



International
Labour
Office

Achieving Equal Employment Opportunities for People with Disabilities through Legislation

Guidelines



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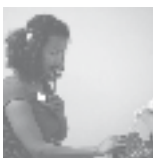
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For a long time it was assumed that unemployment and under-employment of people with disabilities was closely interrelated to, and in fact the unavoidable consequence of, the physical and mental impairments of the persons concerned. It is now recognised that many of the disadvantages they face and the fact that they are often excluded are not due to individual impairments, but are rather a result of the reaction of society to that impairment. Laws and policies are part of this reaction.

Disability issues are now increasingly viewed as issues of human rights. The basic idea of human rights law, centred on the concept of human dignity, is that all people have equal rights, notably the right to live a full and decent life. This reflects the simple, and at the same time crucially important notion that everyone is a human being. Corresponding to the rights of individuals, States have the duty to protect, respect and fulfil human rights. This reappraisal is prompting major shifts in international and national law. The UN Convention on the Rights of Persons with Disabilities (CRPD) that entered into force in 2008 and is widely ratified, reflects these shifts. It is now generally accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed laws, policies and programmes. National governments can make this possible through their legislation.

These guidelines were first published in 2007, with the support of the Government of Ireland, shortly after the adoption of the CRPD, to promote the reappraisal of disability as a human rights issue. Intended primarily for policy-makers and drafters of legislation, particularly in States Parties to the CRPD that are required to review their legislative provisions as a first step, they aim to support the revision of existing laws and development of new laws of relevance to women and men with disabilities, and the development of regulations and policies to give effect to these laws. Focusing on key concepts underlying international standards – equality of opportunity, non-discrimination, equal treatment of men and women – and providing examples of law and practice

in countries around the world, the guidelines are updated in this second edition, drawing on the rapid developments that have taken place in national legislation as well as implementation and enforcement measures since 2008. We hope that they will continue to serve as a useful tool, particularly in promoting equal opportunities for persons with disabilities in training and employment.

This edition of the guidelines builds on the first edition, developed by Dr Lisa Waddington and Dr Aart Hendriks, Maastricht European Institute for Transnational Legal Research (METRO), University of Maastricht, the Netherlands, and by Dr Pauline Conroy, Ralaheen, Dublin, Ireland, who produced a version easily accessible to an international audience, reflecting valuable commentary by former ILO colleagues Jane Hodges, Debra Perry and Bob Ransom. Thanks are due to Barrister Claire Bruton, Centre for Disability Law and Policy, National University of Ireland, Galway, who compiled the recent examples and commentary it now contains and to Stefan Trömel, Senior Disability Specialist and Jürgen Menze, Junior Professional Officer, Disability Inclusion, for their observations. This edition would not have been possible without the tireless work of Barbara Murray, Senior Disability Specialist, ILO Gender, Equality and Diversity Branch, Conditions of Work and Equality Department, who contributed to and edited the guidelines, and coordinated the process throughout.

Shauna Olney

*Chief, Gender, Equality
and Diversity Branch*

Purpose and Rationale of the Guidelines

1.1 People with disabilities globally

Over one billion people worldwide have a physical, sensory, intellectual or mental impairment of one form or another. This equals approximately 15 per cent of the world's population.¹ People with disabilities can be found in every country, with over two thirds of them living in the developing world.

Throughout the world there is an undeniable link between disability, poverty and exclusion. The denial of equal employment opportunities to people with disabilities forms one of the root causes of the poverty and exclusion of many members of this group. There is ample evidence that people with disabilities are more likely than non-disabled persons to experience disadvantage, exclusion and discrimination in the labour market and elsewhere. As a result of these experiences, people with disabilities are disproportionately affected by unemployment. When they work, they can often be found outside the formal labour market, performing uninspiring low-paid and low-skilled jobs, offering little or no opportunities for job promotion or other forms of career progression. Employees with disabilities are often underemployed.

The most appropriate laws to advance equal opportunities for people with disabilities in the labour market, and policy measures to implement these laws, vary from one State to another. Each State has a margin of discretion in assessing which laws and policy measures are most suitable to meet its specific circumstances and the needs of people with disabilities. Factors such as legal and cultural traditions and financial resources will influence legislation. When drafting laws in the disability field, attention should also be paid to other laws, particularly the terminology used, norms established, scope and enforcement mechanisms in place, to facilitate their implementation and compliance.

¹ World Health Organisation, World Report on Disability, (2011)

International human rights law, ILO international labour standards and national labour law in many countries impose a duty on each State to take whatever steps are necessary, to the maximum of its resources, to ensure that each person with a disability enjoys the right to equal opportunities in the labour market. This requires the adoption of a national strategy to progressively achieve the full aspirations enshrined in this right, a strategy which itself is in conformity with international human rights and labour law, as laid down in international and regional instruments such as treaties, conventions, or covenants. This applies at times of economic recession as well as in periods of growth.

1.2 Using the guidelines

These guidelines consist of a set of pointers and explanatory text, and are designed to assist drafters of national or federal disability and labour legislation. They are also aimed at other relevant bodies and authorities which have the objective of promoting equal employment opportunities for women and men with disabilities. The guidelines have been drafted with reference to ILO labour standards in this area, the existing ILO Labour Legislation guidelines² and other relevant international labour and human rights instruments. They describe and analyse an array of policy measures that can be adopted to implement these laws, and address the inclusion of disability rights within the world of work. The guidelines can be used as a tool to evaluate elements of a national equal opportunities strategy and for further discussion and debate at national level. The guidelines can serve as a yardstick to measure the compliance of distinct national laws and policy measures seeking to implement these laws with international human rights and labour law.

In Section 2, the guiding principles and concepts underlying legislation are presented, along with terminology. Sections 3 and 4 ex-

² <http://labordoc.ilo.org/record/360919?ln=eng>

amine the main types of law and policy used to promote employment of people with disabilities in the open employment market, while Section 5 focuses on implementation measures. Section 6 addresses the consultation process that should precede the adoption or revision of legislation and policies seeking to promote equal employment opportunities for people with disabilities. Section 7 analyses the enforcement of laws promoting the equal employment opportunities for people with disabilities. A summary of the main points is presented in Section 8.





Notes

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Current Trends in Disability Legislation

2.1 ILO Conventions and Recommendations

The International Labour Organization (ILO) is a UN specialised agency dedicated to guaranteeing fair and decent conditions of labour everywhere. The adoption of international labour standards (Conventions and Recommendations) is one of the key means through which the ILO carries out its mandate. Since the end of the Second World War, the promotion of equal employment opportunities has been a key objective of the ILO. This follows from the “Declaration of Philadelphia” adopted by the International Labour Conference in 1944, and which is part of the ILO Constitution, which stipulates: “All human beings, irrespective of race, creed, or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity...”³

In an early 1944 Recommendation concerning employment services, including vocational training and vocational guidance,⁴ the ILO proposed that persons with disabilities should, wherever possible, be trained with other persons, under the same conditions and with the same allowances, and that training should continue to the point where the disabled person is able to enter employment in the trade or occupation for which he or she has been trained. The ILO called for equality of employment opportunity for disabled workers and for affirmative action to promote the employment of workers with serious disabilities. The principle of equal treatment was embodied in this early text.

Through its standard setting work and its unique system of supervision, the ILO has made a significant and consistent contribution to the promotion of equal employment opportunities. Examples are to be found in ILO’s Equal Remuneration Convention, 1951 (No. 100), Discrimination (Employment and Occupation) Convention,

³ Declaration of the Aims and Purposes of the International Labour Organization. Annex to the ILO Constitution

⁴ Employment (Transition from War to Peace) Recommendation No. 71, 1944

1958 (No. 111) and Equality of Treatment (Social Security) Convention, 1962 (No. 118). People with disabilities were explicitly mentioned in some but not all of these standards – the most notable being Convention No. 111 which does not include disability in the list of enumerated grounds of discrimination, although it does make provision that, after consultation with the social partners, ‘special measures’ in the case of disabled persons should not be deemed to be discrimination.⁵ The Convention also foresees that additional grounds of discrimination will be determined by member States, after consultation with the representative employers’ and workers’ organizations, and with other appropriate bodies. Disability is indeed often considered under Convention No. 111 in this context.⁶ Specific provision was made for people with disabilities in the Vocational Rehabilitation (Disabled) Recommendation, 1955 (No. 99), which provides for special support measures to facilitate the integration of disabled persons in the labour market.

In 1983, one year after the adoption of the World Programme of Action concerning Disabled Persons and two years after the International Year of Disabled Persons, the ILO adopted the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) and its accompanying Recommendation (No. 168). Convention No. 159 requires ratifying States to introduce a national policy based on the principle of equality of opportunity between disabled workers and workers generally, respecting equality of opportunity and treatment for disabled women and men and providing for special positive measures aimed at effective implementation of these principles. The emphasis on full participation is reflected in the definition of vocational rehabilitation as “being to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such a person’s integration or reintegration into society”⁷.

⁵ Article 5

⁶ Article 1 (1) (b)

⁷ ILO Convention No. 159, Article 1 (2).

Since then, the ILO has been actively involved in the promotion of equal employment opportunities for people with disabilities, through its Disability Programme. The ILO Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), for example, contains an explicit prohibition to discriminate on grounds of disability (Article 6 (1)). Most recent ILO initiatives of relevance are the ILO Declaration on Fundamental Principles and Rights at Work (1998) and the ILO Code of Practice on Managing Disability in the Workplace (2002), guidelines primarily targeting employers, and the Declaration on Social Justice for a Fair Globalization (2008). Although not solely targeting persons with disabilities, the ILO Social Protection Floors Recommendation, 2012 (No. 202) is of considerable importance to this group. The Recommendation requires that the floor of basic social protection in member States apply to persons of active age who are unable to earn sufficient income including by reason of sickness or disability.

2.2 Disability as a human rights issue

For a long time, disability was treated primarily as a social welfare issue. This reflected the widely held belief that people with disabilities needed care and assistance, being unable and incapable of living their own lives such that they were deserving of protection and were supported generally through social security systems. As a corollary, people with disabilities were seen as objects of social welfare, charity and care and not as subjects in their own right capable of making their own personal decisions, let alone entitled to the full enjoyment of the right to work. Due to their marginalized position in society and resulting invisibility, as well as widespread prejudice, people with disabilities did not fully enjoy their human rights, including the right to decent work.

The human rights charters and conventions adopted from the mid-1940s to the late 1960s – such as the United Nations Universal Declaration on Human Rights, 1946, the UN Covenant on Eco-

conomic, Social and Cultural Rights 1966 and the UN Covenant on Civil and Political Rights, 1966 - do not specifically mention people with disabilities. It is only since the 1970s that the disadvantages faced by disabled persons, their social exclusion and discrimination against them were increasingly perceived to constitute a human rights issue. The shift from a social-welfare approach to one based on human rights is reflected in explicit reference to persons with disabilities in human rights charters, conventions and initiatives adopted since the 1980s and in an increasing number of special – and usually non-binding – instruments adopted by such organizations as the UN and the Council of Europe. These instruments include the Council of Europe Coherent Policy for the Rehabilitation of Persons with Disabilities, 1992 and the U.N. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993.

The most significant recent development of relevance to the employment of persons with disabilities is the United Nations Convention on the Rights of Persons with Disabilities (CRPD), the first legally enforceable United Nations instrument specifically directed at persons with disabilities. Adopted by the UN General Assembly on 13 December 2006 and in force since 3 May 2008,⁸ the CRPD requires States Parties to recognize the right of persons with disabilities to work on an equal basis with others, including *‘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’* (article 27).

The central concept of ‘disability’ is not defined but the Preamble affirms the social construction of ‘disability’ by recognizing 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*

⁸ Convention on the Rights of Persons with Disabilities, A/RES/61/106 (2007).

with others". This represents a significant shift from the more traditional approach in which disability is seen as linked to an individual's impairment.

Discrimination on the basis of disability is prohibited by the CRPD. States should ensure that reasonable accommodation is provided to persons with disabilities in the workplace, and the refusal to provide such accommodation by employers or others is regarded as a form of discrimination. Employers thus have a duty to make adaptations to enable a person with a disability to exercise their right to work.

Similar shifts from a social welfare to a human rights law approach and from segregated to inclusive service provision are taking place on a regional and national level, with an increasing number of existing human rights instruments being amended, to include the rights of people with disabilities, and new instruments being adopted, both comprehensive and disability specific.

2.3 The principle of non-discrimination

A key element of this new approach is the adoption of non-discrimination laws and policies, reflecting the principle that people with disabilities are inherently equal human beings and thus entitled to equal treatment and equal opportunities, particularly with respect to employment. Non-discrimination law can take different forms and have different foci.

- Non-discrimination laws can protect people with disabilities from unequal treatment in a wide range of fields, such as employment, occupation, transportation and access to services or housing or may be confined to the employment, occupation and vocational training field.
- Discrimination against people with disabilities can be one of several grounds on which discrimination is prohibited, such as the grounds of gender, race, age, religion, indigenous or ethnic status.

- Non-discrimination law can help raise awareness, for example, of gender dimensions of participation in the workforce.
- Non-discrimination laws can contain provisions for equal treatment between persons with and persons without a disability through, for example, provisions stipulating that the work environment must be adjusted, adapted or accommodated for their use.

POINTERS



While an important development for persons with disabilities, anti-discrimination laws have limitations, including the cost involved in making legal complaints, the impact of such complaints on the relationship with the employer, and the difficulty of enforcing compliance.



These limitations can be offset by the inclusion of more expansive human rights measures, such as the recognition of the need for equal concern and respect for all human beings which imposes obligations on states to provide for certain individuals needing different or appropriate treatment.

2.4 The location of disability within legislation

Governments have a choice as to where to locate disability within their statutes. They can decide to take a “twin-track approach” and include disability provisions in two or more locations.

Constitutional Law is the highest level of legislation. If a constitution includes provisions on people with disabilities, this can reflect the importance given to disability issues in the country. Such provisions can either state fundamental rights, make specific

provisions for the basic rights of people with disabilities including non-discrimination, lay down principles of solidarity or justice, or guarantee a means to prevent discrimination and ensure equality, or do a mixture of these things.

The national constitution is commonly the highest law of the country and binding upon all state authorities, including the legislature, administration and judiciary. Laws, policies and case law should therefore be in conformity with the Constitution. In view of this, special attention should be paid to the promotion of equal employment opportunities for people with disabilities and non-discrimination through constitutional provisions.

Many countries mention disability in their constitutional provisions. These include Brazil, Cambodia, Canada, China, Ethiopia, Fiji, Germany, Kenya, Mongolia, New Zealand, Seychelles, Slovenia, South Africa, South Sudan, Tanzania, Thailand and Uganda.

Constitutional provisions send out an important message regarding the status of people with disabilities within the national legal order and seek to guarantee that other laws as well as policies are in conformity with the Constitution. Like human rights law, they first of all seek to regulate the relations between the State and individuals. On occasions, they can provide individuals with a right they can enforce directly in the courts towards the State and, sometimes, towards other private parties. The enforceability and effect of constitutional rights depend on the wording used and the legal culture and system in a country. Often, to be effective for individuals, general constitutional provisions need to be translated into more detailed legislation.

The inclusion of provisions in the Constitution specifically referring to disability is a potentially important guarantee of the rights of disabled people. Commonly, three types of constitutional provisions can be distinguished.

- Firstly, national constitutions may require the State to address the needs of and/or to take special measures to promote the societal integration of people with disabilities.

Examples include the constitutions of China, Kenya, Malawi, Slovenia, South Africa and the United Republic of Tanzania.

The Constitution of the People's Republic of **China**, 1988, Article 45 obliges the State to “help make arrangements for work of the blind, deaf mute and other handicapped persons’ and also grants all citizens the right to material assistance from the state and society when they are ... disabled”.

The Constitution of **Kenya**, article 54 provides persons with disabilities with the right to be treated with dignity and respect and to access educational institutions and facilities to allow integration into society. It also states that persons with disabilities are entitled to reasonable access to all places, to public transport and information, to use alternative means of communication and access materials and to use devices to overcome constraints a living from their disability.

The Constitution of **Malawi**, article 13, obliges the State to adopt and implement policies and legislation aimed at ensuring fair opportunities in employment for persons with disabilities, as well as greater access to public places and the fullest possible participation in all spheres of Malawian society.

The Constitution of **South Africa**, article 9, states that “... to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.

The Constitution of **Slovenia**, article 52 (1), offers protection and guaranteeing vocational training to disabled persons.

The Constitution of the United Republic of **Tanzania** (Tanzania Mainland), article 11, states that “The State Authority shall make appropriate provisions for the realisation of a person’s right to work, to self-education and social welfare at times of old age, sickness or disability and in other cases of incapacity”.

- Secondly, national constitutions may prohibit discrimination on the ground of disability.

Examples include the constitutions of Brazil, Canada, Fiji, Finland, Germany and Uganda.

Article 7 of the Constitution of the Federal Republic of **Brazil** explicitly prohibits discrimination of any kind concerning the recruitment of or salaries paid to persons with disabilities.

In **Canada**, Section 15 of the Canadian Charter of Rights and Freedoms, 1982 provides the 'every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

Section 38 of the **Fiji** Constitution (Amendment Act) 1997 states that 'a person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her actual or supposed characteristics or circumstances including...disability'.

Article 6 of the Constitution of **Finland** expressly prohibits any different treatment on the ground of disability unless there is an acceptable reason for such treatment.

Article 3 of the Basic Law of the Federal Republic of **Germany** states that all persons shall be equal before the law and that no person shall be disfavoured because of disability.

Article 21 of the Constitution of **Uganda** states that a person shall not be discriminated against on the basis of disability, among other grounds, and article 32(1) provides that the State shall take affirmative action in favour of groups marginalized on the basis of disability among other grounds.

- Thirdly, constitutions can create oversight bodies for the enforcement of constitutional rights, such as the Office of the Ombudsperson and Human Rights Commissioners.

Examples include the constitutions of South Africa and Zimbabwe

The Constitution of **South Africa** establishes a Human Rights Commission to (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic. (S. 181(1) and S. 184)

In **Zimbabwe**, the Human Rights Commission is established pursuant to the Constitution of Zimbabwe 2013, articles 242-244, and amongst its mandate is "to support and entrench human rights and democracy" and "to protect the sovereignty and interests of the people".

Civil and labour law provisions provide an effective location for laws relating to the rights of people with disabilities and are therefore the main focus of these guidelines. Laws can take the form of non-discrimination laws sometimes focused specifically on disability but more commonly including a number of protected grounds (see Section 3) or laws that confer employment rights, such as quota laws (see Section 4). The scope of the law is specified in detail, precise definitions are given (e.g. what constitutes discriminatory practice, or who may benefit from quota provisions), there are specific rules regarding the burden of proof (often lessening this burden for perceived victims of discrimination) and provision is made for enforcement.

Criminal or penal law, involving fines and imprisonment, has impact only if it can be proven that the defendant (e.g. the employer) intended to discriminate. Such provisions are not especially effective in conferring rights on employees with disabilities, since it has to be proved that employers intended to discriminate. This is difficult in practice since persons frequently discriminate without having any hostile feelings towards disabled persons and discrimination may be unintentional. The burden of proof in criminal cases is also higher than in civil cases, and more difficult to meet. Such provisions can send a strong dissuasive message, however.

Each national system has its own approach to criminalization of social issues. Countries with penal law provisions prohibiting discrimination on the ground of disability include Finland, France, Luxemburg, Spain and the Netherlands.⁹ These countries have also introduced anti-discrimination provisions in other sections of their legislation.

Example

In the **French** Penal Code, Article 225.1, disability-based discrimination is prohibited in recruitment to, sanctioning or dismissal from employment, the exercise of any given economic activity business activities and the provision of goods and service. A punishment of two years' imprisonment and a fine are specified for infringements.


Some states which have adopted civil and labour law provisions, rather than criminal law statutes concerning persons with disabilities include criminal or administrative penalties within these laws. Examples include the legislation of Australia, Hong Kong, China, Mauritius and the Philippines. Such penalties relate to discrimination and incitement of discrimination, harassment, ridicule or serious contempt.


POINTERS




Civil or labour law provisions on the employment-related rights of persons with disabilities are likely to have the greatest practical impact on opportunities for disabled job-seekers and workers. These can be included in a non-discrimination Act expressly directed at persons with disabilities or contained within a general non-discrimination Act covering other protected grounds such as gender or age.

⁹ Degener, T. and G. Quinn (2002) A Survey of International, Comparative and Regional Disability Law Reform. Paper presented at an Expert Group Meeting on the Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, Mexico City, 11-14 June 2002.

 There are good reasons to include disability in the national constitution, both in provisions imposing a duty on the State to meet the needs of people with disabilities and in constitutional non-discrimination provisions, as well as to ensure that there is access to justice through the monitoring and enforcement bodies. Besides reflecting the level of importance attached to disability concerns in a country, constitutional provisions, as the highest level of law, set a standard for other laws and for policies in the country.

 Constitutional provisions, on their own, often have limited impact however. This is because they frequently do not give substantive rights, so cannot be invoked in court or by non-citizens; they tend to be broad, and do not contain precise definitions, so that judgements will be discretionary; and also because they place obligations on the state and state entities, rather than on individuals or the private sector; and can often be subject to a general justification defence, in that infringement may be regarded as a way of avoiding greater harm.

 Criminal law provisions on non-discrimination may be introduced to complement public, private and labour law non-discrimination provisions, but should not be seen as an alternative to these.

2.5 The concept of disability

When legislation is being formulated to eliminate the disadvantages faced by disabled persons, to dismantle the exclusionary mechanisms they face in society, and to enhance equal employment opportunities for them, the question arises of how to define the beneficiaries of the legislation. In other words: what constitutes a disability and what groups of persons should be protected against discrimination?

In this discussion, two opposing views can be distinguished. On the one hand, there are those who situate the problems of disability in the impairment of the person concerned, while paying little or no attention to his or her physical or social environment. This is referred to as the individual or medical model of disability. On the other hand, there are those who perceive disability as a social construct: disabilities result from the failure of the physical and social environment to take into account the needs of particular individuals and groups. According to this social model of disability, society creates disabilities by accepting an idealised norm of the physically and mentally perfect person and by organizing society on the basis of this norm. A third model of disability has recently emerged: the human rights model that lies at the core of the CRPD. Going beyond the social model of disability, this approach encompasses the values for disability policy that acknowledges the human dignity of disabled persons and provides for civil and political as well as economic, social and cultural rights.¹⁰ It recognizes some intersecting grounds of discrimination, such as the connection between disability and gender, or between disability and indigenous or ethnic identity as leading to discrimination and offers a roadmap for change.

¹⁰ Degener, T. (forthcoming) “*From the social to human rights model of disability*” in Blanck, Flynn and Quinn (eds) *A Research Companion to Disability Law*.

Examples

According to the individual model of disability, a person with a mobility impairment is disabled as a result of an individual impairment. He or she can try to overcome the functional limitations which come along with this by undergoing medical or paramedical treatment and/or by using medical or paramedical aids, such as a wheelchair or crutches.

According to the social model of disability, a mobility impairment should be seen in the context of the surrounding society and environment. Reducing or overcoming the limitations on activities and restrictions to participation associated with mobility impairment implies taking away societal barriers, and ensuring that the built environment is accessible.

According to the human rights model of disability, impairment is part of human diversity, a person's human dignity is central, the individual should be involved in all decisions affecting him or her and the main 'problem' lies outside the person, and in society.

POINTERS



Both the social and individual models of disability have proven to have advantages and constraints, depending on the aim of the legislation. The individual or medical model can be particularly helpful in such fields as rehabilitation medicine and social security law, while the social model can be instrumental in tackling the root causes of exclusion, disadvantage and discrimination. The social model recognises that the answer to the question of whether a person can be classified as disabled, is intrinsically related to such factors as culture, time and environment.



The emerging human rights approach, codified in the CRPD, provides a framework to examine the interaction of the impairment and the society which gives rise to a disability and to develop a roadmap for change.

2.6 Defining disability in legislation

The definition of disability, which determines who will be recognised as a person with a disability, and hence protected by the relevant legislation, is very much dependent on the goal being pursued by the particular law or policy. Thus, there is no single definition of disability which can be used in all labour and social legislation. In many cases, non-discrimination legislation does not contain a definition, but adopts the definition contained in social security law. The two different approaches to definition are as follows.

- Wording aimed at a narrow, identifiable beneficiary group. This approach usually involves providing a list of conditions or types of impairments. These impairments are generally long lasting or permanent in nature and impair a person's daily life or capacity to participate in employment. This should be used if the aim is to craft laws to provide financial or material support to disabled individuals, or employers of disabled people. A limited, impairment-related definition of disability (individual model) thereby ensures that support is targeted at those who are most in need.
- Broadly inclusive wording aimed at protection from discrimination on the grounds of disability. This broader definition of the protected group (social model) should be used in anti-discrimination laws because many people, including those with minor or temporary disabilities, people associated with people with disabilities and those who are wrongly assumed or perceived to have a disability, can be affected by disability-based discrimination.

Examples

In **Australia**, the Disability Discrimination Act 1992 (as amended) covers a disability that presently exists; or previously existed but no longer exists; or may exist in the future; or is imputed to a person. The legislation includes a list of the types of impairments and the criteria required for particular types of impairments to be included.

In **China**, the 1990 Law of the People's Republic of China on the Protection of Disabled Persons defines disabled persons as persons: '... with visual, hearing, speech or physical disabilities, intellectual disability, psychiatric disability, mental disorder, multiple disabilities and/or other disabilities'.

In **Germany**, Book 9 of the Social Code defines disabled persons as persons whose physical functions, mental capacities or psychological health are highly likely to deviate for more than 6 months from the condition which is typical for the respective age and whose participation in the life of society is therefore restricted. The severity of the disability is assessed by determining the percentage difference between the disabled person's earning capacity and that of an equally skilled individual who is not disabled.


In **India**, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 defines disability as blindness, low vision, leprosy-cured; hearing impairment; locomotor disability mental retardation and mental illness., while a person with a disability is defined as « a person suffering from not less than forty per cent of any disability as certified by a medical authority.


The **South Africa** Employment Equity Act defines people with disabilities as "people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment".


The **United Kingdom** Equality Act 2010 applies to persons with a past or current physical or mental impairment which has a substantial and long-term adverse effects on his or her ability to carry out normal day to day activities. The Act also provides that people with severe disfigurement and people living with HIV or AIDS were added. The Act was amended in 2010 to remove the previous exclusion of certain conditions from the definition of disability - namely alcoholism, drug addiction, tendency to set fires and voyeurism.

Terms used to describe disability: In laws on the statute books in many countries, various words are used to describe people with disabilities such as ‘invalids’, ‘handicapped,’ or ‘retarded.’ Terms such as these are considered by many to be offensive, inappropriate and outdated. Legislation should include terms which are consistent with respect for the dignity of human beings – such as ‘persons with disabilities’, or ‘disabled persons’.

POINTERS

-  The definition or definitions of disabilities used should reflect the fact that people with disabilities may be prevented from participating in the open employment market by both individual and environmental barriers.

 -  Consideration needs to be given as to whether a threshold level of impairment is required for access to benefits, quotas or incentives or whether minor or temporary disabilities are also protected.

 -  Terms should be carefully chosen, to avoid language considered offensive.
-

2.7 The principle of equality

The principle of equality is closely related to the notion of human dignity. It is grounded in the idea that all human beings, regardless of physical, mental and other differences, are of equal value and importance. Each person is entitled to and should be afforded equal concern and respect, or, as stated in Article 1 of the Universal Declaration of Human Rights (1948): ‘All human beings are born free and equal in dignity and rights. ...’. The ILO Declaration of Philadelphia (1944) affirms that all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being

and their spiritual development in conditions of freedom, and dignity, of economic security and equal opportunity. This means that all women and men should have an equal chance and be provided with equal opportunities to participate in society, including the labour market. The CRPD aims 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.” Should differences therefore be ignored? No, on the contrary, it is widely believed that people who differ from others in ways which cause them disadvantage should be treated differently to compensate for the disadvantages they face, arising from those differences.

The principle of equality, as well as its corollary, namely the prohibition of discrimination, can be defined in various ways in law.

Formal equality

In a formal approach to equality, persons who are situated alike should be treated in the same way. Such an approach frequently ignores individual and contextual differences and disadvantages, as if these were irrelevant. The denial of identical treatment is prohibited, but there is no requirement to make accommodations or adjustments. This approach, therefore, falls short of meeting the support needs of some disabled people.

Equality of opportunity

Another way in which equality may be conceptualised is through equality of opportunity. This concept provides for equal chances, but not necessarily equal results. In this way of looking at equality, the importance of individual and group differences is acknowledged and account is taken of external barriers experienced by disabled people, which may inhibit social participation. Both stereotypes and structural barriers are seen as obstacles to full participation. In this approach, disability is ignored, if stereotypes are the basis for action, and taken into account if changes to the social or built environment are necessary to promote access and inclusion and resources are required to ensure that persons with

disabilities can make use of the opportunities provided, such as through the provision of reasonable accommodation.

Equality of results

Equality of results is concerned with securing the same outcomes for all. When equality is viewed in this way, individual and group differences are acknowledged. For example, account is taken of any additional costs a disabled worker has, in examining the question of whether they receive equal pay. This concept of equality has several weaknesses. It does not clearly indicate where responsibility lies for meeting the needs of disabled persons so as to guarantee true equality of results – with the State, with the private sector or with the individual. In addition, it is not clear in this approach whether an individual's merits are understood to justify unequal results. This approach could be used to justify unequal pay for persons with disabilities in employment, for example through their exemption from minimum wage provisions, if the desired result is to maximize the number of employees with disabilities. Equality of results can be used, however, as an indicator of the effectiveness of measures taken to achieve equality of opportunity.

POINTER



The concept of equality of opportunity is now the most frequently applied in national legislation and is particularly important for persons with disabilities.

2.8 Social policy and affirmative action

The promotion of equal employment opportunities for people with disabilities not only entails the prohibition of discrimination on grounds of disability. It also requires that States take affirmative action to ensure that people with disabilities have access to employment opportunities in the labour market, including requirements that the workplace environment be adapted to make it accessible

to all people with disabilities who are able to work, with appropriate technical aids or supports if necessary. Here a distinction should be made between social policy measures, which are always permitted, and affirmative action measures, which deviate from the equal treatment norm and therefore need a justification.

Social policy

Respect for human dignity requires the formulation of a social policy, such as a policy to combat illiteracy, unemployment, underemployment and homelessness or increase women's access to income-generating activities. Such policies are closely related to the promotion of equality of opportunity or equality of results. The beneficiaries of these policies are notably the underprivileged segments of society. Even though this is the case, social policies should not be classified as non-discrimination measures, primarily or exclusively aimed at enhancing equal opportunities.

Social Policy Measures - Examples

Offering an occupational rehabilitation programme to a worker after a serious work accident constitutes a social policy measure. The programme seeks to ensure that the worker can remain an active member of the workforce and will not be confronted with unemployment.

Offering funding from a public authority to employers to enable them to adapt their work premises to allow access to persons with disabilities.

Affirmative action measures

Affirmative action measures – sometimes called positive action – are aimed at ensuring equality of opportunity in practice, taking into account the diversity of the persons concerned. They are often aimed at historically disadvantaged groups that have been subject to long-standing, entrenched discrimination, with a view to halting discrimination, redressing the effects of past discrimination and restoring a balance. Employers can be required by the States to introduce such measures. Affirmative action is traditionally perceived as a response to social, structural or institutional discrimination

experienced, and as a justified exception to the principle of equal treatment. In other words, affirmative action is not discrimination. Affirmative action measures seek to promote equality of opportunity and are aimed at overcoming structural disadvantage experienced by groups. Such measures are not intended to cater for the needs of single individuals and are thus distinct from reasonable accommodation (see section 3.4 below). Affirmative action measures are to be regularly examined to ensure they are still needed and remain effective and are intended to last until there has been compensation for, or catching up from a structurally disadvantaged position.

Affirmative Action Measures – Examples

Obliging employers to employ a certain number or percentage of workers with a work disability (a quota) or requiring them to set a specific target constitutes an affirmative action measure. The measure could restrict the opportunities of employers to hire (and fire) employees on the basis of that employee's individual assessment and can require the employer, to treat disabled workers differentially (see Section 4).

Health and safety legislation could be amended to allow positive support for the reintegration of persons with disabilities into the workforce. It could also prevent the application of health and safety legislation in an overly protectionist form which could result in the denial of access of persons with disabilities to equal treatment in employment.

POINTERS



Social policy measures are legally distinct from affirmative action measures. They are always permitted, while affirmative action measures, which deviate from the equal treatment norm, need to be justified.



Affirmative action measures are designed to deal with a group disadvantage and do not provide the individual adaptations required by reasonable accommodation.

2.9 Multiple Discrimination

It is increasingly recognised that individuals may face discrimination on more than one ground and there is an emerging trend to recognize multiple discrimination as a legal concept in itself. At national level, this is reflected in a shift that is taking place from laws that prohibit discrimination on single grounds, to legislation that includes a list of prohibited grounds. Legal approaches requiring each prohibited ground to be dealt with separately are often inadequate to address the manner in which individuals experience discrimination on multiple grounds. Multiple discrimination is also recognized internationally. The CRPD, for example, expresses concern about multiple or aggravated forms of discrimination faced by persons with disabilities 'on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'.¹¹ The Declaration on the Rights of Indigenous Peoples calls on States to take effective and where appropriate special measures to improve economic and social conditions, paying particular attention to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.¹²

¹¹ UN Convention on the Rights of Persons with Disabilities,(2006) Preamble, para p.

¹² UN Declaration on the Rights of Indigenous Peoples.

Example: Disability and gender

Law-and policymakers are increasingly aware that women are more likely than men to be confronted with disadvantage, exclusion and discrimination, irrespective of working abilities. This holds equally true with respect to disabled persons, the majority of whom are women, at a global level. Women with disabilities are more vulnerable to discrimination, because they are women and have a disability. They may experience compound or intersecting discrimination, reflecting the fact that it is the combination of gender and disability which creates a different type of discrimination, rather than the sum of the two types. When women with disabilities work, they often experience unequal hiring and promotion standards, unequal access to training and retraining, unequal pay for equal work and occupational segregation.¹³ Throughout the world, they are less likely to be referred to vocational training and rehabilitation programmes, and if they do complete training, are more likely to remain unemployed or work in part-time jobs. Article 6 of the CRPD includes a recognition that women and girls with disabilities are subject to multiple discrimination, and in this regard the States parties are required to put in place measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

POINTERS



National law and policymakers should consider including an explicit prohibition of multiple discrimination.



Stereotypical views on sex and gender roles are often used as a justification for promoting the employment of disabled men, or for unnecessarily excluding women from particular jobs to prevent impairments. In preparing legislation, national law-and policymakers should be as sensitive as possible to the gender dimension of disability, disability laws and policies, so as to ensure that both women and men with disabilities can benefit equally.

¹³ O'Reilly, A (2007) *The Right to Decent Work of Persons with Disabilities*, ILO Geneva.



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Non-Discrimination Legislation

3.1 Disability in legislation

Legislation prohibiting discrimination is now regarded as an essential element of the response to discrimination in employment and occupation. The object of non-discrimination legislation is to prohibit discrimination on the ground of disability, as well as other grounds.

3.2 The scope of disability law

An increasing number of States prohibit discrimination on the ground of disability, particularly in the field of employment, either through comprehensive laws applying to different groups in the population as a whole or disability-specific laws. This reflects the increasing acknowledgement that disability is frequently used as a reason to exclude people with disabilities and to deny them equal employment opportunities, where this is not justified in the given circumstances. The objective of such laws is to combat the exclusion of and the denial of equal opportunities to people because of particular characteristics, such as disability and to increase the participation rates of persons with disabilities in employment and other

States with comprehensive non-discrimination legislation applying to the population as a whole, with explicit mention of disability include:

Canada - Human Rights Act, 1985, which prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted and Employment Equity Act, 1986 which applies to women, aboriginal peoples, persons with disabilities and members of visible minorities.

Ireland - Employment Equality Act, 1998, which outlaws discrimination on the basis of gender, civil status, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the traveller community.

Namibia - Affirmative Action Act, 1998, which applies to racially disadvantaged persons, women irrespective of race and persons with disabilities (physical or mental limitations, irrespective of race or gender).

sectors of society. By making disability a protected ground, the law extends protection against discriminatory behaviour and punishes those people who violate the non-discrimination norm.

States with non-discrimination legislation applying only to people with disabilities include:

Australia Disability Discrimination Act 1992

Costa Rica Law 7600 on Equal Opportunities for People with Disabilities, 1996.

Ghana Persons with Disability Act 2006.

Malta Equal Opportunities (Persons with Disability) Act 2000.

Japan Law to Promote the Elimination of Discrimination based on Disability, 2013.

Turkey Law on Disabled People (Law 5378, 2005).

United States of America Rehabilitation Act, 1973; Americans with Disabilities Act, 1990, as amended.

States with non-discrimination provisions in traditional laws relating to protection and rehabilitation include:

China Law of the People's Republic of China on the Protection of Disabled Persons.

Nicaragua Act No.202, Law for the Prevention, Rehabilitation and Equalization of Opportunities for Persons with Disabilities in Nicaragua (1995).

In certain countries, such as the **United Kingdom**, non-discrimination law defines precisely the category of disabled persons covered by the law. Where definitions are included, caution should be exercised to ensure that they do not, intentionally or unintentionally, restrict the group of protected individuals. This can occur when legal protection is not provided to individuals who experience disability discrimination but who fail to meet the particular wording of the legal definition of disability.

In other countries, such as the **Netherlands**, the law does not define the term disability. The law in fact, offers protection to both disabled

and non-disabled persons against unjustified adverse treatment on grounds of a disability. Case law in these countries can focus on whether a person has been discriminated against on grounds of a real or perceived impairment, avoiding the question of whether that person is disabled or not according to the law.

National legislation increasingly requires all employers to respect the principle of non-discrimination, irrespective of the size of the enterprise. Some exceptions may be foreseen, linked to an individual's competence and capacity to perform the essential functions of the post concerned, or to undergo the relevant training. The obligation to provide reasonable accommodation for persons with disabilities needs to be taken into account in decisions about whether an exception is justifiable (see 3.4 below).

Employer thresholds – examples

In the **United Kingdom**, the Disability Discrimination Act of 1995 originally applied to employers with a workforce of 20 or more employees. Following a government review which revealed that 95 per cent of employers and 4.5 million workers, including a quarter of all disabled employees were excluded from coverage as a result, this threshold was reduced to 15 or more employees in 1998. The exemption for small employers was completely removed in October 2004, in line with the European Commission Directive on Equal Treatment in Employment and Occupation (2000/78/EC) which all EU members are obliged to translate into national law and which applies to all employers. The UK Equality Act 2010, that repealed and replaced the Disability Discrimination Act 1995, does not provide any threshold of a number of employees for its provisions to apply.

In the **United States**, under the Americans with Disabilities Act 1990 (as well as other federal non-discrimination legislation), firms with less than 15 employees are excluded unless several small employers operate as an integrated enterprise. The reason for this is that small employers are not expected to engage in interstate trade relations, thus depriving the federal legislature from the competence to regulate their employment policies. Under – often similarly worded – State disability non-discrimination acts, smaller employers are covered.

POINTERS



Non-discrimination laws should explicitly refer to disability as a protected ground. If there is already a non-discrimination law, this may be suitable for amendment by the addition of disability as a non-discrimination ground. Or Ministers, after consultation with the social partners, may be permitted to adopt regulations specifically covering disability. If no law referring to disability exists, it may be necessary to draft a new law in the interests of certainty.



Where the term *disability* is not defined in non-discrimination legislation, the definition contained in social security legislation should not be adopted, as the two types of legislation serve different purposes.



Enterprises of every size should be covered by the non-discrimination provisions. The only exception to the basic right to non-discrimination should be linked to inherent requirements of the job.

3.3 Different forms of discrimination

The prohibition of discrimination does not make all forms of differentiation among workers and job applicants illegal. Employers can require that employees and job applicants possess certain skills or competencies which are legitimate, in view of the nature of the job concerned or the context in which the job is carried out. Such genuine occupational requirements may result in the exclusion of persons with particular disabilities from a job, but this does not constitute discrimination.

Inherent requirements of a job – Examples

A taxi company requiring job applicants to have a driving licence, for example, excludes blind people as well as people who, due to a medical condition, no longer have a driving licence. Such a licence requirement on the part of the taxi company is legitimate and proportionate and therefore constitutes a genuine or justifiable occupational requirement.

An accountancy practice advertises a position where it requires a high standard of mathematics from applicants. This could exclude applicants who are dyslexic. Due the requirements of the position, however, this requirement is legitimate and proportionate and therefore constitutes a genuine or justifiable occupational requirement.

Discriminatory behaviour arises when an employer treats a (candidate) worker adversely or less favourably on the ground that he or she has a disability, where the disability has no, or hardly any, effect on job performance and should be regarded as irrelevant.

Various forms of discrimination can be distinguished, including:

Direct discrimination occurs when a person is treated less favourably than another similarly situated person because of a particular characteristic protected by non-discrimination law, such as race or sex.

Example

An employer advertises for a job and states in the advertisement “no blind people should apply”.

Indirect discrimination occurs when an apparently neutral situation, regulation or practice in fact results in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion applies to everyone, but has a disproportionately harsh impact on some persons on the basis of certain characteristics. Intention to discriminate is not required for indirect discrimination to be judged to have occurred.

Example

An employer advertises for a job and states in the advertisement: only people with a driving licence should apply. This requirement does not expressly exclude disabled people and appears to be neutral on an initial examination. However, people with certain kinds of disabilities cannot acquire a driving licence and will be unable to apply for the job. If the requirement of having a driving licence is unnecessary for the job, in that the job rarely requires the worker to drive, and taxis can be hired or public transport used for the few occasions when vehicular travel is required, the requirement will amount to indirect discrimination and is incapable of being justified.

Harassment occurs when unwanted conduct related to a protected ground takes place with the purpose or effect of violating the dignity of a person and/or of creating an intimidating, hostile, degrading, humiliating or offensive environment. An example is verbally abusive behaviour by a work colleague directed at a person's protected characteristic or ground such as sex, disability or ethnic status.

Discrimination by reason of association occurs where a person is treated less favourably than another person not due to their having a protected or particular characteristic but rather due to their connection or relationship with a person who has such a characteristic. It is particularly in the case of those who have caring responsibilities for persons with disabilities that this form of discrimination is likely to occur.

Instruction and incitement to discriminate occurs when a person or institution demands that others treat a person less favourably than another similarly situated person because of a particular characteristic protected by non-discrimination law, or encourages them to do so. An example is stimulating or calling for hatred or violence against disabled people.

Victimisation/penalisation occurs where a person protected from discrimination by law, or a whistleblower or witness takes a pro-

tected act such as making a complaint of discrimination to the appropriate authority and adverse treatment is then taken by the employer, such as dismissal of the employee, as a reaction to the protected act.

POINTERS



Laws prohibiting discrimination on the ground of disability should cover all forms of discrimination:

- direct discrimination
- indirect discrimination
- harassment
- discrimination by association
- instruction and incitement to discriminate
- victimisation



Multiple discrimination should be prohibited in the law



The law should protect persons who report discrimination from retaliation or victimization and encourage the reporting of discrimination.



The exception of genuine occupational requirements or inherent requirements of the job should be defined narrowly and applied strictly, to prevent the unjustified exclusion of workers and job applicants with a disability.

3.4 Reasonable accommodation

Disability can sometimes affect an individual's ability to carry out a job in the usual or accustomed way. The obligation to make a reasonable or effective accommodation, or the right to be accommodated, is often found in modern disability non-discrimination

law although its origins were in the context of non-discrimination legislation regarding religion. For example, the United States Civil Rights Act 1964 (Title VII) requires employers to reasonably accommodate the religious beliefs of employees which are sincerely held, unless this would impose an undue hardship on the employer. Reasonable accommodation for persons with disabilities in the workplace has its origins in this provision. Disability non-discrimination legislation increasingly requires employers and others to take account of an individual's disability and to make efforts to cater for the needs of a disabled worker or job applicant, and to overcome the barriers erected by the physical and social environment. This obligation is known as the requirement to make a reasonable accommodation.¹⁴ The failure to provide a reasonable accommodation

Examples of a reasonable accommodation

- an adjusted office chair (for a person with a back impairment)
- adapted working hours (e.g. for a person with a medical condition requiring frequent rest-breaks)
- adapted or flexible working hours (e.g. for a person with a medical condition requiring frequent rest-breaks)
- a reduction in working hours of an employee
- a computer keyboard with a Braille reader (for a blind person)
- the assignment of a job coach (e.g. for a person with an intellectual or mental health disability)
- providing a sign language interpreter for a deaf job applicant
- removal of certain tasks from the job of an employee who is unable to complete these due to his or her impairment
- reallocating an employee who has acquired a disability to a different position, if he or she is no longer capable of performing the tasks of the previous job
- provision of additional training for a person with a disability
- adapting the work station to enable a worker with a disability to work effectively
- allowing an employee to work from home.

¹⁴ The obligation is also sometimes referred to a reasonable adjustment or an effective accommodation/ adjustment.

to workers and job applicants, who face obstacles in the labour market, is not merely a bad employment practice but is increasingly perceived as an unacceptable form of employment discrimination and therefore unlawful, as provided for in the CRPD.

The law should define closely what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.

Examples

In **Ireland** the Employment Equality Act 1998 provides that an employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities. This Act excludes from the remit of reasonable accommodation any provision which an employee would normally be expected to provide for him or herself such as to exclude any requirement of an employer to provide personal care items.

In **South Africa**, reasonable accommodation in employment is required by the Employment Equity Act, 1998. The Act defines it as involving any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment. Details on its scope are provided in the *Code of Practice on Disability in the Workplace* and in the Technical Assistance Guidelines on the Employment of People with Disabilities.

In the **United States**, the obligation to make a reasonable accommodation is to be found in the Americans with Disabilities Act 1990. Reasonable accommodation is understood to mean any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities. The Act provides the following as examples of reasonable accommodation: “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters”. There are three categories of “reasonable accommodations”: changes to a job application process, changes to the work environment or the way a job is usually done, and changes that enable an employee with a disability to enjoy equal benefits and privileges of employment, such as access to training.

Other countries, including Australia, New Zealand and South Africa have legal provisions stipulating that the failure to provide a reasonable accommodation constitutes a form of discrimination.

The provision of a reasonable accommodation is an individualized measure that does not need to be temporary in nature – in fact, it could be provided for an individual for the duration of his or her employment. It should be distinguished from an affirmative action measure aimed at groups. The duty to provide a reasonable accommodation should not be confused with the duty to comply with general accessibility and occupational health and safety standards.

A disabled worker or job applicant claiming a reasonable accommodation should demonstrate that:

- he or she is (otherwise) qualified for the job; and
- the employer (or other party) was aware of his or her needs; and
- with an accommodation, he or she could (safely) perform the essential functions of that particular job.

It would be preferable for this to be proved with corroborating medical or other appropriate evidence, for example through a report of a suitably qualified expert or other suitable documentation

An employer is only exempted from this obligation in cases where he/she can prove that:

- they were not aware of the disability; or
- he/she was not aware of the need for an individual accommodation; or
- an effective accommodation, enabling the disabled worker/job applicant to perform the essential functions of a job, is not available; or
- the requested accommodation imposes a 'disproportionate burden' on the employer.

Disproportionate burden

The 'defence' or justification for not accommodating a disabled person needs to be drafted carefully. Otherwise, unscrupulous employers would have recourse to this in order to avoid any obligation. Much litigation might ensue and the very valuable support of reasonable accommodation would be denied to many persons with disabilities. The fact that the workplace or work schedule would be inconvenienced clearly does not amount to a 'disproportionate burden'.

In practice, the question as to what constitutes a disproportionate burden very much depends on the context of the case concerned, and is not merely dependent on the financial costs of an accommodation, the financial resources available or financial compensation schemes. It depends on such factors as its practical implications, effects on the overall work process, the size of the enterprise, number of disabled workers already employed, public funding available and length of the envisaged employment contract.

POINTER



Reasonable accommodation is a key component of modern anti-discrimination legislation concerning persons with disabilities and should be provided for in all such laws.

3.5 Shifting the burden of proof

Under some legislation, a person who considers his or herself wronged because of discrimination has to produce evidence to prove that this has occurred. In some cases it may be possible to collect this necessary evidence without difficulty – such as in the case of recruitment, where advertisements for job vacancies and recruitment materials are easily available. In most other cases, involving an action which is suspected rather than established, it may prove

impossible to gather credible evidence. This is true, for example, when the information and records that might constitute evidence are held by person against whom the claim is made (for example, by an employer in an equal pay case). This person may be able to win the case by saying nothing and simply challenging the evidence produced. In practice, this requirement has been recognised as one of the greatest obstacles to obtaining a fair and just result.

To deal with this major procedural problem, many countries have shifted the burden of proof away from the person bringing the claim to court. In many jurisdictions it now suffices for such a person to establish, before a court or other competent authority, facts from which it may be inferred that there has been discrimination. After this, it is for the person who allegedly discriminated to prove that there has been no discrimination. Such a shift of the burden of proof does justice to the fact that it is usually very difficult, if not impossible, for a person to prove that he or she has been subjected to discrimination. A shifting of the burden of proof makes non-discrimination law effective.

In 2003, all fifteen countries of the **European Union** (EU) were required to introduce laws or amendments to their laws or other legal instruments to allow for a shifting of the burden of proof in employment discrimination cases involving direct or indirect discrimination. All new Member States will also have to follow suit. This follows from a European Union law (a Directive) adopted by the Council of Ministers in the year 2000. The Directive stipulates that disability discrimination cases are subject to a shifting of the burden of proof in favour of the employee or job applicant with a disability from 2003 onwards.

For example the Equality Act 2010 of the United Kingdom provides that if there are facts from which court should decide, in the absence of other explanation, that a person is guilty of discrimination, the Court must hold that there has been a breach of the Act. No contravention will be found if the employer or person accused of discrimination can demonstrate that there was no discrimination.

POINTERS

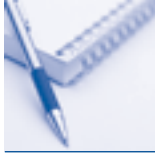


Non-discrimination law should stipulate that the burden of proof shifts to those considered to have discriminated once the person who considers him or herself wronged has provided facts from which it may be presumed that discrimination has taken place.



Once the burden of proof has shifted to the person who is alleged to have discriminated against the complainant, evidence must be provided in the form of a valid non- discriminatory justification for the treatment.





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Quotas

Quota schemes are probably the best known, most common and the most familiar affirmative action measures aimed at promoting the integration of people with disabilities in the labour market. Quotas are sometimes introduced by law and sometimes by government decision or regulation.

Under quota schemes, employers employing a specified minimum number of persons are obliged to ensure that a certain percentage (a quota) of their workforce is made up of people with disabilities. Such schemes first emerged in Europe in the aftermath of the First World War, and initially war veterans who were disabled as a result of military action were the only beneficiaries. These schemes typically exempted small employers. In the post Second World War period, quota schemes were extended to cover disabled civilians, and were adopted in many countries throughout the world. The exemption for small employers was, however, often maintained.

Many commentators assert that quota systems do not fit well within the employment rights approach of many countries that have introduced sophisticated non-discrimination legislative provisions for persons with disabilities within the labour market, including reasonable accommodation. Quotas are still provided in many countries, however, in spite of the employment rights approach, due to the view that this system is required to counteract the low employment rates of persons with disabilities. More recently, some quota schemes have been expanded to expressly include people with intellectual disabilities (such as the quota scheme in Japan) and people with mental health problems (such as in Germany).

Quota schemes can be divided into three basic groups:

- A binding quota which is backed up with a levy
- A binding quota which is not backed up with an effective sanction and/or with an effective enforcement mechanism
- A non-binding quota or target based on a recommendation, e.g. government circular

4.1 A quota-levy scheme

Under a quota-levy scheme, a binding quota is set and all covered employers who do not meet their obligation are required to pay a levy. The money raised through such quota schemes usually goes into a fund to support the employment of people with disabilities. Usually, this fund is administered by the public authorities, although exceptionally the social partners are involved, as in the case of France.

Germany was amongst the first countries to adopt such a quota-levy scheme in 1974. Under the Social Code, Book 9, of 2002, public and private employers with a workforce of at least 20 employees are required to ensure that five per cent of their workforce is made up of people with disabilities. Employers who do not meet their quota obligation are obliged to pay a fixed compensatory levy for every unfilled quota place. This levy is used exclusively to promote the rehabilitation and employment of people with disabilities and can be used, for example, to provide grants to employers who exceed their quota obligations or to help employers meet any extra costs associated with the employment of a person with a disability, such as adaptations to buildings or the provision of extra training.

In **Austria**, the Disabled Persons Employment Act requires firms to provide at least one job to a disabled worker per 25 non-disabled workers, a rule which is strictly enforced by non-compliance taxation in the form of a compensatory levy. The Compensatory Levy Fund is used to promote the inclusion of persons with disabilities in employment, through for example, wage subsidies, subsidies for workplace adaptations and bonuses for employers who exceed their quota obligation.

In **Ecuador**, a quota scheme for employment of persons with disabilities covers both public and private employers with at least 25 employees. From 2010 onwards, people with disabilities should make up four per cent of the total number of employees. The law also includes provisions on a penalty levy for failing to observe the quota.

A quota-levy system has been adopted by other European countries, including France. In **France**, the funds arising from non-fulfilment of the quota obligation may be used to fund vocational training of individuals with disabilities. The French quota law also provides other options for employers to partially meet their obligation under the law, such as by purchasing goods or services from sheltered workshops employing disabled people, or by agreeing a plan, negotiated between employers' and employee organizations, aimed at the integration of disabled workers, through recruitment, training, job retention or adjustment to technological change.

In **Japan**, the employment quota for people with disabilities varies depending on the level of full-time employment and unemployment in the general labour market. Employers with a workforce of 200 or more regular employees are required to pay a levy for each employee below the legally mandated level of 1.8% of the total workforce.

It is not sufficient to provide merely for the payment of a levy when an employer fails to meet the set quota. Some means of collecting the levy must also be put in place. Statutory bodies are generally given the task of both administering the collection and the distribution of the funds collected. In most countries, such as Germany and China, existing organizations have been given these additional responsibilities. An exception to this pattern is France, where a completely new organization (AGEFIPH) has been established to administer the funds, with representation of the social partners as well as the public authorities.

Commonly, employers are given the task of assessing and declaring the amount due, and then paying the levies to the fund set up for this purposes – frequently called the national rehabilitation fund (NRF). The levies can be collected annually, quarterly or monthly, and are usually transferred directly to the NRF bank account. In some countries employers do not have to carry out this self-assessment but are informed of their financial obligations by the NRF or another body.

In **Austria**, the national rehabilitation fund is administered by a government ministry which calculates the amount owed by an employer and informs the employer of this. The Ministry has access to information about employers' insurance obligations and uses this information to calculate the quota and levy responsibilities.

In **France**, the fund is managed by an association established by law in 1987 (AGEFIPH). The administrative council of AGEFIPH comprises representatives of employers, workers and, persons with disabilities, qualified persons nominated by the social partners, disabled persons' organizations and the Ministry for Employment and Solidarity.

In some countries tax collectors are given the power to collect levy payments and pass them on to the NRF.

In **Poland**, levy payments are regulated under the law providing for tax liabilities. Under this law tax offices have to control payments and to collect funds owed to the national rehabilitation fund. If an employer fails to pay the levy directly to the national rehabilitation fund, the fund can ask the tax office to collect the money directly from the employer's bank account or even take the employer's property. A court decision is not needed to do this.

Employers are fined for a late payment of the owed levy sums, in some countries.

In **China**, employers are obliged to pay a daily fine for each day that a payment is overdue.

In **Japan**, the Minister for Labour is entitled to impose overdue interest for any late payments of the levy at the rate of 14.5 per cent per annum based on the number of days since the deadline for payment. The Minister for Labour may also seize property from an employer who has failed to pay the levy within the required time period.

In some countries, quota-levy schemes are valued, not just for their contribution to promoting employment but also because of revenue-raising potential and the designation of this money for measures to support the employment of people with disabilities, such as through grants to employers who have met or exceeded the quota or to provide subsidies for the cost of reasonable accommodation. If

employers prefer to pay the compensatory levy rather than employ disabled persons, however, the operation and effectiveness of the quota scheme should be reviewed. It is important that this option is not readily available to employers and the monetary amount of the levies should be fixed at a level which discourages this approach.

To increase the effectiveness of the quota scheme in securing jobs for persons with disabilities, other options for employers to meet their quota obligation, should be considered, in addition to recruiting disabled persons or paying a levy. Examples include providing for on-the-job training, apprenticeships, the introduction of a plan to recruit and train workers with disabilities and/or to make technical adaptations to the workplace.

POINTER



If a quota-levy scheme is being considered because it is seen as a source of funding for disability-related activities and services, other approaches should be explored, as these are likely to be more cost-effective and to reflect the value persons with disabilities bring to the labour market. The introduction of quotas should not, however, be at the expense of the individual right of non-discrimination and reasonable accommodation

4.2 A binding quota without an effective sanction

Under this kind of system employers are obliged, through legislation, to employ a quota of persons with disabilities, but this obligation is not backed up with any effective sanction – either because the sanction does not exist or the sanction is not enforced. This may be because the legislation establishing the quota does not provide for an effective sanction or because the public authorities have decided not to litigate in cases where the quota obligation is not met.

In **Thailand**, a quota obligation was established for private employers by the Rehabilitation of Disabled Persons Act of 1991. While those who failed to meet the quota were obliged, by law, to pay a levy, no enforcement mechanism existed and the impact of the quota was limited. The Persons with Disabilities Empowerment Act of 2007 that replaced the 1991 Act, provides for an employment quota for public and private employers, subsequently specified by Ministerial decree as one employee with a disability for every 100 employees. Non-complying employers may offer a business concession, provide sales or services, or offer occupational training for persons with disabilities. Those who do not comply with these options are required to make a compensatory payment. As a form of social sanction, information on compliance or non-compliance with the law can be made public.

In the **United Kingdom** in 1993, less than twenty per cent of British employers met the three per cent quota established under the Disabled Persons (Employment) Act of 1944. The main reason for the failure of the British quota was the unwillingness or inability of successive governments to enforce the quota by strictly policing the granting of exemption permits and prosecuting errant employers. In fact, exemption permits were granted frequently with little requirement to provide relevant grounds. Few prosecutions occurred. Employees were required to register as disabled and many chose not to be registered, most likely due to the stigma attached to being labelled 'disabled'. The quota was abolished in 1996 when the Disability Discrimination Act of 1995 came into force with its non-discrimination provisions. The Equality Act 2010 has repealed and replaced the Disability Discrimination Act 1995 but the same provisions have been retained.

POINTER



The experience of various countries indicates that it is insufficient to simply legislate to impose an obligation on employers to employ people with disabilities. Such quota systems do little more than rely on the goodwill of employers, and do not greatly increase the opportunities of people with disabilities to find jobs in the labour market. Provision must be made for an effective enforcement mechanism if the quota

is to have a practical and meaningful impact on the employment rates of persons with disabilities.

4.3 A non-binding quota based on a recommendation

Under this form of quota system, employers are not legally obliged to employ a set percentage of disabled workers, but it is recommended that they do so. Compliance with the quota obligation is therefore voluntary and there is no sanction in the event that employers fail to meet the recommended quota.

A non-binding quota system existed in the **Netherlands** in the mid 1980s. Legislation was adopted which required employers to facilitate the employment of people with a disability, and a target of between three and five per cent, to be achieved over three years, was set. When the Dutch government assessed the effectiveness of the voluntary scheme after the three-year period, it concluded that there had been little improvement in the employment situation of people with disabilities and abolished the scheme. Legislation introduced in the late 1990s provided for the possibility of introducing a binding quota of three to seven per cent, an option that has never been seriously considered so far.

POINTER



A voluntary quota or target, whereby no legal obligation is imposed on employers, and no sanctions are provided for in the event of a failure to meet the target, is unlikely to have much impact on the number of people with disabilities in employment.

4.4 Making the quota work in practice

Quota systems can be adapted to fit national economic and political requirements, since they allow law- and policymakers to influence the size and nature of both the targeted group of benefi-

ciaries (people with disabilities) and the group upon whom obligations are imposed (employers). This can be done in a number of ways, and consideration should be given to all these factors when establishing a new quota system or reviewing an existing system.

4.4.1 Which people with disabilities should be targeted by quota schemes?

People with disabilities comprise a large and diverse group in the population, and include people with very different abilities and impairments. In recognition of this, some quota schemes target all people with a disability, while others target those with severe disabilities.

Many quota schemes are targeted specifically at those people with disabilities who can be expected to face greatest difficulties in obtaining employment - people with severe disabilities. Such people might be expected to be less able to profit from the existence of non-discrimination legislation, as even in a non-discriminatory environment, they may remain unable to compete for and secure jobs on their individual merits. Therefore a targeted positive action measure in the form of a quota might be an appropriate tool to promote the employment opportunities of this group.

Alternatively, where the main aim is to reduce the number of people claiming disability benefits, enabling them to move into employment, the quota schemes might cover all people entitled to claim such benefits.

Where quota schemes cover all people with a disability, the risk exists that employers will meet their quota obligations by employing people with slight disabilities who would have little difficulty in finding employment, even in the absence of a quota scheme. Those people with more severe disabilities will remain excluded, as there will be little legal incentive to employ such people once employers have met their quota obligation.

In **Germany**, the quota scheme is specifically targeted at people with a severe disability.

In the **Netherlands**, the voluntary quota system covered all people who were entitled to claim disability benefit, as the main aim of the system was to reduce the number of claimants. Although the voluntary quota no longer applies, employers still qualify for an exemption from social security premiums where five per cent of their workers have an employment disability, whatever the disability.

POINTER



When setting up a quota scheme in law, consideration should be given as to the aim of the scheme. If the aim is to help those people with disabilities who find it most difficult to obtain employment, the scheme should be targeted at people with more severe disabilities. If the aim is to reduce the number of disability benefit claimants, all people eligible to claim such benefits should be covered.

4.4.2 How to identify those eligible for employment under the quota?

Quota systems must include some means of identifying those eligible for employment under the scheme. This involves:

- establishing a definition of disability which focuses on the limited working capacity of the individual. This is necessary since only those experiencing most limitations and disadvantage need the protection of the quota and should be able to benefit from its provisions; and
- a means by which such people are administratively identified, for example by a system of registration.

Problems may arise if the definition of disability for the purposes of the quota focuses on impairment, rather than on limited working capacity. Many individuals benefiting under the quota in such cases may actually have a high working capacity, even though they have a

recognised disability, and may thus not need the protection of the quota in finding a job.

While registration is commonly used as a means of identifying those who benefit from the quota, individuals with a disability may experience a number of disincentives which discourage them from seeking to register as disabled for the purposes of a quota. For example, in order to register, individuals must prove that their disability causes limitations and restricts their ability to compete on the conventional labour market, i.e. stress their inabilities. As a result: the labelling associated with the registration scheme may have negative consequences for self-esteem and self-image. The registration results in the individual being placed outside the 'normal' system of job recruitment, and the factors which make the individual 'different' are emphasized. These factors should be taken into account in designing the system and steps taken to minimize their impact, for example by providing for benefits to registered individuals with disabilities under the law.

Another disincentive arises from systems where registration is preceded by a medical examination. In such cases, the physical and emotional costs for the individual may be even higher, and the State will also incur significant financial costs in maintaining such a registration scheme.

POINTERS



In designing a quota scheme, it is important to ensure that very real benefits accrue to those who register and are 'labelled' as disabled by this process. This may assist in counter-balancing any perceived problems associated with registration. One means of achieving this is to ensure that registration entitles an individual to coverage under the quota system, but also to other related benefits, such as social security benefits or financial support to assist in finding and/or maintaining employment.



It is important that a person's disability is not made public within their place of employment, without the person's consent and that confidentiality should be maintained

4.4.3 Should the quota especially favour certain disabled people?

Even where a quota is targeted at people with severe disabilities or disability benefit claimants, there may still be a group of people who either experience particular difficulty in finding employment under the quota, or whose employment should be specifically promoted for one reason or another. This group of people might include:

- people with particularly severe disabilities;
- war veterans with a disability; and
- people with a disability occupying training or apprenticeship positions.

In addition, the likelihood of finding employment seems to decrease if the disabled person concerned possesses another characteristic on the basis of which people often experience discrimination (for example in the case of women, older people or those belonging to an ethnic, linguistic, religious or sexual minority).

The quota system can be used to give employers additional incentives to employ such people. Specifying, for example, that people facing particular difficulties will be regarded as occupying more than one quota position can do this. It will therefore be easier for employers to meet their quota obligations by employing such people.

In **France** and **Germany**, both an individual disabled person occupying a training or apprenticeship position and an individual with particularly severe disabilities, can be regarded as occupying two or even three quota positions.

POINTER



If the quota makes it easier for employers to meet their quota obligations by recruiting a person or persons with disabilities facing particular difficulties in getting jobs, it will be more effective in promoting opportunities for those who really need support in their job search. This can be done by making the employment of a person facing particular difficulties equivalent to more than one quota position.

4.4.4 Standard quota or varying quota rates?

States can set either one single quota target which applies to all employers in all sectors of the economy or different quota targets for different industries or different regions of the country.

Targeted quotas might be used because it is felt that:

- certain sectors or regions are able to provide a large number of jobs which are suitable for people with severe disabilities; or
- certain sectors or regions are only able to provide a limited number of jobs which are suitable for people with severe disabilities.

These factors might be relevant because the relative size of the agricultural, industrial and service sectors varies from country to country, or from region to region. Each sector offers different possibilities for employing people with various kinds of disabilities. Even within these sectors, there are variations which are determined by the production processes which are in use – for example, the employment opportunities for people with disabilities differ greatly between a labour intensive farming system and a highly mechanised system of farming. Leading on from this, labour intensive employment offers wholly different integration possibilities for people with certain types of disability (such as intellectual disability) compared with employment in which the new technologies play an important part. It is important, though, that a wide range of sectors are covered in order to avoid quotas being directed at lower skilled or lower paid areas of the labour market.

In **China**, the specific rate of the quota is determined by the government of provinces, autonomous regions and municipalities directly under the Central Government.

In **Germany**, a forerunner to the current quota system, established in 1953, initially set a quota of 10 per cent for the public sector and for the banking and insurance sectors, and a quota of 6 per cent for the rest of the private sector.

POINTER



A review of the various employment sectors in a country should be carried out and considered before deciding on whether to adopt a single quota covering all employers or whether to set separate quotas for specific sectors or regions.

4.4.5 What is the appropriate quota percentage?

The quota percentage should be based on consideration of the number of people with disabilities willing and available to work, and the size and profile of companies in the economy. It should also be decided whether special assistance is needed for those with particular types or levels of disability. This information enables a comparison between the number of jobs which are required, and the number of jobs which would result if all employers fulfilled the quota obligation.

Within the **European Union**, the quota percentage has varied between 2 per cent in Spain and 15 per cent in Italy, where the quota not only covered people with disabilities, but also widows, orphans and refugees. In **Serbia**, the quota system requires employers to hire at least one person with a disability if they have 20-50 employees, and to hire another person with disabilities for every 50 additional employees.

POINTER



Before deciding on a quota rate, answers should be obtained to the questions of how many jobs are required and how many jobs will be made available with different levels of quota.

4.4.6 Should small and medium-sized employers be included?

Small and medium-sized companies are usually exempted from quota obligations, and this has an impact on the effectiveness of a quota scheme. In some countries, the exemption applies to employers with less than 10 employees; in others, to companies with less than 200 employees.

The question of whether small companies should be covered by the quota system, or whether they should be exempted, is significant for a number of reasons.

- Arguments in favour of including small companies are based on evidence suggesting that it is easier for many people with disabilities to integrate socially in small companies. In addition to this, where a high number of people are employed in small companies in a State, the exclusion of such firms will similarly exclude a large proportion of the workforce and, as a consequence, significantly restrict the number of jobs reserved for people with disabilities.
- Arguments against including small companies are frequently economic. For example, if firms incur extra costs when employing a person with a disability under a quota system, and these costs are not compensated by grants from the national rehabilitation fund or the relevant agency, small companies with a relatively low turnover may be less able to absorb this cost and therefore be placed in a difficult position.

In the **European Union**, the minimum size of firms covered by quota legislation varies from 20 employees in Germany to 50 employees in Spain. These cut-off figures have a significant effect on the number of employers covered by the quota system and the number of jobs yielded. Approximately 90 per cent of all enterprises in the European Union have nine or fewer employees and thus, while they generate approximately 30 per cent of the employment in the European Union, they are not covered by any quota scheme. The predominance of small firms varies from country to country, however. 80 per cent of workers are employed in such firms in Spain and Portugal, compared to 63 per cent in Denmark. Exclusion of small firms from the quota scheme would therefore have a much greater impact in Spain and Portugal than it would in Denmark. In countries with few large employers - like Mongolia, where the quota applies to employers with 50 or more employees - excluding small employers from the quota results in few jobs for persons with disabilities.

POINTER



Before deciding on whether to include or exclude small employers from a quota scheme, and determining the cut-off point for employers which will not be covered by the quota, an assessment should be made of the importance of small employers within the State. Where small employers provide a high percentage of the jobs in a State, the impact of the quota will be significantly reduced if such employers are excluded from its scope. For this reason, it may be decided to include them.

4.4.7 Should the quota apply to both the public and private sectors?

Quota schemes can be directed at either the public sector or the private sector or both. Since the public sector is a major employer in most countries, and has an important role to play as a model employer, it would seem counterproductive to exclude this sector from any quota scheme. In addition, if the law applies only to private sector employers, and the public sector is exempted, questions arise about public sector commitment to employing people with disabilities and the credibility of the quota scheme is thus undermined.

In many countries, however, public sector employment is in decline and private sector employment is growing, so that the private sector is likely to yield more jobs for people with disabilities in the long run. For this reason, it is important that the quota applies to private employers as well as public sector employers.

POINTER



Quota systems should apply to both public and private sector employers. The exclusion of either the public sector or the private sector as a whole from a quota scheme would significantly reduce its scope and the number of jobs reserved for people with disabilities.

4.4.8 What options should be open to employers?

Traditionally, quota levy schemes have obliged employers to employ persons with disabilities, or pay a levy into a designated fund. Reviews of the operation of such schemes in recent years have highlighted the tendency of many employers to make levy payments rather than recruiting disabled job seekers. Thus, the primary aim of the quota schemes – to get more persons with disabilities into employment – was only being partially met. To counteract this trend, and to encourage employers to become more actively involved, other optional ways for employers to meet their quota obligations might be considered, such as the provision of on-job-training opportunities or provision of sub-contract work to centres employing disabled persons.

Example

In **France**, the quota law was reformed in 1987 to provide for options to employers in addition to recruiting disabled persons or paying a compensatory levy. Employers may now partially meet their obligations under the quota by contracting with sheltered workshops to carry out production or provide services, or by formulating joint plans and agreements to recruit and train workers with disabilities and/or to make technical adaptations to the workplace.

POINTER



It is important to bear in mind that quotas were originally introduced to promote jobs for disabled persons. The quota-levy system seems to make a greater contribution to the promotion of the employment of people with disabilities than the other forms of quota described above.

Planning for Implementation

When drafting disability laws and formulating policies to put these laws into practice, special attention needs to be paid to implementation, so that any issues in the implementation of the law are identified and can be easily resolved. The effectiveness of legislation and policy that aims to promote equal employment opportunities for persons with disabilities will depend on the measures introduced to implement these in practice. These should include information campaigns about the rights and duties of disabled persons, employers and other stakeholders under the law, and the policy provisions that have been introduced, as well as a range of employment support services and measures for employers and for disabled job seekers and workers.

5.1 The role of information

Information campaigns usually play an important role in implementing laws promoting the employment of people with disabilities and in encouraging good employment practices. They could, for example, send the message that workplace diversity makes good business sense, and reduce the stigma which is often attached to disability by highlighting the working capacity of disabled persons and the fact that many employers find their disabled employees to be excellent workers and an asset to the company. They could, for example, aim to inform people with disabilities about their rights under the employment legislation, or trade unions about their role in ensuring that disabled workers are aware of their rights and entitlements, and that they can access these.

There are many options to choose from, ranging from general campaigns involving on-line, radio, newspaper, and television advertisements, to targeted campaigns focusing on specific groups, involving peer educators (such as employers, or persons with disabilities). Consideration should be given to such campaigns in drawing up legislation and regulations to give effect to these. Ideally, media representatives should be involved in the design and implementation of the campaigns.

Employer Business and Disability Networks

In 2009, the ILO set up the ILO Global Business and Disability Network (GBDN) as an employer-led, member-based initiative that drives strategic business awareness about the positive relationship between the inclusion of people with disabilities and business success.¹⁵ The GBDN is a network of multinational companies, national employers' organizations, business networks and disabled people's organizations working in collaboration to promote disability inclusion in the workplace. It aims to strengthen the work of employers' organizations so that they can influence small and medium-sized companies at the national level.

It includes in its membership several employers organizations that campaign for disability inclusion in the workplace - such as the Australian Employers Network on Disability, the Business Disability Forum, UK; the Business Network for Social Inclusion, Brazil; BusinessNZ, New Zealand; the Chamber of Industries of Guayaquil, Ecuador; and the Employers' Federation of Ceylon, Sri Lanka; the Qaderoon Business Disability Network, Kingdom of Saudi Arabia; and the US Business Leadership Network.

In addition to general information campaigns, provision should be made at the planning stage for technical advisory services targeted at employers, persons with disabilities and other stakeholders. Such services should include information and advice on technical aids and adaptations, job placement, financial grants and incentives, benefits in kind as well as career guidance and related services.

POINTER



If laws are to have practical impact, well planned information campaigns and services are crucial. These should be designed to address the specific requirements of different stakeholders.

¹⁵ <http://www.businessanddisability.org/>

5.2 Employment support measures

Employment support measures can be provided to either the employer or the person with a disability or both. These should be planned for and adequately resourced from the time the law comes into force. They can take many different forms:

- financial incentives (grants or tax deductions);
- benefits in kind, e.g. loan or transfer of specialised equipment to be used by a worker with a disability or access to training schemes for people with disabilities;
- advisory or information services, e.g. job placement schemes targeted at people with a disability, advice to employers on suitable reasonable accommodations or technical aids linked to the recruitment or retention of persons with disabilities.

Where the employment support measures take the form of financial support, the money provided could:

- merely cover the extra costs associated with employing the disabled worker. e.g. costs associated with making a reasonable accommodation; or
- provide a financial incentive to the disabled person, or, more usually, the employer. This incentive goes above and beyond any identifiable additional costs associated with employing a person with a disability. Such incentives can be classified as a “reward” for the employer, and are not designed to cover or be specifically attached to any extra costs associated with employing disabled workers.

The following sections consider specific forms of employment support measures.

5.2.1 Provision of specialised work-related equipment

In some cases an individual with a disability will require specialised disability-related equipment in order to enable him or her to carry

out a job or to receive training. For example, a blind person may require a computer keyboard with a Braille reader in order to use a computer; or, a person with cerebral palsy may require adapted agricultural equipment in order to work on a farm. Sometimes this equipment can be made or adapted readily and cheaply, and its provision will not prove problematic.

At times it will be difficult, however, for either the worker with a disability or the employer to obtain and/or pay for the equipment or to know what support is available. In such cases, the public authorities can play an important supporting role by providing information on the types of equipment and grants available and providing such equipment, either on loan or on a permanent basis. The equipment can be provided to either the person with a disability or to the employer. If it is provided to the disabled persons, he or she can then take the specialised equipment with him or her if s/he changes jobs.

The public authorities can compile information regarding such specialised equipment in a central location. They can also centralise the purchase of the equipment, resulting in significant economies

In the **United Kingdom**, for example, the Work Choice Programme provides individually-tailored programmes that may involve training and skills development, confidence-building, and interview coaching to help a person with a disability to get and keep a job. There are also Disability Employment Advisors at job centres to advise on programmes available to job-seekers with disabilities and assist in finding a job or gaining new skills.

In parts of the UK (England, Scotland and Wales), the Access to Work scheme, provides grants to people with disabilities to enable them to start working, stay in work or start their own business. These grants are designed to partially cover extra employment costs, including special aids or equipment for employment; adaptations to premises and existing equipment; help with travel to work if public transport is unsuitable; a support worker to provide help in a workplace; and a communicator for support at interviews.

of scale and consequent financial benefits, which would be unavailable to individuals. If necessary, the public authorities could set up units to produce and repair such equipment.

The question of whether this equipment will be made available free of charge or whether some fee or deposit will be payable needs to be decided when the scheme is being designed.

5.2.2 Provision of specialised equipment for daily living

Many people with disabilities require specialised equipment in order to achieve a degree of independence in everyday life and to increase their ability to function. Common examples of such equipment, include wheelchairs and hearing aids. Without such equipment, individuals with a disability can find it highly difficult to live independently and to find and hold down employment. For these reasons the provision of such basic equipment, needed to function in all spheres of life, can play a vital role in enabling individuals with a disability to take up employment. Because such equipment is used not only for employment, but also in other areas, it is inappropriate to expect the employer to be the provider. Instead this task should be co-ordinated by public authorities which, as with specialised work-related equipment, could set up units to produce and maintain this daily-living-related equipment. In making decisions about what aids and adaptations should be paid for by employers as a form of reasonable accommodation, and what are considered 'daily living' items, and thus paid for by the individual with a disability, a broad view should be taken, to avoid the situation where employees are required to bear the cost of such equipment, even if it is useful at work.

As in the case of work-related equipment, a decision will be required as to whether this equipment will be provided free of charge or whether some fee will be charged. In some countries, a means test is applied, with those with income above a certain level being required to pay, and those with income below this level receiving the equipment free of charge.

In **Germany**, the Office for the Integration of Workers with Disabilities provides support to the purchase of assistive technologies directly related to pursuit of work, as well as training in their use. The assistive devices may be completely financed. The scheme is open to persons with any type of disability and also to persons with slight disabilities as the general aim is to facilitate work. Either the employer or the disabled employee can apply for funding. When the employee applies for funding under this scheme, the assistive technology then becomes his or her property.

5.2.3 Provision of transport facilities

One common problem experienced by people with disabilities concerns transport. Poor transport facilities restrict their ability to travel to and from work and to other locations. Public transport systems are often inaccessible to people with certain kinds of disabilities and many people with disabilities are unable to afford to run their own car or use expensive private taxis. Thus, the lack of suitable transport can prevent persons with disabilities having access to and participating in employment

A number of measures can be introduced to promote the safe and appropriate travel to and from work of people with disabilities:

- The most far-reaching step is to develop an accessible public transport system. This involves ensuring that buses, trams, trains, metro systems and taxis are all accessible to people with disabilities, including people who use wheelchairs.
- Where at least some private taxis are accessible to people with disabilities, individuals can be provided with vouchers which can be exchanged for taxi journeys to and from work. These vouchers can be provided by either the employer or the public authorities.
- Individuals with disabilities can be given financial support to enable them to make their own transport arrangements. This money could be used for taxi travel, to subsidise the purchase or running of an (adapted) car or to pay someone else to bring them to work.

- Specific and separate transport systems can be provided to allow people with disabilities to travel to and from work. The systems usually consist of adapted mini buses which can be accessed by people who use a wheelchair.

In **Australia**, the Mobility Allowance provides financial assistance to people with disabilities who are in paid employment, voluntary work, vocational training, a course of study or training, undertaking independent living/life skills training or a combination of paid work and training and who are unable to use public transport without substantial assistance. The individual recipient is free to decide how to use this money to meet their mobility needs. For example, the money can be put toward the purchase, up keep and running of an adapted vehicle; used to pay someone else to provide transport in a private vehicle; or used to pay for taxi journeys.

5.2.4 Financial support

...For disabled persons

Some people with disabilities may require financial support or financial incentives in order to enable them or to encourage them to take up employment. Such financial support or incentives may be necessary because:

- When they take up a job, individuals may give up the right to claim disability social security benefits, which they regard as providing a guaranteed and regular income. This may be a difficult decision, as the job may involve an uncertain future. Policy makers should pay attention to ensuring that the social security system does not create a disincentive to people with disabilities taking up employment.

One means of achieving this is to allow individuals with a disability to automatically reclaim their disability benefits if, for some reason, they are unable to remain in employment. This right might be limited in time, for example, to a period of one year.

Another way is to introduce a 'bridging' arrangement, in which individuals are entitled to earn income up to a specified level as a supplement to their social security allowance, without the

level of this allowance being affected; a proportionate reduction in this allowance being made for income above this up to a specified level; and the allowance being discontinued above this threshold level.

- A further reason why financial supports and incentives are needed is that many people with disabilities may only be able to find low paid work. From a financial perspective, this may leave them in no better position than when claiming disability benefits. A financial incentive which tops up a low pay packet may help to encourage these individuals to take up poorly paid work.
- A further reason is that people starting a new job must often cover certain costs prior to taking up the work. These costs might result from the need to purchase new clothing, specialised equipment or training, or prepaid transport passes. A once-off payment to people with disabilities who have limited resources could help to cover these costs and help prevent this expenditure becoming a barrier to taking up a job.

In **Finland**, the disability allowance is paid to disabled people aged between 16 and 64 to help them better cope in everyday life, at work or in education. The allowance is intended as compensation for costs incurred by disability or ill health. The allowance comes in three amounts, depending on the severity of disability. The recipient's income or assets do not influence the amount of the allowance, which is also untaxed.

In **New Zealand**, the Disability Allowance reimburses people for on-going regular costs that they incur because they have a disability. The amount paid depends on the person's costs and the level of their income.

...For employers

Financial subsidies

The public authorities can provide financial subsidies to employers in the form of a grant or tax incentive to cover any extra costs associated with employing a disabled worker, including allowing for reasonable accommodation provisions. Such subsidies could

amount to funding for recruitment of disabled employees or tax breaks to employers who employ persons with disabilities. In some cases as a result, for example, of providing additional training or making necessary adaptations to facilities, an employer may be faced with certain additional costs. In order to ensure that these costs are not a disincentive or a reason for not employing a person with a disability, the public authorities could meet all or some of these costs. In many cases, though, employers will not incur any extra costs or the costs will be moderate in providing reasonable accommodation, and benefits may result to the employer – such as easier access for the delivery of goods, when a ramp is installed. In such cases, financial subsidies will not be needed.

In **Belgium**, a Collective Agreement, concluded between the social partners provides that under certain conditions, the employer may pay only part of the total remuneration of the worker with a disability, the remainder being paid by a public body. In exceptional cases, labour inspectors may authorise the employer to pay to workers recognised as having disabilities remuneration which is under the minimum level set either in collective agreements or by custom. This reduction – which may never fall under 50 per cent of the normal remuneration – is justified by the reduced productivity of the worker. The difference between what the employer is authorised to pay and the normal level of remuneration is then paid to the disabled person by the public authorities.

In **Germany**, employers may apply for loans or grants in order to comply with reasonable accommodation duties. In addition, wage subsidies and vocational training are provided for all disabled persons. Employers who are not subject to reasonable accommodation or quota obligations can also apply for grants to make their worksite and workplaces accessible. Wage subsidies are granted where a disabled worker has a lower productivity level. The amount granted depends on the severity of disability and other factors which hamper integration into the open employment sector, such as age. Wage subsidies are granted for a limited time, with a maximum duration of three or eight years, depending on various factors.

In the **Netherlands**, subsidies may be granted to the employer or to the disabled employee for the costs of ‘facilities’/‘services’ related to (re)integration. These may vary from special furniture, to transport facilities, to education or training facilities etc.

Financial incentives to encourage recruitment

Employers could be provided with a financial incentive in the form of a grant, wage subsidy or tax incentive, to encourage them to employ workers with a disability. Unlike the financial subsidy referred to above, the value of this incentive would not be linked to or limited to any additional costs an employer incurred through employing a particular person with a disability. The financial incentive would be intended as an encouragement to employers to take on individuals with a disability, and may be useful in promoting the employment of people with disabilities who experience particular difficulties on labour market. The value of the incentive could be linked to the perceived difficulty of employing the worker, or to his or her lower productivity.

For example, a person with a severe disability or a disabled person without an established work history or with a lengthy period of unemployment may be regarded as more difficult to employ than a person with a mild disability, or with an established work history. The incentive could be linked to the amount of time the worker has been unemployed. A higher incentive could be provided to take on a worker who has been unemployed for one year or more. This approach is likely to be less stigmatizing and easier to administer than if the incentive was linked to the level of the individual's work capacity. The incentive could be temporary (for example, a monthly payment over a period of one or two years) or without a time limit.

In designing financial incentive measures, steps should be taken to prevent or minimize the following problems which may arise:

- where the schemes are temporary, employers may tend to dismiss disabled workers employed under the scheme as soon as possible, and to take on a new worker with a disability who is eligible for financial support;
- workers with a disability who are employed under such schemes may be stigmatised, and regarded as less able or less productive;

- non-disabled workers may resent the employment of subsidized workers with disabilities, if they perceive them as a threat to their own jobs.

Where the payment is temporary, the employer could be obliged to retain the worker for a certain period after the incentive payment has ceased. The incentive could incorporate some form of repayment from the employer who fails to retain the employee in employment for a specified period such as two years. Information campaigns could be designed to highlight the ability of

In **Australia**, a Wage Subsidy Scheme is used as an incentive for employers providing jobs to people with disabilities in the open labour market. The scheme aims to increase the competitiveness of workers with disabilities, in gaining employment of at least 8 hours per week, for a minimum of 13 weeks with the intent of achieving sustainable employment for employees with disabilities. The Scheme enables Disability Employment Services (DES) to offer financial assistance through wage subsidies to employers who employ DES participants. DES may negotiate to pay an employer up to a particular amount as an incentive to employ a participant. When this happens, the DES may claim reimbursement for the wage subsidy it has paid to the employer.

In **Canada**, unemployed individuals eligible for employment insurance who have difficulty finding work due to employment barriers are assisted in locating an employer who will enter into an agreement with the local Human Resources Centre of Canada office to provide the individual with employment. The agreement with the employer can be approved for up to 78 weeks.

In the **Netherlands**, an agreed subsidy (called a 'placement budget') is provided, for employers as compensation for hiring a disabled person for at least six months or permanently. In addition, a subsidy (called a 'reallocation budget') can be provided to an employer who allocates a new job to an employee who has become unable to perform the job for which he or she was initially employed. Alternatively, public subsidies can be provided to employers who request a tailored subsidy package where the reintegration costs exceed the placement budget or reallocation budget.

workers with disabilities and tackle stereotypes. The support of trade unions for the financial incentive scheme should be sought, as a means to overcoming reservations which non-disabled workers may have about the scheme.

POINTER



A combination of financial incentives and employment-related support services should be introduced, to assist disabled job-seekers in finding employment and to encourage and facilitate employers in recruiting and retaining persons with disabilities.



Drafting Legislation and Policy

6.1 Consulting workers' and employers' organizations and civil society

Law- and policymakers should aim to consult widely when seeking to draft or revise laws designed to promote the employment of persons with disabilities as well as policies aimed at implementing these laws. Widespread consultation will enable law- and policymakers to profit from the expertise that exists in the community, and help to ensure the effectiveness of any law and policy which is eventually adopted.

6.1.1 Consulting organizations of people with disabilities

In the first instance, it is important to consult with organizations of and for people with all types of disabilities. These organizations should be representative of the disability community. They should be encouraged to take on board the concerns of women and disadvantaged and under-represented groups of disabled persons, including indigenous persons, those from ethnic minorities and persons with HIV or AIDS. The assumption should always be that people with disabilities are able to represent themselves, and do not require non-disabled people to represent their interests. Some people with disabilities cannot represent themselves, however, because they are very young, or because they have severe intellectual disabilities. In such cases representation can occur through family members or advocate organizations, although even in these cases, every attempt should be made to listen to the disabled individuals, who may be able to express some opinions.

The disability community is very heterogeneous. A number of different organizations may exist, representing the interests of people with different disabilities and their related specific needs. Where this is the case, all large organizations should be consulted. Consultation might be facilitated by a national disability council or a network of national disability organizations.

It is useful to produce a position paper discussing the issues to be tackled and options for change, as a basis on which the consulta-

tion can begin. Larger disability organizations could be specifically invited to comment on and discuss this position paper and smaller organizations (of which the authorities may not be aware), could be given the possibility to respond if they wish. For this to work well, the position paper should be widely distributed and adequate publicity arranged, concerning the consultation. Requests for public comment enrich the debate at this preliminary stage.

Support from the majority of the disability community is essential to the success of any eventual policy. If this support does not exist, people with disabilities may boycott the policy, for example, by not registering as a disabled person; not applying for financial or material support; not seeking to enforce individual rights through the courts. Without this support, the law or policy is likely to fail.

Involving people with disabilities

States should recognise that people with disabilities and their organizations, may not easily be able to respond to and comment on draft legislation and policy initiatives. This might be because they are not used to being consulted on legal and policy issues, and therefore need time to reflect and establish the expertise required to respond, or because they are not physically able to process and understand written information. Special efforts may have to be made in order to promote the involvement of organizations of people with disabilities.

Any written or oral information on the consultation should contain a sufficient amount of background information which clearly sets out the perceived problem and the tools which are proposed for addressing that problem. The fact that the opinions of people with disabilities are valued and welcomed should also be stressed. This is because organizations of people with disabilities may not be used to being asked their opinions on such matters and may need to be encouraged to respond.

If written information is provided, alternative formats may be needed to reach people with certain types of disability:

- Braille may be needed to enable blind people to read the text on their own;
- Text written in a large print may be needed to enable people with limited vision to read the text on their own; and
- Easy-to-read texts and short summaries may be needed to enable people with learning disabilities to read the text on their own.

Where it is not financially feasible to provide such alternative formats, or where they are not relevant (e.g. as a result of illiteracy), the report should remind readers of the need to involve people who are blind or have intellectual disabilities in the information and consultation process. Reading the paper out loud in such circumstances, providing a version on tape or on-line, or explaining its contents in easy to understand language, will be important. Similarly, professional readers should be reminded of the need to involve such people with disabilities in the consultation process, and should ideally have the facilitation skills to ensure their participation.

State representatives could be sent to different parts of the country to discuss the legal and policy issues with people with disabilities and their organizations. Such meetings could reinforce and clarify any written information previously provided. Public meetings could be held, thereby reaching many people who would be unable to receive or read written consultation documents. The representatives could report back to the public authorities and formulate recommendations based on what they heard.

Alternatively, the public authorities could train people with disabilities to report to and chair such meetings, and to report the opinions they heard. This may result in a more open and informal discussion with the disability community.

Sign language interpretation may be needed at such meetings to facilitate the participation of deaf people who use sign language.

Local communities may be able to provide such interpretation if provided with enough notice and sufficient support.

If it is not possible to hold meetings, radio chat programmes or on-line forums may be used to stimulate debate on the legal and policy issues, and obtain feedback.

In **Ireland**, an independent committee was established to advise the Government on disability policy. All members of the Committee had a disability or were the parents of persons with disabilities who were unable to represent themselves. The Committee travelled throughout Ireland holding public hearings to discuss the future of disability policy in Ireland. The Committee concluded its work by presenting a lengthy report, based on its own opinions and those of the public who had contributed to the meetings, on how disability policy in Ireland should be organized.

6.1.2 Consulting employers and employers' organizations

Many of the obligations resulting from a law or policy to promote the employment of people with disabilities fall on employers. It is therefore particularly important to ascertain the opinion of employers prior to adopting or amending the law or policy and, wherever possible, to work in collaboration with employers.

Many countries have a central employers' organization which represents a large number of employers. Consultation with employers' organizations need not, however, be confined to a single body. Consultation should occur with bodies which represent particular kinds of employers, such as rural and industrial employers, employers in different sectors, and large and small employers. This is because different industries or sectors may be able to offer different employment opportunities to people with disabilities. As with the consultation of organizations of people with disabilities, a public position paper, which invites comments, may be one means of securing a widespread and informed response.

Law- and policymakers should be aware that there is frequently resistance among employers to binding obligations regarding the

employment of people with disabilities and also in other areas, with a preference in favour of a voluntary code of good practice. European and North American countries, frequently after trying a voluntary approach, have generally rejected such an approach to promoting the employment of people with disabilities and imposed binding obligations on employers. Bearing these patterns in mind, the ‘business case’ for employing persons with disabilities should be carefully prepared and publicized, providing transparent information on how different policy options have worked in other places and the reasons for the success of some of these policies. Employer business and disability networks, where they exist, have an important role to play in promoting awareness of this business case, based on their experience.

6.1.3 Consulting workers and trade unions

As with the employers’ organizations, consultation should occur both with the central trade union organization, and also with sectoral trade unions. Law- and policymakers should also take into account whether trade unions are generally supportive of the employment of workers with disabilities. Some trade unions may perceive their membership to be made up of non-disabled workers and may therefore feel “threatened” by greater efforts to promote the employment of workers with disabilities. On the other hand, trade unions may already be actively involved in the promotion of the employment of people with disabilities, and be able to provide a valuable insight into problems and effective policies.

Whenever the **European Union** considers proposing new European labour law, it is obliged to consult the social partners - representatives of employers and workers - on the desirability of adopting law in the proposed area. If the European Union decides to go ahead and propose legislation in that area, it must then consult the social partners on the content of that legislation.

6.1.4 Consulting service providers

The consultation process should also include bodies providing specialised services to people with disabilities, such as training and rehabilitation services and workplace services. During consultation, law- and policymakers should consider how the experience and expertise of such bodies could best be used to promote the open employment of people with disabilities. Account needs to be taken of the fact that some specialised service providers will see demand for their services decrease if more disabled people are able to enter the open employment market and will be obliged to adapt and change. Some specialised services may already be actively supporting the employment of people with disabilities in the open labour market, for example, through job placement schemes or support while in employment, and these organizations will be able to provide valuable advice on what works and what does not work, as well as serving as a model to other agencies

6.1.5 Consulting other interested parties

A public position paper could be used to facilitate consultation with other interested parties, which may have direct experience of supporting people with disabilities (in employment), such as faith-based institutions or other charity organizations.

POINTERS



When adopting or revising a disability law or policy, law- and policymakers should consult with a vast array of persons and organizations, especially people with disabilities and organizations representing them, trade unions and employers, all of whom will have valuable experience regarding problems faced and possible policy instruments and approaches. In addition, independent expert consultants might also be able to play a role, as can bodies already involved in administering quota schemes or monitoring

non-discrimination legislation. In this way, problems faced can be recognised and adequately addressed.



Involving and consulting organizations of people with disabilities requires considering alternative means of communication to ensure that the experience and knowledge of these persons can be fully acknowledged when drafting or revising legislation or policy measures.



Public authorities should endeavour to use the experience and insight of the social partners to help them develop appropriate legal and policy measures. For example, in carrying out an objective assessment of the need for a quota and the form which that quota should take; or in developing anti-discrimination measures.

6.2 The consultation process itself

The consultation process may involve several stages before a draft leaves the line ministry and is sent to the Justice Ministry or its equivalent, and thereafter to Cabinet and the relevant Parliamentary Committee for tabling. Consultation can take different forms.

Consultation on laws and policies concerning persons with disabilities frequently involves persons with disabilities and their representatives, and disability-related service providers. This can be through task forces which are established for the specific purpose of advising on the legislation, or through existing national committees or councils representing government ministries and organizations of and for persons with disabilities. In some cases, the consultation takes place on an ad hoc basis, through a meeting or meetings called by the government.

Examples

In **Australia**, the National Disability Advisory Council advises the Commonwealth Government through the Ministry for Social Services. Established in 1996, the NDAC members are selected based on their experience of and expertise in disability issues. The Council plays an important role in facilitating consultation with disability consumer organizations, families, carers and service providers on major Government initiatives. It also maintains links with similar disability advisory bodies operating at State and Territory levels.

In **Cambodia**, the Disability Action Council was set up in 1999 to advise Government on disability strategy and legislation, as well as to act as a coordination body for disability-related programmes and services, including the provision of information. The DAC Executive Board includes representatives of Government, disabled persons and non-governmental organizations, donors and members of the business community. DAC involves the social partners through working groups established for specific purposes. It has a number of committees covering areas such as women and children with disabilities, medical rehabilitation, legislation, community work with disabled people and vocational training.

In **China**, when formulating laws and policies concerning disabled persons, the Government consults the Chinese Federation of Disabled Persons, the All China Federation of Trade Unions and the China Enterprise Confederation. In addition, when implementing national policies, frequent contact is also maintained with the Federations for Disabled Persons, trade unions and enterprise organizations.

In **Kenya**, a Disability Task Force was set up in 1992 to review laws relating to persons with disabilities. One of the key recommendations was the adoption of a proposed Persons with Disabilities Bill. An Act of this name was adopted in 2003, following extensive further consultation with disabled persons organizations and service providers.

In **Mauritius**, the Training and Employment of Disabled Persons Board, established by law in 1996, is consulted by government on the implementation of national policy. This Board comprises representatives of disabled persons and of employers.

In **Tanzania Mainland**, organizations of employers and workers are called upon to cooperate in the application of disability legislation through the Vocational Education and Training Authority and the National Advisory Council.

In the **United Kingdom**, the Disability Rights Task Force was established in December 1997 to examine the full range of issues that affect disabled people's lives and to advise the Government on what further action it should take to promote comprehensive and enforceable civil rights. It produced its final report in 1999, prior to being dissolved.

To be effective and to realistically reflect the needs of the country, consultations on disability-related legislation and policy should also involve the social partners – representatives of employers' and workers' organizations - as well as disabled persons' representatives. Examples of how such consultation can be organized are found by examining the process of labour law development and reform in different countries. In some cases, such consultation take place through existing tripartite bodies, such as economic and social councils, tripartite labour advisory councils or boards,

Examples: Consultation through Ad hoc Tripartite Task Forces

In **Indonesia**, in response to the social impact of the Asian Financial Crisis and the collapse of an authoritarian regime in favour of democratic political reforms, a Tripartite-Plus Task Force was established in 1999 by Decree of the Minister of Manpower. Participants included representatives of government, employers, workers, and other interested civil society groups. Through a broadly consultative process, involving workshops held through the Department of Manpower, the Tripartite-plus constituents reviewed and revised the labour laws to be responsive to a democratic and modern labour market.

In **Kenya**, a coordinated process of labour law reform took place in the past decade, with ILO support, which led to revised and updated texts. Once enacted, the new laws will foster strengthened social dialogue in a legal framework consistent with ILO standards ratified by Kenya. A tripartite Labour Law Task Force carried out nation-wide consultations on what the new labour laws should contain. There was active participation in these consultations: in the first round of media calls for public comment, approximately 40 institutions, NGOs and individuals sent in their views. Subsequently the Task Force submitted its Final Report and the draft legislations to the Minister of Labour and Human Resource Development.

In **Singapore**, a number of tripartite committees were formed over the years, to address various issues and dissolved once consensus was reached in the form of advisories, guidelines or other means. Examples are the different tripartite groups formed to review various aspects of the Employment Act in 1994, 2004, 2008 and 2012.

or national social dialogue commissions or councils (ILO, 2013). In other cases, they occur through bodies set up specifically for the purpose or through more informal arrangements. The Ministry of Labour's direct contacts with the social partners and the issuing of White Papers can be another consultation route. Sometimes the consultation process is enhanced by national or international consultants, who are hired to assist in the drafting of the law.

Examples: Consultation through existing Tripartite Bodies

In **Hungary**, the Labour Code of 1992 recognized the National Interest Conciliation Council (NICC). The NICC comprises the social partners and the Labour Ministry. It is responsible for ensuring consultation on labour relations and employment issues of national importance, notably labour law reform. The social partners also have statutory rights to information.

In the **Netherlands**, the reports of the Social and Economic Council are often used in framing legislation on social issues.

In **South Africa**, the National Economic Development and Labour Council was created in 1995 by the NEDLAC Act No. 35. It reflects the post-apartheid Government's commitment to seeking representative consensus on major economic, social and development policies. In light of the particular needs of South Africa, it is composed of the traditional social partners, plus organizations which represent community interests. Its objectives include considering all proposed labour legislation relating to labour market policy before it is introduced in Parliament. It has reached agreement on a wide array of legislation, including the Employment Equity Act, 1998 which prohibits discrimination on the ground of disability, as well as other grounds. It has also adopted a number of codes of good practice, including.

In **Sri Lanka**, the National Labour Advisory Council provides a forum for the government to seek the views, advice and assistance of workers' and employers' organizations on matters relating to labour legislation, among other topics.

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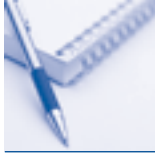


Whether a formal arrangement is chosen or an informal approach is taken, the consultation process provides a unique opportunity to bring together the different parties with an interest in and affected by disability-related legislation and policy. Such a consultative process, involving government, employers', workers' and disabled persons' representatives as well as other interested parties, will go a long way to ensuring that the varying interests are adequately reflected in the law and policy.



Seminars to finalise the text of a law with as wide a stakeholder involvement as possible, have proved useful. Law- and policymakers should make the necessary efforts to consult both the social partners and civil society.





Notes

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Monitoring and Enforcing the Law

In addition to considering how a law and policy is to be implemented and consulting widely so as to ensure widespread support, it is very important at the drafting stage to plan the ways in which these laws and policy will be monitoring and enforced. Monitoring and enforcement are key to effective implementation. In some countries, special organizations and bodies have been established to promote compliance with the principle of non-discrimination, and these may have a statutory duty to implement and enforce equal employment opportunities laws and policies. Since these policies and legislation also touch upon human rights law, for which the State is ultimately responsible, compliance cannot be left to individuals and private interest groups alone, but also demands a degree of State involvement. Laws and policies need to make provision for different or varying implementation environments and issues. Some of the issues are operational and some are more structural.

Enforcement of the law may be foreseen through:

- the Labour Inspectorate;
- an administrative monitoring system or national human rights institution such as a National Disability Council, Ombudspersons or an Equality Commission;
- the judicial system in criminal, civil or labour law courts;
- industrial employment tribunals or
- a combination of the above approaches.

Legislation concerning the employment of persons with disabilities generally contains sections dealing with institutional structures charged with the monitoring and enforcement of the law; announcing its establishment, if it is a new structure (for example, a National Disability Council); and outlining its composition, role and functions. The role of the labour courts may also be described in the law, along with complaints procedures, and sanctions and remedies (such as administrative or penal fines, imprisonment, damages, reinstatements).

7.1 The law in practice

The tasks of monitoring and evaluating compliance with equal employment opportunities policies and legislation can be left to the enforcement agencies involved or assigned to special bodies or independent researchers.

Policies and laws often impose a duty on employers to collect data on the number of people with disabilities employed and report such data to a special agency. Such data can be used by workers' councils that often have the duty to promote equal employment opportunities within the firm, and social partners when drafting or evaluating collective agreements.

The collection of such data involves a restriction on the right to privacy of the disabled persons concerned given that information on these persons and the presence or absence of disabilities is collected and supplied to others. Careful consideration is needed of how this need for information can be balanced with the promotion of equal employment opportunities for a disadvantaged and under-represented group. Reconciling information collection with the right to privacy presupposes the adoption of laws stipulating the exact purposes and clearly defined circumstances under which such information on individuals can be collected and passed on. For example, in the French Labour Code (L. 520), provision is made for the collection of statistics, for example on the number of disabled people in employment, but not names of individuals.

The Labour Inspectorate, within the framework of its usual data collection duties, may be called upon to gather data on actions or infringements of a disability law or equality law with a disability dimension. Labour inspectors have a role in detecting and addressing violations during inspection visits, and may also have an important role in prevention, including through providing technical information and advice.

The task of monitoring compliance with and evaluating the effects of equal employment opportunities policies and legislation can also

be assigned to such bodies as a Human Rights, Equal Opportunities or Disability Commission. These bodies are usually dependent on the data provided by individual employers, but often have the power to start investigations on their own initiative.

Ombudspersons often have administrative functions to check abuses by public authorities, and could also be used to monitor respect for disability provisions. Individuals can usually make complaints to them.

The task of monitoring compliance can be partly carried out by NGOs, such as organizations representing people with disabilities. These bodies can make valuable contributions by investigating the strengths and weaknesses of equal employment opportunities policies and law. They lack, however, the authority – and often the resources – to investigate complaints and measure compliance by individual employers, as a result of which the task of monitoring cannot be solely left to these bodies.

POINTER



When adopting or revising equal opportunities legislation and policies seeking to implement these laws, attention should be paid to the monitoring and evaluation process. The responsibility for performing these tasks can be assigned to various organizations and bodies. In order to be effective, these organizations and bodies should have sufficient means - information, staff, resources - and the necessary powers to carry out these tasks. They should also be accessible to people with disabilities.

7.2 Asserting rights under the law

The effectiveness of an equal employment opportunities law and regulations seeking to implement these laws depends on the avail-

ability and accessibility of judicial and/or administrative procedures to individuals. Individuals, and those who represent their interests, must be enabled to enforce the principle of non-discrimination or to claim appropriate compensation through individual cases or group actions taken before the courts.

Disability complaints can be made at different points in a judicial system, through:

- Constitutional law provisions
- Criminal law provisions
- Civil and labour law provisions
- Combinations of criminal, civil and constitutional law

It has been noted (Section 2.4 above) that it is easier and less intimidating, in many countries, to bring a complaint under civil and labour law than under constitutional law or criminal law.

While court procedures are important, their effectiveness in promoting equal employment opportunities for people with disabilities should not be overestimated. Individual workers who consider themselves wronged because of discriminatory treatment should nevertheless be provided with the opportunity to bring legal action before an independent court and to have an effective remedy provided where discrimination is found to have occurred.

7.3 Strengthening judicial mechanisms

Judicial procedures can be strengthened by the following actions.

- National law should contain such measures as are necessary to protect workers against victimization that is, punishment by the employer in response to an individual bringing a complaint of discrimination or acting as a witness, or otherwise supporting the complainant.
- Harm to the interpersonal relationship between parties can frequently be prevented, or at least reduced, by offering

conciliation procedures – such as mediation or other forms of prevention and settlement – as part of a court procedure or pre-hearing process.

- The financial burden for individuals seeking the enforcement of their rights can be, and according to human rights law should be, alleviated by positive State actions – such as financial assistance or the provision of legal experts – to allow individual applicants to present their cases properly and satisfactorily before a court.
- The use of simple, straightforward court proceedings – such as civil and labour court cases – should be preferred, as these are less onerous than criminal proceedings.
- Court proceedings should take place in a timely manner following the alleged discrimination and an adequate appeal be available.
- The duration of legal procedures can be reduced by imposing strict time periods and by ensuring that there are a sufficient number of judges who are adequately trained.
- The emotional burden on the defendant can be alleviated by allowing NGOs or trade unions to support individual applicants by allowing becoming associated with the case or bringing the case on behalf of the applicant.
- NGOs and trade unions might be given the right to lodge complaints in their own name (collective complaint procedure).
- The burden of proof for the applicant can be lessened by shifting this burden. This means that it will suffice for an applicant (i.e. disabled person) to establish facts indicating that adverse treatment on the ground of disability has occurred. Once this has happened, the defending party must prove that the measure was not discriminatory.
- It is important that decisions are published, and widely available, including in accessible formats for people with disabilities.

- The implementation and enforcement of equal employment opportunities laws and regulations through the courts presupposes knowledge and sensitivity about discrimination issues on the part of members of the judiciary and legal advisors about discrimination issues. Programmes of briefing and awareness-raising specifically aimed at the judiciary, advocates and legal advisors should be planned for, adequately resourced and delivered at regular intervals.

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When adopting or revising equal employment legislation, lawmakers should provide for court procedures but should not solely rely on such individual enforcement mechanisms to ensure effective implementation of the law.

7.4 Administrative enforcement institutions

Some of the risks and disadvantages associated with court procedures can be reduced by making available administrative enforcement procedures to workers who consider that their right to non-discrimination has been violated. The most frequently used options in this respect are the establishment of an Ombudsperson or a Human Rights, Equal Opportunities or Disability Commission.

Procedures before these bodies usually have in common that:

- there are no costs involved for the parties;
- legal representation is not required; and
- the decisions of these bodies are non-binding.

As a result, the procedures before these bodies often have a less formal character and there is a greater degree of co-operation on the part of the employer and other parties.

The fact that the decisions of Ombudsperson and the commissions are legally non-binding does not mean that they lack legal relevance. On the contrary, these bodies have been established in view of the specialist expertise required in the respective fields. This implies that the decisions of these expert bodies are influential, with the expectation that they will be followed by the parties, and that weight is attached to them by courts during court proceedings.

7.4.1 The Ombudsperson

In many States one or more Ombudspersons have been established to promote good State practices towards citizens. Such institutions

The precise mandate of the Ombudspersons differs, both within and between States. In some countries, such as **Croatia**, there are specialised Ombudsperson for various grounds of discrimination. In others, such as the **Netherlands** and **Sweden**, there is a single National Ombudsperson with a broad mandate with respect to State acts and omissions in the area of discrimination.

In **Norway**, the Equality and Anti-Discrimination Ombudsperson has permanent administrative responsibility for opposing discrimination and promoting equality, and for enforcing the Anti-Discrimination and Accessibility Act, 2009 and the chapter on equal opportunities in the Work Environment Act, among other laws. Submitting a complaint to the Ombudsperson is an alternative to filing a lawsuit in discrimination cases. The Ombudsperson's office carries out impartial assessments of complaints received and makes statements about whether discrimination has taken place. The Ombudsperson's statement may be appealed to the Equality and Anti-Discrimination Tribunal. In addition to law enforcement and issuing statements, the Ombudsperson has a promotional role in contributing to increased equality in society as a whole.

In **Finland**, there is a similar system, with the difference that, at the initiative of the Equality Ombudsperson, the Equality Council may issue an injunction to stop discriminatory behaviour in violation of the Equality Act, No. 609 of 1986.

traditionally have the task of investigating written or oral complaints from individuals against the government or other public organs. Given their focus on promoting good State practices, they do not usually have the power to investigate complaints against private employers.

When investigating a complaint, the Ombudsperson can use human rights law, international labour law and non-discrimination law as a yardstick against which to measure state behaviour, although their mandate is usually not confined to these sources of law. They hold hearings using an informal and conciliatory approach. The results of their investigations are commonly published, and sent to both parties, and contain, if appropriate, recommendations for the improvement of state practices. The authority – and possibly the effectiveness – of an order from the Ombudsperson will depend on the precise mandate.

7.4.2 A Human Rights, Equal Opportunities or Disability Commission

In various countries, Human Rights Commissions, Equal Opportunities Commissions and Disability Commissions have been established to promote and protect human rights, equal treatment law and the rights of people with disabilities. These bodies are either directed at disability specifically or also mandated to protect and further other grounds of equality. They are sometimes empowered to receive individual complaints, both against public and private persons and bodies. The adjudication of individual complaints is usually just one – though arguably the most important one – of the many tasks assigned to such bodies. These bodies may also assist individual complainants with their proceedings but this is generally only possible where they do not have a function in deciding cases or claims of discrimination.

These commissions commonly have a very broad mandate to promote and protect the respective bodies of laws. In view of this, these bodies frequently have a range of different tasks. These can include starting investigations on their own initiative, conducting independ-

ent surveys on human rights compliance or equal opportunities or the rights of people with disabilities; assisting persons with disabilities to bring claims, promote and monitor human rights; publishing independent reports and making recommendations on issues falling within the realm of their mandates, and providing assistance to victims of human rights or non-discrimination law or disability law violations. Some statutes require employers to lodge reports with such commissions on their efforts to implement the law.

In **Australia**, all these tasks are performed by a single body: the Human Rights and Equal Opportunity Commission which comprises a President and four separate Commissioners – Sex, Disability, Human Rights and Indigenous Peoples. There seems to be an international trend, for reasons of efficiency, of bringing together the knowledge and expertise of the various specialist bodies in a single human rights and equality commission. This recently occurred in the United Kingdom where the Equality and Human Rights Commission was established taking over responsibilities of the Commission for Racial Equality, the Equal Opportunities Commission (which dealt with gender equality) and the Disability Rights Commission.

POINTER



Additional approaches should be established in addition to court procedures to promote the implementation of equal opportunities legislation. These approaches should involve a clear mandate and be adequately resourced.

7.5 Other Approaches

Policy makers in a number of countries have attempted to address the problems of discrimination and under-representation, and the problems associated with individual law enforcement.

They have addressed these issues through the imposition of positive duties on employers to promote the employment of people with disabilities and to promote equality. The goal of these positive duties is to restructure institutions so as to ensure that they are more open to the employment of people with disabilities (and other disadvantaged and under-represented groups). The duty is therefore triggered as a result of evidence of structural discrimination, including chronic under-representation of people with disabilities in particular types of work or positions of power. As a result of the positive duties, action is required to achieve change. These positive duties can take a number of forms, one of which is contract compliance.

Public Sector Equality Duty

In **England, Scotland and Wales**, the Equality Act, 2010 requires that public bodies, when carrying out their activities, have due regard to the need to eliminate discrimination, harassment and victimisation; advance equality of opportunity for people from different groups, including disability; and foster good relations between people from different groups when carrying out their activities. The objective of the duty is to ensure that public bodies consider equality when carrying out their functions, without adding unnecessary processes and bureaucracy. A review of the operation of this duty, commissioned in 2012, found that its implementation varies considerably across the public sector and made a number of recommendations, including that clearer guidance should be produced clearly setting out what is necessary for compliance and that reporting requirements placed on small employers delivering services should be reduced.

In **Northern Ireland**, public authorities have a duty to take due regard of the need to promote equality of opportunity when carrying out their functions. Each public authority is required to draw up an equality scheme which must state the authorities' arrangements for consultation and assessment of the likely impact of policies on the promotion of equality of opportunity; for monitoring any adverse impact of such policies; for publishing results of its assessments; for training staff; and for ensuring public access to information and services. Such schemes must be approved by the Northern Ireland Equality Commission.

7.5.1 Contract Compliance

Under a contract compliance programme public authorities can require that all contractors, or all firms wishing to contract with the public authorities, have a good record with regard to the employment of workers with disabilities (and other disadvantaged and under represented groups) or, where this is not the case, take active measures to promote the employment of people with disabilities. The requirement to be met may be nothing more than a record of compliance with disability employment legislation, often evidenced by the ‘certification’ of the employer by one of the commissions described above. It may amount to meeting a higher standard, however, or include the taking of action to remedy any perceived problem. Compliance with a quota scheme could also be a requirement. The precise obligation under contract compliance schemes can vary, but the ultimate goal is to increase the participation of people with disabilities in the workforce and, on occasions, to equalise pay and access to benefits.

Specific obligations under a contract compliance scheme could include monitoring the number of existing employees with a disability; undertaking periodic reviews of employment practices; and, where under representation is revealed, engaging in affirmative action to improve the representation of people with a disability in the workforce. Complying with public procurement obligations can be a participatory process involving trade unions in the process of drawing up an equity plan, to remedy any perceived discrepancies. Adherence to contract compliance obligations should be monitored by a statutory body which actively investigates employment policies and employment records of covered undertakings, or by one of the commissions described above.

Public procurement requirements: Examples

In the **United States**, under Section 503 of the 1973 Rehabilitation Act, government contractors are required not merely to abstain from unlawful discrimination but also to take positive measures to increase the representation of minorities in the workforce. This requirement, which is estimated to apply to about 300 000 federal contractors, employing about 40 per cent of the working population, has had a significantly more powerful influence on employers than individual complaint led investigations and prosecutions.

Federal Regulations introduced in 2013 strengthen the affirmative action provisions of Section 503, by establishing a 7 per cent goal for the employment of qualified individuals with disabilities by contractors, who may apply this goal to each of their job groups or to their workforce as a whole if they have 100 employees or fewer. Contractors are required to carry out an annual analysis and assessment of problem areas, and adopt action plans to address problems identified. The aim of these regulations is to aid contractors in their efforts to recruit, hire and improve job opportunities for individuals with disabilities.

Similar positive duties have been introduced in other countries also. In **Canada**, under the Federal Contractors Program, established in 1986, contractors with a workforce of 100 employees or more, who do business with the Government of Canada worth \$1 million or more are required to achieve and maintain a workforce that is representative of the Canadian workforce, so as to promote opportunities for those facing discrimination in the workforce, including persons with disabilities. Contractors must certify their commitment by signing an Agreement to Implement Employment Equity (LAB 1168) prior to contract award.

South Africa, under the Preferential Procurement Policy Framework Act No. 5, 2000 and the **European Union** through the EU Public Procurement Directive 2014/24/EU lay down comparable requirements.

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Laws in relation to disability should contain adequate and efficient implementation and enforcement mechanisms. Enforcement bodies should be considered as well as mechanisms such as that of an Ombudsperson or Human Rights Commission or Equality Authority.



The adequate monitoring and implementation of laws and policies presupposes that the responsible organization or body has the necessary means and powers to perform these tasks. These need to be provided for from the date the law enters into force.



The enforcement of laws and policies, by way of court-based or other enforcement mechanism, is not solely a task of individuals. The State is also obliged to introduce administrative or institutional enforcement mechanisms.





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Summary of Principal Points

These guidelines have been developed for policy-makers and those involved in drafting legislation concerning the employment of persons with disabilities. It is hoped that they will prove useful in developing and reforming such legislation, so that it becomes more effective in practice.

The guidelines focus on the main types of civil and labour law and related policy currently in place to promote employment opportunities for persons with disabilities. Particular attention is paid to non-discrimination legislation and quota laws, and measures which have been introduced to maximize their practical impact. The key points highlighted throughout the guidelines are drawn together here, for ease of reference.

General principles

When considering the adoption of a law promoting the equal employment opportunities for people with disabilities or the formulation of policies seeking to implement such a law, law- and policy-makers should take care to ensure that:

- disability laws and policies are in full conformity with international human rights law and labour standards;
- the provisions are compatible with other national laws and policies;
- the definition or definitions of disabilities used, reflect the fact that people with disabilities may be prevented from participating in the open labour market by both individual and environmental barriers;
- provision is made for affirmative action measures, which provide preferential treatment to groups of disadvantaged persons, to compensate for structural disadvantages faced;
- the gender dimension of disability is always taken into account, along with other forms of multiple or intersecting discrimination;

- the process of developing the laws and policies is participatory, with consultation with all stakeholders, including employers' organizations, workers' organizations, disabled persons' organizations and other interested parties.

Laws aimed at prohibiting discrimination on ground of disability in the labour market should:

- explicitly refer to disability as a prohibited ground;
- exercise caution in defining disability;
- cover all forms of discrimination:
 - direct discrimination;
 - indirect discrimination;
 - harassment;
 - discrimination by association;
 - instruction to discriminate;
 - victimisation.
- make provision for reasonable accommodation, stating that its denial is a form of discrimination and defining what this involves while recognizing the justification of 'disproportionate burden';
- allow for genuine occupational requirements or inherent requirements of the job, which are to be applied narrowly;
- stipulate that the burden of proof shifts to the person who allegedly discriminated, once the complaining party has provided facts suggesting the existence of discrimination;
- be accompanied by social policy measures; and
- allow for affirmative action measures.

Quota laws should:

- be framed as affirmative action measures linked to non-discrimination;
- be aimed at assisting disabled job-seekers to get jobs;

- be backed up with a payment, such as a compensatory levy and an effective enforcement mechanism to encourage compliance by employers;
- offer employers other optional ways of meeting the quota obligation, in addition to recruiting disabled persons and/or paying a levy;
- be based on clearly identified policy goals and be targeted at a clearly specified group of people with disabilities;
- be based on a registration/identification system which guarantees real benefits to those identified as disabled;
- be tailored to the economic situation and employment pattern in the State in question.

The eventual success of equal opportunities legislation and policy measures is often highly dependent on:

- information campaigns, including general and technical information and advice; and
- employment support measures.

The effectiveness of such legislation and policy also depends on the extent to which they reflect the varying interests and needs of groups in society which are affected. To ensure that these interests and needs are adequately taken into account, extensive systematic consultation should take place with the key stakeholders – organizations of disabled persons, employer and worker organizations, service providers as well as relevant government ministries. Consultations should ideally be formalized through existing bodies or through task forces set up for the purpose.

Effective enforcement of the law requires provision for procedures to allow individuals to bring legal actions to court. In addition, it is important to provide for monitoring and enforcement through agencies such as Ombudspersons' offices or Human Rights Commissions. Enforcement procedures should be planned from the outset, and adequately resourced.



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Equal Employment
Opportunities for
People with Disabilities
through Legislation**

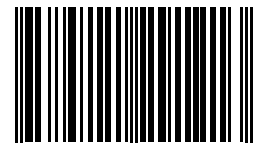
Guidelines

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