Disability Discrimination Law: European Perspectives

Prof. Lisa Waddington, European Disability Forum Chair in European Disability Law, Maastricht University
Current Disability Non-Discrimination Law in Europe

- National Legislation
- European Convention of Human Rights
- EU Law

The Directive prohibits discrimination with regard to employment and vocational training on grounds of religion or belief, sexual orientation, age and disability.

The Directive dates from 2000 and all EU Members States have adopted national legislation to comply with the Directive.
A. Definition of Discrimination

The Employment Equality Directive defines four forms of action as discrimination:

- direct discrimination
- indirect discrimination
- harassment
- instruction to discriminate against another person
Direct discrimination

- “where one person is treated less favourably than another is, has been or would be treated in a comparable situation” on the ground of disability

It is important that the less favourable treatment is on the ground of disability. It is not necessary that the person complaining of direct discrimination actually has a disability him or herself.
Indirect Discrimination

- where an apparently neutral provision, criterion or practice would put persons having a particular disability at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.
Harassment

- where unwanted conduct related to the ground of disability takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Harassment needs to be on the ground of disability - individuals are protected from harassment on the grounds of disability, even if they are not disabled themselves.
Instruction to discriminate

- instruction to discriminate is defined as a form of discrimination.
B. Reasonable Accommodation (1)

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.” Art.5
B. Reasonable Accommodation (2)

CJEU in *Ring* and *Skouboe Werge*: “the concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with others”.

The Directive requires an individualised accommodation to meet the needs of a particular individual.

The Directive does not explicitly define a denial of an accommodation as a form of discrimination.
C. The Definition of Disability (1)

• Joined Cases C-335 and C-337/11 *Ring* and *Skouboe Werge* (2013)

Court of Justice of the EU (CJEU) noted that the UN Convention on the Rights of Persons with Disabilities (CRPD) forms “an integral part of the EU legal order” and that secondary legislation must be interpreted in a manner consistent with the CRPD as far as possible.

CJEU noted that other case law on this topic was decided before the EU became a party to the UN CRPD and that the CRPD addresses the concept of disability.
C. The Definition of Disability (2)

The CRPD recognises the role that environmental factors play in creating disability. This influenced CJEU’s judgment.

CJEU: “the concept of ‘disability’ must be understood as referring 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 others”.

The impairment must be “long-term”.
C. The Definition of Disability (3)

A curable or incurable disease could amount to a disability if it led to the required degree of limitation. However, an illness which did not lead to such a limitation was not covered, and illness was not an additional ground of protection. The disability did not have to prevent a person from working at all – it was sufficient if a person was only able to work part-time as result of the disability.

It was not necessary that an individual required an accommodation in order to be disabled.
C. The Definition of Disability (4)

Case C-363/12 Z (2014)

Concerned a woman who was unable to give birth naturally. Her child was born via a surrogacy arrangement and she was denied paid leave equivalent to maternity / adoption leave. Court stated that the concept of disability within the meaning of the Directive “presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in professional life on an equal basis with other workers.”
C. The Definition of Disability (5)

CJEU held that Z’s condition did not impact on her ability to access, participate in or advance in employment in any way, and therefore her condition did not constitute a disability within the meaning of the Directive.

CJEU held: Z was not protected from employment discrimination on the ground of disability under the Directive.
II. Gaps in EU Equality Law
A. Scope

Current Legislation only prohibits employment and vocational training discrimination

- EU equality legislation has been criticized for this reason for some time.
- In 2008 the European Commission proposed a new directive extending the material scope of non-discrimination law for disability and some other grounds.
- To date this directive has not been adopted as a result of opposition from some Member States.
B. A European Accessibility Act

The European Commission announced some time ago that it would propose an “Accessibility Act”.

- It seems this will be a directive to achieve disability accessibility for certain goods and services across the EU. It will be linked to standards.

- To date the Accessibility Act has not been proposed.
C. Case Law of the CJEU defining “disability”

- In spite of endorsing the CRPD, in practice the CJEU still focuses on impairment when it applies the definition of disability.

- CJEU only recognizes as disabled those persons who have an impairment which impacts on ability to work – this is more limited than the CRPD.
III. New Directions in Research

EU funded research project: European Research Agendas for Disability Equality (EuRADE) (2007-2009)

- Project aimed to increase research capacity of DPOs and identity research priorities of DPOs.

- In 2008 the EuRADE project carried out a survey of DPOs to establish their research priorities.

- Received responses from 68 civil society organisations in 26 European countries.
A. EuRADE Survey (1)

Respondents identified research on “Non-Discrimination and human rights” as their top priority.

Specific priorities under this heading were:

- Understanding disability discrimination
- Creating a legal framework to effectively combat disability discrimination
- Value of (comparative) legal research
- Need to incorporate the UN Convention in research
A. EuRADE Survey (2)

- “Evidence needed; a) proof (statistical data etc.) of all types of discriminatory behaviour (direct, indirect etc.) in all areas of life, b) proof of multiple discrimination, especially against the most vulnerable groups of disabled people like women with disabilities, immigrants with disabilities etc. ...”

- “How do discrimination, obstacles and inequality manifest themselves in the lives of hard of hearing people? What different forms of discrimination are there? How to recognize institutional discrimination? And what kinds of institutional discrimination are there?”
A. EuRADE Survey (3)

• “Analyse why instruments such as reasonable accommodation have not worked as well as expected and the main barriers preventing its effective use. ... If strategic litigation is the way to go, how can this be most efficiently done. The success rate before courts has been low – how can this be improved?”

• “How are people empowered to use these otherwise rather abstract principles?”
A. EuRADE Survey (4)

- “A study on the formulation of a new legislative framework that can promote the principle of equal treatment.”

- The key goal for all respondents was for research to contribute to a better understanding of the nature of disability discrimination, and the creation of a legal framework which would serve to combat such discrimination and guarantee the rights of persons with disabilities.
B. EuRADE Publications


Disability Discrimination Law In Australia

Professor Beth Gaze,
Law School, University of Melbourne
Disability discrimination laws in Australia

- Origins in the international human rights system, as source of constitutional power to legislate

- Legislation at Commonwealth and state levels
  - Person using the laws can choose which to use
  - State laws have covered disability discrimination since 1982 in Victoria, revised several times
  - Commonwealth law: Disability Discrimination Act 1992

- Laws cover a wide range of social activities:
  - Employment including independent contractors, education, provision of goods and services, accommodation, government activity etc.
Features of Australian disability discrimination law

1. Aims of the law
2. Definitions of disability
3. The range of mechanisms available to counteract discrimination
4. Definitions of discrimination
   □ What the P has to prove
5. Enforcement: the effectiveness of the law
   □ Some examples
6. Main achievements and major challenges
1. The aim / purpose of disability discrimination law

- Two roles:
  - Protect the rights of an individual when they experience unlawful discrimination
    - provide an individual remedy
  - Advance the position / rights of people with disabilities generally in moving towards substantive equality
    - Seeking systemic change
  - The two levels are interdependent

- Mechanisms of change:
  - legislative change, legal decisions, and bargaining in ‘the shadow of the law’ in settling disputes
  - development of guidelines, codes of practice and educative processes
    - the role of the DD Commissioner is extremely important.
Equality/non-discrimination as an aim

- Formal or substantive equality?
  - Equal treatment is often problematic in situations involving disability

- Social model of disability:
  - Limitations are imposed by the built and social environment because they are constructed without attention to the needs of people with disabilities

- The essence of DD law is a requirement for adjustments to be made
  - To the environment, to entrenched social practices, to attitudes
  - Does this approach promote systemic change?
  - But law still implicitly based on a ‘deficit model’ rather than an idea of inclusion of people with differing abilities
2. Definition of Disability
Disability Discrimination Act 1992 (Cth)

DDA s. 4(1) *disability*, in relation to a person, means:

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

and includes a disability that:

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

To avoid doubt, a *disability* that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.
Breadth of the definition

Covers HIV / AIDS

*Marsden* (NSW 2001):
- Heroin addiction held to be a disability; NSW Act amended to exclude this, but other laws have not been

*McDougall* (VCAT 2004)
- Wanted to move to Perth to avoid exposure to gaming machines in Melbourne
- Sought to require employer to transfer her job to Perth
- Unsuccessfully argued gambling addiction was a disability

*Bevilacqua* (2015, VCAT)
- Morning sickness a disability
3. The range of mechanisms

1. Prohibition of direct and indirect discrimination
2. Requirement to make reasonable adjustments for a person with a disability
   - in employment, education, services and accommodation: Equal Opportunity Act 2010 (Vic) only
3. Facilitation of provision of special services or facilities by an exception
   - but no requirement to take affirmative or positive action
4. Agency / Disability Discrimination Commissioner
   - But functions limited – no power to assist enforcement,
   - Enforcement rests entirely on the people affected
5. Disability Standards
6. Disability Action Plans
4. Defining disability discrimination

- Disability discrimination:
  - Direct
  - Indirect
  - Specific provision for aids, carers and assistance animals, and for discrimination against associates of a person with a disability
  - Specific reference to reasonable adjustments
    - DDA unless it would impose unjustifiable hardship (DDA)
    - EOA 2010 – independent requirements to provide reasonable adjustments
  - Specific defences:
    - Unjustifiable hardship / the adjustment is not reasonable
    - The person could not carry out reasonable requirements / inherent requirements of the job
  - Exceptions:
    - health and safety risks to persons or property
    - Selected other laws
    - Insurance and superannuation etc
The definitions of discrimination

- Originally based on English definitions of US concepts; now reformed:
- **Direct discrimination**: treat someone differently because of disability
  - DDA: ‘because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.’
    - Comparison is essential as a separate element
  - EOA: ‘treats, or proposes to treat, a person with an attribute unfavourably because of that attribute’
    - Comparison is not essential, but can be used to show the basis is the disability
  - But no assistance with onus of proof in Australia – if cannot get evidence of respondent’s motivation, may not be able to prove discrimination
  - Does not deal with multiple or intersectional discrimination, e.g. sex and disability discrimination, or race and disability
Examples – Direct discrimination

**Purvis v State of NSW** (High Court, 2003)

- Boy with acquired brain injury suspended and then excluded from public high school because of behaviour

- Who is the correct comparator?
  - Student without the injury or the behaviour
  - Student without the injury but with the behaviour

- Does ‘disability’ include its behavioural manifestations?

- Are they part of the circumstances that should not be materially different?

- **HC**: comparison is with a student with the behaviour but not the injury
**Examples – Direct discrimination 2**

*Agius v St Vincents Hospital* (2012, Federal Magistrates Court)
- Patient attended hospital emergency dept – no Auslan interpreter
- Comparison was with someone with other communication difficulties like a blind person or person with other language issues
- Requirement to have Auslan interpreter on staff was unjustifiable hardship and would not solve the problem

*Slattery v Manningham City Council* [2013] VCAT 1869
- Resident with mental illness barred from council premises because of behaviour
- Held: it was direct discrimination; remedy included training for senior council staff
The definitions: indirect discrimination

- an apparently neutral practice that disadvantages people with a particular attribute

**Elements:**
- requirement condition or practice
- that disadvantages people with a particular attribute,
- who cannot comply (required in the DDA but not the EOA)

**Defence:** the R, C or P is reasonable
Examples – indirect discrimination

*Innes v Rail Corp of NSW* (2013) Federal Magistrates Court

- Action brought personally by Disability Discrim Commissioner
- Failure to provide audible announcements on Sydney train system

Illustrates systemic potential of indirect discrimination, but major enforcement problems

- Why did he have to bring it in his personal capacity?
- Way was there no other avenue for making progress?
- Failure of the Disability standards?
Systemic approaches
Disability Standards

Rationales:
- clearer obligations for potential respondents
- Industry specific codes

- S. 31 making disability standards: disallowable by Plt
  - Education (2005)
  - Access to premises (2011)
  - Employment?
- Why so slow? consensus approach and legislative status

- Legal effect of standards:
  - s.32 breach is unlawful
  - s.34 compliance is a defence to DD
Disability Standards: examples

Public transport (2002) – *Innes v Rail Corp 2011 FMC*

- Require progressive implementation
- Despite phasing in of obligations over 10 years, Rail Corp argued that a failure rate of 20% was reasonable compliance

Education: *Walker v Victoria* (2012 Full Federal Court)

- School consulted with parents and experts, then made its own decision about what adjustments to implement
- Complied with education standards: the duty is to take reasonable steps, and they had done this.
5. Enforcement and effectiveness

- No public enforcement
- Some legal aid but varies between states and is quite limited
- Agencies have powers to intervene but that is very different from resourcing and supporting litigants
- Courts take technical points and many decisions are overturned on appeal
6. Achievements and major challenges

- What can law realistically provide?
  - Many but not all issues are to do with resources available and the allocation of existing resources
  - Resources are often inadequate
- Reported cases don’t tell the whole story
- Individuals are protected where they can establish that the basis was disability
- Definitions have evolved and improved, but there is still much scope for this
- Need for better systemic tools – to strengthen the use of indirect discrimination and disability standards