



SHARPENS YOUR THINKING

## Why is a European Law on Disability Discrimination important

WHITTLE, R.

Available from Sheffield Hallam University Research Archive (SHURA) at:

<http://shura.shu.ac.uk/671/>

---

This document is the author deposited version. You are advised to consult the publisher's version if you wish to cite from it.

### Published version

WHITTLE, R. (2001). Why is a European Law on Disability Discrimination important. In: Inclusion Europe, Brussels, Belgium, 22-23 November 2001.

---

### Repository use policy

Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in SHURA to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain.

## **Why is a European law on disability discrimination important?**

**By Richard Whittle**

Key note address at Inclusion Europe's Dialogue Meeting, "*Me, You, Us... together against discrimination*", Brussels, Belgium, 22-23 November 2001.

**Why is a European law on disability discrimination important?**

**Richard Whittle\***

*EU law offers great potential for advancing the rights and interests of disabled people living within the European Union, but this potential is yet to be fully realised. A major step forward in this regard is the recently adopted Framework Directive for equal treatment in employment and occupation – a measure constituting the first European law on disability discrimination. Through a brief outline of what may be described as the two main strands of EU activity from which an advancement in disability rights can be gained, namely the ‘human rights’ and the ‘design for all’ strands, this presentation seeks to place the Framework Directive within the broader context of an evolving EU disability policy. Falling squarely within the ‘human rights strand’, this directive is examined both in terms of its importance to disabled people as a European law, as well as its place within the wider disability agenda of the European Union. By so doing, this presentation aims to provide the audience with a greater awareness of the potential proffered by EU law for the advancement of disability rights and, as a result, a greater facility to fully exploit that potential. Whilst the nature of the question set for this presentation necessitates a generic approach to disability, specific reference will be made to learning disabilities where pertinent.*

## **1 Introduction**

The purpose of my presentation is to focus on one aspect of EU law that has recently become relevant to people with disabilities, and that is the right to equal treatment. In November last year, the European Union adopted (as part of its non-discrimination package) a Framework Directive prohibiting discrimination on a number of new grounds, including discrimination based on ‘disability’.<sup>1[1]</sup> Generally referred to as the ‘Framework Directive’, this measure is in effect the first European law on disability discrimination. Together with the recent amendments to the text of the European treaties, the adoption of this directive signals the beginning of a new and exciting era in European disability law and policy; an era that promises a significant improvement in the day-to-day lives of disabled Europeans.<sup>2[2]</sup> Whilst I should be quick to qualify that this era will not take shape (and give rise to benefits) over-night, I can say with confidence that it has undoubtedly begun.

It should be noted from the outset, however, that the Framework Directive does have a major limitation, and that limitation concerns its ‘material’ scope of application. In contrast to its sister directive in the non-discrimination package (a measure commonly referred to as the Race Directive and which has an extensive scope of application) the protection afforded by the Framework Directive is limited to the context of employment and occupation alone.<sup>3[3]</sup> Clearly, as most people at today’s conference can no doubt testify, disability discrimination extends well beyond this context. Certainly, those (with learning disabilities) that participated in the project groups supporting this conference expressed personal experience of discrimination not only in respect of employment (both in terms of employment opportunities and working conditions) but also in terms of education (primarily exclusion from integrated schools); community services; health care; housing, and tenancy rights. It is clear that this experience is similarly reflected across the spectrum of disabilities. As already documented at a European level, discriminatory barriers are encountered in almost every aspect of day-to-day activity for people with disabilities.<sup>4[4]</sup> Clearly, therefore, the

limited scope of the protection that is afforded by the Framework Directive will need to be addressed in the context of disability.<sup>5</sup><sup>[5]</sup>

Nonetheless, despite this (and some other limitations that I will identify later during the presentation) the Framework Directive does represent a very significant and positive step forward for disability rights within the European Union. We should remember that prior to 1997 (and the amendments at Amsterdam), the European treaties made no reference whatsoever to disability and this clearly limited the relevance of European law, and the benefits that it could bring, to disabled Europeans.<sup>6</sup><sup>[6]</sup> Since 1997, however, the treaties have included a dedicated legal basis that enables the European institutions to adopt laws (such as directives) to combat discrimination on a number of new grounds. This legal basis is Article 13 of the EC Treaty and it specifically refers to disability as a ground of discrimination.

## **2 Article 13 EC – the ‘human rights’ strand to disability law & policy**

The potential, as well as the limitations, of Article 13 in the context of disability have already been examined in detail elsewhere, so there is no need to repeat that analysis here.<sup>7</sup><sup>[7]</sup> I merely wish to stress, however, that it is from this legal basis that we now have the Framework Directive and its protection for people with disabilities in the context of employment and occupation. Moreover, it is from this legal basis that the EU institutions could adopt a more expansive European law offering even greater protection against disability discrimination – protection limited only by the scope of the powers found in the treaties themselves. Finally, and perhaps of greater significance for the long-term, the mere existence of Article 13 (and the inclusion of disability as a protected ground) sends a clear message to national authorities that disability policy is just as much about human rights as it is about welfare and rehabilitation. This message is arguably an indirect statement of policy and is reflective of the paradigm shift in disability policy that has already taken place at an international level<sup>8</sup><sup>[8]</sup> and is similarly reflected at national level in some EU Member States.<sup>9</sup><sup>[9]</sup> Nonetheless, for the majority of countries within the EU, considerable changes to their law and policy will be required if this is going to be equally reflected within their national systems. It is in this regard, therefore, that the message emanating from Article 13, and the potential it affords for further action in disability law and policy, is most significant.

## **3 Article 95 EC – the ‘design for all’ strand to disability law & policy**

In addition to the inclusion of Article 13, the amendments to the European treaties in 1997 included a political declaration or commitment that specifically refers to disability.<sup>10</sup><sup>[10]</sup> This declaration is attached to Article 95 of the EC Treaty. In essence, it requires the European institutions to take the needs of disabled people into account when this article is used as a legal basis for Community action.

The purpose of Article 95 is to allow the European institutions to approximate national laws (or bring them closer together) when they directly affect the functioning of the internal market. This includes, amongst others, matters relating to the free movement of goods and services throughout the European Union.<sup>11</sup><sup>[11]</sup> The institutions can do this under Article 95 by issuing European directives. So the declaration on disability (which is attached to this article) basically requires the European institutions to try and make these directives (and through them, national law) as disability-friendly as possible. In this way, Article 95 can be used to establish disability standards; standards that have as their purpose the removal of barriers to participation and can thereby

achieve concrete change for disabled Europeans. Based on the principle of 'design for all', these standards could regulate matters such as the design of goods and the provision of services to the benefit of all people within the European Union - not only those with disabilities - as well as improve the marketability of such goods and services. Some recent successes for the disability movement in this regard include access standards for coaches and buses<sup>12</sup>[12] as well as information technology and telecommunications.<sup>13</sup>[13]

When you consider that there are few policy areas today that do not impact in one way or another on the functioning of the internal market, it becomes clear that the scope of application of Article 95 is very wide indeed. Consequently, the potential of the declaration attached to this article to make a real difference to the lives of disabled Europeans is considerable. In many ways, it is just as significant as the inclusion of disability within legal basis provided by Article 13 (discussed above).

There are, however, some limitations to the use of this declaration as well as the application of Article 95 generally. First, the declaration is non-binding in nature and cannot (in itself) give rise to a legal obligation on the part of the Community institutions to comply with its requirements. Second, the facility provided by Article 95 can only be invoked where disparities in national laws, regulation or administrative action exist, or are likely to exist, in a given area and such disparities give rise to, or are likely to give rise to, obstacles in the functioning of the internal market.<sup>14</sup>[14] In other words, the Community institutions cannot simply rely on Article 95 to introduce standards (which may or may not be of benefit to disabled people) without first demonstrating that such obstacles are likely to emerge. Third, the application of Article 95 is excluded where the proposed measure relates "to the free movement of persons" or to the "rights and interests of employed persons";<sup>15</sup>[15] areas typically forming the main segments of national disability non-discrimination laws.

Nonetheless, the following observations should be made in respect of the above limitations. First, whilst the declaration is non-binding in nature and will not (in itself) give rise to a separate cause of action under Community law, it is clearly an agreement between all Member States and will certainly have some legal scope. As such, it could arguably be used to challenge (by way of judicial review) a measure based on Article 95 that clearly had implications for but failed to take the needs of disabled people into account.<sup>16</sup>[16] In any event, it is suggested that the mere existence of this declaration (and its status as a political agreement) should render the need for such challenges unnecessary - provided that it is used effectively by disability NGOs through strategic lobbying at both national and European level and effective coordination of support from key elements within both the European Commission and European Parliament. Second, whilst Article 95 cannot be used without the presence of barriers (that either exist or are likely to exist) as regards the functioning of the internal market, it is suggested that the recent introduction of comprehensive disability non-discrimination laws in some Member States are likely to give rise to such barriers. Applying to, among others, the provision of goods and services, these laws are likely to result in disparities in national requirements for the design and provision of such products and would themselves represent barriers to the functioning of the internal market. These barriers are likely to arise in a number of diverse areas of Community activity and will almost certainly justify the introduction of standards to the benefit of people with disabilities under Article 95. Finally, whilst the exclusion of matters relating to the 'free movement of persons' and the 'rights and interests of employed persons' is clearly of significance, it is suggested that these exclusions are not as wide as they might first appear. Certainly, the reference in the second exclusion to 'employed persons' does not encompass persons that are out of work and seeking employment.<sup>17</sup>[17] Moreover, these exclusions are likely to be more concerned with preventing the adoption of measures aiming to regulate *directly* matters pertaining to the 'free movement of persons' and the 'rights and interests of employed persons' rather than measures merely having implications thereto. If so, this would clearly leave considerable scope for action in these areas. Certainly, this observation is

supported by the adoption of the recent coach and buses directive (referred to above) under Article 95; a directive that was not hindered in its adoption by these exclusions and which clearly has implications for the free movement of all persons, including those with disabilities.

In any event, beyond the actual use of Article 95, it is clear that the principle of 'design for all' in the declaration attached to this article can find (and has already found in certain instances) expression under alternative legal bases in the treaty. Certainly, Article 13 provides a suitable legal basis for the introduction of disability specific standards in any area of Community activity where the necessary legal powers reside. Moreover, discussion is currently taking place at European level to improve air passenger rights through legislation and this too could significantly benefit people with disabilities, as well as other air-passengers.<sup>18</sup>[18] Similarly, discussions are also taking place at European level to regulate passenger accessibility to the railways, and legislative success has already been gained (to the benefit of people with disabilities) in the context of maritime transport.<sup>19</sup>[19] Such activity has either been based on, or is expected to be based on, the relevant treaty articles for transport and this clearly demonstrates that the legislative gaps arising from the limitations to Article 95 can be filled through the use of alternative legal powers residing elsewhere in the treaty. In this sense, therefore, it is as if the disability declaration has been extended to all areas of Community competence.

The importance of the 'design for all' strand to EU disability policy cannot be overstated. The drive towards harmonisation of technical standards and the functioning of the internal market holds great promise for disabled Europeans but the harmonisation of matters such as construction, transportation, environmental design and communications (to name but a few) will only further marginalise people with disabilities if their needs are not taken into account during this process. The inclusion of disability as a prohibited ground in Article 13 and the declaration attached to Article 95 has undoubtedly helped raise the profile of the disability issue within the European Union as well as accorded disability NGOs with greater credibility and influence within this process. Disability is now clearly on the legislative and political agenda of the European Union and it is essential this momentum (evidenced by recent initiatives) can be maintained. In the context of learning disabilities (for example), the establishment of standards regulating the dissemination of information (in any form) is just one area in which the incorporation of the needs of people with learning disabilities could have a significant and positive impact. Disability NGOs representing this group should therefore be proactive in monitoring Community initiatives in this field of activity and be prepared to lobby for amendments should they be necessary.

#### **4 A co-ordinated EU disability strategy**

Together, therefore, both the declaration attached to Article 95 and the inclusion of disability as a prohibited ground of discrimination in Article 13 have either given rise to, or helped to encourage, a number of recent initiatives emanating from the European Union. These initiatives will clearly have a positive impact on the disability rights agenda and they range from binding legislation to recommendations and guidelines, as well as political resolutions.<sup>20</sup>[20] However, perhaps the most exciting aspect of these initiatives is that - when viewed as a whole - they arguably form part of an evolving and an increasingly co-ordinated EU disability strategy. This strategy is both wide-ranging and forward thinking and is encapsulated in a recent Communication from the Commission entitled: *Towards a Barrier Free Europe for People with Disabilities*.<sup>21</sup>[21] Based on the principles of non-discrimination and inclusiveness, this emerging disability strategy holds great promise for disabled Europeans in the years to come. Be that as it may, for the purpose of today's presentation, I must focus on just one element of this strategy, and that is the prohibition of discrimination. In particular, the title of my presentation asks the following question: why is a European law on disability discrimination important?

## **5 The importance of a European law on disability discrimination**

In response to that question, the following two reasons should be identified - reasons that are equally applicable to any European law designed to positively influence the disability rights agenda. The first concerns the very *nature of European law* and the effect that it has on our national legal systems. The second concerns, the *practical impact* that such a measure would have on the further development of EU disability law and policy. Both of these reasons are considered in turn and, thereafter, consideration is given to the first European law in this field, that is, the Framework Directive and its intended application in the context of disability.

### **5.1 The nature of European law**

There are essentially three aspects concerning the nature of EU law that make such a measure important for our purposes. The first is that EU law rules supreme over national law. As such, it can demand changes at national level to ensure compliance with the obligations arising from the Community legal order. Thus, if you do not already have a disability non-discrimination law in your country, then a European law in this area would demand its introduction or the adjustment of existing non-discrimination laws to encompass a disability dimension. Alternatively, if (like UK citizens, for example) you already have a disability non-discrimination law in place, then a European law in this area may still require positive changes to that legislation. The British Disability Rights Commission (for example) is currently identifying those aspects of the Disability Discrimination Act 1995 that will need amending in light of the Framework Directive and some improvements will certainly have to be made. This is equally the case with the relevant authorities in Ireland and Sweden and their respective legislation in the context of disability discrimination.

The reason why EU law must rule supreme is that without its supremacy over national law, Member States would be unable to fully integrate with each other - integration being the overriding objective of the European Union. As such, the European institutions must be able to ensure that Member States will implement certain laws in a co-ordinated manner. What this means in practice, is that a European disability non-discrimination law will demand a consistent level of protection against such discrimination in all Member States. This is important because it will enable people with disabilities to travel throughout the Union safe in the knowledge that a minimum level of protection against disability discrimination will exist in each country that they visit. This will go some way to enabling people with disabilities to exercise their right of free-movement - a fundamental right under EU law that has supposedly been available to all EU citizens since the signing of the EC Treaty in 1957!!

The second aspect of European law that makes it important for our purposes is that it applies to so many different areas of public and private life that its effects on our day-to-day activities are considerable. It influences, for example, areas such as employment, education, health, transport, consumer rights, and broadcasting (to name but a few). Given that disabled people encounter barriers in almost every aspect of social life,<sup>22[22]</sup> it is this far-reaching influence of European law that makes it such a powerful tool for advancing disability rights. Thus, provided that it is used correctly, European law has the potential to significantly improve the lives of disabled people within European Union. As such, a European law on disability discrimination is merely one way of realising that potential.



The third and final aspect regarding the nature of European law is that it is more *accessible* and more *enforceable* than any other international system of law that has an impact on human rights. Due to its unique nature, European law is essentially part of the national legal systems of all Member States and can often be relied on directly before national courts. The 'direct effect' of measures such as the Framework Directive increases the *accessibility* of European law and the ability of individuals to use it to their advantage within their national legal systems. Additionally, European law is more effectively *enforced* than any other international system of law impacting on human rights - systems such as the human rights apparatus of the United Nations (for example). Its enforcement can be ensured not only by individuals taking cases before their national courts, but also by the European institutions themselves, as well as other Member States. The European Commission (for example) can itself act as a "watchdog" to ensure that Member States implement European law correctly. If a Member State fails to do so, it can find itself before the European Court of Justice which, in turn, can impose a substantial fine on the failing Member State, as well as an order for compliance. Similarly, the Member States can themselves initiate this process of enforcement against a failing Member State which can again ultimately lead to the imposition of a penalty and a compliance order from the Court of Justice. Together, therefore, these enforcement mechanisms significantly increase the ability of EU law to bring about positive change for disabled Europeans.<sup>23</sup>[23]

## **5.2 The practical impact of a European law on disability discrimination**

The second reason why a European law on disability discrimination is important is the practical impact that it would have on disability law and policy generally throughout the European Union. It is important in this regard to draw a distinction between a disability non-discrimination law that would operate in just one Member State and a disability non-discrimination law that would apply throughout the entire European Union. Currently, many of the benefits of European citizenship - such as the right to freely move and work within the Union - are simply unobtainable for a large number of disabled Europeans. Thus, apart from the protection that would be accorded to an individual against disability discrimination within their local environment, a comprehensive European law prohibiting such discrimination would help to make this so called right of free-movement a realistic possibility for all disabled EU citizens. Moreover, the introduction of disability standards through the 'design for all' strand to EU disability policy in areas such as transport and the provision of goods and services would complement and greatly enhance this prohibition. Together, these initiatives would help to bring the benefits of the European Union closer to people with disabilities and, as a form of international law, would provide great symbolic value for disabled people across Europe.

In addition, the political and legal processes that are involved in making a European law on disability discrimination can provide significant benefits in themselves. For example, the development of policy at a European level provides an additional political and legal forum for debate, consultation, and negotiation on disability issues. It therefore allows NGOs to start a debate within this forum that might not have otherwise taken place at a national level. Likewise, it provides the opportunity to reopen a debate that (following the introduction of a disability non-discrimination law within a Member States) would otherwise have been closed. Finally, a European-level process facilitates exchanges of information and good practice between different NGOs and national policy makers throughout the European Union and encourages a continued enhancement of standards and levels of protection. As such, the introduction of a European law on disability discrimination would greatly encourage the sharing and advancing of ideas, methods and good practice in this area of disability policy.

So these are the main reasons why a European law on disability discrimination is important. And, as you are aware, these reasons are very relevant at the moment because we now have our first

European law that actually prohibits discrimination based on disability. This law, as previously mentioned, is commonly referred to as the 'Framework directive'.

## **6 What are directives?**

Prior to considering the Framework Directive itself, I should first clarify what a European directive is. In essence, it is one form of legal instrument that can be used by the European institutions to achieve their aims.<sup>24</sup>[24] Generally speaking, a directive specifies a number of objectives that must be fulfilled in order to achieve that aim. If necessary, a Member State must either introduce new laws or adapt existing ones in order to comply with these objectives. They are typically given a maximum amount of time (or a transition period) within which to do so – although they are free to comply with the directive before this transition period has expired.

## **7 The Framework Directive**

In terms of the Framework Directive, I should say from the outset that it is not my intention to provide you with a detailed analysis of its provisions within this presentation. This analysis can be found elsewhere.<sup>25</sup>[25] Instead, I aim to provide only a brief overview of the main elements to this directive and a workable but basic understanding of the issues arising from it. In particular, I will address the following questions: What does the Framework Directive do? Where will it apply? and Who will benefit from it?

Prior to addressing these questions, however, I should explain that the transition period for compliance with the Framework Directives' obligations in relation to disability is a maximum of 6 years. In other words, Member States do not have to comply with their obligations until 2 December 2006 – although they can voluntarily do so before that date if they wish. It is important to note, therefore, that the mere adoption of the Framework Directive at a European level does not immediately give rise to rights and obligations at a national level.

### **7.1 What does the Framework Directive do?**

In terms of its purpose, the Framework Directive simply aims to improve the employment opportunities for certain groups of people (the protected groups) and one of those groups is people with disabilities. The other protected groups are those falling within the prohibited grounds of discrimination based on religion or belief, age and sexual orientation. I cannot stress enough, however, that the Directive *does not* aim to provide the protected groups with any special advantages in employment. Instead, it merely aims to remove the existing disadvantage of unfair discrimination.

The Directive's objective, therefore, is simple. It is to ensure that employers act fairly when they make employment related decisions – nothing more, nothing less. The prohibition of discrimination is there to prevent the employer from taking into account issues relating to your disability when those issues are irrelevant to your ability to do the job.

## *Concept of discrimination (Article 2)*

Specifically, the directive does this by prohibiting an employer from treating you less favourably because of your disability. Such treatment is described in the directive as '**direct discrimination**' and can only be excused under very specific and limited circumstances (Article 2(2)(a) and Article 2(5)).

In addition, the Framework Directive prohibits an employer from adopting what, on their face, may appear to be neutral provisions, criteria or practices, but which in reality place people with a disability at a particular disadvantage. This is described as '**indirect discrimination**' (Article 2(2)(b)). An example of this form of discrimination that immediately comes to mind is a job requirement for a driving license. This requirement would clearly place blind people at a particular disadvantage (as they cannot get a driving license) and would therefore constitute indirect discrimination. Nonetheless, there will be occasions where this form of discrimination should be allowed to continue and this is recognised and permitted by the Framework Directive in two scenarios.

The first scenario (which is essential to make the law work in practice) applies in respect of all of the protected groups and allows the employer to maintain the discriminatory provision, criteria or practice where he/she can provide an objective justification for it. Thus, to return to our drivers license example, if the requirement for a driving license pertains to employment as a lorry or bus driver (for example) then such a requirement would easily be justified for reasons of public safety. This difference of treatment would therefore be allowed to continue.

The second scenario applies to disability only. It allows the employer to retain the provision, criteria or practice that places a disabled person at a disadvantage provided that the employer is obliged to provide the disabled person with reasonable accommodations to overcome that disadvantage. So what does this mean in practice? Well, lets take the driving license example again. Imagine a situation where being able to drive was an advantage for, but not an essential element of, the job (say working in an office). In this situation, if the employer is under an obligation (either under the Framework Directive or due to national requirements) to accommodate the blind person by swapping some of his tasks with another colleague or providing the occasional taxi, for example, then the requirement for a driving license will not be prohibited under the Framework Directive. As a result, the employer will be allowed to retain his/her otherwise discriminatory provision, criterion or practice (that is, the requirement for a driving licence) provided that such an obligation to accommodate the disabled individual exists.

It is important to recall, however, that the protection afforded by the Framework Directive will only apply to you where you are actually qualified for the job in question. So, if you do not have the necessary qualifications to do a particular job then a rejection will not constitute discrimination under the Directive. The problem with disability, however, is that employers often do not recognise your abilities. Instead, they often see only the barriers that you encounter on a daily basis (both within and outside the employment context). By focusing on your disability rather than your ability to perform the job, employers are often tempted to conclude that you are unsuitable for the post and reject your application. This is clearly unfair. What the employer is ignoring, or simply misunderstanding, is that these barriers can often be removed through **reasonable accommodations** or adjustments to work practices and/or the work environment.

### *The duty to provide 'reasonable accommodations' (Article 5)*

It is here that the Framework Directive offers the greatest benefit for people with disabilities. It places an obligation on employers to provide you with reasonable accommodations in the employment setting. In the context of learning disabilities (for example), accommodations that could be made include: extra time to learn skills; extra time (initially) to complete a particular set of tasks or a reassignment of those tasks if they prove particularly difficult to complete; the provision of support through close contact with a fellow worker, and the provision of specialized equipment to assist in the performance of a job.

Thus, as a result of this duty, when the employer comes to decide whether or not you are qualified for a job, your suitability for the post must be assessed in light of any accommodations that could reasonably be provided to you. I should point out, however, that this is not an unlimited duty. It only requires accommodations that are 'reasonable'. This is underscored in the Directive by its reference to 'disproportionate burden'. What this means is that the employer will be required to provide you with the necessary accommodations *unless* they impose a disproportionate burden on him/her. The decision as to what is 'reasonable' will vary from case to case. It depends on a number of factors including the financial resources of the employer and the possibility of obtaining public funding or other assistance. I think a useful indicator for this purpose is that it would *not* be reasonable to expect an employer to provide you with accommodations that involve significant difficulty or expense.

### *Positive action and genuine occupational requirements (Articles 7 & 4)*

The Framework Directive also recognises that real equality in practice may not be achieved through the prohibition of discrimination alone. It therefore allows Member States to maintain or adopt "specific measures to prevent or compensate for disadvantages linked to any of the [protected grounds]" (Article 7). In the context of disability (for example) it would allow for the introduction or continued use of employment quotas and other employment measures that discriminate *in favour of* people with disabilities. In addition to the allowance of positive action measures, the Directive also allows employers to discriminate in favour of the protected groups where the characteristics of that group constitute "a genuine and determining occupational requirement" (Article 4). Thus, in the context of disability, it will allow an employer to discriminate in favour of a person with a disability where he/she can show that having a disability constitutes a genuine and determining occupational requirement (such as being a disability officer or representative, for example).

### *Additional protection afforded by the Directive*

The Framework Directive also prohibits **harassment** in the workplace on grounds of disability (Article 2(3)). This means that it prevents your employer from acting in a way that intimidates or upsets you, or makes you feel uncomfortable and this is particularly relevant to people with learning disabilities given the regularity with which they encounter such treatment. Clearly, this prohibition could benefit from an extension of coverage so that it imposed a liability on employers', not just for their actions, but those of their employees as well. However, due to the wording of the Directive, such an extension is dependent on national authorities according an expansive interpretation of the Directive when implementing its provisions into national law. It is therefore incumbent on disability NGOs to lobby their national governments to ensure that such an interpretation is accorded at national level.

In addition to the prohibition of harassment, the Directive protects you and your work colleagues against **victimization** (Article 11). What this means is that your employer cannot treat you

negatively if you are involved in a complaint or legal proceedings to force him/her to comply with the obligations arising from the Directive. Finally, the Framework Directive also prohibits an **instruction to discriminate** (Article 2(4)). In essence, this prohibition is intended to prevent discrimination through an intermediary. In the context of disability (for example) it seeks to prevent an employer from instructing an employment agency to filter out people with disabilities for consideration as potential employees.

## **7.2 Where does the Framework Directive apply (its material scope - Article 3)?**

Having considered what the Framework directive does, the next question to be addressed is where does it do it, or in other words in what areas will it apply?

You may say that we already know - the Directive only applies to matters relating to employment and occupation. To a certain extent, that observation would be correct. However, within this context, the Framework Directive does have quite a broad application. The first thing to note is that it applies to all persons in both the public and private sectors including public bodies. This means that whether you work for the government, or a government related body, or a simply a private employer, you will be protected under the Directive.

Moreover, and of particular interest for our purposes, is the extension of the Directive's scope of application to encompass matters of "access" relating to "all types and to all levels of vocational guidance, vocational training [etc]". Given the breadth of the interpretation that has been accorded to the term "vocational training" by the Court of Justice, it is arguable that this particular phrasing extends the coverage of the Directive to any training providers, including higher educational establishments, insofar as they provide courses that can be classified as vocational training under Community law. This is significant because whilst the duty to provide reasonable accommodations in the Directive does not extend beyond employers and will not therefore apply to training providers (unless of course it is the employer providing the training) the remaining elements of the equality principle do. As such, training providers throughout the European Union, including higher educational establishments, must take heed of this principle in the context of disability. This is important for all people with disabilities, including those with learning disabilities, who are simply seeking to access real qualifications and recognition for skills on the same terms as non-disabled people.

Nonetheless, to return to the immediate context of employment, I feel that it is important to identify the particular circumstances in which the Framework Directive will help you get a job and, just as importantly, help you keep that job.

In terms of getting the job, the Directive's protection extends to all of the processes that you would normally have to go through: from the job advertisement, to your application, the interview, and the selection criteria used by the employer to determine the successful candidate. As previously mentioned, the Directive also covers "access to" all types and levels of vocational guidance and training including practical work experience. In terms of keeping the job, the protection under the Directive applies to employment and working conditions, including dismissals and pay, as well as the membership of, and involvement in, organisations of workers (such as Trade Unions) or employers (such as the CBI, which is an employers confederation).

Specifically, in all of these aspects of employment you have the right to be treated equally. The Directive will provide you with an equal opportunity to apply for a job and to perform the job that you are qualified to do as well as participate in any training facilities that are provided by the employer and any activities and benefits afforded by workers or employers organisations. And remember, in order to help remove any barriers that may prevent or limit your ability to participate on equal terms, the Directive imposes on employers a duty to provide you with reasonable accommodations should they be necessary.

I should make it very clear, however, that the Framework Directive does not help you in relation to matters that fall outside the areas identified above. It will not, for example, help you get to work by providing accessible transport, or ensure that you have equality of access to the provision of goods and services when you want to spend your salary. Moreover, a specific exclusion in the Directive prevents its application to “payments of any kind made by state schemes or similar, including state social security or social protection schemes” (Article 3(3)). As such, the Directive will not impact in any way on your disability or welfare benefits. It will not ensure (for example) that you can automatically return to those benefits should your employment not work out, or increase the amount of money that you can earn before those benefits are reduced or stopped.

### **7.3 Who does it apply to (its personal scope)?**

The final question to be addressed is: who does the Framework Directive protect? You might say that we already know. After all, the four grounds of discrimination protected by the Directive, that is religion or belief, disability, age, and sexual orientation, have already been identified. Unfortunately, however, the Directive has left unanswered many questions as to who exactly will come within these grounds of discrimination and, of all of the grounds, disability arguably raises the most questions. Questions such as: Will those with minor disabilities be covered by the Directive? Will it cover those that have no current disability but have a history of a disability or are regarded as having one? Will it cover those who are likely to acquire a disability in the future? And what about carers, friends and families of people with disabilities - people that are associated with a disabled person - are they protected too?

The reality of course is that all of these people have suffered or are likely to suffer discrimination on grounds of disability at some point in their lives and should therefore be protected against such discrimination. However, with things as stand, these questions will initially be left to national governments and thereafter national courts (with the European Court of Justice acting as final arbiter) unless the European institutions do the right thing and intervene at an early stage to ensure that those that should be protected are protected. Certainly, I am confident that people with learning disabilities will be covered by whatever definition emerges, as I have yet to see a definition of disability in a non-discrimination law that would not cover them. One issue that I am not so confident about, and which is of particular importance for people with learning disabilities, is the issue of carers and friends and family and whether these individuals will also be protected by the Framework Directive. Whilst the wording in the Directive is clearly broad enough to include them within its protective remit, the decision ultimately rests with those implementing the directive and we can only hope that they will recognise and allow this possibility.

Beyond the definition of disability, I should also raise at this stage the issue of sheltered and semi-sheltered employment. I do so because it is not clear at present whether this form of employment

(and the people within it) will actually benefit from the protection afforded by the Framework Directive. On a conservative estimate there are approximately 400,000 people working in sheltered and semi-sheltered employment throughout the European Union - a large proportion of which are people with learning disabilities.<sup>26</sup>[26] Whilst variations exist throughout the European Union as to the level of protection that is actually afforded to this group, it is clear that many have little or no employment rights at all. As such, this is a group of people that could very much benefit from the protection afforded by the Directive.

Unfortunately, however, the case law of the European Court of Justice has made it unclear as to whether such protection will extend to this group. At issue here, is whether people in sheltered and semi-sheltered employment fall within the definition of 'worker' under European law and this depends upon whether the work that they do can be described as an "effective and genuine economic activity". Whilst in the majority of instances this will clearly be the case, in one of the few examples where the Court of Justice actually considered this issue it held that the work undertaken in a particular scheme did not amount to such activity.<sup>27</sup>[27] This decision was based on a perception that the goods produced were bought out of charity and therefore for social objectives only – a perception of such schemes that is clearly outdated and must be revised. In the meantime, however, doubt remains as to whether people employed in sheltered and semi-sheltered schemes will be protected by the Directive and this is clearly an important issue that must be clarified.

#### **7.4 Issues that should be highlighted**

Having addressed those three initial questions, I now wish to highlight some key aspects of the Framework Directive that will require further consideration in the context of disability.

First, the definition of disability will need to be clarified in a way that ensures that all people encountering disability discrimination (including carers and friends and family) are protected.

Second, the definition of 'worker' under European law must be clarified in a way that ensures protection for people in sheltered and semi-sheltered employment. This is also an important issue for people who wish to work less than half of the standard working hours per week. Just like those in sheltered and semi-sheltered employment, uncertainty exists as to whether they would satisfy the current definition of 'effective and genuine economic activity' for the purposes of 'worker' under Community law. Clearly, this is relevant to all people with disabilities - irrespective of the type of work they undertake - many of whom work less than half of the standard working week.

Thirdly, in assessing whether or not an individual is qualified for the job, an employer will be entitled - and is in fact obliged under European law - to consider whether that individual would pose a health and safety risk either to themselves or to their work colleagues. If such a risk is identified, then the employer is free to not employ that individual. However, the crucial thing to ensure in this regard is that such an assessment is conducted in a rational and objective way. It must not be turned into just another opportunity to justify disability discrimination based on prejudice, ignorance, and fear – a concern that should be heeded by all disability interests groups.

Fourthly, in order to ensure that all people with disabilities - especially those with learning disabilities - can get the most out of the Framework Directive, a coordinated and effective education campaign will have to be undertaken. This will need to take into account the particular barriers encountered by people with learning disabilities to enable them to fully understand what the Directive does. Moreover, an educational campaign must also be aimed at national governments and employers to ensure that they fully understand the nature of learning disability. This is necessary to ensure that they appreciate the true abilities of people with learning disabilities as well as the kinds of accommodations that could and should be provided to facilitate their employment. It is important to note in this regard that it is the national authorities themselves that will take the lead role in providing disabled people with the information they need to understand their rights under the Directive (Article 12). Disability NGOs should therefore fully exploit the facility provided by the Directive for dialogue with national authorities (Article 14) and their ability to assist or represent people with disabilities in legal action to enforce this measure (Article 9(2)).

Finally, the Framework Directive makes it very clear that Member States cannot reduce the current level of protection that they already provide (Article 8). So if you already have laws in your country on disability discrimination you must ensure that your governments do not reduce the protection that you already enjoy. Likewise, because the Directive specifies minimum requirements only, Member States are free to introduce even greater protection if they wish. So it is also important for you to lobby your national governments to provide even more protection than what the Directive demands.

## **7.5 Major limitations to the Framework Directive**

Beyond the need to clarify certain issues in the Framework Directive, there are two main limitations to the effectiveness of this measure that should be identified:

The first is that the Directive does not require Member States to establish an independent enforcement body. An example of such a body in the context of disability is the British Disability Rights Commission. This type of body would analyse the problems faced by disabled people, study possible solutions thereto, and provide concrete assistance for victims of discrimination. It would clearly be of benefit, therefore, to have an enforcement body in each Member State and the failure of the Framework Directive to require the establishment of these bodies represents a missed opportunity.

The second, and most significant limitation of course, is that the protection afforded by the Framework Directive applies only to the context of employment. As stressed at the beginning of this presentation, disability discrimination extends well beyond this context and regularly occurs in areas such as education (at all levels), transport, the provision of goods and services, health care, welfare provision and housing but to name a few. Sadly, the continued existence of discrimination in these areas limits the practical benefits that may emanate from the Framework Directive on its own. For example, a disability non-discrimination law in employment would be of little use to you if you have a mobility impairment and cannot get to work due to inaccessible public transport; if your employment opportunities are limited due to systemic discrimination encountered whilst at school; or, even where you have a job, if you cannot fully enjoy your salary due to discrimination in the provision of goods and services.



Clearly, therefore, the application of the non-discrimination norm beyond the context of employment to encompass areas such as transport, education, health care and the provision of good and services would have a tremendous positive impact on the lives of disabled Europeans. Of particular significance in this regard for all people with disabilities, but those with learning disabilities in particular, is the potential application of a recent decision by the US Supreme Court under the Americans with Disabilities, 1990 (ADA). In the decision of *Olmstead v. L.C.*,<sup>28</sup>[28] the Supreme Court held that the unjustified segregation of people with disabilities would constitute discrimination under this statute. Where integrated service provision in a given situation is found to be the 'least restrictive alternative', the continued segregation of people with disabilities will, following the decision in *Olmstead*, be held to be unlawful under the ADA. Put simply, if this interpretation of the equality principle were to be applied to a comprehensive European law on disability discrimination, it would cause a dramatic shift in disability policy throughout the European Union. Representing a major advancement to the principle of 'integrated service provision' for disabled Europeans, such an interpretation would dramatically affect those areas of supported employment, education, health care and housing (to name a few) that are provided on a segregated basis. It is essential, therefore, that the disability movement continues to push forward at a European level to secure a more expansive form of protection against such discrimination for this, as well as the many other benefits, that would derive from a comprehensive European law on disability discrimination.

## **8 Conclusion**

Despite these limitations to the Framework Directive, however, it is clear that it represents a major advancement in disability rights at a European level. The benefits that it will bring in the context of disability, and in particular learning disabilities, have been identified above and will soon have to be reflected at national level in every Member State of the European Union.

As a measure falling squarely within the 'human rights' strand to EU disability policy, the Framework Directive both complements, and is complemented by, those activities emanating from the 'design for all' strand. The Framework Directive, as with any future European law on disability discrimination, provides clear and enforceable rights to individuals - rights that (in contrast to disability standards) are responsive to the individual circumstances of a given case. These rights take on a high profile at a European level and have tremendous symbolic value. The fundamental right to equality, a right that would radiate throughout a European law on disability discrimination, provides the necessary impetus and support for further action under the 'design for all' strand - the absence of which would risk further marginalisation resulting from the overriding objective of market integration. As such, a European law on disability discrimination is of great importance for all disabled Europeans, including those with learning disabilities.

---