

Equality and Accessibility

A Proactive Approach to Strengthen the Legal Status and Protection against Discrimination of Persons with Disabilities

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1 Introduction

In November 2002, the Norwegian Government appointed a legislative committee to investigate the need for legislative and judicial measures to strengthen the legal status and protection against discrimination of persons with disabilities. In June 2005 the Committee's report was tabled for the Minister of Justice. The report has been published as NOU (Official Norwegian Report) 2005: 8 *Likeverd og tilgjengelighet*, which in English read *Equality and Accessibility*.¹ This presentation is based on the Committee's deliberations and proposals, as it is found in the English Summary of the Committee's report.²

Nine members comprised the Committee. Two members represented the two Norwegian Confederations of Organisations of Disabled People, and two members respectively the Norwegian Association of Local and Regional Authorities and the Confederation of Norwegian Business and Industry. The other members, appointed by the Ministry, were two lawyers (one University Professor, one Judge of the Court of Appeal), two former politicians and one Professor in Social Work and Health Science. All together there were five lawyers in the Committee.

The Committee was, according to the terms of reference, tasked to draft a new bill and/or proposals to amend existing legislation in order to strengthen the protection accorded by the law against the discrimination of persons with disabilities. The object should be to promote full participation in society and equality between persons with disabilities and other citizens. The most *proactive* elements of the proposed legislation are in the field of accessibility. Before presenting these proposals, I will as a starting point emphasize the value platform and objective as presented in the report.³

2 Human Rights, and the “Meaning” of Disability

As stated in countless human rights' documents, *all* people are equal and have the same human worth. Human worth is the same regardless of biological, social and cultural factors such as gender, ethnicity and disability. Disabilities are a natural expression of human diversity. All people are vulnerable to changes

¹ The report is available on the Internet (“odin.dep.no”). It is also available, in Norwegian, in Braille and as an audio book. Orders for Official Norwegian Report 2005: 8 in its various formats can be addressed to: Avdeling for offentlige publikasjoner, P.O. Box 8134 Dep, NO-0033 Oslo, Norway. The report has an English Summary (Vedlegg (Enclosure) 3); and Vedlegg (Enclosure) 4 is an English translation of the Draft statute – Act relating to prohibition against discrimination on the basis of disability (Discrimination and Accessibility Act) and amendments to other Acts.

² As chairman of the Committee, I drafted the English summary. In many respects, this article is based on that summary. I am, therefore, indebted to the other members of the Committee for their comments to the proposed summary, and first and foremost, to the legal secretary of the Committee, Mrs. Marianne J. Hotvedt.

³ NOU 2005: 8, Chapter 3.

resulting from age, sickness and other circumstances. Most people will experience changes in ability in different phases of life. The principle of human equality constitutes the basis for human rights. This principle is the source for the rules concerning the right to equal treatment and prohibition against discrimination.

The solidarity concept of the welfare society can also be seen as rooted in the principle of equality. A supreme political objective consistent with this involves ensuring “full equality and active participation” for persons with disabilities. Other stated primary objectives are associated with improved accessibility, a focus on individual needs in connection with services, inclusive working conditions and economic and social security. All these objectives can be derived from the equality principle and the goal of full equality and active participation.

In Norway, there is a fairly good documentation of how people with disabilities meet obstacles created by society limiting their potential for equal participation in the community. This shows that the stated political objectives and values associated with disability and persons with disabilities are not in practice satisfactorily reflected. There is a “gap” between the required standard and the reality.⁴ A broad political consensus concerning this view resulted in the appointment of the legislative committee. The Committee’s terms of reference are confined to legal measures, but the Committee has also drawn attention to certain other means of closing the gap mentioned above. Legislation alone is not capable of ensuring equality for persons with disabilities. Changes of attitudes and ways of thinking are important instruments for ensuring that due regard for persons with disabilities is taken into account in specific decisions. Financial incentives and other positively directed measures may efficiently further the objective. However, the Committee has, in accordance with the terms of reference, given priority to the task of drafting legislation that can help to ensure such equality, primarily by preventing discrimination and promoting accessibility.

3 Understanding of the Term “Disability”

During the last decade, there has been a shift in perspective in the understanding of the term “disability”. The traditional view has been that disability is a quality of the individual. This view is based on a medical understanding of disability, where a disability is regarded as the result of individual biological factors associated with sickness, injury or physical defects. According to this view, disability should be responded to with medical treatment and rehabilitation in order, if possible, to “correct” the problem experienced by the individual. This view has long been the object of considerable criticism, particularly with regard to its failure to take into consideration that it may be the very arrangement of the surroundings that makes biological factors result in disability. The structure of society and the specific situation are decisive for the extent to which an

⁴ See e.g. Official Norwegian Report 2001: 22 *From User to Citizen* (The report of the Manneråk Committee).

individual regards himself or herself as disabled. Just as a wheelchair user is less disabled in an environment without stairs, a blind person is not disabled when using a telephone. Thus, disability is not only associated with individual qualities and biological factors, but also to a greater or lesser extent with the situation and the environment.

In other words, disability is not a quality, but a factor or a situation that may occur in an individual's meeting with society. The Committee supports the essence of this understanding of disability. The World Health Organization has prepared a classification, International Classification of Functioning, Disability and Health (ICF) that is intended to serve as an analysis tool for both treatment and research and for shaping policy.⁵

Although the Committee subscribes to a relational or social understanding of disability, the Committee found it difficult to apply such a definition in the legislation. This is primarily owing to the extent to which the concept incorporates consequences while the legislation is precisely designed to combat these consequences. The Committee has therefore adopted "disability" as the key term.

In Norwegian, the basis for discrimination is proposed to *nedsatt funksjonsevne*. It is difficult to find a precise English term for this central concept. In the WHO's terminology, the closest equivalent is strictly speaking *impairment*. However, since all legislation from English-speaking countries in this field uses the term *disability*, the latter term is used to translate "nedsatt funksjonsevne". The Norwegian term "nedsatt funksjonsevne" denotes individual physical, mental and cognitive *impairments* without specifying degree or duration or requiring that the *impairment* has resulted in any impedimental consequences for the person concerned.

Disability denotes qualities associated with the individual. At the same time, the Committee did not wish to reserve protection against discrimination for persons who *have* a disability, but rather to provide protection against discrimination *on the basis of* disability. Rather than defining a protected group of persons, the Committee wished to define a *protected ground*. It thus makes no difference whether a discriminated person has a disability or whether he or she has been discriminated on the basis of an assumed disability or because he or she has a disabled child. The focus shall be on the act of discrimination. The Committee has also emphasized the importance of protection against discrimination on the basis of former disability, assumptions concerning future disability and the disability of other persons (e.g. a spouse or child). This is laid down in section 4 of the proposed statute.

⁵ The work of the ICF is based on a view of disability as a complex phenomenon that can be explained neither by means of a purely medical model nor by means of a purely social model based on a view of disability solely as a socially created problem. See World Health Organization: *Towards a Common Language for Functioning, Disability and Health – ICF*. 2002 (UN).

4 “Discrimination” and Obligations for an Anti-discrimination Legislation

Both legislation and legal theory operate with the terms direct and indirect discrimination. Discrimination that is associated with explicit different treatment is referred to as direct discrimination. Cases where neutral or formally equal treatment results in discriminatory different treatment are referred to as indirect discrimination. The most important factor involved in this distinction is that differences in consequences are also included in the discrimination concept.

As regards protection against discrimination, it is required that the different treatment is of a *negative character*. This differentiates discrimination from positive discrimination, i.e. different treatment designed to compensate for the fact that specific groups have a weaker social status than others. In order to be characterized as discrimination, the different treatment must *lack a reasonable justification* and/or *have a disproportionate negative consequence*. According to generally accepted ethical standards and major human rights conventions, certain individual factors do not constitute a justification for different treatment, e.g. gender, skin colour, sexual orientation, etc. Disability is also an individual factor that in itself does not constitute a justification for different treatment. It is nevertheless important to point out that certain forms of different treatment on the basis of individual characteristics such as disability must be accepted. For example, blind people may be excluded from being employed in a job that requires driving a car.

However, even if different treatment is justified on objective grounds, it may be found to be discriminatory if there is disproportionality between ends and means, between the objective consideration on which the different treatment is based and the negative consequence of the different treatment on the affected parties. What constitutes a reasonable cause and what constitutes disproportionality in any individual case will depend on the specific circumstances and how the specific limits of the discrimination concept are defined.

Prohibition against discrimination is often followed up by prohibition against harassment, prohibition against instructions and prohibition against reprisal against persons who institute legal proceedings for discrimination. This also applies to the statute proposed by the Committee. The delimitation of the discrimination concept applied in the legislation does not necessarily conform to an individual’s subjective experience of discrimination or harassment. In the proposed statute, the Committee therefore uses the term discrimination to denote the illegitimate and unlawful form of different treatment. These proposals constitute in some way a clear-cut anti-discrimination legislation that will be more a reactive, than a proactive, legal instrument. However, the case law produced by a new Anti-Discrimination Ombud, may give increased to awareness of discrimination as an existing phenomenon.

The Anti-Discrimination Ombud shall handle all cases of discrimination, regardless of prohibited ground. In parallel with the work of the Committee, the Parliament (“Storting”) drafted and adopted a new Act relating to prohibition of discrimination on the basis of ethnicity, national origin, ancestry, skin colour,

language, religion and ethical orientation (Discrimination Act) in addition to a separate Act relating to a joint enforcement apparatus for discrimination matters (the Act relating to the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal). These Acts were adopted in April 2005 and the Ministries' proposals were therefore important documents for the Committee's considerations. This legislation supplements the Gender Equality Act of 1978. The legislative committee wished to harmonize its proposals with the remainder of Norwegian discrimination legislation in order to prevent fragmentation of protection against discrimination. This applies to terminology, understanding of the discrimination concept and various enforcement issues.

Pursuant to its terms of reference, the Committee ensured that the Draft statute complies with Norway's international law and human rights obligations. These can be inferred from binding conventions that have precedence over Norwegian national legislation. This applies to the United Nations Covenant on Civil and Political Rights (1966), the United Nations Covenant on Economic, Social and Cultural Rights (1966) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950). In addition, both the United Nations and the Council of Europe have issued a number of recommendations and guidelines with which Norway should comply when drafting and applying national legislation. The most important "soft law" implemented in this area is the UN's "Standard Rules on the Equalization of Opportunities for Persons with Disabilities" from 1993.⁶

EEA cooperation also entails certain obligations for Norway.⁷ In the area of employment, the EU has adopted Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (framework directive) and, pursuant to EU Council Directive 2000/43/EC of 29 June 2000, member states are obliged to adopt the principle of equal treatment between persons irrespective of racial or ethnic origin. In addition, a number of political steering documents have been issued as part of the EU's anti-discrimination work. Furthermore, the EU has adopted a number of directives and regulations that place requirements on accessibility, particularly in relation to means of transport, and several such requirements are currently being prepared. Rules have also been issued that provide for a greater emphasis on universal design and other social considerations in connection with public procurements through EU Council Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and EU Council Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Work on implementation of these directives in Norwegian statutes and regulations is in hand.

⁶ The Committee's chairman and secretary have on two occasions participated as advisers to Norway's UN delegation in connection with the current negotiations concerning a new United Nations convention on equal rights for persons with disabilities.

⁷ Norway is hardly obliged to comply with EU legislation in this area, but it is nevertheless regarded as desirable to do so.

Other countries have had legislation for a number of years designed to ensure equal treatment of, and improved accessibility for, persons with disabilities. Members of the Committee made study tours to Australia, Canada, the UK, Finland, Ireland, Sweden and the USA for considering other countries' protection against discrimination, and their experience and assessments. Investigation of other countries' legislation and enforcement of such legislation has been important for the Committee's considerations, since the Committee's proposed statute is a form of second or third generation discrimination legislation in relation to persons with disabilities. During the study tours, the Committee visited representatives of public authorities, interest organizations and critical legal institutions. In this way, the Committee has gained not only an insight into the legislation, but also an understanding of how the legal provisions function in practice.

5 Preferences of Legislation Models

In recent years, there have been signs of a change in perspective in the policy towards disabled persons, cf. the "UN Standard Rules" of 1993, referred to above. Furthermore, the United Nations has started work on a binding convention on equal rights for persons with disabilities. (The working title of the convention is Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.) The human rights approach is a clear precondition for this work.

The cause of this shift in perspective is associated with the changed understanding of disability from a traditional biological/medical approach involving an emphasis on qualities of the individual to a relational approach, where disability is understood to be a consequence of society's lack of accommodation to the diversity of the population. The relational understanding emphasizes that all persons, regardless of disability, are equal citizens. Society must therefore adapt to the variation in the requirements of its citizens. Only such an understanding can ensure that everyone is able to take part in society on equal terms. The Committee's proposed statute will contribute to laying down this changed understanding in binding rules of law.

Protection against discrimination manifests itself in different ways in different countries. Protection against discrimination can be laid down in various types of legislation. Regulation can be laid down in the Constitution or in ordinary legislation. In ordinary legislation, it is possible to establish protection against discrimination in both criminal and civil law. Protection against discrimination may furthermore be given differing extent, depending upon the grounds for discrimination and the social sectors affected.

The Committee's recommendation is that the primary protection should be provided in civil legislation, on par with legislation that protects against discrimination on the basis of gender and ethnicity, religion, etc. In the view of the Committee, civil legislation has definite advantages over purely constitutional protection or a primary emphasis on protection afforded by criminal law. Civil legislation may act proactively, while criminal law must, per definition, have to be reactive.

There are several possible approaches for providing protection via civil law, dependent upon which social sectors and grounds for discrimination the regulation applies to. In the countries the Committee has studied, protection against discrimination is marked by various approaches. Grounds for discrimination and social sector appear to constitute two main dividing lines, and these may be combined in different ways:

Civil law protection against discrimination – various approaches		
Area of society \ Grounds for discrimination	Common for many grounds for discrimination	Separate for one or a number of closely related grounds for discrimination
General for all or most areas of society	A	B
Specific for a limited area of society	C	D

Legislation in *category A* is characterized by application of general protection against discrimination to most social sectors and is common for several grounds for discrimination. Such legislation is characterized by a *human rights* approach. The greater the number of social sectors and grounds for discrimination included, the more pronounced is the universal character of protection against discrimination. Protection against discrimination in major human rights covenants is formulated in this way, e.g. article 26 of the Covenant on Civil and Political Rights, article 14 of the European Convention for the Protection of Human Rights and article 1 of protocol No. 12 of the Convention. A particular characteristic of the provisions of the convention is that the grounds for discrimination are not stated exhaustively. In countries that have a constitutional prohibition against discrimination, it is usual that this includes several grounds and applies in general to all social sectors. However, constitutional regulation normally only places limits on the public authorities and not on private parties. Finland, Sweden and Canada all have prohibition against discrimination in their constitutions. In Canada, protection against discrimination at the statutory level is formulated as general “human rights” legislation. Ireland’s legislation is common for a number of grounds for discrimination and covers in total most social sectors. In Australia, the same statute at the state level covers several grounds for discrimination. Apart from the incorporated provisions of the Convention, there are no examples of such legislation in Norway.

The legislation in *category B* is characterized by the general application of protection against discrimination to most social sectors but is limited to

protection in relation to a single ground of discrimination or a number of closely related grounds. The approach is based on *group rights*. Historically, such legislation often comes into being when a group for a long time has been oppressed or suffered discrimination. After attaining a degree of strength, such groups take up the fight for a better legal protection of themselves. In many countries, this approach is associated with the fight for civil rights. The Norwegian Gender Equality Act belongs to category B. The Act was adopted as a result of a focus on oppression of women and the fight for women's rights. The new Act (from 2005) against discrimination on the basis of ethnicity, religion, etc. (Discrimination Act) is correspondingly general, applies to most social sectors and a limited ground for discrimination. This Committee has primarily been assigned the task of assessing legal protection against discrimination of persons with disabilities, which is also based on a group approach. Viewed as a whole, it can therefore be established that the group approach is predominant in Norway. In other countries too there are a number of examples of legislation against discrimination on the basis of disability that fall into category B. In the USA, the UK and at the federal level in Australia, separate statutes protect against discrimination on the basis of disability, while other statutes provide protection against discrimination on the basis of gender and ethnicity. Such a broad group approach is clearly similar to the approach that has been adopted in Norway. The same approach also underlies the UN Convention on the Elimination of all Forms of Discrimination against Women, the UN Convention on the Elimination of All Forms of Racial Discrimination and the ongoing work in the UN on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. The EU Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin falls likewise into category B.

The legislation in *category C* provides protection against discrimination on several grounds while applying to a limited *social sector*. The legislation is based on the assumption that protection against discrimination is only needed in a single specific social sector. In European countries, anti-discrimination legislation is often initiated by the EU. The EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (framework directive) is legislation in category C, since it requires prohibition against discrimination on several grounds, but only within the area of employment. In several EU member states, neither arguments concerning human rights nor the fight for group rights have played any decisive role at the national level. The legislation has been adopted as a result of the requirements laid down in the Directive. The framework directive is a minimum directive that allows for national legislation applying to several social sectors and several grounds for discrimination. Most countries have mainly confined themselves to implementing the requirements of the framework directive and have, consequently, adopted legislation in category C. This applies for example to Sweden and Finland. In Sweden, there are also examples of legislation in category C that were not initiated by the EU. In Finland, the general constitutional protection (category A) is supplemented by a civil Act based on the social sector approach that implements the framework directive. Norway,

too, has implemented the framework directive. In accordance with the directive, new equal treatment chapters have been adopted in the Working Environment Act, and thus legislation in category C. This regulation will give way to the generally applicable Acts against discrimination on the basis of gender and ethnicity, religion, etc., which will include the area of employment. The provisions of the Working Environment Act thus function purely as referring provisions in matters concerning such discrimination.

Legislation in *category D* includes protection against discrimination for a single ground for discrimination in addition to applying to a limited social sector. In some countries, several such Acts coexist as an arbitrary result of solving specific problems by means of legislation with a narrow scope. Such an approach appears as *fragmentary*, and is adopted on an *ad hoc* basis when different groups are found to suffer discrimination in specific social sectors. Prohibition against discrimination in the Norwegian housing legislation, which provides protection on the housing market against discrimination on the basis of homosexual orientation, has such a fragmentary character.

6 The Committee's General Recommendations: Separate or Joint Act?

In its deliberations, the Committee took, as its point of reference, that protection should include all social sectors where persons with disabilities risk discrimination. The Committee even found that the human rights approach (category A) is, in principle, to be preferred. Equal ranking of the various grounds for discrimination will result in a considerable signal effect. This applies particularly to the forms of discrimination that the general public is less preoccupied with. Inadequate accessibility for persons with disabilities may be such a form of discrimination.

Joint regulation further prevents some groups from more or less arbitrarily enjoying stronger protection than others, and prevents one or more social sectors from more or less arbitrarily being perceived as more important than others. An Act that covers such a broad range of grounds will focus on the discrimination itself rather than on the delimitation or definition of the ground for discrimination. Joint regulation will moreover be appropriate where discrimination can be associated with several grounds (multiple discrimination) and where it is not clear what grounds the discrimination can be associated with. The Committee would also point out that countries such as Canada, Ireland and Australia report positive experience with legislation covering a broad range of broadly defined grounds. On this basis, the Committee holds the view that a joint, general anti-discrimination Act (category A) would in principle be the best way of providing citizens with general protection against discrimination, both on the basis of disability and on other bases. Proposal of such a general Act did not lie within the framework of the Committee's terms of reference, and the Committee was not broadly enough composed to be able to judge what grounds and what social sectors should be covered by a generally applicable Act.

The Committee's proposal for a separate Act against discrimination on the basis of disability involves a parallel to the remaining Norwegian anti-discrimination legislation (category B). Since it has now (2005) been decided that the enforcement of anti-discrimination legislation shall be gathered in a single joint body authorized by a separate Act, this will prevent fragmentation of protection against discrimination. It will also be easier to provide for the Committee's focus on accessibility issues in the form of clear proposals laid down in a separate Act relating to prohibition against discrimination on the basis of disability. While discrimination on the basis of, for example, gender and ethnicity in many cases originates in attitudes, exclusion of persons with disabilities is often the result of inadequate accessibility caused by physical obstacles and other barriers.

The conclusion of the Committee has therefore been to propose a separate Act against discrimination on the basis of disability. At the same time, the Committee recommends that the Government as soon as possible appoints a separate legislative committee to consider the desirability of a single joint Act against discrimination in Norway and, if appropriate, to propose the drafting of such an Act. Such a committee should also be able to consider existing differences in protection against discrimination across various grounds and also if protection against discrimination should be given constitutional protection by means of a separate section in the Constitution.

7 The Committee's Proposed Statute; General Provisions

The Committee proposed a separate *Act relating to prohibition against discrimination on the basis of disability (Discrimination and Accessibility Act)*. The main emphasis is placed on a prohibition against direct and indirect discrimination. This prohibition against discrimination is, like prohibition against discrimination on other bases in Norwegian law, supplemented by a prohibition against harassment, a prohibition against instructions regarding discrimination and prohibition against reprisal against persons who institute legal proceedings concerning discrimination. It is also prohibited to be an accessory to any form of discrimination. These provisions are laid down in sections 3 to 7 of the proposed Act. Different treatment that is necessary in order to achieve a just result and which does not involve disproportionate intervention in relation to the person or persons so treated is not regarded as discrimination pursuant to the proposed Act.

When interpreting the prohibition against discrimination, the purpose provision in section 1, first paragraph, will have significance as an interpretive factor. This is worded as follows: "The purpose of the Act is to ensure equality and promote equal opportunities for social participation for all persons, regardless of functional ability and to prevent discrimination on the basis of disability."

This purpose provision will be useful as a proactive tool, as it calls for promotion of equal opportunities for social participation. Section 1, second paragraph, is even more focused on the proactive aspects: "The Act shall help to

dismantle disabling barriers created by society and prevent new ones from being created.”

In section 2 it is laid down that the Act “shall apply in all social sectors with the exception of family life and other circumstances of a personal nature”.

In order to ensure fulfilment of the purposes of the Act, “public authorities and organizations of employers and employees”, as well as “employers in the public and private sectors” are subject to specific activity obligations. This is provided in section 3.

On the basis of the wish for a broadly defined ground for discrimination, it is laid down in section 4 (Prohibition against discrimination) that the prohibition “applies to discrimination on the basis of present disability, past disability, possible future disability or assumed disability, as well as discrimination on the basis of other persons’ disability”. No exception has been made for any specific diseases or conditions.

In section 8 it is laid down that the prohibition against discrimination shall not apply to positive discrimination that helps to promote the purpose of the Act, but such discrimination shall cease when the purpose of it has been achieved.

In the event of violations of the anti-discrimination provisions, the new bodies that shall have responsibility for monitoring compliance with all discrimination legislation in Norway will be *the Equality and Anti-Discrimination Ombud* and *the Equality and Anti-Discrimination Tribunal*. This apparatus will be assigned both a proactive role and an enforcement function. As a general rule, the Ombud has the right to state opinions but does not have decision-making powers, whereas the Tribunal has decision-making powers including the right to issue an order to stop, rectify, etc. The ordinary courts may only grant compensation for violations of the Discrimination and Accessibility Act. No threats of punishment have been proposed in connection with violations of the provisions of the Act since the Committee considers that civil law, with civil law requirements as regards assessment of evidence and consideration of guilt, will constitute more effective legislation than placing violations of the Act in the domain of criminal law with its special rules regarding burden of proof and criterion of guilt, which would then necessarily apply. When assessing whether or not discrimination has taken place pursuant to the provisions of the Act, it is proposed in section 12 that a special burden of proof provision shall apply. This provision states, “if there are any circumstances that give reason to believe that there has been a breach of any of the provisions”, such a violation shall be assumed to have taken place “unless the person responsible for the act, omission or remark produces evidence showing that no such breach has taken place”.

8 The most Proactive Provisions in the Act; Demands for Improved Accessibility and “Universal Design”

It can, as stated above, be inferred from the protection against discrimination laid down in international human rights covenants that inadequate accommodation in certain situations may be discriminatory. All foreign

legislation studied by the Committee includes special rules concerning accommodation in relation to persons with disabilities. The accommodation requirement is characterized as an obligation to ensure “reasonable accommodation”, “reasonable adjustments” or similar wording. The principle of reasonable accommodation is also included in the EU framework directive. The provisions have in common, firstly, that the obligation may only apply to the reasonable accommodation. Secondly, the obligation does not apply to accommodation that will entail a disproportionate burden for the person or body subject to the Act. The disproportionality limitation entails that accommodation constituting an “undue burden” or “undue hardship” may not be demanded. The content and extent of the obligation varies otherwise from country to country.

The Committee proposes special accommodation obligations in its statute, which is also the background for the main title of the report “Equality and Accessibility” and the choice of short title of the Act (Discrimination and Accessibility Act). In preparing the accommodation obligations, the Committee finds that “universal design” may be used as a legal standard when specifying detailed requirements regarding accessibility to buildings, constructions, developed outdoor areas, ICT, means of transport, etc. The Committee commissioned a legal opinion that elucidates various legal issues regarding the use of such a standard in legal texts, and this showed that such an approach is feasible.⁸ *Universal design* will ensure accessibility for persons with disabilities and, in addition, benefit many persons regardless of an assessment of their ability. Improved accessibility and universal design will, for example, be important for pregnant women, parents of young children with and without perambulators, persons with temporary disabilities and persons who, owing to advanced age, have reduced mobility, weak eyesight, hearing or sense of direction.

9 The Accessibility Requirements

The Committee has proposed that such accessibility requirements be laid down in three separate provisions. They have all a proactive character.

In *section 9*, public undertakings and private undertakings that offer goods and services to the general public are required to make active and targeted efforts regarding *general accommodation* (universal design). By *universal design* is meant “design or accommodation of the main solution as regards the physical conditions so that the normal function of the undertaking can be used by as many people as possible”. Public undertakings and private undertakings that offer goods and services to the general public are furthermore obliged to ensure that universal design is applied to the normal functions of the undertaking, provided this does not entail an undue burden for the undertaking in question.

When assessing if the design or accommodation entails an undue burden, particular importance shall be attached to the necessary costs associated with the

⁸ Nicolai V. Skjerdal: *Universell utforming – Fra ideal til rettsnorm*, see NOU 2005: 8 Vedlegg (Enclosure) 1.

accommodation, the undertaking's resources, the consequences of the accommodation in dismantling disabling barriers, whether the normal function of the undertaking has a public character, safety considerations and the consideration of cultural heritage. Violation of the obligation to ensure the application of universal design pursuant to the third paragraph is regarded as discrimination, if a person with a disability is adversely affected by the inadequate accommodation. It is not regarded as discrimination if the undertaking meets specific provisions laid down in statutes or regulations concerning the obligation to implement universal design.

In *section 10*, obligations regarding individual accommodation within reason are imposed in four situations on the basis that such accommodation is most appropriate in relations involving a *special responsibility* regarding the person with a disability, that the relation has a permanent character and that the arena concerned constitutes *an essential part of the life of the individual*. Persons subject to the Act are, respectively, employers (in order to ensure that employees or job applicants with disabilities are able to take up or continue employment, have access to training and other forms of competence development, as well as perform work and have a potential for progress in their work on an equal terms with other employees), schools and other educational institutions (in order to ensure that pupils or students with disabilities are given equal opportunities for education and training), and civic authorities (firstly, in order to ensure that pre-school children with disabilities are given equal opportunities for development and activity, and, secondly, to ensure accessibility to day centres, respite care facilities, etc. of a permanent nature and are particularly designed for persons with disabilities). Here too, it is proposed that the obligation does not include accommodation entailing an undue burden. Violations of the obligation to individually accommodate within reason, pursuant to section 10, shall be regarded as discrimination.

In cases involving violations of the accommodation obligations pursuant to sections 9 and 10, compensation shall not be the normal reaction. Accessibility will only be improved if *the Equality and Anti-Discrimination Tribunal* uses its decision-making powers to order stoppage, rectification, etc. This is made clear in the proposed statute.

The Committee assumes that *section 11* contains the most controversial proposals. Here are laid down clear obligations that "buildings, constructions and developed outdoor areas intended for the use of the general public" shall be subject to universal design from specified dates. These dates are not the same for new and existing buildings, etc. The Committee has assessed that the proposed statute can be adopted and enter into force on 1 January 2007 at the earliest. The date for enforcement in relation to new buildings, etc. has therefore been set to 1 January 2009. Buildings, etc. erected or completed following major alterations (general renovation) and that are designed for the use of the general public shall, after this date, be subject to universal design.

In the case of buildings, constructions and developed outdoor areas completed prior to this date and intended for the use of the general public, the requirement regarding universal design commences on 1 January 2019. This will involve an obligation to make necessary alterations before the final date for compliance with the obligation, unless major alterations are carried out before

this date. The Committee has proposed that the ordinary planning and building authorities shall have responsibility for ensuring that the requirements of the first and second paragraphs are observed by processing plans and applications for planning permission pursuant to the Planning and Building Act. During its work, the Committee has had necessary contact with the Committee preparing a new Building and Planning Act, which submitted its findings in June 2005 proposing a purpose provision with emphasis on accessibility (using the term “universal design”). The Committee regarded it as desirable that corresponding obligations should be laid down in this Act, which is the main legal instrument for the ordinary planning and building authorities. It provides for restrictive granting of dispensations when there are important conservation considerations or other special considerations (safety regulations, and escape routes in the event of fire, etc.).

Dispensations from the planning and building authorities may be brought before the Equality and Anti-Discrimination Tribunal by representative organizations for persons with disabilities, see section 14. The state planning and building authority can institute legal proceedings regarding the validity of such a revocation decision.

10 Potential Cost of the Accessibility Requirements

In the view of the Committee, most of the proposals of the Discrimination and Accessibility Act will entail negligible costs, which will be outweighed by the socio-economic benefit of reduced discrimination. The Committee has commissioned estimates of the potential cost of the proposals in section 11. The estimates from ECON Analyse⁹ are based on an assessment of the following questions: a) What proportion of the buildings is “intended for the use of the general public”; b) What proportion of the buildings is already subject to universal design?; c) What are the additional costs (e.g. per unit area) associated with universal design for new buildings?; d) What is the cost of adapting existing buildings?; e) How will the efficiency of area utilization in buildings be affected by universal design requirements?; and f) To what extent will owners and tenants adapt the use of buildings so that they can reduce the parts of the buildings subject to the new requirements? The estimates are uncertain, but they indicate that costs associated with universal accessibility requirements in new buildings from 2009 and in existing buildings from 2019 will total approximately Euro 4.4 billion over the period 2005–2025 (calculated at present values). This corresponds to an average annual cost of approximately Euro 220 million, or approximately 0.1 per cent of Norway’s gross domestic product. For information, Norway has a population of 4.6 million people.

⁹ ECON analyse: *Kostnader ved å sikre universell utforming i Norge*, see NOU 2005: 8 Vedlegg (Enclosure) 2.

11 The Committee's recommendations beyond the scope of the Discrimination and Accessibility Act

In the view of the Committee, equality for certain persons with disabilities will not in practice be adequately ensured by protection against discrimination and requirements regarding improved accessibility in accordance with the proposed statute of the legislative committee. This applies, *inter alia*, to persons with severe cognitive disabilities and disabilities particularly involving dependence upon continuous assistance from other persons, for example deaf-blindness. This will only to a small extent be alleviated by an obligation to ensure physical accommodation. The Committee has therefore proposed certain amendments to the Social Services Act in order to strengthen the equality of this group as a supplement to the Discrimination and Accessibility Act. This applies to the service "user-managed personal assistance" (BPA), which is proposed in future to include a possible "personal assistance". Furthermore, "civic day centres" for persons unable to obtain or retain employment including permanent sheltered employment owing to severe disability should be a new compulsory social service.

In order to ensure that accessibility remains a major priority in all contemplations concerning planning and alterations to buildings, the Committee has proposed that the purpose provision of the generally applicable Planning and Building Act be amended in such a way that the principle of universal design and due regard for accessibility for persons with disabilities are clearly specified as important considerations affecting all measures pursuant to the Act.

12 Further Work on a Discrimination and Accessibility Act

The Committee submitted its report on 18 May 2005. The recommendations were, until 1 January 2006, circulated for hearing to all relevant bodies. The Government will now have to consider, on the basis of comments received, whether or not a bill should be drafted in accordance with the Committee's recommendations. The bill itself will, in such event, be drafted by the competent ministry and submitted by the Government to the Storting in the form of a Proposition to the Odelsting.

In the above, it has not been mentioned that the Committee's recommendations contain a number of dissenting views that reflect essential disagreements, and which are expected to be clarified by the consultation round. On the one hand, the Committee's representatives from the Confederation of Norwegian Business and Industry and the Norwegian Association of Local and Regional Authorities wished only to a limited extent to impose increased costs on the public sector. This has resulted in reservations against the accessibility provisions of section 11 and against establishment by statute of new services in the Social Services Act.

On the other hand, three members of the Committee, including the two representatives from organizations representing persons with disabilities, held the view that, in certain areas, the Committee has not gone far enough, for

example by not submitting proposals for universal design in ICT and accessibility requirements in relation to means of transport. In addition, some minor dissenting views arise from the wish of some representatives that the Penal Code be applied more actively against discriminatory acts.

The Committee's majority has, for its part, stressed that a civil law prohibition with sanctions enabled by a separate enforcement mechanism would be more suitable and more effective, both for preventing and for responding to discrimination. As mentioned, this will be the most proactive way to combat discrimination on the basis of disability.

Addendum 20 December 2005:

The results of the Parliamentary Elections in September 2005 made way for a new Government based on three political parties with a majority in the Parliament. In their political program for the next four years, called the declaration of Soria Moria, it is explicitly stated: "The Government will implement an Act relating to prohibition against discrimination on the basis of disability." – Therefore, there are possibilities for the realization for such an Act as proposed by the Committee.