not meet the threshold of disability as are absent due to mere illnesses). The issue of justification was not definitively addressed by the AG who noted that this was within the remit of the national court.

### **Reasonable Accommodation:**

43. The concept of reasonable accommodation recognises that the inherent characteristics of disability and its accompanying impairment can result in individuals with disabilities have difficulties in performing the job or functions of the job in a traditional or conventional manner. This manifests itself in the form of barriers which without an obligation being placed on employers to provide reasonable accommodation would leave individuals with disabilities in a legal no man's land

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the principles in Article 5 of the Framework Directive which is concerned with the obligation on employers to provide reasonable accommodation.

<sup>43</sup> G. Quinn, 'Disability Discrimination Law in the European Union', in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge, Cambridge University Press, 2007) at p.p. 261-2.

<sup>44</sup> (C-335/11), Opinion of Advocate General Kokott 6 December 2012. Judgment from the Court of Justice is awaited at the time of preparation of this paper.

being excluded from the labour market and accompanying benefits. It is designed to ensure not only that the disabled person is treated equally but also is put on an equal footing and can therefore practice their profession. Therefore reasonable accommodation allows for employers to take account (on an individual basis) of relevant characteristic of their employee/prospective employee and by doing so making changes, etc to allow the employee concerned to do the work. In other words: *“Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.”*<sup>45</sup>

44. Article 5 of the Directive creates the obligation for employers to make reasonable accommodation for persons with disabilities unless this would create a disproportionate burden for the employer. It does not apply beyond the grounds of disability and this was made clear in the CJEU judgment in *Coleman*.

45. There is no mention within the Directive as to whether failure to provide reasonable accommodation constitutes a form of discrimination but the Commission and others have suggested that such action does amount to discrimination within the meaning of the Directive.<sup>46</sup> The aim of the provision of such reasonable accommodation (known as appropriate measures) is to enable a person with a disability to *“have access to, participate in, or advance in employment, or to undergo training”*.

46. Some expansion is provided to member states in the non-binding recitals where it states that appropriate measures *“shall be provided i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources”*.<sup>47</sup> Whilst these are mere examples, this indicates that reasonable accommodation measures should be designed to adapt normal

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<sup>45</sup> S. Fredman, ‘Disability Equality: A Challenge to the Existing Discrimination Paradigm?’ in A. Lawson and C. Gooding (ed), *Disability Rights in Europe: Essays in European Law*, (Hart Publishing, 2005) pp 199-218 at p. 203.

<sup>46</sup> EU Commission, *Disability Mainstreaming in the European Employment Strategy*, EMCO/11/290605 (Brussels, 2005) at p. 3 where the Commission explained its view of reasonable accommodation as an “obligation whose failure can constitute unfair discrimination.” See also G. Quinn, ‘Disability discrimination law in the European Union’ in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge: Cambridge University Press, 2007), at p 261 and R. Whittle, ‘The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Perspective’ [2002] ELR 303 at p. 312.

<sup>47</sup> Recital 20.

procedures or working patterns. The reference in Article 5 of the Directive to an employer being required to take appropriate measures clearly places the duty on the employer to be proactive. As the aim of Article 5 is to “*to enable a person with a disability to have access to, participate in or advance in employment*”, it appears the assessment of what is required is an individual analysis having regard to the specific requirements of the individual and the employment situation involved.<sup>48</sup> It is reactive in nature and therefore is consistent with the UNCRPD which at Article 2 provides:

*“Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities, the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.*

47. The Court of Justice in *Ring v Dansk Almennyttigt Boligselskab DAB*<sup>49</sup> recently stated that that the reduction in working hours may be part of the measures envisaged as part of Article 5 of the Framework Directive and stated that the is within the remit of the member state to determine whether such a measure, in each specific case, may involve a disproportionate burden on the employer. Further and potentially more significantly, she stated that where an employer applies of a reduced notice period to a worker who has been absent from the workplace due a disability and this reduced notice period amounts to a failure on the part of the employer to make reasonable adjustments within the meaning of Article 5, this cannot be justified.

48. Apart from the financial limitations on the duty of an employer to provide reasonable accommodation (non beyond the limitation of a disproportionate burden),<sup>50</sup> the non-binding recital 17 significantly provides that the Directive “*does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.*” Effectively this means that there is no requirement on an employer to employ a person with a

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<sup>48</sup> L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union*, (Brussels: European Commission, 2009) at p. 6

<sup>49</sup> (C-335/11), Opinion of Advocate General Kokott 6 December 2012. Judgment from the Court of Justice is awaited at the time of preparation of this paper.

<sup>50</sup> Article 5.

disability where they are unable to perform the essential functions of the post even with the provision of reasonable accommodation. The inclusion of ‘essential’ as the all-important qualifier for an employee being deemed incapable of performing their duties of employment means that where an employee is unable to perform minor or ancillary aspects of their employment duties (even with the provision of reasonable accommodation), an employer cannot justify the termination of employment on that basis.

49. Pragmatic guidance is also provided to member states in the non-binding recital on the crucial limiting provision of disproportionate burden of which it provides that *“account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance”*.<sup>51</sup>
50. Article 2 of the UNCRPD defines reasonable accommodation to mean necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. It is expressly mentioned in the substantive Articles dealing with education, employment, liberty and security of the person and access to justice. The duty imposes positive obligations to identify barriers in the way of a disabled person’s enjoyment of their human rights and to take appropriate steps to remove them. The emphasis is on the barriers which operate in a particular case and thus on the need to respond to the personal circumstances of the individual disabled person. Unlike the EEA and the Framework Directive the UNCRPD includes failure to provide reasonable accommodation within the definition of discrimination. The concepts of reasonableness and undue burden are clearly provided at the heart of the duty of reasonable accommodation and amount to progressive concepts.

## **RIGHT TO WORK:**

51. Article 27 requires that States Parties recognize the right of persons with disabilities to work, on an equal basis of others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. And that States

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<sup>51</sup> Recital 21.

Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to inter alia:

- Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, continuance of employment, career advancement and safe and healthy working conditions;
- Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
- Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
- Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- Promote opportunities for self-employment, entrepreneurship, the development of cooperative and starting one's own business.
- Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.
- Promote the acquisition by persons with disabilities of work experience in the open labour market.
- Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

52. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forces or compulsory labour. The Optional protocol gives the Committee on the Rights of Persons with Disabilities to examine individual complaints of alleged violations of the the Convention. Committee members may also conduct inquiries into allegations of grave or systemic violations of the Convention. This has not been ratified by the EU.

**Proposed Directive:**

53. There is a directive concerning gender discrimination in the area of goods and services which are available to members of the public, such as housing, but education is not covered.<sup>52</sup> In 2008, the EU Commission announced the publication of a draft directive which was proposed to extend the prohibition on discrimination in the areas of housing, social protection, education and goods and services beyond gender to other grounds such as disability.<sup>53</sup> However the inclusion of education has proved controversial with some members states being concerned, in particular, at the duty of reasonable accommodation contained in Directive. The Directive has reached a stalemate and has not progressed beyond consideration by the Council of the EU as of July 2012.
54. The most recently published version of the Directive includes a recital based on Article 1 of the UNCRDP which in its definition of disability refers to the interaction between impairments and socially created barriers that limited participation. The proposed Directive also defines an unjustified failure to make reasonable accommodation as a form of discrimination and links this to the UNCRPD. This demonstrates a clear desire to implement the UNCRPD through EU legislation.<sup>54</sup>

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<sup>52</sup> Directive 2004/113.

<sup>53</sup> For a detailed examination of the proposed Directive see L. Waddington, 'Future prospects for EU Equality law: lessons to be learnt from the proposed Equal Treatment Directive' [2011] 36(2) European Law Review 163.

<sup>54</sup> L. Waddington, 'Future prospects for EU Equality law: lessons to be learnt from the proposed Equal Treatment Directive' [2011] 36(2) European Law Review 163 at p. 179.