

ANLAGEN ZUR STUDIE

Umfrage Inklusion in anderen Ländern

International vergleichende Studie zur
Barrierefreiheit in Unternehmen

Impressum

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Dr. Friedrich Mehrhoff, Marlon Becker

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Anlagen

Anlage 1 – Flyer

komm **mit** mensch

Sicher. Gesund. Miteinander.

 **DGUV**
Deutsche Gesetzliche
Unfallversicherung
Spitzenverband

Aufruf zur Unterstützung

Internationale Studie zur Barrierefreiheit am Arbeitsplatz

Hintergrund

Das Bundesministerium für Arbeit und Soziales fördert entsprechend des Nationalen Aktionsplanes 2.0 der Bundesregierung zur Umsetzung der UN-Behindertenrechtskonvention (UN-BRK) eine international vergleichende Studie zur Barrierefreiheit in Unternehmen. Die Studie wird durch die DGUV durchgeführt und aus dem Ausgleichsfonds finanziert.

Ziel

Das Ziel der Studie ist es, über Einzelfälle hinausgehende Maßnahmen und Möglichkeiten in anderen Ländern für ein weitgehend barrierefreies Arbeitsumfeld zu sammeln und diese anschließend deutschen Unternehmen und ihren Verbänden zur Umsetzung anzubieten. Hierfür wurde ein Interview-Leitfaden konzipiert, um geeignete Beispiele zur Barrierefreiheit am Arbeitsplatz in anderen Ländern zu identifizieren.

Kontakt

Sollten Sie mit dem Thema vertraute Ansprechpersonen im Ausland kennen, mit denen die DGUV Kontakt aufnehmen kann, würden wir uns über eine Nachricht freuen. Neben Einzelfallbeispielen sind für die Studie insbesondere Beispiele interessant, die strukturelle Veränderungen anstoßen und dadurch auf andere Unternehmen übertragbar sind, sowohl in Größe als auch Branche.

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Berlin, 16. April 2018

Die Suche nach „Best Practices“ für eine inklusivere Arbeitswelt!

**Barrierefreiheit kennt keine Grenzen,
insbesondere keine Ländergrenzen!
Lassen Sie uns gemeinsam von den „Best Practices“
profitieren!**

Entsprechend der UN-Behindertenrechtskonvention (UN-BRK) führt die Deutsche Gesetzliche Unfallversicherung (DGUV) eine internationale Studie zur Barrierefreiheit im Arbeitsleben durch (3/18-10/19). Die Studie ist Bestandteil des Nationalen Aktionsplans der Bundesregierung zur Umsetzung der UN-BRK.

Das Ziel der Studie ist es, Maßnahmen und Möglichkeiten im Ausland zu finden, die die vorausschauende barrierefreie Gestaltung im Arbeitsleben unterstützen und dadurch den Zugang zum ersten allgemeinen Arbeitsmarkt für Menschen mit Behinderungen verbessern. Von besonderer Bedeutung sind dabei die Beispiele, die strategische bzw. strukturelle Veränderungen anstoßen und dadurch auf mehrere Unternehmen übertragen werden können. Unterscheidungen zwischen Unternehmensbranche und -größe sind möglich

Barrierefreiheit im Arbeitsleben ...

... unterstützt Menschen mit Behinderungen ihr volles berufliches Potential ausschöpfen zu können. Neben der vorausschauenden Barrierefreiheit werden in der Studie auch angemessene Vorkehrungen (reasonable accommodation) berücksichtigt, sofern diese auf weitere Unternehmen übertragen werden können.

In der Studie finden die verschiedenen Arten von Barrieren Berücksichtigung. So werden neben baulichen und kommunikativen Barrieren auch die Barrieren berücksichtigt, die Menschen mit psychischen Erkrankungen betreffen. Darüber hinaus sind im Rahmen der Studie auch die Beispiele interessant, mit denen „Barrieren in Köpfen“ abgebaut werden, um das Bewusstsein für Menschen mit Behinderungen im beruflichen Kontext zu schärfen.

Wir brauchen Ihre Unterstützung!

Hierfür haben wir einen Fragebogen erstellt, der die Suche nach „Best Practices“ unterstützt. Wir würden uns freuen, wenn Sie die nachfolgenden drei Fragen beantworten. Der geltende Datenschutz wird strengstens eingehalten.

Von einer barrierefreien Arbeitsumgebung, einer Gerechtigkeit am Arbeitsplatz und der Vielfalt an Menschen profitieren wir alle; nicht nur Menschen mit Behinderungen.

Vielen Dank für Ihre Unterstützung.

03.07.2018, DGUV

Datum: Bitte geben Sie hier Ihren Text ein

Fragebogen:

Welche Organisation bzw. Organisationen ist/sind hauptsächlich für die Barrierefreiheit im Arbeitsleben verantwortlich? Welche Rolle nehmen Sie in diesem Zusammenhang persönlich ein? Können Sie uns einen Kontakt zu den genannten Organisationen zur Verfügung stellen?

Organisation: Bitte geben Sie hier Ihren Text ein

Persönlich: Bitte geben Sie hier Ihren Text ein

Kontakt: Bitte geben Sie hier Ihren Text ein

Bitte beschreiben Sie kurz bis zu **drei konkrete Beispiele/Maßnahmen**, mit denen Sie vertraut sind und die die Barrierefreiheit im Arbeitsleben verbessern?

1) Bitte geben Sie hier Ihren Text ein

2) Bitte geben Sie hier Ihren Text ein

3) Bitte geben Sie hier Ihren Text ein

Welche Faktoren/Rahmenbedingungen sind erforderlich, um die genannten Beispiele auf weitere Unternehmen übertragen zu können? Bitte begründen Sie Ihre Meinung mit wenigen Worten.

strukturell: Bitte geben Sie hier Ihren Text ein

rechtlich: Bitte geben Sie hier Ihren Text ein

organisatorisch: Bitte geben Sie hier Ihren Text ein

technisch: Bitte geben Sie hier Ihren Text ein

sonstige: Bitte geben Sie hier Ihren Text ein

Absender: Bitte geben Sie hier Ihren Text ein

Bitte senden Sie den Fragebogen an marlon.becker@dguv.de zurück.

Anlage 3 – Überblick statistische Erfassung

Auswertung Rückmeldungen aus den Fragebögen - Überblick	
Kategorien	Summe
Geltungsbereich	
Bewusstseinsbildung	21
Unterstützung bei der Arbeitssuche	50
Erhalt eines Arbeitsplatzes	56
Funktionseinschränkungen	
Motorisch	12
Kognitiv	14
Psychisch	3
Sensorisch	18
Keine Unterscheidung	63
Beispiel aus dem...	
Produzierendes Gewerbe	13
Dienstleistungssektor	61
Öffentliche Verwaltung	17
Sonstige	3
Wirkungsebene	
Organisatorisch / Strukturell	45
Rechtlich	8
Ökonomisch	15
Technisch	31
Barrieren, die abgebaut werden	
Baulich	32
Kommunikativ / digital	49
Organisatorisch	33
"Barrieren in den Köpfen"	35

Doppelnennungen sind in den einzelnen Kategorien möglich, wenn ein Beispiel verschiedene Bereiche abdeckt/anspricht; Die Kategorie *Beispiele aus dem...* orientiert sich dabei an der Zuständigkeitsaufteilung der GUV, so dass in dem Bereich "Dienstleistungssektor" z.B. Behindertverbände zusammengefasst sind. Der Bereich "Sonstige" umfasst z.B. private Stiftungen.

Aus den Rückläufern werden auch nur die Beispiele eingepflegt, die ausführlich genug beschrieben wurden, um eine Einordnung vorzunehmen, so dass sich nicht alle mitgeteilten Beispiele in der Liste wiederfinden.

Es werden nur die Beispiele in der Auswertung berücksichtigt, die die Checkliste 2.0 durchlaufen haben.

"Barrieren in den Köpfen" zielen auf Vorurteile von Vorgesetzten/Mitarbeitenden gegenüber Menschen mit Behinderung ab

Anlage 4 – Checkliste

Checklist for best practices for the Project Management – 31.07.2018



Green	Yellow	Red
Green	Yellow	Red
Green	Yellow	Red
Green	Yellow	Red
Green	Yellow	Red
Green	Yellow	Red

Does the measure concern the accessibility in the work-site?

Does it concern the first open labour market?

Is it transferable to private enterprises?

Does it go beyond the single case?

Are there any existing similar approaches in Germany?

Is the example relevant?

Anlage 5 – Interview Leitfaden

Interner Interviewleitfaden für Best Practices – 31.07.2018

Umfrage Inklusion in anderen Ländern – International vergleichende Studie zur Barrierefreiheit in Unternehmen

Informationen über Interviewpartner

Name:

Organisation:

Position:

Mail:

Einleitung

- Dank für die Teilnahmebereitschaft
- Vorstellung eigener Person
- Ablauf und Anlass des Interviews
- Hinweis auf Datenschutz
 - o Was passiert mit den genannten Erkenntnissen?

Eingangsfrage:

Wie sind Sie mit dem Thema der Barrierefreiheit im Arbeitsleben verbunden und welche Position nehmen Sie dabei ein?

Fragen zu den genannten Beispielen

Klärung offener Verständnisfragen zu den bereits genannten Beispielen

- 1) *Warum haben Sie sich für die von Ihnen genannten Beispiele entschieden? Bitte nennen Sie in diesem Zusammenhang 2 konkrete Aspekte.*
- 2) *Worin unterscheiden sich diese Beispiele von den anderen guten Beispielen in ihrem Land?*
- 3) *Was galt es während der Umsetzung dieses/dieser Beispiels/Beispiele zur Barrierefreiheit besonders zu beachten?*
- 4) *Welche Faktoren waren dabei förderlich und welche waren hinderlich?*
- 5) *Haben bereits schon mehrere Unternehmen dieses Beispiel / diese Beispiele umgesetzt?*
- 6) *Wo ist die Barrierefreiheit in Ihrem Land angesiedelt?*

Konkretisierungsfragen, wenn nicht bereits schon beantwortet:

- 7) *Welche Probleme / Widerstände galt es in der Umsetzung der Maßnahmen zu überwinden?*
- 8) *Welche Vorteile ergeben sich für Arbeitgeber, die die Barrierefreiheit im Arbeitsleben verbessern?*

Abschluss

- Gibt es noch weitere bekannte Beispiele zur Barrierefreiheit, die für andere Länder interessant sein könnten?
- Sind weitere Experten bekannt?
- Fragen des Interviewpartners?
- Klärung des weiteren Vorgehens
- Vielen Dank für die Teilnahme

Fact sheet



Land:	USA
Expertin:	Jill Houghton (jill@disabilityin.org)
Beispiel:	Barrierefreiheit durch Bewertungssystem (Disability Equality Index (DEI))

Disability IN und AAPD

Disability IN und American Association of People with Disabilities (AAPD) sind non-profit Organisationen, die sich für die Rechte und die Inklusion von Menschen mit Behinderung in den Arbeitsmarkt einsetzen und den DEI im Jahr 2012 konzipiert und eingeführt haben.

Zahlen und Fakten

- 145 Unternehmen beteiligten sich in 2018 (Anstieg von 32 % gegenüber 2017)
- Die beteiligten Unternehmen umfassen insgesamt fast 8 Millionen Arbeitnehmer
- Beteiligung unterschiedlicher Branchen: Finanzdienstleistungen (14,5 %), Technologie (9,7 %), Gesundheitswesen (8,3 %)

Beschreibung des Beispiels

Der DEI ist ein Assessment-Tool, das Unternehmen unterstützt, die vorhandene Situation in Bezug auf Barrierefreiheit und Inklusion zu überprüfen. Die bisherigen Aktivitäten des Arbeitgebers werden in einem Audit in unterschiedlichen Prüfkategorien bewertet. Die Durchführung der Prüfung und die Auswertung erfolgt durch Disability: IN und AAPD.

Unternehmen, die einen Score von mindestens 80 % erreichen, werden in einem öffentlich einzusehenden Ranking als „Top Score Unternehmen“ gerankt. Ähnliche Bewertungssysteme wurden auch in anderen Ländern gefunden.

Detaillierte Informationen über DEI unter:
→ <https://www.disabilityequalityindex.org/>

Wirkungen

- Verankerung der Barrierefreiheit und Inklusion als Qualitätsmerkmal in der Unternehmensbewertung, so dass eine gute Bewertung positive Auswirkungen auf die Unternehmensreputation in der Außendarstellung haben kann.
- Durch die Erhebung des IST-Zustandes erhalten Unternehmen einen Überblick über die Ausgangssituation, an der zukünftige Maßnahmen und Strategien ausgerichtet werden können.
- Durch das Ranking von „Top Score Unternehmen“ erhalten Menschen mit Behinderung eine Orientierungshilfe, inklusive Unternehmen ausfindig zu machen.
- Die Unternehmen, bei denen Defizite identifiziert wurden, werden fachmännisch unterstützt, Verbesserungspotentiale auszuschöpfen und vorhandene Lücken zu schließen, um mindestens einen Score von 80 % zu erreichen.

Handlungsempfehlung

Ausgestaltung eines Anreizsystems für Unternehmen, das über die Zahlung von Strafen hinausgeht und nicht an den individuellen Bedarf (anlassbezogen) gebunden ist, um die vorausschauende barrierefreie Gestaltung der Infrastruktur zu fördern und den Bedarf an individuellen Anpassungen zu reduzieren.

Fact sheet



Land:	Schweden
Experte:	Magnus Berglund (magnus.berglund@scandichotels.com)
Beispiel:	Barrierefreiheit durch die Schaffung einer neuen Position in der Geschäftsführung

Scandic Hotels

Scandic ist der größte Hotelbetreiber in Nordeuropa. Das Ziel von Scandic Hotels ist es, die Zugänglichkeit in den eigenen Hotels zu verbessern, um das Hotelerlebnis allen Menschen zugänglich zu machen.

Zahlen und Fakten

Scandic ist in sechs Ländern mit 280 Hotels und 55.000 Zimmern verbreitet, verfügt über ein Team von ca. 16.000 Mitarbeitern und erreicht einen Jahresumsatz von über 1,4 Milliarden Euro (2017).

Beschreibung des Beispiels

Im Herbst 2003 wurde Magnus Berglund zum Director Accessibility für alle Scandic Hotels ernannt. Neben der Schulung von Mitarbeitern im Umgang mit Menschen mit Behinderung ist Berglund für die Belange der Barrierefreiheit zuständig.

Die unternehmensinternen Standards für Barrierefreiheit, die über die rechtlichen Anforderungen hinausgehen, wurden auf der Basis der Erfahrungswerte der Kunden zusammengetragen.

Die „Scandic Standards für Barrierefreiheit“ sind in einer Checkliste zusammengefasst, die als Standard aller Hotels gelten. Eine pdf Datei, in der die Standards aufgeführt sind, ist unter folgendem Link zu finden:

→ <https://www.scandichotels.de/immer-bei-scandic/besondere-bedürfnisse>

Wirkungen

Durch die strukturelle Verankerung in der Geschäftsführung findet Barrierefreiheit bereits in der Planungsphase von Unternehmensstrategien und in Unternehmensentscheidungen Berücksichtigung und Anwendung.

Handlungsempfehlung

In Deutschland ist der Inklusionsbeauftragte nicht in der Geschäftsführung angesiedelt und wird, ebenso wie die Schwerbehindertenvertretung, in der Regel erst dann angehört und involviert, wenn sich die Maßnahmen bereits in einem fortgeschrittenen Planungsprozess befinden. Die Erschaffung einer entsprechenden Stelle, die in der Geschäftsführung auf Management Ebene angebunden ist, würde auch in Unternehmen in Deutschland die Position der Barrierefreiheit nachhaltig stärken.

Fact sheet



Land:	Tibet Autonome Region, PR China
Expertin:	Sabriye Tenberken (founders@kanthari.org)
Beispiel:	Barrierefreiheit durch Selbstintegration

Braille ohne Grenzen

...ist eine internationale Organisation, die 1998 in Swisttal gegründet wurde.

Das Ziel ist es, blinde oder sehgeschädigte Menschen in der Art und Weise auszubilden, dass diese den Prozess der Selbstintegration möglichst ohne fremde Hilfe bewerkstelligen können.

Zahlen und Fakten

- Bis 2016 wurden ca. 450 Menschen mit Seheinschränkungen ausgebildet
- Davon haben sich mindestens 150 in Regelschulen integriert.
- Ein Grossteil der Erwachsenen haben sich eigene Berufe beschaffen oder sind bei Absolventen von Braille Ohne Grenzen und ihren Unternehmen angestellt.

Beschreibung des Beispiels

Das Konzept des Trainingszentrums beruht auf dem Ansatz der Selbstintegration. Das Selbstintegrationskonzept stellt den Menschen mit seinen Fähigkeiten in den Mittelpunkt, um die selbstbestimmte Eingliederung in die Gesellschaft und das Arbeitsleben zu fördern.

Dementsprechend werden nicht die Lebensumstände des Menschen mit Sehbehinderung in den Fokus gestellt, sondern die Fähigkeiten priorisiert, die den betroffenen Menschen in die Situation versetzen, Hindernisse eigenständig zu überwinden.

Die Selbstintegration funktioniert allerdings nur mit entsprechendem vorbereitenden Training, weshalb die Teilnehmer intensiv ein bis drei Jahre ausgebildet werden. → <http://www.braillewithoutborders.org/GERMAN/>

Wirkungen

Neben dem Training in Kommunikation, selbstständigem Denken, Entwickeln von Problemlösungen sowie in Blinden- und Mobilitätstechniken wird ein besonderer Wert auf „weiche Faktoren“ gelegt.

Die Konzeption des Rehabilitation- und Trainingszentrums gliedert sich in 4 Teilbereiche:

- Vorbereitende Grundschule
- Berufsausbildung
- Förderung der Selbstintegration
- Herstellung von Braille Lehr- und Lernmaterialien für blinde und sehgeschädigte Menschen

Handlungsempfehlung

Dadurch, dass Blindheit nicht als Mangel, sondern als Chance für alle Beteiligten verstanden wird, wird das Selbstvertrauen und die Selbstakzeptanz gesteigert, um auf sehende Mitmenschen zuzugehen und damit eine vollständige und selbstbestimmte Teilhabe zu realisieren.

Dementsprechend sind in der Ausbildung junger blinder oder sehgeschädigter Menschen – neben der Vermittlung von Wissensbeständen – Mobilitätstrainings zu integrieren sowie lebenspraktische Fertigkeiten zu vertiefen, um Barrieren abzubauen, von denen blinde oder sehgeschädigte Menschen im Arbeitsleben auf dem allgemeinen Arbeitsmarkt konfrontiert werden.

Fact sheet



Land:	Polen
Expertin:	Elzbieta Sieniawska (elzbieta.sieniawska@capgemini.com)
Beispiel:	Barrierefreiheit durch Corporate Social Responsibility

Capgemini

Capgemini ist ein Beratungs- und IT-Dienstleistungsunternehmen mit Hauptsitz in Paris. Globale Unternehmen werden in komplexen Herausforderungen in Bezug auf Cloud, Digitalisierung und der Einrichtung von Plattformen unterstützt.

Zahlen und Fakten

- Ca. 8.400 Mitarbeiter in Polen
- Mehr als 90 Menschen mit Behinderungen sind beschäftigt
- Menschen aus über 40 Ländern arbeiten bei Capgemini in Polen

Beschreibung des Beispiels

Finanzielle Anreize: Finanzmittel, die im Rahmen der Ausgleichsabgabe durch die Beschäftigung von Menschen mit Behinderung eingespart werden, werden an die Teams weitergegeben, in denen Menschen mit Behinderung arbeiten. Diese Finanzmittel können zur Kompensation von Mehrarbeit durch andere Kollegen oder für andere Aktivitäten wie z. B. zum Bewusstseins- oder Teambuilding genutzt werden.

Kooperation mit Stiftung: Durch die Kooperation mit *Managers of the Future Foundation (Moffin)* wird auf externe Unterstützung im Bereich Inklusion und Barrierefreiheit zurückgegriffen, um Wissenslücken innerhalb des eigenen Unternehmens reduzieren zu können.

Multiplikatoren: Mit der Unterstützung von Moffin werden ausgewählte Mitarbeiter innerhalb des Unternehmens fortgebildet, um die Aktivitäten zur Bewusstseinsbildung auch ohne die Unterstützung externer Experten nachhaltig aufrechtzuerhalten (z.B. bei Neueinstellungen).

Wirkungen

Ursprung der unterschiedlichen Initiativen ist das Engagement der CSR Abteilung, indem die Unternehmensverantwortung neben ökologischer Themen auch auf soziale Aspekte wie Inklusion und Diversität ausgedehnt (CSR+Diversity) wird.

Durch die gesamtwirtschaftliche Einbindung der Inklusion und Barrierefreiheit in der Unternehmensstrategie wird die Position der Barrierefreiheit und Inklusion in Unternehmensentscheidungen gestärkt. Maßnahmen und Kampagnen können auf der Basis vorhandener Managementsysteme geplant und mit den erforderlichen Ressourcen umgesetzt werden.

Handlungsempfehlung

Die „Sustainable Development Goals“ der Vereinten Nationen werden demnach systematisch in der Betriebsstruktur verankert (Abteilung CSR). Zeitliche Kapazitäten sowie fachliche und finanzielle Ressourcen werden zur Verfügung gestellt, um Themen der Inklusion und Barrierefreiheit nachhaltig angehen zu können. In klein- und mittelständischen Unternehmen, in denen Veränderungen der Betriebsstruktur unter Umständen nicht möglich sind, könnten Kooperationen mit externen „Unterstützern“ weiterhelfen, um zusätzliche Kapazitäten mobilisieren und einbinden zu können sowie den Transfer von Wissen sicherzustellen.

Fact sheet



Land:	China
Expertin:	Sarah Albert (sarah.albert@flex.com)
Beispiel:	Barrierefreiheit durch Corporate Social Responsibility

Flex

Flex ist ein US-Unternehmen mit über 200.000 Mitarbeitern weltweit, die eine breite Palette an Elektronikprodukten herstellen. Am Standort in Zhuhai (Süd-China) sind 20.000 Menschen beschäftigt.

Zahlen und Fakten

Ca. 500 Mitarbeiter haben eine Behinderung. Den größten Teil bilden Menschen mit einer Hör- und / oder Sprachbehinderung. Menschen mit körperlichen Einschränkungen oder Lernschwierigkeiten sind ebenfalls beschäftigt.

Beschreibung des Beispiels

Die Beschäftigung von Menschen mit Behinderung erlangt in China einen besonderen Stellenwert, da vielschichtige Herausforderungen zu bewältigen sind.

Das Verständnis, dass Menschen mit Behinderung ein Recht auf Arbeit haben, muss tief verankert sein (inclusive Mindset).

Dementsprechend wurden die Themen zur Inklusion und Barrierefreiheit in der bereits vorhandenen Abteilung Corporate Social Responsibility (CSR) angesiedelt, denen sich ein Team von mittlerweile 28 Mitarbeitern widmen.

→ <https://flex.com/connect/innovation-sites/zhuhai-china>

Wirkungen

Durch die nachhaltige Verankerung der Barrierefreiheit in der Unternehmensstruktur (Abteilung CSR) finden Themen der Barrierefreiheit in Unternehmensentscheidungen strategische Berücksichtigung. Maßnahmen und Kampagnen werden auf der Basis vorhandener Managementsysteme geplant und umgesetzt:

Initiierung verschiedener Maßnahmen und Kampagnen zur Bewusstseinsbildung, Organisation multiprofessioneller Konferenzen für Unternehmen, Service Provider, Regierungsorganisationen und Betroffenen sowie die Einrichtung spezieller Talent Programme.

Handlungsempfehlung

Um einen Paradigmenwechsel im Umgang mit Menschen mit Behinderung zu initiieren, ist es von entscheidender Bedeutung, dass die Vision einer inklusiven Belegschaft nicht nur vom TOP-Management getragen wird, sondern dass auch zeitliche Kapazitäten sowie fachliche und finanzielle Ressourcen zur Verfügung gestellt werden, indem Fragen der Barrierefreiheit nachhaltig in Unternehmen verortet werden.

Fact sheet



Land:	Malaysia
Experte:	Thomas NG (thomas@genashtim.com)
Beispiel:	Barrierefreiheit durch „Heimarbeit“

Genashtim

Genashtim ist ein mehrfach ausgezeichnetes Unternehmen, das Online Trainings und diverse Dienstleistungen multinationalen Konzernen, Akademien und Regierungsorganisationen zur Verfügung stellt. Der Gründer selbst war mehr als 20 Jahre im Vorstand internationaler Konzerne tätig.

Zahlen und Fakten

- Gründung im Jahr 2009
- 70 % Person mit Behinderung und 25 % Flüchtlinge, die bei Genashtim beschäftigt sind.
- 100 % cloud basierte Arbeit von zu Hause.
- Mitarbeiter in mehr als 10 Ländern über 6 Kontinente verteilt.

Beschreibung des Beispiels

Genashtim ist ein cloud-basiertes Unternehmen, in dem die Mitarbeiter ausschließlich von zu Hause arbeiten. Dabei nutzt Genashtim neueste Technologien, um benachteiligte und ausgegrenzte Gruppen auf der ganzen Welt mit einander zu vernetzen und verschiedene Dienstleistungen online anzubieten.

Neben diversen Dienstleistungen für Unternehmen werden in Kooperation mit einer Universität Online-Master-Programme angeboten und durchgeführt.

Detaillierte Informationen über Genashtim unter:
→ <https://www.genashtim.com>

Wirkungen

Durch die Nutzung modernster Technik hat Genashtim ein Unternehmen gegründet, ohne dass Mitarbeiter vor Ort körperlich präsent sein müssen. Es gibt keine Büros oder sonstigen Zentren, in denen sich Mitarbeitende treffen, wodurch das Pendeln von und zur Arbeitsstätte sowie damit zusammenhängende Barrieren entfallen.

Sobald weitere Personen, ob mit oder ohne Behinderung, eingestellt werden, werden diese in spezialisierten Trainings zwischen 2-4 Wochen auf die bevorstehenden Aufgaben vorbereitet. Neben der Nutzung virtueller Arbeitsumgebungen sowie digitaler Werkzeuge werden die Arbeitsprozesse individuell an die vorhandenen Bedürfnisse der Mitarbeiter angepasst, um vorhandene Defizite auszugleichen.

Handlungsempfehlung

Insbesondere vor dem Hintergrund der globalen Digitalisierung und der Industrie 4.0 wird Heimarbeit mit den dazugehörigen Risiken für Menschen mit und ohne Behinderung zunehmen. Dabei sind die Barrieren im privaten Sozialraum geringer als die am Arbeitsplatz „Betrieb“ einzustufen.

Fact sheet



Land:	Niederlande
Experte:	Henny Mulders (henny.mulders@uwv.nl)
Beispiel:	Barrierefreiheit durch Umstrukturierung der Arbeitsprozesse

UWV

UWV (Uitvoeringsinstituut Werknemersverzekeringen) ist eine durch das Ministerium für Soziales und Beschäftigung beauftragte öffentliche Verwaltung in den Niederlanden, die u.a. die Aufgabe der öffentlichen Arbeitsvermittlung übernimmt.

Zahlen und Fakten

UWV hat die Redesign Methode seit 2013 selbst als Arbeitgeber umgesetzt und in weiteren Betrieben eingeführt. In der UWV führte dies zur Sicherstellung von 100 nachhaltigen Jobs für Menschen mit Behinderung.

Beschreibung des Beispiels

Bei der „Inclusive Work Redesign Methode“ handelt es sich um eine systematische Beratung von Unternehmen, in der die Arbeitsprozesse analysiert werden, um einzelne Tätigkeitsmerkmale zu identifizieren, die nicht Bestandteil ursprünglicher Tätigkeitsbeschreibungen sind, aber dennoch einen wesentlichen Teil der alltäglichen Arbeit ausmachen. Durch die identifizierten Tätigkeitsmerkmale entstehen neue Aufgaben und Stellenbewertungen.

→ https://www.inclusiearbeidsorganisatie.org/sites/default/files/kb-uplo-ads/zijlstra_ruitenbeek_mulders_lierop_2017.pdf

Wirkungen

In der „Redesign Methode“ findet ein Wechsel der Perspektive statt, indem die Beratung bedarfsorientiert an der Nachfrage des Unternehmens (Business Case) und nicht an dem konkreten Unterstützungsbedarf des Einzelnen (Qualifizierung, Umschulung etc.) ausgerichtet wird.

Durch die systematisch angelegte Beratung von Unternehmen werden neue Tätigkeitsfelder erschlossen, um Menschen mit Behinderung in den allgemeinen Arbeitsmarkt zu integrieren. Darüber hinaus werden Arbeitsprozesse gestrafft, wodurch Arbeitszeit gespart und die Effektivität gesteigert wird.

Handlungsempfehlung

Die „Spezialisten“ der UWV, die die Unternehmen in der Umgestaltung der Arbeitsprozesse beraten und nachhaltig begleiten, werden durch eine mehrtägige Schulung an der Universität Maastricht fortgebildet. Neben der auf die Unternehmen abgestimmte Beratung und Begleitung ist die Verankerung der Weiterbildung in bestimmten Berufsgruppen, etwa bei den Reha-Managern oder dem Integrationsfachdienst in Deutschland, anzustreben, um auf vorhandenen Strukturen aufzubauen und eine flächendeckende und branchenübergreifende Abdeckung sicherzustellen.

Fact sheet



Land:	England
Experte:	Daniel Schmidt (daniel.schmidt@microlinkpc.com)
Beispiel:	Barrierefreiheit durch Kooperation mit externen Dienstleistern

Lloyd Banks Group

Lloyd Banks Group (LBG) hat im Jahr 2009 einen Umstrukturierungsprozess mit der Unterstützung eines externen Dienstleisters (Microlink) durchgeführt, der durch das Business Disability Forum wissenschaftlich begleitet wurde.

Zahlen und Fakten

Zwischen den Jahren 2012 bis 2014 waren ca. 19 % der Belegschaft auf individuelle Arbeitsplatzanpassungen angewiesen. Nach der Umstrukturierung sind die durchschnittlichen Kosten pro Anpassung im Schnitt um 53 % gesunken. 62 % der Kollegen beschreiben darüberhinaus die Reduzierung von Abwesenheitszeiten.

Beschreibung des Beispiels

Bis zur Umstrukturierung der Unternehmensprozesse fielen Arbeitsplatzanpassungen in den Kompetenzbereich der Personalabteilung (HR) bzw. der Medizinabteilung (Occupational Health). Die jeweiligen Personen fühlten sich häufig aufgrund mangelnder Kenntnisse und Erfahrungen überfordert. Die Finanzierung der erforderlichen Anpassungen war nicht zentral gesteuert, so dass jede Abteilung das eigene Budget belasten musste.

Daraufhin startete die LBG im Jahr 2009 eine interne Umfrage, um den IST-Zustand zu erheben, auf dem weitere Maßnahmen ausgerichtet wurden.

→ https://members.businessdisabilityforum.org.uk/media_manager/public/86/Resources/BDF%20Lloyds%20BG%20Workplace%20adjustments%20case%20study.pdf

Wirkungen

Durch die zentralisierten und einheitlichen Prozesse wurde die Basis gelegt, um unternehmensinterne Barrieren in der Beschaffung und Durchführung von Arbeitsplatzanpassungen abzubauen:

- Schaffung neuer Strukturen und Positionen, indem für jeden Mitarbeiter, der einen konkreten Anpassungsbedarf hat, ein Gesamtverantwortlicher zur Seite gestellt wird.
- Stärkung des Vertrauens in den Mitarbeiter und dessen Bedarfseinschätzung, indem die Bedarfsprüfung, inwiefern das Hilfsmittel auch tatsächlich erforderlich ist, abgeschafft wird.
- Unterstützung durch einen externen Dienstleister, der in technischen Lösungen für Barrierefreiheit spezialisiert ist.
- Zentralisierte Finanzierung aller Arbeitsplatzanpassungen.

Handlungsempfehlung

Durch den Umstrukturierungsprozess und den Paradigmenwechsel, indem der konkrete Bedarf durch die Auswirkungen der Behinderung an den Arbeitsbedingungen ausgerichtet wird, werden Barrieren, die die Ausübung einer beruflichen Tätigkeit hindern, zeitnah beseitigt.

In diesem Zusammenhang wird die Kooperation mit einem externen Dienstleister und die Installierung geeigneter Unternehmensprozesse hervorgehoben, um unabhängig von Entscheidungen staatlicher Unterstützungssysteme eigenständig und zeitnah auf konkrete Bedarfssituation reagieren zu können.

Fact sheet



Land:	Österreich
Experte:	Wolfgang Kowatsch (wolfgang.kowatsch@myAbility.org)
Beispiel:	Barrierefreiheit mit Hilfe privater Unternehmensberatung

myAbility

myAbility ist eine private Unternehmensberatung, die Unternehmen darin unterstützt, das Potenzial von Menschen mit Behinderung sowohl als Mitarbeiter als auch als Kunden optimal zu nutzen.

Zahlen und Fakten

40 % der Mitarbeiter von myAbility haben eine Behinderung und verfügen über langjährige Erfahrungen im Umgang mit Unternehmen. Das DisAbility Wirtschaftsforum umfasst derzeit 23 Mitgliedsunternehmen.

Beschreibung des Beispiels

Performance Check: Der Performance Check ist eine Bewertungshilfe für Arbeitgeber im deutschsprachigen Raum, um die Barrierefreiheit in Unternehmen zu erheben.

DisAbility Wirtschaftsforum: Die von myAbility initiierten Events von und für Unternehmen dienen dem zielgerichteten Austausch von gemachten Erfahrungen und vorhandenem Wissen, um die Wettbewerbsvorteile durch Barrierefreiheit und Diversität erschließen zu können.

Sensing Journey: Das Training zur Bewusstseinsbildung, in dem Mitarbeiter und Führungskräfte in Unternehmen in interaktiven Schulungen und praktischen Übungen mit Hilfe der Anleitung eines inklusiven Coaching-Teams sensibilisiert werden.

myAbility Talent Programm: Das Programm fördert Studierende mit Behinderung in einem speziell darauf ausgerichteten Nachwuchsprogramm, in dem der offene Umgang mit der Behinderung als Erfolgsfaktor gestärkt und entsprechende Talente mit passenden Unternehmen in Kontakt gebracht werden.

→ <https://www.myability.org/>

Wirkungen

Unternehmer werden durch die Mitarbeiter von myAbility auf der Basis unterschiedlicher Leistungsangebote in der Ausübung sozialer und gesetzlicher Pflichten unterstützt.

So werden z.B. „Barrieren in den Köpfen“ abgebaut, indem hochrangige Unternehmer der freien Wirtschaft, in der Regel CEO's, gemachte Erfahrungen platzieren, um sich auf dieser Basis über Vor- und Nachteile von Inklusion und Barrierefreiheit sowie mögliche Hindernisse und Probleme in der Praxis auszutauschen.

Handlungsempfehlung

Die Initiierung von regelmäßig stattfindenden und flächendeckenden Veranstaltungen, die nicht von dem Staat oder der öffentlichen Verwaltung organisiert werden, auf denen hochrangige Vorstandsmitglieder privater Unternehmen Erfahrungen austauschen, ist auch in Deutschland zu fördern, um Themen wie Barrierefreiheit und Inklusion auch in dem Bewusstsein von Unternehmensführungen zu etablieren.

Fact sheet



Land:	England
Experte:	Andrew Kneen (andrew.kneen@shell.com)
Beispiel:	Barrierefreiheit durch globale Standards

Shell

Shell ist eines der weltweit größten Mineralöl- und Erdgas-Unternehmen. Der Konzern ist in mehr als 140 Ländern aktiv. Weltweit beschäftigt Shell rund 86.000 Mitarbeiter.

Zahlen und Fakten

Seit der Einführung des Workplace Accessibility Services wurden 1.304 Anträge gestellt (337 IT und 967 weitere); die Laufzeiten betragen im Durchschnitt 54 Tage, sofern eine Genehmigung erforderlich war und bei durchschnittlich 19 Tagen beim „Self Service“; die Kundenzufriedenheit liegt bei 96 %.

Beschreibung des Beispiels

Bis zur Umstrukturierung, die bei Shell hinsichtlich der Beantragung individueller Arbeitsplatzanpassungen durchgeführt wurde, wurde folgende Ausgangssituation erhoben: 7 nicht miteinander verbundene Verfahren, 110 mögliche Arbeitsschritte, bis zu 20 Monate Lieferzeit sowie undefinierbare Kosten. Im Jahr 2016 wurde daraufhin in einem Pilotprojekt die Einführung eines zentralisierten und globalisierten Verfahrens getestet, welches im Jahr 2018 nach erfolgreichem Abschluss auf weitere Standorte ausgedehnt wurde. Seit Oktober 2018 nehmen mehr als 80 Standorte teil.

→ <https://members.businessdisabilityforum.org.uk/resource-category/resource/case-study-shell-introduces-global-workplace-accessibility-capability/>

Wirkungen

Durch die Anpassung eines globalen und Mitarbeiter orientierten Prozesses konnten in der Pilotphase die Lieferzeit für entsprechende Arbeitsplatzanpassungen auf 30 Tage oder weniger reduziert und die Durchschnittskosten pro Anpassung auf 260 Pounds minimiert werden.

- Leichter Zugang: durch verbesserte Prozesse und zugewiesener Unterstützung benötigt es 5 Klicks, um eine Hilfe zu beantragen.
- Self-Service: der Mitarbeiter ist in der Entscheidungsfindung und in der Prozessgestaltung eingebunden.
- Technisches Portal: ein durch Kennzahlen unterstütztes Webportal, das einen Produktkatalog mit Unterstützungsmöglichkeiten enthält.
- Vertrauensorientierter Ansatz: Vorgesetzte werden über den Bedarf nur noch informiert, eine Genehmigung ist nicht mehr erforderlich.
- Querschnittsthema: Interessen verschiedener Abteilungen wurden in der Erstellung und der Gestaltung des „Workplace Accessibility Services“ einbezogen.

Handlungsempfehlung

Trotz angestrebter Barrierefreiheit werden auch zukünftig „individuelle Arbeitsplatzanpassungen“ erforderlich sein, um individuelle Einschränkungen zu kompensieren und eine vollständige Teilhabe im Arbeitsleben sicherzustellen. Durch die Einführung des „Workplace Accessibility Service“ wurde ein globaler Ansatz gewählt, um die einheitliche Versorgung aller Shell-Mitarbeiter und die Einhaltung internationaler Standards zu gewährleisten. Durch den zentralisierten und einheitlichen Prozess wurde die Basis gelegt, um unternehmensinterne und über die Ländergrenzen hinaus bestehende Barrieren in der Beschaffung und Durchführung von Arbeitsplatzanpassungen abzubauen, was auch in Deutschland vor dem Hintergrund der verschiedenen Zuständigkeiten und Rechtsgrundlagen zu fördern ist.

Fact sheet



Land:	Russland
Expertin:	Olga Loeva (o.loeva@fond-deystvuy.ru)
Beispiel:	Barrierefreiheit durch interaktives Training zur Bewusstseinsbildung

Deystvuy Charitable Foundation

Deystvuy Charitable Foundation ist eine non-profit Organisation, die das interaktive Training erstellt und gemeinsam mit externen Experten, die eine Behinderung haben, durchführt.

Zahlen und Fakten

Unternehmen wie Philip Morris International (PMI), L'Oreal, Deloitte, Abby, Air Liquide und die russische Bank Rosbank haben den DISability Skills Interactive Quest bereits durchgeführt. Die Kosten werden von den Unternehmen getragen.

Beschreibung des Beispiels

DISability Skills Interactive Quest ist ein durch Menschen mit Behinderung geleiteter Workshop für Mitarbeiter und Führungskräfte in Unternehmen.

Der Workshop wurde von einer Projektmanagerin, die selbst eine Behinderung hat, mit langjähriger Trainingserfahrung entwickelt. Schwerpunkt dieser Methode ist der praktische Teil, in dem die Teilnehmer mit Menschen mit unterschiedlichsten Behinderung im direkten Austausch sind.

Die Teilnehmer werden nach einer gemeinsamen Einleitung in verschiedene Gruppen geteilt und durch 5 Stationen von jeweils einem Moderator mit Behinderung begleitet. An jeder Station erhalten die Teilnehmer verschiedene Übungen und Aufgaben, die in einer vorbestimmten Zeit zu lösen sind.

Im letzten Teil des Workshops kommen die Teilnehmer für eine Feedbackrunde (genannt „Q&A“) zusammen, in der die gewonnenen Erfahrungen und Eindrücke geteilt und diskutiert werden

→ <https://drive.google.com/file/d/1jpyr6XiwQFFNUvw05RrnUjQh-7dxL8VW/view?usp=sharing>

Wirkungen

Durch den interaktiven Austausch und die praktischen Übungen, die auf den Wechsel der Perspektive ausgerichtet sind, erhalten die Teilnehmer neue Eindrücke und Erfahrungswerte, um vorhandene Vorurteile, Hemmnisse oder Unsicherheiten im Umgang mit Menschen mit Behinderung abzubauen und ein gegenseitiges Verständnis zu entwickeln.

Handlungsempfehlung

Ein professionalisiertes Training zur Bewusstseinsbildung, in dem Menschen mit Behinderung involviert sind, das systematisch aufgebaut ist und durch externen Dienstleister flächendeckend über verschiedene Branchen hinweg angeboten wird, könnte auch in Deutschland unter Einbindung vorhandener Organisationen angeboten werden, um Barrieren in den Köpfen abzubauen zu können.

Fact sheet



Land:	Israel
Expertin:	Shachar Liran Hanan (shacharlh@s-tov.org.il)
Beispiel:	Barrierefreiheit durch Vertrauensbildung

Shekulo Tov

Shekulo Tov ist ein Service Provider, der 2005 gegründet wurde und sich auf die Rehabilitation und Wiedereingliederung psychisch kranker Menschen in den allgemeinen Arbeitsmarkt spezialisiert hat.

Zahlen und Fakten

Vermittlungen auf den allgemeinen Arbeitsmarkt:

- 2014: 215
- 2015: 305
- 2016: 600
- Vermittlungsquote = 30 %

Beschreibung des Beispiels

In insgesamt 7 Business-Units (Trainingszentren) werden überwiegend Menschen mit psychischen Erkrankungen, die als nicht erwerbsfähig gelten, für die Aufnahme einer Tätigkeit im allgemeinen Arbeitsmarkt vorbereitet.

Die insgesamt 7 Business-Linien unterteilen sich z.B. in Second Hand Bücherläden, Cafés, Second Hand Bekleidungsgeschäfte, Hundeausführservice, Herstellung individualisierter Geschenkartikel. Dabei werden die Business-Units mitten in der „Community“ platziert, um einen Austausch mit der Zivilgesellschaft zu ermöglichen und zu fördern.

→ <https://stov.org/about/the-integrative-unit-model/>

Wirkungen

Keine systembedingten Zuständigkeitswechsel und damit den Erhalt der Vertrauensbeziehung zu den Klienten, die in der Wiedereingliederung von psychisch erkrankten Menschen besonders hervorgehoben wird.

- Ein Team aus „Spezialisten“ (Business Manager, Jobcoach, Arbeitstherapeut), das den Klienten von Anfang an bis zur Vermittlung auf den allgemeinen Arbeitsmarkt und darüber hinaus begleitet.
- Das Team aus „Spezialisten“ steht auch dem Arbeitgeber bei Fragen oder Problemen als Ansprechpartner vor Ort zur Verfügung, um den Unterstützungsbedarf der Unternehmen abzudecken. Ebenfalls können sich auch Mitarbeiter an das Team der „Spezialisten“ wenden.
- Eine Rückkehr in die Business-Unit ist jederzeit möglich, sofern die Vermittlung auf den allgemeinen Arbeitsmarkt scheitern sollte.

Handlungsempfehlung

Durch das Konzept der durchgängigen Zusammenarbeit werden Wechsel der Zuständigkeiten und der Ansprechpartner vermieden, was sich positiv auf die Vertrauensbeziehung zwischen Klient, „Spezialist“ und Unternehmen auswirkt, wodurch die Wahrscheinlichkeit einer erfolgreichen und nachhaltigen Eingliederung auf den allgemeinen Arbeitsmarkt gesteigert wird. In dieser Begleitungskette könnte das Budget für Arbeit genutzt werden.

International study on accessibility at the workplace



Background

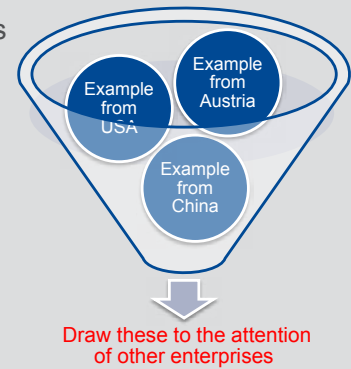
- German Federal Government's National Action Plan 2.0 (www.einfach-teilhabe.de)
- Commissioned by the Federal Ministry of Labour and Social Affairs (www.bmas.bund.de)
- Conducted by the German Social Accident Insurance (DGUV) (www.dguv.de)

Objective

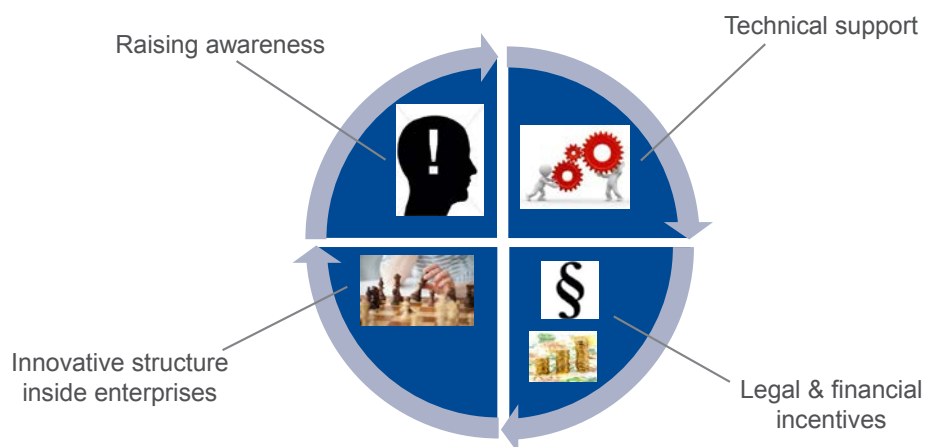
➔ Breaking down barriers at the workplace to improve the access of persons with disabilities to the competitive labour market

Find best practices worldwide, which ...

- ✓ are relevant to the private sector
- ✓ show substantial changes
- ✓ are transferable to other enterprises



Examples



Examples

Innovative structure



Country: Sweden

Organization / Company: Scandic Hotels

Example: Director Accessibility

Description: Creating a new position as "Director Accessibility" at management level to strengthening the position of accessibility and being able to consider accessibility in decisions from the very early beginning.

Connecting Accessibility with CSR (Corporate Social Responsibility).

Examples

Innovative structure



Country: Netherlands

Organization / Company: UWV – Public Administration

Example: Redesign of business processes

Description: Systematical consultation of employers carried out to create new opportunities of employment for PwD and optimizing business processes.

The Inclusive Work Redesign Method provides a change of perspective by focusing on employers needs besides of enabling individuals (retraining).

Examples



Innovative structure

Country: Malaysia

Organization / Company: Genashtim

Example: Virtual workplace as alternative employment relationship

Description: Employees with and without disabilities work from their home-place. There are no offices, no commuting to work and thus no barriers by reaching the workplace.

Based on State-of-the-Art-technology Genashtim is able to connect persons all over to world in order to deliver services to multinational companies.

Examples



Legal & financial incentives

Land: USA

Organization / Company: Disability:IN & AAPD

Example: Disability Equality Index (DEI)

Description: Benchmarking tool assisting employers to evaluate the current situation in terms of inclusion and accessibility in order to build up new strategies and future measures and obtain financial subsidies.

The Disability Equality Index (DEI) supports companies to identify opportunities for continued improvement and to build a company's reputation as an employer of choice.



Preventing employability – German approach of inclusion

- Legal obligation since 2004 – Disability Management (DM)
- Employers have to offer DM procedure if:
 - employee is ill more than six weeks per year and
 - frequently or in time intervals of absence from work
- Federal Labor Court decision 2007:
 - if employers do not provide evidence that they have offered a disability management program they may not dismiss the employee because of illness



Article 26, 1 a UN-CRPD “Habilitation and Rehabilitation”

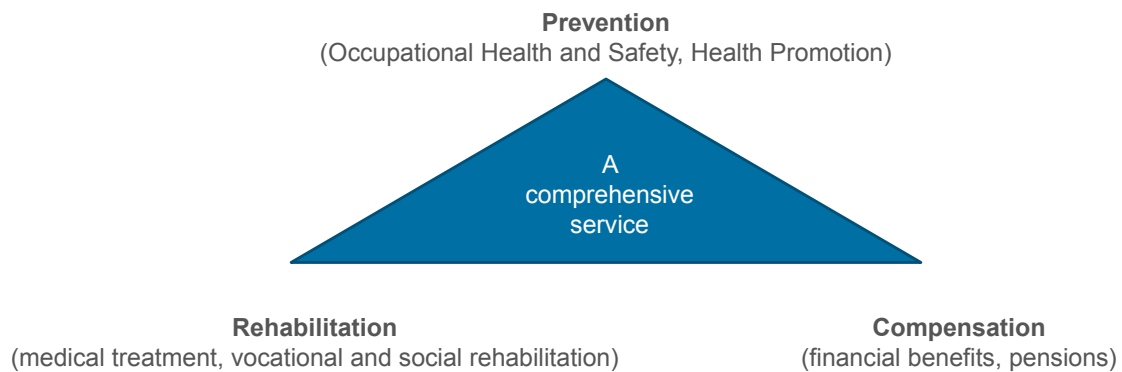
“Services and programs begin at the earliest stage, and are based on the multidisciplinary assessment of individual needs and strengths...”

Article 27 UN-CRPD “Work and Employment”

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

(k) Promote vocational and professional rehabilitation, job retention and return to work programmes for persons with disabilities

Statutory Accident Insurance in Germany



Best Practice in Germany

- Action Plan of DGUV or employers
- Inclusion Award of Federation of Employers with partners
- Financing projects and supporting services by quota systems
- Inclusion in the first labour market, no sheltered workshops
- Guidelines of RI for business leaders: paid job and inclusion
- Close link to “Sustainable Development Goal” of UN (SDG)
- Nothing without participation: peers as experts!

Request (Until October, 2019)

We need your support!

Share the information



Fill in the questionnaire



Provide us personal contacts





International study on accessibility at the workplace

Contact:

German Social Accident Insurance (DGUV)
- Rehabilitation Strategies -

Herr Dr. Friedrich Mehrhoff: Friedrich.Mehrhoff@dguv.de

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Anlage 8 – Rechtliche Expertise Barrierefreiheit in Deutschland

Laws Concerning Accessibility for Workers with Disabilities in Companies in Germany

by René Dittmann (LL.M.)

A. Introduction

The Convention on the Rights of Persons with Disabilities (UN CRPD) was agreed between the state parties with emphasis on the fact that the majority of persons with disabilities live in conditions of poverty (No. 20, Preamble UN CRPD). This stands in connection to the comparatively low employment rate of persons with disabilities¹. The realization of the right to work of persons with disabilities according to Art. 27 UN CRPD - that includes the right to the opportunity to gain a living by work in a labour market and a work environment that is open, inclusive and accessible to persons with disabilities - requires the accessibility of the working world. The refusal to adapt the workplace to persons with disabilities can constitute a disability-based discrimination prohibited under the UN CRPD. The obligation regarding the accessibility at the workplace contains not only physical accessibility, but also accessible transport and support services to get to the workplaces as well as accessible information pertaining to work, advertisements of job offers, selection processes and communication at the workplace. Furthermore, all trade union and labour rights must also be accessible, as must training opportunities and job qualifications.²

In the following the legal bases concerning the accessibility at the workplace for persons with disabilities in the Federal Republic of Germany (FRG) are summarized. In addition, the regulations regarding the duty to provide reasonable accommodation are taken into account, since, if necessary, they should ensure equal participation in working life in particular cases (Art. 27 (1) No. i UN CRPD in conjunction with Art. 2 UN CRPD). After an overview of the relevant legal framework for participation in working life in Germany (B.), the employer obligations (C.) as well as the social benefits for the employment of persons with disabilities are outlined (D). Finally, the provisions regarding the accessibility and the reasonable accommodation at the workplace are presented (E.).

B. Legal framework for participation in working life of persons with disabilities in Germany

1. Requirements of the Basic Law (*Grundgesetz*)

The FRG is a social constitutional state (Art. 20 (1) and Art. 28 (1) Grundgesetz [GG]). According to the German Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG)) the constitutional definition as a *social state* obliges the FRG to ensure a just social order³ and requires state provision and welfare for individuals or groups of society who are hindered in their personal and social development by their personal circumstances or social disadvantages⁴. On the one hand the principle of the social state binds the state but on the other hand it includes no statements about how to fulfill this obligation. Instead, it leaves the legislature a wide scope for action⁵.

¹ OECD, *Sickness, Disability and Work*, p. 50; *Welti*, in: MacEachen (ed.), *The Science and Politics of Work Disability Policy*, p. 171; most recently: legislative material of the parliament (*Bundestagsdrucksache*) 19/4157.

² Committee on the Rights of Persons with Disabilities from 22.05.2014, CRPD/C/GC/2, No. 41; see also: *Mehrhoff*, in: Wansing, *Welti*, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*.

³ BVerfG from 18.07.1967 – 2 BvF 3/62.

⁴ BVerfG from 22.06.1977 – 1 BvL 2/74.

⁵ BVerfG from 18.07.1967 – 2 BvF 3/62.

Furthermore, it can exert an influence on the interpretation of fundamental rights of the Basic Law (*Grundgesetz*)⁶, that are constitutional value judgments⁷. One of these is the prohibition of discrimination because of disability per Article 3 (III) sentence 2 GG (“No person shall be disfavored because of disability”⁸). Associated with this is a subjective right vis-à-vis the public authorities bound by the fundamental rights to desist and prevent disadvantageous unequal treatment due to disability⁹. Disadvantage is also given, if people with disabilities are excluded from development and activity opportunities by the public authorities and this exclusion is not sufficiently compensated by a support measure related to the disability¹⁰. In addition, the prohibition of discrimination in conjunction with the social state principle demands the state to support and actually realize equality with people without disabilities, even it is not connected with an individual subjective participation right¹¹. The state therefore has the duty to forbid discrimination by private persons¹². Moreover, the prohibition of discrimination is also taken into account in the interpretation of civil law and thus develops a pronounced third-party effect¹³.

2. Requirements of international law

Ratified international law has the status of federal law (*Bundesrecht*) within the state, and thus it is subordinated to the Basic Law, but nevertheless, it has to be taken into account as an interpretation aid regarding the fundamental rights¹⁴. This effect of human rights and international law has been clarified in the context of the European Convention on Human Rights (ECHR)¹⁵ and the UN CRPD¹⁶.

By joining the Convention on the Rights of Persons with Disabilities, the FRG has also accepted the obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention (Art. 4 (I) (a) UN CRPD). Therefore, the German laws – including in the field of labour law and social law - must be applied and interpreted in conformity with the Convention¹⁷.

Furthermore, ratified international law must, as appropriate, be observed and applied by the German courts like other statutory law of the federal government, within the framework of methodologically acceptable interpretation¹⁸. Such a direct applicability presupposes that a provision of international law is appropriate and sufficiently well-defined to have legal effect like a domestic provision. In addition, it must convey a subjective right of the individual¹⁹. For Art. 27 UN CRPD this is not assumed²⁰, but for the general prohibition of discrimination according to Art. 5 (II) UN CRPD²¹, which also includes

⁶ *BVerfG* from 13.01.1982 – 1 BvR 848/77.

⁷ *BVerfG* from 15.01.1958 – 1 BvR 400/51.

⁸ „Niemand darf wegen seiner Behinderung benachteiligt werden“

⁹ *Kischel*, in: BeckOK Grundgesetz, Art. 3 GG, No. 234; *Welti*, Behinderung und Rehabilitation im sozialen Rechtsstaat, p. 352.

¹⁰ *BVerfG* from 08.10.1997 – 1 BvR 9/97.

¹¹ *Welti*, Behinderung und Rehabilitation im sozialen Rechtsstaat, p. 460; *Caspar*, EuGRZ 2000, 135 (139).

¹² *Welti, Frankenstein & Hlava*, Angemessene Vorkehrungen und Sozialrecht, p. 43.

¹³ *BVerfG*, from 28.03.2000 – 1 BvR 1460/99.

¹⁴ *BVerfG* from 04.05.2011 – 2 BvR 2333/08.

¹⁵ *BVerfG* from 14.10.2004 – 2 BvR 1481/04.

¹⁶ *BVerfG* from 21.03.2016 – 1 BvR 53/14.

¹⁷ *Welti & Nachtschatt*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*, p. 60; *Banafsche*, in: Banafsche & Platzer, *Soziale Menschenrechte und Arbeit*, p. 85.

¹⁸ *BVerfG* from 14.10.2004 – 2 BvR 1481/04; Federal Social Court (*BSG*) from 06.03.2012 – B 1 KR 10/11 R.

¹⁹ *BSG* from 06.03.2012 – B 1 KR 10/11 R.

²⁰ *Welti & Nachtschatt*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*, p. 60.

²¹ *BSG* from 06.03.2012 – B 1 KR 10/11 R.

the obligation to provide reasonable accommodation (Art. 2 UN CRPD)²². However, it is not possible to directly assert a judicial right against a non-state institution²³.

3. Anti-discrimination law in the European Union

On European Union level in 2000 the Council Directive 2000/78/EC was adopted to lay down a general framework for combating discrimination, amongst others, on the ground of disability as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment (Art. 1 Directive 2000/78/EC). In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided in the sphere of employment, occupation and vocational training (Art. 5 Directive 2000/78/EC). Therefore, the EU Member States have to create regulations, that oblige employers to provide reasonable accommodation.²⁴

European Union's Directives address the EU Member States and shall be binding, as to the result to be achieved, but shall leave to the national authorities the choice of form and methods (Art. 288 Sentence 3 Treaty on the Functioning of the European Union (TFEU)). But after the implementation deadline the national law has to be interpreted in conformity with Community law²⁵. In this context, it has to be noted that the ratification of the UN CRPD by the EU has led it to be used for interpreting EU law²⁶.

4. Anti-discrimination law in the Federal Republic of Germany

4.1. Equal treatment obligations for private employers

The principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question²⁷. The Directive 2000/78/EC was implemented in Germany in 2006²⁸, in particular by the adoption of the General Act of Equal Treatment (*Allgemeines Gleichbehandlungsgesetz [AGG]*)²⁹. The AGG prohibits discrimination on different grounds, including disability, in the context of employment and occupation (§§ 1, 3 and 7 AGG). The scope of the AGG refers to selection, recruitment and employment conditions, continued employment, career advancement and safe and healthy working conditions (§ 2 AGG). However, the AGG contains no provision that obliges employers to provide reasonable accommodation. Nevertheless, this duty can be derived by an interpretation of the AGG's provisions in conformity with the EU directive 2000/78/EC in conjunction with the UN CRPD³⁰. In connection with the legality of a different treatment due to occupational requirements the German Federal Labour Court (*Bundesarbeitsgericht (BAG)*) has already confirmed, that opportunities to provide reasonable accommodation have to be examined³¹.

²² Further information to reasonable accommodation in context of the UN CRPD as well as the EU Directive 2000/78/EG in: *Ferri*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*.

²³ *Welti, Frankenstein & Hlava*, *Angemessene Vorkehrungen und Sozialrecht*, p. 28.

²⁴ *Ferri & Lawson*, *Reasonable accommodation for disabled people in employment*, p. 40; *Rabe-Rosendahl*, *Angemessene Vorkehrungen für behinderte Menschen im Arbeitsrecht*, p. 162.

²⁵ *ECJ* from 5.10.2004 – C-397/01.

²⁶ *ECJ* from 11.04.2013 – C-335/11.

²⁷ *ECJ* from 5.10.2004 – C-397/01.

²⁸ Act implementing European directives putting into effect the principle of equal treatment (*Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung*) from 14.08.2006, BGBl. I, p. 1897.

²⁹ See *Welti*, in: Stendahl, Erhag & Devetzi (eds.), *A European Work-First Welfare State*, p. 148.

³⁰ *Welti, Frankenstein & Hlava*, *Angemessene Vorkehrungen und Sozialrecht*, p. 47.

³¹ *BAG* from 19. 12.2013 – 6 AZR 190/12.

A reference to the AGG is also found in the special labour law on severely disabled persons (§ 164 (II) Social Code Book (*Sozialgesetzbuch* [SGB] IX³²). Moreover, the AGG is valid for persons, who are claiming a service in a vocational rehabilitation facility (§ 52 SGB IX) as well as for employees in sheltered workshops (*WfbM*) for persons with disabilities (§ 221 (IV) SGB IX). Furthermore, the prohibition of discrimination is anchored in other parts of the Social Code Book to prevent disadvantages when claiming a social right (§ 33c SGB I³³), concerning training and employment services (§ 36 (II) SGB III³⁴) or at the vocational guidance by the social insurance agencies (§ 19a SGB IV³⁵)³⁶.

The central legal consequence of a violation of the prohibition of discrimination under the AGG is a claim for compensation of the person concerned³⁷

4.2. Equal treatment obligations for public authorities

For public authorities on federal level the Act on Equal Opportunities for Persons with Disabilities (*Behindertengleichstellungsgesetz* [BGG]) is to apply. This law includes provisions regarding accessibility (§§ 8-12a BGG) as well as a prohibition of discrimination due to disability, which contains the requirement to provide reasonable accommodation (§ 7 BGG). In order to implement the goals of the BGG also at the level of the 16 German *Länder* (states), similar state laws were created in all the essential provisions³⁸.

5. The German social law and the law of rehabilitation and participation

Benefit entitlements and specific rights for persons with disabilities are existing in particular in the German Social Code (*Sozialgesetzbuch*), which consist mainly of the Social Code Books I to XII. The German social law system is divided into different insurance and welfare systems³⁹, each with its own social service agencies (e.g. the health insurance funds in the statutory health insurance system (SGB V⁴⁰) or the employment agencies in the system of employment promotion (SGB III)). The responsibility of the agencies and their delimitation follows from the respective books of the Social Code (§ 12 SGB I). Regarding rehabilitation and participation of persons with disabilities or persons who are threatened by disabilities, benefits of different agencies and different benefit groups come into consideration (§ 29 (II) SGB I and §§ 5, 6 SGB IX). In order to overcome the disadvantages of this multi-branch system, the SGB IX aims to coordinate the rehabilitation activities of the social service agencies that can be responsible for rehabilitation and participation of persons with disabilities (rehabilitation agencies)⁴¹.

In addition, the SGB IX also contains special regulations for the participation of severely disabled persons (§§ 151-241 SGB IX), which mainly concern the sphere of employment (employment and other duties of the employer, special protection against dismissal, representatives for severely disabled employees).

³² SGB IX: laws regarding rehabilitation and participation of persons with disabilities.

³³ SGB I: general requirements regarding the whole social code book.

³⁴ SGB III: law of employment promotion.

³⁵ SGB IV: Common rules for the social insurance.

³⁶ Bundestagsdrucksache 16/1780, p. 28.

³⁷ Bundestagsdrucksache 16/1780, p. 38.

³⁸ *Frehe*, in: *Frehe, H. & Welti, F. (eds.)*, *Behindertengleichstellungsrecht*, p. 106.

³⁹ See *Welti*, in: *MacEachen (ed.)*, *The Science and Politics of Work Disability Policy*, p. 171; *Welti & Groskreutz*, in: *Pennings, Erhag & Stendahl (eds.)*, *Non-public Actors in Social Security Administration*, p. 10.

⁴⁰ SGB V: law of the statutory health insurance.

⁴¹ See *Welti*, in: *MacEachen (ed.)*, *The Science and Politics of Work Disability Policy*, p. 174; *Welti*, in: *Stendahl, Erhag & Devetzi (eds.)*, *A European Work-First Welfare State*, p. 148.

6. Occupational health and safety law in Germany

The employment relationship between employee and employer establishes ancillary obligations that oblige the employers to protect the life and health of their employees (§§ 241 (II), 618 German Civil Code (*Bürgerliches Gesetzbuch* [BGB])). These ancillary obligations are specified by the public occupational health and safety laws (e.g. the *Arbeitsschutzgesetz* [ArbSchG]), which are at the same time indispensable private law obligations of the employer in the sense of a minimum standard to be observed⁴².

The ArbSchG commits the employers to provide the necessary safety and health-friendly workplace design (§§ 3 and 4 ArbSchG). The monitoring of occupational safety and health according to the ArbSchG is a state task (§ 21 (1) sentence 1 ArbSchG), that is carried out in cooperation of the occupational safety authorities of the *Bundesländer* with the accident insurance agencies (§ 21 (III) ArbSchG), which are responsible for the prevention of occupational accidents, occupational diseases and work-related health hazards (§ 14 SGB VII⁴³). In addition, employers are required to appoint company doctors and occupational health and safety specialists to support occupational safety and accident prevention (§ 1 Occupational Safety Law (*Arbeitssicherheitsgesetz* [ASiG])).

C. Obligation of employers to employ persons with severe disability

1. Employment obligation of private employers

Private employers with at least 20 workplaces have an employment obligation for persons with severe disabilities (§ 154 (I) sentence 1 SGB IX). The number of severely disabled persons to be employed at least depends on the size of the company. In companies with less than 40 jobs, at least one and in companies with fewer than 60 jobs, at least two severely disabled persons must be employed. Those with more than 60 workplaces have to employ on at least five percent of the jobs persons with severe disabilities (§ 154 (I) SGB IX). In assigning employees to the number of jobs required for people with disabilities, people with special difficulties of participation and trainees are given a higher weighting (§ 159 SGB IX).

2. Employment obligation of public employers

Contrary to the employment obligation for private employers, the employment obligation for public employers at federal level is continuously six percent, if on the 31.10.1999 already at least six percent of the jobs were staffed with severely disabled persons (§ 241 (I) SGB IX).

3. Compensatory levy

If the employment obligation is not fulfilled, a compensation levy has to be paid by the employer for each unoccupied job (§ 160 (I) sentence 1 SGB IX). The levy amounts for each unoccupied workplace for severe disabled persons between 125 € and 320 € per month (§ 160 (II) SGB IX).

D. Social benefits regarding the employment of persons with disabilities

The avoidance, overcoming and reduction of limitations on employability due to disability or an impending disability, as well as the permanent safeguarding of participation in working life are objectives of the participation benefits (*Leistungen zur Teilhabe*) in Germany (§ 4 (I) No. 2 and No.3 SGB IX). These include the benefits for medical rehabilitation (*Leistungen zur medizinischen Rehabilitation*), benefits for participation in working life (*Leistungen zur Teilhabe am Arbeitsleben*),

⁴² BAG from 12.8.2008 – 9 AZR 1117/06.

⁴³ SGB VII: law of the statutory accident insurance.

⁴⁴ See *Welti*, in: MacEachen (ed.), *The Science and Politics of Work Disability Policy*, p. 177.

supplementary benefits to secure a livelihood (*unterhaltssichernde und ergänzende Leistungen*), benefits for participation in education (*Leistungen zur Teilhabe an Bildung*) and benefits for social participation (*Leistungen zur sozialen Teilhabe*) (§ 5 SGB IX).

Regarding the provision of participation benefits, various rehabilitation agencies are responsible. Besides the health insurance funds (*Krankenkassen*), the Federal Employment Agency (*Bundesagentur für Arbeit*), the agencies of the statutory accident insurance (*Unfallversicherungsträger*) and the agencies of the statutory pension insurance (*Rentenversicherungsträger*), agencies on municipality or regional level (e.g. social integration assistance agencies (*Eingliederungshilfeträger*)) financed by the counties and towns (*Kreise und kreisfreie Städte*) and by the states can be responsible (§ 6 SGB IX).⁴⁵

1. Benefits for medical rehabilitation

The focus of the benefits for medical rehabilitation is on a disorder of body functions and structures⁴⁶ and they have the objective to maintain or to improve the state of health⁴⁷ in order, among other things, to avoid limitations of earning capacity (§ 42 (I) No. 2 SGB IX). Medical rehabilitation is a multi-professional and multimodal benefit that differs from acute medical care⁴⁸ and which is typically provided in and by facilities⁴⁹. The benefits include, for example, medical and psychotherapeutic treatments, medicines, various medical-therapeutic services and technical aids as well as ergonomic tests and work therapy. If necessary, medical, psychological and educational aids are also provided (§ 42 (II), (III) SGB IX).

The benefits for medical rehabilitation include also the gradual reintegration into the workplace (*stufenweise Wiedereingliederung*, § 44 SGB IX). It is a possibility for workers whose working capacity is still reduced due to sickness to return gradually to the workplace under medical supervision. This return to work should be supported by medical and supplementary benefits provided by rehabilitation agencies.

2. Benefits for participation in working life

The benefits regarding the participation in working life focus on contextual factors - on personal and environmental factors. The objective of these benefits is the empowerment to participate in working life⁵⁰ by preserving, improving or restoring employability of persons with disabilities or those who are threatened by disability (§ 49 (I) SGB IX)⁵¹. For that, for example, vocational knowledge and skills are taught or the necessary assistance for mobility are provided (e.g. travel cost subsidy, grants to the driver's license or to the disability-friendly adaption of a car). Furthermore, the cost of a necessary work assistance for severely disabled people or for necessary technical aids and tools at the workplace can be taken. Likewise, according to § 50 SGB IX benefits are provided to employers.⁵² These benefits are intended to give employers financial incentives to provide people with disabilities with new jobs or to secure jobs on a permanent basis⁵³. The financial support of such a rehabilitation in a company⁵⁴

⁴⁵ See *Schian*, in: Gobelet & Franchignoni (eds.), *Vocational Rehabilitation*.

⁴⁶ *Welti & Dittmann*, *Soziale Sicherheit*, 449 (464).

⁴⁷ *BSG* from 12.08.1982 – 11 RA 62/81.

⁴⁸ *Nebe* in: in: Feldes, Kohte & Stevens-Bartol, *SGB IX*, No. 8; *Reimann*, in: Ruland, Becker & Axer (eds.), *SRH*, No. 108.

⁴⁹ *Welti*, in: MacEachen (ed.), *The Science and Politics of Work Disability Policy*, p. 178; *Welti & Dittmann*, *Soziale Sicherheit*, 449 (465).

⁵⁰ *BSG* from 06.4.2011 – B 4 AS 3/10 R.

⁵¹ More detailed: *Schian*, in: Gobelet & Franchignoni (eds.), *Vocational Rehabilitation*, p. 317 et seq.

⁵² See *Welti*, in: MacEachen (ed.), *The Science and Politics of Work Disability Policy*, p. 178.

⁵³ *Jabben*, in: BeckOK Sozialrecht, § 50 SGB IX.

⁵⁴ See *Luik*, in: Deinert & Welti, *SWK-BR, Leistungen an Arbeitgeber*, No. 2.

may be provided by certain conditions (§ 50 (II) SGB IX), for instance by drawing up a reintegration plan or by an obligation to continue employment for a limited period of time after termination of the grant⁵⁵. The benefits to employers according to § 50 SGB IX are in particular training grants for the execution of educational services in the company (e.g. financing the training allowance), integration subsidies (temporary partial financing of the wage), subsidies for work aids in the company (for a disability-friendly design of training and work places) and reimbursements for a temporary probationary employment⁵⁶. In order to enable or to maintain an appropriate, suitable and socially insured employment for persons with special needs, also Supported Employment (*Unterstützte Beschäftigung*) can be claimed, which includes individual training and, if necessary, vocational accompaniment (§ 55 SGB IX).

Moreover, the benefits for participation in working life include benefits in sheltered workshops for persons with disabilities, for whom employment on the general labour market is not, not yet or not yet again possible because of the type or the severity of the disability (§ 56 in conjunction with § 219 SGB IX)⁵⁷. Furthermore, a Budget for Work (*Budget für Arbeit*) exists to encourage the participation of this group of persons in the general labour market⁵⁸. The budget for work contains an open-ended wage subsidy to the employer and the financing of expenses for necessary guidance and supervision at the workplace (§ 61 SGB IX).

3. Supplementary benefits to secure a livelihood

The benefits for medical rehabilitation and for the participation in working life are supplemented by benefits to secure a livelihood and through other benefits (§ 64 SGB IX). The livelihood-securing benefits contain for example the sickness benefits (*Krankengeld*) during sick leave (§ 44 SGB V), the injured benefits (*Verletztengeld*) during inability to work because of a work accident or an occupational disease (§ 45 SGB VII) or transitional payment (*Übergangsgeld*) during the participation in a rehabilitation measure (§ 66 SGB IX).

4. Benefits for participation in education

The benefits for participation in education are provided to secure that persons with disabilities can take advantage of educational opportunities equally like non-disabled persons (§ 75 (II) SGB IX). It includes assistance for school education, school vocational training, higher education as well as further education (§ 75 (II) SGB IX).

5. Benefits for social participation

In order to enable and facilitate the equal participation in the community life, social participation benefits are provided, as far as other participation benefits are not provided (§ 76 SGB IX). The objective of this benefit group is that persons with disabilities achieve the most possible self-determined and self-responsible lifestyle both in their own living and social space⁵⁹. These include e.g. personal assistance, benefits to acquire and maintain practical knowledge and skills as well as benefits for mobility and technical aids (§ 76 (II) SGB IX).

⁵⁵ *Jabben*, in: BeckOK Sozialrecht, § 50 SGB IX, No. 3.

⁵⁶ See *Luik*, in: Deinert & Welti, SWK-BR, Leistungen an Arbeitgeber, No. 10 ff.

⁵⁷ *Welti*, in: MacEachen (ed.), *The Science and Politics of Work Disability Policy*, p. 178; *Schreiner*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*; *Welti & Nachtschatt*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*, p. 82.

⁵⁸ *Welti & Nachtschatt*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*, p. 78.

⁵⁹ Bundestagsdrucksache 18/9522, p. 261.

6. Social integration assistance benefits

Participation benefits can be provided not only by the social insurance agencies, but also as welfare benefits under the social integration assistance scheme (§ 6 (I) No. 7 SGB IX). The tasks of social integration assistance are in particular the integration of persons with disabilities into society and enabling the exercise of an appropriate occupation or other appropriate occupational activities (§ 53 (III) SGB XII⁶⁰). In comparison to the participation benefits of other rehabilitation agencies, the social integration assistance is subordinated (§ 54 (IV) sentence 2 in conjunction with § 2 SGB XII).

7. Accompanying help in working life

Participation in the working life of people with severe disabilities should also be made possible and supported by the accompanying help at work (*begleitende Hilfen im Arbeitsleben*, § 185 (II) SGB IX). This benefit is provided by the integration offices (*Integrationsämter*), which cooperate closely with the Federal Employment Agency and other rehabilitation agencies (§ 185 (II) SGB IX). The accompanying help in working life is financed by the employers' compensatory levy (§ 160 (V) SGB IX).

These services essentially correspond to the services for participation in working life⁶¹ and can be provided to people with severe disabilities or to employers (§ 185 (III) SGB IX). However, the participation benefits of the rehabilitation agencies have priority and their increase through the benefits of the integration offices is not allowed (§ 185 (VI) SGB IX). Moreover, it is also necessary to check in advance what can reasonably be expected of the employers⁶².

The accompanying help in working life provided by the integration offices differ from the rehabilitation agencies' participation benefits in that they can be provided not only for a limited period of time, but also on a permanent basis⁶³.

E. Legal framework for accessibility and reasonable accommodation for persons with disabilities in working life in Germany

1. Accessibility at the workplace

1.1. Obligations of private employers

If an employer employs people with disabilities, he or she has the duty to ensure that workplaces are set up and operated in such a way that the special needs of these workers are considered with regard to safety and health (§ 3a (II) workplace ordinance (*Arbeitsstättenverordnung* [ArbStV])).

The requirement for an accessible workplace therefore arises when accessibility becomes necessary for the first time as a result of a newly acquired disability of an employee or when persons with disabilities are recruited for the first time⁶⁴. The accessibility requirement concerns in particular the barrier-free design of workstations, sanitary facilities, break and standby rooms, canteens, first aid rooms and accommodation, as well as the related doors, traffic routes, escape routes, emergency exits, stairs and orientation systems that are used by workers with disabilities (§ 3a (II) ArbStV).

⁶⁰ SGB XII: law of the social assistance.

⁶¹ *Welti & Dittmann*, Soziale Sicherheit, 449 (466).

⁶² *Ritz*, in: *Deinert & Welti*, SWK-BR, Begleitende Hilfen, No. 1.

⁶³ *Welti & Dittmann*, Soziale Sicherheit, 449 (465).

⁶⁴ *Welti & Dittmann*, Soziale Sicherheit, 449 (457).

If an employer fails to ensure that a workplace is set up or operated in the manner prescribed, he or she commits an administrative offence (§ 9 (I) No. 2 ArbStV), which may be connected with a fine of 5000 €⁶⁵. In addition, this is an indication of a disadvantage according to the AGG⁶⁶.

However, employers can make exceptions from the obligation to an accessible workplace, if the employer takes other measures that are just as effective or the implementation of the provision would lead to unreasonable hardship in certain cases and the deviation is compatible with protection of the workers (§ 3a (III) ArbStV).

Besides the ArbStV, also the law for severe disabled persons includes an accessibility requirement for employers⁶⁷. To realize the employment obligation concerning the persons with severe disabilities⁶⁸, employers have to ensure by suitable measures that the required number of persons with severe disabilities can find a permanent disability-adequate employment in their companies (§ 164 (III)). However, this duty of organization of the employer is subject to the proviso that it is not unreasonable or involves disproportionate expenditures or contrary to occupational health and safety laws or civil service regulations (§ 164 (II) SGB IX in conjunction with § 164 (IV) sentence 3 SGB IX).

1.2. Obligations of public employers

Public authorities on federal level are, moreover, obliged to accessibility according to the BGG (§§ 8 et seq. BGG). For instance, the obligation concerns the architectural facilities (§ 8 BGG), the use of easy-to-understand language (§ 11 BGG) or the websites and mobile applications including the offers intended for employees in the intranet (§ 12a BGG).

2. Reasonable accommodation at the workplace

2.1. Obligations of private employers

2.1.1. Special obligations of the employers concerning the employment of severe disabled persons

German private employers are not explicitly obliged to provide reasonable accommodation at the workplace. Nevertheless, they have special duties regarding persons with severe disabilities (§ 164 (IV), (V) SGB IX) that can be understood as an obligation to reasonable accommodation⁶⁹. According to § 164 (IV) sentence 1 SGB IX severely disabled have a claim on employment that corresponds to their abilities and knowledge to their employers (No. 1), on preferential consideration regarding internally vocational training and career advancement (No. 2), on facilitation of participation in external vocational training measures (No. 3), on a disability-adequate adaptation and operation of the working place as well as on the disability-adequate design of the specific workplace, the work environment, the work organization and the working hours (No. 4). Furthermore, this claim covers a right on equipment with technical work aids (No. 5). In addition, severely disabled persons are entitled to part-time employment if shorter working hours are necessary because of the type or severity of the disability (§ 164 (V) SGB IX).

The claim on employment according to § 164 (IV) sentence 1 No. 1 SGB IX shall ensure that persons with severe disabilities can make full use of their abilities and knowledge. Therefore, this right comprises also a claim on another employment and if necessary on a contract change, provided the

⁶⁵ Lorenz, in: Kollmer, Klindt & Schucht, Arbeitsschutzgesetz, § 3a ArbStV, No. 21.

⁶⁶ Welte & Nachtschatt, in: Wansing, Welte, & Schäfers (eds.), The Right to Work for Persons with Disabilities, p. 74.

⁶⁷ See Faber, in: Feldes, Kohte & Stevens-Bartol, SGB IX, § 81 No. 28.

⁶⁸ See C.1.

⁶⁹ Welte & Nachtschatt, in: Wansing, Welte, & Schäfers (eds.), The Right to Work for Persons with Disabilities, p. 80 et seq.

previous contract does not cover the new activity. However, included is not a claim on the establishment of a new work place.⁷⁰ For example, the transfer to another companies branch can be considered to practice a health-adequate work activity there⁷¹.

However, these claims do not exist if the fulfillment would not be reasonable or they would impose disproportionate expenditures for the employer or if the occupational health and safety laws or civil service regulations preclude them (§ 164 (IV) sentence 3 SGB IX).

2.1.2. Obligations of the employers concerning the employment of not severe disabled persons with disabilities

2.1.2.1. Obligations to provide reasonable accommodation by an interpretation of national law in conformity with EU law and the UN CRPD

Persons with disabilities but without a recognized severe disability may have a claim on reasonable accommodation arising from the interpretation of private law in conformity with EU law and the UN CRPD. In particular, such an interpretation can be considered for the labour law ancillary obligations that oblige the employers to protect the life and health of their employees⁷² as well as for the prohibition of discrimination according to the AGG⁷³.

2.1.2.2. Gradual Reintegration

A reasonable accommodation can also be seen in the gradual reintegration⁷⁴, which allows both an adjustment of working time and an adjustment of work activity⁷⁵, to facilitate the reintegration of sick workers into the workplace.

The gradual reintegration is carried out for a rehabilitative purpose, that means the focus is not on a work performance in the usual sense. As a result, employees do not have a remuneration entitlement against the employer during this measure⁷⁶. The livelihood is instead secured by the supplementary benefits⁷⁷ or, if necessary, by unemployment benefits⁷⁸. During the gradual reintegration, the employer has not to pay contributions to the health insurance scheme (§§ 224 (1), 251 (1), (4) SGB V), the pension insurance scheme (§ 170 (1) SGB VI⁷⁹), the care insurance scheme (§ 59 (1), (2), (4) sentence 2 SGB XI⁸⁰) and the unemployment insurance scheme (§ 347 SGB III).

Since the gradual reintegration has a rehabilitative purpose⁸¹, the physician should be allowed to prescribe a reintegration activity that is from a different kind than the actual work contract owed activity due to therapeutic reasons⁸². However, this opinion is controversial. The State Labour Court of Cologne (*Landesarbeitsgericht Köln*) said, though, that the reintegration activity should usefully be an

⁷⁰ BAG, Urteil vom 04. Oktober 2005 – 9 AZR 632/04 –, BAGE 116, 121-130, Rn. 23.

⁷¹ BAG, Urteil vom 03. Dezember 2002 – 9 AZR 481/01 –, juris

⁷² See B.6.; BAG from 19.12.2013 – 6 AZR 190/12; *Nebe*, Sonderheft Sozialrecht aktuell 2014, 1 (3); *Welti & Nachtschatt*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*, p. 81.

⁷³ See B.4.1.; *Welti, Frankenstein & Hlava*, *Angemessene Vorkehrungen und Sozialrecht*, p. 47; *Welti & Nachtschatt*, in: Wansing, Welti, & Schäfers (eds.), *The Right to Work for Persons with Disabilities*, p. 81.

⁷⁴ See D.1. and D.3; *Rabe-Rosendahl*, *Angemessene Vorkehrungen für behinderte Menschen im Arbeitsrecht*, p. 387; *Welti & Dittmann*, *Soziale Sicherheit*, 449 (464).

⁷⁵ *Anton-Dyck*, *Stufenweise Wiedereingliederung nach § 28 SGB IX, § 74 SGB V*, p. 105 et seq.

⁷⁶ BAG, from 29. 01.1992 – 5 AZR 37/91.

⁷⁷ See D.3.

⁷⁸ BSG, from 21.03.2007 – B 11a AL 31/06 R.

⁷⁹ SGB VI: law of the statutory pension insurance.

⁸⁰ SGB XI: law of the social care insurance.

⁸¹ BAG from 29.01.1992 – 5 AZR 37/91.

⁸² See Gagel, NZA 2001, 988 (989).

already existing activity in the company (but not necessarily the former activity) by which an employee can test his or her working ability⁸³.

A claim of persons with disabilities against employers to carry out the gradual reintegration does not explicitly exist in German laws. However, it may result from the provisions of the law on the severely disabled persons (§ 164 (I) No. 1 SGB IX)⁸⁴ as well as from the EU- and UN CRPD-conforming interpretation of national law.

2.1.3. Vocational reintegration program

For employees who have been sick for more than six weeks in a year (continuously or repeatedly), employers are according to § 167 (II) SGB IX required to provide a vocational reintegration program (*Betriebliches Eingliederungsmanagement (BEM)*). This procedural obligation of employers applies to all employees and does not require a disability or a severe disability⁸⁵. The objective of the BEM is to save the job by finding opportunities to overcome the existing sickness and to prevent renewed sickness. A possible measure to do so can also be the provision of reasonable accommodation⁸⁶. This procedure requires the participation of the employee, the employer and the company-internal representation of the interests of the employees respective those of the employees with severe disabilities (§ 167 (II) sentence 1 SGB IX). If necessary also the company occupational physician has to be consulted (§ 167 (II) sentence 2 SGB IX). If participation benefits are considered as well, the rehabilitation agencies or in case of employees with severe disabilities the integration offices have to be consulted by the employer (§ 167 (II) sentence 4 SGB IX)⁸⁷. A properly carried out BEM can have the result that reasonable accommodation and workplace accessibility for the worker will be provided.

To give employers a financial incentive to set up a BEM, the rehabilitation agencies and integration offices can provide premiums or bonuses (§ 167 (III) SGB IX). Premiums may be paid to employers once or repeatedly to reward the personnel and organizational effort for the introduction of the BEM. With bonuses a reduction in social security contributions is meant⁸⁸.

If an employer does not carry out a BEM, this may have consequences in the protection proceedings against unfair dismissals. The employer has then to explain comprehensively and in detail why neither further employment in the previous workplace nor its appropriate adaptation or change would have been possible and why the employee could not have been employed in another job with a changed activity⁸⁹. In addition, the non-execution of a BEM or of any measure found during the BEM as appropriate to save the workplace (e.g. a gradual reintegration) may result in claims for damages⁹⁰.

Already before the implementation of the BEM the employer had to examine, whether a work disabled employee can be kept employed on a health-adequate, reasonable and suitable work place in the company. If necessary, the employer has to vacate such a work place by using his or her instruction right and he or she has to endeavor to obtain the works councils approval if required⁹¹. This obligation

⁸³ State Labour Court of Cologne from 24.05.2016 – 12 Sa 677/13.

⁸⁴ BAG from 13.06.2006 – 9 AZR 229/05.

⁸⁵ BAG, from 12.07.2007 – 2 AZR 716/06.

⁸⁶ Welti & Dittmann, Soziale Sicherheit, 449 (461).

⁸⁷ See Mehrhoff, in: Wansing, Welti, & Schäfers (eds.), The Right to Work for Persons with Disabilities; *Mittag et al.*, International Journal of Public Health 2018, p. 2.

⁸⁸ Welti, NZS 2006, 623 (628).

⁸⁹ BAG from 13.05.2015 – 2 AZR 565/14.

⁹⁰ State Labour Court of Westphalia ((*Landesarbeitsgericht Westfalen*, based in Hamm) from 04.07.2011 – 8 Sa 726/11.

⁹¹ BAG from 29.01.1997 – 2 AZR 9/96.

plays particularly an important role if the employer gets a medical recommendation⁹². Moreover, employers have protection and consideration duties against their employees that can oblige them to reuse their instruction rights to redefine the activities owed by the employee under the employment contract so that a work disabled employee is able to work again. Provided the employee demands the transfer on a health-adequate work place and he or she can explain how an appropriate employment should be, the employer has to fulfill the employees desire if the redefinition of the work performance is reasonable and legally possible⁹³.

2.2. Obligations of public employers

For public employers under the scope of the BGG⁹⁴ the prohibition of discrimination according to § 7 BGG applies as well, that also includes the requirement to provide reasonable accommodation (§ 7 (II) BGG). These are measures that are in a particular case appropriate and necessary to ensure that a person with disabilities can enjoy and exercise all rights on an equal basis with others, unless they impose a disproportionate or undue burden for the public authority (§ 7 (II) BGG).

F. Concluding remarks

German laws concerning accessibility for workers with disabilities in companies can be found in various legal sources, distinguishing between obligations of public and private employers. Moreover, there is a difference in the legal situation for persons with severe disabilities and those with disabilities but without officially recognized severe disabilities.

1. Obligations regarding accessibility and reasonable accommodation

For public employers, there is a direct obligation to provide reasonable accommodation from constitutional, supranational and international law⁹⁵. Moreover, this obligation can be found on a federal legal level in the provisions of the BGG. In addition, the BGG contains various obligations to provide accessibility⁹⁶.

Private employers are not directly bound by the requirements of superior law. However, it can have an indirect effect through the interpretation of labour law provisions⁹⁷, though this may often be accompanied by a considerable effort of justification.

At the level of federal law, private employers are obliged to an accessible workplace, but only if and where people with disabilities are already employed. In fact, this regulation – wrongfully understood - can itself be a barrier, as the accessibility requirement seems to be avoidable by not hiring persons with disabilities. However, companies that have to employ severely disabled persons are obliged to organize the company accordingly.⁹⁸ In addition, all severely disabled employees have special rights against the employers, which may be classified as rights to reasonable accommodation⁹⁹. Further

⁹² BAG from 17.02.1998 – 9 AZR 130/97.

⁹³ BAG from 19.05.2010 – 5 AZR 162/09.

⁹⁴ See B.4.2.

⁹⁵ See B.1. to B.3.

⁹⁶ See E.1.2. and E.2.2.

⁹⁷ See B.1. to B.4. and E.2.1.2.1.

⁹⁸ See E.1.1.

⁹⁹ See E.2.1.1.

reasonable accommodations may be the gradual reintegration¹⁰⁰, the vocational reintegration program¹⁰¹ and measures related to the employers protection and consideration duties¹⁰².

The accessibility obligations are regularly subject to the proviso that they are not a disproportionate burden on employers or that alternatively other effective measures can be taken¹⁰³. Another effective measure in a particular case can be the provision of reasonable accommodation, that, however, finds its limits in a disproportionate employer burden as well¹⁰⁴. In this assessment, the extensive rehabilitation and participation benefits provided by the rehabilitation agencies and the integration offices have to be considered¹⁰⁵.

2. Incentives for employers to employ persons with disabilities

Incentives to employ severely disabled persons are the employment obligation¹⁰⁶ and the compensatory levy¹⁰⁷. By that the employers should be motivated to hire persons with severe disabilities (incentive function). Moreover, the different expenditures between the employers that comply with the employment obligation and those that do not comply with, should be compensated by the compensatory levy (balancing function)¹⁰⁸.

However, the compliance with the employment obligation and the avoidance of the compensatory levy are only one criterion of personnel managers regarding the decision to employ a person with disabilities. Another aspect is the existence and the use of public benefits¹⁰⁹. In particular, the benefits to employers that are provided by the rehabilitation agencies¹¹⁰ and the integration offices¹¹¹ should be mentioned in this context. They set financial incentives to provide new jobs and apprenticeships or to secure existing jobs permanently¹¹².

Moreover, the German law also provides incentives to avoid the termination of employment. Employers who implement a BEM can be supported by the rehabilitation agencies and the integration offices with premiums and reductions in social security contributions¹¹³. In addition, the gradual reintegration¹¹⁴ provides a possibility for sick workers to be gradually reintegrated without the employer having to pay a wage or pay social security contributions¹¹⁵.

All in all, various laws are existing in Germany to ensure the accessibility for workers with disabilities in companies. However, there are differences between public and private employers as well as regarding the severity of disability. Furthermore, the legal bases concerning the accessibility and

¹⁰⁰ See E.2.1.2.2.

¹⁰¹ See E.2.1.3.

¹⁰² See E.2.1.3.

¹⁰³ See E.1.

¹⁰⁴ See E.2.1.1. and E.2.2.

¹⁰⁵ See chapter D.

¹⁰⁶ See C.1 and C.2.

¹⁰⁷ See C.3.

¹⁰⁸ *BVerfG* from vom 26.05.1981 – 1 BvL 56/78.

¹⁰⁹ Bundestagsdrucksache 19/4157, p. 7.

¹¹⁰ See D.2.

¹¹¹ See D.7.

¹¹² *Jabben*, in: BeckOK Sozialrecht, § 50 SGB IX.

¹¹³ See E.2.1.3.

¹¹⁴ See D.1.

¹¹⁵ See E.2.1.2.2.

reasonable accommodations are anchored in many different laws or must be derived by interpretation of the law, which can be seen as a barrier to the law enforcement¹¹⁶.

¹¹⁶ Regarding the complexity of the social system in Germany, see: Committee on the Rights of Persons with Disabilities from 07.07.2014, CRPD/C/D/2/2010, No. 6.2.

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**Survey on Inclusion in Other Countries - International Comparative Study on
Accessibility in Companies**

*(Umfrage Inklusion in anderen Ländern – International vergleichende Studie zur Barrierefreiheit in
Unternehmen)*

**LAWS AND POLICIES CONCERNING
ACCESSIBILITY FOR WORKERS WITH DISABILITIES
IN COMPANIES**

Report written for the *Deutsche Gesetzliche Unfallversicherung e.V. (DGUV)*

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August 2019

FINAL VERSION

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ACCESSIBILITY FOR WORKERS WITH DISABILITIES IN COMPANIES

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A. Introduction

1. Background and Focus of the Report

Across the globe, unemployment rates for persons with disabilities of working age are higher than those for non-disabled people.¹ The 2010 Organization for Economic Co-operation and Development (OECD) Report *'Sickness, Disability and Work: Breaking the Barriers: A Synthesis of Findings across OECD Countries - Key Trends and Outcomes in Sickness and Disability'*² highlighted that people with disabilities are under-represented in the workforce in all OECD countries. The UN Human Rights Office's *'Thematic study on work and employment of persons with disabilities'*,³ released in 2012, confirmed that people with disabilities are far less likely to be in work than non-disabled individuals and that when they are employed, they are more likely to be in low paying jobs, at lower levels and with poor working conditions when compared with persons without disabilities. This trend is also visible within the European Union (EU), where the 2011 EU Labour Force Survey (LFS-AHM) showed that the employment rate of people with basic activity difficulties in the EU-28 was 47.3%, almost 20 percentage points below that of people without such difficulties.⁴ These low employment rates in turn contribute to the high rate of poverty of households headed by persons with disabilities.⁵

It is widely acknowledged that persons with disabilities face multiple barriers in accessing and retaining employment, in the form of stigma, prejudices and stereotyped behaviour, lack of an accessible workplace and/or lack of reasonable accommodations. To counteract these negative factors and to promote the right to work of persons with disabilities, an 'enterprise culture' that improves workforce inclusion and enhances accessibility in the workplace is essential. Public policies can support companies in challenging existing ways of doing things, and in fostering 'universal design' and new ideas and solutions to the benefit of workers with disabilities, but, more generally, of all workers. Legislation can play a vital role in prompting both public and private companies to develop accessibility and reasonable accommodation practices and increase participation of persons with disabilities in work. This would also contribute to reducing poverty and isolation and would open the doors to wider participation in society.

Against this background, this report briefly sets out the **legal and policy framework** for accessibility of workplaces in 20 selected jurisdictions: **Austria**, the **Netherlands**, **Finland**, **France**, **Italy**, **Poland**, **Spain**, the **United Kingdom (UK)**, **Norway**, **Russia**, **Israel**, **Canada**, the **United States of America (US)**, **Argentina**, **Brazil**, **India**, **China**, **Japan**, the **Republic of Korea** (i.e. South Korea), and **Australia**. In particular, this report focuses on the extent to which domestic legislation ensures that private companies provide inclusive and accessible workplaces for workers with disabilities and examines whether private employers are subject to a duty to provide reasonable accommodation.

The **UN Convention on the Rights of Persons with Disabilities (CRPD)** is used as a **conceptual framework** and **benchmark** to guide the assessment of national legislation. The CRPD represents the 'gold standard' for the protection of the rights of persons with disabilities globally, and, at the time of the writing of this report, the CRPD has been ratified by all of the countries included in within this report, with the exception

¹ See data reported at <<https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities/disability-and-employment.html>>.

² Available at <<http://www.oecd.org/els/soc/46488022.pdf>>.

³ UN OHCHR, *Thematic study on the work and employment of persons with disabilities. Report of the Office of the United Nations High Commissioner for Human Rights*, available at <https://www.ohchr.org/Documents/Issues/Disability/A-HRC-22-25_en.pdf>.

⁴ See data reported at <http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Disability_statistics_-_labour_market_access>. See also <<https://ec.europa.eu/eurostat/statistics-explained/pdfscache/34420.pdf>>.

⁵ IDA contribution to the OHCHR, *Thematic study on work and employment of persons with disabilities. Report of the Office of the United Nations High Commissioner for Human Rights*, available at <<https://www.ohchr.org/EN/Issues/Disability/Pages/WorkAndEmployment.aspx>>.

of the US, which has signed the Convention but not ratified it.⁶ Where appropriate, the report makes reference to other international instruments and/or international policies or initiatives that are relevant to improve accessibility in the workplace. The analysis of European Union (EU) countries' legislation is preceded by a brief explanation of EU policies and Directive 2000/78 (Employment Equality Directive).⁷ The Employment Equality Directive is important for the purpose of this report because it bans discrimination *inter alia* on the grounds of disability and requires Member States to introduce duties to make reasonable accommodations for disabled people in employment contexts. The report **does not undertake a comparative analysis** of the country legal frameworks presented. Rather, it **aims to provide the context** for comparative empirical research on company practices carried out by *Deutsche Gesetzliche Unfallversicherung e.V. (DGUV)*.

The report is meant for the general public. It is not academic in nature. As such, it aims to be a flexible instrument to help key stakeholders (governments, employers, workers, employers' organizations, trade unions and other actors, such as civil society organizations) in ensuring greater workplace equality and inclusion.

2. Structure

Further to this **introduction**, **Section B** discusses the legal-conceptual framework, i.e. the **key legal tenets** that underpin and support the subsequent analysis of domestic legislation and policies. **Section C** succinctly presents **relevant international initiatives** or policies. **Section D** includes the analysis of **domestic legal provisions** on accessibility of the workplace and on reasonable accommodation as a tool to achieve accessibility in individual cases, for each of the countries covered by the report. The analysis for each country is structured as follows. First, some **factual background** information (e.g. data on disability and employment rates for people with disabilities in the considered country) is provided. Then, the **country's legal framework** on the protection and promotion of the rights of persons with disabilities, with a particular focus on **non-discrimination provisions**, is briefly examined. This succinct overview of the pertinent legal framework is meant **to contextualise and frame the subsequent analysis** of relevant **provisions concerning accessibility and reasonable accommodation** applicable to private employers, which is then provided. This is followed by the identification of domestic **policies** on the inclusion of persons with disabilities in employment contexts, with a particular focus on those that foster accessibility and support companies in creating inclusive workplaces. The analysis is complemented, where appropriate and if possible, by a succinct discussion of **how the legislation has been implemented and enforced**. Where possible, relevant case law is mentioned, to allow a better understanding of whether and how legislation is applied in practice. Section E provides some brief concluding remarks.

3. Scope of the Report

The report focuses on domestic legislative **provisions that either oblige or incentivise private companies to develop accessibility and reasonable accommodation practices in the workplace**, locating them in the broader context of the protection of the rights of persons with disabilities. It also looks at **selected policies that support private companies in making their workplace more accessible**. The report acknowledges that in some countries the rights of persons with disabilities are explicitly recognised and protected in the constitution (which is the highest source of law), and that several domestic constitutions include general

⁶ Ratifications are detailed at <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>.

⁷ Council Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303 2.12.2000, p. 16.

multi-ground non-discrimination provisions and/or broad formulations of the equality principle.⁸ The report refers to labour law provisions and non-discrimination laws (laws focused specifically on disability and/or laws that include a number of protected grounds). It also briefly discusses those domestic labour laws that oblige private companies to fulfil a specific quota of workers with disabilities (quota laws), or policy recommendations providing for non-binding quotas or targets. The report, moreover, discusses accessibility obligations that can either be included in labour laws or general accessibility legislation, or inferred from general non-discrimination norms.

The geographical scope of the report is limited to 20 countries. **The case studies were selected by Deutsche Gesetzliche Unfallversicherung e.V. (DGUV)** to offer a global coverage and a variety of different samples.

4. Methodology

This report draws on a range of different primary and secondary sources in English. Legislation and case law were consulted where available in the English language on official websites or legal databases. Non-official websites (e.g. websites of NGOs or DPOs) have been consulted occasionally. Information about developments within the countries is also derived from State reports submitted to the Committee on the Rights of Persons with Disabilities (CRPD Committee), from a series of reports compiled by the expert members of the Academic Network of European Disability Experts (ANED)⁹ and of European Network of Legal Experts in Gender Equality and Non-Discrimination,¹⁰ and from studies released by international organizations, such as the International Labour Organization (ILO). This report also draws upon a wide range of sources, including EU primary and secondary legislation, case law and policy documents, UN treaty law, the general comments and concluding observations of the CRPD Committee, academic literature, and NGOs reports. All the sources are duly referenced in footnotes.

5. Limitations of the Report

The present report seeks to build upon, without duplicating, existing studies and current literature. It is, however, subject to a number of limitations.

Due to short timeframe to compile the two parts of the report, the fact that the report was compiled in two phases, and in consideration of its nature, its required length, the report only includes the most relevant sources (as detailed above) and is not meant to be exhaustive. Rather, it is, by necessity, brief and does not engage in a lengthy critical discussion. The report also does not include any extensive examination of the CRPD. Section B only focuses on the provisions that are relevant to the subsequent analysis of country legal frameworks.

This report was commissioned to review legislation and policies on **accessibility of workplaces**, with a focus on relevant labour law and anti-discrimination legislation to be complied with by private employers (in particular, companies and enterprises). However, due to the different approaches adopted by the various legal systems considered, the provisions examined may vary greatly. Although all of the country-related analysis adopts the same structure, the length and content may also significantly differ, depending on the legal framework under consideration and on the sources available. When federal countries are discussed, the report only focuses on federal legislation (while acknowledging that legislation related to the rights of persons with disabilities is enacted at the State level).

⁸ ILO, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation* (2011), available at <http://www.ilo.org/wcmsp5/groups/public/--ed_emp/--ifp_skills/documents/instructionalmaterial/wcms_162169.pdf>.

⁹ <<https://www.disability-europe.net/>>.

¹⁰ <<https://www.equalitylaw.eu/>>.

The report has a limited scope, as detailed in section 3. It does not endeavour to provide either an analysis of disability policies or an account of broader employment law and policies. Although it is recognised that public procurement might have some important potential in the promotion of employment by obliging contractors to have inclusive employment strategies, the report does not include any reference to public procurement legislation.

Statistical data reported are the most up to date official data that could be found in the English language. These data are only meant to provide the reader with some factual background and to provide context to the legal analysis. Data may refer to different periods of time in different countries.

As mentioned above, the report mostly (although not exclusively) draws on sources written in the English language, which are referenced in footnotes. The names and references to legislation are drawn from official sources. In some cases, a lack of reliable data and sources in English has limited the scope of the analysis. The accuracy of the sources has been checked and, where possible, primary sources have been preferred. However, occasionally non-official sources had to be used and relied upon. In several countries, recent and relevant reported decisions were not available in the English language and for this reason they could not be included in the analysis.¹¹

With regards to the UK, the report acknowledges that the UK is currently in the process of withdrawing from the EU and that this process might affect the way in which the rights of persons with disabilities are regulated.

¹¹ In relation to Japan, Nakagawa and Blanck (J. Nakagawa and P. Blanck, 'Future of Disability Law in Japan: Employment and Accommodation', in (2010) *Loyola of Los Angeles International and Law Reviews - Comparative Law Review*, available at <http://bbi.syr.edu/publications/blanck_docs/2010/nakagawa_blanck_future_disability_law_japan.pdf>) report several cases concerning reasonable accommodation. All these cases, however, precede 2010 (i.e. the enactment of legislation on reasonable accommodation), and, for this reason, they have not been included.

C. Conceptual Framework

1. The Concept of Disability

This report is informed by the social-contextual model of disability, i.e. the view that **disability** arises from the interaction of individual impairments (e.g. physical, sensory, intellectual or mental) and **attitudinal or environmental barriers**, which is enshrined in the CRPD. The CRPD does not provide a comprehensive definition of ‘persons with disabilities’, but according to **Article 1** (which sets out the purpose of the Convention):

‘[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.

In addition, consistently with Article 1 CRPD, this report generally refers to ‘**persons with disabilities**’ or ‘workers with disabilities’, adopting the so-called ‘people-first language’,¹² which is currently used in several international documents, in the CRPD itself and in the English versions of EU case law. Occasionally the expression ‘disabled people’ will be used. Where appropriate, linguistic nuances or the use of different terms in international or domestic legislation will be acknowledged.¹³

2. The Right to Work of Persons with Disabilities

This report is informed by the understanding that accessibility is essential to fulfil and promote the **right to work of persons with disabilities**.

The right to work is well rooted in international human rights law. Article 23 of the Universal Declaration of Human Rights (UDHR) affirms that:

‘[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests’.

Along the lines of **Article 23 UDHR**, the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes a number of important provisions relating to work and equal employment opportunities. **Article 6, 7 and 8 ICESCR** deal respectively with the right to gain a living, the right to just and favourable conditions and the right to form trade unions. Other international human rights treaties and regional instruments, such as the European Social Charter, include provisions protecting in a general fashion the right to work. In addition, the **International Labour Organization (ILO)**, the UN agency that sets labour standards, develops policies and programmes promoting the right to work, has drafted comprehensive instruments on work-related rights. The ILO has adopted instruments on the right to work of persons with disabilities, including the 1983 ‘Convention No. 159 on Vocational Rehabilitation and Employment

¹² P. Foreman, ‘Language and disability’ (2005) 30 (1) *Journal of Intellectual & Developmental Disability*, at 57-59.

¹³ The report acknowledges that disability-related terminology varies greatly and is currently subject to a debate. It also acknowledges that in the English language, proponents of the social model prefer the use of the term ‘disabled persons/people’, referring to the fact that people with impairments are disabled by external social barriers.

(Disabled Persons)¹⁴ and Recommendation No. 168¹⁵ on rehabilitation and vocational training for people with disabilities. The ILO Convention No. 159 requires States Parties to ‘formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons’. It establishes that this policy should also promote employment opportunities for persons with disabilities in the open labour market.

The **CRPD** includes a broad formulation of the right to work in **Article 27**. According to Ferraina, this provision ‘is cross-referencing the prescriptions of the ICESCR, though not in an as exhaustive way, as it intends by no means to replace the ICESCR’, rather to approach the right to work from a disability angle.¹⁶ **Article 27 CRPD requires States Parties to create an open, inclusive, and accessible labour market where persons with disabilities enjoy the right to work on an equal basis with others.**¹⁷ Article 27 does not specify what an open, inclusive, and accessible labour market is. However, Article 27, para. 1(b), provides that States must protect the right of persons with disabilities to ‘just and favourable conditions of work’. Ventegodt Liisberg affirms that the concept of working conditions covers ‘all the rules and terms governing work, including access to employment and promotion, working tasks, remuneration, working hours, holidays, safety and health, mental and physical conditions of work, protection from dismissals, and access to sick leave and other types of leave’.¹⁸

In particular, Article 27 aims to ensure that persons with disabilities:

- ❖ Are not discriminated against on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
- ❖ Enjoy the right to work and earn a living on an equal basis with others;
- ❖ Receive equal pay for equal work done;
- ❖ Choose the work of their own preference;
- ❖ Benefit from equal opportunities and safe and healthy working conditions;
- ❖ Can join labour and trade unions;
- ❖ Have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- ❖ Can avail of career counselling, vocational trainings and career opportunities;
- ❖ Can avail of business opportunities and be self-employed;
- ❖ Are employed in the public and private sector;
- ❖ Have the right to be provided with reasonable accommodations when needed;

¹⁴ ILO, Convention No. 159 Concerning Vocational Rehabilitation and Employment (Disabled Persons), adopted in Geneva at the 69th ILC Session (20 June 1983), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312304.

¹⁵ ILO, Recommendation No. 168 Concerning Vocational Rehabilitation and Employment (Disabled Persons) (1983), adopted in Geneva, 69th ILC session (20 June 1983), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO::12100:P12100_ILO_CODE:R168:NO.

¹⁶ S. Ferraina, ‘Analysis of the Legal Meaning of Article 27 of the UN CRPD: Key Challenges for Adapted Work Settings’ *GLADNET Collection* 2012, available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?Article=1559&context=gladnetcollect> at p. 10.

¹⁷ M. Ventegodt Liisberg, ‘Article 27’, in V. Della Fina, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham: Springer 2017).

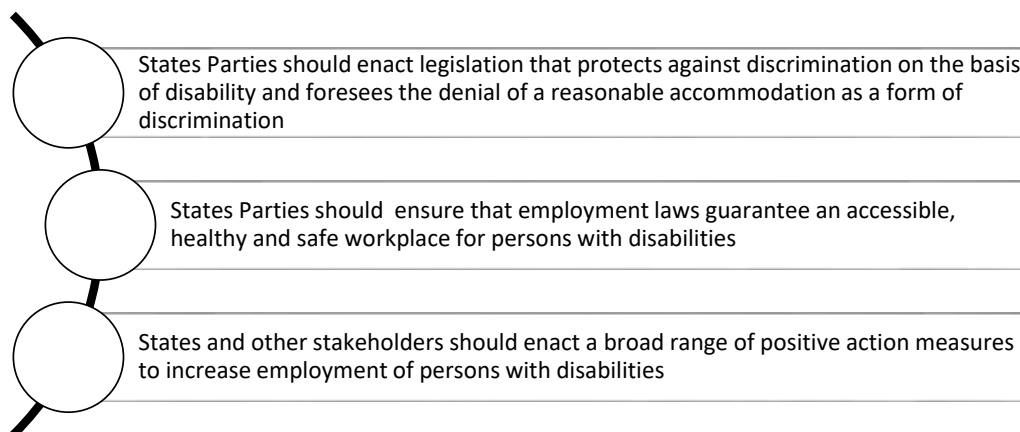
¹⁸ *Ibid.* at 499.

- ❖ Can avail of vocational and professional rehabilitation programmes to support their return to work;
- ❖ Are not subject to forced work.

Article 27 provides for a wide and diverse **range of positive measures that States should implement** to promote the employment of persons with disabilities.

According to the International Disability Association (IDA), the most often used positive action measures in the context of work and employment include (but are not limited to): financial incentives, quota systems, pro-active targeted recruitment and promotion policies.¹⁹ Article 27 CRPD does not require State Parties to have quota systems, but encourages positive measures. Moreover, the text of this provision suggests that financial incentives should go beyond the coverage of the costs of reasonable accommodations and could be useful in promoting the employment of persons with disabilities in small and medium enterprises (SME).

Figure B.1: Summary of Relevant Obligations stemming from Article 27 CRPD



Article 27 must be read in light of the general principles of the CRPD, which include: equality, full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity, equality of opportunity and accessibility.²⁰ It must also be read in conjunction with other provisions of the CRPD, the right to work being strictly connected and interdependent with other rights, such as, for example the right to education.

The CRPD Committee has also acknowledged that the realization of the right to work is, on some occasions, dependent upon certain social services. In its 'General Comment No. 5 on the right to live independently and being included in the community', the CRPD Committee affirmed that the 'existence

¹⁹ IDA contribution to the OHCHR, *Thematic Study on Work and Employment of Persons with Disabilities*, available at <<https://www.ohchr.org/EN/Issues/Disability/Pages/WorkAndEmployment.aspx>>.

²⁰ Article 3 CRPD.

of individualised support services, including personal assistance, is often a pre-condition for effective enjoyment of the right to work and employment'.²¹

The CRPD (as general international human rights law) **does not** create obligations on private employers. However, States Parties, when implementing Article 27 CRPD, should ensure that employers and companies do not discriminate against persons with disabilities and accommodate the needs of workers with disabilities.

In elaborating policies that meet the obligations laid down in the CRPD, States Parties must involve persons with disabilities (as required by Article 4(3) CRPD). The General comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention.²² Among the issues directly affecting persons with disabilities, for which consultation with them is essential, are **accessibility requirements** and **reasonable accommodation policies**.²³

3. The Concept of Reasonable Accommodation

3.1. Content and Scope of Reasonable Accommodation

The legal concept of 'reasonable accommodation' (or its synonym 'reasonable adjustment') first appeared in the United States. It was introduced in the US Equal Employment Opportunity Act of 1972, which amended the Civil Rights Act 1964. Originally, it defined specific solutions that the employer was obliged to adopt in order to accommodate needs related to religious practices. In 1973, the US Rehabilitation Act extended the duty of reasonable accommodation to the disability context. Along the lines traced by the Rehabilitation Act, the Americans with Disabilities Act (ADA) of 1990 has introduced a provision requiring employers to adopt specific adjustments that remove the environmental and social barriers faced by persons with disabilities in the workplace.²⁴ In 2000, the concept of reasonable accommodation was incorporated within European Union (EU) legislation. Article 5 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation²⁵ establishes the duty of the employer to provide disabled workers with reasonable accommodations, which will be discussed later in this report.

With the CRPD, **reasonable accommodation has become an integral part of the international human rights framework**, and a gateway for the enjoyment of all human rights (including the right to work).

Article 2 CRPD defines reasonable accommodation as:

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

Reasonable accommodation requires a **focus on the 'particular case'** and entails the **effectiveness of the modifications** or adjustments in removing the disadvantage for the particular person with a disability. The

²¹ UN Committee on the Rights of persons with Disabilities (2017), General Comment No. 5 on the Right to Live Independently and Being Included in the Community (Un Doc. CRPD/C/GC/5).

²² UN Committee on the Rights of persons with Disabilities (2018), General comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention (Un Doc. CRPD/C/GC/7).

²³ Ibid. para. 20.

²⁴ Among others see D. Ferri, 'Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg', (2018) *Social Inclusion*, at <<https://www.cogitatiopress.com/socialinclusion/Article/view/1204>>.

²⁵ Council Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303 2.12.2000, p. 16.

individually oriented nature of the duty to provide accommodation is also recognised by the CRPD Committee, which states:

‘...the duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context. [...] Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account. Thus, a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard’.²⁶

The CRPD unequivocally links the duty to accommodate to the **principle of equality**,²⁷ recognizing the role of reasonable accommodation as a gateway to the equal enjoyment of all human rights, being they civil, political or socio-economic rights. **Article 5(2) CRPD requires States Parties to prohibit discrimination on the basis of disability.** The latter is defined in **Article 2 CRPD** as

‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation’.

3.2. The ‘Disproportionate or Undue Burden’ Limit

The right to be provided with a reasonable accommodation is not absolute: it is instead subject to the ‘disproportionate or undue burden’ limit. This means that the denial of reasonable accommodation does not constitute a discrimination when the accommodation entails a disproportionate burden on the duty bearer. There is no explicit guidance in the CRPD as to what may constitute a disproportionate burden. In **Jungelin v Sweden**,²⁸ the CRPD Committee held that States Parties to the Convention enjoy a margin of discretion when formulating and assessing the reasonableness and proportionality of accommodation measures. The complaint made to the CRPD Committee was raised by Ms. Jungelin, a person with a visual impairment. Despite the fact that she met the required qualification for the job she had applied to, she was not hired because her potential employer’s intranet system was not accessible and could not be adjusted to accommodate her sight impairment. Ms. Jungelin claimed that this amounted to a denial of reasonable accommodation, and, consequently, to a discrimination on the grounds of disability. However, her complaints were rejected by the Swedish courts. Endorsing the defence of the employer, the domestic tribunals took the view that the cost of adjusting the computer system would have imposed a disproportionate burden on the employer. The CRPD Committee, with some dissenting opinions, concluded that the Swedish courts had carried out a thorough and well-balanced assessment of the factual circumstances at hand. The decision to deem the accommodation requested as constituting an unreasonable burden was therefore justified and the CRPD Committee held that there was no violation of Article 5 of the CRPD on equality and non-discrimination. This decision of the CRPD Committee suggests that the financial cost of a requested accommodation is a relevant factor in determining whether and to what extent the duty-bearer can duly claim to be exempt from the duty to accommodate. This approach is confirmed by the ‘General Comment No. 4 on Article 24: Right to education’ which explicitly affirms that

²⁶ UN Committee on the Rights of persons with Disabilities (2014), General Comment on Article 9 of the Convention (UN Doc. CRPD/C/GC/2).

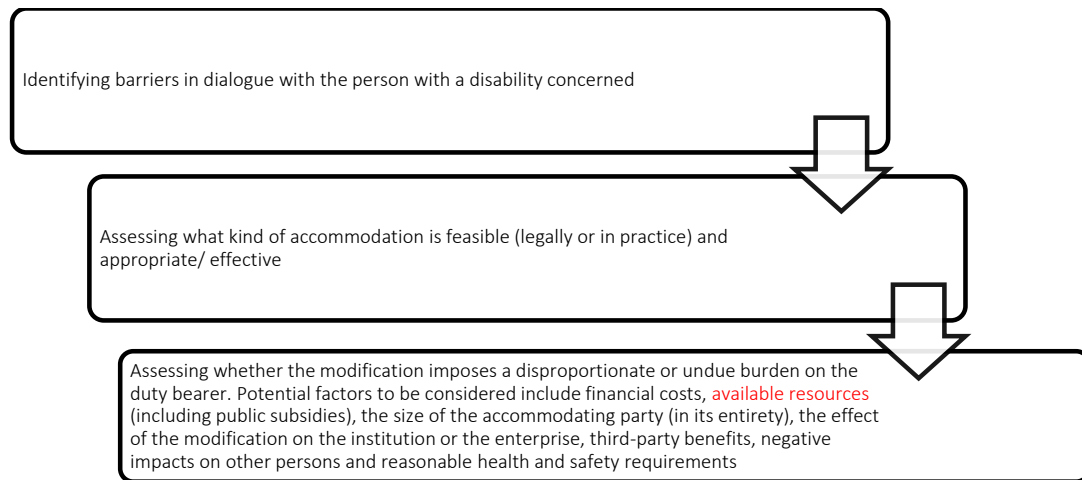
²⁷ A. Broderick, *The Long and Winding Road to Equality and Inclusions for Persons with Disabilities* (Antwerp, The Netherlands: Intersentia, 2015) at p. 107

²⁸ UN Committee on the Rights of Persons with Disabilities (2014), *Marie-Louise Jungelin v Sweden* (Communication No. 5/2011).

‘the availability of resources and financial implications is recognized when assessing disproportionate burden’.²⁹

The CRPD Committee in the ‘General comment No. 6 on equality and non-discrimination’³⁰ gives guidance on how to implement the duty to provide reasonable accommodation, which is summarized in the figure below.

Figure B.2: Implementation of the Duty to Provide Reasonable Accommodation



3.3. Reasonable Accommodation in Employment Contexts

In employment contexts, reasonable accommodation is concerned with the removal of the disadvantage to which a person with a disability would otherwise be subjected by an employer’s standard working practices or systems (which are usually designed to suit non-disabled people.)³¹

Article 27 CRPD requires States Parties to ensure that reasonable accommodation is provided in the workplace. The material scope of this obligation is wide: accommodations should be provided to persons with disabilities when they participate in ‘general technical and vocational guidance programmes, placement services and vocational and continuing training’, ‘labour and trade union rights’ and ‘self-employment, entrepreneurship, [...] cooperatives and [...] one’s own business’.

The CRPD Committee in ‘General comment No. 6 on equality and non-discrimination’ includes examples of reasonable accommodation in the workplace such as ‘**making existing facilities and information accessible to the individual with a disability; modifying equipment; reorganizing activities; rescheduling work... or enabling access to support personnel** without disproportionate or undue burden’.³²

²⁹ UN Committee on the Rights of Persons with Disabilities (2016), General Comment No. 4 on Article 24: Right to Inclusive Education (UN Doc. CRPD/C/GC/4), para 27.

³⁰ UN Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Article 5: Equality and non-discrimination (UN Doc. CRPD/C/GC/6), para 23.

³¹ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment Contexts*, Publications Office of the European Union, Luxembourg (2016).

³² UN Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Article 5: Equality and non-discrimination (UN Doc. CRPD/C/GC/6), para 26.

Other examples of reasonable accommodations can be found in studies or documents released by other UN bodies or agencies, such as the Office of the United Nations High Commissioner for Human Rights (OHCHR) and by the World Health Organization (WHO). The ILO in 2016 has also compiled a list of best practices in relation to reasonable accommodations in the employment context.³³

4. Accessibility in Employment Contexts

4.1. Accessibility as General Principle of the CRPD

Accessibility is recognised as a ‘general principle’ of the CRPD in Article 3 and broad accessibility obligations are formulated in Article 9 and in other substantive provisions of the Convention.³⁴ Lawson clarifies that ‘for CRPD purposes, accessibility covers more than technical design specifications for products, information and signage or the built environment. It also covers communication and forms of live assistance’.³⁵ **Workplaces are mentioned in Article 9(1)(a) as an example of the facilities which must be made accessible.**

Article 9 CRPD places a range of **obligations** to achieve accessibility **on State Parties**, but does not distinguish between public or private ownership of buildings, transport or technologies. The CRPD Committee explicitly affirms that, ‘as long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise’.³⁶ Article 9(2)(b)(d) CRPD makes it clear that **States Parties must ensure that private entities (including companies) provide for accessible services and facilities.** This interpretation of Article 9 is premised on the need to promote and fulfil the principles of non-discrimination and equality.

General Comment No. 2 invites States to use non-discrimination law to enforce accessibility requirements, but the relationship between accessibility and discrimination is not entirely straightforward. The General Comment states that lack of accessibility should be considered discriminatory ‘where the service or facility was established after relevant accessibility standards were introduced’, or ‘where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation’.³⁷ Accordingly, the Committee suggests that, when reviewing their accessibility legislation, ‘States Parties must consider and, where necessary, amend their laws to prohibit discrimination on the basis of disability’.³⁸

4.2. Reasonable Accommodation v Accessibility in a Nutshell

General Comments No. 2 and No. 6³⁹ give guidance on the differences between reasonable accommodation (which is concerned with one identified person) and accessibility (which is concerned with generally removing barriers for people with disabilities).

³³ The study is available at <http://www.ilo.org/global/topics/equality-and-discrimination/WCMS_536630/lang--en/index.htm>.

³⁴ F. Seatzu, ‘Article 9: Accessibility’ in V. Della Fina, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham: Springer, 2017), at p. 227.

³⁵ A. Lawson, *Maximising the Impact and Effectiveness of Accessibility Measures for Goods and Services: Learning from National Experience*, Synthesis Report for the Academic Network of European Disability Experts, available at <<http://www.disability-europe.net/theme/accessibility>>.

³⁶ UN Committee on the Rights of Persons with Disabilities (2014), General Comment No. 2 on accessibility (UN Doc. CRPD/C/GC/2), para 13.

³⁷ Ibid. para. 31.

³⁸ Ibid.

³⁹ UN Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Article 5: Equality and non-discrimination (UN Doc. CRPD/C/GC/6), para 24.

In a nutshell, the main difference between accessibility and reasonable accommodation is that accessibility obligations are group-related, while reasonable accommodation has an individualised nature. Consequently, accessibility obligations are anticipatory in nature. The CRPD Committee affirms that the ‘duty to provide accessibility is an *ex ante* duty’ and that States Parties therefore have ‘the duty to provide accessibility before receiving an individual request to enter or use a place or service’.⁴⁰ The reasonable accommodation duty is, by contrast, an *‘ex nunc’* duty, enforceable only ‘from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context’.⁴¹ Another key difference is that reasonable accommodation obligations are subject to the limit of ‘undue’ or ‘disproportionate’ burden. By contrast, ‘the obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities’.⁴²

⁴⁰ Ibid. para 25.

⁴¹ Ibid. para. 26. See also UN Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on Article 5: Equality and non-discrimination (UN Doc. CRPD/C/GC/6), para 24.

⁴² Ibid. para. 25.

D. Relevant International Law and Policies and Other International Initiatives in a Nutshell

The **CRPD** is the first UN human rights treaty that protects and promotes the rights of persons with disabilities in a comprehensive way and has become the global **legal benchmark** to assess national laws and policies. The CRPD has also become a **catalyst** and has prompted regional organizations (e.g. the EU) to adopt further policy initiatives to stimulate and help States Parties to comply with the CRPD. For example, as will be discussed later, the EU has adopted the European Disability Strategy 2010-2020. Governments of the ESCAP (i.e. the regional development arm of the UN that serves as the main economic and social development centre for the UN in Asia and the Pacific) gathered in Incheon (Republic of Korea) in 2012 launched the Asian and Pacific Decade of Persons with Disabilities for the period 2013 to 2022 and the Incheon Strategy to ‘Make the Right Real’ for Persons with Disabilities in Asia and the Pacific.⁴³ The **Incheon Strategy** lays down a set of regionally agreed disability-inclusive development goals. One of the targets is to ‘**increase work and employment for persons of working age with disabilities who can and want to work**’.

The CRPD has also helped mainstream disability within the UN action. The **2030 Agenda for Sustainable Development**⁴⁴ mentions persons with disabilities several times and sets an ambitious target with regard to employment. By 2030, the goal is to ‘achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value’.

In the last ten years, the ILO, which has been promoting decent work for people with disabilities since its outset, has launched disability-specific programmes or initiatives aimed at overcoming particular disadvantages or barriers, but also contributes to fostering skills training, employment promotion, social protection schemes and poverty reduction strategies. The **ILO Disability Inclusion Strategy and Action Plan 2014-17**⁴⁵ aimed to promote international standards on disability rights (including the CRPD), to mainstream disability and strengthen strategic cooperation within the UN system in order to promote disability. In 2017, the strategy was subject to an evaluation, which looked at its implementation and results. The summary of this evaluation, published in 2018, suggests that ‘strong steps to advancing disability issues within ILO during the strategy period’ have been made. It was, however, highlighted that disability awareness among ILO staff remains low, and disability is not fully mainstreamed into ILO’s country programmes. In that regard, the report suggests that disability interventions are still dependent upon key individuals being interested in disability rather than the issue being institutionalized into ILO’s programmes. In that connection, it makes a number of recommendations to mainstream disability in ILO’s work and to ensure better efficiency of actions taken. Other international policy initiatives **address primarily States’ action**, and for the most are indirectly relevant to companies. However, they might nudge States towards improving their legislative and policy frameworks. International programmes also provide funding that might support States in streamlining accessibility projects and in cooperating with employers.

Indirectly relevant to accessibility in the work place is the Global Cooperation on Assistive Technology - GATE Project conducted under auspices of the World Health Organization.⁴⁶ This project is meant to assist States Parties to the WHO to improve access to assistive technology as a part of Universal Health Coverage. In May 2016, WHO launched the Priority Assistive Products List, which includes selected assistive technology and is meant to be a guide to enhance production, procurement and service provision, to develop reimbursement policies and to shape markets. Albeit GATE does not deal with

⁴³ <<https://www.unescap.org/sites/default/files/Incheon%20Strategy%20%28English%29.pdf>>.

⁴⁴ Resolution adopted by the General Assembly on 25 September 2015 ‘Transforming our world: the 2030 Agenda for Sustainable Development’, available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>.

⁴⁵ <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/genericdocument/wcms_370772.pdf>.

⁴⁶ See at https://www.who.int/phi/implementation/assistive_technology/phi_gate/en/.

accessibility of workplaces, it contributes to support people with disabilities to conduct their life in an independent manner (including to work). There are, then, a series of **guidelines** and several **reports** released by international organizations that provide **guidance to companies and employers** and might help them to make their own workplace inclusive. For example the ILO, in 2002, has published a code to provide practical guidance on the management of disability issues in the workplace,⁴⁷ a study on reasonable accommodation,⁴⁸ and a policy brief on making apprenticeships and workplace learning inclusive of persons with disabilities.⁴⁹ In 2008 the Austrian Institute for SME Research conducted a study, on behalf of the European Commission/DG Employment, Social Affairs and Equal Opportunities,⁵⁰ on **'Practices of providing reasonable accommodation for persons with disabilities in the workplace: 24 company case studies across Europe - Contract VC/2007/0315'**. This report presents selected cases of good practice that illustrate how reasonable accommodation in these fields can be realised, and endeavours to provide guidance on how to achieve a proper balance between the interests of employees and employers. The report aims to contribute to raising awareness among employers and persons with disabilities on how appropriate accommodation in the workplace can be carried out.

There are also networks and international initiatives that involve companies. The **ILO Global Business and Disability Network**⁵¹ is a network of multinational enterprises, employers' organizations, business networks and disabled persons' organizations who share knowledge and identify good practices among companies and employers' organizations. The network also helps companies build their technical expertise on disability issues.

For the purpose of this report, it is finally worth mentioning the World Wide Web Consortium (W3C). This is an international consortium that develops international standards for the Web. Beginning in 1994, the W3C created various working groups to develop web standards, guidelines, and supporting materials within the realm of the Web Accessibility Initiative (WAI). The Accessibility Guidelines Working Group (formerly WCAG Working Group), which is part of the WAI, developed WCAG technical documents. In 1999, the W3C established the first accessibility standard for the Web, WCAG 1.0. Almost ten years later, in December 2008, the WAI revised the WCAG guidelines and published an updated version (i.e., WCAG 2.0), which are currently in use. The WCAG 2.0 guidelines are accepted as the primary standard by which accessibility should be measured. In June 2018, the Web Content Accessibility Guidelines (WCAG) 2.1 were published. These should help companies implementing accessibility of their websites for their customers (but arguably also for their workers).

⁴⁷ <http://www.ilo.org/wcmsp5/groups/public/--ed_emp/documents/publication/wcms_103324.pdf>.

⁴⁸ <http://www.ilo.org/global/topics/equality-and-discrimination/WCMS_536630/lang--en/index.htm>.

⁴⁹ <http://www.ilo.org/wcmsp5/groups/public/--ed_emp/--ifp_skills/documents/publication/wcms_633257.pdf>.

⁵⁰ <<http://ec.europa.eu/social/BlobServlet?docId=1961&langId=en>>.

⁵¹ <<http://www.businessanddisability.org/index.php/en/>>.

E. Case Studies

1. The role of EU Law

In the EU, national legislation and policies related to accessibility of the workplace are deeply informed by EU law. In addition, the EU institutions play an important role in supporting and streamlining the actions of Member States on disability. Before discussing national legislation, it is therefore essential to briefly examine the EU laws and policies that inform national legislation.

1.1. EU Law and Policies in a Nutshell

The European Disability Strategy 2010–2020 (EDS), which is the cornerstone of the EU disability policy, has the ‘overall aim’ of ‘empower[ing] people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy’. It identifies EU-level actions that, alongside national measures, are designed to ensure the effective implementation of the CRPD. It focuses on the elimination of barriers under eight main ‘areas for action.’ These ‘areas for action’ include employment, accessibility, and equality. In relation to employment, the key objective of the Commission is stated to be to ‘[e]nable many more people with disabilities to earn their living on the open labour market.’ The commitments set out in connection with this area for action principally concern ‘providing Member States with analysis, political guidance, information exchange and other support’. EU action will support national efforts *inter alia* to help their integration in the labour market **making use of the European Social Fund (ESF)**; develop active labour market policies; **make workplaces more accessible**; promote use of the General Block Exemption Regulation⁵² which allows the granting of **state aid** without prior notification to the Commission. As regards ‘equality’, the Commission intends to tackle discrimination in the workplace by ensuring the implementation and enforcement of the **Employment Equality Directive**⁵³ and by supporting and supplementing national policies and programmes to promote equality. ‘Accessibility’ is given a high priority in the EDS, which recognises that accessibility is a ‘precondition for participation in society and in the economy’.

1.2. The Employment Equality Directive

The main piece of legislation which is relevant for the purpose of this study is the Employment Equality Directive. This Directive aims ‘to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’. It sets out **minimum standards which Member States must ensure** are met in their national laws. It thus requires them to prohibit discrimination *inter alia* on the grounds of disability in the sphere of employment, occupation and vocational training.

The Employment Equality Directive does not define ‘disability’ but in the case of *Ring and Werge*,⁵⁴ and subsequent case law the CJEU interpreted the term ‘disability’ within the Directive in light of Article 1 CRPD. The CJEU now recognises that a disability for the purpose of the Directive is a long-term limitation ‘which results in particular from physical, mental or psychological impairments which in interaction with

⁵² Commission Regulation (EU) No 651/2014 of 17 June 2014, Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Articles 107 and 108 of the Treaty, OJ L 187 26.6.2014, p. 1.

⁵³ Council Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303 2.12.2000, p. 16.

⁵⁴ CJEU, Joined cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* (C-335/11) and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation* (C-337/11).

various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’.

The directive explicitly bans direct and indirect discrimination as well as harassment. In addition, the CJEU affirmed that it bans also discrimination by association on any of the grounds provided. Of key relevance to this report is **Article 5**, which **obliges Member States to require employers to provide reasonable accommodation to disabled applicants and employees**. According to Article 5 (and in line with Article 2 of the CRPD), the employer is not required to make an accommodation if it would impose a disproportionate burden on them. What amounts to a ‘disproportionate burden’, however, is not spelled out in the Directive. Article 5 simply states that ‘[w]hen this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate’. This statement alludes to subsidies or other measures that subsidise the cost of the accommodation or which otherwise support the employer to make accommodations. **Recital 21** gives some further guidance on how to assess whether a particular accommodation amounts to a disproportionate burden. It reads:

‘To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance’.

A ‘disproportionate’ burden exists when the accommodation required involves a significant financial cost for the employer, which is not sustainable having regard to the financial resources of the enterprise and the subsidies available. The CJEU has yet to offer additional guidance on what might be considered a disproportionate burden. Accordingly, to date this task has been left to Member States and their domestic courts and tribunals.⁵⁵

In addition, for the purpose of this report it is worth recalling that Article 9(1) requires Member States to establish and make available appropriate ‘judicial and/or administrative procedures’ for the enforcement of rights protected by the Directive. Article 10 specifies that once claimants have established facts from which discrimination can be inferred, the burden of proof must shift to the respondent. Article 17 requires Member States to develop a system of sanctions for breach of the national measures which implement Directive rights and to ensure that these sanctions are applied in practice. Where these sanctions take the form of compensation to the victim, they must be ‘effective, proportionate and dissuasive’. It is also worth noting that Articles 13 and 14 of the Directive impose obligations on Member States to promote dialogue with social partners and encourage dialogue with NGOs about fostering equality on the grounds of disability (as well as the other grounds covered by the Directive).

1.3. The CRPD in EU Law

The CRPD has been ratified both by the EU and by its Member States. Upon the ratification by the EU, the CRPD has become EU law, and in hierarchical terms is inferior to the provisions of the Treaties, but superior to secondary EU law.⁵⁶ The latter point implies that provisions of EU secondary law must, as far as possible, be interpreted in a manner that is consistent with the CRPD. Consequently, if the wording of secondary EU legislation is open to more than one interpretation, preference should be given, as far as practicable, to the interpretation which renders the European provision consistent with the Convention.

⁵⁵ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment Contexts*, Publications Office of the European Union, Luxembourg (2016).

⁵⁶ For further discussion see D. Ferri, ‘The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: a constitutional perspective’ (2010) *European Yearbook Of Disability Law*, at 2.

This means that the Employment Equality Directive must now be interpreted in light of and in compliance with the CRPD.⁵⁷

1.4. The European Accessibility Act

The proposal for a European Accessibility Act was published in December 2015.⁵⁸ In December 2017, an agreement on the text of the EEA was reached in the Council, after the European Parliament had adopted its position in September 2017. In March 2019, the EEA was approved by the Parliament and the Council at the time of the writing of this report is in the process of being published in the Official Journal.⁵⁹

The EEA is a Directive based on Article 114 TFEU and its purpose is:

‘to contribute to the proper functioning of the internal market by approximating the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for certain products and services by, in particular, eliminating and preventing barriers to the free movement of products and services covered by this Directive arising from divergent accessibility requirements in the Member States’.

The EEA does not impose detailed technical solutions to make a product or service accessible. Rather, it seeks to establish ‘accessibility principles’ to be complemented by supplementary standards.

The EEA does not relate to workplaces. Rather, it concerns goods and services available on the EU market and the business environment, in order to empower people with disabilities and allow them to have access to a range of good and services. It covers: consumer general purpose computer hardware systems and operating systems for those hardware systems; a range of self-service terminals (e.g. payment terminals, ATM...), websites and other services related to transportation, consumer banking services; e-books and dedicated software; and e-commerce services. The availability of these accessible services on the market can indirectly stimulate a more accessible work environment. If economic operators are obliged to offer accessible products and services to their consumers, those products and services might also be available to their workers.

⁵⁷ Ibid.

⁵⁸ Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, COM/2015/0615 final.

⁵⁹ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) OJ L 151, 7.6.2019, p. 70.

2. Austria

2.1. Factual Background

In 2015, according to a micro-census survey carried out on behalf of the Ministry of Social Affairs by Statistics Austria, 18.4% (around 1.3 million people) of the resident population over the age of 15 had a permanent disability.⁶⁰ According to a survey reported in the ANED 2018 Annual Report on Disability, the employment rate of persons with disabilities in Austria (56.4%) is higher than the EU average (48.1%).⁶¹ However, the most recent shadow report on the implementation of the CRPD in Austria affirms that ‘unemployment rates of persons with disabilities have increased dramatically since 2013’, and that ‘due to the insufficient availability of data, it is almost impossible to give a valid account of persons with disabilities in the labor market’.⁶²

2.2. The Rights of Persons with Disabilities in Austria: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Austria is a federal republic, comprised of nine *Länder*, which are Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna.⁶³ As mentioned in the Introduction, this report only considers federal legislation.

The Austrian legal framework includes, in various acts, a neat prohibition of discrimination on the grounds of disability. Article 7 para 1 of Federal **Constitution**⁶⁴ bans discrimination on the basis of disability and provides for the equal treatment of all people in all fields of life.

At the federal level, various provisions protect persons with disabilities from discrimination and entail the 2005 ‘**Disability Equality Package**’.⁶⁵ This includes the Federal Disability Equality Act (BGStG) and the Disability Employment Act (BEinstG).⁶⁶

Austrian law included several definitions of disability.⁶⁷ Among them, Section 3 of the BGStG provides for a definition of disability. In particular, it states that disability ‘is the effect of a not only temporary physical, mental or intellectual impairment or an impairment of the senses which makes participation in the life of society difficult. Non-temporary means a period which is expected to be more than six months’. A similar definition is included in the Disability Employment Act (BEinstG). Other definitions are included in the laws of the *Länder*.

The **Federal Disability Equality Act (*Behindertengleichstellungsgesetz- BGStG*)**,⁶⁸ bans discrimination against persons with disabilities in access to goods and services available to the public, including housing.⁶⁹ The act covers direct discrimination, indirect discrimination, harassment and instructions given by others

⁶⁰ Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, ‘Overview of the horizontal issue of disability in Austria’ (2018), available at <<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=441>>.

⁶¹ ANED European Semester 2018/2019 country fiche on disability, Austria, report prepared by P. Flieger and U. Naue, available at <<https://www.disability-europe.net/country/austria>>.

⁶² Österreichischer Behindertenrat, ‘Second Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria’ (2018), p. 24, available at <https://www.behindertenrat.at/wp-content/uploads/2018/07/2018-07-17-Alternative-Report-Austria-English.pdf>

⁶³ <<https://www.austria.org/overview>>.

⁶⁴ Federal Constitution Act, available at <https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf>.

⁶⁵ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 14.

⁶⁶ *Ibid.* at para. 50.

⁶⁷ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 16; Ministry of Labour, Social Affairs and Consumer Protection, National Action Plan on Disability 2012-2020, p. 16, available at <<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>>.

⁶⁸ Federal Law on the Equality of Persons with Disabilities (BGBl. I Nr. 82/2005), available only in German at <https://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=91145&p_country=AUT&p_count=1168>

⁶⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 52, 63, 109.

to discriminate. The act does not qualify lack of accessibility (i.e. the presence of barriers) as a discrimination, but the Austrian report to the CRPD Committee states that:

‘When determining whether a disadvantage due to barriers constitutes discrimination, it should be examined whether the cost and/or effort required to eliminate the barriers would represent a disproportionate burden. If it is possible to take advantage of support from public funds for the corresponding measures, this should be considered when assessing reasonability. If the barriers cannot be eliminated with reasonable cost and/or effort, at least a substantial improvement of the situation should be strived for which comes as close as possible to equal treatment’.⁷⁰

The **Disability Employment Act (*Behinderteneinstellungsgesetz- BEinstG*)**⁷¹ bans discrimination based on disability in the employment context.⁷² Moreover, in order to enhance employment inclusion of the act provides for a series of positive measures, including hiring quotas (1 person with disabilities every 25 employees)⁷³ and special protection against dismissals of employees with disabilities. Further, the **Disability Employment Act** imposes on the employer a **duty to provide reasonable accommodation**, in compliance with the Employment Equality Directive.⁷⁴ In particular, it requires an adequate accommodation of the workplace alongside initial and further training (with the exception of cases where these measures would constitute an unreasonable burden on the employer).⁷⁵ However, the Austrian National Council of Disabled Persons, in answering the questionnaire on ‘disability-inclusive policies’ for the UN Special Rapporteur on the Rights of Persons with Disabilities, suggested that, within the Austrian legal framework on disability, there is no general definition of the term ‘reasonable accommodation’.

In addition, the **Occupational Health and Safety Act** is relevant in relation to accessibility of workplaces.⁷⁶ This act, however, imposes various obligations on the employers (as well as on the workers) which are mainly related to health and safety measures to avoid the accidents, occupational diseases, work-related illness and permanent damage.⁷⁷

Alongside these federal acts, several provincial acts promote, to varying degrees, the rights of persons with disabilities.⁷⁸ It should be noted that legislation on the barrier-free environment, and by extension provisions relating to accessibility, generally fall within the remit of the *Länder*,⁷⁹ even though there are a

⁷⁰ Ibid. para 54.

⁷¹ Employment of Persons with Disabilities Act (BEinstG) (BGBl. No. 22/1970), available only in German at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=42258&p_count=96150&p_classification=08.01&p_classcount=1624>

⁷² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 50, 66.

⁷³ The obligation to employ persons with disabilities applies to companies with more than 24 employees.

⁷⁴ Council Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303 2.12.2000, p. 16.

⁷⁵ ILO, abstract of the law <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=42258&p_count=96150&p_classification=08.01&p_classcount=1624>; *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 34.

⁷⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 113.

⁷⁷ Health and Safety at Work Act, 1994, brochure available in English at <[https://www.arbeitsinspektion.gv.at/inspektorat/Information in English/OSH provisions/Health and Safety at Work Act ArbeitnehmerInnenschutzgesetz and regulations](https://www.arbeitsinspektion.gv.at/inspektorat/Information%20in%20English/OSH%20provisions/Health%20and%20Safety%20at%20Work%20Act%20ArbeitnehmerInnenschutzgesetz%20and%20regulations)>

⁷⁸ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 15. Examples of provincial laws on disability rights include: Upper Austrian law on the equal opportunities of people with impairments (Provincial Law Gazette, LGBl. No. 41/2008); Opportunities Act of Vorarlberg (Provincial Law Gazette, LGBl. No. 30/2006); Carinthian Equal Opportunities Act.

⁷⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at paras. 105 – 108.

few federal acts on accessibility to services (e.g. transport services).⁸⁰ Recently, in 2017, for example, Lower Austria adopted the Anti-Discrimination Act, which includes provisions related to accessibility on workplaces, vocational training, vocational guidance and, in general, on the promotion of the employment opportunities for persons with disabilities.⁸¹

The CRPD in the Austrian Legal Framework

Austria was one of the first countries to sign the CRPD and its Optional Protocol on March 30, 2007,⁸² and ratified them on September 26, 2008.⁸³

It is worth highlighting that, in 2007-2008, four German-speaking countries, including Austria, engaged in consultations on a standard translation of the CRPD into German.⁸⁴ However, the CRPD Committee expressed concern about such a translation as it ‘does not accurately represent the meaning of the Convention and may give rise to decisions that are incompatible with the Convention’ and recommended Austria to revise it in compliance with the CRPD itself.⁸⁵

A recent judgment of the Supreme Court of Austria⁸⁶ held that the CRPD has to be implemented into domestic law, and it is **not directly applicable**, i.e. it does not afford any subjective rights and it is not a benchmark for assessing the lawfulness of another legal act.⁸⁷

The focal point for matters relating to the implementation of CRPD in Austria is the Federal Ministry of Labour, Social Affairs and Consumer Protection (BMASK), and is supported by the Federal Disability Advisory Board (BBB). An Independent Monitoring Committee, which includes representatives of people with disabilities, monitors the implementation of the CRPD

2.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

Accessibility in employment contexts is mandated, in general terms, by the **Disability Employment Act** in so far as it prohibits discrimination, while, as mentioned above, accessibility of goods and service open to the public is guaranteed by the Disability Equality Act.⁸⁸ While the latter law is for the benefit of clients and customers with disabilities, it may also favour workers with disabilities inside these institutions.

The **Occupational Health and Safety Act** includes additional provisions which have been complemented by policy initiatives such as the project on freedom from barriers in the workplace as part of the Austrian

⁸⁰ Federal Act on Local and Regional Public Transport (Öffentlicher Personennah- und Regionalverkehrsgesetz 1999 – ÖPNRV-G 1999), available in English at <https://www.bmvit.gv.at/en/verkehr/downloads/oeprnv_g_engl.pdf>; Federal Act on Equal Treatment of People with Disabilities (2016).

⁸¹ European network of legal experts in gender equality and non-discrimination, news report, ‘Lower Austria passes Anti-Discrimination Act’, 2 May 2017, available at <<https://www.equalitylaw.eu/downloads/4083-austria-lower-austria-passes-anti-discrimination-act-pdf-139-kb>>

⁸² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 1.

⁸³ Federal Law Gazette, BGBl. III No. 155/2008. See also: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en>

⁸⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 2.

⁸⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Austria*, at para. 6.

⁸⁶ Austria, Supreme Court (*Oberster Gerichtshof, OGH*), 10 ObS 162/16w, Vienna, 24 January 2017.

⁸⁷ European Union Agency for Fundamental Rights (FRA), ‘Fundamental Rights Report 2018’ (2018), p. 231, available at <<https://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018>>

⁸⁸ Dieter Schindlauer, *Country Report Non-Discrimination - Austria* (European network of legal experts in gender equality and non-discrimination 2018), available at <<https://www.equalitylaw.eu/downloads/4740-austria-country-report-non-discrimination-2018-pdf-2-29-mb>>, at p. 56.

Health and Safety Strategy 2007–2012.⁸⁹ Accessibility standards for a barrier-free environment in Austria have been elaborated by the Austrian Standards Institute.⁹⁰

Various forms of **subsidies** are granted to companies that employ persons with disabilities, which include **subsidies to foster inclusion in the workplace and make the workplace accessible**.⁹¹

Reasonable Accommodation

As highlighted above, the duty to provide reasonable accommodation in employment contexts is provided for in Austrian legislation (implementing the Employment Equality Directive). The reasonable accommodation obligation extends to public and private sector companies of any size. To that end, the Disability Employment Act sets forth a compensatory fund. In addition, the Federal Disability Equality Act ‘states that the Federal government undertakes to take the appropriate and necessary steps to enable persons with disabilities to have access to its performances and offers’.⁹²

Moreover, federal guidelines on personal assistance at the workplace have been in place since 2011.⁹³ Besides supporting the worker in the workplace (e.g. carrying out manual support activities in the course of the professional activity such as filing of documents), the Personal assistant can accompany the worker from home to the workplace or training location, and support the worker with disabilities in other everyday activities (e.g. help him/her getting in and out of the car, putting on/taking off the jacket, help with lunch).⁹⁴

2.4. Overview of Austrian Policies on Inclusion of Persons with Disabilities in the Workplace

The main disability policy document is the National Action Plan on Disability 2012-2020 (NAPD), which sets out the strategy of the Austrian Federal Government for the implementation of the CRPD.⁹⁵ It contains 250 measures divided up into eight main areas.⁹⁶ Among the goals listed in the Plan, that of increasing funding programmes for the elimination of barriers, appointing staff responsible for

⁸⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 113. The core tenets of the Austrian Health and Safety Strategy 2007–2012 are summarized at <<https://healthy-workplaces.eu/en/tools-and-publications/campaign-toolkit/tools-and-examples/promotion/leafletbrochure/austrian-occupational-health-and-safety-strategy-2007-2012>>.

⁹⁰ Austrian Standard Institute official website available at <<https://www.austrian-standards.at/en/home/>>; on accessibility <<https://www.austrian-standards.at/en/infopedia-topic-center/specials/accessibility-of-buildings/>>

⁹¹ Examples of these subsidies are integration subsidies, wage subsidies, job safeguarding subsidies, grants for wage/training costs or subsidies to adapt facilities to make them more barrier-free; see *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 289, 291.

⁹² Austrian National Council of Disabled Persons, ‘OeAR answer to the questionnaire on ‘disability-inclusive policies’ by the UN Special Rapporteur on the Rights of Persons with Disabilities’, 13th May 2016, Vienna, available at <https://www.ohchr.org/Documents/Issues/Disability/DisabilityInclusivePolicies/CSOs/OeAR_ENG.docx>

⁹³ BMASK-44.101/0105-IV/A/6/2010 at https://www.sozialministeriumservice.at/cms/site/attachments/7/6/7/CH0011/CMS1199712266329/rl_persoeliche_assistenz_am_arbeitsplatz.pdf (only in German).

⁹⁴ *Ibid.*, p. 4.

⁹⁵ Ministry of Labour, Social Affairs and Consumer Protection, National Action Plan on Disability 2012-2020, available at <<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>>; *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 8; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Austria*, at para. 4.

⁹⁶ Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, ‘Overview of the horizontal issue of disability in Austria’ (2018), *supra*, p. 32; <https://www.sozialministerium.at/siteEN/Labour_Disabilities/People_with_disabilities/#intertitle-14>

accessibility in every ministry and creating internal guidelines on accessibility in compliance with international, EU and national law are amongst the most relevant for the purpose of this analysis.⁹⁷

Measures envisaged by the NAPD to address unemployment or non-inclusive workplaces include: awareness raising campaign for the employment of people with disabilities carried out by the Federal Social Office; implementation of employment-orientated case management in the advisory and placement processes of the Austrian Public Employment Service; and, structural adaptations to facilitate inclusion. Moreover, the plan provides for projects aimed at promoting health and rehabilitation mechanisms in the workplace, which include the 'Fit 2 Work Programme' and the 'Health Street Project'.⁹⁸ Such measures are similar to those set up in the Austrian Health and Safety Strategy 2007-2012, which includes a project on freedom from barriers in the workplace.⁹⁹ A new National Action Plan on Disability is currently under discussion.¹⁰⁰

Alongside the NAPD, the Nationwide Labour Market Policy Programmes for the Disabled¹⁰¹ of the BMASK and the longer-term plans of the Austrian Public Employment Service (AMS) provide for positive measures to enhance inclusion in the workplace.¹⁰² The activities of the latter consist of providing support to persons with disabilities who have difficulties in finding employment due to their disability.¹⁰³

As mentioned above, Austria has a hiring quota system for persons with disabilities. The number of people with disabilities receiving special supports is released by the *Sozialministeriumservice* on the basis of the data sent by employers to the health insurance funds. If the number of registered persons with disabilities receiving special support employed in a company is lower than the quota provided for in the law, the employer has to pay a compensatory levy.¹⁰⁴

Examples of best practice when it comes to inclusion of people with disabilities in the labour market comprise projects such as 'Self-employed with a Disability'. The latter project is meant to support self-employment of persons with disabilities. Another relevant example is 'Mentoring for People with Disabilities', a pilot project supporting the transition into the labour market of persons with disabilities.¹⁰⁵ The event 'Careers without Barriers'¹⁰⁶ complemented by an internet platform to find information about job opportunities¹⁰⁷ should also be mentioned among best practices.

Lastly, the **Partnership Agreement 2014-2020**¹⁰⁸ with the European Commission is relevant in that it can facilitate the use of EU funds to support accessibility measures. In particular, this Agreement establishes a strategy for the optimal use of European Structural and Investment Funds and includes a set of actions for increasing the participation of the most vulnerable groups, including persons with disabilities, in the labour market.

⁹⁷ Ministry of Labour, Social Affairs and Consumer Protection, National Action Plan on Disability 2012-2020, p. 45-46, available at <<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>>

⁹⁸ Ibid. p. 77 – 79.

⁹⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 113.

¹⁰⁰ ANED European Semester 2018/2019 country fiche on disability, Austria, report *supra*, p. 7.

¹⁰¹ These kind of programmes (BABE) are drawn up every two years and are aimed to provide accompanying assistance services.

¹⁰² Ibid. p. 71.

¹⁰³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 17.

¹⁰⁴ Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, 'Overview of the horizontal issue of disability in Austria' (2018), *supra*, p. 11.

¹⁰⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 295, 299.

¹⁰⁶ Ibid. at para. 299.

¹⁰⁷ <www.arbeitundbehinderung.at>

¹⁰⁸ Partnership Agreement 2014-2020 with Austria, available at <https://ec.europa.eu/info/publications/partnership-agreement-austria-2014-20_en>

2.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

At the federal level the Federal Ministry of Labour, Social Affairs and Consumer Protection (BMASK) and the Federal Disability Advisory Board implement relevant federal legislation.¹⁰⁹

Despite a relatively progressive legislation, stigma and prejudice prevent people with disabilities from accessing the labour market and lack of awareness of the potential of persons with disabilities are still present in Austrian society.¹¹⁰ Moreover, the CRPD Committee expressed concern that ‘approximately 19,000 Austrians work in sheltered workshops outside of the open labour market and receive very little pay’.¹¹¹ The Committee also highlighted that the majority of the employers do not comply with the quota requirements and the gender gap in the employment of persons with disabilities causes concern.¹¹² DPOs and social services providers, moreover, underlined that the lack of any system of central coordination causes difficulties in the transition from the sheltered labour market to the primary labour market.¹¹³

At the end of 2017, 62.4% of the 250 measures drawn by the NAPD had already been realized, while another 32% has been partially implemented or in preparation; only 5.6% of the measures no steps have been taken yet towards implementation.¹¹⁴ However, the success of the Plan could be contrasted by the fragmentation that characterizes its implementation, in which the participation of the provinces was intermittent and irregular.¹¹⁵

The recent Second Alternative Report on the implementation of the CRPD in Austria (2018) which was released in conjunction with the second state report review before the CRPD Committee, states that an ‘inclusive approach relating to accessibility which is applicable across Austria and in line with Article 9 of the CRPD was not developed’.¹¹⁶

¹⁰⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 357 – 361; Ministry of Labour, Social Affairs and Consumer Protection, National Action Plan on Disability 2012-2020, p. 28-29, available at <<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=225>>

¹¹⁰ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 301.

¹¹¹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Austria*, at para. 44-46, 12.

¹¹² *Ibid.*

¹¹³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 301 – 303.

¹¹⁴ Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, ‘Overview of the horizontal issue of disability in Austria’ (2018), *supra*, p. 33.

¹¹⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Austria*, at para. 10.

¹¹⁶ Österreichischer Behindertenrat, ‘Second Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria’ (2018), p. 10, available at <https://www.behindertenrat.at/wp-content/uploads/2018/07/2018-07-17-Alternative-Report-Austria-English.pdf>

3. The Netherlands

3.1. Factual Background

In 2009, nearly 1.7 million people aged 15 to 64 years in the Netherlands had a disability affecting their capacity to work.¹¹⁷ According to EU Statistics on Income and Living Conditions for 2009, the employment rate for people with disabilities (aged 20-64) in the Netherlands was 54.0%, compared to 79.6% for non-disabled people (60.5% for disabled men and 49.3% for disabled women).¹¹⁸ The *VN-verdrag handicap in Nederland 2017* affirmed that, in 2015, people with disabilities were twice as likely to be unemployed when compared with people without a disability.¹¹⁹ This report also states that people with disabilities who have a job are much more likely than those without a disability to have a part-time job.¹²⁰ The Netherlands Institute for Human Rights (NIHR), in its shadow report to the CRPD Committee, highlights that ‘the participation rate of persons with disabilities in the labour market has not increased since 2012’ and that ‘for persons who used to do sheltered work, the chances of finding a job have even decreased from 50% to 30%’.¹²¹

3.2. The Rights of Persons with Disabilities in the Netherlands: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Article 1 of the Dutch Constitution (*Grondwet*) enshrines the principle of equality and non-discrimination.¹²² This provision does not mention disability explicitly. However, protection against disability discrimination is encompassed under ‘other grounds’. In addition, since the Netherlands is a monist State,¹²³ international non-discrimination provisions such as Article 26 ICCPR and Article 14 ECHR can be directly applied in court proceedings.

The main piece of legislation protecting persons with disabilities against discrimination is the **2003 Act on Equal Treatment on the Ground of Disability or Chronic Illness** (*Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*),¹²⁴ often referred to as the **Disability Discrimination Act (DDA)**.¹²⁵ While the Employment Equality Directive¹²⁶ only includes disability as a ground of discrimination, the DDA also

¹¹⁷ Data reported by Statistics Netherlands (CBS), available at <<https://www.cbs.nl/en-gb/news/2010/46/nearly-1-7-million-disabled-people-in-the-dutch-labour-force>>. Data also reported in the Country Report on the Netherlands prepared by the Irish National Disability Authority, available at <<http://nda.ie/nda-files/Health-and-Personal-Social-Services-for-People-with-Disabilities-in-The-Netherlands1.pdf>>.

¹¹⁸ Data reported in the ANED Country profile, available at <<https://www.disability-europe.net/country/netherlands>>. Additional data is reported in the J. Schoonheim and J. Smits, *Report on the employment of disabled people in European countries*, available at <<https://www.disability-europe.net/downloads/487-nl-employment-report>>.

¹¹⁹ <<http://www.platformgehandicaptenleiden.nl/wp-content/uploads/2017/12/Rapportage-VN-verdrag-handicap-in-Nederland-2017.pdf>>.

¹²⁰ Ibid.

¹²¹ NIHR, Submission to the Committee on the Rights of Persons with Disabilities - Concerning the initial report of the Netherlands, p. 22, available at <https://mensenrechten.nl/nl/publicatie/38664>

¹²² Constitution of the Kingdom of the Netherlands, available at <<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>>.

¹²³ Article 93 of the Constitution of the Kingdom of the Netherlands, available at <<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>>.

¹²⁴ <<https://www.government.nl/topics/discrimination/prohibition-of-discrimination>>. A copy of the act is also available at <https://mensenrechten.nl/sites/default/files/2013-05-08.Legislation%20Equal%20Treatment.pdf>

¹²⁵ R. Holtmaat, *Country Report Non-discrimination Netherlands* (European network of legal experts in gender equality and non-discrimination 2016), available at <<https://www.equalitylaw.eu/downloads/3740-the-netherlands-country-report-non-discrimination-2016-pdf-1-66-mb>>.

¹²⁶ Council Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303 2.12.2000, p. 16

protects against discrimination on the basis of ‘chronic illness’. These pieces of legislation do not explicitly define disability. According to Holtmaat and Loenen,¹²⁷ guidance on the meaning of disability can be derived from the *travaux préparatoires* of the DDA, which mentioned that the impairment must be long-term or irreversible.

The initial scope of the DDA was restricted to employment and vocational training. In 2009 the scope of the Act was extended to encompass the fields of primary and secondary education (Art. 5b DDA) and housing (Article 6a, 6b and 6c DDA). In 2012, the Act was further extended to ban discrimination in public transport.¹²⁸

The DDA bans direct and indirect discrimination and harassment. **Article 2 of the DDA imposes a duty to provide reasonable accommodation in employment contexts**, but also in all areas covered by the DDA, i.e. education and housing.¹²⁹ Failure to meet the duty of reasonable accommodation amounts to a discrimination, unless the accommodation entails a disproportionate burden on the duty bearer. A reasonable accommodation must be effective. As noted by Holtmaat, Article 2 DDA uses the word ‘effective’ rather than ‘reasonable’ (which is the term used in Article 5 of the Employment Equality Directive and by the CRPD). Article 2 reads as follows:

‘The prohibition of making a distinction also includes the duty for the person to whom the prohibition is addressed, to make effective accommodations in accordance to the need for this, unless doing so would constitute a disproportionate burden upon him or her’.¹³⁰

Article 6c provides for a derogation from the duty to provide an effective accommodation and states that Article 2 is not applicable if it would require reconstruction or building work in or around a residential building.¹³¹

The DDA includes a **general duty on all those bound by the DDA to improve accessibility for people with disabilities** (in addition to the duty to provide reasonable accommodation in individual cases) by virtue of Article 2a para. 1.

Several other national laws protect the rights of persons with disabilities and/or contain specific provisions concerning disability,¹³² including welfare legislation concerning benefits and care for persons with disabilities.¹³³ For the purpose of this analysis, two pieces of legislation are particularly relevant. First, the **Act on Reintegration of Labour-disabled 2005 (Wet Werk en Inkomen naar Arbeidsvermogen WIA)** allows employees and students to apply for individual benefits that will accommodate them in work or study. As noted by Smits, benefits might entail support (e.g. assistive devices) to removing barriers in the build environment.¹³⁴ Secondly, the **Work and Income According to Labour Capacity Act (Wet werk en inkomen naar arbeidsvermogen, WIA)**¹³⁵ covers all risks of inability to work for employees under retirement age who are unable to work and provides for both income protection and rehabilitation.¹³⁶ The WIA

¹²⁷ R. Holtmaat updated by T. Loenen, *Country Report Non-discrimination Netherlands* (European network of legal experts in gender equality and non-discrimination 2018), available at <<https://www.equalitylaw.eu/downloads/4756-the-netherlands-country-report-non-discrimination-2018-pdf-2-38-mb>>.

¹²⁸ Ibid. p. 30-31.

¹²⁹ Ibid. p. 48.

¹³⁰ Translation provided by R. Holtmaat, Ibid. p. 47.

¹³¹ Ibid. p. 48.

¹³² For a list of relevant legislation see, J. Smits, *The Netherlands – ANED Country profile*, available at <<https://www.disability-europe.net/country/netherlands>>. For example, the Appropriate Education Act 2012 (*passend onderwijs*) ensures support for students with disabilities in primary, secondary and vocational education.

¹³³ E.g. General Exceptional Medical Expenses Act 1967 (AWBZ); Long Term Care Act 2016 (Wet Langdurige Zorg WLZ).

¹³⁴ See J. Smits, *ANED 2012 Task 4 - National Accessibility Report*, available at <<https://www.disability-europe.net/country/netherlands>>.

¹³⁵ See at <https://www.arboned.nl/en/compliance-law/wia>.

¹³⁶ Ibid.

distinguishes between two types of benefits: benefits for workers who are fully and permanently disabled and benefits for workers who are partially and/or temporary disabled.¹³⁷ For the group of fully and permanently disabled, disability benefits amount to 75% of the last earned wage.¹³⁸ The Full Invalidation Benefit Regulation (*Inkomensvoorziening volledig arbeidsongeschikten, IVA*) provides an income for those who are considered completely and permanently incapacitated for work or have no (or only a slight) chance of recovery.¹³⁹

Workers with less-severe impairments are expected to continue their employment with some adaptations and receive wage subsidies.

Accessibility is mainly guaranteed by provisions included in sectorial legislation, which is often (e.g. in the case of transport services) either EU legislation or implementation of EU directives. With regards to accessibility of the built environment, Dutch law requires ‘services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way’, but there is no general legal obligation to guarantee accessibility.¹⁴⁰ The ‘Building Code 2003’ provides for the requirement for new buildings with a floor space of 400 square meters or more, to make at least one entrance and 40% of the floor space accessible for people with disabilities and to provide at least one accessible toilet. The Social Support Act 2015 (WMO)¹⁴¹ includes provisions related to the accessibility of local transport facilities and adaptations to the building environment for people with disabilities.¹⁴² In 2018, the government released a plan to draw up guidelines for accessible building and renovation, which has been welcome by the NIHR.¹⁴³

The CRPD in the Dutch Legal Framework

The **Netherlands ratified the Convention on 13 July 2016**. The CRPD is now part of the domestic legal order and can be applied directly by domestic courts if the provision concerned is sufficiently clear and precise. The Dutch government has not yet delivered its first report to the CRPD Committee.

The Netherlands Institute for Human Rights is the independent body responsible for monitoring the implementation of the CRPD, and an advisory committee of persons with a disability is involved in the monitoring process. The Ministry of Health, Welfare and Sport is the ministry responsible for the implementation of the CRPD (focal point).

3.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

As mentioned above, Dutch law requires buildings and infrastructures open to the public (including schools, health centres) to be designed and built in a disability-accessible way. This is for the benefit of clients and customers, but may also favour workers with disabilities inside these institutions. The Netherlands Institute for Human Rights (NIHR), reports that, in January 2018, ‘the Ministry of the Interior and Kingdom Relations presented an action plan for the building sector to improve the accessibility of

¹³⁷ See at <<https://ec.europa.eu/social/main.jsp?catId=1122&langId=en&intPageId=4990>>.

¹³⁸ P. Koning and M. Lindeboom, ‘The Rise and Fall of Disability Insurance Enrolment in the Netherlands’ (2015) 29(2) *Journal of Economic Perspectives* 151–172, available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/38354/pk_2015_01.pdf?sequence=1>.

¹³⁹ <<https://ec.europa.eu/social/main.jsp?catId=1122&langId=en&intPageId=4990>>

¹⁴⁰ R. Holtmaat, *Country Report Non-discrimination Netherlands*, available at <<https://www.equalitylaw.eu/downloads/3740-the-netherlands-country-report-non-discrimination-2016-pdf-1-66-mb>>, p. 50.

¹⁴¹ <<https://www.government.nl/topics/care-and-support-at-home/social-support-act-wmo>>.

¹⁴² *Ibid.* On the predecessor of the WMO 2015 (i.e. Social Support Act 2006) see, J. Smits, *ANED 2012 Task 4 - National Accessibility Report*, available at <<https://www.disability-europe.net/country/netherlands>>.

¹⁴³ <<https://www.mensenrechten.nl/nl/nieuws/nieuw-plan-voor-uitvoering-vn-verdrag-handicap-goede-stap-voorwaarts>>.

homes and buildings, which are open to the public'.¹⁴⁴ Similar initiative have been taken to improve accessibility of transportation and websites.¹⁴⁵

As mentioned above, alongside the duty to provide a reasonable accommodation to employees, as of January 2017,¹⁴⁶ the DDA also stipulates a general duty on all those bound by the DDA (including employers) to improve accessibility for people with disabilities (in addition to the duty to provide reasonable accommodation in individual cases). Employers are obliged to ensure accessibility gradually (*geleidelijk*) for people with disabilities.¹⁴⁷ However, Dutch legislation includes a limit to this duty: employers can invoke the disproportionate burden defence (as if in the case of reasonable accommodation).¹⁴⁸

Reasonable Accommodation

Article 4 DDA prohibits discrimination in the context of employment, from recruitment to dismissal. The reasonable accommodation obligation extends to public and private sector companies of any size. However, the size of the company and the length of the employment relationship may influence the assessment of whether the accommodation constitutes a 'disproportionate burden'.

Holtmaat reports that a reasonable accommodation only needs to be given when the employee has indicated his/her need to have such an accommodation.¹⁴⁹ Employers are in fact prohibited from requesting information about the physical and/or mental health condition of an applicant during the selection procedure and of the worker. If employers are aware of the disability or chronic illness of one of their employees, they are under a best efforts obligation (*inspanningsverplichting*) to ascertain whether reasonable accommodations are needed.¹⁵⁰ Having regard to the duty to provide reasonable accommodation, this author also argues that the case law consistently affirms that 'the effectiveness and necessity of an accommodation must be determined using objective criteria. The opinion of the employee is important but not decisive'.¹⁵¹ Thus, while an employer may be expected to consult the disabled person in question and ask for his/her opinion, this is not a duty.

Assistive devices or support for work or education can be requested directly by persons with disabilities in compliance with the Act on Reintegration of Labour-disabled 2005.¹⁵² Support can take the form of a sign language interpreter. The maximum amount of sign language interpretation services to be provided is set at 15% of working time. This provision is restricted to employees only.¹⁵³

¹⁴⁴ NIHR, Submission to the Committee on the Rights of Persons with Disabilities - Concerning the initial report of the Netherlands, available at <<https://mensenrechten.nl/nl/publicatie/38664>>.

¹⁴⁵ Ibid.

¹⁴⁶ This amendment was passed in 2016 following the ratification of the CRPD, but its entry into force was postponed to 1 January 2017 (<https://zoek.officielebekendmakingen.nl/stb-2016-215.html>)

¹⁴⁷ R. Holtmaat updated by T. Loenen, *Country Report Non-discrimination Netherlands 2018*, <https://www.equalitylaw.eu/downloads/4756-the-netherlands-country-report-non-discrimination-2018-pdf-2-38-mb>. This duty was implemented by virtue of a Decree: Decree General accessibility for persons with a disability or chronic illness (*Besluit algemene toegankelijkheid voor personen met een handicap of chronische ziekte*) of 7 June 2017, Staatsblad 2017, 256 of 20 June 2017

¹⁴⁸ Ibid.

¹⁴⁹ R. Holtmaat, *Country Report Non-discrimination Netherlands*, available at <<https://www.equalitylaw.eu/downloads/3740-the-netherlands-country-report-non-discrimination-2016-pdf-1-66-mb>>.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² J. Smits, *ANED Country report on Social Protection and Article 28 (2016)*, available at <<https://www.disability-europe.net/country/netherlands>>.

¹⁵³ Ibid.

An employer can request a subsidy for adaptations to the workplace once his/her employee has been in employment for at least 6 months.¹⁵⁴ Portable adaptations, such as an adapted desk or chair, beyond the usual equipment expected to be provided by an employer, must be purchased by the employee, who can request a subsidy from the UWV (Benefits Provision Office). Personal assistance in the form of a job coach is also possible.¹⁵⁵

3.4. Overview of Dutch Policies on Inclusion of Persons with Disabilities in the Workplace

Dutch policies on inclusion in the workplace encompass financial incentives to work, subsidies to employers to hire disabled employees, and vocational training and reintegration in work programmes.

The Return to Work Scheme for the Partially Disabled (*Regeling Werkhervatting Gedeeltelijk Arbeidsgehandicapten*, WGA) helps people with disabilities to return to work. A WGA beneficiary can apply for support at the workplace, adapted transport (when travel to work is difficult because of illness or disability, financial compensation for an adjustment to transport means or travel expenses can be provided), reimbursement for childcare and job coach.¹⁵⁶ Dutch policies also aim at reducing the number of adults receiving disability benefits.¹⁵⁷ According to the WGA, three kinds of WGA benefits are provided, and they may be pay-related, pay-supplementary or follow-up benefits.¹⁵⁸

Reintegration services for disability benefit recipients were also enhanced recently, with a move to more individually-tailored packages of work placements, either purchased by the benefits agency from the private sector ('Trajectories') or designed by the individuals themselves given a budget from the benefits agency ('Individual Reintegration Plans').¹⁵⁹ The Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*, UWV), an autonomous administrative authority (ZBO) commissioned by the Ministry of Social Affairs and Employment (SZW), is responsible for implementing the employee insurance schemes (unemployment, illness, incapacity for work).¹⁶⁰

Sheltered employment is a common form of employment in the Netherlands for people with disabilities.¹⁶¹ Sheltered employment is usually financed by the government and managed by the municipalities.

¹⁵⁴ J. Schoonheim and J. Smits, *Report on the Employment of Disabled People in European Countries-The Netherlands*, available at <<https://www.disability-europe.net/downloads/487-nl-employment-report>>.

¹⁵⁵ Ibid. Job coaching will be provided for usually three years and the cost per job coach is a maximum in the first year of 75 euro per hour and 6800 euro in total (equalling 90 hours of job coaching in the first year). In the second and third year the maximum is lower, at 1400 euro a year or 18.6 hours a year of job coaching (see, J. Smits, *ANED Country report on Social Protection and Article 28* (2016), available at <<https://www.disability-europe.net/country/netherlands>>).

¹⁵⁶ <<http://ec.europa.eu/social/BlobServlet?docId=15286&langId=en>>.

¹⁵⁷ J. Schoonheim and J. Smits, *Report on the employment of disabled people in European countries-The Netherlands* (2009), available at <<https://www.disability-europe.net/downloads/487-nl-employment-report>>.

¹⁵⁸ The disability system in the Netherlands contains both a social insurance program that protects workers against lost labor earnings (WAO/WIA) and a program that provides a social assistance minimum income for disabled adults with little or no work history (*Wajong*); moreover, separate social minimum scheme for the disabled self-employed (WAZ) was closed to new entrants from 2004. D. McVicar, R. Wilkins, N. R. Ziebarth 'Four decades of disability benefit policies and the rise and fall of disability reciprocity rates in five OECD countries' (2016), available at <https://www.human.cornell.edu/sites/default/files/PAM/people/nr22/The-rise-and-fall-of-disability-reciprocity-rates-in-five-OECD-countries_v11-clean.pdf>

¹⁵⁹ D. McVicar, R. Wilkins, N. R. Ziebarth 'Four decades of disability benefit policies and the rise and fall of disability reciprocity rates in five OECD countries' (2016), available at <https://www.human.cornell.edu/sites/default/files/PAM/people/nr22/The-rise-and-fall-of-disability-reciprocity-rates-in-five-OECD-countries_v11-clean.pdf>

¹⁶⁰ <<https://www.uwv.nl/overuwv/english/about-us-executive-board-organization/detail/about-us>>

J. Schoonheim and J. Smits, *Report on the employment of disabled people in European countries-The Netherlands* (2009), available at <<https://www.disability-europe.net/downloads/487-nl-employment-report>>.
<[s-for-People-with-Disabilities-in-The-Netherlands1.pdf](https://www.disability-europe.net/downloads/487-nl-employment-report)>.

In 2013, the government concluded an agreement with organizations of employers and trade unions to encourage the hiring of persons with disabilities through a quota system (*sociaal akkoord van 11 april 2013*).¹⁶² The government envisaged the creation of 125,000 jobs for people with disabilities by 2026, 25,000 of which will be jobs in the public sector (*banenafpraak*). Every year employers have to provide a certain number of jobs for people with disabilities. In 2017, private employers met the agreed quota of employee with disabilities, while the public sector did not. The Cabinet has decided to set the quota system for the public sector for 2018 to 1.93%.¹⁶³ In September 2018, the Dutch government announced the introduction of new measures with the aim to enhance the participation of people with disabilities in the labour market.¹⁶⁴

3.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite the existence of legislation and relevant policy instruments, the NIHR many people with disabilities still experience discrimination in the workplace.¹⁶⁵ Furthermore, it appears from qualitative studies that the procedure for requesting an accommodation or a specific facility to enhance accessibility is sometimes complicated and long.¹⁶⁶ Holtmaat reports that the NIHR dealt with eight cases on reasonable accommodation in employment and occupation in 2014. In six of these cases the NIHR found that the norm was violated.¹⁶⁷ This author also observes a similar trend in 2015. Some recent cases related to discrimination on the grounds of disability in employment context can be found on the NIHR website, and several of them relate to the failure to provide reasonable adjustments.¹⁶⁸ Thus, despite the existence of a relatively advanced legislative framework in the Netherlands, the duty to provide reasonable accommodation has not yet been fully implemented.¹⁶⁹

¹⁶² <<https://www.rijksoverheid.nl/onderwerpen/werken-met-arbeidsbeperking/meer-banen-mensen-arbeidsbeperking>>.

¹⁶³ *Kennisdocument Wet banenafpraak en quotum arbeidsbeperkten (voorjaar 2018)*, available at <<https://www.rijksoverheid.nl/onderwerpen/werken-met-arbeidsbeperking/documenten/publicaties/2015/03/06/kennisdocument>>.

¹⁶⁴ NIHR, Submission to the Committee on the Rights of Persons with Disabilities - Concerning the initial report of the Netherlands, p. 22, available at <https://mensenrechten.nl/nl/publicatie/38664>.

¹⁶⁵ *VN-verdrag handicap in Nederland 2017*, p. 24, available at <<http://www.platformgehandicaptenleiden.nl/wp-content/uploads/2017/12/Rapportage-VN-verdrag-handicap-in-Nederland-2017.pdf>>.

¹⁶⁶ *VN-verdrag handicap in Nederland 2017*, p. 24, available at <<http://www.platformgehandicaptenleiden.nl/wp-content/uploads/2017/12/Rapportage-VN-verdrag-handicap-in-Nederland-2017.pdf>>.

¹⁶⁷ R. Holtmaat, *Country Report Non-discrimination Netherlands*, p. 50, available at <<https://www.equalitylaw.eu/downloads/3740-the-netherlands-country-report-non-discrimination-2016-pdf-1-66-mb>>.

¹⁶⁸ <http://www.wervingenselectiegids.nl/discriminatie-thema-s/handicap-en-chronische-ziekte>. See e.g. Judgment number 2013-47 (<<https://www.mensenrechten.nl/nl/oordeel/2013-47>>).

¹⁶⁹ *Ibid.*

4. Finland

4.1. Factual Background

In 2011, Statistics Finland reported that 18% of people 20–64 years old have an impairment which disadvantages them when seeking employment or actively participating in the workforce.¹⁷⁰ According to the data jointly released by Statistics Finland and the Ministry of Employment and the Economy, in 2014, there were 333,974 employed people with partial work incapacity, which is 58.4% of all 571,860 people with partial work incapacity.¹⁷¹ Data show that the employment opportunities of persons with disabilities in Finland are more limited when compared to the opportunities for non-disabled people: 53.8% of persons with disabilities are employed, while 74.7% of non-disabled people are employed. Persons with moderate disabilities have better employment opportunities compared to persons with severe disabilities. In particular, data show that 59.2% of persons with moderate disabilities are employed, while 30.2% of persons with severe disabilities are employed.¹⁷² Finnish persons with disabilities have less employment opportunities at younger ages (16-24 and 25-34), but better employment opportunities at older ages.¹⁷³

4.2. The Rights of Persons with Disabilities in Finland: Introductory Remarks

The Relevant Legal Framework in a Nutshell

The Finnish legal framework includes, in various acts, a neat prohibition of discrimination on the grounds of disability.

Section 6 of the Constitution of Finland¹⁷⁴ provides for equality before the law and explicitly prohibits discrimination on a number of grounds, including disability. The constitutional prohibition of discrimination may be directly invoked in courts, and legislation must be interpreted in accordance with it.¹⁷⁵ According to Hiltunen, this provision has been applied primarily in situations involving the use of public power, but it may also be applied to relationships between private parties.¹⁷⁶ The constitutional guarantee of non-discrimination is supplemented by provisions ensuring substantive equality. For the purpose of this analysis, it is worth mentioning Section 19(2) on the right to social security. The latter provision states that '[e]veryone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider'.

The new **Non-Discrimination Act 1325/2014** (*Yhdenvertaisuuslaki*), which entered into force on 1 January 2015, is the main instrument transposing the EU directives on equal treatment (including the Employment Equality Directive)¹⁷⁷ into national law.¹⁷⁸ This Non-Discrimination Act, whilst implementing the EU

¹⁷⁰ K. Valkama, H. Katsui and T. Kröger, *European Semester 2017/2018 country fiche on disability –Finland*, available at <<https://www.disability-europe.net/country/finland>>. Other data can be found at <https://www.stat.fi/til/tyti/2016/13/tyti_2016_13_2017-04-12_kat_004_en.html>.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ <<https://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>>.

¹⁷⁵ R. Hiltunen, *Country Report Non-discrimination- Finland*, p. 5, available at <<https://www.equalitylaw.eu/downloads/4425-finland-country-report-non-discrimination-2017-pdf-1-57-mb>>.

¹⁷⁶ Ibid.

¹⁷⁷ Council Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303 2.12.2000, p. 16.

¹⁷⁸ The current Non-Discrimination Act repealed the prior Non-Discrimination Act, which was in force from 2004 to 2014. The English text of the Non-Discrimination Act 2014 can be found at <<https://www.finlex.fi/en/laki/kaannokset/2014/en20141325.pdf>>.

directives on equal treatment, goes beyond the minimum requirements set forth in them.¹⁷⁹ The act applies to all public and private activities (excluding private life, family life and the practice of religion): these include all activity of public authorities, education, provision of goods and services and employment.¹⁸⁰

Section 8 of the Non-Discrimination Act lists the grounds of discrimination, including state of health and disability, but does not define them. Hiltun highlights that there is no univocal definition of disability in Finnish legislation and that the original Government proposal (*Hallituksen esitys yhdenvertaisuuslaiksi 19/2014*) referred to the concept of disability envisaged in the CRPD.¹⁸¹ In addition, the Government proposal also referred to the CJEU decision in the *Ring and Werge* case and explained that an illness combined with long-lasting effects preventing participation in employment can be considered a 'disability'.¹⁸²

As it will be further discussed in Section 3.3., the Non-Discrimination Act includes a **duty to provide reasonable accommodation** to ensure that persons with disabilities have equal access to employment, to education as well as goods and services. Failure to meet the duty of reasonable accommodation is defined as discrimination in the Non-Discrimination Act (Section 8(2) of the Act).

As regards to employment, compliance by employers with the Non-Discrimination Act is ensured by the **Occupational Health and Safety Authority (OHSA)**.¹⁸³ The OHSA ensures that working conditions are as healthy and safe as possible, preventing disability.¹⁸⁴ It also ensures that the employers act in compliance with employment legislation. It can receive communications from employees and conduct inspections in companies.¹⁸⁵ If the OHSA considers that there are grounds to suspect that a discrimination occurred, it must report the case to a public prosecutor. Discrimination is an offence punishable under the **Penal Code**, which includes two provisions on discrimination.¹⁸⁶ The first concerns discrimination, *inter alia*, in the provision of services, while the second covers discrimination in the field of employment.

Several other national laws protect the rights of persons with disabilities and/or contain specific provisions concerning disability, including welfare legislation that provides for benefits and care for persons with disabilities.¹⁸⁷ The Act of Vocational Rehabilitation (Act 189/2001) and the Social Welfare Act (Act 710/1982) include provisions aimed at supporting persons with disabilities to get jobs.¹⁸⁸ Accessibility is

¹⁷⁹ R. Hiltunen, *Country Report Non-discrimination- Finland*, p. 6, available at <<https://www.equalitylaw.eu/downloads/4425-finland-country-report-non-discrimination-2017-pdf-1-57-mb>>.

¹⁸⁰ The Non-Discrimination Ombudsman (Act on the Non-Discrimination Ombudsman, 1326/2014 -*Laki yhdenvertaisuusvaltuutetusta*) can hear complaints on the violation of the Non-Discrimination Act and can conduct conciliation proceedings. Decisions of the Ombudsman are not legally binding. The National Non-Discrimination and Equality Tribunal (Act on the Non-Discrimination and Equality Tribunal 1327/2014 - *Laki yhdenvertaisuus- ja tasa-arvolautakunnasta*) has jurisdiction over complaints on discrimination outside the field of employment and can prohibit the continuation of the discriminatory conduct

¹⁸¹ Ibid. p. 29.

¹⁸² Ibid. p. 29.

¹⁸³ R. Hiltunen, *Country Report Non-discrimination- Finland*, p. 8, available at <<https://www.equalitylaw.eu/downloads/4425-finland-country-report-non-discrimination-2017-pdf-1-57-mb>>.

¹⁸⁴ The website of the authority is <<http://www.tyosuojelu.fi/web/en>>.

¹⁸⁵ R. Hiltunen, *Country Report Non-discrimination- Finland*, pp. 8-9, available at <<https://www.equalitylaw.eu/downloads/4425-finland-country-report-non-discrimination-2017-pdf-1-57-mb>>.

¹⁸⁶ R. Hiltunen, *Country Report Non-discrimination- Finland*, p. 6, available at <<https://www.equalitylaw.eu/downloads/4425-finland-country-report-non-discrimination-2017-pdf-1-57-mb>>.

¹⁸⁷ Legislation with regard to persons with disabilities includes: the Social Welfare Act, the Health care Act, the Act of the Status and Rights of the Social Welfare Clients, the Act on the Status and Rights of the Patient, the Act on Services and Support for the Disabled, the Special Care Act for Persons with Intellectual Disabilities and the Act of Interpretation Services for Persons with Disabilities.

¹⁸⁸ A. Teittinen, *Report on the employment of disabled people in European countries (2011)*, available at <<https://www.disability-europe.net/downloads/383-fi-employment-report>>.

mainly guaranteed by the Non-Discrimination Act and by provisions included in sectorial legislation,¹⁸⁹ which is often (e.g. in the case of transport services) either EU legislation or domestic legislation implementing EU directives. Accessibility of the built environment is guaranteed by the Land Use and Building Act.¹⁹⁰ This Act requires services available to the public, buildings and infrastructures, including new private buildings to be used as workplaces, to be designed and built in a disability-accessible way. Section 117(3) of the Land Use and Building Act affirms that ‘a building must conform with its purpose [...] and also be suitable for people whose capacity to move or function is limited’.¹⁹¹ Accessibility provisions are also included in various pieces of legislation.¹⁹²

The CRPD in the Finnish Legal Framework

Finland ratified the CRPD and its Optional Protocol on 11 May 2016.¹⁹³ The Finnish government has not yet delivered its first report to the CRPD Committee.

The responsibilities of the Ministry of Social Affairs and Health (focal point appointed in compliance with Article 33 CRPD) include the implementation of the CRPD, including preparatory work on legislation, various reports, provision of information relating to the Convention, information-gathering and application of statistics.¹⁹⁴ The Parliamentary Ombudsman together with the Human Rights Centre serve as an independent national mechanism tasked to promote, protect and monitor the implementation of the CRPD.¹⁹⁵

4.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

As noted above and as highlighted by Heinonen and Teittinen,¹⁹⁶ there is no specific law dealing with accessibility for persons with disabilities. However, accessibility obligations for buildings and services are included in the Land Use and Building Act and related Decree.¹⁹⁷ The latter requires that all new services available to the public and new buildings and infrastructure must be accessible.¹⁹⁸ Hiltunen, in a recent report, affirms that while accommodation measures are distinct from the requirements of the Land Use and Building Act, the Non-Discrimination and Equality Tribunal, in a topical decision (concerning the

¹⁸⁹ P. Heinonen and A. Teittinen, *ANED 2012 Task 4 - National Accessibility Report* (2012), available at <<https://www.disability-europe.net/downloads/383-fi-employment-report>>.

¹⁹⁰ R. Hiltunen, *Template for Thematic Report on Reasonable Accommodation and Accessibility Obligations in Employment* (2015).

¹⁹¹ Land Use and Building Act (*Maankäyttö- ja rakennuslaki* 132/1999), Section 117(3) available at <<https://www.finlex.fi/en/laki/kaannokset/1999/en19990132.pdf>>. See also: Decree on accessible building (2005) and Decree on housing design (2005).

¹⁹² E.g. Information society code (917/2014) available only in Finnish and Swedish at <<http://www.finlex.fi/fi/laki/kaannokset/2014/en20140917.pdf>>.

¹⁹³ On the ratification process see the report available at <<https://www.equalitylaw.eu/downloads/3835-finland-finland-ratifies-the-convention-on-the-rights-of-persons-with-disabilities-and-its-optional-protocol-pdf-60-kb>>.

¹⁹⁴ <<https://www.humanrightscentre.fi/rights-of-persons-with-disabilit/national-monitoring-and-implemen/>>.

¹⁹⁵ <https://www.oikeusasiamies.fi/en_GB/web/guest/the-rights-of-persons-with-disabilities>

¹⁹⁶ P. Heinonen and A. Teittinen, *ANED 2012 Task 4 - National Accessibility Report* (2012), available at <<https://www.disability-europe.net/downloads/383-fi-employment-report>>.

¹⁹⁷ *Maankäyttö- ja rakennuslaki* (132/1999)], Section 117(3), Land Use and Building Decree [*Maankäyttö- ja rakennusasetus* (895/1999)], Section 53 cited in R. Hiltunen, *Country report Non-discrimination Finland 2018*, <https://www.equalitylaw.eu/downloads/4746-finland-country-report-non-discrimination-2018-pdf-2-04-mb>

¹⁹⁸ *Ibid.*

provision of services), found that failure to comply with the Land Use and Building Act, by using a wheelchair-accessible toilet as storage space, constituted a discrimination.¹⁹⁹

Accessibility of the workplace is mainly guaranteed by **Section 7(1) and (2)** of the **Non-Discrimination Act** which provides for the duty of the employer to promote equality. The provision does not explicitly mention accessibility. However, it states that:

‘(1) The employer must assess the realisation of equality in the workplace and, taking into account the needs of the workplace, develop the working conditions as well as the methods complied with in the selection of personnel and in making decisions concerning the personnel. These measures shall be effective, expedient and proportionate, taking into account the operating environment, resources and other circumstances.

(2) An employer who regularly employs at least 30 persons must have a **plan for the necessary measures for the promotion of equality**. These measures and their effectiveness must be discussed with the personnel or their representatives’.²⁰⁰

The content and extent of the equality plan are determined by the employer.²⁰¹ The plan, however, must list the concrete actions required in the workplace for achieving equality. All employers with more than 30 employees must adopt an equality plan by the end of 2016. The ministry has published a **tool for the assessment of equality**,²⁰² to guide and support employers in meeting the requirements and obligations of the Non-discrimination act. Since accessibility reviews may form part of an equality assessment, the Finnish government highlights that employers must refer to guidelines and other material published by DPOs that may help them to make their workplace accessible.²⁰³

Alongside the general equality obligation laid out in the Non-Discrimination Act, **Section 12(2)** of the **2002 Occupational Safety and Health Act**²⁰⁴ concerning the design of the working environment requires employers to take into consideration needs of employees with disabilities when designing working environments and working premises, or production methods as well as work equipment and other devices. Section 24 of the same act also requires that:

‘[t]he structures of a workstation and the work equipment used at work shall be chosen, designed and placed in an ergonomically appropriate way **taking the nature of the work and the employee’s capacities into consideration**. As far as possible, the structures shall be adjustable and allow for flexible arrangement and have such operating qualities that the work can be done without causing a harmful or hazardous load on the employee’s health’.

Reasonable Accommodation

In Finland, the duty to provide reasonable accommodation for people with disabilities in employment and occupation is provided by **Section 15** of the **Non-Discrimination Act**.

Section 15(1) states that public and private employers (and those providing education or other services) must provide reasonable accommodation in order ‘to realise equality of persons with disabilities’, and in particular ‘to manage their work tasks and to advance their career’. Section 4 of the Act includes a wide definition of employer encompassing the private and public sectors.

¹⁹⁹ Non-Discrimination and Equality Tribunal decision 60/2015, 31.03.2016 cited in R. Hiltunen, Country report Non-discrimination Finland 2018, <https://www.equalitylaw.eu/downloads/4746-finland-country-report-non-discrimination-2018-pdf-2-04-mb> at p. 39 ft. 75.

²⁰⁰ The full text of the provision is available at <https://www.finlex.fi/en/laki/kaannokset/2014/en20141325.pdf>.

²⁰¹ <http://www.tyosuojelu.fi/web/en/employment-relationship/non-discrimination>.

²⁰² <http://yhdenvertaisuus.finlex.fi/en/>.

²⁰³ <http://yhdenvertaisuus.finlex.fi/en/yhdenvertaisuuden-arviointi/miten-arvioidaan/>.

²⁰⁴ Occupational Safety and Health Act 738/2002 (Työturvallisuuslaki) available at https://www.finlex.fi/en/laki/kaannokset/2002/en20020738_20060053.pdf.

Accommodations may consist of modifications of the physical environment, assistive devices, or working arrangements (adjustment of work organisation, working hours, or use of an assistant).²⁰⁵ The Government Decree on Public Employment and Enterprise Service (916/2012) gives the employer the right to apply for a benefit for adjusting the workplace or the working conditions.²⁰⁶ It is also worth noting that assistive devices (e.g. wheelchairs) or devices for medical rehabilitation used regularly (in and outside the workplace) by a person with a disability can be given by municipalities. Municipalities can provide a voucher for a disabled person, which he/she can use for purchasing devices for aid.²⁰⁷

The Government Proposal for the Act (*Hallituksen esitys yhdenvertaisuuslaiksi 19/2014*) explains that ‘the need for reasonable accommodation usually appears in practice when a person with disabilities or e.g. her/his assistant requires it if she/he considers it is needed’.²⁰⁸ There is no obligation on the employer to investigate whether a reasonable accommodation is required.

Section 15(2) states that:

‘...in assessing the reasonableness of the adjustments, attention shall also be devoted, in addition to the needs of the person with disabilities, to the size, financial position, nature and extent of the operations of an actor, referred to in subsection 1, as well as the estimated costs of the adjustments and the support available for the adjustments.

According to Section 15(3) the employer must provide a written report on its procedures to a person with disability who considers that they have been discriminated against as a result of the denial of reasonable accommodation.

4.4. Overview of Finnish Policies on Inclusion of Persons with Disabilities in the Workplace

In Finland, the Ministry of Social Affairs and Health is responsible for the coordination of disability policies, whose implementation is however in the responsibility of all public authorities. Under the responsibility of this Ministry, the National Institute for Health and Welfare (THL)²⁰⁹ promotes research and development on the independent living of people with disabilities and barrier-free planning, as well as on various services, such as personal assistant, housing, and assistive devices. It also gathers statistical data on disability issues.

The main disability policy programme was Finland’s Disability Policy Programme 2010-2015.²¹⁰ The main aim of the programme was that of promoting equality for persons with disabilities. The measures included in the programme covered 14 different sectors: independent living, social inclusion and participation, built environment, transport, education and training, employment, health and rehabilitation, social security, legal protection, safety and personal integrity, culture and free-time, discrimination, disability data, taxation and international activities. The main targets for employment included the removal of barriers to access and retain employment by way of ‘individual vocational guidance and advice, subsidised

²⁰⁵ <<http://www.tyosuojelu.fi/web/en/employment-relationship/non-discrimination>>.

²⁰⁶ Government Decree on Public Employment and Enterprise Service (916/2012), available at <<http://www.finlex.fi/fi/laki/ajantasa/2012/20120916>>.

²⁰⁷ Ministry of Health and Social Affairs (1363/2011). See J-P. Lauronen and S. Vehmas, *ANED Country report on Social Protection and Article 28 –Finland*, available at <<https://www.disability-europe.net/>>.

²⁰⁸ Government Proposal on Non-Discrimination Act 19/2014 [Hallituksen esitys yhdenvertaisuuslaiksi 19/2014 vp], available at <<http://www.finlex.fi/fi/esitykset/he/2014/20140019>> cited in R. Hiltunen, *Template for Thematic Report on Reasonable Accommodation and Accessibility Obligations in Employment 2015* (2015).

²⁰⁹ National Institute for Health and Welfare (THL) official website available at <<https://thl.fi/en/web/thlfi-en>>

²¹⁰ The programme is available <<https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/73337/URN%3ANBN%3Afi-fe201504224874.pdf?sequence=1>>. The final report on the programme is available in Finnish: *Suomen vammaispoliittinen ohjelman VAMPO 201 – 2015 loppuraportti* (Final report of the Finland’s Disability Policy Programme). *Sosiaali- ja terveysministeriö*. <<http://urn.fi/URN:ISBN:978-952-00-3706-2>>. See also the replies to the Special Rapporteur on Disability, available at <<https://www.ohchr.org/EN/Issues/Disability/SRDIsabilities/Pages/SocialProtection.aspx#replies>>.

employment and strengthening the co-operation between the employment and education administrative sectors as well as in general providing active support to young persons in particular so that they can find a place in the working life'. Among the measures envisaged, the programme included that of 'support to the employer of persons with disabilities for the realisation of necessary measures of reasonable accommodation in order to facilitate the working'. In this respect, as mentioned above, public subsidies for arranging working conditions are available to employers to support changes in the working environment.²¹¹ The subsidy for arranging working conditions or acquiring new equipment is up to a maximum of 4000 euros.²¹² The need for the benefit is assessed by having regard to the impairment of the employee and the economic status of the employer.²¹³

Further to the disability programme 2010-2015, the current government has launched a key program to **improve the employment of the persons with partial working capacity in 2016-2018**.²¹⁴ The budget is 15 million euros. In addition, encouraging and promoting career opportunities for people with partial work abilities is one of the key objectives of the Government's strategic programme for 2015–2018.²¹⁵

4.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Hiltunen reports that there have been several decisions by the Non-Discrimination and Equality Tribunal on reasonable accommodation duties outside the employment field.²¹⁶ Interestingly, the Tribunal affirmed that the duty to provide reasonable accommodation cannot be avoided by referring to the need to comply with a different piece of legislation.²¹⁷ However, Hiltunen also suggests that the practical implementation of the duty to provide reasonable accommodation (in general and in the workplace) is not well documented.²¹⁸ Case law on breaches of the duty is limited, partly because the body supervising the duty of reasonable accommodation, the Occupational Safety and Health Authority, and trade unions representing the workers do not publish detailed information on discrimination. Among the scant case law available, a decision of the Rovaniemi Appeal Court²¹⁹ held that failing to reinstate a visually impaired teacher after her return from maternity leave constituted a discrimination on the basis of disability and awarded the teacher compensation. The employer (City of Oulu) claimed that the teacher no longer had the ability to work in the school, since her task would have been to teach a special class for severely disabled children and, because of her limited eyesight, she could not observe the behaviour and health of

²¹¹ R. Hiltunen, *Template for Thematic Report on Reasonable Accommodation and Accessibility Obligations in Employment* (2015).

²¹² Ibid.

²¹³ The Employment Office (TE): Work place adaptation benefit, available at <http://www.te-palvelut.fi/te/fi/tyonantajalle/loyda_tyontekija/tukea_rekrytointiin/tyolosuhteiden_ajarjestelytuki/index.html>.

²¹⁴ Reply of Finland to the OHCHR Special Rapporteur's request for information on the rights of persons with disabilities 20th May 2016, available at <<https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/SocialProtection.aspx#replies>>. <https://www.ohchr.org/Documents/Issues/Disability/SocialProtection/States/MS_Finland_ENG.doc>.

²¹⁵ *Finland – a land of solutions. Strategic Programme of Prime Minister Juha Sipilä's Government* (2015), available at <<http://valtioneuvosto.fi/en/sipila/government-programme>>. See also A. Polvinen et al., 'Working while on a disability pension in Finland: Association of diagnosis and financial factors to employment' (2018) *Scandinavian Journal of Public Health* Vol 46, Issue 19, pp. 74 – 81, <https://doi.org/10.1177/140349481773846>.

²¹⁶ R. Hiltunen, *Country Report Non-discrimination- Finland*, p. 37, available at <<https://www.equalitylaw.eu/downloads/4425-finland-country-report-non-discrimination-2017-pdf-1-57-mb>>.

²¹⁷ Ibid. Some of the decisions are available at <<https://www.equalitylaw.eu/country/finland>>.

²¹⁸ European Commission, European Network of legal experts in gender equality and non-discrimination. Country Report on Non-Discrimination, Finland 2018, available at <<https://www.equalitylaw.eu/downloads/4746-finland-country-report-non-discrimination-2018-pdf-2-04-mb>>

²¹⁹ Rovaniemi Appeal Court, 23.10.2014, 483/23.10.2014, S13/536.

the children. The Court noted that the employer had not made any attempt to provide reasonable accommodation and considered this entailed a discrimination under the Non-Discrimination Act.²²⁰

²²⁰ European Commission, European Network of legal experts in gender equality and non-discrimination. Country Report on Non-Discrimination, Finland 2018, available at <https://www.equalitylaw.eu/downloads/4746-finland-country-report-non-discrimination-2018-pdf-2-04-mb>.

5. France

5.1. Factual Background

On the basis of EU Statistics on Income and Living Conditions 2016 (version of March 2018), persons with disabilities in France amount to 25.7% of the total population.²²¹ The employment rate of persons with disabilities is 56.3% (compared to 74.2% of persons without disabilities), and is above the EU average, which is 48.1%.²²² Since 2008, the employment rate of disabled people has grown almost continuously, except for the years 2014-2015, in which it decreased of about 2%.²²³ However, a gender gap remains.²²⁴

5.2. The Rights of Persons with Disabilities in France: Introductory Remarks

The Relevant Legal Framework in a Nutshell

The French **Constitution** includes equality as one of the principles upon which the French Republic is founded, in particular in the preamble and in Article 1.²²⁵ These constitutional provisions, however, do not explicitly mention disability as a ground upon which discrimination is prohibited.

The first act on the rights of persons with disabilities was Law of 23 November 1957.²²⁶ This law included a definition of ‘disabled worker’ as ‘any person whose prospects of obtaining or keeping a job are reduced as a result of insufficient or reduced mental or physical capacities’.²²⁷ A more comprehensive piece of legislation concerning rights of persons with disabilities was adopted in 1975: the Disability Orientation Act.²²⁸ This act, which adopted a welfare approach,²²⁹ set the basis to ensure guarantee accessibility for persons with disabilities.²³⁰ Currently, for the purposes of this report, the two most relevant French pieces of legislation are the Law of 10 July 1987 and Law of 11 February 2005.

²²¹ ANED European Semester 2018/2019 country fiche on disability, France, report prepared by C. Nicolas and S. Ebersold, p. 8, available at <<https://www.disability-europe.net/country/france>>

²²² ANED European Semester 2018/2019 country fiche on disability, France, report, *supra*, p. 25-31.

²²³ *Ibid.*; see also *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 262.

²²⁴ The employment rate of women with disabilities (54.2%) is slightly lower than the one of men with disabilities (58.8%). See ANED European Semester 2018/2019 country fiche on disability, France, report, *supra*, p. 8.

²²⁵ Constitution of October 4, 1958, preamble, Articles 1, 2, 72 (3), available at <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf>

²²⁶ *Loi n° 57-1223 du 23 novembre 1957 sur le reclassement professionnel des travailleurs handicapés*, available only in French at <https://www.unea.fr/sites/default/files/loi_571223_du_23_novembre_1957_sur_le_reclassement_professionnel_des_travailleurs_handicapes_0.pdf>.

²²⁷ P. Thornton, ‘Employment Quotas, Levies and National Rehabilitation Funds for Persons With Disabilities: Pointers for Policy and Practice’ (1998) Cornell University, Gladnet Collection, p. 12, available at <https://ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_106625.pdf>

²²⁸ *Loi n° 75-534 du 30 juin 1975 d’orientation en faveur des personnes handicapées*, version consolidée au 13 juin 2019 available only in French at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000333976>>

²²⁹ P. Thornton, ‘Employment Quotas, Levies and National Rehabilitation Funds for Persons with Disabilities: Pointers for Policy and Practice’ (1998), *supra*, p. 13.

²³⁰ M. Calvez, ‘The 2005 Disability Policy in France. An opportunity for the development of disabilities studies’ (2010) Third European meeting of EHESP School of Public Health ‘Limitations disability and dependency: how to measure how to train? European developments in public health. Disabilities health, society’ Round table 2: ‘Research and training: the future of research in disability’, November 2010, Amsterdam, Netherlands, available at <<https://halshs.archives-ouvertes.fr/halshs-00535890/document>>.

Law of 10 July 1987²³¹ includes various provisions on vocational integration and employment of persons with disabilities.²³² It also provides for employment quota for disabled persons, and establishes that 6% of the total personnel (when the staff includes a minimum of 20 employees)²³³, both in public and private sector, must be persons with disabilities. In order to fulfil the quota, employers can hire people with disabilities (direct hire), or subcontract workers from the sheltered workplaces (indirect hire), or paying a contribution fee to AGEFIPH (*Association de gestion du fonds pour l'insertion professionnelle des personnes handicapées* - Fund for professional inclusion of people with disabilities).²³⁴

This law initially established that the beneficiaries of the quota were those disabled workers registered by COTOREP²³⁵ (*Commission Technique d'Orientation et de Reclassement Professionnel* - a special administrative structure), which is now the *Commission des droits et de l'autonomie des personnes handicapées* (CDAPH). Currently the beneficiaries of the quota (and of measures of occupational integration) are indicated in Article L5212-13 of Labour Code (*Code du Travail*) and include those registered with the CDAPH, and other categories of persons recognised having a disability.²³⁶ Article 5213-1 of the Labour Code provides a definition of 'disabled worker' as:

'any person whose abilities to obtain or retain a job is actually diminished as a result of the alteration of one or several physical, sensory, mental or psychological functions.'²³⁷

The recent Decree No. 2018-850 of October 5, 2018²³⁸ streamlines and improves the procedure to be recognised as workers with disabilities. *Inter alia*, it provides for the automatic issuing of a certificate related to the disability for victims of work accidents or occupational diseases, invalidity pensioners, as well as for holders of an allowance or disability pension. The **Law No. 2018-771 of September 5, 2018**²³⁹ 'for the freedom to choose one's professional future' reforms the obligation of employment of disabled workers/quota system and **will enter into force from 1 January 2020**. In particular, while the employment quota will still amount to 6% of the company's workforce, the calculation method will change from January 1, 2020.²⁴⁰

The **Law No. 2005-102 of 11 February 2005 on Equal Opportunities and the Integration of Disabled Persons**²⁴¹ concerns equal rights, equal opportunities, participation and citizenship of people with disabilities, and applies to all fields including employment. It has the main aim to promote the right of free choice of life of persons with disabilities and defines the term 'disability' by connecting (albeit quite

²³¹ *Loi no 87-517 du 10 juillet 1987 en faveur de l'emploi des travailleurs handicapés* [SL 1987 - Fr. 2], available only in French at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512481>>.

²³² *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 9. See also P. Thornton, 'Employment Quotas, Levies and National Rehabilitation Funds for Persons With Disabilities: Pointers for Policy and Practice' (1998), supra, p. 12, 14.

²³³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 82.

²³⁴ See at <<https://private.disabilityin.org/global/france/>>.

²³⁵ <<https://informations.handicap.fr/a-description-cotorep-2293.php>>.

²³⁶ <<https://travail-emploi.gouv.fr/emploi/emploi-et-handicap/oeth>>.

²³⁷ Article 5213-1 of the *Code du Travail*: 'Est considérée comme travailleur handicapé toute personne dont les possibilités d'obtenir ou de conserver un emploi sont effectivement réduites par suite de l'altération d'une ou plusieurs fonctions physique, sensorielle, mentale ou psychique'.

²³⁸ See at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037469492&categorieLien=id#JORFARTI000037469499>>.

²³⁹ <<https://travail-emploi.gouv.fr/emploi/emploi-et-handicap/Article/obligation-d-emploi-des-travailleurs-handicapes-ce-qui-change-en-2020>>.

²⁴⁰ <https://travail-emploi.gouv.fr/IMG/pdf/obligation_emploi_th.pdf>.

²⁴¹ *Loi n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, version consolidée au 13 Juin 2019*, available only in French at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000809647 %3B>>.

loosely) the impairment to environmental barriers.²⁴² This definition applies for the purpose of implementing all provisions provided by French legislation, including anti-discrimination legislation. According to Sophie Latraverse

‘as much as it situates the definition of disability ‘in relation to participation to life in society experienced by an individual in the context of his or her environment’, legislation is drafted in such a way that people who could satisfy the requirement of Article L114 of the CSW but do not wish to be registered as disabled may have difficulty in enforcing their right to reasonable accommodation’.²⁴³

This law introduced different types of measures aimed to protect and promote the rights of persons with disabilities.²⁴⁴ With regard to employment, this law affirms the right to work of all persons with disabilities confirming employment quota provided for in Law of 10 July 1987 as a core instrument to foster inclusion of workers with disability.²⁴⁵ It also provides for fines/financial penalties for those employers that have not undertaken ‘any positive action for the employment of disabled workers’ during the previous four years.²⁴⁶

In France, access to the civil service is conditional upon passing a competitive entry examination. In that regard, the above-mentioned **Law No. 2005-102 of 11 February 2005 on Equal Opportunities and the Integration of Disabled Persons** establishes an obligation to adapt the examination processes to the needs of disabled persons to guarantee them equal access to those competitive procedures.²⁴⁷

With regard to non-discrimination legislation, France transposed the Employment Equality Directive through **Law of 27 May 2008**,²⁴⁸ which bans discrimination *inter alia* on the ground of disability in the labour market and obliges the employer to provide reasonable accommodations where necessary.²⁴⁹

The aforementioned acts are complemented by the **Labour Code**, which prohibits discriminatory practices against persons with disabilities in employment contexts,²⁵⁰ and the elements to be taken into account to determine the salary that persons with disabilities are entitled to receive.²⁵¹ However, Article 1133-3 of the Labour Code stipulates that a differential treatment based on the decision that a person is not physically able to carry out a job by reason of health or disability, when such a decision is based on the opinion of an occupational health doctor, does not constitute discrimination.²⁵² Moreover, Articles 225-1

²⁴² Article L 114: ‘Constitue un handicap, au sens de la présente loi, toute limitation d’activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison d’une altération substantielle, durable ou définitive d’une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychiques, d’un poly-handicap ou d’un trouble de santé invalidant’.

²⁴³S. Latraverse, Country Report Non-Discrimination, France (2018), European network of legal experts in gender equality and non-discrimination, <https://www.equalitylaw.eu/downloads/4747-france-country-report-non-discrimination-2018-pdf-2-96-mb>

²⁴⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 9, 30, 85.

²⁴⁵ S. H. Lo, ‘The ‘employability’ of disabled people in France: A labile and speculative notion to be tested against the empirical data from the 2008 ‘handicap-Santé’ study’ (2013) 7 (4) *Alter* 227 – 243, p. 229.

²⁴⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 264.

²⁴⁷ *Ibid.* p. 66.

²⁴⁸ LOI n° 2008-496 du 27 mai 2008 portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations, available only in French at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783>

²⁴⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 33, 34.

²⁵⁰ Labour Code, Article L.5213-6; *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 38.

²⁵¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 276.

²⁵² Article 1133-3 reads as follows: ‘Les différences de traitement fondées sur l’inaptitude constatée par le médecin du travail en raison de l’état de santé ou du handicap ne constituent pas une discrimination lorsqu’elles sont objectives, nécessaires et appropriées’.

and 225-2 of the Criminal Code provide for sanctions in case of discrimination on the ground of (*inter alia*) disability.²⁵³

Law No. 2014-288 of 5 March 2014²⁵⁴ on vocational training, employment and social democracy²⁵⁵ introduced a regional program for access to training for people with disabilities.²⁵⁶

New provisions (including provisions related to accessibility of building for persons with disabilities) have been introduced by **Law of 27 January 2017**²⁵⁷ on equality and citizenship.

The CRPD in the French Legal Framework

The French Republic signed the CRPD on March 30, 2007 and ratified it together with its Optional Protocol on February 18, 2010.²⁵⁸ The CRPD and its Optional Protocol entered into force in France on March 20, 2010.²⁵⁹

The competent State bodies for ensuring that domestic law is compliant to the CRPD are national courts, in particular the *Conseil d'État* (supreme administrative court) and the Court of Cassation.²⁶⁰

There are several organs entrusted with the task of monitoring the implementation of the CRPD,²⁶¹ mainly the Defender of Rights²⁶², which cooperates with other entities, such as the National Consultative Commission on Human Rights (CNCDH)²⁶³, the French Council for Disabled People on European and International Issues (CFHE),²⁶⁴ the National Advisory Council for Persons with Disabilities (CNCPH)²⁶⁵ and, in some cases, the General Secretariat of the Interministerial Committee on Disability (CIH).²⁶⁶

²⁵³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 72, 73.

²⁵⁴ Loi n° 2014-288 du 5 mars 2014 relative à la formation professionnelle, à l'emploi et à la démocratie sociale, available only in French at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028683576&categorieLien=id>>

²⁵⁵ Loi n° 2014-288 du 5 mars 2014 relative à la formation professionnelle, à l'emploi et à la démocratie sociale, Article 21, available only in French at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028683576&categorieLien=id>>

²⁵⁶ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 268.

²⁵⁷ LOI n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté, available in French at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&categorieLien=id>>

²⁵⁸ Common Core Document, France, attached to the State's Party Report, p. 32; *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 2, 3; <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtddg_no=IV-15&chapter=4&clang=en>

²⁵⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 4.

²⁶⁰ *Ibid.* at para. 6, 7.

²⁶¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 13-21.

²⁶² The Defender of Rights is a Constitutional independent authority competent in 4 different areas: the rights of the users of public services (as the national Ombud), the defence of children's rights, the non-discrimination and promotion of equality (as the national equality body) and the issue of ethics in security services. It has, moreover, a protection responsibility and it exercises a promotional activity in order to address the improvement of access to rights and promote equality. More information on the Defender of Rights available at <<http://equineteurope.org/author/france-dr/>>

²⁶³ The French National Consultative Commission on Human Rights (*Commission Nationale Consultative des Droits de l'Homme - CNCDH*) is the French national institution for human rights, established in 1947 in Paris. Among other functions, it monitors the implementation in France of all recommendations from the international and European committees. More information on the National Consultative Commission on Human Rights available at <<http://ennhri.org/The-French-National-Consultative-Commission-on-Human-Rights>>

²⁶⁴ The French Council for Disabled People on European and International Issues is a member of the European Disability Forum (EDF). It has the aim to provide a link between France and Europe for disability policies. Its official website is available at <<http://www.cfhe.org/>>.

²⁶⁵ The National Advisory Council for Persons with Disabilities is an advisory body created in 1975 to ensure the institutional consultation of persons with disabilities in the development and implementation of policies that affect them. More information available in French at <<https://www.gouvernement.fr/conseil-national-consultatif-des-personnes-handicapees-cncph>>.

²⁶⁶ The General Secretariat of the Interministerial Committee on Disability, active since 2013, brings together all the ministers concerned by the disability policy. It is in charge of defining, coordinating and evaluating the policies conducted by the State

5.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

French law requires that services open to the public, buildings and infrastructures are accessible to people with disabilities. To that end, provisions related to accessibility are included in various pieces of legislation, introduced at various junctures, mostly through **Law No. 2005-102 of 11 February 2005 on Equal Opportunities and the Integration of Disabled Persons**²⁶⁷

According to Latraverse, inaccessible workplaces can trigger a 'legal action on the ground of discrimination in access to employment, which could be based on indirect discrimination pursuant to Article L1132-1 LC and Article 2 of Law No. 2008-496 of 27 May 2008'.²⁶⁸

Reasonable Accommodation

French law provides for a duty to reasonably accommodate persons with disabilities in employment contexts.²⁶⁹ In particular, Article L.5213-6 of the Labour Code obliges employers to take 'appropriate measures' to enable workers with disabilities to gain access to a job or to retain a job corresponding to their qualification, to undertake it or to progress in their career. It also requires employers to provide suitable training for workers with disabilities. Accommodation measures should not imply disproportionate costs for the employer.²⁷⁰ Financial supports are available to employers in order to provide accommodations.²⁷¹

5.4. Overview of French Policies on Inclusion of Persons with Disabilities in the Workplace

In France, there is an employment quota system.²⁷² The obligation of employment of persons with disabilities supported by the Fund for the Inclusion of Persons with Disabilities in the Public Service (FIPHFP), created by **Law No. 2005-102 of 11 February 2005 on Equal Opportunities and the Integration of Disabled Persons**.²⁷³

The French Council for Disabled People on European and International Issue (CFHE), the National Advisory Council for Persons with Disabilities (CNCPH) and the General Secretariat of the Interministerial Committee on Disability (CIH), already mentioned above, play a central role in the promotion and

towards persons with disabilities. More information available in French at <https://www.gouvernement.fr/comite-interministeriel-du-handicap-cih>.

²⁶⁷ Loi n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, version consolidée au 13 juin 2019, available only in French at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000809647 %3B>

²⁶⁸ S. Latraverse, Country Report Non-Discrimination, France (2018), European network of legal experts in gender equality and non-discrimination p. 53, available at <https://www.equalitylaw.eu/downloads/4747-france-country-report-non-discrimination-2018-pdf-2-96-mb>

²⁶⁹S. Latraverse, Country Report Non-Discrimination, France (2018), European network of legal experts in gender equality and non-discrimination p. 53, available at <https://www.equalitylaw.eu/downloads/4747-france-country-report-non-discrimination-2018-pdf-2-96-mb>

²⁷⁰ Labour Code, *supra*, Article L5213-6.

²⁷¹ S. Latraverse, Country Report Non-Discrimination, France (2018), European network of legal experts in gender equality and non-discrimination p. 53, available at <https://www.equalitylaw.eu/downloads/4747-france-country-report-non-discrimination-2018-pdf-2-96-mb>. The European Blind Union reports that a bonus of 1600 Euros is granted to employers who directly or indirectly hire a disabled person for over 12 consecutive months, and that up to 80% of the measures taken to hire a disabled worker, including equipment and specific training, can be compensated through public funding. See at <http://www.euroblind.org/convention/article-27/france#1>.

²⁷² See *supra* note 158.

²⁷³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 264.

implementation of policies towards the inclusion of persons with disabilities in the employment context.²⁷⁴ The CIH, created in 2009, is in charge of defining, coordinating and evaluating the public policies for the inclusion of persons with disabilities. The creation of this Committee signalled a shift in the development of policies on December 2, 2016 when it published²⁷⁵ the decisions that commit the State in strengthening vocational rehabilitation policy, in improving disability compensation, in developing including companies and in reinforcing policies on professional re-adaptation.²⁷⁶

Moreover, the National Reform Programme 2018²⁷⁷ included measures aimed to reform employment policy in relation to persons with disabilities, to harmonise and improve the services aimed at sustaining insertion and job retention, to secure job retention and prevent professional disinsertion.²⁷⁸ As mentioned above, the **Law No. 2018-771 of September 5, 2018**²⁷⁹ ‘for the freedom to choose one’s professional future’ reforms the obligation of employment of disabled workers/quota system and **will enter into force from 1 January 2020**. This programme has also the aim to reform the ‘adapted companies’ (AEs),²⁸⁰ namely full-fledged enterprises in the ordinary workplace that employ at least 80% of workers with disabilities; these companies receive a flat-rate assistance and a specific subsidy for each worker with disabilities.²⁸¹

5.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Among relevant case law on reasonable accommodation, the *Volot-Pfiser* case²⁸² deserves to be mentioned. In its decision, the *Conseil d’Etat* stated that measures to reasonably accommodate a worker should not create a disadvantage as regard to remuneration or prevent proper professional progression.²⁸³

On a more general note, it is worth mentioning that the UN Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, in her report published in 2017, highlighted that there is not enough coordination between ‘the relevant ministries tasked to mainstream and implement disability provisions’, especially with regard to accessibility. She also noted that while the minimum employment quota for workers with disabilities is complied with in the public sector, it is not met in the private sector. She concluded that ‘more efforts are required to enable the effective inclusion of persons with disabilities in the workplace’, including by providing the necessary reasonable accommodations.²⁸⁴

²⁷⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 13, 18 – 21.

²⁷⁵ http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2016/12/cih_2016_-_releve_de_decisions_et_mesures.pdf

²⁷⁶ ANED European Semester 2018/2019 country fiche on disability, France, report, *supra*, p. 5, 6.

²⁷⁷ National Reform Programme 2018 – France available only in French at <https://ec.europa.eu/info/sites/info/files/2018-european-semester-national-reform-programme-france-fr.pdf>

²⁷⁸ ANED European Semester 2018/2019 country fiche on disability, France, report, *supra*, p. 9.

²⁷⁹ <https://travail-emploi.gouv.fr/emploi/emploi-et-handicap/Article/obligation-d-emploi-des-travailleurs-handicapes-ce-qui-change-en-2020>

²⁸⁰ *Ibid.*

²⁸¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 276.

²⁸² Conseil d’Etat, No. 347703, 11 July 2012, available only in French at <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000026198987>

²⁸³ S. Latraverse, Country Report Non-Discrimination, France (2018), European network of legal experts in gender equality and non-discrimination p. 53, available at <https://www.equalitylaw.eu/downloads/4747-france-country-report-non-discrimination-2018-pdf-2-96-mb> p. 54.

²⁸⁴ End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to France (Paris, 13 October 2017), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22245&LangID=E>

6. Italy

6.1. Factual Background

In 2016, according to EU Statistics on Income and Living Conditions data, in Italy the employment rate of persons with disabilities was 48.9%, a slightly higher percentage than the EU average (48.1%).²⁸⁵ The national employment rate of women with disabilities is 42.1% (with a difference of 4.8% from the one of women without disabilities), while the employment rate of men with disabilities is 57.1% (compared to the one of men without disabilities, which is 74.4%).²⁸⁶ National employment data (related to the period 2014-2015) show an increase in the number of workers with disabilities.²⁸⁷

6.2. The Rights of Persons with Disabilities in Italy: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Italy is politically and administratively divided into 20 regions.²⁸⁸ While competences over disability issues are shared between the State and the Regions, this report only focuses on national law and does not discuss regional legislation.

The **Constitution**²⁸⁹ of the Italian Republic enshrines the principle of equality in Article 3. Alongside formal equality, Article 3 para. 2 requires the State to remove those obstacles that prevent the realisation of equality and to guarantee ‘the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country’.²⁹⁰ Article 38, which explicitly mentions disability in relation to employment rights, establishes that:

‘(1) Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. (2) Workers have the right to be assured adequate means for their needs and necessities in the case of [...] disability, [...]. (3) Disabled and handicapped persons are entitled to receive education and vocational training.’²⁹¹

Those constitutional provisions are complemented by **Law No. 104/1992** (‘Framework law for care, social integration and rights of persons with disabilities’),²⁹² which is the most important piece of legislation related to the rights of persons with disabilities.²⁹³ This Law aims to guarantee the dignity and autonomy of disabled people and combat social exclusion (Article 1). It has remained largely unchanged since its adoption.²⁹⁴ The key thrust of this law is to remove obstacles, improve access and ensure that disabled people to enjoy mainstream services and facilities. Law No. 104/1992 includes provisions on physical accessibility to buildings, structures and services,²⁹⁵ as well as on accessibility of the workplace.²⁹⁶ A particular emphasis is placed on the education of children with disabilities within mainstream schools and universities. The scholastic integration aims to develop the potential of each person with disabilities in

²⁸⁵ ANED, European Semester 2018/2019 country fiche on disability - Italy, Report prepared by G. Griffo, A. Straniero, C. Tarantino, p. 30, available at <<https://www.disability-europe.net/country/italy>>.

²⁸⁶ ANED, European Semester 2018/2019 country fiche on disability - Italy, Report prepared by G. Griffo, A. Straniero, C. Tarantino, p. 30, available at <<https://www.disability-europe.net/country/italy>>.

²⁸⁷ *Ibid.* p. 32.

²⁸⁸ Common Core Document, Italy, attached to the State’s Party Report, *supra*, at para. 28.

²⁸⁹ Constitution of the Italian Republic, available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>

²⁹⁰ *Ibid.* Article 3.

²⁹¹ Constitution of the Italian Republic, *supra*, Article 38.

²⁹² Law 5 February 1992, No. 104, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/1992/02/17/092G0108/sg>>

²⁹³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 7.

²⁹⁴ D. Ferri, ‘Italy’ In: L. Waddington and A. Lawson (eds). *The UN Convention on the Rights of Persons with Disabilities in Practice A Comparative Analysis of the Role of Courts*. Oxford: Oxford University Press, 2018.

²⁹⁵ Law 5 February 1992, No. 104, Articles 23 – 28.

²⁹⁶ *Ibid.* Articles 18 – 22.

learning, communication, relationships and socialisation (Articles 12 and 13). According to Articles 17 and 18, the Regions will be in charge of ensuring vocational training and integration into the labour market for persons with disabilities. This Framework Law also contains specific measures to promote the 'integration' into the job market.

Several provisions concerning disability are included in other pieces of legislation. Among them, the most relevant for the purpose of this analysis is **Law No. 68/1999**²⁹⁷ ('Norms for the right to work of the disabled'). Law No. 68/1999 aims to foster targeted job placement, to establish specific services to support job placements and to incentivize the hiring of persons with disabilities.²⁹⁸ It provides for a quota system. In particular, both public and private employers (employing at least 15 workers) are obliged to hire a percentage of disabled workers (e.g. employers are obliged to hire: 7% of persons with disabilities when their company's workforce amount to 50 employees or more; 2 employees with disabilities if the total number of the company's employees is between 36 and 50; 1 employee with disabilities if the total number of employees is between 15 and 35).²⁹⁹ In conjunction with the quota system, Italian law provides for **financial support for employers to carry out workplace adaptation, tax reductions and flexible work arrangements**.³⁰⁰ Article 10 establishes criteria that the employer must respect when employing persons with disabilities.³⁰¹ Article 15 provides for sanctions in case of violation of the law.³⁰² Alongside Law 68/1999, the **Decree of the President of the Council of Ministers of January 13, 2000** complements Law 68/1999 and stipulates the requirements related to job placement of persons with disabilities, pursuant to Article 1 of Law No. 68/1999.³⁰³ A recent reform of employment law, namely **Law No. 92/2012**³⁰⁴ 'Regulations concerning employment in a growth perspective', includes actions aimed at implementing employment rights of persons with disabilities³⁰⁵ by increasing job opportunities and facilitating their access in the labour market.³⁰⁶ **Legislative Decree No. 151/2015** updated specific aspects of employment legislation to increase the efficiency of the system, providing for: guidelines concerning targeted placement; the establishment of the company observatory and of the 'disability manager'; and the creation of the targeted placement database.³⁰⁷

The Employment Equality Directive was implemented in Italy by **Legislative Decree No. 216/2003**.³⁰⁸ This Decree prohibits discrimination in employment on various grounds, including disability. Another piece of legislation (Law No. 67/2006) was passed in 2006³⁰⁹ to extend the prohibition of direct and indirect discrimination on the ground of disability beyond the field of employment.

²⁹⁷ Law 12 March 1999, No. 68, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/1999/03/23/099G0123/sg>>

²⁹⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 5, 7, 134.

²⁹⁹ Law of 12 March 1999, No. 68, Article 3 (1), *supra*, interpretation of the norm by the author, not literal or even official translation.

³⁰⁰ M. Sargeant, E. Radevich-Katsaroumpa, A. Innessi 'Disability quotas: past or future policy?' (2018) 39 (3) *Economic and Industrial Democracy* 404 – 421, p. 415.

³⁰¹ *Ibid.* Article 10.

³⁰² *Ibid.* Article 15.

³⁰³ Decree of the President of the Council of Ministers of January 13, 2000, available only in Italian at <https://www.lavoro.gov.it/documenti-e-norme/normative/Documents/2000/20000113_DPCM.pdf>

³⁰⁴ Law 28 June 2012, No. 92, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/2012/07/03/012G0115/sg>>

³⁰⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 138.

³⁰⁶ M. Sargeant, E. Radevich-Katsaroumpa, A. Innessi 'Disability quotas: past or future policy?', *supra*, p. 410.

³⁰⁷ F. Deriu, 'La promozione dei diritti e l'integrazione delle persone con disabilità in Italia' (2018) INAPP Public Policy Innovation, visita di studio della delegazione tunisina, p. 10, available at <http://oa.inapp.org/xmlui/bitstream/handle/123456789/222/Deriu_Diritti_integrazione_disabili_Visita_Tunisina_2018.pdf?sequence=1&isAllowed=y>

³⁰⁸ Legislative Decree 9 July 2003, No. 216, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/2003/08/13/003G0240/sg>>

³⁰⁹ Law 1 March 2006, No. 67 (Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni) in GU no. 54/2006 at <<https://www.gazzettaufficiale.it/eli/id/2006/03/06/006G0090/sg>>

Since neither the Decree transposing the Employment Equality Directive nor Law No. 67/2006 mentioned reasonable accommodation for persons with disabilities, in 2013 the CJEU held that Italy had failed to fulfil its duty to implement Article 5 of the Employment Equality Directive.³¹⁰ In order to comply with EU law and to implement the CJEU decision, a new paragraph was added to Article 3 of Legislative Decree No. 216/2003 by **Law No. 99/2013**.³¹¹ Article 3 para. 3-bis provides that, in order to guarantee equal treatment of persons with disabilities, public and private employers should adopt reasonable accommodations in workplaces.

The **Civil Service Reform Law** (Legislative Decree No. 40/2017³¹² as amended by Legislative Decree No. 43/2018³¹³) created the National Board for the integration of persons with disabilities in the workplace (*Consulta nazionale per l'integrazione in ambiente di lavoro delle persone con disabilità*), which is entrusted with the task of verifying the correct application of the rules on labour integration of people with disabilities, and of drawing up plans and guidelines aimed at increasing in the number of workers with disabilities.³¹⁴

The CRPD in the Italian Legal Framework

Italy signed the CRPD on March 30, 2007 and ratified it through Law No. 18/2009.³¹⁵ Article 117 para. 1 of the Constitution confers on international provisions a sub-constitutional status. This means that national judges have to interpret, as far as possible, the domestic provision in a manner consistent with the international provision.

Law No. 18/2009 also established the National Observatory of the Status of Persons with Disabilities, which is the Italian monitoring body,³¹⁶ with the task to 'promote the full integration of people with disabilities, implementing the principles enshrined in the Convention'.³¹⁷ The Interministerial Decree No. 167/2010 defined the Observatory an 'advisory body' for disability policies attached to the Ministry of Labour and Social Politics.³¹⁸

6.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

Accessibility for persons with disabilities and universal design are guaranteed by different pieces of legislation.³¹⁹ Italian law requires buildings and infrastructures open to the public (including schools, hospitals...) to be designed and built in a disability-accessible way. This is intended for the benefit of clients and customers, but may favour workers with disabilities inside these institutions. Violation of the

³¹⁰ CJEU, C-312/11, *European Commission v. Italy*, 4 July 2013.

³¹¹ Law 9 August 2013, No. 99, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/2013/08/22/13G00142/sg>>

³¹² Legislative Decree 6 March 2017, No. 40, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/2017/04/03/17G00053/sg>>

³¹³ Legislative Decree 13 April 2018, No. 43, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/2018/05/04/18G00068/sg>>

³¹⁴ See at <<http://www.funzionepubblica.gov.it/lavoro-pubblico-e-organizzazione-pa/comitati-unic-di-garanzia-cug/costituita-la-consulta-nazionale>> (only in Italian).

³¹⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 213.

³¹⁶ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 213, 214.

³¹⁷ Law 18/2009, Article 3 (1), available only in Italian at <<https://www.gazzettaufficiale.it/gunewsletter/dettaglio.jsp?service=1&datagu=2009-03-14&task=dettaglio&numgu=61&redaz=009G0027&tmstp=1237200828355>>

³¹⁸ Interministerial Decree 167/2010, Article 1, available only in Italian at <<https://www.gazzettaufficiale.it/gunewsletter/dettaglio.jsp?service=1&datagu=2010-10-08&task=dettaglio&numgu=236&redaz=010G0186&tmstp=1287646184396>>

³¹⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 15.

mandatory requirements contained in these rules could amount to discrimination on the grounds of disability.³²⁰

Reasonable Accommodation

A duty on the employer to provide reasonable accommodation was introduced in the Italian legal framework in 2013. According to the new amendment, employers are required to adopt reasonable accommodations ‘as defined by the [CRPD]’. As regards public bodies, reasonable accommodation should not entail any financial burden. According to Favilli, this provision runs the risk of being ineffective ‘if it is not supported by specific guidelines addressed in particular at employers, in both the private and public sectors’.³²¹

Alongside this provision, Article 2 of Law No. 68/1999 defines ‘targeted job placement’ as a system of technical support measures that allow to evaluate workers with disabilities’ ability to include them in a suitable workplace, taking into account tailored supports to address the needs of the worker.³²²

6.4. Overview of Italian Policies on Inclusion of Persons with Disabilities in the Workplace

The National Observatory on the Status of Persons with Disabilities is entrusted with the task of drafting biannual action plans aimed at the promotion of integration of persons with disabilities.³²³ The second Biannual National Action Programme on disability 2017-2019,³²⁴ laid down by the Observatory, was published in the Official Gazette as a Decree of the President of the Republic 12 October 2017.³²⁵ It identifies the actions and policies to be adopted in order to implement the CRPD.³²⁶ In Chapter 7, the Programme identifies those measures that are necessary to promote the inclusion of persons with disabilities in the employment context, requiring, for example, the identification of specific interventions to enhance work integration.³²⁷ It aims to introduce public funds for activities, carried out by private employers, aimed at improving accessibility and at providing assistive technology. To this end, the programme highlights the need to: simplify procedures to request public subsidies for accessibility measures, make resources available to employers without bureaucratic burdens and ensure greater usability of public services in this respect.³²⁸ A plan to implement the 2017-2019 programme was created in February 2018, however, the election of the new Government led to an interruption in the Observatory’s activities. The current Government has not yet officially advanced the implementation of the 2017-2019 programme.³²⁹

³²⁰ C. Favilli, *Country Report Non-discrimination Italy (2018)*, available at <https://www.equalitylaw.eu/downloads/4687-italy-country-report-non-discrimination-2018-pdf-2-02-mb>

³²¹ *Ibid.* p. 88

³²² Law 12 March 1999, No. 68, Article 2, *supra*, interpretation of the author, not literal or even official translation.

³²³ <http://www.osservatoriodisabilita.gov.it/losservatorio/>

³²⁴ Biannual National Action Programme on disability 2017-2019, available at <https://www.cliclavoro.gov.it/Cittadini/Disabili/Documents/Programma-biennale.pdf>

³²⁵ Decree of the President of the Republic 12 October 2017, available only in Italian at <https://www.gazzettaufficiale.it/eli/id/2017/12/12/17A08310/SG>

³²⁶ ANED European Semester 2018/2019 country fiche on disability, Italy, report, *supra*, p. 4.

³²⁷ Biannual National Action Programme on disability 2017-2019, *supra*, p. 76 – 82.

³²⁸ *Ibid.*

³²⁹ ANED European Semester 2018/2019 country fiche on disability, Italy, report, *supra*, p. 7.

Italia Lavoro,³³⁰ the national agency for labour active policies has undertaken various activities to raise awareness about the International Classification of Functioning, Disability and Health (ICF) and the work integration for persons with disabilities.³³¹

A relevant role in the policy-promoting process in Italy is played by social cooperatives, legally recognized by Law No. 381/1991.³³² They are defined as entities that pursue the general interest of the community to promote the social integration of citizens by two types of activities: providing social, healthcare or educational services and engaging in employment integration activities for disadvantaged groups, such as persons with disabilities.³³³ Those cooperatives often provide for sheltered employment, which in Italy has been used to facilitate access for persons with intellectual and psychosocial disabilities to the labour market.³³⁴

Collective bargaining has also played a relevant role in supporting an inclusive workplace and in identifying physical and cultural barriers hampering the inclusion and development of workers with disabilities.³³⁵

In Italy employment services to persons with reduced working capacity are provided at regional and local levels.³³⁶ Some regions (e.g. Basilicata, Calabria, Molise, P.A. Bolzano, P.A. Trento, Umbria and Veneto) resort to Integrated Programmes on labour, employment services, education and active labour policies, which constitute a framework for the organization of services.³³⁷

Lastly, the **Partnership Agreement 2014-2020**³³⁸ with the European Commission sets the strategy for the use of European Structural and Investment Funds and includes a set of actions aimed at increasing the participation of vulnerable groups in the labour market.

6.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite a relatively progressive legislation, Italy is still far from effectively implementing the CRPD. The CRPD Committee expressed concern about the lack of consultation with persons with disabilities through DPOs.³³⁹ In relation to accessibility, the CRPD Committee highlighted the insufficient monitoring of accessibility standards and the lack of enforcement in cases of non-compliance.³⁴⁰ With regard to employment, the CRPD Committee emphasized the high rate of unemployment among people with disabilities.³⁴¹ In that connection, an empirical study recently showed that the quota system has not achieved the desired results.³⁴² This was confirmed by another recent empirical study, which suggests that

³³⁰ Italia Lavoro S.p.A. at <<https://www.anpalservizi.it/>>

³³¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 139.

³³² Law 8 November 1991, No. 381, available only in Italian at <<https://www.gazzettaufficiale.it/eli/id/1991/12/03/091G0410/sg>>

³³³ PathWays Project, 'Report on the comparison of the available strategies for professional integration and reintegration of persons with chronic diseases and mental health issues, based on five categories of social welfare models in Europe, Italy Country Report', p. 7, available at <https://www.path-ways.eu/wp-content/uploads/country_report_it.pdf>

³³⁴ *Ibid.* p. 8.

³³⁵ M. Aimo, D. Izzi 'Disability and Employee Well-being in Collective Agreements: Practices and Potential' (2018) 7(3) *E-Journal of International and Comparative Labour Studies* 96 – 108, available at <http://ejcls.adapt.it/index.php/ejcls_adapt/Article/view/612/828>

³³⁶ *Ibid.* p. 2.

³³⁷ ANED European Semester 2018/2019 country fiche on disability, Italy, report, *supra*, p. 11.

³³⁸ Partnership Agreement 2014-2020 with Italy, available at <https://ec.europa.eu/info/publications/partnership-agreement-italy-2014-20_en>

³³⁹ CRPD Committee, *Concluding Observations on the Initial Report of Italy*, at para. 7.

³⁴⁰ *Ibid.* at para. 21.

³⁴¹ *Ibid.* at para. 69.

³⁴² M. Sargeant, E. Radevich-Katsaroumpa, A. Innessi 'Disability Quotas: Past or Future Policy?', *supra*, p. 415.

Law No. 68/1999 has had a positive but very low impact on the participation of disabled people in the labour market.³⁴³

There are several judicial decisions concerning reasonable accommodation in employment. In general, courts have tried to interpret Italian legislation in compliance with the CRPD and have consistently held that the failure of the employer to provide accommodation amounts to discrimination.³⁴⁴

³⁴³ M. Agovino, A. Garofalo, K. Marchesano 'The effects of employment promotion measures on labour market participation of disabled people: the case of Italy' (2018) 52 (1) *Quality & Quantity* 135 – 155, available at <<https://link.springer.com/Article/10.1007/s11135-016-0455-6>>

³⁴⁴ D. Ferri, 'Italy', in L. Waddington and A. Lawson (eds). *The UN Convention on the Rights of Persons with Disabilities in Practice A Comparative Analysis of the Role of Courts*. Oxford: Oxford University Press, 2018.

7. Poland

7.1. Factual Background

According to the EU Statistics on Income and Living Conditions 2016 (version of March 2018), in Poland, persons with disabilities represent 22.8% of the total population. Women with disabilities amount to 24.6% of persons with disabilities in Poland, while men represent 20.7%.³⁴⁵ Data provided by the Polish National Labour Force Survey (BAEL), in 2017, highlight an increase in the participation of persons with disabilities in the workforce compared to the past.³⁴⁶ In particular, the employment rate of people with disabilities increased of almost 4% up to 26.3% since 2015.³⁴⁷ However, the difference between the employment rate of persons with disabilities and those without disabilities remains high.³⁴⁸ It is worth mentioning that the CRPD Committee, in 2018, expressed concern about the lack of data on disability and about the absence of a national databased related to persons with disabilities.³⁴⁹

7.2. The Rights of Persons with Disabilities in Poland: Introductory Remarks

The Relevant Legal Framework in a Nutshell

The **Constitution** of the Republic of Poland³⁵⁰ guarantees equality before the law and establishes the principle of non-discrimination in Article 32. That provision reads as follows:

‘(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by the public authorities. (2) No-one shall be discriminated against in political, social or economic life for any reason whatsoever.’

Article 32 applies to all fields of political, social and economic life. This provision entails that persons with disabilities have the same employment-related rights of those without disabilities. However, the Polish Constitution also specifies that rights related to employment, such as the choice of the occupation and of the workplace, are not absolute rights, and they can be limited by law.³⁵¹

The Polish Constitution mentions persons with disabilities in Articles 67 and 69. In particular, Article 67 para. 1 states that people who are unable to work due to illness or disability and people who have reached the age of retirement are guaranteed the right to social security. Article 69 establishes that: ‘Public authorities shall provide, in accordance with the statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication’.

In 1997, the **Charter of Rights of Persons with Disabilities**³⁵² was adopted by the *Sejm* (lower house of the Parliament) of Poland. This resolution (not binding) prohibits discrimination on the ground of disability and establishes the right of persons with disabilities to access goods and services on an equal basis with others as well as the right to live an independent life in an environment free of barriers. Notably for the purpose of this analysis, the Charter also ensures the right of people with disabilities to:

³⁴⁵ ANED European Semester 2018/2019 country fiche on disability, Poland, report prepared by A. Kròl, p. 29, available at <<https://www.disability-europe.net/country/poland>>.

³⁴⁶ ANED European Semester 2018/2019 country fiche on disability, Poland, report prepared by A. Kròl, p. 29, available at <<https://www.disability-europe.net/country/poland>>.

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.* p. 9.

³⁴⁹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Poland*, at para. 53.

³⁵⁰ Constitution of the Republic of Poland, 2nd April 1997, available at <<https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>> .

³⁵¹ *Ibid.* Article 65 (1).

³⁵² The Charter of Rights for Persons with Disabilities, Resolution of the Sejm of 1 August 1997, Monitor Polski, 1997, No 50, item. 475, available at <<https://www.rpo.gov.pl/en/content/charter-persons-disabilities>> .

work in the open labour market, in accordance with qualifications, education and opportunities and making use of counselling and mediation, and when the disability and state of health so require - the right to work in conditions adapted to needs of people with disabilities

Although the Charter is not binding, it states that the rights affirmed 'result from the Constitution, Universal Declaration of Human Rights, Convention on the Rights of the Child, Standard Rules for the Equalisation of Opportunities of Persons with Disabilities, instruments of international and internal law'. In that connection, the Charter requires 'the Government of the Republic of Poland and self-government authorities to take actions aimed at implementing these rights'.³⁵³

Alongside the Constitution, the **Labour Code** reiterates that disability is one of the ground on the basis of which discrimination in employment is prohibited.³⁵⁴ The Labour Code also establishes that employees, including persons with disabilities, are to be equally treated with regard to the commencement and termination of employment, the terms of employment, promotion and access to training.³⁵⁵ The **Equal Treatment Act of 2010** transposed into Polish Law the Employment Equality Directive, and bans discrimination on various grounds, including disability.³⁵⁶ The Equal Treatment Act also introduced, in compliance with Article 5 of the Directive, a duty to provide reasonable accommodation on the employer. As highlighted by Bojarski,³⁵⁷ Polish law requires the employer to adopt 'necessary reasonable accommodation' where needed in a particular case 'in line with the specific needs reported to the employer', unless these accommodations impose a disproportionate burden on the employer. In line with the Directive, the burden is not disproportionate when the employer can rely on public funds to cover the cost of the accommodation.

Under the **Act on the Retirement Pensions and Other Pensions from the Social Insurance Fund** and its implementing regulation, the official recognition of someone's incapacity to work gives rise to the right to social benefits (which replace or complement remuneration).³⁵⁸ The **Act on Vocational and Social Rehabilitation and Employment of Disabled People**,³⁵⁹ in conjunction with its implementing regulations, regulate rehabilitation and employment of people with disabilities.³⁶⁰ This Act provides for wage subsidies for employers in order to encourage them to hire persons with disabilities.³⁶¹ Furthermore, it includes measures aimed to support and protect persons with disabilities in the open labour market, such as

³⁵³ Open Society Mental Health Institute, 'Rights of People with Intellectual Disabilities. Access to Education and Employment. Poland' (2005), report under the responsibility of E. Wapiennik within the EUMAP – EU Monitoring and Advocacy Program, p. 26, available at https://www.opensocietyfoundations.org/uploads/3ac6b567-be56-4954-b75e-819274ec0ebb/poland_2005_0.pdf

³⁵⁴ Labour Code, z dnia 23 grudnia 1997 r. (Dz.U. tłum. gb 1998 Nr 21, poz. 94), Article 11 (3), available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/45181/91758/F1623906595/The-Labour-Code%20consolidated%201997.pdf>

³⁵⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 412.

³⁵⁶ Poland, Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010 (Equal Treatment Act). The prohibition of discrimination is also included in other acts.

³⁵⁷ L. Bojarski, *Country report Non-discrimination Poland*, p. 7 available at <https://www.equalitylaw.eu/downloads/4801-poland-country-report-non-discrimination-2018-pdf-2-79-mb>

³⁵⁸ I. Radlińska, M. Bażydło, B. Karakiewicz 'The rights of persons with disabilities in Poland' (2014) 4 *Journal of Public Health, Nursing and Medical Rescue* 25-30, p. 26, available at http://pzpr.eu/numery/2014_4/201445.pdf

³⁵⁹ Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Text No 776), available (unofficial website) at <https://www.global-regulation.com/translation/poland/2985879/the-act-of-27-august-1997-on-the-vocational-rehabilitation-and-social-and-employment-of-persons-with-disabilities.html>; available in Polish (original language) at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=48525

³⁶⁰ Open Society Mental Health Institute, 'Rights of People with Intellectual Disabilities. Access to Education and Employment. Poland' (2005), *supra*, p. 90.

³⁶¹ *Ibid.* Articles 26 et ss.; *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 430.

regulations on working time and additional holidays,³⁶² and provides for the creation of sheltered work enterprises and vocational activity establishments.³⁶³

While there is no definition of disability in the Equal Treatment Act, the **Act on Vocational and Social Rehabilitation and Employment of Disabled People** defines disability as ‘the permanent or periodic inability to fulfil social roles due to permanent or long-term violation of the body’s efficiency, in particular resulting in inability to work’.³⁶⁴ Article 21 of this Act establishes a quota system according to which public and private enterprises with 25 or more full-time employees must ensure that 6% of their workforce consists of persons with disabilities³⁶⁵ (with the exception of the educational sector in which the quota is 2%). Employers that fail to comply with the mandatory quota are subject to a fine.³⁶⁶

Another relevant piece of legislation on the promotion of the participation of persons with disabilities in the labour market is the **Act on Employment Promotion and Labour Market Institutions**.³⁶⁷ This piece of legislation focuses on vocational integration³⁶⁸ with the aim of defining ‘the tasks of the State regarding employment promotion, alleviation of the effects of unemployment and occupational activation’.³⁶⁹ It ‘stipulates that job placement, vocational counselling and information for the unemployed, job seekers and employers must comply with the principles of accessibility, equality, freedom to choose a profession and place of employment, data protection and confidentiality’.³⁷⁰ Similarly to the Act on Vocational and Social Rehabilitation and Employment of Disabled People, this law includes a series of provisions aimed to facilitate the access in the labour market of those.³⁷¹ The **Act on Social Employment** establishes a series of measures related to social integration,³⁷² in order to promote access to the labour market of persons with intellectual or psychosocial disabilities.³⁷³ Social cooperatives also play a central role in the inclusion of persons with disabilities in the labour market and are regulated by the **Act on Social Cooperatives**.³⁷⁴

Finally, for the purpose of this report, the **Act on Civil Service**,³⁷⁵ **Act on Local Self-Government Employees**³⁷⁶ and **Act on Employees of Public Offices** should be mentioned. The first two pieces of legislation do not impose any health requirement to be fulfilled, thus allowing access of persons with disabilities to these public jobs on an equal basis with others. By contrast, the Act on Employees of Public

³⁶² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 437.

³⁶³ *Ibid.* at para. 441.

³⁶⁴ Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Text No 776), *supra*, Article 2 (10).

³⁶⁵ Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Text No 776), *supra*, Article 21.

³⁶⁶ PathWays Project, ‘Report on the comparison of the available strategies for professional integration and reintegration of persons with chronic diseases and mental health issues, based on five categories of social welfare models in Europe, Poland Country Report’, *supra*, p. 8.

³⁶⁷ Act of 20 April 2004 on promotion of employment and on labour market institutions (Text No. 1001), available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=68870>.

³⁶⁸ Open Society Mental Health Institute, ‘Rights of People with Intellectual Disabilities. Access to Education and Employment. Poland’ (2005), *supra*, p. 89.

³⁶⁹ *Ibid.* Article 1.

³⁷⁰ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 426.

³⁷¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 428.

³⁷² *Ibid.* at para. 452.

³⁷³ Open Society Mental Health Institute, ‘Rights of People with Intellectual Disabilities. Access to Education and Employment. Poland’ (2005), *supra*, p. 89.

³⁷⁴ Law on Social Cooperatives (Dz. U. No. 94, entry 651), available only in Polish at <https://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=83260&p_country=POL&p_count=1471>. See *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 455.

³⁷⁵ Act of 21 November 2008 on the Civil Service (Text No. 1505), available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93477>

³⁷⁶ The Law Of 21 November 2008 On The Local Government Employees, available (unofficial translation) at <<https://www.global-regulation.com/translation/poland/2986015/the-law-of-21-november-2008-on-the-local-government-employees.html>>

Offices includes health criteria in order to access certain public offices jobs,³⁷⁷ but obliges public authorities to give priority to persons with disabilities in recruitment procedures.³⁷⁸

Several bylaws include provisions on employment of people with disabilities and rehabilitation.³⁷⁹ Notably, a regulation explicitly provides for the refund of additional costs resulting from employment of disabled employees, according to which an employer may obtain from the Ministry ‘a refund equivalent of 20 times an average wage per each adapted workstation of a disabled unemployed person or a disabled job seeker referred to work by a labour office, or a disabled employee whose disability occurred during the employment’.³⁸⁰

The CRPD in the Polish Legal Framework

The Republic of Poland signed the CRPD on March 30, 2007 and ratified it, with some reservations,³⁸¹ on September 25, 2012.³⁸² In 2012, the Ministry of Family, Labour and Social Policy published online the text of the CRPD in the Polish language, together with an accessible version for visually impaired persons.³⁸³ Additionally, an easy-to-read Polish-language version of the text of the CRPD was published.³⁸⁴

The CRPD Committee, in its Concluding Observations, expressed its concern about the lack of ‘technical capacity of focal points designated to implement the Convention’, as well as about the lack of ‘meaningful involvement of representative organizations of persons with disabilities in the monitoring of the implementation of the Convention’.³⁸⁵

7.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

In Poland, national law requires that buildings open to the public and infrastructures are accessible to people with disabilities.³⁸⁶ The **Act on Spatial Planning and Development**³⁸⁷ provides for the needs of persons with disabilities to be taken into account in planning and spatial development, and includes technical parameters to ensure accessibility.³⁸⁸ This provision is applicable to workplaces. However, there is not a general obligation ‘to reconstruct existing properties and in many instances public buildings are still not easily accessible for people with disabilities’.³⁸⁹ Other accessibility requirements are included in other pieces of legislation in relation to transport and ICT.

There is not a general provisions related to accessibility of workplaces. However, accessibility can be obtained by means of reasonable accommodation.

³⁷⁷ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 418.

³⁷⁸ *Ibid.* at para. 419.

³⁷⁹ *Ibid.* at para. 445.

³⁸⁰ *Ibid.* at para. 467.

³⁸¹ Reservations of Poland to the CRPD available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&clang=en#EndDec>

³⁸² <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&clang=en>

³⁸³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 44.

³⁸⁴ *Ibid.* at para. 45. The text is referred to as ‘children-friendly’. That text is available at <www.niepelnosprawni.gov.pl>.

³⁸⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Poland*, at para. 55.

³⁸⁶ L. Bojarski, *Country report Non-discrimination Poland*, p. 7 available at <https://www.equalitylaw.eu/downloads/4801-poland-country-report-non-discrimination-2018-pdf-2-79-mb>

³⁸⁷ Act of 27 March 2003 On Planning And Spatial, available (unofficial translation) at <<https://www.global-regulation.com/translation/poland/2986009/act-of-27-march-2003-on-planning-and-spatial.html>>

³⁸⁸ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 71.

³⁸⁹ *Ibid.* p. 59.

Reasonable Accommodation

As mentioned above, under the Employment Equality Act, employers are obliged to provide disabled employees with the necessary reasonable accommodations.³⁹⁰ Failure to make necessary reasonable accommodation constitutes a violation of the principle of equal treatment.³⁹¹ However, as highlighted by Bojarski, this failure results in discrimination only in the situation when there is a ‘traditional’ employment contract.³⁹²

Article 94(2) of the Labour Code requires the employer to organize the work in order to ensure ‘the effective use of working time, as well as achieving high efficiency and appropriate quality of work through using the employees’ abilities and qualifications’.³⁹³ The Regulation of the Ministry of Family, Labour and Social Policy on general occupational health and safety rules obliges employers to adapt the workplace to the needs of employees with disabilities.³⁹⁴ More specifically, it requires adapting a workstation and sanitary facilities to the needs of a person with disabilities, as well as the access to them.³⁹⁵

As highlighted above, financial support to employers that adapt the workplace to the needs of such employees is provided through public funding.³⁹⁶

The Ministry of Family, Labour and Social Policy, in order to provide employers with guidance on reasonable accommodation, has published the ‘Framework Guidelines on Facility and Premises Design, and Adaptation of Workstations to Special Needs of Disabled People’.³⁹⁷

7.4. Overview of Polish Policies on Inclusion of Persons with Disabilities in the Workplace

The body responsible for disability policy (including employment related policies) is the Government Plenipotentiary for Disabled People, which is part of the Ministry of Family, Labour and Social Policy.

As mentioned, the quota system and the provisions related to reasonable accommodation (as well as public funding available to employers to cover those additional costs related to employee with disabilities) are the main instruments to foster inclusion in the labour market. Poland has not yet introduced a comprehensive strategy to implement the CRPD.³⁹⁸ The Office of Government Plenipotentiary for Disabled People is finalising a Strategy for Disabled Persons 2018-2030,³⁹⁹ but at the time of writing this report such a Strategy is not yet published. It is envisaged, however, that the Strategy would cover all areas of life (including employment), in compliance with the CRPD.

³⁹⁰ Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Text No 776), *supra*, Article 23A (*State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 464).

³⁹¹ <<https://www.disability-europe.net/dotcom/text/poland/b1-anti-discrimination-legislation>>

³⁹² L. Bojarski, *Country Report Non-Discrimination Poland* (2018), p. 55, available at <<https://www.equalitylaw.eu/downloads/4801-poland-country-report-non-discrimination-2018-pdf-2-79-mb>>

³⁹³ Labour Code, *supra*, Article 94 (2).

³⁹⁴ Ordinance on general provisions on health and safety at work, Sections 45.1, 48 (source given by European network of legal experts in gender equality and non-discrimination, *Country Report Non-Discrimination, Austria* (2018), *supra*).

³⁹⁵ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 463. See also L. Bojarski, *Country Report Non-Discrimination Poland* (2018), p. 55, available at <<https://www.equalitylaw.eu/downloads/4801-poland-country-report-non-discrimination-2018-pdf-2-79-mb>>.

³⁹⁶ *Ibid.* at para. 467.

³⁹⁷ *Ibid.* at para. 469.

³⁹⁸ ANED European Semester 2018/2019 country fiche on disability, Poland, *supra*, p. 7.

³⁹⁹ ANED European Semester 2018/2019 country fiche on disability, Poland, *supra*. See also <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23508&LangID=E>

The Accessibility Plus Programme 2018-2025, approved by the Council of Ministers on July 17, 2018,⁴⁰⁰ should be implemented through more than 44 concrete projects to develop accessibility standards,⁴⁰¹ and is intended to enhance *inter alia* accessibility of workplaces.⁴⁰²

Sheltered workshops are still quite widespread in Poland and they are entitled to receive a financial support from the State Fund for Rehabilitation of Disabled People.⁴⁰³

Awareness rising and social campaigns have also been conducted to promote inclusion in the labour place.⁴⁰⁴

7.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

The CRPD Committee expressed various concerns with regards to the implementation of the CRPD in Poland.⁴⁰⁵ The Committee noted that Polish legal framework do not specifically classify the denial of reasonable accommodation as a discriminatory act.⁴⁰⁶ It also highlighted the failure of implementation of regulations and norms on universal design and physical accessibility.⁴⁰⁷ With regards to the employment field, the CRPD Committee expressed concern about the ‘low rate of employment of persons with disabilities, and the barriers that women with disabilities face when they seek to enter the open labour market and, as a consequence, their smaller income than others, particularly in rural areas’.⁴⁰⁸

DPOs suggest that the system to obtain financial support for employers is very bureaucratic since and requires companies to have experienced accountants and qualified staff to handle the administrative procedures related to application for support and financing. This discourages small companies with scarce financial and human resources to engage with public authorities to obtain funding to enhance accessibility.⁴⁰⁹

Case law in relation to the right to work of persons with disabilities and in relation to reasonable accommodation is reported to be scant.⁴¹⁰

⁴⁰⁰ <<http://cecgr.com/2018/07/18/poland-accessibility-plus/>>

⁴⁰¹ *Ibid.*

⁴⁰² ANED European Semester 2018/2019 country fiche on disability, Poland, *supra*, p. 8.

⁴⁰³ *Ibid.* at para. 443.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Poland*.

⁴⁰⁶ *Ibid.* at para. 7 (a).

⁴⁰⁷ *Ibid.* at para. 15 (b) (c).

⁴⁰⁸ Committee on the Rights of Persons with Disabilities ‘Information of the Commissioner for Human Rights on measures taken by the Republic of Poland in 2015-2017 in order to implement the provisions of the Convention on the Rights of Persons with Disabilities’, (2018), *supra*, at para. 47.

⁴⁰⁹ PathWays Project, ‘Report on the comparison of the available strategies for professional integration and reintegration of persons with chronic diseases and mental health issues, based on five categories of social welfare models in Europe, Poland Country Report’, *supra*, p. 5.

⁴¹⁰ L. Bojarski, *Country Report Non-Discrimination Poland* (2018), p. 55, available at <<https://www.equalitylaw.eu/downloads/4801-poland-country-report-non-discrimination-2018-pdf-2-79-mb>>

8. Spain

8.1. Factual Background

According to data EU SILC 2016 (version of March 2018), persons with disabilities amount to 22.4% of the population.⁴¹¹ The same statistics show that the employment rate of persons with disabilities is 40.5%, while that of persons without disabilities is 66%. Among the total number of employed persons with disabilities, women are 40,1% while men are 40,9%.⁴¹² Thus far, the employment rates of persons with disabilities have not been stable: they have declined between 2008 and 2012 and slightly increased in the following period but not consistently.⁴¹³

8.2. The Rights of Persons with Disabilities in Spain: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Spain is a regional State divided into in Autonomous Communities and cities with the Statute of Autonomy.⁴¹⁴ For the purpose of this report, only national legislation will be analyzed.

The **Constitution** of Spain⁴¹⁵ establishes, in Article 9, para. 2, that it is the responsibility of the State 'to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life'. The principle of non-discrimination is enshrined in Article 14 of the Constitution. Disability is not explicitly mentioned as a ground of discrimination, but is encompassed within 'any other condition or personal or social circumstance'.⁴¹⁶ The right to work is protected under Article 35, para. 1. The main provision concerning persons with disabilities is Article 49, which stipulates that:

'The public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of the physically, sensorially and mentally [disabled] by giving them the specialized care they require, and affording them special protection for the enjoyment of the rights granted by this Part to all citizens.'

In December 2018, the Spanish Government proposed an amendment to this provision to align its wording and content to the CRPD.⁴¹⁷ It remains to be seen whether this text will be approved.

According to the Workers' Statute,⁴¹⁸ a discriminatory dismissal of a worker or a dismissal in violation of the worker's fundamental rights is void and the worker will be immediately reinstated and paid any unpaid wages.

The rights of persons with disabilities are protected and promoted by the **General Law on the Rights of Persons with Disabilities and their Social Inclusion No. 1/2013**, which applies to all social fields, including

⁴¹¹ ANED European Semester 2018/2019 country fiche on disability, Spain, report prepared by M. A. Verdugo and C. Jenaro, p. 30, available at <<https://www.disability-europe.net/country/spain>>

⁴¹² *Ibid.* p. 31.

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.* at para. 86.

⁴¹⁵ Constitution of Spain, October 31, 1978, ratified by referendum of the Spanish people on December 7, 1978 and sanctioned by his majesty the king before the *Cortes Generales* on December 27, 1978, available at <http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf>

⁴¹⁶ Judgment no. 269/1994 of October 199 of the Spanish Constitutional Court.

⁴¹⁷ See at <<https://www.equalitylaw.eu/downloads/4774-spain-proposed-draft-reform-of-article-49-of-the-constitution-on-the-rights-of-persons-with-disabilities-pdf-259-kb>>.

⁴¹⁸ *Real Decreto Legislativo 2/2015, de 23 de octubre, Estatuto de los Trabajadores* (RLD 2/2015, of 23 October), available only in Spanish at <<https://www.boe.es/buscar/pdf/2015/BOE-A-2015-11430-consolidado.pdf>>

employment.⁴¹⁹ This piece of legislation includes a definition of disability. This definition is partially inspired by the CRPD and provides that persons with disabilities are those who have physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.⁴²⁰ However, it also stipulates that persons with a disability are ‘those with a recognised degree of impairment equal to or greater than 33 %’.⁴²¹ This law bans discrimination on the grounds of disability and includes various provisions related to the right to work of persons with disabilities (Articles 35-47).⁴²² The duty on employers (both public and private) to provide reasonable accommodation for people with disabilities is included in this Law. The limit to the duty is that of ‘disproportionate burden’. Furthermore, Article 63 of this Law explicitly qualifies as a discrimination the failure to provide reasonable accommodation, but also the failure to ensure accessibility for people with disabilities.⁴²³ Article 67 and 68 of the General Law also allow for positive actions to be adopted to foster inclusion of persons with disability in society.

A series of positive actions have been introduced to support inclusion of people with disabilities in the labour market. The **Act No. 43/2006**⁴²⁴ on Improving Growth and Employment included measures to encourage hiring of persons with disabilities on permanent contracts. The **Law 3/2012 of July, 6 2012** providing for Urgent Measures to Reform the Labour Market has also established a ‘right to geographical mobility to protect the health of persons with disabilities’.⁴²⁵ The latter entails that workers with disabilities in need for rehabilitation treatment in another city ‘have a prior right to take another job in the same professional group if the company has another vacancy in a locality where such treatment is more accessible’.⁴²⁶ This law includes other positive measures in relation to people with disabilities, such as the possibility for them to retain their jobs in case of redundancy.⁴²⁷

The Royal Decree No. 870/2007 regulates supported employment for persons with disabilities, which entails individualized guidance by specialized job coaches to facilitate work integration of disabled workers in the open labour market.⁴²⁸

⁴¹⁹ RLD 1/2013, 29 Noviembre, *Ley General de derechos de las personas con discapacidad y de su inclusión social* (RLD 1/2013, 29 November, <https://www.boe.es/boe/dias/2013/12/03/pdfs/BOE-A-2013-12632.pdf>)

⁴²⁰ Article 4 of the General Law on the Rights of Persons with Disabilities and their Social Inclusion No. 1/2013.

⁴²¹ Article 4(2) of the General Law on the Rights of Persons with Disabilities and their Social Inclusion No. 1/2013.

⁴²² Explanation of the provisions at < https://www.garrigues.com/sites/default/files/docs/Labour-Updates-14-2013_1.pdf> p. 3 – 5.

⁴²³ Article 63 of the General Law on the Rights of Persons with Disabilities and their Social Inclusion No. 1/2013 reads as follows: ‘*Se entenderá que se vulnera el derecho a la igualdad de oportunidades de las personas con discapacidad, definidas en el artículo 4.1, cuando, por motivo de o por razón de discapacidad, se produzcan discriminaciones directas o indirectas, discriminación por asociación, acosos, incumplimientos de las exigencias de accesibilidad y de realizar ajustes razonables, así como el incumplimiento de las medidas de acción positiva legalmente establecidas*’.

⁴²⁴ Law 43/2006, Of 29 December, For The Improvement Of Growth And Employment, available (unofficial translation) at <<https://www.global-regulation.com/translation/spain/1445942/law-43-2006%252c-of-29-december%252c-for-the-improvement-of-growth-and-employment.html>>

⁴²⁵ L. Cachon, *Country Report Non-Discrimination Spain* (2018), available at <<https://www.equalitylaw.eu/downloads/4745-spain-country-report-non-discrimination-2018-pdf-2-28-mb>> p. 43.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Real Decreto 870/2007, de 2 de julio, por el que se regula el programa de empleo con apoyo como medida de fomento de empleo de personas con discapacidad en el mercado ordinario de trabajo at <https://www.boe.es/eli/es/rd/2007/07/02/870>. See also PathWays Project, ‘Report on the comparison of the available strategies for professional integration and reintegration of persons with chronic diseases and mental health issues, based on five categories of social welfare models in Europe, Spain Country Report’, https://www.path-ways.eu/wp-content/uploads/country_report_es.pdf, p. 7.

In Spain, there are employment quotas for persons with disabilities. In companies with more than 50 workers, 2% must consist of people with disabilities;⁴²⁹ in relation to public sector contracts the quota is set out by Act No. 9/2017.⁴³⁰

The CRPD in the Spanish Legal Framework

Spain signed the CRPD on March 30, 2007 and ratified it without reservations on December 3, 2007.⁴³¹ The CRPD came into force in the Spanish legal framework on May 3, 2008.⁴³² The National Disability Council (*Consejo Nacional sobre la Discapacidad*), established in 2009, is the body responsible for the application and implementation of the CRPD.⁴³³ It is entrusted with the tasks of issuing of recommendations and reports on issues related to the rights of persons with disabilities, including accessibility.

The Spanish Committee of Representatives of Persons with Disabilities (CERMI) is the umbrella organization promoting the rights of persons with disabilities.

8.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

A general obligation to ensure accessibility in the workplace can be inferred from the General Law on the Rights of Persons with Disabilities and their Social Inclusion No. 1/2013. This Law requires ‘universal accessibility’, which is defined as ‘the condition that the environments, processes, goods, products and services, as well as the objects, instruments, tools and devices must comply with, to be comprehensible, usable and practicable by all people safely and comfortably and in the most autonomous and natural possible’ (Article 2 lett. K). Universal accessibility can be achieved by means of universal design, or by the provision of reasonable adjustments when required in a particular case.

Article 23 para. 2 states that ‘[i]n the field of employment, the basic conditions of accessibility and non-discrimination referred to in this chapter shall be considered supplementary to those included in the labor legislation’. As mentioned above, failure to provide an accessible workplace may be considered a form of discrimination (Article 63 of the General Law).

Article 8 of the Royal Decree 870/2007,⁴³⁴ provides for subsidies to support the employer to bear the additional costs of to employ workers with disabilities.⁴³⁵

Several other provisions in other pieces of legislation include accessibility obligations and accessibility requirements in relation to the built environment, transportation and ICT.⁴³⁶

Reasonable Accommodation

⁴²⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 181; PathWays Project, ‘Report on the comparison of the available strategies for professional integration and reintegration of persons with chronic diseases and mental health issues, based on five categories of social welfare models in Europe, Spain Country Report’, https://www.path-ways.eu/wp-content/uploads/country_report_es.pdf, p. 7.

⁴³⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Spain*, at para. 4 (c).

⁴³¹ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en>

⁴³² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 1.

⁴³³ <https://www.mscbs.gob.es/ssi/discapacidad/informacion/consejoNacionalDisc.htm>.

⁴³⁴ Real Decreto 870/2007, de 2 de julio, por el que se regula el programa de empleo con apoyo como medida de fomento de empleo de personas con discapacidad en el mercado ordinario de trabajo at <https://www.boe.es/eli/es/rd/2007/07/02/870>,

⁴³⁵ *Ibid.* Article 8.

⁴³⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 42 (a) (b) (c).

The General Law on the Rights of Persons with Disabilities and their Social Inclusion No. 1/2013 establishes, under Article 2 lett. m and Article 63, a duty to ensure reasonable accommodation for persons with disabilities. Article 2 lett. m defines reasonable accommodation as: ‘necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities not imposing a disproportionate or undue burden, where needed in a particular case effectively, and practice to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise, on an equal basis with others, of all human rights’.⁴³⁷ Cachon highlights that ‘employers are required to consult the person with disabilities in question and may consult other accredited entities specialised in occupational risk prevention services’.⁴³⁸ As mentioned above, failure to provide reasonable accommodation constitutes a discrimination.

The Royal Decree 170/2004 amending Royal Decree No. 1451/1983⁴³⁹ allow companies hiring disabled workers with a permanent contract to apply for grants to adapt the workplace or eliminate barriers or obstacles that prevent or hinder the work of workers with disabilities.⁴⁴⁰ However, subsidies to facilitate implementation of reasonable accommodations are under the remit of regional Governments.⁴⁴¹

8.4. Overview of Spanish Policies on Inclusion of Persons with Disabilities in the Workplace

The Action Plan of the Spanish Strategy on Disability 2014-2020⁴⁴² is the most important document related to Spanish disability policy. It was approved by the Council of Ministers on September 12, 2013,⁴⁴³ in compliance with the CRPD, and in line with the European Disability Strategy 2010-2020 and the Council of Europe Disability Strategy 2020. It addresses five areas of action, including employment and accessibility. With regard to employment the Strategy aims *inter alia* to promote the right to work of people with disabilities, in compliance with principles of equal treatment and non-discrimination.⁴⁴⁴ Among other measures, the Strategy mentions the need to ensure compliance with legislation regarding the adaptation of workplaces.⁴⁴⁵

Another important policy document is the Employment Activation Strategy 2017-2020, approved by Royal Decree 1032/2017 and adopted to create more and better jobs, in a context of demographic challenges.⁴⁴⁶ This strategy includes a commitment to favour ‘the labour inclusion of people with disabilities’.⁴⁴⁷

⁴³⁷ L. Cachon, Country Report Non-Discrimination, Spain (2018), p. 42, available at

<<https://www.equalitylaw.eu/downloads/4745-spain-country-report-non-discrimination-2018-pdf-2-28-mb>>

⁴³⁸ L. Cachon, Country Report Non-Discrimination, Spain (2018), p. 43, available at <<https://www.equalitylaw.eu/downloads/4745-spain-country-report-non-discrimination-2018-pdf-2-28-mb>>

⁴³⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 178.

⁴⁴⁰ Royal Decree 170/2004, Of 30 January, Amending Royal Decree 1451 / 1983, Of 11 May, In Accordance With Provisions In The Act 13/1982 Of 7 April, Which Regulates Selective Employment And Measures Of Promoting Employment Of The..., available (unofficial translation) at <<https://www.global-regulation.com/translation/spain/1449519/royal-decree-170-2004%252c-of-30-january%252c-amending-royal-decree-1451---1983%252c-of-11-may%252c-in-accordance-with-provisions-in-the-act-13-1982-of-7-apri.html>>

⁴⁴¹ L. Cachon, Country Report Non-Discrimination, Spain (2018), p. 43, available at <<https://www.equalitylaw.eu/downloads/4745-spain-country-report-non-discrimination-2018-pdf-2-28-mb>>

⁴⁴² <https://www.mscbs.gob.es/ssi/discapacidad/docs/plan_accion_EED.pdf>

⁴⁴³ <https://webcache.googleusercontent.com/search?q=cache:HNFfndT3KQMJ:https://ec.europa.eu/social/BlobServlet%3Fdo_cld%3D12683%26langld%3Dlt+&cd=2&hl=it&ct=clnk&gl=ie>

⁴⁴⁴ Ministry of Health, Plan of Action of the Spanish Strategy on Disability 2014-2020 <<https://www.mscbs.gob.es/ssi/discapacidad/informacion/planAccionEstrategiaEspanolaDiscapacidad.htm>>

⁴⁴⁵ *Ibid.* p. 17 (para 38).

⁴⁴⁶ L. López Cumbre ‘Spain’s Activation Strategy for Employment’ (2018), available at <<https://www.ga-p.com/wp-content/uploads/2018/07/spains-activation-strategy-for-employment.pdf>>

⁴⁴⁷ ANED European Semester 2018/2019 country fiche on disability, Spain, report, *supra*, p. 2.

Spanish policies promoting inclusion of persons with disabilities in the workplace encompass financial incentives. These are provided to any enterprise employing workers with disabilities, whose disability is 'equal to or exceeding 33%'⁴⁴⁸ and include subsidies for permanent contracts, support for training of workers with disabilities, and tax rebates.⁴⁴⁹ The 'Incorpora programme'⁴⁵⁰ offers companies the opportunity to be socially active and supports the hiring of persons with disabilities: in particular, 'Incorpora' works in a close partnership with businesses and provides them with business advice and full support the recruitment and integration process'.⁴⁵¹

Sheltered employment is widespread in Spain. Special Employment Centres,⁴⁵² which are regulated by the Royal Decree 2273/1985 and the Royal Decree 469/2006,⁴⁵³ are characterised by a workforce which is composed by a majority of persons with disabilities.⁴⁵⁴ Another form of supported work is represented by 'labour enclaves', which are 'half-way between sheltered employment and general labour markets',⁴⁵⁵ and aims to encourage the transition to the open labour market of persons with disabilities.⁴⁵⁶ Job placement services are also provided by non-profits organizations.⁴⁵⁷

8.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

The CRPD Committee welcomed the adoption of the most recent pieces of legislation concerning the legal protection of the rights of persons with disabilities as well as the adoption of the Action Plan of the Spanish Strategy on Disability 2014-2020. However, it expressed concerns about the lack of implementation of accessibility standards.⁴⁵⁸ The Committee also highlighted that Spain has not implemented the Committee's recommendation made in its previous Concluding Observations to increase the low employment rate of persons with disabilities in the open labour market.⁴⁵⁹ The Committee also suggested that there is not reliable information on the application of anti-discrimination laws including those on reasonable accommodation and highlighted the failure to comply with the quota set out in the revised text of Act No. 9/2017 on public sector contracts.⁴⁶⁰ The CRPD Committee considered Spain in breach of *inter alia* Article 27 CRPD in its recent *Communication No. 34/2015*.⁴⁶¹ The complainant, who had suffered a traffic accident that left him with a permanent motor disability, was declared permanently disabled and was expelled from the local police force. Further to this expulsion, the complainant claimed *inter alia* the violation of his rights to vocational rehabilitation and to work. The Committee found that the fact that

⁴⁴⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 182.

⁴⁴⁹ *Ibid.* at para. 183 – 185.

⁴⁵⁰ <www.incorpora.org>

⁴⁵¹ PathWays Project, 'Report on the comparison of the available strategies for professional integration and reintegration of persons with chronic diseases and mental health issues, based on five categories of social welfare models in Europe, Spain Country Report', *supra*, p. 7.

⁴⁵² <https://www.sepe.es/contenidos/personas/encontrar_empleo/empleo_personas_discapacidad/centros_especiales_empleo.html>

⁴⁵³ *Ibid.*

⁴⁵⁴ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 174.

⁴⁵⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 174.

⁴⁵⁶ PathWays Project, 'Report on the comparison of the available strategies for professional integration and reintegration of persons with chronic diseases and mental health issues, based on five categories of social welfare models in Europe, Spain Country Report', *supra*, p. 5.

⁴⁵⁷ *Ibid.* p. 8 – 9.

⁴⁵⁸ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Spain*, at para. 16 (a).

⁴⁵⁹ *Ibid.* para 50.

⁴⁶⁰ *Ibid.* at para. 50 (a) (b) (c).

⁴⁶¹ Committee on the Rights of Persons with Disabilities, Views adopted by the Committee under Article 5 of the Optional Protocol, concerning communication No. 34/2015, CRPD/C/21/D/34/2015, available at <<https://juris.ohchr.org/Search/Details/2515>>

author was prevented from undertaking a modified-duty assignment or entering into a dialogue aimed at enabling him to carry out activities complementary to his usual police work constituted a breach of Articles 5 and 27 of the CRPD.

An empirical research conducted in 2018 showed that all the measures adopted in Spain to promote the integration of persons with disabilities in the labour market have not produced the expected results. The reasons for such a failure seem to lie, at least partially, in the stigma and negative attitudes of employers.⁴⁶² Another recent empirical study reports that the Spanish hiring subsidies are only limitedly effective.⁴⁶³ Moreover, it has been argued that special employment services tend to have less favourable working conditions and lower wages.⁴⁶⁴

⁴⁶² M. Garrido-Cumbrera, J. Chacón-García 'Assessing the Impact of the 2008 Financial Crisis on the Labor Force, Employment, and Wages of Persons with Disabilities in Spain' (2018), *supra*.

⁴⁶³ S. Jiménez-Martín, A. Juanmartí Mestres, J. Vall Castelló 'Hiring subsidies for people with a disability: do they work?' (2019) 20 (5) The European Journal of Health Economics 669-689, available at <<https://link.springer.com/Article/10.1007/s10198-019-01030-9>>

⁴⁶⁴ B. Cueto, V. Rodríguez 'Is sheltered employment more stable than ordinary employment?' (2016) 55 Work 51-61, DOI:10.3233/WOR-162377.

9. The United Kingdom (UK)

9.1. Factual Background

According to the UK Government official statistics on disability, there are over 11 million people with a limiting long term illness, impairment or disability, and the most commonly-reported impairments are those that affect mobility, lifting or carrying.⁴⁶⁵ In 2012, 46.3% of working-age people with disabilities were in employment compared to 76.4% of working-age non-disabled people.⁴⁶⁶ In the period 2014-2016, the employment rate of disabled people accounted to 47.9% and was much lower than the employment rate of non-disabled people at 80.1%.⁴⁶⁷ In September 2017, the Office for National Statistics UK labour market reported that the number of persons with disabilities in work, aged between 16 and 64, has risen from 2.9 million in 2013 to 3.5 million in 2017.⁴⁶⁸ According to the Labour Force Survey January to March 2018, released in May 2019, more than 3.7 million persons with disability are currently employed in the UK. Yet, persons with disabilities are more than twice as likely to be unemployed as non-disabled people.⁴⁶⁹

9.2. The Rights of Persons with Disabilities in the UK: Introductory Remarks

Before addressing the relevant framework, it is worth noting that after the 'Brexit' referendum of 23 June 2016, the UK is currently in the process of withdrawing from the EU. At the time of the writing of this report, the European Union (Withdrawal) Act 2018⁴⁷⁰ has received Royal Assent on 26 June. However, the withdrawal agreement is still under negotiation, and there is uncertainty on the future of equality law, mostly derived from EU law.⁴⁷¹ There is an overall political ambiguity on the UK's future relationship with the EU and on the overall policy direction, which might impact on the protection and promotion of the rights of persons with disabilities.

The Relevant Legal Framework in a Nutshell

The UK comprises England, Wales, Scotland, and Northern Ireland (NI). The competence to legislate on equality is reserved to the Westminster Parliament for Great Britain (i.e. England, Wales and Scotland), whilst the Northern Ireland Assembly has competence to legislate in this area. This report only considers legislation in Great Britain and does **not** discuss NI legislation.

Since the UK does not have a written Constitution, legislation is the primary tool for establishing disability rights and non-discrimination in the UK.⁴⁷² The main piece of legislation⁴⁷³ protecting persons with disabilities against discrimination is the **Equality Act 2010**.⁴⁷⁴ This act now prohibits direct and indirect discrimination, harassment, victimisation and instructions to discriminate because of race, sex, disability,

⁴⁶⁵ <<https://www.gov.uk/government/publications/disability-facts-and-figures/disability-facts-and-figures>>. The data is also reported in House of Lords- Select Committee on the Equality Act 2010 and Disability (2015-16), The Equality Act 2010: the impact on disabled people, available at <<https://publications.parliament.uk/pa/ld201516/ldselect/ldseqact/117/117.pdf>>.

⁴⁶⁶ Ibid.

⁴⁶⁷ Work, Health and Disability Green Paper Data Pack (2016) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644090/work-health-and-disability-green-paper-data-pack.pdf>.

⁴⁶⁸ <<https://fullfact.org/economy/disabled-people-work/>>

⁴⁶⁹ <<https://www.scope.org.uk/media/disability-facts-figures>>

⁴⁷⁰ <<http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted/data.htm>>.

⁴⁷¹ S. Fredman et al., *The Impact of Brexit on Equality Law* (2017), available at <<http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2017/11/The-Impact-of-Brexit-on-Equality-Rights.pdf>>.

⁴⁷² A. McColgan, updated by L. Vickers, *Country report Non-discrimination United Kingdom* (2017), available at <<https://www.equalitylaw.eu/downloads/4307-united-kingdom-country-report-non-discrimination-2017-pdf-1-74-mb>>.

⁴⁷³ The Human Rights Act 1998, which gives effect to the European Convention on Human Rights (ECHR) in UK law, provides valuable protection to persons with disabilities against discrimination.

⁴⁷⁴ The text of the act is available at <<https://www.legislation.gov.uk/ukpga/2010/15/contents>>. This act does not apply to Northern Ireland.

sexual orientation, religion or belief and age in all sectors of employment and occupation (both public and private), and access to goods and services, education, housing and the performance of public functions.

A person is regarded as disabled for the purposes of the Equality Act 2010 if she/he ‘has a physical or mental impairment ... [which] has a substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities’. A disability will be considered to have a ‘substantial and long-term adverse effect’ if it impacts substantially upon how the person performs day-to-day activities, and has lasted for at least 12 months, or the period for which it is likely to last is at least 12 months, or for the rest of the person’s life.⁴⁷⁵ References to ‘disability’ and ‘mental or physical impairments’ in other legislation are not relevant in the context of application of the Equality Act 2010.⁴⁷⁶ People with cancer, HIV infection and multiple sclerosis are considered to be disabled for the purpose of the Equality Act.⁴⁷⁷

The Equality Act prohibits direct and indirect discrimination and prohibits unjustified discrimination ‘arising from disability’ (section 15), and failures to make reasonable accommodations (the act refers to ‘reasonable adjustments’ in sections 20 and 21). The Equality Act 2010 permits ‘positive action’ to improve disabled people’s participation in society.

Individuals who consider themselves to have been discriminated against in an employment context can bring legal proceedings to the employment tribunals. Complaints concerning any other unlawful discrimination by public or private sector bodies can be brought to the civil courts. The Equality and Human Rights Commission (EHRC) is the regulatory body responsible for enforcing the Equality Act 2010. The EHRC can provide legal assistance to victims of discrimination, intervene in or institute legal proceedings, and make applications to court for injunctions or, in Scotland, interdicts.⁴⁷⁸ It can also provide general guidance, publish information and undertake research.

Other national laws protect the rights of persons with disabilities and/or contain specific provisions concerning disability. The adult care system is provided by the Care Act 2014, which came into force in 2015.⁴⁷⁹

Accessibility is mainly guaranteed by the Equality Act,⁴⁸⁰ which includes a duty to provide accessibility by anticipating for people with disabilities in some areas to which disability discrimination legislation applies,⁴⁸¹ and by provisions included in sectorial legislation, which was often (e.g. in the case of transport services) either EU legislation or implementation of EU directives.⁴⁸² Accessibility of the built environment is guaranteed by building regulations, which set accessibility standards to ensure that as many people as possible are able to access and use buildings and their facilities.⁴⁸³

The CRPD in the UK Legal Framework

The UK ratified the CRPD on 8 June 2009 and the Optional Protocol on 7 August 2009. It submitted its first report in 2013.⁴⁸⁴

⁴⁷⁵ <<https://www.gov.uk/definition-of-disability-under-equality-act-2010>>.

⁴⁷⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities* (CRPD/C/GBR/1), para. 51.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ <<https://www.equalityhumanrights.com/en/court-action>>.

⁴⁷⁹ See at <<http://www.legislation.gov.uk/ukpga/2014/23/section/13/enacted>>.

⁴⁸⁰ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities* (CRPD/C/GBR/1), paras 88 et seq.

⁴⁸¹ A. McColgan, updated by L. Vickers, *Country report Non-discrimination United Kingdom* (2017), available at <<https://www.equalitylaw.eu/downloads/4307-united-kingdom-country-report-non-discrimination-2017-pdf-1-74-mb>>.

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.* para 99.

⁴⁸⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities* (CRPD/C/GBR/1), paras 88 et seq.

It must be also noted that, in 2014, the UN Committee on the Rights of Persons with Disabilities also launched an inquiry under Article 6 of the CRPD Optional Protocol on ‘the cumulative impact of the legislation, policies and measures adopted by the State party relating to social security schemes and to work and employment’. In October 2016 the UN Committee concluded that the provisions on welfare and social care and persons with disabilities adopted by the UK have disproportionately and adversely affected the rights of persons with disabilities.⁴⁸⁵

9.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

Accessibility of the workplace is mainly guaranteed by the **Equality Act 2010** by means of reasonable adjustments. If there is the need to make physical adaptations to the premises and the employer is not the owner of such premises, he is expected to request the consent of the landlord. Schedule 21 of the Equality Act states that where a person (e.g. an employer) is placed under a duty to make reasonable adjustments but he/she requires the consent of a third party (the landlord) to make such adjustments, it is ‘always reasonable’ for the employer ‘to have to take steps to obtain the consent’ (Section 2 of Schedule 21).

Employers can find guidance on how to improve accessibility in ‘Clarkit’, which is a free online toolkit designed to promote practical workplace solutions to the barriers that disabled people and employers face.⁴⁸⁶ This has been created by the Clear Company, which is the UK’s leading auditor of inclusive best practice in recruitment.

Reasonable Accommodations

The duty of reasonable accommodation provided for in the Equality Act 2010 applies in respect of applicants for posts, anyone on a work placement or internship which is paid, and (actual or prospective) workers employed ‘under a contract of employment, a contract of apprenticeship or a contract personally to do work’, also to a variety of types of workers who fall outside this definition including police and other officers, barristers (in Scotland advocates), partners and contract workers). It is not dependent upon the size of the employer and it applies to both public and private sector. It applies where a provision, criterion or practice or a physical feature or the lack of an aid puts a person with disabilities at a substantial disadvantage in comparison with persons who are not disabled. *Inter alia* in *Salford NHS Primary Care Trust v Smith* Employment Appeal Tribunal stated that reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer.⁴⁸⁷

Adjustments include: making physical adjustments to premises; allocating some duties to another employee; transferring the person to fill an existing vacancy; flexible working hours; allowing absence from work for rehabilitation, treatment and assessment; giving or arranging special training; acquiring or modifying equipment; modifying instructions or reference manuals; modifying procedures for testing or assessment; providing a reader or interpreter; and providing supervision or other support.⁴⁸⁸ In the case of *Archibald v Fife Council*,⁴⁸⁹ the House of Lords held that the obligation to make reasonable accommodation could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a disabled person.

⁴⁸⁵ UN Committee on the Rights of Persons with Disabilities (2016), Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under Article 6 of the Optional Protocol to the Convention (UN Doc. CRPD/C/15/4).

⁴⁸⁶ <<http://www.clarkit.co.uk/about/>>.

⁴⁸⁷ A summary of the case can be found at <<https://www.employmentcasesupdate.co.uk/site.aspx?i=ed8995>>.

⁴⁸⁸ A. McColgan, updated by L. Vickers, *Country report Non-discrimination United Kingdom* (2017), available at <<https://www.equalitylaw.eu/downloads/4307-united-kingdom-country-report-non-discrimination-2017-pdf-1-74-mb>>.

⁴⁸⁹ *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 651

Guidance on reasonable accommodation is provided by the EHRC **Employment Statutory Code of Practice**,⁴⁹⁰ and by the Government Equalities Office.⁴⁹¹

Employers are obliged to make an adjustment if they know, or could reasonably be expected to know, that a disabled person is, or may be, an applicant for work.⁴⁹² The Employment Statutory Code of Practice also states that:

‘[a]n employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially’.⁴⁹³

There is not a specific duty to consult the employee, but it would be good practice ‘for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made’.⁴⁹⁴

The Equality Act does not use or define the concept of ‘disproportionate burden’, but, in UK law, the question of whether any particular adjustment is ‘reasonable’ involves, in essence, the determination of this question.

‘Access to work’ funding is available in Great Britain to pay for the adjustments required to get people with disabilities into work, and/or to assist them to remain in work.⁴⁹⁵

9.4. Overview of UK Policies on Inclusion of Persons with Disabilities in the Workplace

Priestley⁴⁹⁶ reports that in August 2015 the Secretary of State for Work and Pensions announced a new Government target to reduce the employment gap between disabled and non-disabled people, equivalent to ‘getting 1 million more disabled people into work’.⁴⁹⁷ To reach this target different measures have been put in place to increase employment rates and foster inclusion of persons with disabilities in the workplace. These include programmes to support persons with disabilities to find a job, and allowances to support those persons with disabilities who are in a low paid job. With regards to the latter, the Employment and Support Allowance⁴⁹⁸ provides an income where disabled people are not working or working but on a low income.

⁴⁹⁰ <<https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>>. Additional guidance is included in <<https://www.equalityhumanrights.com/en/multipage-guide/employing-people-workplace-adjustments>>.

⁴⁹¹ The guidance is available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/138118/Equality_Act_2010_-_Duty_on_employers_to_make_reasonable_adjustments_for....pdf>.

⁴⁹² Ibid. para. 6.17.

⁴⁹³ Ibid. para. 6.19.

⁴⁹⁴ Ibid. para. 6.32.

⁴⁹⁵ <<https://www.gov.uk/access-to-work>>.

⁴⁹⁶ M. Priestley, *European Semester 2016/2017 country fiche on disability –United Kingdom* (2016), available at <<https://www.disability-europe.net/country/united-kingdom>>.

⁴⁹⁷ <<http://www.reform.uk/publication/rt-hon-iain-duncan-smith-mp-speech-on-work-health-and-disability/>>.

⁴⁹⁸ <<https://www.gov.uk/employment-support-allowance/overview>>.

The Access to Work scheme provides for advice and financial support for disabled employees and their employers to implement adjustments to the workplace.⁴⁹⁹ According to Corby et al. the most common type of adjustment is time-related or part-time work requests.⁵⁰⁰

9.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

As mentioned above, in the UK, failure to meet the duty of reasonable accommodation amounts to a discrimination and there are several cases concerning the failure to provide adjustments. Most of those seem to confirm a broad interpretation of the ‘reasonable adjustment obligation’. Exemplary in this respect, is the *G4S Cash Solutions (UK) Ltd v Powell*.⁵⁰¹ In this case, the Employment Appeal Tribunal held that the duty of reasonable adjustment could include continued payment at a higher rate for work usually paid at a lower rate. In a nutshell, the Claimant had a back injury and was moved to a new role that was usually paid at a lower rate. The Employment Appeal Tribunal found that a reasonable adjustment would be to continue to pay at the higher rate.

The CRPD Committee released its Concluding Observations on the UK initial report in August 2017.⁵⁰² Despite the existence of advanced legislation and effective enforcement, the Committee expressed concern ‘for the insufficient affirmative action measures and provision of reasonable accommodation to ensure that persons with disabilities can access employment on the open labour market...’.⁵⁰³ In relation to the employment context, the Committee expressed concerns about the effectiveness of policies on accessibility and reasonable adjustments. Moreover, the Committee affirmed that the Work Capability Assessment, which is the test used by the British Government's Department for Work and Pensions to decide whether welfare claimants are entitled to Employment Support Allowance, ‘emphasizes a functional evaluation of skills and capabilities, rather than recognizing the interactions between impairment and barriers in society faced by persons with disabilities’.⁵⁰⁴ Thus, it recommended to develop, introduce and monitor an effective employment policy for persons with disabilities to ensure that they can access decent work and that there is equal pay for work of equal value.⁵⁰⁵

While concerns have been expressed that the UK's withdrawal from the EU could lead to negative outcomes for persons with disabilities, the Government has stated that it does not intend to weaken rights of persons with disabilities and that it will preserve funding for existing projects.⁵⁰⁶

⁴⁹⁹ S. Corby, L. William and S. Richard, ‘Combating disability discrimination: A comparison of France and Great Britain’, 2019, 25 (1) European Journal of Industrial Relations 41–56. Available at <https://journals.sagepub.com/doi/pdf/10.1177/0959680118759169?casa_token=VVWt1_aEUhYAAAAA:k1Jl63UuLtlB8eMfrkS q1QwCYTouVLPj55SQ__csTeqnWDIFvj_bteg-bYfr0j42Pp3DBgNYvQ>

⁵⁰⁰ S. Corby, L. William and S. Richard, ‘Combating disability discrimination: A comparison of France and Great Britain’, 2019, 25 (1) European Journal of Industrial Relations 41–56. Available at <https://journals.sagepub.com/doi/pdf/10.1177/0959680118759169?casa_token=VVWt1_aEUhYAAAAA:k1Jl63UuLtlB8eMfrkS q1QwCYTouVLPj55SQ__csTeqnWDIFvj_bteg-bYfr0j42Pp3DBgNYvQ>

⁵⁰¹ A text of the case can be found at <<https://www.employmentcasesupdate.co.uk/site.aspx?i=ed31608>>.

⁵⁰² Committee on the Rights of persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1, 24 August 2017.

⁵⁰³ Committee on the Rights of persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1, para. 56(b).

⁵⁰⁴ Ibid. para 56 (c).

⁵⁰⁵ Committee on the Rights of persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1, 24 August 2017, para 57.

⁵⁰⁶ House of Lords, Library Briefing, ‘Disability in the UK: Rights and Policy. Debate on 28 June 2018’, available at <<http://researchbriefings.files.parliament.uk/documents/LLN-2018-0071/LLN-2018-0071.pdf>>

10. Norway

10.1. Factual Background

In 2015, statistics Norway estimated that approximately 12-15% of the Norwegian population has disabilities.⁵⁰⁷ These data, however, vary depending on how disability is defined.

The latest Labour Force Survey of Disabled People, which dates back to September 3, 2018, showed that the percentage of persons with disabilities aged between 15-66 amounts to 16.8% of the total population.⁵⁰⁸ The employment rate of people with disabilities is 43.9%.⁵⁰⁹ According to the same survey, the employment rate of males with disabilities between 15-66 years old (46%) is higher than the one of females with disabilities of the same age (42.2%).⁵¹⁰

10.2. The Rights of Persons with Disabilities in Norway: Introductory Remarks

Norway is not a State Member of the EU. It is however a member of the European Economic Area (EEA) and has implemented EU anti-discrimination legislation (including the Employment Equality Directive).⁵¹¹

The Relevant Legal Framework in a Nutshell

After its revision in May 2014 and the latest amendments in 2018, the Norwegian **Constitution** provides for a comprehensive protection of human rights. Article 2 stipulates that the Constitution must 'ensure democracy, a state based on the rule of law and human rights'.⁵¹² The principle of equality and the prohibition against discrimination are provided for in Article 98, which affirms that:

'All people are equal under the law. No human being must be subject to unfair or disproportionate differential treatment.'

Article 110 of the Constitution requires the State to:

'[...] create conditions under which every person capable of work is able to earn a living through their work or enterprise. Those who cannot themselves provide for their own subsistence have the right to support from the state.'⁵¹³

Article 92 of the Constitution also states that:

'The authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway'.

⁵⁰⁷ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, CRPD/C/NOR/1, 7 December 2015, at para. 282.

⁵⁰⁸ <https://www.ssb.no/en/arbeid-og-lonn/statistikker/akutu/aar>

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid. Between 2014 and 2017, the employment rate of the total persons with disabilities was stable in general terms; however, the unemployment rate was higher for men than for woman. Moreover, the percentage of employed men increased (+4%), while the one of employed women decreased (-3%). Common Core Document, Norway, attached to the State's Party Report, at para. 49, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=HRI%2fCORE%2fNOR%2f2017&Lang=en

⁵¹¹ In that regard see E. L. McClimans, Country report Non-discrimination Norway (2018), available at <https://www.equalitylaw.eu/downloads/4793-norway-country-report-non-discrimination-2018-pdf-2-24-mb>

⁵¹² The Constitution of the Kingdom of Norway (as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2018), is available at <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>. See also the *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 13.

⁵¹³ Ibid. Article 110.

This provision requires public authorities to implement human rights conventions, including the CRPD (which, as it will be highlighted in the subsequent section, was ratified by Norway in 2013).

The relevant legal framework when it comes to accessibility of workplaces consist of two pieces of legislation: the Anti-Discrimination and Accessibility Act (ADAA)⁵¹⁴ and the most recent act on the matter, the 2018 Equality and Anti-Discrimination Ombud Act.⁵¹⁵

The **Anti-Discrimination and Accessibility Act (ADAA)**⁵¹⁶ aims to promote equal opportunities and equal rights for people with disabilities and to enhance their social.⁵¹⁷ There is no definition of disability in the Act. However, McClimans suggests that, in the preparatory works of the law, disability was defined as ‘reduced functional ability either regarding physical, mental or cognitive abilities’.⁵¹⁸ The ADAA prohibits discrimination on the ground of disability in all areas of life, including employment, and allows for positive measures or targeted differential treatment to promote the rights of people with disabilities. It imposes, in Section 13, a duty to ensure universal design (which will be discussed further below). It stipulates that:

‘Public and private undertakings focused on the general public shall have a duty to ensure universal design of the undertaking’s general function provided that this does not impose a disproportionate burden on the undertaking’.

With regard to the employment field, Section 19 is among the most relevant provisions. It stipulates that:

‘[e]mployer and employee organisations shall make active, targeted and systematic efforts to promote the purpose of this Act within their fields of activity’.

Chapter 5 of the Act also imposes a series of obligations on employers, including that of providing reasonable (individual) accommodations to disabled workers (Section 26).⁵¹⁹ The duty to provide accommodations applies in so far as the accommodation does not impose a disproportionate burden. Section 26 affirms that

‘[w]hen assessing whether the accommodation imposes a disproportionate burden, particular weight shall be given to the effect of the accommodation on the dismantling of disabling barriers, the necessary costs associated with the accommodation and the resources of the undertaking’.

The ADAA is enforced by the Equality and Anti-Discrimination Ombud, an independent body administratively subordinate to the Ministry of Children and Equality,⁵²⁰ and by the Equality and Anti-Discrimination Tribunal, which may impose fines to ensure compliance with its orders and award compensation for economic and non-economic loss in discrimination cases.⁵²¹

The most recent **Equality and Anti-Discrimination Act**⁵²² entered into force on January 1, 2018. It seems to complement the ADAA and includes provisions that are particularly relevant to persons with

⁵¹⁴ Act (No. 61 of 2013) prohibiting discrimination on grounds of disability (Anti-Discrimination and Accessibility Act). available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=97447> .

⁵¹⁵ Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act), entered into force on January 1, 2018, available at <<https://lovdata.no/dokument/NLE/lov/2017-06-16-51>>

⁵¹⁶ Act June 20, 2008 No 42 relating to a prohibition against discrimination on the basis of disability (the Anti-Discrimination and Accessibility Act), available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=88353>

⁵¹⁷ *Ibid.* section 1.

⁵¹⁸ E. L. McClimans, *Country report Non-discrimination Norway* (2018), p. 38 available at <https://www.equalitylaw.eu/downloads/4793-norway-country-report-non-discrimination-2018-pdf-2-24-mb>

⁵¹⁹ *Ibid.* section 3 and 14; and *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 16.

⁵²⁰ Common Core Document, Norway, attached to the State’s Party Report, at para. 183, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2FCORE%2fNOR%2f2017&Lang=en>

⁵²¹ *Ibid.* at para. 187.

⁵²² Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act), entered into force on January 1, 2018, available at <<https://lovdata.no/dokument/NLE/lov/2017-06-16-51>>

disabilities.⁵²³ On the whole this act prohibits discrimination on various grounds, including disability, in all areas of life. For the purpose of this analysis, Section 25 is particularly relevant as it lays down a general duty of employer and employee organizations to promote equality and prevent discrimination on the basis of *inter alia* disability. In a similar vein, Section 26 places on **employers a general duty to promote equality**. According to this provision:

‘All employers shall, in their operations, make active, targeted and systematic efforts to promote equality and prevent discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity and gender expression. Such efforts shall encompass recruitment, pay and working conditions, promotion, development opportunities, accommodation, the opportunity to combine work with family life and preventing harassment.

All public undertakings, regardless of size, and private undertakings that ordinarily employ more than 50 persons shall, in the context of their operations

- a) investigate whether there is a risk of discrimination or other barriers to equality,
- b) analyze the causes of identified risks,
- c) implement measures suited to counteract discrimination and promote greater equality and diversity in the undertaking, and
- d) evaluate the results of efforts made pursuant to a) to c).

The efforts specified in the second paragraph shall be made on an ongoing basis and in cooperation with employee representatives’.

According to Section 26a, both public undertakings, and private undertakings (with more than 50 employees) must ‘**issue a statement on equality** measures implemented or planned to promote the Act’s purpose of equality irrespective of ethnicity, religion, belief, *disability*, sexual orientation, gender identity and gender expression’ (emphasis added). Section 29 goes on to define the material scope of the prohibition of discrimination in employment and affirms that it applies in employment relationships, including the promotion, appointment, reassignment of a worker with disabilities and his/her pay and working conditions. Other provisions lay down the duties of employers in relation to ensuring equality. Finally and notably for the purpose of this analysis, the **Equality and Anti-Discrimination Act** also contains **provisions on universal design and individual accommodation**, which will be further discussed in section 10.3.⁵²⁴

Alongside these acts, the **Working Environment Act (WEA)**⁵²⁵ includes provisions concerning accommodations for employees with a reduced capacity for work. Namely, according to the WEA, employers are obliged to provide individual support for employees with reduced capacity for work and for employees who at some stage of the working relationship develop a need for facilitation (Section 4-6). On the whole, the WEA also mandates employers to create an accessible and non-discriminatory working environment.⁵²⁶

⁵²³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 36.

⁵²⁴ Common Core Document, Norway, attached to the State’s Party Report, at para. 200, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2FCORE%2fNOR%2f2017&Lang=en>

⁵²⁵ Act relating to working environment, working hours and employment protection, etc. (Working Environment Act), amendment acts incorporated, available at <<https://www.arbeidstilsynet.no/globalassets/regelverkspdf/working-environment-act>>.

⁵²⁶ G. Chhabra, ‘Two words, too apart to converge? A comparison of social regulation policies aimed at the employment of disabled people in Norway and India’ (2019) 13 *European Journal of Disability Research* 83 – 100, p. 93.

The **National Insurance Act**⁵²⁷ recognizes the right to a set of economic benefits to certain social categories, including persons with disabilities. Among the benefits afforded to persons with disabilities, there are work assessment allowance and assistive measures.⁵²⁸ Additionally, the **Civil Service Act**⁵²⁹ provides for rules in relation to the government's employees with disabilities.⁵³⁰ The Act states that 'if there are qualified applicants who have a disability, at least one such applicant must be called in for an interview', and that 'a qualified applicant with a disability can be appointed even if there are more highly qualified applicants'.⁵³¹

The CRPD in the Norwegian Legal Framework

Norway signed the CRPD on March 30, 2007 and ratified it on June 3, 2013.⁵³² Norway's initial report to the CRPD Committee was submitted in June 2015.⁵³³ Norway has not yet signed the Optional Protocol to the CRPD.⁵³⁴ In that connection, in May 2019, the Committee itself has expressed concern about the lack of ratification of the Optional Protocol, recommending Norway to proceed as soon as possible.⁵³⁵

The Ministry of Children and Equality is the national focal point for the CRPD and has the overall responsibility for the implementation of its provisions, whereas the Equality and Anti-Discrimination Ombud has the task of monitoring the national implementation of the CRPD.⁵³⁶

10.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

In Norway, the **ADAA** requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. The ADAA in Section 1 also states that:

'[e]quality shall mean: a) equal status, b) equal opportunities and rights, c) *accessibility*, and d) *accommodation*'.

Section 13 of the ADAA refers to 'universal design', which is defined as 'designing or accommodating the main solution with respect to the physical conditions, including information and communications technology (ICT), such that the general function of the undertaking can be used by as many people as possible'. A breach of the obligation to ensure universal design amounts to a prohibited discrimination. Section 13 applies to public and private undertakings that offer goods or services to the general public. This duty applies in so far as it does not entail a disproportionate burden. Section 13 provides that

'[w]hen assessing whether the design or accommodation such a burden, particular importance must be attached to the effect of the accommodation on the dismantling of disabling barriers, if

⁵²⁷ National Insurance Act (No. 19 of 1997), available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=47496>

⁵²⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 31.

⁵²⁹ Civil Service Act (No. 3 of 1983), available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=63362>

⁵³⁰ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 259. G. Chhabra, 'Two words, too apart to converge? A comparison of social regulation policies aimed at the employment of disabled people in Norway and India' (2019) 13 *European Journal of Disability Research* 83 – 100, p. 92

⁵³¹ *ibid.* para 259.

⁵³² United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en>

⁵³³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*

⁵³⁴ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 1.

⁵³⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Norway*, 7 May 2019, CRPD/C/NOR/CO/1, at para. 5 (c) and 6 (c).

⁵³⁶ <<https://www.regjeringen.no/en/topics/equality-and-social-inclusion/likestilling-og-inkludering/funksjonsnedsetjingar/id2005941/>>

the main business function is of a public nature, the necessary costs associated with providing the accommodation, the undertaking's resources, whether the normal function of the undertaking is of a public nature, safety considerations and cultural heritage considerations'.

Section 17 of the **Equality and Anti-Discrimination Act**⁵³⁷ echoes what already provided for in Section 13 of the ADAA and requires that:

'[p]ublic undertakings and private undertakings focused on the general public have a duty to ensure that their general functions have a universal design'.

This section also defines universal design in a manner consistent to the ADAA, and provides that the duty of guaranteeing universal design is not absolute and it doesn't apply when universal design imposes an undue burden on the duty bearer.⁵³⁸

Accessibility requirements are the provided in other pieces of legislation. For example with regards to the build environment, the Planning and Building Act⁵³⁹ regulates physical accessibility for persons with disabilities in relation to planning and building matters.⁵⁴⁰

In light of these provisions as well as of the **general duty of employers to promote equality** enshrined in the **Equality and Anti-Discrimination Act**, it can be affirmed that employers are obliged to make the workplace accessible to people with disabilities, unless this entails a disproportionate burden on them.

Reasonable Accommodation

Norwegian legislation includes a number of provisions on individual accommodation.⁵⁴¹ In particular, Section 26 of the ADAA provides for a duty of the employer to ensure individual accommodations to the worker with disabilities. A breach of the obligation to ensure individual accommodation amounts to discrimination on the ground of disability. The ADAA refers to a right of 'individual accommodation' and does not explicitly mention the term 'reasonable'. However, this accommodation entails what prescribed by Article 2 CRPD and by Article 5 of the Employment Equality Directive.

The Equality and Anti-Discrimination Act also includes various norms related to reasonable accommodation, which must be provided also outside the employment field. With regards to work, in particular, Section 22 stipulates that:

'Workers and job seekers with disabilities have a right to suitable individual accommodation in respect of recruitment processes, workplaces and work tasks, to ensure that they have the same opportunities as other persons to secure or sustain employment, benefit from training and other skills development measures, and carry out and have the opportunity to progress in their work.

The right applies to accommodation that does not impose a disproportionate burden. In the assessment, particular weight shall be given to

- a) the effect of accommodation in terms of dismantling barriers for persons with disabilities
- b) the costs associated with accommodation

⁵³⁷ Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act), entered into force on January 1, 2018, section 1, available at <<https://lovdata.no/dokument/NLE/lov/2017-06-16-51>>

⁵³⁸ *Ibid.*

⁵³⁹ Planning and Building Act (2008), Act of 27 June 2008 No. 71 relating to Planning and the Processing of Building Applications (the Planning and Building Act) (the Planning part), available at <<https://www.regjeringen.no/en/dokumenter/planning-building-act/id570450/>>

⁵⁴⁰ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 24, 56, 57.

⁵⁴¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 35.

c) the resources of the undertaking.⁵⁴²

In substance, the right to obtain an accommodation applies only when accommodations do not impose a disproportionate burden, which is identified taking into account various elements, like the effects and costs of accommodation and the resources of the undertaking.⁵⁴³

Moreover, Section 4 of the Working Environment Act specifies that work equipment shall to be reasonably arranged so that employees with disabilities can work (para. 1) and when an employee becomes less capable to work because of an accident or similar events, the employer 'shall, as far as possible, implement the necessary measures to enable the employee to retain or be given suitable work'.⁵⁴⁴

10.4. Overview of Norwegian Policies on Inclusion of Persons with Disabilities in the Workplace

The entity that coordinates Norwegian policies for persons with disabilities is the Ministry of Children, Equality and Social Inclusion, which is also the focal point for the implementation of the CRPD.⁵⁴⁵

The Norwegian Labour and Welfare Administration (NAV) manages programmes related to access to the labour market.⁵⁴⁶ In order to promote employment of persons with disabilities several financial incentives are provided to employers. The most relevant are wage subsidies to cover part of the costs for hiring persons with disabilities. Moreover, compensation of the costs incurred by employers to accommodate the workplace is provided.⁵⁴⁷ The Job Strategy for Persons with Disabilities, that was presented in 2012 and continued until 2014,⁵⁴⁸ identified the barriers that preclude access to the labour market to persons with disabilities and elaborated practical measures in order to include as many persons with disabilities as possible in the Norwegian labour market.⁵⁴⁹

The 'Inclusive Working life Agreement 2014-2018',⁵⁵⁰ the fourth of a series of agreements that started in 2001⁵⁵¹ between the Minister of Labour and social partners, sets forth a series of agreed measures to promote inclusion and access of persons with disabilities to employment. One of the purposes of this agreement is to reduce absence due to illness and prevent expulsion and withdrawal from working life.⁵⁵² It also aims to foster work practices that develop and value individual capabilities.

⁵⁴² Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act), entered into force on January 1, 2018, section 22, available at <<https://lovdata.no/dokument/NLE/lov/2017-06-16-51>>

⁵⁴³ *Ibid.*

⁵⁴⁴ Act relating to working environment, working hours and employment protection, etc. (Working Environment Act), amendment acts incorporated, section 4, available at <<https://www.arbeidstilsynet.no/globalassets/regelverkspdf/working-environment-act>>

⁵⁴⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 3, 300.

⁵⁴⁶ *Ibid.* at para. 248.

⁵⁴⁷ G. Chhabra, 'Two words, too apart to converge? A comparison of social regulation policies aimed at the employment of disabled people in Norway and India' (2019) 13 *European Journal of Disability Research* 83 – 100, p. 94.

⁵⁴⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 251.

⁵⁴⁹ <<https://www.regjeringen.no/en/dokumenter/jobs-strategy-for-people-with--disabilit/id733535/>>; and *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 251.

⁵⁵⁰ Letter of Intent regarding a more inclusive working life 4 March 2014 – 31 December 2018 (the IA Agreement), available at <https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2016/ia_agreement_-2014_18.pdf>

⁵⁵¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 253

⁵⁵² <https://www.bufdir.no/en/English_start_page/Disabilities_in_Norway/>; and G. Chhabra, 'Two words, too apart to converge? A comparison of social regulation policies aimed at the employment of disabled people in Norway and India' (2019) 13 *European Journal of Disability Research* 83 – 100, p. 94.

Crucial for ensuring full participation in the society is recent Government's Action Plan for Universal Design (2016-2019),⁵⁵³ which includes numerous measures to enhance accessibility of the built environment, transportation, ICT and all services.

10.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

While Norwegian law and policy are extremely ambitious, the ANED report 2018-2019 points out that the real situation of persons with disabilities in the Norwegian employment context is still far from ideal.⁵⁵⁴ The report also highlights that the employment sector is one in which a reform is needed.⁵⁵⁵ The OECD also highlights that the 'sickness and disability system does not adequately encourage and facilitate those with work capacity to re-enter the labour force'.⁵⁵⁶ The Initial Report of Norway to the CRPD Committee confirms that persons with disabilities still face barriers.⁵⁵⁷

The CRPD Committee expressed concern about the fact that the CRPD 'has not been incorporated into national law and there is no comprehensive strategy or action plan for the implementation of the Convention [...] developed in consultation with organizations of persons with disabilities'.⁵⁵⁸

A study conducted in 2018 reveals that there has been a growth in employment of persons with disabilities between 2006-2010 and 2011-2015.⁵⁵⁹ In the latter period, employers have become more responsive to including persons with disabilities in employment and providing workplace adaptations.⁵⁶⁰ However, another study shows that, in Norway, anti-discrimination legislation has only had a little direct impact on concrete companies' practices, which are influenced by a great number of factors, both economic and non-economic.⁵⁶¹

⁵⁵³ <<https://www.regjeringen.no/en/dokumenter/regjeringens-handlingsplan-for-universell-utforming/id2473299/>>

⁵⁵⁴ ANED, 'European Semester 2018/2019 shadow fiche on disability – report on Norway', report prepared by J. Sandvin and T. Bliksvaer, available at <<https://www.disability-europe.net/country/norway>>

⁵⁵⁵ ANED, 'European Semester 2018/2019 shadow fiche on disability – report on Norway', report prepared by J. Sandvin and T. Bliksvaer, available at <<https://www.disability-europe.net/country/norway>>

⁵⁵⁶ https://www.regjeringen.no/contentassets/54174c4ea27845ef86f315334bb57493/oeed_economic_surveys_norway_january_2018.pdf cited in ANED, 'European Semester 2018/2019 shadow fiche on disability – report on Norway', report prepared by J. Sandvin and T. Bliksvaer, available at <<https://www.disability-europe.net/country/norway>>

⁵⁵⁷ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 9.

⁵⁵⁸ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Norway*, at para. 5 (a) and (c).

⁵⁵⁹ Y. Kuznetsova, J. P. Cerdeira Bento, 'Workplace Adaptations Promoting the Inclusion of Persons with Disabilities in Mainstream Employment: A Case-Study on Employers' Responses in Norway' (2018) 6 (2) *Social Inclusion* 35 – 45.

⁵⁶⁰ *Ibid.*

⁵⁶¹ Y. Kuznetsova, B. Yalcin, 'Inclusion of persons with disabilities in mainstream employment: is it really all about the money? A case study of four large companies in Norway and Sweden' (2017) 13 (2) *Disability & Society* 233 – 253.

11. Russia

11.1. Factual Background

According to data included in the Initial Report of Russia to the CRPD Committee, which however date back to 2013, the number of persons with disabilities in Russia rose considerably between 1993 and 2013 from 4.7 million to 13.2 million.⁵⁶² The Report indicates that, according to data from the Pension Fund of Russian Federation (PFR), the number of employed persons with disabilities grew by 22.3% between 2008 and 2013 and, at the beginning of 2014, reached 18.4% of the total number of persons with disabilities.⁵⁶³ Data however are not collected systematically, and despite the creation of the Federal Register of Disabled Persons (FRD) in 2017, Demianova suggests that several problems still exist with regards to comparability and reliability of statistics on disability.⁵⁶⁴

11.2. The Rights of Persons with Disabilities in Russia: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Russia, officially called 'Russian Federation', is a confederation of states.⁵⁶⁵ This report only consider federal legislation.

The **Constitution** of the Russian Federation⁵⁶⁶ enshrines the principles of equality and non-discrimination, as well as the protection of human dignity.⁵⁶⁷ Article 19 para. 2 bans discrimination on various grounds ('sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances'), but does not mention disability explicitly. However, disability is encompassed under 'other circumstances'. Article 7 of the Constitution ensures the development of humankind, protects labour and health of people in the Russian Federation, guaranteeing a minimum wage and public support for specific categories of citizens, including persons with disabilities.⁵⁶⁸ Moreover, Article 37 para. 3 bans discrimination in the workplace and stipulates the right to work and the right of everyone to freely dispose of their own capacity for labour.⁵⁶⁹

A set of legislative acts has been adopted to protect persons with disabilities and promote their social participation.⁵⁷⁰ The main one is the **Federal Act on Social Protection for Persons with Disabilities**, often cited as Social Protection for Persons with Disabilities Act.⁵⁷¹ The preamble specifies that the aim of the

⁵⁶² *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 2.

⁵⁶³ *Ibid.* at para. 368.

⁵⁶⁴ A. Demianova, *supra*, p. 11-12.

⁵⁶⁵ Common Core Document, Russia, attached to the State's Party Report, at para. 1 and 6, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2fCORE%2fRUS%2f2017&Lang=en>

⁵⁶⁶ The Constitution of the Russian Federation, adopted at the December 12, 1993 referendum, available at <http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptiCk6BZ29/content/id/571508>

⁵⁶⁷ Article 19 (1) and (2), 21 (1).

⁵⁶⁸ Article 7 reads as follows: '1. The Russian Federation shall be a social state whose policy is aimed at creating conditions ensuring a worthy life and a free development of Man. 2. In the Russian Federation the labour and health of people shall be protected, a guaranteed minimum wage shall be established, State support shall be provided for the family, maternity, fatherhood and childhood, to the disabled and to elderly citizens, the system of social services shall be developed and State pensions, allowances and other social security guarantees shall be established.'

⁵⁶⁹ Article 37 (3) reads as follows: 'Everyone shall have the right to work in conditions, which meet safety and hygiene requirements, and to receive remuneration for labour without any discrimination whatsoever and not below the minimum wage established by federal law, as well as the right of protection against unemployment'. See also *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 367.

⁵⁷⁰ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 5, 10.

⁵⁷¹ Federal Law No. 181-FZ of November 24, 1995 about Social Protection of Disabled People in the Russian Federation, available at

act is to ensure that persons with disabilities have the same opportunities as other citizens to exercise civil, economic, political and other rights and freedoms.⁵⁷² Article 1 para. 1 defines a person with disability as ‘a person with impaired health and persistent impairment of body function caused by illness or the consequences of trauma or defects and resulting in the limitation of everyday activities and the need for social protection’.⁵⁷³ Article 3, as modified after the ratification of the CRPD, bans discrimination on the basis of disability, and gives a definition of discrimination which reproduces *verbatim* that included in Article 2 CRPD.⁵⁷⁴ Other provisions guarantee participation and inclusion in society of persons with disabilities.⁵⁷⁵ Positive measures in the areas of vocational training and work are also mentioned as a tool to foster inclusion. In particular, Article 20 of the Federal Act on Social Protection for Persons with Disabilities establishes hiring quotas for persons with disabilities.⁵⁷⁶

In order to implement the CRPD, the Russian Federation enacted the **Federal Law No. 419-FZ of December 1, 2014**.⁵⁷⁷ This piece of legislation amends 25 existing acts on social protection of persons with disabilities to ensure compliance with the CRPD.⁵⁷⁸ Those amendments concern *inter alia* non-discrimination, accessibility to facilities and services, economic and training support.⁵⁷⁹ However, Russian legislation as yet does not include a provision on reasonable accommodation.⁵⁸⁰

The rights of people with disabilities in the field of work are enshrined in the **Labour Code**.⁵⁸¹ The code prohibits discrimination in the employment on the ground *inter alia* of disability.⁵⁸² It also establishes that the employer ‘shall create labour conditions for disabled persons according to the individual rehabilitation program’.⁵⁸³ In the Code, a set of other provisions have been introduced in order to ensure the ability of persons with disabilities to exercise their labour rights on an equal basis with others. The **Code of Administrative Offences No. 195-FZ of 30 December 2001**⁵⁸⁴ has introduced sanctions in case of failure to meet the hiring quota requirements⁵⁸⁵ and of non-compliance with the labour code standards.⁵⁸⁶

The CRPD in the Russian Legal Framework

https://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=44981&p_country=RUS&p_count=859&p_classification=08.01&p_classcount=18 .

⁵⁷² *Ibid.* preamble.

⁵⁷³ *Ibid.* Article 1 (1).

⁵⁷⁴ D. Bartenev and E. Evdokimova, Russia, in L. Waddington and A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice* (OUP, 2018), p. 352.

⁵⁷⁵ See *Articles 2 (1), 9 (3), 14, 15*.

⁵⁷⁶ *Ibid.* at para. 343.

⁵⁷⁷ Federal Law No. 419-FZ of December 1, 2014, on Amendments to Certain Laws of the Russian Federation on Social Protection of Persons with Disabilities Following the Ratification of the Convention on the Rights of Persons with Disabilities (as amended by Federal Law No. 394-FZ of December 29, 2015), available at <https://wipolex.wipo.int/en/legislation/details/17073>

⁵⁷⁸ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 20.

⁵⁷⁹ *Ibid.* at para. 53, 98, 106.

⁵⁸⁰ E. Shinkareva, ‘Development of Law on Protection from Disability-Based Discrimination in Russia’ (2018), 23 (4) *Białostockie Studia Prawnicze*, p. 57, available at https://webcache.googleusercontent.com/search?q=cache:fQBHG6R14SkJ:https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/7572/1/BSP_23_4_E_Shinkareva_Development_of_Law.pdf+&cd=1&hl=it&ct=clnk&gl=ie .

⁵⁸¹ Labour Code of the Russian Federation of 31 December 2001, available at <https://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm>

⁵⁸² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at paras. 329-330.

⁵⁸³ Article 224.

⁵⁸⁴ Code of Administrative Offences of the Russian Federation No. 195-Fz Of December 30, 2001 (adopted by the State Duma on December 20, 2001, endorsed by the Council of Federation on December 26, 2001), available at <https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru073en.pdf>

⁵⁸⁵ *Ibid.* Articles 19 (7) and 5 (42).

⁵⁸⁶ *Ibid.* Article 9 (13); see also *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 105.

The Russian Federation signed the CRPD on September 24, 2008 and ratified it on September 25, 2012⁵⁸⁷ In Russia, which is a monist country, the CRPD is fully applicable within the whole territory of the Federation, without any exception.⁵⁸⁸

Nevertheless, Russia has not ratified the Optional Protocol to the CRPD as yet.⁵⁸⁹

11.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

Further to the ratification of the CRPD, several provisions have been introduced to ensure accessibility for persons with disabilities of transportation, built environment polling stations social infrastructures, hospitals.⁵⁹⁰ Article 15 of the Federal Act on Social Protection for Persons with Disabilities ‘obliges authorities and organizations to ensure that persons with disabilities have unimpeded access to facilities, services and information in all areas provided for by the Convention, including city planning and development, the design, construction renovation and maintenance of facilities, the development and operation of transport, information and communications systems’.⁵⁹¹ However, in the Russian legal framework there is no term analogous to ‘universal design’.⁵⁹²

To ensure that persons with disabilities work in safe and healthy working conditions, the Health and Safety Rules of 18 May 2009, which are applicable to enterprises in all sectors of the economy, set out a series of requirements ‘to establish safe and healthy working conditions that take into account their physical needs’.⁵⁹³

The most important Russian policy document on accessibility of persons with disabilities is the State Accessible Environment Programme 2011-2020, which aims at creating a barrier-free environment (including a barrier-free workplace).⁵⁹⁴ The programme includes the promotion of best practices in various social sectors, but also financial support allocated to DPOs to promote inclusion of persons with disabilities in the labour market.⁵⁹⁵

Reasonable Accommodation

The concept of ‘reasonable accommodation’ is not mentioned explicitly in Russian legislation. However, according to the Initial Report to the CRPD Committee, a duty to provide reasonable accommodation can be inferred from other legal provisions and is inherent to the legal framework.⁵⁹⁶ For example, Article 23 of the of the Federal Act on Social Protection for Persons with Disabilities requires that persons with

⁵⁸⁷ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en>

⁵⁸⁸ *Ibid.* at para. 48. See also D. Bartenev and E. Evdokimova, Russia, in L. Waddington and A. Lawson, *The Un Convention on the Rights of Persons with Disabilities in Practice* (OUP, 2018), p. 352.

⁵⁸⁹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Russian Federation*, at para. 5.

⁵⁹⁰ D. Bartenev and E. Evdokimova, Russia, in L. Waddington and A. Lawson, *The Un Convention on the Rights of Persons with Disabilities in Practice* (OUP, 2018), p. 352, at p. 362. See e.g. Federal Act on Technical Regulations on the Safety of Buildings and Facilities; Urban Planning Code; Code SP 59.13330.2012; see also *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 30, 96, 100.

⁵⁹¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 95.

⁵⁹² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 18.

⁵⁹³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 337.

⁵⁹⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 8, 34, 112.

⁵⁹⁵ *Ibid.* at para. 44, 111, 365.

⁵⁹⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 17.

disabilities are effectively able to exercise their right to work in equal conditions of other people.⁵⁹⁷ This provision seems to encompass a duty of the employer to reasonable accommodate the employee. Furthermore, a few provisions include obligations which are akin to the duty to provide reasonable accommodation. Among them, Article 15 of the Federal Act on Social Protection for Persons with Disabilities states that, when existing facilities cannot be fully adapted to the needs of persons with disabilities, steps must be taken by the owners of those facilities to satisfy the minimum requirements of persons with disabilities, in agreement with civil society associations of persons with disabilities.⁵⁹⁸ Under the current legislation, however, denial of reasonable accommodation is not explicitly recognized as a prohibited ground for discrimination in all areas.⁵⁹⁹

It is worth mentioning that the Ministry of Labour and Social Protection Order No. 685 of 19 November 2013 (Annex 15) entrusts the Ministry of Labour and Social Protection with the authority to determine the basic requirements related to workplace accommodations for persons with disabilities, taking into account their needs and physical and/or mental conditions.⁶⁰⁰

11.4. Overview of Russian Policies on Inclusion of Persons with Disabilities in the Workplace

Between 2011 and 2015 a set of policies to promote employment of persons with disabilities have been adopted. For example positive actions have been adopted to improve the effectiveness of job placement and vocational training initiatives,⁶⁰¹ and the 2013-2014 programmes under Presidential Decree 597/2012 aimed to facilitate the recruitment of unemployed persons with disabilities.⁶⁰²

Social enterprises play a central role to include people with disabilities in the labour market.⁶⁰³ Furthermore, a wide range of financial supports are given from the Federation or regions to employers and DPOs. In particular, to promote the employment of persons with disabilities in the private sector financial support is provided to employers, 'involving partial offsetting of the costs of establishing special posts for persons with disabilities and provision of other benefits'.⁶⁰⁴ Moreover, when hiring a person with a disability, a company can reduce the tax base for calculating tax on profits, and, if more than 50% of the workforce are persons with disabilities, the enterprise receives a reduction in value added tax and property, land and transport taxes.⁶⁰⁵

The Federal Labour and Employment Service,⁶⁰⁶ the public agency responsible for identifying and preventing violations of human rights in employment settings, ensures the application of legislation and applies administrative and criminal sanctions in cases of violation.

⁵⁹⁷ Federal Law No. 181-FZ of November 24, 1995 about Social Protection of Disabled People in the Russian Federation, *supra*, Article 23; see also *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 334.

⁵⁹⁸ Federal Law No. 181-FZ of November 24, 1995 about Social Protection of Disabled People in the Russian Federation, *supra*, Article 15; see also *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 52.

⁵⁹⁹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Russian Federation*, at para. 13.

⁶⁰⁰ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 348.

⁶⁰¹ *Ibid.* at para. 339.

⁶⁰² *Ibid.* at para. 349.

⁶⁰³ *Ibid.* at para. 352.

⁶⁰⁴ *Ibid.* at para. 363.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ <<http://government.ru/en/department/238/events/>>

11.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

According to data which are reported in the Initial Report to the CRPD Committee, the efforts made by the Russian Federation to implement and enforce accessibility and reasonable accommodation provisions have led to an increase in the employment rate of persons with disabilities.⁶⁰⁷ However, the CRPD Committee noted 'with concern that, under the current legislation, denial of reasonable accommodation is not explicitly recognized as a prohibited ground for discrimination in all areas'.⁶⁰⁸ In particular in relation to reasonable accommodation in the workplace, the Committee has affirmed that 'there is a lack of transparent and formalized training and assistance in providing reasonable accommodation for persons with disabilities in the workplace'.⁶⁰⁹

In 2016, the International Labour Organization reported that Russia has one of the biggest disability employment gap (52.7%), while has one of the lowest employment rate of persons with disabilities.⁶¹⁰ This data confirm that persons with disabilities in Russia still face discrimination, and lack of accessible work environments.⁶¹¹ The Human Rights Watch World Report 2018 reiterates that, in Russia, lack of physical accessibility and employment discrimination persist.⁶¹²

A recent study has reported a few decisions in which Russian court relied on the Convention and affirmed the right of disabled workers to be reasonable accommodated.⁶¹³ In 2011, the Supreme Court Decision No. 92-G11-1 of 11 May 2011 affirmed the equal right of persons with disabilities to be employed in the State civil service.⁶¹⁴ No further case law could be found because the official English translation of judgments is not available online.⁶¹⁵

⁶⁰⁷ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 341, 347, 351, 357, 362, 368.

⁶⁰⁸ *Ibid.* at para. 13.

⁶⁰⁹ *Ibid.* Para 53

⁶¹⁰ <<https://www.theguardian.com/global-development-professionals-network/2016/jun/23/russia-and-the-us-have-the-worst-employment-gaps-for-disabled-people>>

⁶¹¹ A. Arbuz, 'Employment of persons with disabilities in the new industrialization (by the example Omsk region)' (2019), 240 *Advances in Social Science, Education and Humanities Research*, Atlantis Press, 2nd International Scientific Conference on New Industrialization: Global, National, Regional Dimension (SICNI 2018), available at <<https://www.atlantis-press.com/proceedings/sicni-18/55911926>>

⁶¹² <<https://www.hrw.org/world-report/2018/country-chapters/russia#1aadcc>>

⁶¹³ D. Bartenev and E. Evdokimova, 'Russia', in L. Waddington and A. Lawson, *The Un Convention on the Rights of Persons with Disabilities in Practice* (OUP, 2018), p. 352.

⁶¹⁴ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 360.

⁶¹⁵ <<https://www.lexadin.nl/wlg/courts/nofr/oeur/lxctrus.htm>>

12. Israel

12.1. Factual Background

Statistical data from 2017 on disability in Israel are included in a publication released by the Commission for Equal Rights of Persons with Disabilities and Myers-Jewish Joint Distribution Committee (JDC) Brookdale Institute.⁶¹⁶ According to these data, there are almost 1,412,000 persons with disabilities in Israel,⁶¹⁷ who constitute 17% of the overall population. Persons with disabilities who are employed amount to 50% of all persons with disabilities.⁶¹⁸ The most prevalent types of disabilities among the working age population are physical disabilities (17.5%) and psychosocial disabilities (9.2%).⁶¹⁹ While the percentage of men with disabilities is similar to that of woman,⁶²⁰ the disability and gender gaps in employment are considerable: 43% of women with disabilities are employed (compared with 74% of employed women without disabilities) while 54.5% of men with disabilities are employed (compared with 84% of men without disabilities). Between 2013 and 2015, a decline in the employment rate of persons with disabilities from 57% to 51% was registered, while the employment rate of persons without disabilities remained stable.⁶²¹

12.2. The Rights of Persons with Disabilities in Israel: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Israel (also known as ‘State of Israel’) is a parliamentary democracy.⁶²² It does not have a written Constitution.⁶²³ However, a set of Basic Laws, which enjoy semi-constitutional status, lay down rules related to the functions and powers of the State bodies and human rights. Among them, the **Basic Law: Human Dignity and Liberty**⁶²⁴, enacted in 1992, establishes the values of the Israeli State ‘as a Jewish and democratic state’⁶²⁵ and prohibits ‘any violation of the life, body or dignity of any person as such’⁶²⁶, in that establishing a principle akin to the equality principle.⁶²⁷

The main legislative act related to disability is the **Equal Rights of Persons with Disabilities Law 5758-1998**⁶²⁸ (hereinafter ‘Equal Rights Law’). This law enshrines Israel’s commitment to protect and promote the rights of persons with disabilities in compliance to the principle of equality and the principle of human

⁶¹⁶ L. Barlev, Y. Keren-Abraham, Y. Haber, G. Admon-Rick, ‘People with Disabilities in Israel 2017’ Main Findings, Jerusalem, Commission of Equal Rights of Persons with Disabilities, Ministry of Justice and Myers-JDC-Brookdale Institute, available at <<https://brookdale.idc.org.il/en/publication/people-with-disabilities-2017/>>

⁶¹⁷ *Ibid.* p. 2.

⁶¹⁸ *Ibid.* p. 4.

⁶¹⁹ JDC Israel Unlimited, Ruderman and Myers-JDC-Brookdale, ‘Facts and Figures – People with Disabilities in Israel 2018’, p. 7, available at <https://brookdale.jdc.org.il/wp-content/uploads/2018/08/Facts_Figures_2018.pdf>

⁶²⁰ L. Barlev, Y. Keren-Abraham, Y. Haber, G. Admon-Rick, ‘People with Disabilities in Israel 2017’ Main Findings, Jerusalem, Commission of Equal Rights of Persons with Disabilities, Ministry of Justice and Myers-JDC-Brookdale Institute, p. 2, available at <<https://brookdale.idc.org.il/en/publication/people-with-disabilities-2017/>>

⁶²¹ JDC Israel Unlimited, Ruderman and Myers-JDC-Brookdale, ‘Facts and Figures – People with Disabilities in Israel 2018’, p. 13, available at <https://brookdale.jdc.org.il/wp-content/uploads/2018/08/Facts_Figures_2018.pdf>

⁶²² <<https://embassies.gov.il/UnGeneva/AboutIsrael/Pages/AboutIsraelgeneralinfo.aspx>>

⁶²³ <https://knesset.gov.il/constitution/ConstIntro_eng.htm>

⁶²⁴ Basic Law: Human Dignity and Liberty, 1992, available at <https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm>

⁶²⁵ *Ibid.* section 1.

⁶²⁶ *Ibid.* section 2.

⁶²⁷ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 35.

⁶²⁸ Equal Rights For Persons With Disabilities Law, 5758-1998, as amended, including all amendments up to Amendment No. 11, 5773-2012, Sefer Hachukkim 2388 of November 19th, 2012, available at <<https://www.justice.gov.il/En/Units/CommissionEqualRightsPersonsDisabilities/Equal-Rights-For-Persons-With-Disabilities-Law/Pages/Equal-Rights-For-Persons-With-Disabilities-Law.aspx>>

dignity.⁶²⁹ Section 5 provides for a definition of disability in Israeli legislation,⁶³⁰ defining a person with disabilities as ‘a person with a physical, mental or intellectual, including cognitive, impairment, whether permanent or temporary, which substantially limits his functioning in one or more of the central spheres of life’.⁶³¹ The Equal Rights Law prohibits discrimination on the ground of disability in all areas of life, including employment.⁶³² It also ensures accessibility of all public places and services. With regard to employment, the Equal Rights Law prohibits discrimination on the basis of disability in relation to all stages of the employment process (including hiring, working conditions, promotion and dismissal),⁶³³ and requires affirmative action to support inclusion.⁶³⁴ Section 9 of the Equal Rights Law requires that if ‘an employer with over 25 workers finds that persons with disabilities are not appropriately represented among her/his employees, she/he shall act to promote such appropriate representation, including making adjustments to the workplace’.⁶³⁵ The prohibition on discrimination in the field of employment also includes failure to make reasonable adjustments.⁶³⁶ Section 12 provides that a person who suffered from discrimination in employment is entitled to seek redress.

The Equal Rights for Persons with Disabilities (State Participation in Financing Adjustments) Regulations 5766-2006 ‘allow an employer of an employee with disabilities, or an employer who intends to hire a person with disabilities, to apply to the Administration in order to receive government participation in funding of the adjustments required in the employee’s workplace environment, based on her/his disability, needs and attributes, so that the employee will be able to perform her/his job and to function in the workplace like other employees’.⁶³⁷ Moreover, the Equal Rights for Persons with Disabilities (Accessibility Adjustments for Professional Training) Regulations 5775-2014 include accessibility provisions for training courses under the supervision of the Ministry of Labour, Social Affairs and Social Services (MOLSASS).⁶³⁸

The **Persons with Disabilities (Allowance and Rehabilitation) Law 5719-1959** and the **National Insurance Institute Law 5755-1995**⁶³⁹ define degrees of disability and methods of evaluation, in order to allow persons with disabilities to work without losing their disability allowances.⁶⁴⁰ The latter was amended in 2017.⁶⁴¹ The **Civil Service (Appointments) Law 5719-1959** establishes the duty of appropriate representation for persons with disabilities in the Civil Service workforce and requires the Civil Service to promote the employment of persons with disabilities.⁶⁴²

⁶²⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 16.

⁶³⁰ *Ibid.* at para. 22.

⁶³¹ Equal Rights For Persons With Disabilities Law, 5758-1998, as amended, including all amendments up to Amendment No. 11, 5773-2012, Sefer Hachukkim 2388 of November 19th, 2012, section 5, available at <<https://www.justice.gov.il/En/Units/CommissionEqualRightsPersonsDisabilities/Equal-Rights-For-Persons-With-Disabilities-Law/Pages/Equal-Rights-For-Persons-With-Disabilities-Law.aspx>>

⁶³² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 36.

⁶³³ Equal Rights For Persons With Disabilities Law, 5758-1998, as amended, including all amendments up to Amendment No. 11, 5773-2012, Sefer Hachukkim 2388 of November 19th, 2012, section 8, available at <<https://www.justice.gov.il/En/Units/CommissionEqualRightsPersonsDisabilities/Equal-Rights-For-Persons-With-Disabilities-Law/Pages/Equal-Rights-For-Persons-With-Disabilities-Law.aspx>>

⁶³⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 38.

⁶³⁵ *Ibid.* para 276.

⁶³⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 38 (c).

⁶³⁷ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 281.

⁶³⁸ *Ibid.* at para. 61.

⁶³⁹ National Insurance Law (Consolidated version), 5755-1995 (as amended until the end of April 1997), available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=49591>

⁶⁴⁰ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 24, 280.

⁶⁴¹ JDC Israel Unlimited, Ruderman and Myers-JDC-Brookdale, ‘Facts and Figures – People with Disabilities in Israel 2018’, p. 5. available at <https://brookdale.jdc.org.il/wp-content/uploads/2018/08/Facts_Figures_2018.pdf>

⁶⁴² *Ibid.* at para. 278.

There are other Israeli laws that concern to varying degrees persons with disabilities. Among them, the Rehabilitation of Persons with Mental Disabilities in the Community Law 5760-2000 provides for various support measures to assist them in realizing their full occupational potential.⁶⁴³

The CRPD in the Israeli Legal Framework

The State of Israel signed the CRPD on March 30, 2007 and ratified it on September 28, 2012.⁶⁴⁴ The Israel Commission for Equal Rights of Persons with Disabilities is the coordinating entity acting within the government to advance the CRPD implementation as well as the entity monitoring its actual implementation.⁶⁴⁵

12.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

As mentioned above, the Equal Rights Law requires for public spaces and infrastructures to be accessible. Section 19B of the Equal Rights Law enshrines the principle of accessibility, stating that:

‘A person with a disability is entitled to accessibility within a public place and a public service.’⁶⁴⁶

The Planning and Building Law 5725-1965⁶⁴⁷ on accessibility provides for accessibility requirements related to services and public places.⁶⁴⁸ Furthermore, a set of **Accessibility Regulations**⁶⁴⁹ prescribe detailed obligations to ensure accessibility, a stage-by-stage timeframe for making public places accessible as well as provisions aimed at the implementation of accessibility on the technical level (including references to Israeli standards).⁶⁵⁰ The legal framework is complemented by Israeli accessibility standards, elaborated by the Israeli Standards Institute.⁶⁵¹

Accessibility is compulsory for all places open to the public and for workplaces in new buildings, as well as for new private residential buildings that have at least 6 residential units.⁶⁵² Existing workplaces do not need to be accessible, although accessibility can be ensured through reasonable accommodation. However, if services open to the public must be accessible to customers, those accessibility requirements also benefit workers in those public services/shops.

Reasonable Accommodation

⁶⁴³ *Ibid.* at para. 288.

⁶⁴⁴ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 2.

⁶⁴⁵ <<https://www.justice.gov.il/En/Units/CommissionEqualRightsPersonsDisabilities/Equality-and-Inclusion/Pages/Convention-on-the-Rights-of-Persons-with-Disabilities.aspx>>

⁶⁴⁶ Equal Rights For Persons With Disabilities Law, 5758-1998, as amended, including all amendments up to Amendment No. 11, 5773-2012, Sefer Hachukkim 2388 of November 19th, 2012, section 19B, available at <<https://www.justice.gov.il/En/Units/CommissionEqualRightsPersonsDisabilities/Equal-Rights-For-Persons-With-Disabilities-Law/Pages/Equal-Rights-For-Persons-With-Disabilities-Law.aspx>>

⁶⁴⁷ Planning and Building Law 5725-1965, passed by the Knesset on the 14th Tammuz, 5725 (14th July, 1965) and published in Sefer Ha-Chukkim No. 467 of the 14th Av, 5725 (12th August, 1965), available at <<https://www.adalah.org/uploads/oldfiles/Public/files/Discriminatory-Laws-Database/English/07-National-Planning-Building-Law-1965.pdf>>

⁶⁴⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 18.

⁶⁴⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 20.

⁶⁵⁰ *Ibid.* at para. 19.

⁶⁵¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 74, 75.

⁶⁵²

<https://www.justice.gov.il/En/Units/CommissionEqualRightsPersonsDisabilities/Accessibility/Accessibility_Legislation/Pages/Places-Requiring-Accessibility.aspx>

Reasonable accommodation is defined by Section 8 (e) of Equal Rights Law specifies that accommodations 'include modifying the workplace, the equipment therein, job requirements, work hours, job hiring tests, training and instruction and work procedures, all without imposing an undue burden on the employer'.⁶⁵³ Employers are not obliged to implement adjustments if those adjustments affect the essence of the job or the position, or if they would impose an 'undue burden' upon them. In order to ascertain whether an accommodation entails an undue burden a number of factors must be considered: the cost and nature of the accommodation, the size and structure of the business, the scope of activity, the number of employees, composition of the staff and the existence of external or State sources of financing for the accommodation.⁶⁵⁴ As mentioned above, the Equal Rights for Persons with Disabilities (State Participation in Financing Adjustments) Regulations 5766-2006 provides for financial support *inter alia* to cover costs of accommodations⁶⁵⁵

12.4. Overview of Israeli Policies on Inclusion of Persons with Disabilities in the Workplace

The Administration for the Integration of Persons with Disabilities at the Workforce in the MOLSASS is entrusted with the task of improving the employment situation of persons with disabilities in Israel and operates three centres providing long and short term support to employers who want to employ a person with disabilities, assisting them with all the processes required for employing new workers with disabilities and keeping those employed at the workplace.⁶⁵⁶

In Israel, sheltered employment exists in the form of rehabilitation vocational services that aim to prepare persons with disabilities to work in the open labour market.⁶⁵⁷

12.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Although the State of Israel has taken measures to comply with the obligations set out in the CRPD, there are still discrepancies between the legal framework and practice in the field of the rights of persons with disabilities.⁶⁵⁸ Persons with disabilities in Israel are still disadvantaged in employment as well as in education and income, since they still suffer from discrimination and accessibility barriers, not only physical barriers but also barriers of services.⁶⁵⁹ In particular, persons with disabilities still face discrimination in the labour market in terms of admittance, wages and the extent of employment.⁶⁶⁰

Recent measures, such as the Expansion Order for Promoting Employment of Persons with Disabilities (into effect on October 5, 2014) or the Amendment No. 15 to the Equal Rights Law setting a quota of persons with disabilities in the public sector, aim to increase the employment rate of persons with disabilities.⁶⁶¹

No relevant case law could be found in English.

⁶⁵³ *Ibid.* section 8 (e).

⁶⁵⁴ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para 274.

⁶⁵⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 281 (a).

⁶⁵⁶ *Ibid.* at para. 281 (b).

⁶⁵⁷ *Ibid.* at para. 282, 284, 286.

⁶⁵⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 352.

⁶⁵⁹ *Ibid.* at para. 352 – 354.

⁶⁶⁰ *Ibid.* at para. 358.

⁶⁶¹ *Ibid.* at para. 277.

13. Canada

13.1. Factual Background

In 2006, the disability rate in Canada was approximately 14.3%.⁶⁶² The 2012 Canadian Survey on Disability (CSD) reported a similar percentage, stating that 3.8 million individuals in Canada have a disability that limited their daily activities.⁶⁶³ In 2006, 207.580 employed working-age adults with disabilities required resource-specific accommodations and 270.920 required physical/structural changes to their workplace environments. In 2006, 70.2% of employed working-age adults with disabilities with requirements had their resource-specific workplace modification needs met.⁶⁶⁴ Approximately 1.2 million Canadians with disabilities live below the poverty line. The employment rate of persons with disabilities was extremely low and it has remained unchanged over the last decade.⁶⁶⁵ According to the 2012 survey, in line with the global trend already highlighted in the preface, persons with disabilities in Canada experience significantly higher rates of unemployment than persons without disabilities.⁶⁶⁶ Among them, women with disabilities experience more difficulties in finding a job.⁶⁶⁷ The most recent 2017 Canadian Survey on Disability (CDS) shows that the disability rate in Canada has grown since 2012. It confirms the existing employment gap and shows that persons with disabilities with a job represent 59% of the total number of persons with disabilities and they are less likely to be employed than individuals without disabilities. The survey also shows that persons with more severe disabilities (28%) aged 25 to 64 years are more likely to be living in poverty than their counterparts without disabilities (10%) or with milder disabilities (14%).⁶⁶⁸

13.2. The Rights of Persons with Disabilities in Canada: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Canada is a federal state and provisions on rights of persons with disabilities are included in federal, provincial and territorial legislation. Legislation relevant to persons with disabilities includes **human rights laws** and **sectoral laws** governing specific social and economic areas.⁶⁶⁹ As mentioned in the Introduction, this report only considers federal legislation.

The Canadian legal framework includes, in various acts, a neat prohibition of discrimination on the grounds of disability. The **Canadian Bill of Rights** generally protects fundamental freedoms, legal rights and equality before the law.⁶⁷⁰ The Canadian Constitution Act 1982 (**Canadian Charter of Rights and Freedoms**) provides for the principle of equality in Article 15. The latter provision explicitly **bans**

⁶⁶² M. Prince, 'Employment Equality for Canadians with Disabilities' from the official website of the Council of Canadians with Disabilities (2014), available at <<http://www.ccdonline.ca/en/socialpolicy/employment/Employment-Equality9June2014>>.

⁶⁶³ <<https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2015001-eng.htm>>. See also, *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 6.

⁶⁶⁴ Federal Disability Report, *Advancing the Inclusion of People with Disabilities* (2009), p. 34, available at <http://www.gov.mb.ca/dio/pdf/2009_fdr.pdf>.

⁶⁶⁵ International Association of Professionals in Disability Management (IAPDM), available at <<https://www.cspdm.ca/news-events/broad-directions-for-the-new-canadian-accessibility-legislation/>>.

⁶⁶⁶ This is highlighted in multiple reports. Among the most recent see *the Parallel Report for Canada of March 20 - April 7, (2017)*, available at <http://www.cacl.ca/sites/default/files/uploads/INT_CRPD_CSS_CAN_26744_E_Parallel_Report.pdf>.

⁶⁶⁷ Coalition of Canadian, *Disabled Persons Organisation-Parallel Report* (2017), executive summary, p.3, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCAN%2f26744&Lang=en>.

⁶⁶⁸ Canadian Survey on Disability Reports, Stuart Morris, Gail Fawcett, Laurent Brisebois, Jeffrey Hughes, *A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017*. Available at: <<https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm>>

⁶⁶⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 2. See also, at <<https://www.canada.ca/en/canadian-heritage/services/rights-people-disabilities.html>>.

⁶⁷⁰ Canadian Bill of Rights S.C. 1960, c. 44, available at <<http://laws-lois.justice.gc.ca/eng/acts/C-12.3/page-1.html>>.

discrimination *inter alia* on the grounds of ‘mental or physical disability’. In addition, Article 15(2) allows for positive actions that have as their object ‘the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability’.⁶⁷¹

The **Canadian Human Rights Act (CHRA)**⁶⁷² protects Canadians with disabilities from discrimination when they are employed by or receive services from the federal government, or sub-national governments and by private companies regulated by federal laws.⁶⁷³ Disability is defined in the act as ‘any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug’. In particular, a general prohibition of discrimination *inter alia* on the grounds of disability is included in Article 3 para. 1 of the CHRA. In addition, this provision includes a prohibition of multiple discrimination.⁶⁷⁴ The **CHRA** mentions a series of prohibited discriminatory practices, and imposes on employers a general duty to accommodate employees to avoid discrimination.⁶⁷⁵ **Employers must accommodate employees on any of the protected grounds, if the accommodation does not entail undue hardship**, and taking into account health, safety and cost.⁶⁷⁶ The Canadian Human Rights Commission (CHRC),⁶⁷⁷ among its tasks,⁶⁷⁸ provides guidance on the implementation of this duty.⁶⁷⁹ Article 17 CHRA states that a **plan for adapting any services, facilities, premises, equipment or operations to meet the needs of persons with disabilities** is to be approved by the CHRC. If the CHRC is satisfied that, by reason of any change in circumstances, a plan previously approved is not appropriate anymore and no longer meets the needs of persons with a disability, the Commission may rescind its approval of the plan to the extent required by the change in circumstances. Article 24 empowers the Governors to enact regulations that, for the benefit of persons having any disability, prescribe standards of accessibility to services, facilities or premises.

Besides the CHRA, there is federal legislation that systematically requires employers to proactively change their hiring and employment practices to remove barriers to equal opportunity.⁶⁸⁰ The most relevant act is the **Employment Equity Act**,⁶⁸¹ which requires federally regulated employers to achieve workplace equality and remove the barriers to employment experienced by persons with disabilities and other designated groups.⁶⁸² Article 2 lays down the purpose of the act and affirms that this is

⁶⁷¹ <http://laws-lois.justice.gc.ca/eng/Const/Const_index.html>.

⁶⁷² Canadian Human Rights Act (R.S.C., 1985, c. H-6), available at <<http://laws-lois.justice.gc.ca/eng/acts/h-6/page-1.html>>.

⁶⁷³ Provincial and territorial human rights laws are akin to the Canadian Human Rights Act and protect people from discrimination in areas of provincial and territorial jurisdiction, such as restaurants, stores, schools, housing and most workplaces. For a list of legislation see at: <<https://www.chrc-ccdp.gc.ca/eng/content/provincial-territorial-human-rights-agencies>>.

⁶⁷⁴ Article 3.1 reads as follows: ‘For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds’ at *ibid*.

⁶⁷⁵ For a general account see <<https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/diversity-equity/duty-accommodate-general-process-managers.html>>.

⁶⁷⁶ Article 15(2) CHRA.

⁶⁷⁷ The CHRC, established by the CHRA, is the independent body entrusted with the promotion of human rights through research and policy development, but also through collaboration with other federal bodies. The CHRC can review any regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament and can issue guidelines.⁶⁷⁷ In addition, the CHRC can hear discrimination complaints. It can liaise with both the complainant and respondent to resolve the issue through mediation, and when a complaint cannot be settled, or when further examination is necessary, the CHRC may refer the complaint to the Canadian Human Rights Tribunal.

⁶⁷⁸ See below.

⁶⁷⁹ <<http://www.chrc-ccdp.gc.ca/eng/content/what-duty-accommodate>>.

⁶⁸⁰ K. Banks, ‘Reasonable Accommodation as Equal Opportunity in Canadian Employment Law’ in Aa.Vv., *Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law*, (Wolters Kluwer International BV, 2016) chapter 2.07 [C], page 42.

⁶⁸¹ Employment Equity Act (S.C. 1995, c. 44) available at <<http://laws.justice.gc.ca/eng/acts/e-5.401/>>.

⁶⁸² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 82.

‘to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences’.

Interestingly, the Employment Equity Act provides for a definition of persons with disabilities (not of ‘disability’ as the CHRA does). Article 3 states that persons with disabilities are those:

‘who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who (a) consider themselves to be disadvantaged in employment by reason of that impairment, or (b) believe that an employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment’.

This definition also includes ‘persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace’.

Article 5 of the Employment Equity Act lays down the duty of the employer to eliminate barriers and provide reasonable accommodation, which will be discussed further in the subsequent section.

The most recent legislative intervention on accessibility for persons with disabilities is represented by Bill C-81 (42 – 1), that was passed by the Senate, on May 13th 2019 and received the royal assent in June 2019. It is called Act to ensure a barrier-free Canada, better known as ‘**The Accessible Canada Act**’.⁶⁸³ The Accessible Canada Act aims to introduce new rules that promote accessibility making Canada Barrier-free.⁶⁸⁴ The principles that inform this Act are those of inherent dignity, equal opportunity and inclusive design. It is worth mentioning that this Act includes a definition of disability which echoes Article 1 CRPD.

As mentioned above, other legislative acts include disability related provisions. For instance, voting rights of persons with disabilities are provided for in the Canada Elections Act, while specific provisions related to access to justice and disability rights in criminal proceedings are included in the Criminal Code and in the Canada Evidence Act.

The CRPD in the Canadian Legal Framework

Canada ratified the CRPD in 2010, and the Optional Protocol in 2018. It must be borne in mind that Canada is a dualist country, i.e. a treaty that has been signed and ratified still requires incorporation through domestic law to be enforceable at the national level.⁶⁸⁵ Hence, the CRPD is not directly enforceable.

The Government of Canada’s Office for Disability Issues (ODI) ‘provides leadership on disability issues at the federal level’ and is the designated focal point.⁶⁸⁶

When reviewing the initial report of Canada, in April 2017, the Committee expressed concern that ‘the provisions of the Convention have yet to be appropriately incorporated into legislation and policies across sectors and levels of government’. It also highlighted the ‘uneven application of the Convention and the Committee’s jurisprudence by the judiciary and law enforcement officials’.⁶⁸⁷

⁶⁸³ <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=9990870&Language=E> [accessed: 17/05/2019]

⁶⁸⁴ < <https://www.canada.ca/en/employment-social-development/programs/accessible-people-disabilities/act-summary.html>>

⁶⁸⁵ L. Barnett, *Canada’s Approach to the Treaty-Making Process* Background Paper† No. 2008-45-E, available at <<https://lop.parl.ca/Content/LOP/ResearchPublications/2008-45-e.htm>>.

⁶⁸⁶ State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities, at para. 9 and 42.

⁶⁸⁷ UN Committee on the Rights of Persons with Disabilities (2017), Concluding observations on the initial report of Canada, (Un Doc. CRPD/C/CAN/CO/1).

13.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility of the Workplace

Article 5(a) of the **Employment Equity Act** lays down the duty of the employer to eliminate barriers. It provides that:

‘Every employer shall implement employment equity by

- (a) **identifying and eliminating employment barriers** against persons in designated groups that result from the employer’s employment systems, policies and practices that are not authorized by law [...]’.

In 2016, the CHRC began implementing a three years strategic plan (2016-2018) for ensuring equal opportunities to those who are considered vulnerable people, including persons with disabilities. The Commission highlights that employment equality requires special measures and accommodation of differences and it encourages employers to act and to adopt inclusion practices. The Commission is responsible for guaranteeing compliance with the Employment Equity Act: this involves auditing federally regulated employers to ensure that they are providing equal opportunities to four designated vulnerable groups, among which are persons with disabilities.⁶⁸⁸ In 2018, the Commission detailed a new strategic plan with the aim to implement more and more measures protecting equal rights and accessibility.⁶⁸⁹

A new federal accessibility law has been recently approved.⁶⁹⁰ The Act’s purpose is to identify, remove and prevent accessibility barriers in areas such as **employment, built environment**, federally run programs and services, banking, telecommunications and transportation. In advance of the release of the act, the Federal Government released a report entitled ‘*Creating new national accessibility legislation: What we learned from Canadians*’ setting out a range of priority areas following national consultations and identified employment for persons with disabilities as a key area for action and a priority.⁶⁹¹ The report showed that accessibility is essential in order to ensure inter alia fair hiring practices, fair wages, and career advancement.

The Accessible Canada Act in its approved form applies to the employment settings. As mentioned above, it includes a definition of disability which mirrors that of the CRPD, and includes a definition of barrier which reads as follows:

‘barrier means anything — including anything physical, architectural, technological or attitudinal, anything that is based on information or communications or anything that is the result of a policy or a practice — that hinders the full and equal participation in society of persons with a physical, mental, intellectual, learning, communication or sensory impairment or a functional limitation’.⁶⁹²

This definition is essential to define the concept of accessibility for persons with disabilities in the Canadian legislation and policies, even in relation to the employment context. All regulated entities included in the act must ensure accessibility and must create an accessibility plan. Even though the Accessible Canada Act has the aim to identify, remove and prevent barriers to accessibility, it allows for several exemptions and establishes no precise timeline for the implementation of accessibility obligations.

⁶⁸⁸ Canadian Human Rights Commission, Departmental Plan 2017-2018, available at: <https://www.chrc-ccdp.gc.ca/eng/content/departmental-plan-2017-18>.

⁶⁸⁹ Canadian Human Rights Commission, Department Plan 2018-2019, available at: <https://www.chrc-ccdp.gc.ca/eng/content/2018-19-departmental-plan>.

⁶⁹⁰ <<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-81/royal-assent>>.

⁶⁹¹ <<https://www.canada.ca/en/employment-social-development/programs/planned-accessibility-legislation/reports/consultations-what-we-learned.html>>.

⁶⁹² Act to Ensure a barrier-free Canada, paragraph 2, available at <<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-81/third-reading#enH763>>

The repeated use of the word ‘may’ instead of ‘shall’ in key provisions also seems to render the application of the Act optional and might give rise to problems in its effective implementation.⁶⁹³

There are provincial acts on accessibility such as the Accessibility for Ontarians with Disabilities Act (2005), which establishes a lot of requirements for the employers, and the Accessibility for Manitobans Act (2013), that establishes employment accessibility standards (especially in articles 4, 5, 6, 13(4)), but they fall outside the scope of this report.⁶⁹⁴

Reasonable accommodation

As mentioned above, in Canada, duties to provide reasonable accommodation are included in human rights legislation (e.g. the CHRA) and the **Employment Equity Act** and are applied in relation to all discrimination grounds.⁶⁹⁵ The duty to accommodate derives also from rulings of the Supreme Court of Canada.⁶⁹⁶

Article 5 lett. b) of the **Employment Equity Act** requires employers to institute positive policies and practices and making reasonable accommodations as ensure that persons with disabilities achieve a degree of representation in the employer’s workforce. Accommodations include both technical and organizational arrangements. For instance, employers are required to provide mechanical lifting devices, ergonomic chairs, hearing aids, or lumbar support braces.⁶⁹⁷

Accommodations need to be agreed with the employee and need to be provided accordingly. A key example is a 1995 case from Alberta’s court in *Re Calgary District Hospital Group*.⁶⁹⁸ In this case, a nurse with a back-related injury was refused return to work because her back injury had left her unable to perform several key aspects of her regular position, including the lifting and transferring of patients. The court stated that the hospital had not examined ways to re-arrange the nursing positions in order to find an accommodation, and stated that the duty to accommodate may in fact include significant workplace reorganization.⁶⁹⁹

The obligation for reasonable accommodations is limited by the proof of undue hardship, and it forces organizations to take into account the needs of workers with disabilities.

13.4. Overview of Canadian Policies on Inclusion of Persons with Disabilities in the Workplace

The right to work of Canadians with disabilities is ensured by a range of measures, including federal, provincial and territorial human rights legislation and specific legislation, regulations, policies and guidelines.⁷⁰⁰ Canada has **not** introduced quota systems within employment schemes designed to facilitate the employment of persons with disabilities. It decided instead to strengthen the voluntary

⁶⁹³ Opinion ‘Canada’s pending accessibility law comes off as the Liberals just fulfilling an election promise’ <<https://www.cbc.ca/news/opinion/accessibility-law-1.5005005>>

⁶⁹⁴ K. Banks, ‘Reasonable Accommodation as Equal Opportunity in Canadian Employment Law’, in Aa.Vv., Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law’ (Wolters Kluwer International BV, 2016) chapter 2.07 [C], page 43.

⁶⁹⁵ Ibid. chapter 2, page 27.

⁶⁹⁶ M. Lynk, ‘Disability and the Duty to Accommodate in the Canadian Workplace’, page 3, available at <<http://www.addictionconsulting.com/media/ACCOMMODATION.pdf>>.

⁶⁹⁷ K. Banks, ‘Reasonable Accommodation as Equal Opportunity in Canadian Employment Law’, in Aa.Vv., Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law’ (Wolters Kluwer International BV, 2016) chapter 2.04, page 40.

⁶⁹⁸ *Re Calgary District Hospital Group and U.N.A.* Loc. 121-R (1994), 41 L.A.C. (4th) 319

⁶⁹⁹ Ibid. See also at <<http://www.ohrc.on.ca/pt/book/export/html/2873>>.

⁷⁰⁰ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 45.

approach by employers. As noted by Vorhnolt,⁷⁰¹ the rationale of this approach is rooted in the belief that quotas might perpetuate stigma and discrimination against people with disabilities, and that individuals with disabilities are professionally competitive if they are integrated in a work environment which is adapted to their needs.

Canadian provinces have utilised disability legislation and programmes to integrate people with disabilities into the labour market and assure employment equality and opportunities, including policies on sheltered workshops. For instance, in the province of Québec, the *Contrat d'intégration au travail*⁷⁰² promotes the employment of individuals with disabilities by supplying grants.

The most relevant policies on reasonable accommodation are the '**Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service**' and the '**Employment Equity Policy**'.⁷⁰³ The first outlines steps to achieve the full participation of people with disabilities in the public administration⁷⁰⁴ and in public services in general whether as candidates for employment or as employees.⁷⁰⁵ The Employment Equity Policy supports the fulfilment of the obligations laid down in the Employment Equity Act.⁷⁰⁶ These policies, however, have not proven sufficient to foster a culture of accommodation and the CRPD Committee has encouraged Canada to 'develop strategies aimed at providing decent job opportunities for women and young persons with disabilities, including the provision of reasonable accommodation, flexible time arrangements...'.⁷⁰⁷

Moreover, there is the Opportunities Fund (OF) for Persons with disabilities,⁷⁰⁸ which provides \$40 million a year to assist individuals prepare for, obtain and retain employment.⁷⁰⁹ The Labour Market Agreements for Persons with Disabilities (LMAPDs), which expired on March 31, 2018, and are being consolidated into novel workforce development agreements with provinces and territories,⁷¹⁰ has been instrumental in allocating funds to increase employment opportunities for persons with disabilities. Through the LMAPDs, the Government of Canada allocated \$222 million annually to provinces and territories to design and deliver programs and services to increase employment opportunities for persons with disabilities. A wide range of activities were supported under the LMAPDs, including pre-employment preparation, skills development and post-secondary education supports.⁷¹¹

13.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

There is considerable jurisprudence on disability, accommodations for persons with disabilities and accessibility in workplaces for persons with disabilities. Disability is the most frequently invoked ground of accommodation within Canadian case law.⁷¹² In this short report, it is not possible to examine this rich body of case law. It suffices to point out that Canadian courts have recognized that accommodations

⁷⁰¹ K. Vorhnolt, et al., 'Disability and employment – overview and highlights' (2018) 27(1) *European Journal of Work and Organizational Psychology* 40-55, DOI: 10.1080/1359432X.2017.1387536.

⁷⁰² <<http://www.emploi.quebec.gouv.qc.ca/entreprises/recruter/aide-financiere-a-lembauche/contrat-dintegration-au-travail/>>.

⁷⁰³ Official website of Canadian Public Services and Procurement, available at <<http://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/tech/acccsblt/index-eng.html>>.

⁷⁰⁴ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 82.

⁷⁰⁵ Official website of Canadian Public Services and Procurement, available at <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12541>>.

⁷⁰⁶ *Ibid.* available at <<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12543>>.

⁷⁰⁷ UN Committee on the Rights of Persons with Disabilities (2017), Concluding observations on the initial report of Canada, (UN Doc. CRPD/C/CAN/CO/1).

⁷⁰⁸ <<https://www.canada.ca/en/employment-social-development/services/funding/disability-opportunity-national.html>>.

⁷⁰⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 83.

⁷¹⁰ <<https://www.canada.ca/en/employment-social-development/programs/training-agreements/lma-disabilities.html>>.

⁷¹¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 84.

⁷¹² *Ibid.* chapter 2.04, p. 39.

require a balancing between the right of an employee with a disability to equal treatment, and the right of an employer to operate a productive workplace. Reasonable accommodations is allowed when an employee can perform the essential job duties of the existing, re-structured or newly-assigned position.⁷¹³

On a more general note, despite the relatively advanced legislation, when reviewing initial report of Canada, in April 2017, the CRPD Committee expressed concern in relation to the 'lack of legislation and public policies to protect the rights of persons with disabilities who identify as lesbian, gay, bisexual, transgender or intersex'.⁷¹⁴ In addition, the CRPD Committee expressed concern in relation to the 'absence of strategies to end models of sheltered workshops and ensure access to the open labour market for persons with disabilities, in particular women and young persons with disabilities'. The CRPD Committee encouraged Canada to 'adopt a policy on the employment of persons with disabilities, including indigenous persons with disabilities, that guarantees access to employment, promotes work in open, inclusive and accessible markets and environments, equal opportunities and gender equality and provides for reasonable accommodation for persons with disabilities at work'.⁷¹⁵

Even though there are actual policies aimed to the inclusion in the labour market of persons with disabilities, many of disabled people still experience significant discrimination, especially when disability intersects characteristics of other vulnerable groups, such as indigeneity, age and gender identity.⁷¹⁶

⁷¹³ M. Lynk, 'Disability and the Duty to Accommodate in the Canadian Workplace', p. 25, available at <<http://www.addictionconsulting.com/media/ACCOMMODATION.pdf>>.

⁷¹⁴ UN Committee on the Rights of Persons with Disabilities (2017), Concluding observations on the initial report of Canada, (Un Doc. CRPD/C/CAN/CO/1).

⁷¹⁵ Ibid.

⁷¹⁶ Stienstra D., (2018). *Canadian Disability Policies in a World of Inequalities*. Performance Improvement quarterly Journal, 31 (4), 397-418, available at <<https://www.mdpi.com/2075-4698/8/2/36/pdf>>

14. The United States of America

14.1. Factual Background

In the year 2016, the American Community Survey (ACS) highlighted that in the previous year, an estimated 12.8% of people reported a disability in the US; among those, 24.8% were employed.⁷¹⁷ Data also shows that employment rates among persons with disabilities do not vary greatly by gender, but are particularly low within the black community and among people with low levels of education. The ACS also highlighted that employed people with disabilities are underrepresented in management and professional/technical jobs, and overrepresented in service, production, and transportation jobs.⁷¹⁸

According to the most recent survey, the percentage of persons with disabilities among the population has not changed significantly, but the rate of persons with disabilities employed has increased to 37.0%.⁷¹⁹ This data contrasts with those released by the U.S. Department of Labour, which reports that the employment rate of persons with disabilities was at 17.6% in 2016, compared to 65.3% for people without disabilities.⁷²⁰

The 2015 Kessler Foundation National Employment and Disability Survey (KFNEDS) shows that people with disabilities are actively engaging in job preparation and job search activities, and successfully negotiating barriers at work.⁷²¹ According to the survey, the possibility of working and/or remaining in employment depended on accessibility and reasonable accommodations. It is reported that approximately 50% of the respondents used workplace accommodations and were satisfied with their jobs, and nearly 90% felt accepted in their workplace.⁷²²

14.2. The Rights of Persons with Disabilities in the US: Introductory Remarks

The Relevant Legal Framework in a Nutshell

The United States have only signed the CRPD, but they have never ratified it.⁷²³

The US is a federal jurisdiction and provisions on the rights of persons with disabilities are included in federal and state legislation. However, disability rights are largely regulated at the federal level by the **Americans with Disabilities Act (ADA)** of 1990.⁷²⁴ States may pass disability statutes as long as they are consistent with the ADA.

The ADA prohibits discrimination on the basis of disability in employment and in other social and economic sectors.⁷²⁵ According to Section 3 of the ADA, the term 'disability' means, with respect to an individual: a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.⁷²⁶ As it relates

⁷¹⁷ The DOL's Office of Disability Employment Policy, Employment and Training Administration, Chief Economist, Office of the Secretary, and the White House Council of Economic Advisors (CEA) report that only one-third (32.0%) of working-age people with disabilities were employed on average in the 2010-2012 period, compared to over two-thirds (72.7%) of people without disabilities. <<https://www.dol.gov/odep/pdf/20141022-KeyPoints.pdf>>.

⁷¹⁸ <<https://www.dol.gov/odep/pdf/20141022-KeyPoints.pdf>>.

⁷¹⁹ <<http://www.disabilitystatistics.org>>

⁷²⁰ Lisa R. Kiesel, Sharyn Dezelar & Elizabeth Lightfoot (2019) *Equity in social work employment: opportunity and challenge for social workers with disabilities in the United States*, Disability & Society, DOI: 10.1080/09687599.2018.1561354

⁷²¹ <<https://researchondisability.org/national-disability-employment-survey/kessler-natempsurv-news/2018/04/16/national-survey-demonstrates-that-americans-with-disabilities-are-striving-to-work-and-overcoming-barriers>>.

⁷²² Ibid.

⁷²³ <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>

⁷²⁴ Americans with Disabilities Act (ADA) (1990) available at <<https://www.eeoc.gov/laws/statutes/ada.cfm>>.

⁷²⁵ U.S. Department of Justice, Civil Rights Division, Disability Rights Section, 'A Guide to Disability Rights Law' (2009), available at <<https://www.ada.gov/cguide.htm>>.

⁷²⁶ Americans with Disabilities Act (ADA) (1990), SEC. 12102. [Section 3] (1), available at <<https://www.eeoc.gov/laws/statutes/ada.cfm>>. This definition was introduced by the ADA Amendments Act (ADAAA) of 2008,

to employment, Title I of the ADA makes it unlawful to discriminate in employment against a qualified individual with a disability, and protects the rights of both employees and job seekers with disabilities. The ADA gives a broad definition of employer as a:

‘person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person’.⁷²⁷

In other words, to be covered by the ADA, an employer must employ 15 or more employees. The ADA forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment. As it will be further discussed in section 6.3, the ADA also obliges employers to adopt reasonable accommodations when needed in a specific case, unless these would cause undue hardship. The concept of ‘undue hardship’ is comparable to that of ‘disproportionate burden’ included by the CRPD.

The Equal Employment Opportunity Commission (EEOC)⁷²⁸ is responsible for enforcing the provisions relating to the prohibition of employment discrimination. It is authorized to issue regulations to provide details for the implementation of the ADA, to investigate charges of various kinds of discrimination, to make findings of whether discrimination has occurred, to settle charges through mediation or by other means, and to file lawsuits on behalf of victims of discrimination.⁷²⁹

The victim of unlawful disability discrimination, harassment, or retaliation under the ADA is entitled to recover his/her back pay (i.e. lost wages), attorney fees and other expenses. The victim of discrimination can also ask for reinstatement in the job.

Alongside the ADA, the **Rehabilitation Act**⁷³⁰ of 1973 prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the ADA. Section 501 provides for affirmative action (i.e. an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities) and non-discrimination in employment by Federal agencies of the executive branch. Section 503 prohibits employment discrimination against individuals with disabilities by federal contractors and subcontractors. It also requires that federal contractors and subcontractors take affirmative action to recruit, employ, train, and promote qualified persons with disabilities.⁷³¹ Section 504 prohibits discrimination on the ground of disability by organizations that receive funding from a federal department or agency, which includes schools, hospitals, nursing homes and mental health centres.⁷³²

which rejected the findings of two Supreme Court decisions that had narrowed the definition of disability (*Sutton v. United Airlines, Inc.*, 527 US 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 US 184 (2002)).

⁷²⁷ Ibid. Section 101.

⁷²⁸ Official Website of the Equal Employment Opportunity Commission (EEOC), available at <<https://www.eeoc.gov/>>.

⁷²⁹ V. Lo, ‘Promotion of the Employment of Persons with Disabilities in Japan, the United States and China: carrot, stick or both?’, (2012) *Arizona Journal*, p.579.

⁷³⁰ Rehabilitation Act, (1973), available at <<https://www2.ed.gov/policy/speced/leg/rehab/rehabilitation-act-of-1973-amended-by-wioa.pdf>>.

⁷³¹ Office of Federal Contract Compliance Program, ‘Fact Sheet: New Regulations on Section 503 of the Rehabilitation Act of 1973’ (2003) U.S. Department of Labor, available at <https://www.dol.gov/ofccp/regs/compliance/factsheets/NewRegsFactSheet_QA_508c.pdf>.

⁷³² <<https://www.eeoc.gov/laws/statutes/rehab.cfm>>.

For the purpose of this analysis, it is worth mentioning the **Workforce Innovation and Opportunity Act (WIOA)**⁷³³ of 2014. The WIOA focuses on assisting job seekers (including those with disabilities) in accessing employment and introduced relevant amendments into the Rehabilitation Act⁷³⁴. In particular, it set out an ‘Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities’. This was established under Section 609 of the Rehabilitation Act of 1973, as amended by Section 461 of the WIOA of 2014. The Committee has the task to advise *inter alia* on job opportunities for individuals with intellectual or developmental disabilities (I/DD) or other individuals with significant disabilities.⁷³⁵

There are other pieces of legislation concerning the rights of persons with disabilities in different settings, including provisions ensuring access to housing, the right to vote, and the rights related to air travel⁷³⁶ and programmes related to disability benefits.⁷³⁷ Relevant provisions on accessibility are included in the **Architectural Barriers Act (ABA)** (1968), which requires that buildings and facilities that are designed, constructed, or altered with federal funds, or leased by a federal agency, comply with federal standards for physical accessibility.⁷³⁸

14.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

As mentioned above, the ABA requires buildings and infrastructures open to the public (e.g. U.S. post offices, Veterans Affairs medical facilities, national parks, Social Security Administration offices, federal office buildings, U.S. courthouses, federal prisons, non-government facilities that have received federal funding, such as schools, public housing, and mass transit systems) to be accessible. This is for the benefit of visitors, clients, and customers, and may also favour workers with disabilities inside these institutions. Accessibility of the workplace is then ensured through reasonable accommodations.

Reasonable Accommodation

The ADA affirms that ‘reasonable accommodation’ may include:

- ‘(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) 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

⁷³³ Workforce Innovation and Opportunity Act (WIOA), (2014), available at <<https://www.gpo.gov/fdsys/pkg/PLAW-113publ128/html/PLAW-113publ128.htm>>.

⁷³⁴ Title IV of WIOA amended Title I of the Rehabilitation Act. See at U.S. Department of Labor, Laws and Regulations, available at <<https://www.dol.gov/general/topic/disability/laws>>.

⁷³⁵ See the 2016 final report released by the Committee, available at <https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf>.

⁷³⁶ E.g. the Fair Housing Act (1988), which prohibits housing discrimination on the basis of race, colour, religion, sex, disability, familial status, and national origin; the Air Carrier Access Act (1986), that prohibits discrimination in air transportation by domestic and foreign air carriers against qualified individuals with physical or mental impairments; the Voting Accessibility for the Elderly and Handicapped Act (1984), which requires polling places across the United States to be physically accessible to Persons with Disabilities for federal elections; the National Voter Registration Act (1993), that makes it easier for all Americans, included Persons with Disabilities, to exercise their fundamental right to vote.

⁷³⁷ Two other relevant programs dealing with the rights of Persons with Disabilities are the ‘Aid to the Permanently and Totally Disabled (APTD) Program’ and the ‘Social Security Disability Insurance (SSDI) Program’, that were both launched in the 1950s to provide cash benefits to persons with disabilities who were unable to work. Further, in the US, there exists the Supplemental Security Income (SSI), Medicare and Medicaid, that, together with the SSDI, deal with providing the financial and medical needs of persons with disabilities, included the ones in the workplace. See V. Lo, ‘Promotion of the Employment of Persons with Disabilities in Japan, the United States and China: carrot, stick or both?’ (2012) *Arizona Journal*, p. 580.

⁷³⁸ An unofficial text of this act can be found at <<https://www.access-board.gov/the-board/laws/architectural-barriers-act-aba>>.

examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities'.⁷³⁹

The EEOC clarifies that accommodations vary depending upon the needs of the individual applicant or employee, and that an employer generally does not have to provide a reasonable accommodation unless the person with a disability has asked for one.⁷⁴⁰ Once a reasonable accommodation is requested, the employer and the employee should jointly identify the appropriate reasonable accommodation. Where more than one accommodation could be suitable, the employer is allowed to choose the one that is less costly or that is easier to provide.⁷⁴¹

The EEOC has also produced an 'Enforcement Guidance' in order to clarify the rights and responsibilities of employers and persons with disabilities regarding reasonable accommodation and undue hardship.⁷⁴² It identifies three categories of accommodations: (i) accommodations that are required to ensure equal opportunity in the application process; (ii) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (iii) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.⁷⁴³

The Internal Revenue Code includes several provisions aimed at making businesses more accessible to people with disabilities.⁷⁴⁴ Under the Small Business Tax Credit (Internal Revenue Code Section 44: Disabled Access Credit) small businesses with either \$1,000,000 or less in revenue or 30 or fewer full-time employees may take a tax credit of up to \$5,000 annually for the cost of providing reasonable accommodations. The Work Opportunity Tax Credit (Internal Revenue Code Section 51) allows employers who hire certain targeted low-income groups, including individuals with disabilities, to have an annual tax credit of up to \$2,400 for each qualifying employee who works at least 400 hours during the tax year. There is then an Architectural/Transportation Tax Deduction (Internal Revenue Code Section 190 Barrier Removal) which is available to businesses of any size for the costs of removing barriers for people with disabilities, e.g. providing accessible parking spaces, ramps, and curb cuts; providing wheelchair-accessible telephones, water fountains, and restrooms, and making entrances accessible.

14.4. Overview of US Policies on Inclusion of Persons with Disabilities in the Workplace

The Office of Federal Contract Compliance Programs (OFCCP)⁷⁴⁵ enforces the provisions of Title I of the ADA on employment and even those of Section 503 of the Rehabilitation Act. The Department of Health, Education and Welfare, now called the Department of Health and Human Services⁷⁴⁶, is the main federal enforcement agency for the Rehabilitation Act. It has issued regulations to provide guidance regarding what non-discrimination in a disability context means.⁷⁴⁷ The U.S. Department of Labour's Office of Disability Employment Policy (ODEP) also aims to support the implementation of the ADA by means of awareness raising initiatives. It funds the Employment Assistance and Resource Network on Disability

⁷³⁹ Ibid. SEC. 12111. [Section 101] (B) (9), available at <<https://www.eeoc.gov/laws/statutes/ada.cfm>>.

⁷⁴⁰ <<https://www.eeoc.gov/eeoc/publications/fs-ada.cfm>>.

⁷⁴¹ Ibid.

⁷⁴² Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act available at <<https://www.eeoc.gov/policy/docs/accommodation.html>>.

⁷⁴³ Ibid.

⁷⁴⁴ <<https://www.eeoc.gov/eeoc/publications/fs-ada.cfm>>.

⁷⁴⁵ Official Website of the Office of Federal Contract Compliance Programs (OFCCP), available at <<https://www.dol.gov/ofccp/>>.

⁷⁴⁶ Official Website of the Department of Health and Human Services, available at <<https://www.hhs.gov/>>.

⁷⁴⁷ Willborn S. L., 'Reasonable Accommodation in the United States', in A.a.V.v., 'Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law' (Wolters Kluwer International BV, 2016) chapter 1.01 [B], p. 11.

Inclusion (EARN)⁷⁴⁸, a free resource that helps employers tap the benefits of disability diversity. The EARN aims to educate public and private sector organizations on ways to build inclusive workplace cultures and empower them to become leaders in the employment of persons with disabilities.

The US regulatory policy on disability takes an antidiscrimination approach, which informs the way in which accessibility and universal design are enforced.⁷⁴⁹ Additional US policies aim to foster inclusion in the workplace, and encompass benefits to support employees with disabilities that are low income, as well as providing vocational training and reintegration in work programmes. The Ticket to Work Program⁷⁵⁰, for example, helps people aged 18-64 who receive Social Security Disability Insurance or Supplementary Security Income benefits to find and keep employment. It also ensures that Social Security beneficiaries have a choice in obtaining rehabilitation and vocational services and it removes barriers that require people with disabilities to choose between health care coverage and work. Moreover, it promotes the goals of allowing more Americans with disabilities to participate in the workforce and to become financially independent. The ADA National Network,⁷⁵¹ created in 1991, consists of 10 regional ADA Centres located throughout the US to support implementation of the ADA's scope to assure equality of opportunity, full participation, independent living and economic self-sufficiency for persons with disabilities. The Employment Training Administration Program⁷⁵² aims to provide vocational training and rehabilitation to persons with disabilities and render various kinds of employment assistance to persons with disabilities.⁷⁵³

The Disability Non-Discrimination Law Advisor⁷⁵⁴ provides employment law assistance for workers and small businesses.

14.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

There is a considerable body of case law on disability discrimination in the US. However, Cox highlights that there is a relative dearth of precedents defining the scope of the ADA's reasonable accommodations provision.⁷⁵⁵ One of the most well-known case is *US Airways, Inc. v Barnett*, 535 U.S. 391 (2002)⁷⁵⁶ in which the Supreme Court affirmed that the duty to provide reasonable accommodation of the ADA does not require the employer to adopt accommodations which will violate an established seniority system. There are also several circuit court decisions that discuss the scope of reasonable accommodation obligations and the limits of this obligation, and court of appeals decisions that consider whether an accommodation causes undue hardship on the employer (looking at the costs of the accommodation in relation to its benefits).⁷⁵⁷ Among those cases, several decisions consider the limits of the duty of the employer and the extent to which a worker can be accommodated. For example, in 2014, the Sixth Circuit considered a case of a janitor who alleged that she had a sensitivity to certain cleaning products and for this reason asked a reasonable accommodation to avoid exposure to these products. The Court held that eliminating the

⁷⁴⁸ Official Website of the Employment Assistance and Resource Network on Disability Inclusion (EARN), available at <<http://www.askearn.org/>>.

⁷⁴⁹ Janikke Solstad Vedeler, Naomi Schreuer, 'Policy in Action: Stories on the Workplace Accommodation Process' (2018) 22 (2) Journal of Disability Policy Studies 95 – 105.

⁷⁵⁰ Official Website of the Ticket to Work Program, available at <<https://choosework.ssa.gov/index.html>>.

⁷⁵¹ Official Website of ADA National Network, available at <<https://adata.org>>.

⁷⁵² Official Website of the Employment Training Administration Program, available at <<https://www.doleta.gov/>>.

⁷⁵³ V. Lo, 'Promotion of the Employment of Persons with Disabilities in Japan, the United States and China: carrot, stick or both?' (2012) *Arizona Journal* p. 580.

⁷⁵⁴ Official Website of the Disability Non-Discrimination Law Advisor, available at <<https://webapps.dol.gov/elaws/odep/>>.

⁷⁵⁵ Jeannette Cox, 'Reasonable Accommodations and the ADA Amendments' Overlooked Potential' (2016) 24 *Geo. Mason L. Rev.* 147.

⁷⁵⁶ *US Airways, Inc. v Barnett*, [2002] 535 U.S. 391, available at <<https://supreme.justia.com/cases/federal/us/535/391/>>.

⁷⁵⁷ See cases reported in the EEOC Guidance, available at <<https://www.eeoc.gov/policy/docs/accommodation.html>>.

bathrooms as part of the plaintiff's routine or assigning her to a new cleaning tasks without bathrooms were not reasonable accommodations because her job still would have involved exposure to cleaning chemicals. The circuit court also held that there was no evidence that working with a respirator would have complied with the plaintiff's restriction because the restriction was not limited to exposure to breathing fumes from chemical solutions.⁷⁵⁸ In a similar vein, in *Bagwell v. Morgan Cty. Comm'n* (2017), the Court of Appeal for the Eleventh Circuit ruled in favour of the employer and considered that no reasonable accommodation was feasible and that the employee was unable to perform the essential job functions of the position, with or without accommodations.⁷⁵⁹ Moreover, in the more recent case of *Brumley v. United Parcel Service* (2018), the Court of Appeal for the Sixth Circuit stated that ADA accommodations do not necessarily have to be given to employees immediately.⁷⁶⁰ In *Sharbono v. Northern States Power* (2018), the Court of Appeal for the Eighth Circuit stated that the provisions on reasonable accommodation of the ADA are obligations of conduct, and in that case stated that the company was in good faith when denying an accommodation to the employee. Those cases emphasize the limits to reasonable accommodation in the ADA. Those limits have been emphasised also by Kanter.⁷⁶¹ According to this Author, the ADA gives 'a cause of action for persons seeking to gain access to a building, to receive accommodations on the job, or physical and communication access to public events' but 'fails to address the underlying causes of [inequality]'.⁷⁶² According to Kanter, the ADA does not recognize reasonable accommodation as a right *per se* and not a human right that belongs to all, but, as something that an employee may request.⁷⁶³ In that connection, Kanter affirms that the lack of ratification of the CRPD by the US contributes to prevent the advancement of the rights of persons with disabilities in the US.⁷⁶⁴

Data confirm that the ADA has not yet been sufficient to promote employment of people with disabilities. The employment rate of people with disabilities in the U.S. in 2018 remains virtually unchanged. Empirical research shows that (unfounded) concerns about safety and fear of cost of reasonable accommodation still persist.⁷⁶⁵ The limited effectiveness of the ADA is more evident with regards to persons with intellectual disabilities who are more likely to be victims of discriminatory practices, stigmatization, and stereotyping.⁷⁶⁶

⁷⁵⁸ *Horn v. Knight Facilities Management-GM, Inc.*, [2014] U.S. App. Lexis 3797 (6th Cir. Feb. 25, 2014).

⁷⁵⁹ *Bagwell v. Morgan Cty. Comm'n*, [2017] (11th Cir. Jan. 18, 2017)

⁷⁶⁰ *Brumley v. United Parcel Service*, [2018] (6th Cir. Nov. 30, 2018).

⁷⁶¹ Arlene S. Kanter, 'Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities' (2019) 35 *Touro L. Rev.* 301.

⁷⁶² *Ibid.* p. 317.

⁷⁶³ *Ibid.* p. 320.

⁷⁶⁴ Arlene S. Kanter, 'Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities' (2019) 35 *Touro L. Rev.* 301.

⁷⁶⁵ Lisa R. Kiesel, Sharyn Dezelar & Elizabeth Lightfoot (2019): Equity in social work employment: opportunity and challenge for social workers with disabilities in the United States, *Disability & Society*, DOI: 10.1080/09687599.2018.1561354

⁷⁶⁶ Osaretin Uahunoma, Junghwan Kim, Joann S. Olson, Doo H. Lim 'I Had My Way of Doing Things and It Worked for Me': Lived Employment Experiences of Adults with Psychiatric Disabilities (2018), 2 (2) *American Journal of Qualitative Research* 1-18.

15. Argentina

15.1. Factual Background

According to the 2003 National Survey of People with Disabilities, there are 2,176,123 persons with disabilities in Argentina. The majority of them are women. The survey reported that the prevalence of disability increases with age for both sexes.⁷⁶⁷ Moreover, it specifies that the 7.1% of the total population has some disability.⁷⁶⁸ In April and May 2018, the INDEC (National Statistics Institute) launched a new study on disability (*Estudio Nacional sobre el Perfil de las Personas con Discapacidad*) to collect new data on this issue, as these are deemed to be essential in formulating public policies. On July 20, 2018 the INDEC published the preliminary results of this new survey on disability. The latter reports that 1 out of 10 Argentines live with a sensory or physical impairment, with a higher incidence in older demographics (in particular from 40 years upwards).⁷⁶⁹ This data fails, however, to paint a complete picture. In 2018, 6 out of 10 of those who identify as having a disability do not have a disability certificate that documents their condition according to the national standard disability certificate (CUD).⁷⁷⁰

In line with the trend already observed in the other countries analysed within this report, the unemployment rate among people with disabilities is extremely high: more than 75% of persons with disabilities are unemployed or economically inactive. People with visual and hearing disabilities are employed at slightly higher rates than people with other types of disabilities.⁷⁷¹ Among the people with disabilities who have a job, 69% are employed in the private sector and 31% in the public sector.⁷⁷² Despite a quota system in place (see below section 15.2), the Argentinian Ministry of Labour declared that less than 1% of national government jobs are held by disabled people.⁷⁷³

15.2. The Rights of Persons with Disabilities in Argentina: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Argentina is a federal state and provisions on rights of persons with disabilities are included in federal and provincial legislation. As mentioned in the Introduction, this report only considers federal legislation.

The main provisions pertaining to the rights of persons with disabilities have been laid down in the **Constitution** (*Constitución de la Nación Argentina*, 1994). Article 16 of the Constitution establishes the equality principle and *inter alia* states that all Argentinians are equal before the law. It also affirms that they are 'admissible to employment without any other requirement than their ability'.⁷⁷⁴ Aside from the

⁷⁶⁷ M. Belliard, 'Disability insurance risks: the Argentinian case' (2012) 65(3) *International Social Security Review* (English edition) 49-75.

⁷⁶⁸ C. Schiappacasse and al. 'Reflecting on the World Report on Disability – A short Report from Argentina' (2013), 39 *American Journal of Physical Medicine and Rehabilitation*, DOI: 10.1097/PHM.0000000000000020

⁷⁶⁹ Estudio Nacional sobre el Perfil de las Personas con Discapacidad (2018), available at <https://www.indec.gov.ar/ftp/cuadros/poblacion/estudio_discapacidad_07_18.pdf>

⁷⁷⁰ Estudio Nacional sobre el Perfil de las Personas con Discapacidad (2018), available at <https://www.indec.gov.ar/ftp/cuadros/poblacion/estudio_discapacidad_07_18.pdf>

⁷⁷¹ *Ibid.*

⁷⁷² M.P. Venturiello, 'Social policies related to disabilities: an approach from the actions of the State in Argentina', (2017) 5(2) *Revista Espanola de Discapacidad* 160, available at <<https://doaj.org/Article/e915d5edb66d42079962664d3428ebdd>>.

⁷⁷³ E. Joly, 'Disability and Employment in Argentina: The Right to Be Exploited?' (2009) *Nacla Reporting on the Americas since 1967*, p. 6-7, available at <<https://nacla.org/Article/disability-and-employment-argentina-right-be-exploited>>.

⁷⁷⁴ <<http://www.biblioteca.ius.gov.ar/argentina-constitution.pdf>>.

principle of equality, the Constitution includes, in Article 75 para. 23, a ‘programmatic clause’⁷⁷⁵ which states that the Congress is empowered:

‘[t]o legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons [...]’.

The Constitution provides for the right to work in Article 14. Furthermore, Article 14bis stipulates that workers shall be ensured ‘dignified and equitable working conditions; limited working hours; paid rest and vacations; fair remuneration; minimum vital and adjustable wage; equal pay for equal work’.

Non-discrimination legislation⁷⁷⁶ includes Act No. 23592 on Discriminatory Acts,⁷⁷⁷ which prohibits discrimination and obliges those who act in a discriminatory way to repair any damage occurred to the person discriminated against. However, this act does not include any specific provision on disability or persons with disabilities.⁷⁷⁸ Act No. 25280 has adopted the **1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities**.⁷⁷⁹

There are, then, several pieces of legislation and regulations that protect and promote the rights of persons with disabilities. The main act is the **National Act No. 22431/1981 on the System of Comprehensive Protection of Persons with Disabilities**.⁷⁸⁰ The Act was amended in 1994 by Act No. 24314 on Accessibility for Persons with Limited Mobility. This Act defines persons with disabilities in Article 2 as

‘any person who suffers a permanent or prolonged functional impairment, physical or mental, which in relation to their age and social environment involves considerable disadvantages for their family, social, educational or work integration is considered disabled’.

The right to work of persons with disabilities is guaranteed through a quota system, which is set out in **Article 8 of National Act No. 22431/1981 on the System of Comprehensive Protection of Persons with Disabilities**. This Act reserves 4% of federal government jobs for persons with disabilities in the public sector. The Ministry of Labour, Employment and Social Security and the National Advisory Commission on the Integration of Persons with Disabilities (CONADIS), now National Agency for Disability,⁷⁸¹ have the responsibility to ensure that public agencies do not discriminate against persons with disabilities who apply in response to public calls for applications to jobs in public administration. Article 23 of this Act encourages employers to hire people with disabilities. In particular, it stipulates that employers hiring people with disabilities have a tax deduction on profits up to 70% of the total wages of persons with disabilities employed in the company. This Act is also the main piece of legislation related to accessibility, and provides for the elimination of physical barriers in urban settings and transportation. Chapter IV of this Act includes a general obligation to make buildings accessible exists only in relation to public buildings.

⁷⁷⁵ Report on Argentina, in G. Escobar, *Personas con Discapacidad – VII Informe sobre Derechos Humanos* (Federacion IberoAmericana de Ombudsman –Trama Editorial, 2010).

⁷⁷⁶ A comprehensive list of non-discrimination legislation can be found at <http://www.ilo.org/dyn/natlex/natlex4.listResults?p_lang=en&p_country=ARG&p_count=1302&p_classification=05.01&p_cla_sscount=10>. None of the instruments listed focus on disability discrimination.

⁷⁷⁷ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 28.

⁷⁷⁸ Decree No. 1086/2005 adopted the report ‘*Hacia un Plan Nacional contra la Discriminación – La Discriminación en Argentina. Diagnóstico y Propuestas*’ identifies the need for policies that foster inclusion and address intersectional discrimination. . The text in Spanish is available at <<http://www.observatorio.discriminacion.gob.ar/wp-content/uploads/2009/10/plannacional.pdf>>.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ The text of the law in Spanish is available at <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/20620/texact.htm>>.

⁷⁸¹ <<https://www.argentina.gob.ar/andis>>.

Another important piece of legislation for the purpose of this analysis is the **National Employment Act No. 24013**,⁷⁸² which applies to all workers in the country. This Act includes specific provisions aimed at fostering the rights of persons with disabilities.⁷⁸³ In order to encourage employers to hire persons with disabilities, Article 87 exempts employers from the payment of 50% of the corresponding Employer Contributions and Pensions Funds when they hire a worker with disabilities.⁷⁸⁴ In addition, Article 88 establishes that employers who hire a quota of 4% of disabled workers and carry out adjustments to their premises to eliminate architectural barriers will enjoy special credits for the financing of same. In relation to the private sector, the **Bill S-4041/16** aims to introduce the obligation for companies that have more than 100 workers to employ a quota of 4% of persons with disabilities. The Bill was approved by the Senate and is currently under the examination of the Chamber of Deputies.⁷⁸⁵

In 2013, Law N° 26.816 on the Federal Regime of Protected Employment for Persons with Disabilities (*Régimen Federal de Empleo Protegido para Personas con Discapacidad*) was passed and its Regulatory Decree 1771/15 was approved in 2015. This law aims to promote the professional development of persons with disabilities.

Other pieces of legislation concern specific groups of persons with disabilities (e.g. Act No. 25682 on the use of the green walking stick for persons with low vision). In addition, general legislation often includes disability related provisions. For example, Act No. 24901 on vocational training affirms that training should be made available to persons with disabilities through training programmes tailored to their needs and capacities (Article 23).⁷⁸⁶

The CRPD in the Argentinian Legal Framework

In 2007, **Argentina ratified the CRPD and adopted the Convention by Act No. 26378 of 21 May 2008.** Pursuant to Article 75 para. 22 of the Constitution certain human rights treaties (listed in the provision) have the same status as the Constitution. Those which are not mentioned (e.g. the CRPD) have a substitutional status, i.e. ranks above domestic legislation.⁷⁸⁷

Decree 698/2017 has established the National Agency on Disabilities (*Agencia Nacional de Discapacidad*) which is responsible for the design, coordination and general execution of public policies on disability issues, the preparation and execution of actions aimed at promoting full exercise of the rights of persons with disabilities, including the right to work⁷⁸⁸The Disability Observatory, which is part of the now National Disability Agency (Ex CONADIS) disseminates, updates and systematizes information on disability and monitors the application and compliance with the CRPD.⁷⁸⁹

When reviewing the initial report of Argentina, in 2012, the Committee expressed concern that ‘despite the steps taken to align the domestic legal system with the Convention, the former continues to exhibit major inconsistencies with the principles and requirements of the Convention’. The Committee also noted that, ‘because not all of the State party’s provincial legislation is aligned with the Convention, disparities

⁷⁸² The text of the law in Spanish is available at <http://www.ilo.org/dyn/travail/docs/1644/ds_argentina_lev24013_levdelemplo.pdf>.

⁷⁸³ Ibid. para. 25 (c).

⁷⁸⁴ M. Paz Völker, ‘Supported employment and the current labor situation for People with Disabilities in Argentina’ (2013) 38(3) *Journal of Vocational Rehabilitation* 207-214.

⁷⁸⁵ See at <<https://www.cels.org.ar/web/wp-content/uploads/2017/10/InformeComiteDerechosPersonasDiscapacidadAgo2017.pdf>>. See also at <<http://www.senado.gov.ar/parlamentario/comisiones/verExp/4041.16/S/PL>>.

⁷⁸⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 477.

⁷⁸⁷ A.L. Aiello, ‘Argentina’, in L. Waddington and A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice* (OUP, 2013).

⁷⁸⁸ Decreto 698/2017, chapter 1, available at < <http://servicios.infoleg.gob.ar/infolegInternet/anexos/275000-279999/279040/norma.htm>>

⁷⁸⁹ <<https://www.argentina.gob.ar/estructura-andis/observatorio-de-la-discapacidad>>.

arise in the approach taken at the local level to the rights of persons with disabilities and to the effective exercise of those rights'.⁷⁹⁰

Argentina is also a party to the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, which is aimed 'to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society'.⁷⁹¹

15.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

As mentioned above, the main legislation related to accessibility is the **National Act No. 22431 on the System of Comprehensive Protection of Persons with Disabilities**. Article 21 prescribes that at least one access to public buildings must be accessible and that the buildings must include reserved areas, or areas adapted for people using a wheelchair. Areas not open to the public and **industrial and commercial buildings should be adaptable in order 'to allow the employment of people with reduced mobility'**. In addition, Article 88 of the **National Employment Act No. 24013** establishes that employers will enjoy special credits for the financing of adjustment to the workplace to make the workplace accessible.

Federal legislation is complemented by a National Accessibility Plan implemented by the National Disability Agency and aims to facilitate access to the physical environment. This Plan has the goal of analysing, comparing and re-drafting provincial and municipal legislation with a view to amending and/or developing standardized building, planning and zoning codes to align them with the requirements established by the National Act No. 22431.

Reasonable accommodation

In Argentina, reasonable accommodation duties can be inferred from the provisions (mentioned above) that require the employer to adapt the workplace to the needs of persons with disabilities. It transpires, however, that these provisions mostly concern adjustments to the physical environment, rather than organizational accommodations. In its Concluding Observations, the CRPD Committee noted with concern that

'neither the concept of reasonable accommodation nor recognition that the denial of such accommodation is a form of discrimination are explicitly included in anti-discrimination laws or in the laws on, among other things, employment, health and education'.⁷⁹²

15.4. Overview of Argentinian Policies on Inclusion of Persons with Disabilities in the Workplace

The right to work of persons with disabilities in Argentina is ensured by a range of measures which build upon the legislation discussed above and aim to boost employability of persons with disabilities. Services provided to workers with disabilities include the following: preparation of occupational profiles for persons seeking employment by means of in-depth interviews; vocational guidance; assistance to persons seeking employment through vocational guidance workshops.⁷⁹³

The main policy programme to boost the employment of persons with disabilities is the 'Jobs Programme for Workers with Disabilities', which was developed by the Ministry of Labour, Employment and Social

⁷⁹⁰ UN Committee on the Rights of Persons with Disabilities (2012), Concluding observations on the initial report of Argentina, (UN Doc. CRPD/C/ARG/CO/1).

⁷⁹¹ Article 1 of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, available at <<http://www.oas.org/juridico/english/treaties/a-65.html>>.

⁷⁹² UN Committee on the Rights of Persons with Disabilities (2012), Concluding observations on the initial report of Argentina, (UN Doc. CRPD/C/ARG/CO/1).

⁷⁹³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 491.

Security through Resolution No. 802/2004.⁷⁹⁴ It aims to help workers with disabilities to find jobs in the private and public sectors by offering financial incentives to employers. Moreover, the Government has adopted measures to ensure that persons with disabilities who have professional qualifications and technical training are given the necessary support to enter or re-enter the job market.⁷⁹⁵ The 'Special Training and Technical Assistance Programme on Jobs', created by Resolutions 509/02 and 73/10 of the Employment Secretariat, provides funding to non-governmental organizations to carry out training and job programmes for persons with disabilities. Other programmes provide financial support to employers to foster inclusive practices (e.g. the Program of Labour Inclusion for People with Disabilities).⁷⁹⁶ In addition, the 'Program of Financial Support for Microenterprise' supports persons with disabilities who develop a self-employment activity and/or labour microenterprise.

There is a range of trade unions and NGOs who have put in place programmes for the professional development of persons with disabilities, and which aim to dismantle cultural barriers and stigma against persons with disabilities that create exclusion and segregation.

15.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite the quota system and financial incentives, as mentioned above, employment rates of persons with disabilities are low. The CRPD Committee expressed concern about the cultural barriers and prejudices that hinder persons with disabilities from entering the labour market, particularly in the private sector.⁷⁹⁷ Scholars have also highlighted that laws are not always properly implemented, particularly in the inland provinces.⁷⁹⁸ Courts have so far addressed to varying degrees the right to work of people with disabilities and accessibility of the workplace, and referred to the CRPD in various instances.⁷⁹⁹ A case reported by Seda, is *A. G. c/ Falabella S.A* decided by the *Cuarta Camara de Trabajo* of Mendoza in 2015.⁸⁰⁰ In this case, the worker claimed that the employer had not taken measures to guarantee him accessibility of workplace. In the formulation of the decision, the Court took into consideration the CRPD itself and Convention N. 159 of the International Labour Organization.⁸⁰¹ In 2013, the INADI (*Instituto Nacional contra la discriminación, la xenofobia y el racismo* -National Institute against discrimination, xenophobia and racism), published the '*National Map of Discrimination 2013*' and concluded that more than 50% of persons with disabilities in Argentina had suffered a discriminatory act.⁸⁰²

According to an alternative report signed by several Argentinian DPOs,⁸⁰³ the obligation to provide reasonable accommodation provided for in the CRPD has not been implemented by Argentina. According to same alternative report, the right to work of persons with disabilities is not guaranteed and the

⁷⁹⁴ Ibid. para. 485, 519 (c).

⁷⁹⁵ Ibid. para. 538.

⁷⁹⁶ M. Paz Völker, 'Supported employment and the current labor situation for People with Disabilities in Argentina' (2013) 38(3) *Journal of Vocational Rehabilitation* 207-214.

⁷⁹⁷ UN Committee on the Rights of Persons with Disabilities (2012), Concluding observations on the initial report of Argentina, (UN Doc. CRPD/C/ARG/CO/1).

⁷⁹⁸ C. Schiappacasse and al. 'Reflecting on the World Report on Disability – A short Report from Argentina' (2013), 39 *American Journal of Physical Medicine and Rehabilitation*, DOI: 10.1097/PHM.0000000000000020

⁷⁹⁹ A.L. Aiello, 'Argentina', in L. Waddington and A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice* (OUP, 2013).

⁸⁰⁰ Seda J. A., 'Discapacidad Y Derechos. Impacto de la Convención sobre los derechos de las personas con discapacidad' (2017) Editorial Jusbares, available at < editorial.jusbares.gob.ar/libro/descargar/173/pdf>

⁸⁰¹ Ibid.

⁸⁰² Data Reported in the alternative Report of 1 August 2017 '*Informe alternativo situación de las personas con discapacidad en Argentina 2013/2017*' available at <https://www.cels.org.ar/web/wp-content/uploads/2017/10/InformeComiteDerechosPersonasDiscapacidadAgo2017.pdf>, available in English at available at https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/ARG/INT_CRPD_ICJ_ARG_28477_E.docx

⁸⁰³ Ibid.

employment quota of 4% of persons with disabilities in the public sector is systematically infringed. This situation has worsened as a result of the Administrative Decision 12/2017, which authorizes the suspension of the recruitment of personnel for the public sector, including persons with disabilities, in violation of the quota established in the normative framework.⁸⁰⁴

According to a survey conducted by PAR Foundation in 2005 among employers, companies consider to implement inclusion practices. 84.2% of the surveyed companies declared that labour inclusion of persons with disabilities in their companies is feasible and around 45% of the respondents confirmed that they had taken one or more initiatives to include persons with disabilities in the workplace.⁸⁰⁵ However, the alternative report suggests that there are numerous cases of refusal to provide reasonable accommodations, even from public bodies.⁸⁰⁶

The recently created National Agency on Disability itself, so far, has not been able to implement in the social context the policies that have been adopted in the years. The main reason is that disability is a cross-cutting issue and all ministries and secretaries should be involved in the process of improving the lives of people with disabilities, not only a single agency.⁸⁰⁷

⁸⁰⁴ Ibid.

⁸⁰⁵ M. Paz Völker, 'Supported employment and the current labor situation for People with Disabilities in Argentina' (2013) 38(3) *Journal of Vocational Rehabilitation* 207-214.

⁸⁰⁶ Ibid.

⁸⁰⁷ M. Iturrioz, 'People with Disabilities at risk in Argentina' (2018), Global Observatory for Inclusion, available at < <http://www.globi-observatory.org/people-with-disabilities-at-risk-in-argentina/>>

16. Brazil

16.1. Factual Background

The latest Brazilian population census, which is carried out by Brazilian Institute of Geography and Statistics (IBGE) every 10 years, dates back to 2010. It reports that 23.91% of the Brazilian population have some form of disability, a segment totalling approximately 45.6 million people.⁸⁰⁸ The 2010 Census showed that the employment rate of people aged 10 years-old and over is 37,28% for persons with disabilities compared to 60,65% for persons without disabilities.⁸⁰⁹

16.2. The Rights of Persons with Disabilities in Brazil: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Brazil is a Federal Republic and the Union comprises 26 States, one Federal District (where the capital, Brasilia, is located) and 5,507 municipalities.⁸¹⁰ This report only considers relevant federal legislation.

The **Brazilian Federal Constitution**, adopted in 1988 and amended most recently in 2017,⁸¹¹ protects and promote civil and political, as well as social rights (Article 6 of the Brazilian Federal Constitution).⁸¹² It also includes several provision related to the rights of persons with disabilities.⁸¹³ Article 7, sub-section XXXI, expressly prohibits discrimination of any nature ‘with respect to wages and hiring criteria of [disabled] workers’. Article 37, sub-section VIII provides for employment quotas in the public sector, and requires that the law ‘reserve[s] a percentage of public offices and positions’ to persons with disabilities.⁸¹⁴ Article 40 of the Constitution related to public employees allows for positive actions and differential treatment of persons with disabilities. Article 201 relates to social security and allows for differentiated criteria with regards to beneficiaries of social security allowances with disabilities. Article 227 para. 1 provides that:

‘The State shall promote full health assistance programmes for children, adolescents, and young people, the participation of nongovernmental entities being allowed, by means of specific policies and with due regard to the following precepts: [...] creation of preventive and specialized care programmes for persons with physical, sensory, or mental disabilities, as well as programmes for the social integration of disabled adolescents and young people, by means of training for a profession and for community life and by means of enhanced access to communal facilities and services, including the elimination of architectural barriers and all forms of discrimination.’⁸¹⁵

Article 227 para. 2 concerns accessibility and states that:

⁸⁰⁸ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 14.

⁸⁰⁹ IBGE, ‘Disability results from the 2010 Brazilian Population Census’, 12th Meeting of the Washington Group Bangkok, Thailand October 23-25, 2012, available at <http://www.washingtongroup-disability.com/wp-content/uploads/2016/02/wg12_session6_5_borges.pdf>

⁸¹⁰ Common Core Document, Brazil, attached to the State’s Party Report, at para. 39, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2FCORE%2f1%2fAdd.53%2fRev.1&Lang=en>

⁸¹¹ http://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf

⁸¹² Article 6 of the Brazilian Constitution states that: ‘Education, health, food, work, housing, transportation, leisure, security, social welfare, protection of motherhood and childhood, and assistance to the destitute, are social rights, as set forth by this Constitution’

⁸¹³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 16.

⁸¹⁴ *Ibid.* Article 37, sub-section VIII.

⁸¹⁵ Constitution of the Federative Republic of Brazil (Constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994) Documentation and Information Center Publishing Coordination, Brasília – 2010, 3rd edition, Article 227, paragraph 1, available at <<http://english.tse.jus.br/arquivos/federal-constitution>>

‘[t]e law shall regulate construction standards for public sites and buildings and for the manufacturing of public transportation vehicles, in order to ensure adequate access to the [disabled]’.

Article 244 para. 2 further states that:

‘[t]he law shall provide for the adaptation of presently existing sites and buildings of public use and of the public transportation vehicles in order to guarantee adequate access to the [disabled]’.⁸¹⁶

Social inclusion of persons with disabilities is then guaranteed by a set of legislative acts that apply all fields of life, including employment.⁸¹⁷ The most important piece of legislation is **Law on the Inclusion of Persons with Disabilities - Law No. 13146/2015**,⁸¹⁸ which aims ‘to ensure and promote, under conditions of equality, the exercise of fundamental rights and freedoms by persons with disabilities, with a view to their social inclusion and citizenship’.⁸¹⁹ This law includes a definition of disability in line with the CRPD and establishes that a person with disabilities is ‘a person with a long-term physical, mental, intellectual or sensorial disability, which, in interaction with one or more barriers, may obstruct their full and effective participation in society on equal terms with other people’.⁸²⁰ Article 3 of this law also defines ‘accessibility’ as ‘possibility of, and scope for, the safe and autonomous use of spaces, furniture, urban equipment, buildings, transport, information and communication, including ICT, as well as other services and facilities open to the public, public or private use for collective use, both in urban and rural areas, by persons with disabilities or with reduced mobility’. This provision also includes a definition of universal design as ‘design of products, environments, programs and services to be used by all persons, without adaptation or specific design, including assistive technology resources’, and a definition of ‘barriers’ faced by people with disabilities. Furthermore, Article 3 includes a definition of reasonable accommodation which reproduces almost verbatim the wording of Article 2 CRPD. This **Law on the Inclusion of Persons with Disabilities bans discrimination on the ground of disability**, whereby discrimination is defined in a manner consistent to the CRPD (Article 5 of the Law). The law also explicitly qualifies the refusal of reasonable accommodation as a form of discrimination. Interestingly, the refusal of provisions of assistive technologies also constitutes a discrimination on the ground of disability. In that connection, it is important to note that Article 8 of Law No. 7853/1989 makes a criminal offence, subject to one to four years’ imprisonment, to deny someone employment or work on the ground of disability.⁸²¹ The **Law on the Inclusion of Persons with Disabilities** also requires the federal government to collect data related to people and services for people with disabilities: these data should be used for the formulation, management, monitoring and evaluation of public policies.⁸²² For the purpose of this analysis it is worth highlighting that Chapter VI (Article 34 *et seq.*) of this Law focus on the right to work, and prohibits discrimination in the employment context, including vocational training. Significantly, Article 34 states that ‘a person with a disability has the right to work freely ... in an accessible and inclusive environment,

⁸¹⁶ *Ibid.* Article 244, paragraph 2.

⁸¹⁷ Government of Brazil – Rights of persons with disabilities - response to questionnaire by the OHCHR, available at <<http://webcache.googleusercontent.com/search?q=cache:kyfvv4yFC-gJ:www2.ohchr.org/english/issues/disability/docs/study/Brazil.doc+&cd=8&hl=it&ct=clnk&gl=ie>>

⁸¹⁸ Chamber of Deputies Documentation and Information Center, Law No. 13,146, of July 6, 2015, available at <<https://www2.camara.leg.br/legin/fed/lei/2015/lei-13146-6-julho-2015-781174-normaatualizada-pl.html>>

⁸¹⁹ Chamber of Deputies Documentation and Information Center, Law No. 13,146, of July 6, 2015, Article 1, available at <<https://www2.camara.leg.br/legin/fed/lei/2015/lei-13146-6-julho-2015-781174-normaatualizada-pl.html>>

⁸²⁰ *Ibid.* Article 2.

⁸²¹ Chamber of Deputies, Law No. 7,853, of October 24, 1989, Article 8, available at <<https://www2.camara.leg.br/legin/fed/lei/1989/lei-7853-24-outubro-1989-365493-publicacaooriginal-1-pl.html>>

⁸²² *Ibid.* Article 101 and <<http://globalaccessibilitynews.com/2015/06/12/brazil-passes-inclusion-of-people-with-disabilities-act/>>

on an equal basis with other persons'. This provisions also obliges employers 'to guarantee accessible and inclusive work environments'. Article 35 establishes that public policies must 'promote and guarantee the conditions of access and permanence of persons with disabilities in the field of work', including by supporting self-entrepreneurship of people with disabilities. In line with Article 26 CRPD, Article 36 provides for the right of people with disabilities to professional habilitation and professional rehabilitation, which aim to ensure that 'disabled persons can enter, continue or return to the field of work, respecting their free choice, their vocation and their interest'.

In addition, Article 38 specifies that:

'an entity contracted to carry out a public or private selection process for a position, function or job is required to comply with the provisions of this Law and other current accessibility standards.'⁸²³

Other pieces of legislation include provisions related to the right to work of persons with disabilities, and provide for various positive actions. Among them, the **Law No. 8112/1990**⁸²⁴ lays down criteria and procedures to become a civil servant. In that, connection, the law reserves 20% of the available spaces for the respective public examination to persons with disabilities.⁸²⁵ **Law No. 8213/1991**⁸²⁶ provides employment quota for people with disabilities in the private sector.⁸²⁷ Quotas are mandated for companies with 100 or more employees.⁸²⁸ Law No. 8213/1991 also establishes a protection against dismissal and states the workers who are part of the quota cannot be dismissed, except in cases of just cause termination.

Law No. 11180/2005 establishes the obligation for companies to contribute to and support the qualification of their employees. In this regard, Article 428, para. 5 of the Consolidated Labor Code (CLT) authorizes companies to hire apprentices with disabilities regardless of age (in derogation of the usual age requirement which is 24 years of age).

Law No. 12513/2011 established the National Program of Access to Technical Education and Employment (Pronatec), and included various provisions to foster full participation of persons with disabilities in employment.⁸²⁹

The CRPD in the Brazilian Legal Framework

Brazil signed the CRPD and the Optional Protocol thereto on March 30, 2007. The CRPD was ratified on August 1, 2008. The CRPD enjoys equivalent status to a constitutional amendment. For this reason, any law or normative measure contrary to the Convention will also be in breach of the Federal Constitution and will be subject to a Direct Action of Unconstitutionality (ADI or ADIN) before the Brazilian Federal Supreme Court, the country's highest judicial body, for the purpose of terminating continued violation of the respective right.⁸³⁰

⁸²³ Chamber of Deputies Documentation and Information Center, Law No. 13,146, of July 6, 2015, Article 38, available at <<https://www2.camara.leg.br/legin/fed/lei/2015/lei-13146-6-julho-2015-781174-normaatualizada-pl.html>>

⁸²⁴ Presidency of the Republic, Civil House, Sub-Office for Legal Affairs, Law No. 8,112, December 11, 1990, Consolidated Publication of Law No. 8,112, December 11, 1990, determined by Art. 13 of Law No. 9,527 of December 10, 1997, available at <http://www.planalto.gov.br/ccivil_03/Leis/L8112cons.htm>

⁸²⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 210.

⁸²⁶ Presidency of the Republic, Civil House, Sub-Office for Legal Affairs, Law No. 8,213, July 24, 1991, available at <http://www.planalto.gov.br/ccivil_03/leis/l8213cons.htm>

⁸²⁷ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para.210.

⁸²⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 211.

⁸²⁹ Presidency of the Republic, Civil House, Legal Sub-Office, Law No. 12.513, October 26, 2011, available at <http://www.planalto.gov.br/CCIVIL_03/ Ato2011-2014/2011/Lei/L12513.htm>

⁸³⁰ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, *Ibid.* at para. 18.

The National Secretariat for the Promotion of the Rights of Disabled Persons (SNPD) is the body with primary responsibility for implementing the public policies aimed at persons with disabilities.⁸³¹ A Joint Parliamentary Desk for the Defence of the Rights of Persons with Disabilities, composed of Members of the House of Representatives and Senators monitors the implementation of the rights of persons with disabilities. In addition, in 2015, a Permanent Commission on the Rights of Persons with Disabilities was established in the House of Representatives.⁸³² The Office of the Public Prosecutor and the Office of the Public Defender are entrusted with the task of defending the rights of disabled persons.⁸³³

16.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

As mentioned above, accessibility is guaranteed by the Constitution, which confers to persons with disabilities a right to access public spaces, built environment and ICT. Moreover, the **Law on the Inclusion of Persons with Disabilities obliges employers (both private and public) to make the workplace accessible** (Article 34). This is a clear-cut provision, which imposes a duty (which seems anticipatory in nature) to make employment settings accessible. Article 37 of this law also establishes that people with disabilities working on the open labour market must be treated equally, and rules of accessibility, the provision of assistive technology and reasonable accommodation should be applied in the workplace.

Additionally, accessibility obligations are included in various pieces of legislation. Among those, **Law No. 10048/2000**⁸³⁴ and **Law No. 10098/2000**⁸³⁵ set out general standards and basic criteria on the promotion of accessibility for persons with disabilities or reduced mobility.⁸³⁶ The Brazilian Committee on Accessibility (*Comitê Brasileiro de Acessibilidade – ABNT/CB-40*) develops standards in the field of accessibility, in accordance with universal design principles.⁸³⁷

Reasonable Accommodation

In the Brazilian legal framework, the duty to accommodate is provided for in the **Law on the Inclusion of Persons with Disabilities**. As mentioned above, the definition of accommodation included in the law is akin to that of the CRPD. The duty to accommodate applies to employers, and the only limit to which this duty is subject is that of undue or disproportionate burden. The burden of proof (i.e. the duty to prove that the accommodation entails a disproportionate burden) lies with the party whose duty it is to accommodate (i.e. the employer).⁸³⁸

⁸³¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 14.

⁸³² 1st Joint Submission to the Committee on the Convention on the Rights of Persons with Disabilities: an overview from the Brazilian Civil Society, July 2015, available at

<https://webcache.googleusercontent.com/search?q=cache:QfGxv5IEN8UJ:https://tbinternet.ohchr.org/Treaties/CRPD/Shared%2520Documents/BRA/INT_CRPD_CSS_BRA_21427_E.doc+&cd=9&hl=it&ct=clnk&gl=ie>

⁸³³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 23, 24.

⁸³⁴ Chamber of Deputies, Law No. 10,048, November 8, 2000, available at <<https://www2.camara.leg.br/legin/fed/lei/2000/lei-10048-8-novembro-2000-376937-publicacaooriginal-1-pl.html>>

⁸³⁵ Chamber of Deputies, Law No. 10,098, September 19, 2000, available at

<<https://www2.camara.leg.br/legin/fed/lei/2000/lei-10098-19-dezembro-2000-377651-publicacaooriginal-1-pl.html>>

⁸³⁶ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 112, b).

⁸³⁷ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 117.

⁸³⁸ L. de Campos Velho Martel, 'Reasonable Accommodation. The new concept from an Inclusive Constitutional Perspective' (2011) 8 (14) *International Journal of Human Rights* 85 – 112, available at <<https://sur.conectas.org/wp-content/uploads/2017/11/sur14-eng-leticia-de-campos-velho-martel.pdf>>

Reasonable accommodation is mentioned at various junctures in Chapter 6 of the Law, as a duty of the employer in all phases of employment relationship.

16.4. Overview of Brazilian Policies on Inclusion of Persons with Disabilities in the Workplace

Brazil has adopted a number of policies aimed at fostering inclusion of persons with disabilities. In this context and for the purpose of this report, it is worth mentioning the National Policy for the Integration of Persons with Disabilities, established and regulated by Decree No. 3298/1999.⁸³⁹ This refers to the inclusion of persons with disability in the labour market.⁸⁴⁰ The more recent National Plan for the Rights Persons with Disabilities, entitled ‘Living without limits’, launched in November 17, 2011, aims at strengthening the social participation of persons with disabilities by promoting their autonomy, removing barriers and providing access and enjoyment on an equal basis to the goods and services offered to the population as a whole.⁸⁴¹ The Plan includes various measures related to accessibility in general and employment. The Labour Protection Network Program aims to remove the obstacles encountered by this segment in its efforts to secure and maintain employment.⁸⁴²

The Federal Government’s Multi-Annual Plan (PPA) 2004-2007, extended for 2008-2011, also included various policy initiatives, to minimize the social exclusion of persons with disabilities and to foster their employment rate.⁸⁴³

The Secretariat of Labour Inspection (SIT) is the State organ with the responsibility to monitor compliance with employment quotas for persons with disabilities.⁸⁴⁴

16.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite the existence of advanced legislation, in its 2015 Concluding Observations, the CRPD Committee expressed concern for the ‘lack of a coherent and comprehensive disability strategy to implement the human rights model of disability established in the Convention’.⁸⁴⁵ In addition, the Committee recommended that the Brazilian State initiate a systematic review of legislation, policy and programme concerning disability rights and adopt a consultative mechanism for systematic consultations with persons with disabilities through their representative organizations before adopting any kind of measure.⁸⁴⁶

⁸³⁹ Presidency of the Republic, Civil House, Sub-Office for Legal Affairs, Decree No. 3298, December 20, 1999, available at <http://www.planalto.gov.br/ccivil_03/decreto/d3298.htm>

⁸⁴⁰ 1st Joint Submission to the Committee on the Convention on the Rights of Persons with Disabilities: an overview from the Brazilian Civil Society, July 2015, available at <https://webcache.googleusercontent.com/search?q=cache:QfGxv5IEN8UJ:https://tbinternet.ohchr.org/Treaties/CRPD/Shared%2520Documents/BRA/INT_CRPD_CSS_BRA_21427_E.doc+&cd=9&hl=it&ct=clnk&gl=ie>

⁸⁴¹ ‘Living without limits’ Strategic actions in the fields of education, work, health, social assistance and accessibility to improve skills and opportunities, Autonomy and rights for persons with disabilities, available at <<http://www.biblioteca.presidencia.gov.br/presidencia/ex-presidentes/dilma-rousseff/caderno-destaques/edicoes-antiores-lista-de-pdf/old/pdf/in-english/destaques/living-without-limits>> and *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 48 – 54.

⁸⁴² *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 215.

⁸⁴³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 212, 213.

⁸⁴⁴ <https://www.ilo.org/labadmin/info/WCMS_114935/lang-en/index.htm> and *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 216.

⁸⁴⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Brazil*, para 6.

⁸⁴⁶ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Brazil*, at para. 6, 7, 9, 11.

Despite the existence of the National Conference on the Rights of Persons with Disabilities, there are limited opportunities for DPOs to get involved in the legislative and policy procedures.⁸⁴⁷

The Committee also pointed out that the accessibility standards are not always respected, and their lack of effectiveness is evident in rural areas.⁸⁴⁸ The Committee expressed concern about the existing discrimination in the open labour market, especially towards women with disabilities who are more likely to face a double discrimination⁸⁴⁹, as well as about the low levels of compliance with the quota system.⁸⁵⁰

⁸⁴⁷ 1st Joint Submission to the Committee on the Convention on the Rights of Persons with Disabilities: an overview from the Brazilian Civil Society, July 2015, available at https://webcache.googleusercontent.com/search?q=cache:QfGxv5IEN8UJ:https://tbinternet.ohchr.org/Treaties/CRPD/Shared%2520Documents/BRA/INT_CRPD_CSS_BRA_21427_E.doc+&cd=9&hl=it&ct=clnk&gl=ie

⁸⁴⁸ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Brazil, at para. 22, 23.

⁸⁴⁹ 1st Joint Submission to the Committee on the Convention on the Rights of Persons with Disabilities: an overview from the Brazilian Civil Society, July 2015, available at https://webcache.googleusercontent.com/search?q=cache:QfGxv5IEN8UJ:https://tbinternet.ohchr.org/Treaties/CRPD/Shared%2520Documents/BRA/INT_CRPD_CSS_BRA_21427_E.doc+&cd=9&hl=it&ct=clnk&gl=ie; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Brazil*, at para. 48.

⁸⁵⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Brazil*, at para. 48, 49.

17. India

17.1. Factual Background

According to the 2011 Census the percentage of persons with disabilities in India in 2011 was 2.21% of the total of population⁸⁵¹, which corresponds to over 21 million people.⁸⁵² 55.9% were male and 44.1% were female.⁸⁵³ In 2011, persons with disabilities that were employed amounted to 9.7 million (only 25% of the total population of persons with disabilities),⁸⁵⁴ including 7 million of males with disabilities. Only 2.7 million of workers with disabilities were female. The work participation rate of persons with disabilities among the total population of persons with disabilities was overall 36.3% (47.2% males and 22.6% females).⁸⁵⁵

17.2. The Rights of Persons with Disabilities in India: Introductory Remarks

The Relevant Legal Framework in a Nutshell

India, also known as *Bhārat*,⁸⁵⁶ is a union of States that became independent from UK in 1947.⁸⁵⁷

The **Constitution** of India, which was adopted on November 26, 1949 and came into force on January 26, 1950,⁸⁵⁸ includes a catalogue of fundamental rights. The right to equality before the law is established under Article 14,⁸⁵⁹ while Article 15, para. 1 provides for the principle of non-discrimination on various grounds. The latter provision does not explicitly mention disability as a ground of discrimination.⁸⁶⁰ The Initial report submitted by India to the CRPD Committee, however, specifies that the prohibition of all discriminations includes discrimination on the basis of disability.⁸⁶¹ Article 16, para. 1 states that:

‘There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State’.

The right to work and to public assistance in case of unemployment and ‘disablement’ is provided for in Article 41. This provision establishes that:

‘The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want’.

⁸⁵¹ http://censusindia.gov.in/Census_And_You/disabled_population.aspx. See also *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 24; Social Statistics Division, Ministry of Statistics and Programme Implementation, Government of India ‘Disabled Persons in India. A statistical profile 2016’, available at <<https://ruralindiaonline.org/resources/disabled-persons-in-india-a-statistical-profile-2016/>>. Data are also available at <https://enabled.in/wp/disabled-population-in-india-as-per-census-2011-2016-updated/>

⁸⁵² <<https://enabled.in/wp/disabled-population-in-india-as-per-census-2011-2016-updated/>> ; Social Statistics Division, Ministry of Statistics and Programme Implementation, Government of India ‘Disabled Persons in India. A statistical profile 2016’, available at <<https://ruralindiaonline.org/resources/disabled-persons-in-india-a-statistical-profile-2016/>>

⁸⁵³ C-Series, Table C-20, Census of India 2001 and 2011, available at <<https://unstats.un.org/unsd/demographic-social/meetings/2016/bangkok-disability-measurement-and-statistics/Session-6/India.pdf>>

⁸⁵⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 211.

⁸⁵⁵ C-Series, Table C-23, Census of India 2011, available at <<https://unstats.un.org/unsd/demographic-social/meetings/2016/bangkok-disability-measurement-and-statistics/Session-6/India.pdf>>

⁸⁵⁶ <<https://www.india.gov.in/my-government/constitution-india>>

⁸⁵⁷ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 2.

⁸⁵⁸ <<https://www.india.gov.in/my-government/constitution-india>>

⁸⁵⁹ Article 14 of the Constitution of India, part III, available at <https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf>

⁸⁶⁰ *Ibid.* Article 15.

⁸⁶¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 3 and 45.

Alongside the Constitution, the 1993 **Protection of Human Rights Act**⁸⁶² lays down the framework to protect human rights and establishes a National Human Rights Commission with the task of ensuring the protection of those rights.⁸⁶³

Until 2016, the most important piece of national legislation concerning persons with disabilities was the 1995 **Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act (PWDA)**,⁸⁶⁴ which protected the rights of persons with disabilities.⁸⁶⁵ This Act was originally enacted to give effect to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region.⁸⁶⁶ This Act was replaced in 2016 by the **Rights of Persons with Disabilities Act**.⁸⁶⁷ The **Rights of Persons with Disabilities Act (RPWD Act)**⁸⁶⁸ was adopted in order to give effect to the CRPD. It includes several provisions that are modelled on the CRPD, and applies to persons with disabilities who include persons 'with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others'. The act, however, includes other definitions related to disability which do not seem fully compliant with the CRPD, and namely those of 'person with benchmark disability', i.e. a person with not less than 40% disability, and 'person with disability having high support needs', i.e. a person 'with benchmark disability certified ... who needs high support'. The **RPWD Act** prohibits discrimination on the ground of disability. In that connection, Article 3 para. 3 states that:

'No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim'⁸⁶⁹

Discrimination is defined in a manner consistent to Article 2 CRPD, and includes the denial of reasonable accommodation as a form of discrimination. Reasonable accommodation is also defined in a manner consistent to the CRPD.

The RPWD Act also dedicates an entire chapter (Chapter IV) to 'Skill Development and Employment', obliging the Government to formulate schemes and programmes 'to facilitate and support employment of persons with disabilities especially for their vocational training and self-employment'.⁸⁷⁰ Article 20 prohibits discrimination on the basis of disability in employment.⁸⁷¹ It also requires the Government to provide 'reasonable accommodation and appropriate barrier free and conducive environment to employees with disabilities'. Article 21 requires public employers to notify equal opportunity policies in the employment context to the Government.⁸⁷² The RPWD Act provides for positive measure and quotas

⁸⁶² The Protection of Human Rights Act, 1993 No 10 of 1994, available at <<https://www.hurights.or.jp/archives/database/nhri-law-india.html>>

⁸⁶³ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 11.

⁸⁶⁴ The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, published in part II, section 1 of the Extraordinary Gazette of India, Ministry of Law, Justice and Company Affairs (Legislative Department), New Delhi, the 1st January, 1996/ 11, 1917 (Saka), available at <<http://cgemployment.gov.in/en/pwd-act-1995-persons-disabilities-equal-opportunities-protection-rights-and-full-participation-act>>

⁸⁶⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 48.

⁸⁶⁶ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 13, 28 and 29.

⁸⁶⁷ The Rights of Persons with Disabilities Act, 2016 (No. 49 of 2016) [27th December, 2016], Ministry of Law and Justice (Legislative Department), Article 102, available at <<https://www.prsindia.org/uploads/media/Person%20with%20Disabilities/Rights%20of%20Persons%20with%20Disabilities%20Act.%202016.pdf>>

⁸⁶⁸ The Rights of Persons with Disabilities Act, 2016 (No. 49 of 2016) [27th December, 2016], Ministry of Law and Justice (Legislative Department), available at <<https://www.prsindia.org/uploads/media/Person%20with%20Disabilities/Rights%20of%20Persons%20with%20Disabilities%20Act.%202016.pdf>>

⁸⁶⁹ *Ibid.* Article 3 (3).

⁸⁷⁰ *Ibid.* Article 19 (1).

⁸⁷¹ *Ibid.* Article 20.

⁸⁷² *Ibid.* Article 21.

in government and public sector jobs for persons with intellectual disability, Autism, psychosocial disability and multiple disabilities, but it does not impose any obligation to recruit persons with disabilities on private companies.⁸⁷³

The 1923 **Workmen's Compensation Act (WCA)**⁸⁷⁴ provides that, in case personal injury is caused to a worker by accident arising out of or in the course of his employment, the employer of the worker become disabled shall be liable to pay compensation.⁸⁷⁵

The CRPD in the Indian Legal Framework

India signed the CRPD on March 30, 2007 and ratified on 1st October of the same year.⁸⁷⁶ According to the State Initial report submitted in 2011, the ratification of the CRPD advances rights and principles already enshrined in the Constitution.⁸⁷⁷ India is a dualist country this CRPD provisions are not directly effective and must be implemented in national legislation.

The Central Coordination Committee headed by the Minister of Social Justice and Empowerment is the designated focal point and has the task to develop a national disability policy and implement the CRPD.⁸⁷⁸ The Office of the Chief Commissioner for Persons with Disabilities, set up under Section 57 of the Persons with Disabilities Act 1995, and has been mandated to safeguard the rights of persons with disabilities and monitor the implementation of the CRPD.

17.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

Article 40 of the **RPWD Act** establishes that the central Government 'shall ... formulate rules for persons with disabilities laying down the standards of accessibility for the physical environment, transportation, information and communications, including appropriate technologies and systems, and other facilities and services provided to the public in urban and rural areas'. Other provisions on accessibility are included in Articles 41-46. Notably, Article 45 requires that all existing public buildings are made accessible within a period not exceeding five years from the date of notification of the RPWD Act. With regard to the workplace, there is not an explicit obligation for private employers to make the workplace accessible, while public employers are clearly obliged to create a barrier-free environment, by virtue of Article 20 of the RPWD Act.

Detailed rules on accessibility are then included in various other pieces of legislation. Among them, it is worth mentioning the 2016 National Building Code, which incorporates detailed provisions for the construction of buildings, and makes accessible design an inherent part of all building plans.⁸⁷⁹

Reasonable Accommodation

⁸⁷³ V. Aneja, 'Inclusion of Private Establishments under the Right of Persons with Disabilities Act, 2016' (2017), Mondaq Business Briefing.

⁸⁷⁴ The Workmen's Compensation Act (Act No. 8 of 1923), available at <[https://labour.gov.in/sites/default/files/TheWorkmenAct1923\(1\).pdf](https://labour.gov.in/sites/default/files/TheWorkmenAct1923(1).pdf)>

⁸⁷⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 218.

⁸⁷⁶ OHCHR Dashboard, available at <<http://indicators.ohchr.org/>>; <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4>

⁸⁷⁷ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 27.

⁸⁷⁸ *Ibid.* at para. 304.

⁸⁷⁹ National Building Code of India, 2016, available at <https://bis.gov.in/?page_id=117159>

The concept of reasonable accommodation is defined in Article 2 lett. y) of the 2016 RPWD Act as a ‘necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others’.⁸⁸⁰ Article 3 para. 5 and Article 12 para. 3 require the Government and Legal Services Authorities to ensure reasonable accommodation to persons with disabilities.⁸⁸¹

The main provision concerning reasonable accommodation in the workplace is Article 20 para. 2, which, as already mentioned, states that:

‘Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.’⁸⁸²

17.4. Overview of Indian Policies on Inclusion of Persons with Disabilities in the Workplace

In compliance with the Constitution of India,⁸⁸³ and in line with the legislation described above a set of disability policies has been adopted. The National Policy for Persons with Disabilities⁸⁸⁴, formulated in 2006, introduced several measures related to rehabilitation and employment. More specifically, it provides for several incentives and tax exemptions to encourage employment of persons with disabilities in the private sector. The ‘Scheme of Incentives to Employers in the Private Sector for Providing Employment to Persons with Disabilities’, launched in 2008, provides employers who hire workers with disabilities with wage subsidies.⁸⁸⁵ The Ministry of Social Justice and Empowerment is the nodal Ministry to coordinate all matters relating to the implementation of the Policy.⁸⁸⁶

Both the National Council of Vocational Training⁸⁸⁷ and the Apprenticeship Training Scheme⁸⁸⁸, under the responsibility of the Ministry of Labour, ‘reserve an unspecified number of places for persons with disabilities’.⁸⁸⁹

The Department of Empowerment of Persons with Disabilities (DEPwD)⁸⁹⁰ under the Ministry of Social Justice and Empowerment, created in 2012, focuses on the rights of persons with disabilities.⁸⁹¹ The DEPwD is entrusted with the implementation of Incheon Strategy (2013 – 2022)⁸⁹² to ‘Make the Right Real’ for Persons with Disabilities in Asia and the Pacific, mentioned above in Part D of this report.⁸⁹³

⁸⁸⁰ The Rights of Persons with Disabilities Act, 2016 (No. 49 of 2016) [27th December, 2016], Ministry of Law and Justice (Legislative Department), Article 2 (y), available at <<https://www.prsindia.org/uploads/media/Person%20with%20Disabilities/Rights%20of%20Persons%20with%20Disabilities%20Act,%202016.pdf>>

⁸⁸¹ *Ibid.* Article 3 (5), Article 12 (3).

⁸⁸² *Ibid.* Article 20 (2).

⁸⁸³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 3 – 4.

⁸⁸⁴ National Policy for Persons with Disabilities, available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93612&p_country=IND&p_count=510>

⁸⁸⁵ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 37, 78, 235.

⁸⁸⁶ <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/93612/109496/F-838532634/IND93612.pdf>>

⁸⁸⁷ National Council of Vocational Training and Research official website available at <<http://www.ncvrtindia.org/>>

⁸⁸⁸ National Apprenticeship Training Scheme (NATS) official website available at <<http://mhrdnats.gov.in/>>

⁸⁸⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 228.

⁸⁹⁰ Department of Empowerment of Persons with Disabilities official website available at <<http://disabilityaffairs.gov.in/content/>>

⁸⁹¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 16.

⁸⁹² Social Statistics Division, Ministry of Statistics and Programme Implementation, Government of India ‘Disabled Persons in India. A statistical profile 2016’, p. 65, available at <<https://ruralindiaonline.org/resources/disabled-persons-in-india-a-statistical-profile-2016/>>

⁸⁹³ <<https://www.unescap.org/sites/default/files/Incheon%20Strategy%20%28English%29.pdf>>.

The Employees' State Insurance Corporation (ESIC) is responsible for the implementation of the 1948 Employees State Insurance Act (ESI Act)⁸⁹⁴ and provides for social security benefits and vocational rehabilitation.⁸⁹⁵ In order to encourage employment of persons with disabilities, the employers' share of contribution for social security in respect of disabled employees is paid by the Central Government for the initial ten years.⁸⁹⁶

The Vocational Rehabilitation Centres for Handicapped (VRCs)⁸⁹⁷ have been established by Ministry of Labour & Employment to evaluate residual capacity of persons with disabilities to unfold their capabilities. They conduct workshops for retraining and further skills development of unemployed youths with disabilities.⁸⁹⁸

Amongst the National Institutes providing policies dealing with disability, the National Institute of Rehabilitation Training and Research (NIRTAR)⁸⁹⁹ (established in 1984) and the National Institute for Empowerment of Persons with Multiple Disabilities⁹⁰⁰ (NIEPMD) (established in 2005) must be mentioned for the purposes of this report.⁹⁰¹ They have a broad mandate to undertake research to promote education, rehabilitation and empowerment of persons with disabilities.

17.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite the recent measures adopted,⁹⁰² the situation of people with disabilities in India is still critical in many respects. Data released by the Ministry of Labour and Employment show that the number of placements of persons with disabilities by the Employment Exchanges has been steadily declining over the years.⁹⁰³ Data on the employment rate of persons with disabilities are scant. At the time of the writing of this report, there is no data available as to how many persons with disabilities have been employed in the public sector after the entry into force of the RPWD Act.⁹⁰⁴ Sarkar argues that a work environment where all human abilities are treated with equal dignity has yet to come, and accessibility of the workplace is far from being realised.⁹⁰⁵ Empirical research suggests that exclusion from education and employment opportunities is still widespread as is discrimination in public facilities.⁹⁰⁶

The RPWD Act gives rise itself to concerns with regard to its overall compliance to the CRPD and in relation to the protection of persons with intellectual and psychosocial disabilities.⁹⁰⁷

⁸⁹⁴ Ministry of Labour and Employment, Government of India, 'Annual Report 2017 – 2018', p. 167, available at <https://labour.gov.in/sites/default/files/ANNUAL_REPORT_2017-18-ENGLISH.pdf>

⁸⁹⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 248.

⁸⁹⁶ Annual Report 2017-18, Ministry of Labour and Employment, p. 11, available at <<https://labour.gov.in/annual-reports>>

⁸⁹⁷ <<https://labour.gov.in/vrc>>

⁸⁹⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 222.

⁸⁹⁹ NIRTAR official website available at <<http://www.svnirtar.nic.in/>>

⁹⁰⁰ NIEPMD official website available at <<http://niepmd.tn.nic.in/>>

⁹⁰¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, at para. 39.

⁹⁰² Annual Report 2017-18, Ministry of Labour and Employment, p. 261, available at <<https://labour.gov.in/annual-reports>>

⁹⁰³ Annual Report 2017-18, Ministry of Labour and Employment, p. 260 – 261, available at <<https://labour.gov.in/annual-reports>>

⁹⁰⁴ National Disability Network (NDN) and National Committee on the Rights of Persons with Disabilities (NCRPD), February 2019, 'Parallel Report of India on the Convention on the Rights of Persons with Disabilities (CRPD)', available at <https://webcache.googleusercontent.com/search?q=cache:40IZa6QK_Ck:https://tbinternet.ohchr.org/Treaties/CRPD/Shared%2520Documents/Ind/INT_CRPD_ICO_Ind_33881_E.docx+&cd=9&hl=it&ct=clnk&gl=ie>

⁹⁰⁵ A. Sarkar, 'RPWD Act, 2016: Fostering a Disability-friendly Workplace in Indian Organizations' (2018), 53 (4) *The Indian Journal of Industrial Relations* 591 – 603.

⁹⁰⁶ M. Kayama, C. Johnstone, S. Limaye, 'The experiences of disability in sociocultural contexts of India: Stigmatization and resilience' (2019) 00 (0) *International Social Work* 1 – 15, p. 10 – 11.

⁹⁰⁷ S. B. Math, G. S. Gowda, V. Basavaraju, N. Manjunatha, C. N. Kumar, S. Philip and M. Gowda, 'The Rights of Persons with Disability Act, 2016: Challenges and opportunities', 2019, 61 *Indian Journal of Psychiatry*.

The Indian judiciary has in some instances upheld the rights to reasonable accommodation of the disabled employees. In its judgement in the case of *Syed Bashir-ud-din Qadri vs. Nazir Ahmed Shah and Others*, the Supreme Court said that the reasonable accommodation requires the provision of aids and appliances to enable a person with disabilities to carry out his/her duties effectively.⁹⁰⁸

⁹⁰⁸ State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities, at para. 85.

18. China

18.1. Factual Background

The Sixth National Population Census of 2010 estimated that Chinese persons with disabilities amount to 85 million. By the end of 2009, there were 22 million persons with disabilities in employment, of whom 4.43 million worked in cities and towns and 17.57 million in the rural areas.⁹⁰⁹ By the end of 2009, the number of bodies offering various employment services to persons with disabilities in cities and towns had reached 3,043, while there were 1,897 services cooperatives in rural areas.⁹¹⁰ While the employment situation of people with disabilities in China has improved in the past few years, the situation is still challenging. The ILO Business and Disability Network states that around 70% of China's working-age disabled population live in rural areas where the unemployment rate remains high.⁹¹¹ According to the 2014 Statistical Communique on the Development of the Work on Persons with Disabilities of China Disabled Persons' Federation (CDPF),⁹¹² in 2014, 278,000 persons were newly employed in urban areas, 70,000 of whom through a quota scheme, 12,000 by welfare job posts, 107,000 through self-employment and other forms of employment and 13,000 through employment for the purpose of rehabilitation. The employment rate of people with disabilities in rural areas is higher than in urban areas.⁹¹³ Persons with disabilities in China are mainly employed either in collective forms, such as sheltered workshops, or by quota schemes.⁹¹⁴ Empirical research examining the gender-specific pattern in employment, shows males have higher possibility of being employed and the gender gap, consistent with gender inequality found in the general population, persists over the life course.⁹¹⁵

18.2. The Rights of Persons with Disabilities in China: Introductory Remarks

The Relevant Legal Framework in a Nutshell

The main provisions pertaining to the rights of persons with disabilities have been laid down in the **Constitution**.⁹¹⁶ Article 33 of the Chinese Constitution stipulates in a general fashion the principle of equality before the law and affirms that the 'State respects and preserves human rights'. Article 45 of the Chinese Constitution affirms that:

'Citizens of the People's Republic of China have the right to material assistance from the State and society when they are old, ill or disabled. The State develops social insurance, social relief and medical and health services that are required for citizens to enjoy this right.

The State and society ensure the livelihood of disabled members of the armed forces, provide pensions to the families of martyrs and give preferential treatment to the families of military personnel.

The State and society help make arrangements for the work, livelihood and education of the blind, deaf-mutes and other [disabled] citizens'.

⁹⁰⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 112.

⁹¹⁰ *Ibid.* para. 15.

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⁹¹² http://www.businessanddisability.org/index.php/en/?option=com_countryprofiles&view=country&task=overview&Itemid=256&id=15.

⁹¹³ http://www.cdpf.org.cn/english/Resources/statistics/201603/t20160323_545438.shtml

⁹¹⁴ China Disabled Persons' Federation 'Statistical Communique on the Development of the Work on Persons with Disabilities in 2014' (2014), available at http://www.cdpf.org.cn/english/Resources/statistics/201603/t20160323_545438.shtml

⁹¹⁵ Zhu X. et al., 'Thriving of employees with disabilities: The roles of job self-efficacy, inclusion, and team-learning climate' (2019) 58 *Human Resource Management* 21 – 34, available at <https://onlinelibrary.wiley.com/doi/pdf/10.1002/hrm.21920>

⁹¹⁶ Wang C. and Li M., 'Gender Differences in Employment Among People With Disabilities in China' (2018) 29 (1) *Journal of Disability Policy Studies* 12-21, available at <https://journals.sagepub.com/doi/pdf/10.1177/1044207317745667>

⁹¹⁶ Constitution of the People's Republic of China, (1982), amended on March 14, 2004/

Other laws prohibit discrimination on the grounds of disability. The General Principles of the Civil Law provide that the legitimate rights and interests of persons with disabilities are protected by law.⁹¹⁷ The Higher Education Law of the People's Republic of China stipulates that 'institutions of higher learning must admit students with disabilities who meet the admission standards set by the State and must not refuse to admit them for their disabilities' while the Law of the People's Republic of China on Promotion of Employment guarantees the right to work of persons with disabilities.⁹¹⁸ The Law on the Protection of Minors provides that minors with disabilities shall not be discriminated against. In order to achieve equality, duties of reasonable accommodation exist in education, employment and educational context. There are limited duties to accommodate suspects, victims and witnesses with disabilities in the criminal procedure legislation.

The main act protecting the rights of persons with disabilities is the **Law on the Protection of Persons with Disabilities** of 2008.⁹¹⁹ This law, which enshrines the principles of equality and non-discrimination,⁹²⁰ includes a medical-model oriented definition of disability. Namely, it stipulates that a disabled person is 'one who suffers from abnormalities or loss of a certain organ or function, psychologically or physiologically, or in anatomical structure and has lost wholly or in part the ability to perform an activity in the way considered normal'. The Law on the Protection of Persons with Disabilities stipulates, on one hand, that persons with disabilities enjoy equal rights as other citizens and equal protection by the law and, on the other hand, the State and the society are obliged to take positive measures to promote *de facto* equal participation of disabled persons in social life.⁹²¹ In particular, Article 4 requires the State to provide disabled persons 'with special assistance by adopting supplementary methods and supportive measures with a view to alleviating or eliminating the effects of their disabilities and external barriers and ensuring the realization of their rights'.⁹²² Article 34 of that law provides that no enterprises or institutions shall deny employment to disabled graduates on the ground of their disability. If an individual with a disability is denied employment, the disabled person 'may appeal to departments concerned for disposition of and the relevant departments shall instruct the enterprises or institutions concerned to accept' the person in their workplace.⁹²³

Several other national laws contain specific provisions concerning people with disabilities.⁹²⁴ Among the most relevant, is the **Law on the People's Republic of China on Promotion of Employment** (2007).⁹²⁵ As the title suggests, this law aims 'to promote employment, coordination between economic development

⁹¹⁷ State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities, para. 18.

⁹¹⁸ Ibid.

⁹¹⁹ An unofficial translation of this law is provided by the China Disabled Persons' Federation and is available at <http://www.cdpf.org.cn/english/Resources/lawsregulations/201603/t20160303_542879.shtml>. See also State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities, para. 18.

⁹²⁰ Zhang E.G., 'Employment of people with disabilities: International standards and domestic legislation and practices in China' (2006) 34 Syracuse journal of international law and commerce 517.

⁹²¹ G. Zhang, 'China Disabled Persons' Federation- UPR Review on Disability Rights' (2009) Universal Periodic Review of the UN Human Rights Council, page 2, available at <https://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/CDPF_CHN_UPR_S4_2009_ChinaDisabledPersonsFederation.pdf>.

⁹²² Law on the Protection of Persons with Disabilities, (2008), Article 4, available at <http://www.cdpf.org.cn/english/Resources/lawsregulations/201603/t20160303_542879_1.shtml>.

⁹²³ Ibid, Article 34.

⁹²⁴ G. Zhang, 'China Disabled Persons' Federation- UPR Review on Disability Rights' (2009) Universal Periodic Review of the UN Human Rights Council, page 2, available at <https://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/CDPF_CHN_UPR_S4_2009_ChinaDisabledPersonsFederation.pdf>.

⁹²⁵ The text of the law is available at <http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm> and available at <<https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/76984/81380/F1735089926/76984.pdf>>.

and employment increase, and harmony and stability of society'.⁹²⁶ Article 17 of this law encourages the enterprises to increase jobs and to support the unemployed persons and the disabled persons to get jobs, and offers tax preferential treatments. Article 29 specifically deals with workers with disabilities and establishes that 'the State shall guarantee the labour rights of disabled persons'. This provision also requires the Chinese government to create plans on the employment of disabled persons and prohibit discrimination on the grounds of disability in recruitment processes. Article 55 of this law obliges the government to adopt positive measures to promote the employment of persons with disabilities.

The **Labour Law**, entered into force in 1995, establishes, under Article 12, a general principle of equality and non-discrimination in employment. It stipulates, with regard to employment, that workers shall not be discriminated against on the grounds of nationality, race, sex, or religious beliefs.⁹²⁷ Although persons with disabilities are not mentioned, in a subsequent section, this law recognizes that, in order to promote employment for persons with disabilities, preferential treatment may be appropriate when it states:

'any special stipulations in laws and regulations concerning the employment of the disabled [...] shall apply.'⁹²⁸

The **Trade Union Law** (1992) provides that 'all labourers doing physical or mental work in enterprises, public institutions and government organs within the Chinese territory who earn their living primarily from wages shall have the right to participate in and form trade union organizations pursuant to the law' and affirms the right of persons with disabilities to join trade unions.⁹²⁹

The **Law on the Employment Contracts** states that the employer cannot terminate an employment contract if the employee contracts an occupational disease or workplace injury during employment and is confirmed to have lost partially or completely his ability to work.⁹³⁰

A number of Regulations focusing on the rights of persons with disabilities include disability related provisions. For example, the **Regulations on the Employment of Persons with Disabilities** (2007)⁹³¹, stipulates that employers should provide working conditions and workplace safety commensurate with the physical conditions of employees with disabilities.⁹³² In addition, China has adopted Regulations on the Prevention of Disability and the Rehabilitation of Persons with Disabilities (in development)⁹³³ and on accessibility (i.e. Regulations on Barrier-Free Construction).⁹³⁴

The CRPD in the Chinese Legal Framework

China ratified the **CRPD** in **2008**. In order to coordinate the disability work, the State Council Working Committee on Disabilities has been established. It is composed of 36 ministries and social groups.⁹³⁵ The Secretariat of this Committee is the China Disabled Persons' Federation (CDPF), established in March 1998,⁹³⁶ that serves as the unified organizational representative of persons with disabilities in China and is the most important national organization for persons with disabilities⁹³⁷

⁹²⁶ Article 1 of t, the Law on the People's Republic of China on Promotion of Employment (2007).

⁹²⁷ Labor Law (P.R.C.) (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), Article 12.

⁹²⁸ Ibid, Article 14.

⁹²⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 117.

⁹³⁰ Ibid. para 118.

⁹³¹ Available at <http://www.cdcpf.org.cn/english/Resources/lawsregulations/201603/t20160303_542878.shtml>.

⁹³² *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 112.

⁹³³ Ibid. para. 26.

⁹³⁴ Ibid.

⁹³⁵ 'Facts on People with Disabilities in China', from the Official Website of the International Labour Organization, available at <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_142315.pdf>.

⁹³⁶ Official Website of the China Disabled Persons' Federation, available at <http://www.cdcpf.org.cn/english/about1us/200804/t20080409_267487.html>.

⁹³⁷ Ibid.

18.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility of the Workplace

Article 27 of the Law on Protection of Persons with Disabilities explicitly protects the right to work of persons with disabilities and, albeit indirectly, refers to accessibility. It affirms that:

“[t]he State protects disabled persons[...]... right to work. People's governments at various levels shall formulate overall plans on employment of disabled persons and *create condition[s] for their employment.*” (emphasis added)⁹³⁸

It can be assumed that creating the conditions for their employment includes creating an accessible workplace.

The implementation of these rules is however lagging behind since the legal system on the whole lacks coherence, and because of the society's weak awareness of the barrier-free environment.⁹³⁹

Reasonable Accommodation

Discrimination against persons with disabilities is prohibited in employment contexts, in relation to recruitment, changing from the status of a temporary worker to that of a regular employee, promotion, determination of a technical or professional title, remuneration, social security, welfare benefits, leave, and labour insurance.

Reasonable accommodation is not explicitly mentioned by any provision. However, reasonable accommodation duties can be inferred from the general obligation placed on employers to provide working conditions and labour protection suitable to the physical conditions or characteristics of their disabled workers, as well as to remodel the worksite, labour equipment, and living facilities according to actual needs of disabled workers.⁹⁴⁰ Article 38 of the Law on the Protection of Persons with Disabilities is particularly relevant in this respect. This provision states that:

‘Enterprises and institutions where persons with disabilities work shall provide appropriate working conditions and labour protection based on the characteristics of disabled workers, and shall make renovations where necessary on workplaces, work equipment and life facilities in light of their actual needs’.⁹⁴¹

Article 13 of the Regulations on the Employment of Persons with Disabilities also provides that:

‘Employing units shall provide disabled employees with working conditions and labour protection suitable for their physical conditions. No discrimination shall be practiced against disabled persons

⁹³⁸ Law on the Protection of Disabled Persons (P.R.C.) (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991), Article 27, translated in <http://www.cdpf.org.cn/english/info_01.htm>

⁹³⁹ M. Hui and P. Zheyi, ‘Study on Law of Barrier-free Environmental Construction in China’, (2017) *Advances in Social Science, Education and Humanities Research (ASSEHR)*, 80 *International Conference on Education, Culture and Social Development (ICECSD 2017)*, p. 222, available at <https://www.google.ie/search?ei=UXsnW-iYComagQbtt7b4DA&q=download.atlantis-press.com%2Fphp%2Fdownload_paper.php%3Fid%3D25879903&oq=download.atlantis-press.com%2Fphp%2Fdownload_paper.php%3Fid%3D25879903&gs_l=psy-ab.3...24039.26027.0.26274.1.1.0.0.0.0.51.51.1.1.0...0...1c.1j2.64.psy-ab..0.0.0...0.IHhM7IbfwTM>.

⁹⁴⁰ V. Lo, ‘Promotion of the Employment of Persons with disabilities in Japan, the United States and China: carrot, stick or both?’ (2012) *Arizona Journal*, p. 587.

⁹⁴¹ Law on the Protection of Persons with Disabilities, (2008) Article 38, available at <http://www.cdpf.org.cn/english/Resources/lawsregulations/201603/t20160303_542879_1.shtml>.

in promotion, determining technical or professional titles, payment, labour insurance, welfare or in other aspects'.⁹⁴²

18.4. Overview of Chinese Policies on Inclusion of Persons with Disabilities in the Workplace

Since the 1980's, China has been active on the international scene in relation to disability issues. In the Asian and Pacific region, China joined efforts in launching the first and second Asian and Pacific Decade of Disabled Persons, and relevant policy guidelines, such as the UN ESCAP Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities⁹⁴³, that provides regional policy recommendations for action by Governments in the region and concerned stakeholders to achieve an inclusive, barrier-free and rights-based society for persons with disabilities.⁹⁴⁴ It is worth mentioning that China was also one of the first countries to issue a National Plan on the Implementation of the 2030 Agenda for Sustainable Development, committing to lifting about 30 million rural population out of poverty by 2020, among whom many are persons with disabilities.⁹⁴⁵ Furthermore, it has adhered to the UN ESCAP Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific (2013 – 2022).⁹⁴⁶

When it comes to national level, several initiatives have been adopted. In March 2008, the State Council of the People's Republic of China issued its Opinions on Promoting the Cause of Persons with Disabilities, which puts forward the general philosophy, guiding principles, target tasks and major measures of the Chinese Government for promoting and safeguarding the rights and interests of persons with disabilities.⁹⁴⁷

The right to work of persons with disabilities is ensured by a range of measures, including a quota system. In particular, **the Chinese Government has established a system that requires all public and private employers to reserve no less than 1.5% of job opportunities for persons with disabilities, in accordance with specific regulations established by local provincial governments.**⁹⁴⁸ **Those who fail to meet the required quota must pay a fee to the 'Disabled Persons Employment Security Fund'**, which in turn supports vocational training and job-placement services for people with disabilities. China has also promoted the employment of persons with disabilities primarily through preferential tax treatment, financial assistance, employment services, development of public-welfare positions, and the development of community services.⁹⁴⁹ Most of them are implemented at the local level. For example in Taicang City, in compliance to local regulations, social payments are equal to 29.2% of gross remuneration cost (as of 12.2017). The calculation is done using the 'Social Basic Amount' as shown in the employee's paycheck.⁹⁵⁰ The 'Notice of the Ministry of Finance and the State Administration of Taxation on the Issues concerning the Preferential Policies for the Income Taxes Related to the Employment of Disabled Persons' provides

⁹⁴² Regulations on the Employment of Persons with Disabilities, (2007) Article 13, available at <http://www.cdpf.org.cn/english/Resources/lawsregulations/201603/t20160303_542878.shtml>.

⁹⁴³ < <https://www.unescap.org/resources/biwako-millennium-framework-action-towards-inclusive-barrier-free-and-rights-based-society>>

⁹⁴⁴ Zhang E.G., 'Employment of people with disabilities: International standards and domestic legislation and practices in China' (2006) 34 Syracuse journal of international law and commerce 517.

⁹⁴⁵ <<https://en.unesco.org/events/2018-international-day-persons-disabilities-china-disability-policy-dialogue> and <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1405596.shtml>

⁹⁴⁶ UN ESCAP Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific, available at <<https://www.unescap.org/resources/incheon-strategy-%E2%80%9Cmake-right-real%E2%80%9D-persons-disabilities-asia-and-pacific>>

⁹⁴⁷ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 7.

⁹⁴⁸ See e.g. Article 15 of Jiangsu Province code and regulation (Information from Alexander Sirakov DGUV).

⁹⁴⁹ *Ibid.* p. 587.

⁹⁵⁰ Information from Alexander Sirakov DGUV.

for specific tax deductions: it allows companies that hire people with disabilities to deduct the salaries cost related to employees with disabilities from their taxable income in a rate of 200% (as opposed to 100% for all other employees).⁹⁵¹

In 2007, the Ministry of Human Resources and Social Security's Guiding Opinions on Enhancing Piloting of Workplace Injury Rehabilitation proposed the establishment of 'a workplace injury rehabilitation system framework with Chinese characteristics, which focuses on vocational rehabilitation and aims to promote the reintegration and reemployment of workers'. These guidelines contributed to the regularization and improvement of workplace injury rehabilitation.⁹⁵² Nationwide in 2014 there were 6,154 vocational training institutions, including 2,211 established by DPFs and 3,943 by social organizations.⁹⁵³

In order to promote the employment of persons with disabilities, all public employment service agencies are fully open to persons with disabilities and provide free employment services to them, including policy and job information, vocational guidance and placement service, in compliance to the Employment Aid System and the Annual National Employment Aid Month Campaign.⁹⁵⁴

In order to remove all kinds of physical barriers for access and participation of Persons with Disabilities, a great number of accessible infrastructure and facilities were built up everywhere across the country. At present, in 100 big and middle-sized cities such as Beijing, Shenzhen, Shanghai, Shenyang and Guangzhou, a program called Pilot Cities in Accessible Construction is being implemented.⁹⁵⁵

18.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite the existence of several provisions protecting disability rights, the CRPD Committee, in its Concluding Observations, expressed concern 'about the lack of a comprehensive definition of discrimination against persons with disabilities' and about the contradictions between local regulations and national law with regard to the prohibition of discrimination.⁹⁵⁶ The Committee also held that China '**does not consistently apply the concept of reasonable accommodation in relation to the principle of non-discrimination**'. In fact, despite an implied duty to provide reasonable accommodation which can be inferred from anti-discrimination legislation, the CRPD Committee expressly recommended including a definition of reasonable accommodation reflecting Article 2 CRPD, in order to provide for all necessary and appropriate modifications and adjustments applicable in a particular case, beyond general accessibility. Furthermore, the CRPD Committee stated that China should ensure that the law explicitly recognises that the refusal of reasonable accommodation constitutes disability - based discrimination.⁹⁵⁷

An empirical study conducted in 2018 pointed out that, while discrimination based on disability in China is more widespread as compared with the United States, Germany, and Canada, Chinese people have relatively more positive attitudes toward persons with disabilities than in other countries. While Western

⁹⁵¹ Information from Alexander Sirakov DGUV

⁹⁵² *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 118.

⁹⁵³ China Disabled Persons' Federation 'Statistical Communiqué on the Development of the Work on Persons with Disabilities in 2014' (2014), available at <http://www.cdpcf.org.cn/english/Resources/statistics/201603/t20160323_545438.shtml>

⁹⁵⁴ *Ibid.* para. 115.

⁹⁵⁵ G. Zhang, 'China Disabled Persons' Federation- UPR Review on Disability Rights', (2009) Universal Periodic Review of the UN Human Rights Council, p. 4, available at <https://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/CDPF_CHN_UPR_S4_2009_ChinaDisabledPersonsFederation.pdf>

⁹⁵⁶ UN Committee on the Rights of Persons with Disabilities (2012), Concluding observations on the initial report of China, (UN Doc. CRPD/C/CHN/CO/1).

⁹⁵⁷ *Ibid.*

countries tend to adopt a non-discrimination model, the Chinese approach is based on a welfare model but tend to consider persons with disabilities special and in need of protection.⁹⁵⁸

Due to the limitations of this study, no data on the enforcement of reasonable accommodation could be found.

⁹⁵⁸ X. Zhu et al, 'Thriving of employees with disabilities: The roles of job self-efficacy, inclusion, and team-learning climate' (2018) 58 Human Resource Management 21 – 34.

19. Japan

19.1. Factual Background

In Japan, the number of persons with disabilities amounts to 6% of the total population. The number of persons with disabilities between 18-64 years of age is 3.6 million.⁹⁵⁹ In line with the global trend already highlighted in the preface, the employment rate of persons with disabilities is low. However, it has risen, with consistently higher figures recorded each year over a period of 13 years.⁹⁶⁰ Media reports that support services and quotas for workers with disabilities have contributed to the rise of employment rates among persons with disabilities.⁹⁶¹ The 2018 survey by the Japanese Ministry of Health, Labour and Welfare has showed that the number of persons with disabilities working in the private sector as of June 1st, 2018 topped 500,000 for the first time and that the number of workers with disabilities increased of 7.9% from 2017.⁹⁶² The 2017 Report on Employment Service for the disabled (FY2017) of the Ministry of Health, Labour and Welfare showed that the number of job placements for persons with disabilities through Public Employment Security Offices was 97,814, so it reported an increase of 4.9% from the previous fiscal year.⁹⁶³

19.2. The Rights of Persons with Disabilities in Japan: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Article 14 of the Japanese **Constitution** lays down in a general fashion the principle of equality before the law and prohibits discrimination.⁹⁶⁴ However, this provision does not explicitly mention disability as a ground of discrimination. The Constitution also ensures the protection of human rights (Article 11). In that connection, Article 97 stipulates that fundamental human rights are ‘conferred upon this and future generations in trust, to be held for all time inviolate’. The Constitution protects both civil and political rights as well as social, economic and cultural rights. Notably, Article 27 protects the right to work and states that ‘All people shall have the right and the obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law [...]’.⁹⁶⁵

The Japanese legal framework includes, in various acts, a neat prohibition of discrimination on the grounds of disability. The most relevant act is the ‘Basic Act for Countermeasures concerning Mentally and Physically Disabled Persons’ which dates back to 1970 but was revised and renamed in 2011 as **Basic Act for Persons with Disabilities**.⁹⁶⁶ Article 4 of this Act stipulates that:

‘(1) No person may commit an act of discrimination or any other act which violates interests or rights against a person with a disability on the basis of the disability.’

⁹⁵⁹ T. Kudo, ‘Japan’s Employment Rate of Persons with Disabilities and Outcome of Employment Quota System’ (2010) *Tokai Gakuen University*, p. 7.

⁹⁶⁰ A.a.V.v., ‘Employment Quota for Persons with Disabilities at Private Enterprises to be Incrementally Raised to 2.3%’ (2018) 2(6) *Japan Labor Issues*, available at <<http://www.jil.go.jp/english/jli/documents/2018/006-00.pdf>>.

⁹⁶¹ <<https://www.accessible-japan.com/employment-for-the-disabled-on-the-rise-in-japan/>>.

⁹⁶² <<https://www.japantimes.co.jp/news/2019/04/10/national/number-people-disabilities-working-japanese-firms-tops-500000-first-time/#.XOUPNchKg2x>>

⁹⁶³ Japan Institute for Labour Policy and Training, Recent Statistical Survey Reports, May 2018, available at <<https://www.jil.go.jp/english/estatis/esaikin/2018/e201805.html>>

⁹⁶⁴ The Constitution of Japan (1946), available at <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html>.

⁹⁶⁵ The Constitution of Japan (promulgated on November 3, 1946, came into effect on May 3, 1947), available at <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html>

⁹⁶⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para 175. The text of the law in English is available at <<http://www8.cao.go.jp/shougai/english/law/no84.html>>.

(2) When a person with a disability currently requires the removal of a social barrier and if the burden associated with said implementation is not excessive, necessary and reasonable accommodation must be given to implementing the removal of the social barrier so as not to be in violation of the provisions of the preceding paragraph by denial to do so'.⁹⁶⁷

The Basic Act for Persons with Disabilities also obliges public authorities to implement vocational counselling, vocational guidance, vocational training, employment placement, and other measures to boost employment of persons with disabilities (Article 18 para. 1 of the Basic Act).⁹⁶⁸ This Act also requires public authorities to take measures to prioritize the employment of persons with disabilities for job types or workplaces that are suitable for them in order to promote their employment (Article 19 para. 1 of the Basic Act).⁹⁶⁹ Moreover, the Basic Act for Persons with Disabilities obliges public authorities to make public facilities accessible to persons with disabilities and imposes a similar obligation on the private business sector establishing public facilities.⁹⁷⁰

Other relevant pieces of legislation are: the **2005 Comprehensive Support for Daily and Social Lives of Persons with Disabilities Act** (also called 'Services and Support for Persons with Disabilities Act'), which establishes a unified framework for welfare services for persons with disabilities to foster inclusion, and the 2013 **Act for Eliminating Discrimination against Persons with Disabilities** (which became effective in April 2016).⁹⁷¹ The latter prohibits administrative organizations and the private business sector from violating the rights and interests of persons with disabilities through unfair discriminatory treatment on the basis of disability.⁹⁷² It also requires that when a person with a disability requires the removal of a barrier and if the burden associated with that removal is not excessive, reasonable accommodation must be provided.

The **Act on Employment Promotion of Persons with Disabilities** (first enacted in 1960, but revised several times throughout the years, most recently in 2013)⁹⁷³ provides for employment quotas (Articles 38 and 43).⁹⁷⁴ Current quotas are as follows:⁹⁷⁵

Private companies	•2.0%,
National, local authorities, statutory corporations and others	•2.3%
Education boards of prefectural and city governments	•2.2%

For the calculation of the quota, persons with severe disabilities are counted as two disabled workers, and part-time workers (whose prescribed working hours are 20-30 hours per week) are counted as 0.5 towards the quota.⁹⁷⁶ Employers who fail to meet the quota are required to submit a plan to employ persons with

⁹⁶⁷ Basic Act for Persons with Disabilities (2011), available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2436&vm=04&re=02>.

⁹⁶⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, paras 5-6.

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *Ibid.* para 55.

⁹⁷¹ *Ibid.* para. 2.

⁹⁷² An explanatory note on the legislation can be found at <http://www8.cao.go.jp/shougai/english/annualreport/2015/pdf/s1-1.pdf>.

⁹⁷³ *Ibid.* paras. 9-13.

⁹⁷⁴ *Ibid.* para 176. See also, V. Lo, 'Promotion of the Employment of Persons with disabilities in Japan, the United States and China: carrot, stick or both?' (2012) *Arizona Journal*, p. 563.

⁹⁷⁵ https://www.mhlw.go.jp/english/policy/employ-labour/employment-security/dl/disabilities_eng.pdf.

⁹⁷⁶ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 176.

disabilities (Article 46 para. 1 of the Act on Employment Promotion of Persons with Disabilities). Companies with low achievement are given recommendations to implement the hiring plan appropriately (Article 46 para. 6).⁹⁷⁷ Companies that fail to meet the quota have to pay a levy.

The 2013 Amendment to the Act for Employment Promotion of Persons with Disabilities introduced a specific provision that prohibits discrimination against persons with disabilities and sets forth measures to secure equal opportunities for persons with disabilities, including the obligation of the employer to provide reasonable accommodation.⁹⁷⁸ In its consolidated form, the Act **prohibits business operators from treating persons with disabilities in an unfair discriminatory manner on the basis of disability and obliges business operators to take measures to remove obstacles that prevent persons with disabilities from carrying out their work in the workplace**, insofar as the burden for doing so is not excessive.⁹⁷⁹

Other pieces of legislation are relevant when it comes to the right to work of persons with disabilities. In particular, the **Human Resources Development Promotion Law** (1969- Law No. 64)⁹⁸⁰ has the aim to enhance opportunities to develop vocational abilities and establishes Vocational Ability Development Centers for Disabled Persons.⁹⁸¹ In addition, under the current legal framework, national and local authorities must take measures to enable persons with disabilities to engage in appropriate occupations based on the type and severity of their disabilities and respective desires, aptitudes, and vocational experiences, as well as making employment referrals.⁹⁸²

Several other legislative acts include disability related provisions or provisions on disability rights. Among them, the ‘Act on Promotion of Smooth Transportation etc. for Elderly Persons, Disabled Persons etc.’ (so called ‘Barrier Free Law’) sets out the ‘freedom and convenience for anyone anywhere’ and establishes the obligation to conform to the Accessibility Standards.⁹⁸³ Accessibility of buildings for Persons with Disabilities is regulated by the national Heart Building Law (1994), which establishes accessibility obligations for new constructions in relation to all types of buildings.

The CRPD in the Japanese Legal Framework

Japan signed the **CRPD** in 2007 but **ratified** it in January **2014**. Article 98 of the Japanese Constitution states that international treaties shall be faithfully observed. However, generally, international treaties (such as the CRPD) are not directly enforceable in courts.⁹⁸⁴

Japan has designated the Director for Policy for Persons with Disabilities in the Office of the Director General for Policy on Cohesive Society, Cabinet Office and the Human Rights and Humanitarian Affairs Division, Foreign Policy Bureau, Ministry of Foreign Affairs as the focal points for the implementation of the CRPD.⁹⁸⁵ A policy commission - an advisory body which includes persons with disabilities – is entrusted with the task of monitoring the CRPD.

⁹⁷⁷ Ibid.

⁹⁷⁸ State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities, para. 11.

⁹⁷⁹ Ibid.

⁹⁸⁰ <<http://www.dinf.ne.jp/doc/english/law/japan/30select.html>>

⁹⁸¹ Human Resources Development Promotion Law [Law No. 64 of 18 July 1969], available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=27221&p_country=JPN&p_count=851&p_classification=09&p_classcount=34>.

⁹⁸² Vai Jo Lo, (2012), ‘Promotion of the Employment of Persons with disabilities in Japan, the United States and China: carrot, stick or both?’, Arizona Journal, p. 565.

⁹⁸³ State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities, para 57.

⁹⁸⁴ There are some exceptions as discussed by T. Webster, ‘International Human Rights Law in Japan: The View at Thirty’, Scholarly Commons at <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?Article=1581&context=faculty_publications>.

⁹⁸⁵ State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities, para 215.

19.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

The **Act for the Promotion of Employment for Persons with Disabilities** does not specifically address accessibility of the workplace. However, accessibility can be achieved through the enforcement of the prohibition of discrimination and reasonable accommodation.

In addition, Article 10 of this Act lays down the ‘duties of employers relating to employing the physically disabled’ and provides that:

‘With respect to employing the physically disabled, all employers are persons with a **public duty to provide appropriate places of work** based on the principle of social solidarity, and shall actively endeavour to hire the physically disabled’.⁹⁸⁶

The duty to provide appropriate places of work can entail accessibility obligations.

Reasonable Accommodation

A general duty to provide reasonable accommodation is included in Article 4 of the Basic Act for Persons with Disabilities, while a specific duty to provide reasonable accommodation in employment contexts is established in the Act for the Promotion of Employment for Persons with Disabilities (which: (i) prohibits employment discrimination on the basis of disability; (ii) includes mandatory provision of reasonable accommodation; (iii) support for processing complaints and resolving disputes).

Provisions on the obligation of the employer to provide reasonable accommodation concern both recruitment and hiring situations as well as ‘situations after hiring’. According to Article 36 para. 2 ‘employers ... must take necessary measures, taking into account the characteristics of the disability, following a request from a person with disabilities’. Article 36 para. 3 provides that:

‘Employers [...] must take steps such as preparing the facilities necessary for the smooth performance of work, the allocation of support personnel and other necessary measures, taking account of the character of the disabilities the workers have’

The duty does not apply when taking necessary measures would place ‘undue hardship’ on the employer. Article 36 para. 4 states that, when providing reasonable accommodation, employers must fully respect the wishes of persons with disabilities, prepare a system necessary for engaging in consultation with workers with disabilities employed by them and appropriately respond to the same, and take other necessary measures in terms of employment management. Moreover, the Minister of Health, Labour and Welfare has the duty to draw up guidelines enabling employers to appropriately address the prohibition of discrimination, and to effectively provide reasonable accommodation (Article 36 para. 5 of this Act).⁹⁸⁷

If a conflict over the provision of reasonable accommodation occurs between business operators and workers with disabilities, business operators must endeavour to voluntarily resolve the conflict; directors of Prefectural Labour Bureaus can provide necessary advice, guidance or recommendation, and if deemed necessary, the Dispute Coordinating Committees can intervene in such conflicts.⁹⁸⁸

⁹⁸⁶ Act for Employment Promotion etc. of Persons with Disabilities (1960), Chapter III, Title I, Sections 10. And 11., available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/27786/64847/E60JPN01.htm#C02T02>

⁹⁸⁷ Ibid. p. 10; M. Asakura, ‘Prohibition of Discrimination against Persons with Disabilities in Employment’ (2014) 34 *Waseda Bulletin of Comparative Law*, p. 175-176.

⁹⁸⁸ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 13. See also, Ebisui M. et al., ‘Resolving individual labour disputes: A comparative overview’, International Labour Office of the International Labour Organization (ILO), p. 169 and 177.

19.4. Overview of Japanese Policies on Inclusion of Persons with Disabilities in the Workplace

Japanese policies on inclusion encompass subsidies to employers to nudge them to hire employees with disabilities,⁹⁸⁹ and vocational training and reintegration in work programmes. In 1987, regional vocational centres for people with disabilities were established in each prefecture and the Japan Organization for Employment of the Elderly, Persons with Disabilities and Job Seekers (JEED) began to offer training to assist preparation for employment. Following Japan's ratification of the ILO Convention No. 159, employment support measures for people with mental disabilities became widespread.⁹⁹⁰

As mentioned above, Japan has an employment quota system enforced through a 'levy system'. If the company is under quota, it must pay 50,000 yen per month multiplied for the number of persons with disabilities necessary to fulfil the quota. This payment has to be made to the JEED (Japan Organization for Employment of the Elderly, Persons with Disabilities and Job Seekers). By contrast, if the company is over the quota, it receives a grant of 27,000 yen month for each person with disability who is over the quota.⁹⁹¹

The 2002 Basic Program for Persons with Disabilities⁹⁹² affirms that:

'Since employment and work are substantial factors for independence and social integration of persons with disabilities, conditions should be developed to enable persons with disabilities to contribute to the society through working to their full content' (section 5).

The program also identifies the need to support 'initiatives to employ persons with disabilities for the businesses that hire many persons with severe disabilities and special subsidiaries'. It also aims to promote the use of IT in work, and to support persons with disabilities who are willing to create or run new businesses. Subsequent programmes built on the lines traced by this programme.

The National Rehabilitation Center for Persons with Disabilities (NRCD) supports persons with disabilities in Japan and conducts research and development of rehabilitation technologies and assistive products as well as for education and training of rehabilitation professionals.⁹⁹³

A recent UN publication suggests that the 2013 Third National Basic Plan of Action on Persons with Disabilities, and the 2015 Basic Policy on the Law on the Elimination of Discrimination against Persons with Disabilities further commit the Government of Japan to make additional legal revisions to current legislation with an emphasis on integrating technological advances into accommodations to enhance the employment of persons with disabilities.⁹⁹⁴

So called 'Hello Work' offices, a national network of Public Employment Security Offices, facilitate the employment of persons with disabilities through gathering information on disabled job seekers, providing information about job candidates to employers.⁹⁹⁵ Vocational Centres for Persons with Disabilities are set

⁹⁸⁹ T. Hasegawa, 'Japan's Employment Measures for persons with disabilities: Cantered on Quota System on Act of Employment Promotion for Persons with Disabilities' (2010) 7(2) *Japan Labour Review*.

⁹⁹⁰ N. Kurachi, 'The Employment of People with Mental Disabilities in Japan: The Current Situation and Future Prospects' (2010) 7(2) *Japan Labour Review*.

⁹⁹¹ A. Kawano, 'The employment policy for People With Disability (PWD) in Japan: studying of the Special Subsidiary Company (SSC) 2016, available at <<http://r-cube.ritsumei.ac.jp/repo/repository/rcube/7591/51214001.pdf>>

⁹⁹² <<http://www8.cao.go.jp/shougai/english/basicprogram/contents.html>>.

⁹⁹³ National Rehabilitation Center for Persons with Disabilities official website available at <<http://www.rehab.go.jp/english/index.html>>

⁹⁹⁴ UNESCAP, Disability at a Glance 2015. Strengthening Employment Prospects for Persons with Disabilities in Asia and the Pacific, available at <https://www.unescap.org/sites/default/files/SDD%20Disability%20Glance%202015_Final.pdf>.

⁹⁹⁵ V. Lo, 'Promotion of the Employment of Persons with disabilities in Japan, the United States and China: carrot, stick or both?', (2012) *Arizona Journal*, p. 565.

up in various regions or prefectures to administer vocational training and rehabilitation programs,⁹⁹⁶ and to promote the employment of disabled individuals.⁹⁹⁷

On-the-job training is also available for persons with disabilities. For instance, a ‘trial employment’ system has been introduced to enable persons with disabilities to receive skill training on a temporary basis and then move onto regular employment.⁹⁹⁸ The key actor in all these support programs is the job coach. In Japan, three types of job coaches provide support for both employers and persons with disabilities in and outside the workplace.⁹⁹⁹

19.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

While the quota system has functioned fairly well, some companies still fail to fulfil their quota obligations.¹⁰⁰⁰ In particular, a study from Japan-based recruitment and job information provider En-Japan Inc. found that 60% of small and medium enterprises have not met their quotas for mandatory employment of people with disabilities. A study based on a poll reported that only 35% of small and medium enterprises were willing to hire people with mental or physical disabilities.¹⁰⁰¹ The Japanese Government itself in August 2018 gave rise to a ‘scandal’ apologizing for routinely overstating the number of disabled people it employed to meet legal quotas: thousands of able-bodied employees at 27 ministries and government agencies were wrongly counted as disabled.¹⁰⁰²

The duty to accommodate persons with disabilities is however respected. It is in fact somewhat reinforced by the unique features of Japanese employment law. As noted by Nakagawa and Blanck, ‘it is difficult for a Japanese employer to discharge an employee under an employment contract without a fixed period, even if the employee is temporarily incompetent, or lacks or loses the level of productivity or qualifications required to perform the job’.¹⁰⁰³ The difficulty of dismissing an employee under Japanese law has nudged employers to accommodate employee needs and/or transfer an employee with a disability to another job if necessary. An employer may legitimately discharge an employee only if there are reasonable grounds, ‘but Japanese case law on employment contracts has not permitted a broad exercise of the right of dismissal’.¹⁰⁰⁴ For this reason, even before the introduction of a legal obligation to provide reasonable accommodation (which occurred in 2013), the 2008 Survey on the Employment Situation of Persons with Disabilities reported that 72.6% of employers provided accommodation in employment for persons with physical disabilities, 61.9% of employers made adjustments for persons with intellectual disabilities, and 52.4% for persons with mental disabilities. In other words, the majority of employers already provided accommodation for persons with disabilities, even before the introduction of a legal obligation.

⁹⁹⁶ Ibid.

⁹⁹⁷ < <https://www.jeed.or.jp/english/disability/index.html>>

⁹⁹⁸ Ibid. p. 571.

⁹⁹⁹ Ibid. p. 572.

¹⁰⁰⁰ S. Yasui, ‘Employment of people with disabilities. Employment quota system in Japan’ (2017), available at < <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&Article=1082&context=gladnetcollect>>

¹⁰⁰¹ < <https://www2.staffingindustry.com/row/Editorial/Daily-News/Japan-SMEs-failing-to-meet-disability-employment-rate-quotas-48302>>

¹⁰⁰² <https://search.proquest.com/docview/2093883403?pg-origsite=summon> and < <https://thediplomat.com/2018/08/japan-government-investigated-for-cheating-disability-hiring-quotas/>>

¹⁰⁰³ J. Nakagawa and P. Blanck, ‘Future of Disability Law in Japan: Employment and Accommodation’, in (2010) *Loyola of Los Angeles International and Law Reviews - Comparative Law Review*, available at <http://bbi.syr.edu/publications/blanck_docs/2010/nakagawa_blanck_future_disability_law_japan.pdf>.

¹⁰⁰⁴ Ibid.

20. The Republic of Korea (South Korea)

20.1. Factual Background

In South Korea, in December 2009, the total number of registered persons with disabilities amounted to 2.429 million, which accounts for 4.88% of Korea's total population (49.773 million). Among them, 58% are men and 42% are women.¹⁰⁰⁵ A total of 23.243 persons with disabilities lived in residential facilities.

The 2013 National Survey on the Economic Activities by Persons with Disabilities, conducted by Korea Employment Agency for the Disabled, reports that discrimination and prejudice against persons with disabilities were the biggest reasons for them being unemployed.¹⁰⁰⁶ This survey reveals that, as of May 2013, the economic activity participation rate of persons with disabilities was 38.3%, and the employment rate was 36.0% (only half the rate of the total population, which is 60.4%).¹⁰⁰⁷ In 2016, 2.81% of the employees in governmental sector and 2.56% of the workers in the private sector were disabled.¹⁰⁰⁸

20.2. The Rights of Persons with Disabilities in South Korea: Introductory Remarks

The Relevant Legal Framework in a Nutshell

The Korean **Constitution** protects dignity and human rights (Article 10),¹⁰⁰⁹ and provides for the principle of equality in Article 11. The latter provision does not explicitly list disability as a protected ground.¹⁰¹⁰ However, Lee suggests that there is a general academic consensus on a broad interpretation of the provision, according to which discrimination 'shall be forbidden on the basis of any unfair reasons, even if not specifically listed in the Constitution'.¹⁰¹¹ Article 32 para. 3 of the Korean Constitution states that 'the terms and conditions of employment shall be determined by the law to promote the value of humanity'. Article 34 para. 5 also prescribes that 'citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act'.

The Korean legal framework includes several provisions on the rights of persons with disabilities and legislation specifically aimed at promoting disability rights.

The most relevant anti-discrimination instrument is the **Anti-Discrimination against and Remedies for Persons with Disabilities Act (ARPD)** enacted in 2007. This act prohibits discrimination on the basis of disability in both public and private sectors in all aspects of life. The ARPD defines 'disability' as 'a state where a physical or mental impairment or loss of function substantially limits an individual's personal or social activities for an extended period of time' (Article 2 para. 1).¹⁰¹²

¹⁰⁰⁵ WH Kim et al., 'The World Report on Disability and Recent Developments in South Korea' (2014) 93(1) *American Journal of Physical Medicine & Rehabilitation*, available at <https://journals.lww.com/ajpmr/fulltext/2014/01001/The_World_Report_on_Disability_and_Recent.10.aspx>.

¹⁰⁰⁶ National Human Rights Commission of Korea, Opinions on the first National Report of Korea on the Convention on the Rights of Persons with Disabilities.

¹⁰⁰⁷ National Human Rights Commission of Korea, 'Opinions on the first National Report of Korea on the Convention on the Rights of Persons with Disabilities' (2014), available at <http://webcache.googleusercontent.com/search?q=cache:HBMUUMvi-5MJ:disabilitycouncilinternational.org/documents/INT_CRPD_IFN_KOR_18083_E.doc+&cd=10&hl=it&ct=clnk&gl=ie>

¹⁰⁰⁸ <<https://www.statista.com/statistics/641774/south-korea-disabled-workers/>>

¹⁰⁰⁹ The Constitution of the Republic of Korea, (1948), Article 10, available at <https://archive.is/20120710041912/http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035>.

¹⁰¹⁰ Article 11 affirms that 'All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status'.

¹⁰¹¹ SW Lee, 'New Developments in Employment Discrimination in Korea', available at <http://www.jil.go.jp/english/events/documents/clls08_lee.pdf>.

¹⁰¹² *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 10.

With regards to the employment context, the ARPDPA prohibits discrimination by employers in recruitment, hiring, wages, and employee benefits, as well as training, placement, promotion, transfer, retirement, resignation, and dismissal. It stipulates that there should be no refusal of membership of workers with disabilities by the trade unions. Moreover, it prohibits employers from assigning workers with disabilities to different tasks against their will, and obliges employers to provide reasonable accommodation in order to enable workers with disabilities to work under equal conditions as persons without disabilities in carrying out allocated jobs (Article 11).¹⁰¹³

The ARPDPA also includes remedies. In cases where a lawsuit is filed based upon the violation of the ARPDPA, the court may give a judgment awarding compensation, and may also rule to take remedial measures to rectify the discrimination, such as the discontinuation of a discriminatory act and improvement of working conditions (Articles 46 and 48 para. 2). Aside from the remedies for the victims, the Act stipulates that a person who commits a malicious discriminatory act shall be punished by imprisonment for up to three years or a fine not exceeding 30 million Won (Article 49 para. 1).¹⁰¹⁴ The National Human Rights Commission (set out by the National Human Rights Commission Act enacted in May 2001 and revised in July 2005)¹⁰¹⁵ may also investigate complaints regarding disability discrimination and recommend the implementation of remedial measures.

Discrimination on the ground (*inter alia*) of disability is also prohibited by several pieces of legislation:¹⁰¹⁶ the Labour Standards Act;¹⁰¹⁷ the Framework Act on Employment Policy, enacted in December 1993; the Act on the Development of Workplace Skills of Workers, enacted in December 1997;¹⁰¹⁸ and the **Employment Promotion and Vocational Rehabilitation of Disabled Persons Act (EVDPA)**.¹⁰¹⁹

Article 8 of the 1987 Equal Employment Opportunities Act *inter alia* establishes the principle of equal pay.¹⁰²⁰ However, the **Minimum Wage Act** provides that an employer may not pay the legal minimum wage to persons acknowledged to have a mental or physical disability which significantly impedes the undertaking of a job, upon the approval of the Minister of Employment and Labour.

The 1989 **Welfare of Disabled Persons Act (WDPA)**¹⁰²¹ also prohibits discrimination on the basis of disability,¹⁰²² and provides for measures to promote the welfare of persons with disabilities.

Moreover, the Korean legislative framework includes a series of promotional measures. The **EVDPA** is particularly relevant in this analysis as, in order to ensure the right to work of person with disabilities, provides for a mandatory **quota system**. This system applies to the owners of businesses with 50 or more

¹⁰¹³ Ibid. paras. 3, 9, 13, 14, 17, 18, 19, 22, 131, 140.

¹⁰¹⁴ Ibid. para. 29.

¹⁰¹⁵ Ibid. para. 19.

¹⁰¹⁶ Ibid. para. para 131.

¹⁰¹⁷ Labour Standard Act, (1997), available at <<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/46401/74081/F437818795/KOR46401%20Eng2014.pdf>>.

¹⁰¹⁸ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 131. This act prohibits discrimination based on disabilities in workplace skill development training and specifies that in instances where opportunities for vocational training are being provided, workers with disabilities should be prioritized.

¹⁰¹⁹ EVDPA, (1990) formerly Promotion of Employment of Disabled Persons Act, available at <<https://dredf.org/legal-advocacy/international-disability-rights/international-laws/south-korea-act-employment-of-handicapped/>>.

¹⁰²⁰ Equal Employment Opportunities Act, (1987), Article 8, available at <<http://www.moleg.go.kr/english/korLawEng?pstSeq=52977>>.

¹⁰²¹ Welfare Law for Persons with Disabilities (amended as Law No. 4179 and promulgated on December 30, 1989), Article 1, available at <<https://dredf.org/legal-advocacy/international-disability-rights/international-laws/south-korea-welfare-law-for-persons-with-disabilities/>>

¹⁰²² Answer to the Questionnaire from the Special Rapporteur on the Rights of Persons with Disabilities, Ms. Catalina Devandas-Aguilar, available at <https://webcache.googleusercontent.com/search?q=cache:Aq2oWzSVFJ4J:https://www.ohchr.org/Documents/Issues/Disability/DisabilityInclusivePolicies/States/PM%2520republic%2520of%2520Korea_ENG.docx+&cd=4&hl=it&ct=clnk&gl=ie>

regular workers, including central and local governments and public agencies. The EVDPA stipulates that governmental and public agencies must hire a quota of persons with disabilities representing 3% of their workforce, while the quota is slightly lower (i.e. **2.3%**) for the private sector.¹⁰²³ Employers with more than 100 regular workers who have failed to meet the mandatory employment quota must pay the ‘disability employment levy’.¹⁰²⁴ In order to prompt businesses to hire persons with severe disabilities, in 2010, the Korean government also introduced the ‘**double counting system for persons with severe disabilities**’ ‘under which the employment of one person with severe disabilities is considered the same as the employment of two persons with mild disabilities’.¹⁰²⁵

The Framework Act on Employment Policy (1993), besides prohibiting discrimination on the grounds of disability, also requires the government to promote employment of persons with disabilities.¹⁰²⁶ Article 6 para. 6 of this Act, in particular, stipulates that

‘The State shall establish and implement necessary policies with regard to the matters described in any of the following subparagraphs:

[...]

(6) Matters concerning employment promotion for those who have particular difficulties in getting employed under the ordinary conditions of the labour market due to their lack of education and professional experience, old age, physical or mental disabilities, prolonged unemployment, migration from overseas and so on, and for eligible recipients, etc., under the National Basic Living Security Act (hereinafter referred to as ‘vulnerable groups’)[...]’¹⁰²⁷

Article 14 of the **Employment Security Act** (1961) includes persons with disabilities in the list of people for whom local employment and labour offices must provide services as vocational aptitude test, job information, and job counselling.¹⁰²⁸ The Korean government is also operating the ‘public workplace venture’ (a sort of sheltered employment facilities) in order to provide employment opportunities for persons with severe disabilities who find it difficult to enter employment in the regular labour market.¹⁰²⁹

To incentivise companies to employ persons with disabilities but also to enhance self-employment among persons with disabilities, the **Special Act on the Preferential Purchase of Goods produced by Persons**

¹⁰²³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 132. In the Answer to the Questionnaire from the Special Rapporteur on the Rights of Persons with Disabilities, Ms. Catalina Devandas-Aguilar, available at https://webcache.googleusercontent.com/search?q=cache:Aq2oWzSVFJ4J:https://www.ohchr.org/Documents/Issues/Disability/DisabilityInclusivePolicies/States/PM%2520republic%2520of%2520Korea_ENG.docx+&cd=4&hl=it&ct=clnk&gl=ie, the quota indicated is slightly higher. It indicates that ‘any business proprietor who regularly employs at least 50 workers shall employ persons with disabilities to fill up to 5% of the total number of workers’. Notably quota had been considered compliant to the constitution since 2003 by the Constitutional Court. Constitutional Court of Korea, Mandatory Employment of Disabled Persons (15-2(A) KCCR 58, 2001Hun-Ba96, July 24, 2003), available at <http://search.court.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=7959&eventNo=2001%ED%97%8C%EB%B0%9496&pubFlag=0&cld=010400>.

¹⁰²⁴ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 3, 131, 132.

¹⁰²⁵ *Ibid.* para. 132.

¹⁰²⁶ *Ibid.* para. 25, 131.

¹⁰²⁷ Framework Act on Employment Policy, (1993), Article 6, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/41946/98444/F1526551480/KOR41946%202015.pdf>.

¹⁰²⁸ Employment Security Act, (1961), Article 14(1), available at <<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/41947/74095/F-1565688041/KOR41947%202014.pdf>>.

¹⁰²⁹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 134.

with Disabilities,¹⁰³⁰ introduced in 2008, promotes the purchase of products manufactured by companies employing or owned by persons with disabilities.¹⁰³¹

The 2005 **Promotion of Disabled Persons' Enterprise Activities Act (PDEA)** aims to help persons with disabilities start their own businesses or engage in business activities. In order to achieve this goal, it obliges the State and local governments to give preference to investments and loans to disabled business founders (Article 8 para. 2) and in supporting mid-sized businesses, to give preference to Disabled Persons' enterprises (Article 9 para. 1). It also recommends that heads of public sector organizations purchase goods produced by Disabled Persons' enterprises (Article 9) and makes such purchases tax-deductible (Article 14).¹⁰³²

There are the two main pieces of legislation concerning accessibility: the 1977 Act on Promotion of Convenience for the Disabled, Senior Citizens and Pregnant Women (APC), which aims at securing accessibility to buildings, roads, and facilities for persons with disabilities and other vulnerable people,¹⁰³³ and the most recent 2007 Framework Act on Building, which obliges the State and local governments to ensure that buildings and spatial environments are planned and designed in compliance to the accessibility standards.¹⁰³⁴ The government of the Republic of Korea amended the APC in 2014, requiring the central and local governments to acquire 'Barrier-free (BF) Certification' when newly constructing a public building. Additionally, the Korean government established the '4th National Plan for Convenience Promotion 2015-2019' to ensure accessibility to public facilities for persons with disabilities.¹⁰³⁵

There are then other laws ensuring support to persons with disabilities, such as the **Industrial Accident Compensation Insurance Act**, which establishes a system to support workers who suffer workplace injuries resulting in disabilities,¹⁰³⁶ and the Disability Pensions Act (DPA) (2010), that has introduced a pension scheme for persons with severe disabilities. There are also welfare provisions, such as the Welfare of Physically or Mentally Disabled Persons Act (WDPA) (1989).¹⁰³⁷

The CRPD in the Korean Legal Framework

The Republic Korea ratified the **CRPD** on December 11, **2008**. The initial report of Korea was reviewed by the CRPD Committee in 2014. The Committee expressed various concerns, and highlighted the Korean legislation, in particular the Welfare of Disabled Persons Act, is still informed by the medical model of disability.¹⁰³⁸

The Bureau of Policy for Persons with Disabilities at the Ministry of Health and Welfare constitutes the focal point responsible for the implementation of the CRPD.¹⁰³⁹ The National Human Rights Commission of Korea is entrusted with the task of monitoring the implementation of the CRPD.¹⁰⁴⁰ It has the function

¹⁰³⁰ Special Act on the Preferential Purchase of Goods produced by Persons with Disabilities, (2008), available at <http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=37707&type=new&key=>>.

¹⁰³¹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 3.

¹⁰³² *Ibid.* para. 3, 138.

¹⁰³³ *Ibid.* para. 3.

¹⁰³⁴ *Ibid.* para. 45.

¹⁰³⁵ *Republic of Korea - Answer to the Questionnaire from the Special Rapporteur on the Rights of Persons with Disabilities - Questionnaire on the 'provision of support to persons with disabilities'* available at <<https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Provisionofsupporttopersonswithdisabilities.aspx>>.

¹⁰³⁶ *Ibid.* para. 3.

¹⁰³⁷ *Ibid.* para. 3, 9, 10, 11, 17, 20.

¹⁰³⁸ According to the Committee this act refers to the medical model of disability and fails to take into account the various needs of persons with disabilities and to encompass all persons with disabilities, including those with psychosocial disabilities. See UN Committee on the Rights of Persons with Disabilities (2014), Concluding observations on the initial report of Republic of Korea, (UN Doc. CRPD/C/KOR/CO/1).

¹⁰³⁹ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 166.

¹⁰⁴⁰ *Ibid.* para 167.

to conduct research and make recommendations with respect to the law, institutions, policies and practices as they relate to human rights.

20.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

As mentioned above, the 2007 Framework Act on Building, which obliges the State and local governments to ensure that buildings and spatial environments are planned and designed in compliance to the accessibility standards. There is no specific provision that obliges employers to make the workplace accessible to persons with disabilities. However, Article 9 of the Act on Promotion of Convenience for the Disabled, Senior Citizens, and Pregnant Women obliges owners:

‘to install various convenience facilities in buildings, houses, schools, medical facilities, and workplaces in compliance with certain accepted installation standards so that persons with disabilities can easily access and use those facilities’.¹⁰⁴¹

These convenience facilities include: access points, corridors, stairs, exclusive parking lots for the disabled; elevators, ramps, and toilets designated solely for disabled users, and accommodations designed to guide persons with visual or hearing disabilities.¹⁰⁴²

Reasonable Accommodation

As mentioned above the **Anti-Discrimination against and Remedies for Persons with Disabilities Act** prohibits discrimination against persons with disabilities and obliges employers to adopt reasonable accommodation. In particular, Article 11 of this Act offers specific guidance to employers and stipulates:

‘(1) To enable persons with disabilities to work on an equal basis as others in carrying out assigned tasks, an employer shall provide legitimate accommodation as defined in each of the following:

- (i) installing or modifying equipment or devices;
- (ii) modifying or adjusting working hours to accommodate rehabilitation, function test, treatment, etc.;
- (iii) offering training opportunities or accommodation for training;
- (iv) modifying instruction manuals or reference materials;
- (v) improving examination or evaluation procedures;
- (vi) installing and operating auxiliary devices, such as text reading or enlarging programs, paperless Braille handsets, magnifying readers, or print-to-voice converters, and making available supporting staff, including qualified readers and sign language interpreters.

(2) An employer shall not assign persons with disabilities to different tasks against their will on the basis of disability without legitimate grounds.

(3) The specifics of legitimate accommodation to be provided by an employer under paragraph (1) and the workplaces covered in each implementation phase shall be set forth in the presidential decree’

However, the National Human Rights Commission of Korea argues that only facilities above a certain size (at min. 300m²) and workplaces with at least 30 full-timers are obliged to provide reasonable accommodation to persons with disabilities.¹⁰⁴³ Workers in small companies are thus not protected.

¹⁰⁴¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 45.

¹⁰⁴² *Ibid.* para 45.

¹⁰⁴³ National Human Rights Commission of Korea, *Opinions on the first National Report of Korea on the Convention on the Rights of Persons with Disabilities*.

The ARPDA also stipulates that individuals, corporations, and public institutions shall provide reasonable accommodations to ensure that persons with disabilities can access and use electronic and non-electronic information on an equal basis to persons without disabilities (Articles 20 and 21). In accordance with Article 4 (Discriminatory Acts) of the ARPDA a refusal to provide reasonable accommodation without justifiable grounds amounts to discrimination (the act refers to ‘legitimate accommodation’). The ARPDA defines accommodation as ‘any and all human and material arrangements and measures to enable persons with disabilities to participate in activities on an equal basis with persons without disability, including convenient facilities, equipment, tools and services designed to take into consideration the gender of a disabled person as well as the type, extent and nature of a disability.’¹⁰⁴⁴

Moreover, **Article 5 of the EVDPA** gives further substance to the duty to provide accommodation and provides for ‘Details of legitimate accommodation to be offered by the employer pursuant to Article 11 para. 3 of the Act’. Article 5 identifies the following accommodations: exit, entry and ramp to make workplace accessible; installation or modification of facilities and equipment, such as height-adjustable workbench for carrying out assigned tasks; modification of working hours including changes to work schedule to allow for rehabilitation, evaluation, and treatment; provision of personnel and facilities to assist persons with disabilities in participating in training by making available support staff, height-adjustable desks, and documents written in Braille, etc.; provision of instruction manuals and work guidelines for persons with disabilities; and provision of means to support evaluation of persons with disabilities through an increase in allotted test time and provision of larger-sized answer sheets.¹⁰⁴⁵

20.4. Overview of Korean Policies on Inclusion of Persons with Disabilities in the Workplace

The Government of South Korea has adopted a large number of disability policies. It has enacted specific plans to implement the CRPD,¹⁰⁴⁶ and policy plans to promote accessibility¹⁰⁴⁷ and employment of persons with disabilities, in particular vocational training programmes. Among the latter, the Vocational Competency Development Centre provides specialized vocational training for persons with disabilities.¹⁰⁴⁸ The Korean government has also supported ‘Model Enterprises for Persons with Disabilities’, i.e. are private enterprises that hire persons with disabilities as at least 30 percent of their regular workforce.¹⁰⁴⁹ The Korea Employment Promotion Agency for Disabled Persons (KEAD) and the Government of Korea is developing Work Together¹⁰⁵⁰, a website specializing in the employment of persons with disabilities.¹⁰⁵¹ In 2014, the KEAD released a report¹⁰⁵² focused on the vocational training of Persons with Disabilities and other aspects of the Korean Labour Law related to Disabilities.¹⁰⁵³

The Republic of Korea has adhered to the UN ESCAP Incheon Strategy to ‘Make the Right Real’ for Persons with Disabilities in Asia and the Pacific (2013 – 2022), which has the purpose to enable the Asian and

¹⁰⁴⁴ Anti-Discrimination Against and Remedies for Persons with Disabilities Act (Act No. 10280), Article 4, available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=91249&p_country=KOR&p_count=145>

¹⁰⁴⁵ Enforcement Decree of the Anti-Discrimination Against and Remedies for Persons with Disabilities Act, (2011), Article 5, available at <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=91249&p_country=KOR&p_count=145>.

¹⁰⁴⁶ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 2, 4.

¹⁰⁴⁷ *Ibid.* para. 4.

¹⁰⁴⁸ *Ibid.* para. 135.

¹⁰⁴⁹ *Ibid.* para. 138.

¹⁰⁵⁰ Official Website of Work Together, available at <www.worktogether.or.kr>.

¹⁰⁵¹ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 139.

¹⁰⁵² Aa.Vv., ‘Vocational Training of Persons with Disabilities in Korea’ (2014) Government Publications Registration Number 11-1051000-000580-01, available at <<https://www.google.ie/search?q=Vocational+Training+of+Persons+with+Disabilities+in+Korea&oq=Vocational+Training+of+Persons+with+Disabilities+in+Korea&aqs=chrome..69l57.428j0j7&sourceid=chrome&ie=UTF-8>>.

¹⁰⁵³ *Ibid.*; *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 139.

Pacific region to track progress towards improving the quality of life and the fulfilment of the rights of the region's 650 million persons with disabilities, most of whom live in poverty.¹⁰⁵⁴

20.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite relatively advanced legislation and policies, a survey conducted in 2015 on 900 persons with disabilities highlighted a high level of social exclusion and persistent violations of social rights (including employment rights).¹⁰⁵⁵ An empirical study conducted in 2015 found that Korean people with disabilities experience relatively high levels of exclusion from education, employment, information, housing, and social services.¹⁰⁵⁶

In addition, according to a recent report,¹⁰⁵⁷ the Republic of Korea's quota system has shown little uptake in the hiring of persons with disabilities. The lack of effectiveness of the quota system is (at least partially) linked to stigma and prejudices. The National Human Rights Commission of Korea affirms that pursuant to the Act on Welfare of Persons with Disabilities and the Act on Employment Promotion and Vocational Rehabilitation for Disabled Persons, the state, local governments and business owners have the obligation to provide education to employees to raise their awareness on the needs of persons with disabilities and on inclusion, but there are no penalties when this provision is neglected. This has contributed to perpetuate discriminatory practices.

The CRPD Committee expressed concern that the Minimum Wage Act excludes from the benefit of the minimum wage 'those who clearly lack the capacity to work' and fails to set clear standards for conducting assessments and making decisions to define the lack of capacity to work. The Committee is also concerned that, as a result, many persons with disabilities who work, especially those with psychosocial disabilities, receive compensation below the minimum wage, and that the practice of placing such workers in sheltered workshops that do not aim to prepare them for entry into the open labour market continues.¹⁰⁵⁸ In this respect, according to the National Human Rights Commission of Korea 73 (53%) out of 138 workplaces designated as facilities manufacturing products by persons with severe disabilities paid them hourly wages below the minimum wage and, in particular, 21 workplaces (15%) paid less than the minimum wage even without acquiring the approval of Minister of Employment and Labour.¹⁰⁵⁹ Since the Anti-Discrimination Act against Persons with Disabilities came into effect, a total of 413 complaints about discrimination in employment were filed with the Commission by the end of 2013. Among them, discrimination in 'recruiting and employment' accounted for 38.7%, followed by 'retirement and dismissal (22.5%)' and 'salary and fringe benefits (14.3%)' in that order.¹⁰⁶⁰

¹⁰⁵⁴ UN ESCAP, Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific and Beijing Declaration and Action Plan to Accelerate the Implementation of the Incheon Strategy, available at <<https://www.unescap.org/resources/incheon-strategy-make-right-real-persons-disabilities-asia-and-pacific-and-beijing>>

¹⁰⁵⁵ KM Kim et al., 'Social Exclusion of People with Disabilities in Korea' (2015) *Springer Science+Business Media Dordrecht*, p. 761-773, available at <<https://link.springer.com/Article/10.1007/s11205-015-1123-2>>.

¹⁰⁵⁶ Kyung Mee Kim, Dong Ki Kim, Yu Ri Shin, Dong chul Yoo, 'Social Exclusion of People with Disabilities in Korea' (2015) 129 (2) *Social Indicators Research* 761 – 773.

¹⁰⁵⁷ UNESCAP, *Disability at a Glance 2015 . Strengthening Employment Prospects for Persons with Disabilities in Asia and the Pacific*, available at <https://www.unescap.org/sites/default/files/SDD%20Disability%20Glance%202015_Final.pdf>.

¹⁰⁵⁸ UN Committee on the Rights of Persons with Disabilities (2014), Concluding observations on the initial report of Republic of Korea, (UN Doc. CRPD/C/KOR/CO/1).

¹⁰⁵⁹ National Human Rights Commission of Korea, Opinions on the first National Report of Korea on the Convention on the Rights of Persons with Disabilities.

¹⁰⁶⁰ Answer to the Questionnaire from the Special Rapporteur on the Rights of Persons with Disabilities, Ms. Catalina Devandas-Aguilar, available at <https://webcache.googleusercontent.com/search?q=cache:Aq2oWzSVF14J:https://www.ohchr.org/Documents/Issues/Disability/DisabilityInclusivePolicies/States/PM%2520republic%2520of%2520Korea_ENG.docx+&cd=4&hl=it&ct=clnk&gl=ie>

21. Australia

21.1. Factual Background

In 2012, almost one in five Australians reported living with disability (18.3% or 4.3 million people). The majority (78.5%) of people with disability reported a physical condition, such as back problems, as their main long-term health condition. The other 21.5% reported mental and behavioural disorders.¹⁰⁶¹ The Australian Bureau of Statistics (ABS) reports that between 1993 and 2012, the labour force participation rate for working-age people (15-64 years) with a disability was relatively stable. In 1993, the rate was 54.9%, and this was broadly similar in 2012 at 52.8%. Conversely, over the same period, the participation rate for working-age people without disability increased from 76.9% in 1993 to 82.5% in 2012. Between 1993 to 2012, the unemployment rate for 15-64 year olds with a disability decreased from 17.8% to 9.4%. However, in line with the global trend highlighted in the preface, the unemployment rate for people with a disability continued to be significantly higher than for those without disability.

The last Survey of Disability, Ageing and Carers (SDAC) was conducted in 2015 and its results were published in 2016. The survey reported that almost one in five Australians reported living with disability (18.3% or 4.3 million people) and, in relation to the employment context, it showed that more than half of persons with disability aged 15 to 64 years participate in the labour force (53.4%).¹⁰⁶² These results are consistent with those in the 2012 SDAC. Moreover, almost 1 in 12 Australians with disabilities reported they had experienced discrimination or unfair treatment because of their disability.¹⁰⁶³

21.2. The Rights of Persons with Disabilities in the Australia: Introductory Remarks

The Relevant Legal Framework in a Nutshell

Australia (Commonwealth of Australia) is federation and provisions on the rights of persons with disabilities are included in federal and state legislation. Legislation relevant to persons with disabilities includes **anti-discrimination law** but also **sectoral laws** governing specific social and economic areas. As mentioned in the Introduction, this report only considers federal legislation.

At present, Australia does not have a federal bill of rights.¹⁰⁶⁴ However, a new bill is currently under the examination of the Federal Parliament: the Australian Bill of Rights Bill 2017.¹⁰⁶⁵ The bill, in its current formulation, includes a provision stipulating the principle of equality before the law and the equal enjoyment of human rights and fundamental freedoms set out in the Bill 'irrespective of distinctions such as race, colour, sex, intersex status, sexual orientation, gender identity, language, religion, political or other opinion, national or social origin, property, birth, mental or physical **disability** or other status'.

The most relevant piece of federal anti-discrimination legislation¹⁰⁶⁶ that protects the rights of persons with disabilities is the **Disability Discrimination Act 1992 (DDA)**, which was modified after the ratification

¹⁰⁶¹ Australian Bureau of Statistics, available at <<http://www.abs.gov.au/ausstats/abs@.nsf/0/C258C88A7AA5A87ECA2568A9001393E8?Opendocument>>.

¹⁰⁶² 4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015, available at <<https://www.abs.gov.au/ausstats/abs@.nsf/0/C258C88A7AA5A87ECA2568A9001393E8?Opendocument>>

¹⁰⁶³ 4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015, available at <<https://www.abs.gov.au/ausstats/abs@.nsf/0/C258C88A7AA5A87ECA2568A9001393E8?Opendocument>>

¹⁰⁶⁴ Australia does not have a Bill of Rights in its Constitution or Charter of Rights in statutory form. There is, however, a longstanding debate on the desirability of a Human Rights Act which would require statute law to be interpreted, where possible, consistently with the human rights set out in the Act.

¹⁰⁶⁵ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 14.

¹⁰⁶⁶ State and Territory Legislation on Discrimination includes various acts on discrimination such as the Anti-Discrimination Act of NSW (1977), of Qld (1991), of Tas (1998), of NT (1998), the Equal Opportunity Act of Vic (1995), of WA (1984), of SA (1984), Discrimination Act of ACT (1991) (*State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 17).

of the CRPD.¹⁰⁶⁷ The DDA renders direct and indirect discrimination on the basis of disability unlawful in work and employment, education, access to premises, the provision of goods, services and facilities, accommodation, disposal of an estate or interest in land, membership of clubs and incorporated associations, sport and the administration of Australian Federal laws and programs. The DDA applies to the Australian Government, States and Territories, and private sector bodies. The Australian Human Rights Commission is entrusted with the ability to investigate and conciliate complaints of disability discrimination under the DDA.

Section 4 of the DDA gives a broad definition of disability as:

- ‘(a) total or partial loss of the person’s bodily or mental functions; or
 - (b) total or partial loss of a part of the body; or
 - (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future (including because of a genetic predisposition to that disability); or
 - (k) is imputed to a person.

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

The DDA includes a duty to provide reasonable adjustments and defines the denial of reasonable adjustment as a discrimination.

Section 15 of the DDA focuses on discrimination in employment and stipulates that the employer or a person acting or purporting to act on behalf of an employer cannot discriminate against a person on the grounds of disability in the whole hiring process, in the terms or conditions on which employment is offered, and in employment conditions. In addition, denying the employee access to, or limiting the employee’s access to, opportunities for promotion, transfer or training, or to any other benefits associated with employment constitutes a discrimination.

The **Fair Work Act 2009** provides remedies for ‘adverse action’ taken against employees or prospective employees on discriminatory grounds, including physical or mental disability.

The 2013 Australia’s **National Disability Insurance Scheme (NDIS) Act**, which established the National Disability Insurance Scheme, and the National Disability Insurance Scheme Launch Transition Agency (known as the National Disability Insurance Agency or NDIA), in part 2 para. 4 (11), specifies that

‘Reasonable and necessary supports for people with disability should: [...] (c) develop and support the capacity of people with disability to undertake activities that enable them to participate in the mainstream community and in employment.’¹⁰⁶⁸

¹⁰⁶⁷ <<https://www.legislation.gov.au/Details/C2016C00763>>.

¹⁰⁶⁸ National Disability Insurance Scheme Act 2013 (No. 20, 2013 - An Act to establish the National Disability Insurance Scheme, and for related purposes), part 2 paragraph 4 (11), available at < <https://www.legislation.gov.au/Details/C2013A00020>>

The CRPD in the Australian Legal Framework

Australia ratified the CRPD on 17 July 2008. Since Australia adopts a dualist approach to international law, the CRPD cannot be invoked directly in courts. It must be given effect through and implemented by domestic legislation. When reviewing the initial report of Australia, in 2013, the CRPD Committee expressed a general concern ‘that despite the adoption of the National Disability Strategy, the State party has not yet brought its legislation fully into line with the Convention’.¹⁰⁶⁹

11.3. Relevant Provisions on Accessibility and Reasonable Accommodation in the Workplace

Accessibility

The DDA does not explicitly require the accessibility of workplaces. However, the broad definition of discrimination in Section 15 makes it unlawful to discriminate against a person with disability in terms of access and use of commercial premises. Spaces used by the public must be accessible to people with disabilities. Existing places may need to be modified and reasonable adjustments need to be adopted (where this would involve unjustifiable hardship).¹⁰⁷⁰

The government supports enterprises to adopt a ‘**disability action plan**’, to ensure that premises, goods, services and facilities are accessible and non-discriminatory to people with a disability. According to Section 60 of the DDA the action plan is not compulsory (the business ‘may prepare and implement an action plan’). Section 61 establishes however the content that must be included if prepared. Namely the DDA must: review current practices, develop policies and programs, devise evaluation strategies, allocate responsibility, and develop communication strategies.

The DDA defines action plans only in relation to providing goods and services to customers. However, the Australian government is interpreting this concept broadly to include employment policies and practices within these plans. The websites of the Australian Government and of the Australian Human Rights Commission¹⁰⁷¹ provide guidance on how to prepare an action plan.

In 2015, the Attorney-General Senator the Hon George Brandis QC asked the Australian Human Rights Commission to conduct ***Willing to Work***, the first National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability. The report was released in 2016 and sets out **recommendations to businesses, examples of existing good practice** and a list of available resources.¹⁰⁷² The report recommends that businesses seek to engage with flexible work by making job design, work location and hours flexible for all, as far as the demands of the role allow. Among the best practices surveyed there were **Accessibility and Inclusion Plans**.

Reasonable Accommodation

The DDA places on employers a duty to provide reasonable accommodations (termed reasonable adjustments).¹⁰⁷³ The DDA states that reasonable adjustments are all adjustments that do not impose an ‘unjustifiable hardship’ on the employer.¹⁰⁷⁴

¹⁰⁶⁹ UN Committee on the Rights of Persons with Disabilities (2013), Concluding observations on the initial report of Australia, (UN Doc. CRPD/C/AUS/CO/1).

¹⁰⁷⁰ <<https://www.jobaccess.gov.au/employers/ensuring-accessibility-workplace>>.

¹⁰⁷¹ <<https://www.humanrights.gov.au/our-work/disability-rights/publications/developing-effective-dda-action-plan>>.

¹⁰⁷² <<https://www.humanrights.gov.au/our-work/disability-rights/publications/willing-work-good-practice-examples-employers-2016>>.

¹⁰⁷³ *State’s Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 18.

¹⁰⁷⁴ A. Chapman, ‘Reasonable Accommodation in Australia: Displacing the Normative Worker?’, in A.a.V.v., ‘Reasonable Accommodation in the Modern Workplace. Potential and Limits of the Integrative Logics of Labour Law’, Wolters Kluwer International BV, 2016), chapter 3.02 [A],

These general provisions are complemented by Section 65 of the Fair Work Act, which sets out the requirements for flexible working arrangements.¹⁰⁷⁵ In addition, Section 20 of the Disability Services Acts affirms that rehabilitation programmes shall take into consideration the needs of workers with disabilities.¹⁰⁷⁶

The procedural framework for a worker to request Reasonable Accommodation, had been specified and elaborated in the Fair Work Act and is further detailed in State and Territory legislation.¹⁰⁷⁷

The Employment Assistance Fund provides financial assistance to purchase a range of work-related modifications and services for people who are currently working, as well as those who require assistance to find and prepare for work.¹⁰⁷⁸ Furthermore, the Workplace Adjustment Tool lets employers search for ideas on how to make a workplace more accessible for people with disability.¹⁰⁷⁹

21.4. Overview of Australian Policies on Inclusion of Persons with Disabilities in the Workplace

The Australian Government has put in place a series of policy measures to support inclusion in the workplace. The 2009 National Disability Agreement (NDA)¹⁰⁸⁰ lays down a commitment by all Australian governments to work in partnership to improve outcomes for persons with disabilities. Under this agreement, State and Territory Governments are responsible for the provision of specialist disability services, while the Australian Government is responsible for providing employment services and income support targeted to the needs of Persons with Disabilities.

The Australian and State and Territory and Local Governments have also developed a *National Disability Strategy 2010-2020* (NDS), which is Australia's whole of government plan for the progressive implementation of CRPD, aims to boost employment opportunities for persons with disabilities.¹⁰⁸¹

The Disability Employment Service (DES) supports job seekers with disabilities, injury or health condition to prepare for, find and keep a job. As mentioned above, the Employment Assistance Fund helps persons with disabilities by providing them financial assistance to purchase a range of work-related modifications and services. The Disabled Australian Apprentice Wage Support is an incentive paid to employers who employ an eligible Australian Apprentice with disability.¹⁰⁸²

The Australian Disability Employment Network¹⁰⁸³ is a network of service provider organisations who provide specialised employment services for persons with disabilities offering specialist assistance to job seekers with disabilities, injuries or health conditions to find and maintain employment in the open labour market.¹⁰⁸⁴ The Australian Disability Enterprises, is a network of commercial enterprises enabling persons with disabilities to engage in a wide variety of work tasks.¹⁰⁸⁵

Job Access¹⁰⁸⁶ is the national hub for workplace and employment information for persons with disabilities, employers and service providers.

¹⁰⁷⁵ Fair Work Act, (2009), section 65, available at <<https://www.legislation.gov.au/Details/C2017C00323>>.

¹⁰⁷⁶ Disability Services Acts, (1986), section 20, available at <<https://www.legislation.gov.au/Details/C2017C00323>>.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ Ibid. at para. 170.

¹⁰⁷⁹ <<http://wwda.org.au/govtdis/govtdisprogram/employprog1/>>

¹⁰⁸⁰ <https://www.dss.gov.au/disability-and-carers/programmes-services/government-international/national-disability-agreement>

¹⁰⁸¹ <<https://www.humanrights.gov.au/our-work/disability-rights/overview-nds-national-disability-strategy-2010-2020>>

¹⁰⁸² Other information available at <<https://www.humanservices.gov.au/organisations/business/services/centrelink/disabled-australian-apprentice-wage-support-program>>.

¹⁰⁸³ Official Website of the Australian Network on Disability, available at <<https://www.and.org.au/>>.

¹⁰⁸⁴ *State's Party Report under Article 35 of the UN Convention on the Rights of Persons with Disabilities*, para. 166, 169.

¹⁰⁸⁵ Ibid. para. 166, 167.

¹⁰⁸⁶ Official Website of Job Access, available at <<https://www.jobaccess.gov.au/home>>.

The Australian Human Right Commission (AHRC), through the Disability Discrimination Commissioner (who conducts research and public inquiries, encourages reform by promoting disability standards and guidelines, and assists organisations to develop Disability Action Plans), works alomgsides governments, the private sector and civil society to help individuals and organisations understand their rights and meet their legal responsibilities.¹⁰⁸⁷

21.5. Implementation and Enforcement of Accessibility and Reasonable Accommodation Provisions

Despite the existence of a relevant legislative body and a large number of policies enacted, in 2015 the Australia Bureau of Statistics reported that Australians with disabilities are still more likely to be unemployed.¹⁰⁸⁸ Moreover, despite the introduction of new employment strategies, labour force participation of women with disability has not improved over the last two decades.¹⁰⁸⁹

In 2008-2009, employment has been the largest area of complaints to the Australian National Human rights Commission under the Disability Discrimination Act, with 40% of complaints being employment related, 35% related to access to goods, services and facilities and 9% related to education.¹⁰⁹⁰ In a similar vein, there are several court decisions rendered on cases of disability discrimination, which due to the limitations of this study, is not possible to summarise here. In particular, case law on discrimination for failure to adopt a reasonable adjustment are quite developed. The background to, and reasons for, the introduction of Section 5 para. 2 (i.e. direct discrimination because of failure to adopt reasonable adjustment) were described by Mortimer J in *Watts v Australian Postal Corporation* (2014) 222 FCR 220 at [15]-[20] and by Bromberg J in *Sklavos v Australasian College of Dermatologists* (2017) 347 ALR 78 at [34]-[35]. Mortimer J in *Watts* at [22] also stated that the term ‘adjustment is to be given its ordinary meaning, which is ‘an alteration or modification’.

It is worth noting that Australian courts have (relatively consistently) held that reasonable adjustments must be genuinely considered and adopted by the employer (or more generally by the duty bearer) unless they constitute undue hardship. However, in employment contexts, the employer must consider all of the options available (and the activities of the business as a whole). This means that employers must genuinely consider any ‘reasonable adjustments’ to assist the employee to perform the inherent requirements of their role.¹⁰⁹¹ A relevant case is *Butterworth v Independent Australia Services (Human Rights)* [2015] VCAT 2056, the applicant worked at Independence Australia Services, a not-for-profit organisation, in the position of a Customer Service Officer. The applicant sustained neck and shoulder injuries due to alleged overuse of the telephone but, after 14 months of modified duties, the applicant’s employment was terminated. The applicant brought a claim against IAS for discrimination on the basis that IAS failed to make reasonable adjustments. The employer claimed that no reasonable adjustments could be made. The Victorian Civil and Administrative Tribunal held IAS had unlawfully discriminated against the applicant as it had the ability to redeploy the applicant within three different areas of the business to provide less telephone work, and doing so would have had no financial impact. According to Balzon, although this case

¹⁰⁸⁷ <<https://www.humanrights.gov.au/our-work/disability-rights/about-disability-rights>>

¹⁰⁸⁸ Submission, Department of the Treasury, Priorities for the 2017/2018 Federal Budget, January 2017, available at <https://webcache.googleusercontent.com/search?q=cache:q70PlbvPmHKJ:https://treasury.gov.au/sites/default/files/2019-03/C2016-052_Disabled-Peoples-Organisations-Australia.docx+&cd=23&hl=it&ct=clnk&gl=ie>

¹⁰⁸⁹ Department of Social Services, Review of implementation of the National Disability Strategy 2010-2020 Final report, (August 2018) available at <https://www.dss.gov.au/sites/default/files/documents/04_2019/review-implementation-national-disability-strategy-2010-2020-final-report.pdf>. See also the Australian Network on Disability, 2017 Disability Confidence Survey Report, available at

<https://www.and.org.au/data/Disability_Confidence_Survey/Disability_Confidence_Survey_Report_2017_FINAL.pdf>.

, para. 13, 162, 21.

¹⁰⁹¹<<https://lynchmeyer.com.au/legal-updates/failure-make-reasonable-adjustments-employees-disabilities-costly-mistake/>>.

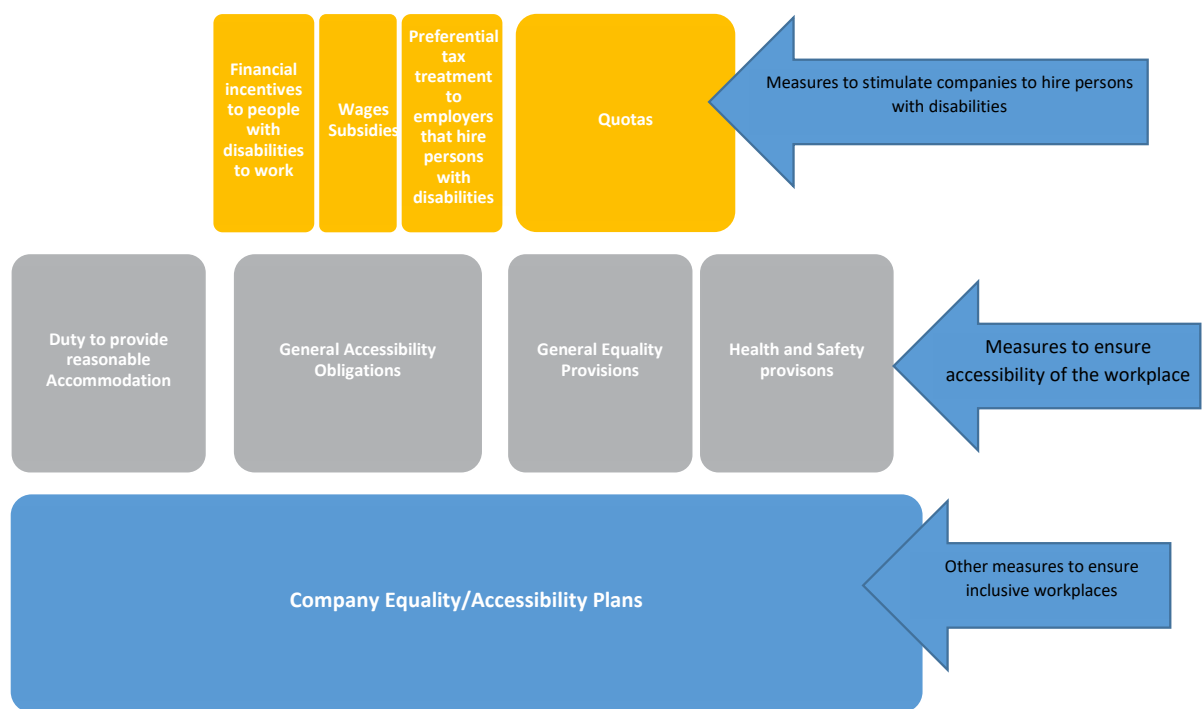
dealt with Victorian legislation, it 'is nevertheless instructive when considering the Commonwealth requirements'.¹⁰⁹²

¹⁰⁹² Ibid.

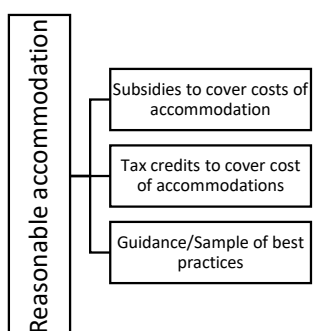
E. Concluding Remarks

The succinct overview of selected countries’ legislation shows that the countries under discussion have resorted to various mechanisms to enhance employment rates of persons with disabilities, and ensure that persons with disabilities do not face barriers in the workplace.

Figure E.1: Measures to enhance employment rates and ensure accessibility



In most of the countries considered non-discrimination legislation imposes on the employer a duty to provide reasonable accommodation. Almost all the countries considered allow employers to obtain public **subsidies** to carry out reasonable accommodations. In some countries, specific **guidance** is provided on reasonable accommodation. Notable in this respect is the **UK Employment Statutory Code of Practice**, which includes detailed guidance on substantive and procedural aspects of reasonable accommodation duties. The **Australian report *Willing to Work***, released in 2016, also sets out **recommendations** to businesses, examples of existing good practice and a list of available resources. The US Enforcement Guidance released by the EEOC is also a useful resource to clarify the rights and responsibilities of employers and persons with disabilities

Figure E.2: Reasonable Accommodation

Alongside firm obligations to render the workplace accessible, such as that included in the Brazilian legislation, other provisions that might enhance indirectly accessibility are those who stimulate employers to adopt equality policies. Among the latter, the most notable is the Finnish legislation that obliges all employers with more than 30 employees to adopt an **Equality Plan**.

Australian enterprises' **Accessibility and Inclusion Plans**, although not compulsory, also represent a best practice.

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Fact sheet



Land:	Tibet Autonome Region, PR China
Expertin:	Sabriye Tenberken (founders@kanthari.org)
Beispiel:	Barrierefreiheit durch Selbstintegration

Braille ohne Grenzen

...ist eine internationale Organisation, die 1998 in Swisttal gegründet wurde.

Das Ziel ist es, blinde oder sehgeschädigte Menschen in der Art und Weise auszubilden, dass diese den Prozess der Selbstintegration möglichst ohne fremde Hilfe bewerkstelligen können.

Zahlen und Fakten

- Bis 2016 wurden ca. 450 Menschen mit Seheinschränkungen ausgebildet
- Davon haben sich mindestens 150 in Regelschulen integriert.
- Ein Grossteil der Erwachsenen haben sich eigene Berufe beschaffen oder sind bei Absolventen von Braille Ohne Grenzen und ihren Unternehmen angestellt.

Beschreibung des Beispiels

Das Konzept des Trainingszentrums beruht auf dem Ansatz der Selbstintegration. Das Selbstintegrationskonzept stellt den Menschen mit seinen Fähigkeiten in den Mittelpunkt, um die selbstbestimmte Eingliederung in die Gesellschaft und das Arbeitsleben zu fördern.

Dementsprechend werden nicht die Lebensumstände des Menschen mit Sehbehinderung in den Fokus gestellt, sondern die Fähigkeiten priorisiert, die den betroffenen Menschen in die Situation versetzen, Hindernisse eigenständig zu überwinden.

Die Selbstintegration funktioniert allerdings nur mit entsprechendem vorbereitenden Training, weshalb die Teilnehmer intensiv ein bis drei Jahre ausgebildet werden. → <http://www.braillewithoutborders.org/GERMAN/>

Wirkungen

Neben dem Training in Kommunikation, selbstständigem Denken, Entwickeln von Problemlösungen sowie in Blinden- und Mobilitätstechniken wird ein besonderer Wert auf „weiche Faktoren“ gelegt.

Die Konzeption des Rehabilitation- und Trainingszentrums gliedert sich in 4 Teilbereiche:

- Vorbereitende Grundschule
- Berufsausbildung
- Förderung der Selbstintegration
- Herstellung von Braille Lehr- und Lernmaterialien für blinde und sehgeschädigte Menschen

Handlungsempfehlung


Dadurch, dass Blindheit nicht als Mangel, sondern als Chance für alle Beteiligten verstanden wird, wird das Selbstvertrauen und die Selbstakzeptanz gesteigert, um auf sehende Mitmenschen zuzugehen und damit eine vollständige und selbstbestimmte Teilhabe zu realisieren.


Dementsprechend sind in der Ausbildung junger blinder oder sehgeschädigter Menschen – neben der Vermittlung von Wissensbeständen – Mobilitätstrainings zu integrieren sowie lebenspraktische Fertigkeiten zu vertiefen, um Barrieren abzubauen, von denen blinde oder sehgeschädigte Menschen im Arbeitsleben auf dem allgemeinen Arbeitsmarkt konfrontiert werden.

Anlage 11 – Rückmeldungen Genashtim

Genashtim (<http://www.genashtim.com/>)

Rückmeldungen von Betroffenen - entsprechend E-Mail vom 28.02.2019 von Thomas Ng (Founder / CEO)


 [Redacted] – Tuesday at 11:52 PM
Genashtim just spoilt me. I love working from home. Working from home is better but it will be best if you can have good internet everywhere you go...

 [Redacted] – 19 hours ago
They simply do not know what they are talking about and it is so unfair for them to accuse us. Working from home is in fact a viable solution to prevailing issues of PWDs in terms of accessibility and terrible traffic specially here in the Philippines. Not to mention that companies here prefer hiring those who have completed a college degree.


Working from home allows us, PWDs to work without any barriers and gives us the flexibility to still be around our families. We don't have to spend huge amount of money for transportation.


A work from home model does not deprive us of our social life, we can still go out with family and friends, we interact with colleagues and clients all over the world. In fact we even have the flexibility to travel to places while still working as long as we are connected on the internet.

Instead of them pointing their fingers to us, they should spend more time and resources in providing employment opportunities to PWDs. < collapse

 [Redacted] – 19 hours ago
For me, that comment was said without thinking of the reality in this world. If the society can provide equal opportunity to PWD's, I think its fine. In my case, I graduated from college and even took programming course thinking I could be accepted for a job in banks or anywhere inline with my course but I always got rejected due to physical condition not even given chance to be interviewed. And now I realize that my condition was not the worse, what about the other PWDs that are in worst cases than me and if I was not given fair treatment from the society what more for them.


Working from home gave PWD's new opportunity to live better and work in comfort. What is the meaning of separating to the society? We are still communicating with the society, we have our friends, clients etc. < collapse

 [Redacted] – Tuesday at 6:00 PM
As a PWD, Working at home is very convenient way. because you can save time on traveling to go on your workplace. save money and less hassle. and also i can spent more time with my family.


 [Redacted Name] – Tuesday at 6:37 PM – Edited

As a visually impaired person, working at home is a blessing and a privilege. You don't have to worry for your transportation , food allowance, and saves time for travelling. I don't have to look for a guide going to the office because I can already manage going around inside our home. I can also spend more time with my family or even take care of my nieces while working.


Working at home doesn't mean that we are separated to the outside world, it even made us international because we only not talk to our fellow Filipino colleagues, we can even interact with our foreign colleagues outside Philippines.

 [Redacted Name] – Tuesday at 10:03 AM

Working from home is truly a blessing for us PWD's because it really fits us. We don't have to commute to go to work. Most of us, if not all, who are in a wheelchair find it very hard to use public transportation here in our country.


 [Redacted Name] – Tuesday at 12:24 PM from Android

Awesome!

 [Redacted Name] – Tuesday at 3:59 PM

With my condition and with the kind of community where I reside, I prefer to work from home. Factors such as pollution, terrible traffic and unsafe place are great reasons, I need to make sure that I wont get sick often. Plus, there's no difference in what we do here with those in offices.

Maybe their notion of working from home is different, perhaps they are thinking that we lack social life or we cannot do other things. Also nowadays some companies are starting to implement working from home for their employees.

 [Redacted Name] – Monday at 11:22 PM

Work from home is something that most of PWDs looking at. I have been searching for this opportunity for many years and finally, I found Genashtim. To me personally, work from home helps me a lot especially in my current condition whereby I do not need to consume long hours travel to work, I could get special care/attention from my mum, save the traveling expenses and I have more time with my parents and myself. To be honest, work from home is one of the best platforms to work and very convenient for people like me.



██████████ – Tuesday at 12:46 AM from iPad

I like to work from home because I don't have to commute and face long hours to get to the office and to avoid dangers on the road also to conserve gasoline/diesel and we are safer because we are in the comforts of our home. And we can mingle with our family members. We have our team's skype and Whatsapp so we can inform our respective teams that we are logging in and whatsoever.



██████████ Monday at 10:08 PM

I have not been able to command a salary at the level of my education, training and experience because either I would mention my Complex Regional Pain Syndrome (CRPS) at interviews and get turned down for a job or I would have to seek lower-level employment in order to survive, and still end up having issues on the job. My pain condition is now such that it is no longer possible for me to apply for regular jobs. Although I am currently employed for two days per week as a secretary doing a light workload, I am just biding time to be able to leave that job because it is becoming increasingly painful and difficult to function as not only do I suffer from CRPS, I also suffer from other painful conditions including a lower back problem which I have had from I was a teenager. With Genashtim, I was able to spell out my CRPS condition in full details, and still get a job with the company to work from home where I can curl up in my bed with my computer when the pain of sitting for long becomes unbearable, and where I can freely use all my contraptions to help with my pains. At Genashtim, I feel very included in a family that openly accepts persons with all sorts of disabilities and gives them at least a chance to try to continue being useful and independent, and to make a living. I believe in being open and truthful, and the fact of the matter is that I cannot think of anywhere else I could go to now and be open about my condition with them in an interview and still get a job. Not in my condition -- no. But at Genashtim, I am accepted.



██████████ – Monday at 11:30 AM

Their interpretation of inclusion is very limited and quite literal. Work-from-home does not exclude us from society. As mentioned by Villy, in the Philippines, the existence of physical and social barriers is very much a reality. The hurdles a PWD has to endure just to reach the workplace is a big challenge.

Also, quite the contrary, work-from-home model promotes inclusiveness because aside from leveling-up the playing field, it gives us the financial capacity to go out and mingle with society.



██████████ – Monday at 3:09 PM

To me, I prefer working from home as I can also spend time with my family and take care of my nieces. Going to office is one thing, we get to meet other colleagues but do the same work we do at home. The cost to go to office is also in consideration. Toll, Oil for the car, parking ticket, food, etc. Many Malaysian is also still unemployed and this platform is the best way to work from home. We also have our monthly gtribe where we talk to our abroad colleagues etc.. We are already given the opportunity to work.



Monday at 10:39 AM

It will be good to ask what's their idea of PWD working from home with that of "inclusion in the society" Do they imagine a PWD stuck in the house in front of the computer working alone all day versus that of a PWD in an office working with other abled-body colleagues.

In the Philippines alone, many of the PWDs are unemployed. Those who are fortunate to have a livelihood, they have to struggle the daily battle of travelling to work. Lack of proper infrastructures such as ramps, sidewalks unruly drivers, disorganized traffic system are just some of the realities that PWD have to constantly brave. For PWDs living in Well-developed countries, I guess they would not need to go through such Hurdles.

Through the use of information technology together with assistive technology, PWDs would no longer need to experience such barriers and can now work from home. This does not mean however that a PWD is being excluded from the society. In fact, it made us even more included than before. It has equalized the playing field for PWDs. We are more independent at work and would require less care assistance from people around us. Working from home does not mean we literally have to work from home all the time. We get to experience a "work-life integration" where we get to have an employment from the most accessible place for us PWDs and be more engage with our social life and be involve not just with our local community but to "online" community as well. [collapse](#)

