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Working Report on Reasonable Accommodation under the CRPD: The Georgian Context

Prepared by Dr. Andrea Broderick

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EXECUTIVE SUMMARY	3
INTRODUCTION.....	12
SECTION 1: CRPD OBLIGATIONS (RELATING SPECIFICALLY TO NON-DISCRIMINATION AND REASONABLE ACCOMMODATION).....	12
1.1 THE REASONABLE ACCOMMODATION DUTY	13
1.2 EXAMPLES OF REASONABLE ACCOMMODATIONS	17
1.3 BACKGROUND AND <i>TRAVAUX PRÉPARATOIRES</i> OF THE CRPD.....	18
1.4 REASONABLE ACCOMMODATION AND INDIRECT DISCRIMINATION.....	19
1.5 REASONABLE ACCOMMODATION AND THE ACCESSIBILITY OBLIGATION....	20
1.5.1 <i>Accessibility, Denial of Access and Access to Rights</i>	23
1.5.2 <i>Reasonable Accommodation and Universal Design</i>	24
1.6 REASONABLE ACCOMMODATION AND POSITIVE ACTION.....	25
SECTION 2: THE LIMITATION TO THE DUTY TO REASONABLY ACCOMMODATE	27
2.1 DISPROPORTIONATE AND UNDUE BURDEN	27
2.2 DRAFTING HISTORY OF THE CRPD.....	28
2.3 IS THERE A DIFFERENCE BETWEEN ‘DISPROPORTIONATE’ AND ‘UNDUE’ BURDEN?.....	29
2.4 FACTORS CONSIDERED UNDER THE DISPROPORTIONATE OR UNDUE BURDEN TEST	29
2.4.1 <i>Cost (Economic and Non-Economic)</i>	30
2.4.2 <i>Benefits to the Person with a Disability and Third-Party Benefits</i> ...	30
2.4.3 <i>Non-financial considerations</i>	32
2.5 THE MEANING OF ‘DISPROPORTIONATE BURDEN’ IN EU LAW	32
2.6 NATIONAL LEGISLATION IN EU MEMBER STATES AND OTHER.....	33
2.7 UNITED STATES LEGISLATION	37
2.8 CRPD COMMITTEE DECISIONS	38
SECTION 3: THE WORKING VISIT TO GEORGIA: PROGRESS, CHALLENGES AND RECOMMENDATIONS.....	39
3.1 WORKING VISIT TO GEORGIA	39
3.2 PROGRESS AND CHALLENGES IDENTIFIED DURING THE WORKING VISIT TO GEORGIA.....	39
3.3 RECOMMENDATIONS IN THE GEORGIAN CONTEXT.....	40
SUMMARY OF RECOMMENDATIONS	55

Report on Reasonable Accommodation under the CRPD: The Georgian Context

Dr. Andrea Broderick¹

Executive Summary

The absence of the concept of ‘denial of reasonable accommodation’ in Georgian legislation is one of the core issues that affects and impedes the work of the Equality Department. The purpose of this report is to analyse, and provide an interpretation of, the concept of reasonable accommodation contained in the United Nations Convention on the Rights of Persons with Disabilities (CRPD). This report is also intended to provide recommendations on relevant issues that must be considered before implementing the reasonable accommodation duty in Georgia, and to help in determining the legislative changes needed to bring Georgia in compliance with its obligations under the CRPD. This should enable the Equality Department to adjudicate cases related to reasonable accommodation and to gain much-needed experience in investigating cases, and applying the CRPD, in the Georgian context.

During the working visit to Georgia, discussions took place with the PDO and other relevant stakeholders in order to assess all stakeholders’ understanding of the CRPD related to non-discrimination and reasonable accommodation. In addition, discussions revolved around the challenges that the PDO faces in pursuing cases related to discrimination against persons with disabilities and/or the reasonable accommodation duty. I also worked with the PDO and all relevant stakeholders to identify, and advise on, challenges arising in the Georgian context regarding application of the concept of reasonable accommodation/disproportionate burden, and regarding the necessary legislative changes. The following is a summary of my observations on positive changes and also challenges, as well as my recommendations:

During the working visit to Georgia, I noted the many positive changes that are being contemplated in Georgian legislative and policy spheres as a result of the current Government’s stated commitment to human rights issues. These include the ratification of the CRPD by Georgia in 2014 and the proposed ratification of the Optional Protocol to the CRPD (OP-CRPD), which will give disabled persons an opportunity to have recourse to the CRPD committee regarding individual violations of their rights. Among others, there are proposals on the table to amend the Georgian Constitution to include a commitment to ensuring ‘special conditions’ for persons with disabilities in the Constitution. Amendments are also being contemplated to the Georgian Constitution to include immunity for the PDO and independence regarding budgetary, and other, functions.

A package of legislative reforms is being discussed/implemented in the field of disability, in order to ensure compliance with the CRPD. Among others, a new law is being drafted, which will result in the annulment of the 1995 Law on Social Protection of Persons with Disabilities. The new law is anticipated to be adopted in the Fall season of Parliament. The

¹ Assistant Professor (Department of International and European Law, Maastricht University). Ph.D. (Maastricht University); Qualified Solicitor (Law Society of Ireland); LL.M. in International and Comparative Disability Law and Policy (National University of Ireland, Galway); BKO teaching qualification (Maastricht University); LL.B (NUIG); BA International (Law and French) (NUIG and Université de Poitiers, France).

Georgian Parliament is also currently working on a 15 year ‘strategy’ or ‘vision’ concerning social policy.

One of the biggest challenges raised by the PDO was the fact that denial of reasonable accommodation is currently not included as an explicit form of discrimination in Georgian legislation. In addition, the work of the PDO is being hindered by the fact that the private sector is currently not obliged to provide information to the PDO in legal claims regarding discrimination issues.

With regard to the insertion of a reasonable accommodation duty in Georgian legislation, most stakeholders were enthusiastic about this and saw it as a step forward. However, concerns were raised by stakeholders about the interpretation, and understanding, of the concept of disproportionate/undue burden in the Georgian context, and particularly the fact that the concept may go beyond what lawyers and judges know, since the defence is relatively unknown in the Georgian legal system.

There also appears to be some confusion regarding the concept of reasonable accommodation itself, and the distinction between reasonable accommodation and indirect discrimination. The distinction between reasonable accommodation and accessibility is often blurred by stakeholders, particularly how the concepts apply to the substantive rights contained in the CRPD. Some stakeholders were using these terms interchangeably and this is something which must be rectified before the reasonable accommodation norm is inserted in Georgian legislation, in order to ensure its proper application.

Recommendations in the Georgian Context

Insertion of a Reasonable Accommodation Duty in Georgian Legislation

Discussions revolved around the most appropriate law in which to insert a reasonable accommodation duty. It is best not to insert reasonable accommodation duties in a combination of laws, since this creates the risk for incoherent application of the principle.

The most appropriate laws in which to insert a reasonable accommodation duty appear to be as follows:

- The Law of Georgia on the Elimination of All Forms of Discrimination

Since the reasonable accommodation duty is a distinct form of discrimination, the PDOs clear preference (and also that of many other stakeholders) was that the duty would be placed in the Law of Georgia on the Elimination of All Forms of Discrimination. The advantages of inserting the reasonable accommodation duty in that law would be to ensure that a denial of reasonable accommodation is explicitly recognised as a form of discrimination. Inserting the reasonable accommodation duty in the non-discrimination law would also ensure that it can be applied consistently across all rights. In addition, the mandate of the PDO would be linked to the duty and this would bring advantages for its enforcement and for the provision of advice/support on equality issues for persons with disabilities who have been unfairly denied reasonable accommodation.

Stakeholders recognised that it may be difficult to reach public consensus on amendments to the non-discrimination law, since the law is often linked to the protection of sexual minorities. This was recognised as a potential barrier to including the duty in the non-discrimination law.

- The Disability Law

At present, amendments to the Law on Social Protection of Persons with Disabilities (hereafter, the disability law) are being negotiated. It appeared that the preferred choice of the relevant Georgian authorities may be to include the reasonable accommodation duty in the amended disability law. While this is not problematic as such, there is a risk that, by including the reasonable accommodation duty in this law, all human rights covered under the CRPD may not be covered (depending on the scope of the law). There is also a risk that, if the reasonable accommodation duty is included in a general disability law, then denial of reasonable accommodation may not be specified as being a form of discrimination. It is recommended to pay attention to both of these points.

In addition, vital enforcement mechanisms, such as the PDO, may be excluded from application of the reasonable accommodation duty if the duty is included in the amended disability law. Attention should therefore be paid to ensuring that there are remedies available in the disability law in cases of denial of reasonable accommodation, and also that there are enforcement mechanisms linked to the PDO.

A suggestion was made that, if the reasonable accommodation duty were included in the amended disability law, then PDO competence could also be extended to the disability law, through the proposed extension of the Organic Law of Georgia on the Public Defender (1996) to all CRPD-related issues. In any event, if the denial of reasonable accommodation is included in the disability law, it should be specified to be a form of discrimination. If the reasonable accommodation provision is linked explicitly with discrimination, then it can be stated that enforcement will be ‘by means of current legislative provisions in operation in Georgia’ (or similar wording). This would presumably ensure extension to the mandate of the PDO.

A Clear and Unambiguous Formulation of Reasonable Accommodation Linked to a Broad Range of Rights

The Georgian legislator should pay particular attention to ensuring the formulation of any reasonable accommodation duty that it enacts in a clear and unambiguous manner. The exact formulation of the duty is a matter for the legislator. Some examples of the wording used in other jurisdictions are contained throughout the report.² In addition, any reasonable accommodation duty enacted in national legislation should cover the full range of rights under the CRPD.

Classification of the Reasonable Accommodation Duty as Direct Discrimination, Indirect Discrimination or a *Sui Generis* Form of Discrimination?

There has been much debate as to whether to classify the refusal to provide reasonable accommodation as direct discrimination, indirect discrimination or as a third, *sui generis*

² Official state translations of those provisions cannot be guaranteed and thus caution must be exercised in relying on exact wording contained in this report. The translations contained in this report have been taken, among others, from L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016); and D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 109.

form of discrimination. In many EU Member States, the form of discrimination (relating to denial of reasonable accommodation) is not specified,³ but even where the form of discrimination is not specified, compliance with the CRPD simply requires that domestic laws explicitly state that the denial of reasonable accommodation constitutes discrimination.

In some countries, denial of reasonable accommodation is considered as a form of direct discrimination (Greece and Malta). In other countries (for example, Austria), denial of reasonable accommodation is classified as a form of indirect discrimination. UK and Swedish legislation define denial of reasonable accommodation as a separate, *sui generis*, form of discrimination.

To avoid any confusion with the legal tool of indirect discrimination, which (as shown in the report) is different from the reasonable accommodation duty, it would seem most appropriate to regard the denial of reasonable accommodation as a *sui generis* form of discrimination.

Definition of Disability

If the Georgian legislator intends to introduce a definition of disability connected to non-discrimination, it must be consistent with the social model of disability and the human rights-based model of disability. It is advisable to ensure that a wide range of individuals are protected from discrimination on the ground of disability. Georgian legislation should not restrict entitlement to reasonable accommodation to a certain category, or certain categories, of disabled people. In particular, the provision of reasonable accommodation should not be limited to those who are severely disabled or those who reach a certain ‘threshold’ of disability.

Clarification of the Concepts of Direct and Indirect Discrimination in Georgian Legislation

The concepts of direct and indirect discrimination, as formulated in paragraphs 2 and 3 of Article 2 of the Georgian Law on Elimination of All Forms of Discrimination, respectively, are confusing. Article 2, para. 2 (which is supposed to contain the direct discrimination prohibition) is badly worded, and would appear to also include the concept of indirect discrimination in the second part of the definition. Article 2, para. 3 is also not clearly worded in accordance with usual definitions of indirect discrimination (see below). This unclarity may cause further confusion between the various forms of discrimination, especially now that it is envisaged to include denial of reasonable accommodation as a form of discrimination in Georgian legislation. It is recommended that this confusing wording should be revisited by the Georgian legislator.

Differentiation between Indirect Discrimination and Reasonable Accommodation

From the perspective of judges and lawyers litigating disability cases, it is particularly important to understand the difference between instances of indirect discrimination and denial of reasonable accommodation. The differences are outlined in this report.

It may also be useful for some research to be commissioned on the current approach of judges towards various forms of discrimination arising in court judgments. This would help to identify the barriers in practice concerning the application of the non-discrimination norm

³ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 14.

in disability cases, and would help to identify the gaps in understanding so that a correct application of denial of reasonable accommodation as a form of discrimination can be ensured.

Interpretation of Disproportionate/Undue Burden

To date, neither the CRPD Committee nor the Court of Justice of the EU (CJEU) has offered additional guidance on what might be considered a disproportionate burden/undue burden. This task has been left to states and to their national courts/tribunals.

Section 2 of this report set out the most commonly occurring criteria to be taken into account in assessing what a disproportionate/undue burden is in the context of providing a reasonable accommodation. These criteria can be taken into account, in the first instance, by duty-bearers when the disabled person requests an accommodation measure. Where, after constructive dialogue, the duty-bearer and the disabled individual cannot agree on the provision of a particular accommodation measure, the claim may then proceed to legal means. In that instance, the criteria set out in section 2 of this report may guide the judiciary when they are deciding on whether an accommodation would result in a disproportionate/undue burden. However, as noted in section 2, the criteria outlined in this report merely constitute examples of the types of criteria applied in national contexts, and it will be for the relevant Georgian authorities to draw up their own criteria. Whatever criteria are deemed appropriate in the Georgian context, the judiciary should bear in mind that the application of these criteria will be sensitive to the context arising in a particular case.

Setting out Guidance on Reasonable Accommodation and Disproportionate/Undue Burden in Accompanying Documents

Many countries legislative provisions on reasonable accommodation are accompanied by guidance documents. The majority of guidance documents in other countries are not binding, however some are. For instance, the Belgian Cooperation Agreement⁴ contains a non-exhaustive list of criteria to be taken into account in assessing the disproportionateness of any burden on duty-bearers.

If relevant terms are not defined in legislation itself, it is advisable that the Georgian legislator would ensure that the new legislative provision(s) regarding reasonable accommodation are accompanied by an explanatory note, setting out clearly the definition of reasonable accommodation, as well as the criteria by which the concepts of disproportionate burden/undue burden is generally understood, as well as setting out a definition of disability. One of the judges whom I spoke with suggested that the explanatory note could also contain an explanation of the various forms of discrimination (including, but not limited to, denial of reasonable accommodation) that are experienced by disabled persons and practical examples of these.

⁴ Belgium, Protocol between the Federal State, the Flemish Community, the French Community, the German-speaking Community, the Walloon Region, the Brussels- Capital Region, the Joint Community Commission, the French Community Commission in favor of people experiencing disability (*Protocole du 19 juillet 2007 entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Région wallonne, la Région de Bruxelles-Capitale, la Commission communautaire commune, la Commission communautaire française en faveur des personnes en situation de handicap*), 19 July 2007.

Burden of Proof

Generally speaking, when a court or other competent authority hears facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the non-discrimination norm. A similar burden of proof applies in the context of the reasonable accommodation duty. Thus, once a case of potential discrimination has been established, the burden of proof will shift to the respondent/duty-bearer to show that the accommodation requested by the disabled person did not constitute a disproportionate/undue burden.

Extension of the Reasonable Accommodation Duty beyond Disability?

During my visit to Georgia, some stakeholders suggested that the reasonable accommodation duty should be extended beyond disability. This has been done in some European Union countries and in other jurisdictions, most notably in Canada. However, it is certainly not universal practice. Since advice in this regard is not within the current mandate, and since I have been asked to provide advice specifically on CRPD obligations, further elaboration on this point will not follow here.⁵

Training for Judges

There is not enough training currently being provided for judges on the interpretation of the reasonable accommodation duty, and its application in concrete cases. It is therefore recommended that this particular component of the training programme at the High School of Justice is extended to cover, among others, the types of issues outlined in this report. It is also advisable that literature is made available to those involved in the training school and all those involved in concrete cases before the courts.⁶

Before training is given to judges specifically on the reasonable accommodation duty, it is advisable that the different forms of discrimination should be set out for judges, with practical examples applied to disability, and that each form should be distinguished from the next. It is recommended that judges are exposed to the social model of disability, and particularly its application to the reasonable accommodation duty. It is also advisable that judges are given training, which includes examples of judgments by courts in other jurisdictions, particularly European Union countries, related to the reasonable accommodation duty in the CRPD. It is also recommended that judges are given training on the application of the reasonable accommodation duty to various types of disabilities, and the open-ended forms of reasonable accommodations that may arise in concrete cases before the courts.

Linking Denial of Reasonable Accommodation to Effective Remedies

It is important to ensure that effective remedies are put in place in order that persons with disabilities can obtain redress where reasonable accommodations have been unfairly denied

⁵ For further information on extending the reasonable accommodation duty beyond disability, see the report of the European Network of Legal Experts in the Non-discrimination field, *Reasonable Accommodation beyond Disability in Europe?* (2013).

⁶ The resources listed in the bibliography can be used as a good starting point.

to them. The classification of the breach of the duty to accommodate will have consequences for the remedies available to potential victims and therefore the sanctions imposed on the duty-bearer(s). In other words, the failure to accommodate must be defined explicitly as a form of discrimination if Georgian law is to be in compliance with the CRPD, and if the discrimination-specific remedies available in cases of discrimination are to be applicable.

The Georgian legislator should consider whether only financial compensation (in the form of damages) is appropriate, in light of the CRPD Committee's concluding observations, which clarify that states should not restrict remedies for disability discrimination to monetary damages. Some states ensure that remedies available in the event of a denial of reasonable accommodation include injunctive relief (ordering the provision of a reasonable accommodation).

Linking the Mandate of the PDO to the Reasonable Accommodation Provision

It is particularly important that the PDOs mandate is extended to application of the reasonable accommodation duty, in whichever law that duty is inserted. The PDO provides vital support to victims of discrimination and that support is particularly important in cases of disability discrimination, due to the ratification of the CRPD by Georgia and the knowledge that the PDO has on the types of rights issues involved.

Re-Submission of the Legislative Initiative by the PDO

It is vital that the PDO resubmits the legislative proposal that it submitted 2 years ago, and that it extends the proposal regarding insertion of a reasonable accommodation duty in Georgian legislation.

Enforcement Mechanisms

Any enforcement mechanisms created in conjunction with the new legislative provision(s) on reasonable accommodation should be inclusive and accessible, including access to legal aid, so that disabled individuals can effectively/easily challenge a denial of reasonable accommodation. The Georgian Government should ensure that all barriers to enforcement of reasonable accommodation duties are eliminated. This includes the provision of effective disability-sensitive training of the judiciary, lawyers and all staff associated with the judicial services.

Monitoring Activities/Collection of Data

It seems that there is a lack of data available in Georgia on disability. The Georgian Government should ensure that up-to-date statistical information is available regarding the number of disabled persons, disaggregated according to type of disability. Data collected should be used to inform legislation and policy making. This is essential in order to adequately implement CRPD provisions, in particular concerning reasonable accommodation and accessibility. Any monitoring activities should seek to identify differences in the situation of persons with different kinds of disability, and should consider the impact of disability non-discrimination legislation and measures to promote equality.

Adoption of Laws and Policies based on the Social Model

The clear shift endorsed by the CRPD towards the social model of disability (and away from the medical model) must be secured at all levels of law and policy making in Georgia. The

out-dated medical model of disability views functional limitations as a consequence flowing from impairment, whereas under the CRPD's version of the social model, disability is viewed as an interaction between persons with impairments and widespread barriers in society (physical barriers, as well as legal and attitudinal barriers, among others).

A Wide-Ranging Action Plan addressing Equality and Reasonable Accommodation

The Georgian Government should ensure the adoption of a wide-ranging action plan or strategy to implement the CRPD. Such an action plan should pay specific attention to combating discrimination and promoting equality, including denial of reasonable accommodation, as well as addressing this as a cross-cutting issue across the substantive Convention rights.

Systemic Integration of an Equality Perspective in all Laws and Policies

Equality action planning and equality reviews should be ensured at key stages of the process of reforming Georgian legislation to ensure compliance with the CRPD. In the aftermath of legislative amendments, impact assessments should also take place to ensure effective CRPD implementation.

Training for All Stakeholders

It may be useful to set up further, and ongoing, training activities and events for all stakeholders involved in implementing the CRPD. Training should be provided for all stakeholders on the human rights-based model and the social model of disability, as well as the importance of the reasonable accommodation duty in ensuring implementation of the right to equality in the CRPD. Training could also be given to stakeholders on the other measures necessary to implement the CRPD, including accessibility and other measures.

Collaboration with the Private Sector

In order to ensure effective implementation of the CRPD on the whole, and understanding of the reasonable accommodation duty, technical assistance, guidelines and information should be provided to the private sector on the application of the reasonable accommodation duty. This is crucial to advancing the effectiveness of non-discrimination legislation and reducing the dependency on legal actions to enforce rights.

Providing State Support

The Georgian Government should consider whether financial supports or subsidies will be put in place in order to offset the cost of reasonable accommodations and other disability-related adaptations.

Consultation with Disabled Persons Organisations (DPOs) and the Role of DPOs and Equality Bodies in Awareness Raising

At all stages of reform in Georgia, DPOs should be consulted to ensure that the views of disabled persons are taken into account in decision-making and implementation measures related to the reasonable accommodation duty, as required by Article 4(3) CRPD.

It is also recommended that a meeting, or series of meetings, would be set up between the PDO, PROLoG and the relevant authorities to discuss the legislative changes on reasonable accommodation before they are enacted.

DPOs and equality bodies also have a role to play in planning and coordinating educational activities in the field of disability.

Awareness Raising

The relevant domestic authorities should make sure that non-financial measures, including awareness-raising measures, are adopted, and that public authorities support awareness-raising campaigns targeted at eliminating disability-based discrimination arising, among others, from a denial of reasonable accommodation. This can be done at the level of Government, or through equality bodies or DPOs.

All Forms of Disability-Based Discrimination

It is advisable that the Georgian legislator would ensure that all forms of disability-based discrimination under the CRPD are included in domestic law, including direct discrimination, indirect discrimination, harassment, instruction to discriminate, discrimination by association, multiple discrimination and discrimination based on perceived or past disability.

Introduction

This introduction sets out the overall goal of the report, puts the report in the context of the site visit to Georgia and provides an overview of the structure of the report.

The Promoting Rule of Law in Georgia Activity (PROLoG), funded by the United States Agency for International Development, is designed to strengthen the justice system to ensure due process, judicial independence, and the protection of human rights. Although Georgia ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2014, the concept of denial of reasonable accommodation is not reflected in Georgian legislation. As a result, the Equality Department is not in a position to examine a case concerning denial of reasonable accommodation, and this is also important in circumstances where the respondent is a private person. The absence of the concept of ‘denial of reasonable accommodation’ in Georgian legislation is one of the core issues that affects and impedes the work of the Equality Department. The purpose of this report is to analyse, and provide an interpretation of, the reasonable accommodation norm contained in the CRPD in order to enable Georgia’s Public Defender’s Office (PDO) to adjudicate non-discrimination cases related to reasonable accommodation. The report will draw on a wide range of sources in that regard⁷ and many of the observations made in the report apply to both public and private sector entities.⁸ This report is also intended to provide recommendations on relevant issues that must be considered before introducing the reasonable accommodation duty in Georgian legislation, and to help in determining the legislative changes needed to bring Georgia in compliance with its obligations under the CRPD. Through this work, the Equality Department will improve its ability to adjudicate cases related to reasonable accommodation, will work to improve the legislation related to such cases, and will also gain much-needed experience in investigating cases, and applying the CRPD, in the Georgian context.

Section 1: CRPD obligations (relating specifically to non-discrimination and reasonable accommodation)

Denial of reasonable accommodation for people with disabilities is one kind of discrimination on the ground of disability covered by the CRPD. The definition and test for such discrimination does not coincide with other forms of discrimination. As such, this section of the report outlines the various obligations in the CRPD related to the duty to reasonably accommodate persons with disabilities in particular, and related to non-discrimination more generally. This section of the report also contains practical examples of applying the right to reasonable accommodation. In this section of the report, the drafting history (*travaux préparatoires*) of the non-discrimination provision/the reasonable accommodation duty is also set out, in order to outline the rationale for defining the denial of reasonable accommodation as a separate form of discrimination. In addition, this section of the report addresses how the denial of reasonable accommodation is different from indirect discrimination and also how it differs from the related, but very different, obligations to ensure accessibility and universal design. This section of the report also briefly explores the difference between reasonable accommodation and positive action (‘specific measures’) contained in Article 5(4) CRPD.

⁷ The ultimate determination of the interpretation of the reasonable accommodation duty is the task of the UN Committee on the Rights of Persons with Disabilities (CRPD Committee). It is expected that the Committee will provide further guidance on the duty in its impending General Comment on Article 5 CRPD, which is due to be drafted at the August 2017 session of the Committee in Geneva.

⁸ I was not asked to focus only on the private sector and therefore the report analyses reasonable accommodation duties under the CRPD on the whole.

1.1 The Reasonable Accommodation Duty

The CRPD endorses the shift from the out-dated medical model of disability (which views functional limitations as a consequence flowing from impairment) to the social model.⁹ Under the CRPD's version of the social model, disability is viewed as an interaction between persons with impairments and widespread barriers in society¹⁰ (physical barriers, as well as legal and attitudinal barriers, among others). The social model of disability, combined with the human rights-based approach endorsed by the CRPD, ensures that persons with disabilities 'are viewed as holders of rights, entitled to exercise all human rights and fundamental freedoms on an equal basis with others, entailing the provision of material support where necessary.'¹¹

The reasonable accommodation obligation in the CRPD forms an integral part of the social model and the human rights-based model of disability. Unlike direct discrimination provisions, which require identical treatment or formal equal treatment, the reasonable accommodation duty requires different treatment for people whose circumstances are different. While direct discrimination provisions have some merit in the disability context - namely, in ensuring the same treatment for disabled individuals as non-disabled individuals in comparable situations, a formal conception of equality (direct discrimination) often results in the enactment of simple non-discrimination proscriptions that 'do not take account of individual or contextual differences between marginalised and socially privileged groups.'¹² Formal versions of equality contain 'no procedural mechanism for prohibiting indirect discrimination, accommodating the needs of persons with disabilities or permitting measures such as positive action.'¹³ By way of contrast with direct discrimination provisions and formal equality, reasonable accommodation measures fall within the substantive model of equality. According to the UNCESCR, substantive equality is concerned 'with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.'¹⁴

Reasonable accommodation" is defined in Article 2 CRPD as comprising of:

'Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to

⁹ For more information on the social model generally and the shift in disability theory from the medical to the social model, see T. Shakespeare (ed.), *Disability Rights and Wrongs* (Routledge, London, 2006), at pages 15–22.

¹⁰ See Paragraph (e) of the Preamble of the CRPD, which recognises that: 'Disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.'

¹¹ A. Broderick, *The long and winding road to disability equality: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 1.

¹² *Ibid.*, p. 32.

¹³ *Ibid.*

¹⁴ UNCESCR, General Comment 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (Article 3 of the ICESCR), adopted at the thirty-fourth session of the Committee, Geneva, 25 April-13 May 2005, UN Doc. E/C.12/2005/4 para. 7.

persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’

It is important to underline three essential components of the definition of reasonable accommodation in Article 2 CRPD. Firstly, the fact that modifications and adjustments must be ‘necessary and appropriate’ (in other words they must be ‘effective,’) to remove the disadvantage for the disabled person concerned. This requirement captures the interests of disabled persons (it will be elaborated on in the next paragraph of this section). Secondly, one must consider the burden of the particular modification or adjustment. This requirement caters for practical considerations related to the duty-bearer concerned (and these considerations will be considered in section 2 of the report). Thirdly, attention must be drawn to the words ‘where needed in a particular case,’ since this emphasises the individualised nature of the reasonable accommodation duty. The focus under the accommodation duty is on the specific circumstances of each case, taking into account the effectiveness of the modifications or adjustments in removing the disadvantage for the particular disabled person and the practicality for the duty-bearer of providing an accommodation.

Concerning the first part of the definition, the use of the word ‘appropriate’ in the definition of reasonable accommodation implies that accommodations must be effective in ensuring that persons with disabilities can exercise their human rights on an equal basis with others.¹⁵ This appears to be confirmed by national¹⁶ and EU law sources relating to the provision of reasonable accommodations. In the EU Employment Equality Directive, ‘appropriate measures’ are defined as ‘*effective and practical measures* to adapt the workplace to the disability.’¹⁷ Anna Lawson points to the fact that ‘the individual-oriented nature of reasonable accommodation thus requires duty-bearers to resist making assumptions as to what might be most appropriate for a particular individual and demands that instead they engage in a dialogue with such a person about how the relevant disadvantages might most effectively be tackled.’¹⁸ Thus, if a disabled person requests an accommodation in the employment context, ‘one must consider the extent to which the requested accommodation will contribute to ensuring participation in the workforce.’¹⁹

In the majority of EU Member States there is no explicit legal requirement on duty-bearers to consult the disabled person regarding the provision of reasonable accommodation. Ferri and Lawson note that, ‘whilst a failure to consult the disabled person would not itself amount to a breach of the reasonable accommodation duty, the absence of consultation carries with it a risk that accommodations will be made which are not appropriate in the individual case and

¹⁵ A. Broderick, *The long and winding road to disability equality: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 160.

¹⁶ The reading of the word ‘appropriate’ as meaning effective measures is reinforced by the use of that term in the Irish Employment Equality Act 1998–2004. Furthermore, Article 2 of the Dutch Act on Equal Treatment on the Grounds of Disability or Chronic Illness (2003) uses the term ‘effective accommodation.’

¹⁷ Article 5, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303, 02/12/2000 P. 0016–0022), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.

¹⁸ A. Lawson, ‘Reasonable Accommodation in the Convention on the Rights of Persons with Disabilities and Non-Discrimination in Employment: Rising to the Challenges?’ in C. O’Mahony and G. Quinn, *Disability Law and Policy: An Analysis of the UN Convention* (Clarus Press, 2017), p. 362.

¹⁹ A. Broderick, *The long and winding road to disability equality: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 161.

which are not effective in addressing.²⁰ Explicit requirements to consult the disabled person are rare in national law, but can be found in Danish, UK and Norwegian laws/codes of practice or case law.²¹ It is notable that in the context of the right to education, the CRPD Committee has stated that ‘discussions between the educational authorities and providers, the academic institution, the student with a disability, and depending on the student’s age and capacity, if appropriate, their parents/caregivers and/or family members *must* take place to ensure that the accommodation meets the requirements, will, preferences and choices of the student and can be implemented by the institution provider.’²²

While the effectiveness of an accommodation and the removal of disadvantage must be balanced against practicality considerations, duty-bearers at the national level are not being required to provide the ‘best possible’²³ accommodation measure. This has been confirmed by the Ombudsman in the Czech Republic, who has clearly emphasised the need for an accommodation to be individualised²⁴ and to reflect the nature of the disability in question, but that it does not have to be the best possible measure in the circumstances.

One of the most important factors concerning the reasonable accommodation duty is that it is incorporated into the non-discrimination obligation. Article 5(2) CRPD requires States to prohibit discrimination on the basis of disability. The definition of ‘discrimination on the basis of disability’ in Article 2 CRPD includes a denial of reasonable accommodation. This has numerous implications for States Parties to the CRPD. Firstly, by including the duty to accommodate within the non-discrimination norm, this makes it a civil and political right. Thus, implementation of the reasonable accommodation duty is required with immediate effect – the provision of reasonable accommodation is not subject to progressive realisation, unlike the accessibility obligation in Article 9 CRPD. The Committee on the Rights of Persons with Disabilities (CRPD Committee) has confirmed this.²⁵ Secondly, since the non-discrimination duty, and therefore the reasonable accommodation norm, spans all human rights in the CRPD (both civil and political rights, as well as economic, social and cultural rights), a wide variety of social actors will be required to modify existing policies, practices or environments in order to ensure that persons with disabilities can participate, and be included in, mainstream society. This includes both public and private enterprises, including state organs, private employers, healthcare providers, goods and service providers, education providers etc. In addition, Jenny Goldschmidt contends that, by making reasonable accommodations part of the prohibition of discrimination and not merely an exception to the

²⁰ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 10.

²¹ *Ibid.*, p. 79.

²² UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 on the Right to Inclusive Education, UN Doc. CRPD/C/GC/4 (2016), para. 29. Emphasis added.

²³ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway*, major thematic report written for the European Network of Legal Experts on Equality and Non-Discrimination (European Commission, 2016), p.10 available at <http://www.equalitylaw.eu/downloads/3724-reasonable-accommodation-for-disabled-people-in-employment-contexts>.

²⁴ Ombudsman, Statement No. 217/2011/DIS (*Stanovisko veřejného ochránce práv č. 217/2011/DIS*), 26 April 2012, available at: <http://eso.ochrance.cz/Nalezene/Edit/2304>. Information taken from D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 70.

²⁵ See UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 on the Right to Inclusive Education, UN Doc. CRPD/C/GC/4 (2016), para. 30.

principle of equal treatment, ‘the whole legal definition of the case is thereby transformed.’²⁶ She states that one is ‘not asked anymore whether it was possible to hire [a] person in a situation where necessary accommodations were not already available; on the contrary, [one has to] demonstrate that the accommodations were *not* possible.’ According to her, this is ‘a fundamental shift.’²⁷ This concerns the burden of proving that providing the requested accommodation constitutes a disproportionate or undue burden – that burden will rest on the duty-bearer (whether that is a public or private entity).²⁸

Article 5(3) of the CRPD also links the equality and non-discrimination norms with the duty to accommodate. In order to promote equality and eliminate discrimination, States Parties are required to take all appropriate steps to *ensure* that reasonable accommodation is provided. In the context of the CRPD, ‘this will require that States oversee the implementation of the duty to accommodate by public and private entities,²⁹ and the entities should engage in a constructive dialogue with the disabled individual in order to determine the most appropriate accommodation in the circumstances of a particular case.’³⁰ States Parties will also be required to undertake education and awareness-raising duties, particularly with regard to all those involved in the implementation of the duty to accommodate, as well as the judiciary and state officials. In addition, national authorities will be required to ensure that their legislative frameworks comply with the obligations engendered by the CRPD,³¹ ensuring ‘that the unjustified denial of reasonable accommodation is included as a distinct form of discrimination in national legislation and that national policy documents give express recognition to this new form of discrimination under international human rights law.’³²

Based on the definition of reasonable accommodation in Article 2 CRPD, taken in conjunction with Article 5(3), one can summarise the key features of the duty to accommodate as follows:

- The identification and removal of barriers that impact on the enjoyment of human rights for persons with disabilities;
- The ‘necessity and appropriateness’ (effectiveness) of modifications or adjustments to address barriers specific to a particular individual;

²⁶ J. Goldschmidt (interviewed by J. Anderson and J. Philips), ‘Shifting the Burden of Proof: How the CRPD is Transforming our Understanding of Discrimination, Intersectionality and Priorities’ in J. Anderson and J. Philips (eds.), *Disability and Human Rights: Legal, Ethical and Conceptual Implications of the Convention on the Rights of Persons with Disabilities* (Netherlands Institute of Human Rights, SIM Special 35, 2012), p. 57 [emphasis in original].

²⁷ *Ibid.*

²⁸ See, for instance, UN Committee on the Rights of Persons with Disabilities, *HM v Sweden*, UN Doc CRPD/C/7/D/3/2011 (2012), para. 8.5.

²⁹ Article 4(1)(e) CRPD requires States to ensure that ‘discrimination on the basis of disability by any person, organization or private enterprise is covered.’

³⁰ This list is drawn from A. Broderick, *The long and winding road to equality and inclusion for persons with disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p.106; See also L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 47.

³¹ A. Broderick, *The long and winding road to equality and inclusion for persons with disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p.106.

³² *Ibid.*, p. 115.

- The adoption of modifications or adjustments that do not impose a disproportionate or undue burden on the duty-bearer;
- The requirement to find a response or solution that is tailored to the individual circumstances of the person with a disability; and
- The fact that accommodations have as their essential objective the promotion of equality and the elimination of discrimination.³³

1.2 Examples of Reasonable Accommodations

Due to the individualised nature of the duty to accommodate, it is not possible to provide an exhaustive list of the types of accommodations that would be appropriate in a given scenario. Furthermore, the drafting history of the CRPD does not reveal much information about the meaning of the term ‘accommodation.’

Ferri and Lawson neatly summarise the substance of what the reasonable accommodation duty requires. They state that accommodations may be divided into two main categories. Firstly, they identify ‘technical solutions - these include assistive devices or other adaptations of the workplace’ and secondly, ‘organisational arrangements - these include organisational arrangements, such as adjustment of working hours and re-distribution of duties, teleworking arrangements, disability leave, extended or additional leave, the provision of assistance, re-location to a different office and redeployment to a different job.’³⁴

Recital 20 of the (non-binding) Preamble to the Employment Equality Directive provides the following examples of types of measures that could amount to a reasonable accommodation in the employment context: ‘Adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.’ The Office of the High Commissioner for Human Rights (OHCHR) has also provided the following non-exhaustive list of examples of reasonable accommodations: Making existing facilities and information *accessible* for the person concerned in a *particular situation*;³⁵ adapting or acquiring equipment; reorganising activities; re-scheduling work; customising learning materials; adapting educational curricula to the capabilities of the person; adjusting medical procedures; implementing specific communication modalities; and enabling access of support personnel to facilities restricted to the public.³⁶

The CRPD Committee has affirmed that ‘there is no “one-size-fits-all”³⁷ formula to reasonable accommodation. In the context of education (both public and private), the Committee has stated that ‘different students with the same impairment may require different accommodations.’³⁸ The Committee is of the view that:

Accommodations may include changing the location of a class, providing different forms of in-class communication, enlarging print, materials and/or subjects in sign, or providing all handouts in an alternative format, providing students with a note-taker,

³³ Ibid, p. 105.

³⁴ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 10.

³⁵ Emphasis added.

³⁶ Office of the United Nations High Commissioner for Human Rights (December 2010), “Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities”, UN Doc. A/HRC/34/26, para. 28. Emphasis added.

³⁷ UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 on the Right to Inclusive Education, UN Doc. CRPD/C/GC/4 (2016), para. 29.

³⁸ Ibid.

or a language interpreter or allowing students to use assistive technology in learning and assessment situations.³⁹

Reasonable accommodations can also be ‘non-material’ in nature, according to the Committee. This can entail measures, such as ‘allowing a student more time, reducing levels of background noise, sensitivity to sensory overload, alternative evaluation methods or replacing an element of curriculum by an alternative element [...]’.⁴⁰

1.3 Background and *Travaux Préparatoires* of the CRPD⁴¹

Despite the fear of many delegates at the negotiation sessions that including the reasonable accommodation duty in the non-discrimination norm would lead to the increased judicial enforceability of socio-economic rights, most delegates recognised the important link between the reasonable accommodation duty and the non-discrimination norm. For example, the representative speaking on behalf of National Human Rights Institutions (NHRI) noted that the intimate connection between the two concepts was ‘one of the most visible and positive accomplishments in modern non-discrimination law in the context of disability’.⁴² The delegate was of the view that the absence of this innovative aspect of comparative disability discrimination law would be ‘conspicuous’ in the context of the CRPD. General Comment 5 (1994) of the United Nations Committee for Economic, Social and Cultural Rights (UNCESCR) was drawn on by many national representatives in order to forge a link in the CRPD between the duty to accommodate and the equality and non-discrimination norms. That general comment includes a denial of reasonable accommodation in the definition of discrimination.

Gráinne de Búrca states that the European Commission was the ‘main advocate’⁴³ of the inclusion of an accommodation duty within the realm of the non-discrimination norm. She contends that this was ‘an attempt to transpose the EU [anti-discrimination] model to the international domain.’ In other words, ‘the Commission - which positioned itself as guardian of the then EC treaties and existing EC legislation - insisted that the failure to achieve reasonable accommodation constituted discrimination.’⁴⁴

Discussions on the issue of progressive realisation at the seventh session of the Ad-Hoc Committee also prove informative in the context of the reasonable accommodation obligation. Several delegates from developing countries expressed concern that including any reference to discrimination in the CRPD’s progressive realisation clause (as had been proposed initially) would tie far-reaching obligations, such as the accessibility obligation, to the non-discrimination norm. The Chair of the session noted that, if a broad definition of

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ This part of the report draws on A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015).

⁴² Seventh Session of the Ad Hoc Committee, volume 8(12), January 31, 2006, available at www.un.org/esa/socdev/enable/rights/ahc7sum31jan.htm, accessed 17 June 2017.

⁴³ G. de Búrca, ‘The EU in the Negotiation of the Disability Convention’ *Fordham Law Legal Studies Research Paper No. 1525611*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525611, accessed 17 June 2017.

⁴⁴ Ibid. It is important to note that Article 5 of the EU Employment Equality Directive (2000/78EC) does not define failure to provide reasonable accommodation explicitly as a form of discrimination.

discrimination were to be adopted and were to include the denial of accessibility as a form of discrimination, then the accessibility obligation would not be subject to progressive realisation, despite the fact that resource limitations could prevent immediate implementation. As a possible way to resolve the issue, the Chair suggested defining ‘denial of reasonable accommodation’ as a form of discrimination.⁴⁵ The International Disability Caucus (IDC) insisted on differentiating between accessibility and reasonable accommodation. It acknowledged that accessibility will have to be implemented progressively, but believed reasonable accommodation to be a ‘core element’ of a non-discrimination approach.⁴⁶ This reflects the final approach that was taken in the CRPD.

1.4 Reasonable Accommodation and Indirect Discrimination

The conceptual basis of the legal tools of indirect discrimination and the duty to reasonably accommodate are quite closely related. Both are based on substantive equality maxims. Indirect discrimination, as defined in European Union Law, occurs where legal provisions, criterion or practices are neutral *prima facie* (in other words, they do not distinguish directly on prohibited grounds), but where they ‘put persons protected by the general prohibition of discrimination at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’ (proportional).⁴⁷

One of the key differences between indirect discrimination and reasonable accommodation concerns the group dimension of the former, as opposed to the individual dimension inherent in the latter measures. Indirect discrimination ‘requires establishing that a wider group of people sharing a protected characteristic are, or potentially would be, disadvantaged by the challenged measure.’⁴⁸ Reasonable accommodation, on the other hand, is a duty owed to a particular individual with a disability and therefore it is a ‘specific response’⁴⁹ designed to meet the individualised needs of a disabled person in a given situation. By implication, the reasonable accommodation duty does not require a group assessment, something which is characteristic of indirect discrimination.⁵⁰ The indirect discrimination tool is therefore more suited to situations which involve a group dimension in order to meet ‘the special needs of

⁴⁵ Daily Summary of discussions at the seventh session of UN Convention on the Rights of Persons with Disabilities, Ad Hoc Committee, January 30, 2006, Volume 8(11) <http://www.un.org/esa/socdev/enable/rights/adhocom.htm>, accessed 17 June 2017.

⁴⁶ Daily Summary of discussions at the seventh session of UN Convention on the Rights of Persons with Disabilities, Ad Hoc Committee, January 31, 2006, Volume 8(13) <http://www.un.org/esa/socdev/enable/rights/adhocom.htm>, accessed 17 June 2017.

⁴⁷ See J. Maliszewska-Nienartowicz, ‘Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?’ *International Journal of Social Sciences*, Volume 3(1) (2014).

⁴⁸ European Network of Legal Experts in the Non-discrimination field, *Reasonable Accommodation beyond Disability in Europe?*, report written by Emmanuelle Bribosia and Isabelle Rorive and supervised by Lisa Waddington (2013), p. 39.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, p. 8.

other vulnerable or disadvantaged groups to ensure their effective participation,⁵¹ as Bribosia and Rorive assert.

A further important distinction between reasonable accommodation and indirect discrimination concerns the effect of application of either legal tool. According to Bribosia and Rorive, indirect discrimination generally ‘enables a determination of whether a provision, criterion or practice has a discriminatory character. Should this be the case, such a provision, criterion or practice must be abandoned and replaced by a new, non-discriminatory, generally applicable measure.’⁵² By way of contrast, the duty to reasonably accommodate requires the adoption of concrete positive measures to remove the disadvantage experienced by a disabled individual.

1.5 Reasonable Accommodation and the Accessibility Obligation

The duty to provide reasonable accommodation must be carefully distinguished from legal obligations to achieve accessibility, contained in Article 9 of the CRPD⁵³ (and elaborated on in many of the other substantive Convention articles). Accessibility duties ‘are generalised and anticipatory (not triggered by an individual request).’⁵⁴ Moreover, accessibility duties usually require ‘compliance with set standards, e.g. installing ramps or providing certain information in Braille or large print.’⁵⁵ Compliance with accessibility standards is intended to ensure overhaul of the environment in general and to ensure (in a progressive/gradual manner) the transformation of social structures, among others. The accessibility obligation therefore does not reflect the individualised, immediate character of the duty to reasonably accommodate.

The CRPD Committee has summarised the main distinction between reasonable accommodation and accessibility as follows: ‘Accessibility is related to groups, whereas reasonable accommodation is related to individuals.’⁵⁶ The Committee has elaborated on the group dimension of accessibility as follows:

[...] The duty to provide accessibility is an *ex ante* duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. States parties need to set accessibility standards, which must be

⁵¹ Ibid, p. 38.

⁵² Ibid.

⁵³ Article 9 CRPD provides that: ‘States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.’ These measures ‘shall include the identification and elimination of obstacles and barriers to accessibility.’

⁵⁴ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p.45.

⁵⁵ Ibid.

⁵⁶ UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Article 9 (Accessibility), UN Doc. CRPD/C/GC/2 (2014), para. 25.

adopted in consultation with organizations of persons with disabilities, and they need to be specified for service-providers, builders and other relevant stakeholders.⁵⁷

By way of contrast, the CRPD Committee has termed the duty to provide reasonable accommodation ‘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. Here, accessibility standards can be an indicator, but may not be taken as prescriptive.’⁵⁸

The difference between claims arising from the reasonable accommodation duty and the accessibility obligation can be seen in the context of an individual communication⁵⁹ brought against Hungary regarding the lack of access of persons with visual impairments to banking services. In that case, the CRPD Committee noted that the authors’ initial complaint to the private entity itself (the bank) had focused on the lack of reasonable accommodation. In other words, the initial claim centred on the ‘failure by [the bank] to provide for individual measures by retrofitting some of its ATMs in the proximity of the authors’ homes in order to adjust the banking card services provided by these ATMs to the authors’ specific needs and so that they [became] accessible for persons with visual impairments.’ However, the communication that was later brought before the CRPD Committee raised ‘a broader claim, i.e. the lack of accessibility for persons with visual impairments to the entire network of ATMs operated by [the bank].’⁶⁰ Thus, the Committee considered the claim under Article 9 CRPD (accessibility), rather than Article 5(3) CRPD (non-discrimination/reasonable accommodation). Since this case concerned accessibility issues in the context of a private bank, the State Party was under an obligation, according to Article 9(2)(b) CRPD, to ensure that private entities open to the public take into account all aspects of accessibility for people with disabilities.

Anna Lawson maintains that ‘the difference between accessibility and reasonable accommodation has implications for the way in which duty-bearers should involve disabled people in decisions about how to implement both duties.’⁶¹ She asserts that:

In order to discharge a reasonable accommodation duty [...] the dialogue required is between the duty-bearer and the specific disabled person in question. This ensures that the resulting modifications will address the disadvantage, as it is experienced by that persons, in a way that is appropriate for them – even if this involves taking measures which many people with the same impairment would find unhelpful.⁶²

By way of contrast, ‘the implementation of accessibility duties ‘requires dialogue between the duty bearer and disabled people’s organisations about [the types of measures] which

⁵⁷ Ibid.

⁵⁸ Ibid, para. 26.

⁵⁹ UN Committee on the Rights of Persons with Disabilities, Individual Communication taken by Szilvia Nyusti and Péter Takács (represented by counsel, Tamás Fazekas, Hungarian Helsinki Committee), Communication No. 1/2010, views adopted by the Committee at its ninth session (15–19 April 2013).

⁶⁰ Ibid, para. 9.2.

⁶¹ A. Lawson, ‘Reasonable Accommodation in the Convention on the Rights of Persons with Disabilities and Non-Discrimination in Employment: Rising to the Challenges?’ in C. O’Mahony and G. Quinn, *Disability Law and Policy: An Analysis of the UN Convention* (Clarus Press, 2017), p. 366.

⁶² Ibid, p. 365/366.

would provide access to disabled people (or people with particular impairment types) more generally.’⁶³

It is important to note that the implementation of accessibility standards cannot guarantee access to rights by all persons with disabilities, since the individual needs and specific requirements of each person with a disability will vary and, therefore, reasonable accommodations may still be required in individual cases (even where accessibility standards are widespread). As the CRPD Committee points out, ‘reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation.’⁶⁴ Thus, ‘individuals who have rare impairments that were not taken into account when the accessibility standards were developed or do not use the modes, methods or means offered to achieve accessibility,’⁶⁵ such as those individuals who do not read Braille print, might ask for a reasonable accommodation that falls outside the scope of any accessibility standard.

Notably, forms of individualised assistance are provided for under Article 9 of the Convention itself.⁶⁶ Such individualised measures might include assistance provided by others, whether in the form of personal care, communication or advocacy support, learning support, therapeutic interventions and aids or adaptations to the physical environment, to equipment and so forth.⁶⁷ Support measures ‘may fall within either accessibility duties or reasonable accommodation measures, depending on the circumstances in which they are provided’ (in other words, whether they are of broad and generalised accessibility-type measures that may later have to be tailored to individual circumstances, or of an immediate, individualised ‘reasonable accommodation’ type measure).⁶⁸ Compliance with accessibility standards and the provision of reasonable accommodation should therefore be seen as complimentary measures to bolster *de facto* equality for persons with disabilities.⁶⁹ As Lawson points out, ‘providing accessibility can remove the need for many reasonable accommodations. In addition, [...] the provision of some reasonable accommodations may result in making a building or information system accessible to other disabled people as well as to the individual in whose favour the accommodation was made.’⁷⁰ Therefore, reasonable accommodations have an important role to play in enabling disabled people to challenge accessibility barriers *in a particular individualised case*.

⁶³ Ibid, p. 366.

⁶⁴ UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Article 9 (Accessibility), UN Doc. CRPD/C/GC/2 (2014), para. 26.

⁶⁵ Ibid, para. 25.

⁶⁶ Article 9(2)(e) CRPD requires States: ‘To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public.’

⁶⁷ Examples drawn from A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 243.

⁶⁸ Ibid.

⁶⁹ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p.45.

⁷⁰ A. Lawson, ‘Reasonable Accommodation in the Convention on the Rights of Persons with Disabilities and Non-Discrimination in Employment: Rising to the Challenges?’ in C. O’Mahony and G. Quinn, *Disability Law and Policy: An Analysis of the UN Convention* (Clarus Press, 2017), p. 366/367.

Lawson sets out the ‘close and mutually reinforcing relationship’⁷¹ between reasonable accommodation and accessibility measures. She describes the relationship as follows: ‘The more accessible an environment is, the less likely it is that aspects of its structure or functioning will place a disabled person at a disadvantage which calls for reasonable accommodation.’⁷² She provides the following illustration:

The disadvantage caused to a person with intellectual disabilities by inaccessible information would call for reasonable accommodation (perhaps in the form of a verbal explanation) whereas, had the information been accessible to that person (eg because it was in easy read format) there would have been no requirement for reasonable accommodation.⁷³

The CRPD Committee has pointed out a further distinction between reasonable accommodation and accessibility related to the limitations on the two duties. 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.’ The duty of reasonable accommodation, contrarily, ‘exists only if implementation constitutes no undue burden on the entity.’⁷⁴

Another obvious distinction between the two duties is that the unjustified failure to provide reasonable accommodation (subject to the disproportionate/undue burden defence) must be classified as a form of discrimination, whereas failure to ensure accessibility is not a form of discrimination under the CRPD.

1.5.1 Accessibility, Denial of Access and Access to Rights

As pointed out above, breach of the accessibility norm is not usually linked with the non-discrimination norm, unlike a failure to provide reasonable accommodation. One must ask whether inaccessible social structures ever amount to a breach of the equality guarantee/the non-discrimination norm. The CRPD Committee has clarified the link between accessibility and equality in its General Comment No. 2. In that general comment, the Committee stated that the:

Denial of access to the physical environment, transportation, information and communication, and services open to the public constitutes an act of disability-based discrimination that is prohibited by article 5 of the Convention.⁷⁵

One must note, however, that ‘denial of access’ is not the same thing as ‘lack of access’ (or inaccessibility). As I have pointed out elsewhere,⁷⁶ denial of access means instances of systemic or deliberate discrimination. A simple example of such might arise where a disabled

⁷¹ Ibid, p.366; See further A. Lawson, ‘Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach?’ (2011) 11 *European Anti-Discrimination Law Review* 11.

⁷² Ibid, p. 366.

⁷³ Ibid.

⁷⁴ UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Article 9 (Accessibility), UN Doc. CRPD/C/GC/2 (2014), para. 25.

⁷⁵ UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Article 9 (Accessibility), adopted at the eleventh session of the Committee (30 March–11 April 2014) on 11 April 2014, UN Doc. CRPD/C/GC/2, para. 34.

⁷⁶ A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 244/245.

individual is denied access to a restaurant or to a bus service on the ground of disability *per se*. The Committee's comments certainly 'do not appear to equate denial of access with inaccessibility or to indicate that every instance of inaccessibility of the physical environment, technology, transportation etc. should be viewed as a prohibited act of discrimination.'⁷⁷

Failure to fulfil accessibility obligations resulting in unequal access to, and enjoyment of rights, may constitute discrimination only in certain very limited circumstances. The CRPD Committee observes that:

As a minimum, the following situations in which lack of accessibility has prevented a person with disabilities from accessing a service or facility open to the public should be considered as prohibited acts of disability-based discrimination: [emphasis added]

1. Where the service or facility was established after relevant accessibility standards were introduced;
2. Where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation.⁷⁸

Finally, it is important to note that ensuring 'access to' a right is not (always) the same as ensuring accessibility. I have noted elsewhere that ensuring access to human rights for persons with disabilities includes the implementation of accessibility obligations, but it is not limited to this. In other words, while accessibility is a vital means of ensuring access to, and enjoyment of rights, for persons with disabilities, it is not the only means of ensuring access to rights. Guaranteeing accessibility (based on set accessibility standards) does not result in the full enjoyment of rights in all cases. Beyond the adoption of accessibility measures, ensuring access to, and enjoyment of, rights is also linked closely with the provision of reasonable accommodations and other individualised measures, as well as positive action measures (see below). In order for disabled individuals to be able to access, and enjoy, their right to independent living, for example, this may require the provision of individualised measures, such as reasonable accommodations, residential and community support services and personal assistance, as well as the adoption of accessibility measures. Making school buildings physically accessible will not result in the full enjoyment of the right to education in many cases – by simply being able to enter a building, this does not mean that all persons with disabilities will be able to access the right to education and to benefit from education provided.⁷⁹

1.5.2 Reasonable Accommodation and Universal Design

There is a clear link between the obligation to universally design goods and services etc. and the duty to provide a reasonable accommodation, although they are distinct concepts. As pointed out above, the reasonable accommodation duty requires the adaptation of structures in an individualised manner at the request of a person with a disability. The objective of

⁷⁷ Ibid.

⁷⁸ UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Article 9 (Accessibility), adopted at the eleventh session of the Committee (30 March–11 April 2014) on 11 April 2014, UN Doc. CRPD/C/GC/2, para. 31.

⁷⁹ This paragraph has been taken directly from A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 239/240.

universal design is to ensure maximum accessibility for all individuals (persons with disabilities and non-disabled individuals), regardless of their type of impairment, age, etc. Universal design evolved from accessible design features and is based on the idea that structures should ‘benefit all, not merely accommodate the few.’⁸⁰ Universal design should result in a reduction for the need for individualised measures, such as reasonable accommodations. However, Article 2 CPRD also states that the concept of universal design ‘does not exclude assistive devices’ for particular groups of persons with disabilities, where this is needed.⁸¹

1.6 Reasonable Accommodation and Positive Action

Positive action (or affirmative action, as it is called in the United States) must be clearly distinguished from the duty to reasonably accommodate. The text of the CRPD differentiates between reasonable accommodation and positive action measures by including ‘specific measures’ as a sub-category of measures in Article 5(4), clearly separate from the duty to accommodate in Articles 2 and 5(3) of the Convention. In other human rights treaties, positive action is often termed ‘special measures.’ In the context of the CRPD, however, the term ‘special’ was believed to have a derogatory meaning, as pointed out by the Working Group of the Ad-Hoc Committee during the negotiations of the CRPD.⁸² Therefore, the positive action measures in Article 5(4) of the CRPD are termed ‘specific measures.’

Positive action is designed to remedy historical and ongoing disadvantage experienced by persons with disabilities. Waddington and Broderick set out the following explanation of positive action:

[It can] take the form of setting quotas in political institutions specifying the percentage or number of persons with disabilities to be included in the institution. Other examples of positive action measures which target persons with disabilities include the preferential treatment of candidates with disabilities in the education sector (i.e. allowing access to university courses), even where the qualifications of the candidate with disabilities are not equal to those of the candidate without disabilities; establishing goals and timetables for the advancement of persons with disabilities in social and political institutions; providing extra assistance to persons with disabilities to enable them to gain educational qualifications; and targeted recruitment campaigns raising awareness about employment opportunities among persons with disabilities.⁸³

⁸⁰ R. Jackson, ‘National Centre on Accessing the General Curriculum, Curriculum Access for Students with Low-Incidence Disabilities: The Promise of Universal Design for Learning (2011) 2, <http://sde.ok.gov/sde/sites/ok.gov.sde/files/LowIncidence.pdf>.

⁸¹ This whole paragraph has been drawn from A. Broderick, ‘Article 4: General Obligations’ (forthcoming book chapter, 2018) and L. Waddington and A. Broderick, *Promoting Equality and Non-Discrimination for Persons with Disabilities* (Council of Europe, 2017).

⁸² Footnote 28, Report of the Working Group to the Ad Hoc Committee, Annex I: Draft articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, available at www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.html, accessed 18 June 2017.

⁸³ L. Waddington and A. Broderick, *Promoting Equality and Non-Discrimination for Persons with Disabilities* (Council of Europe, 2017), p. 15.

Waddington and Bell explain that positive action measures share some or all of the following characteristics:⁸⁴

- i. Firstly, they are ‘targeted at a well-defined social group;’
- ii. Secondly, they ‘seek to redress disadvantages in a specific setting, such as access to education or employment.’ The authors state that positive action schemes ‘will typically be designed for those pursuing a particular job or career where there is evidence of past and/or present disadvantage. The initiative may be open to any potential jobseeker, but it is normally not aimed at everyone in the labour market possessing a particular characteristic;’
- iii. Thirdly, the authors state that ‘the necessity for positive action will be subject to periodic review.’⁸⁵ However, ‘this does not mean that positive action must be time-limited, but it is not automatically assumed to be indefinite.’⁸⁶ Reasonable accommodations, on the other hand, ‘are not generally assumed to have any preordained time-limit.’⁸⁷

An essential difference between positive action and reasonable accommodation is that reasonable accommodations are mandated clearly by articles 2 and 5(3) of the CRPD, whereas positive action measures are simply permitted, but are not obligatory. Thus, the failure to provide positive action at the national level does not amount to discrimination, unlike the reasonable accommodation duty.

Another distinguishing feature of the duty to accommodate, as opposed to positive action measures, lies in the individualised nature of the former, when compared with the group dimension inherent in the latter measures. The duty to accommodate has the advantage of being tailored specifically to meet the needs of the disabled individual in question. As Ferri and Lawson point out, the purpose of the duty is ‘the removal of the specific disadvantage to which a particular disabled individual would otherwise be exposed so as to ensure equality.’⁸⁸ This distinguishes the reasonable accommodation duty ‘from more generic target-driven positive action measures’ and ‘confines reasonable accommodation duties to situations in which meaningful comparisons can be made with the position of people who are not disabled or who are not disabled in the same way.’⁸⁹ The crux of the duty to accommodate involves ‘an individual assessment and a tailored individual solution,’⁹⁰ both in terms of the actual

⁸⁴ L. Waddington and M. Bell, ‘Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity’ (2011) 48(5) *Common Market Law Review* 1503, at pages 1523/1524.

⁸⁵ It is notable that the positive action provision in the CRPD does not contain a time-limit and therefore Article 5(4) CRPD permits the adoption of both temporary and permanent positive action measures. In most cases, positive action measures will be time-limited. However, permanent or long-term positive action may be required for persons with severe intellectual disabilities, for instance.

⁸⁶ L. Waddington and M. Bell, ‘Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity’ (2011) 48(5) *Common Market Law Review* 1503, at pages 1523/1524.

⁸⁷ *Ibid.*

⁸⁸ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 48.

⁸⁹ *Ibid.*

⁹⁰ E.U. Network of Experts on Disability Discrimination, *Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice* (Report Prepared by L. Waddington in collaboration with L.A. Basser, R.L. Burgdorf, J. Cooper, S. Quinlivan, and members of the European Commission Expert Group on Disability Discrimination) 2004, at page 8.

accommodation requested and the assessment as to whether the accommodation constitutes a disproportionate or undue burden for an entity. By way of contrast, positive action is targeted generally at members of socially disadvantaged groups. The duty to accommodate ‘has the advantage of being tailored specifically to meet the needs of the disabled individual and, thereby, avoids (for instance) the controversial aspects of positive action measures, which often hinge on stereotypes⁹¹ and generalised assumptions regarding marginalised groups.’⁹²

The aims of reasonable accommodation and positive action are similar, to the extent that both types of measures seek to increase the participation and inclusion of persons with disabilities in society. However, unlike positive action measures, the aim of the duty to accommodate is not to repair historical inequalities. Rather, the duty to accommodate is ‘focused on current discriminatory obstacles to the enjoyment of rights by persons with disabilities, whereas positive action seeks to target the present effects of past discrimination.’⁹³

Section 2: The limitation to the duty to reasonably accommodate

This section of the report contains an analysis of the defence of ‘disproportionate/undue burden’ contained in Article 2 CRPD. In particular, this section also addresses the interpretation of, and difference (if any), between the concepts of ‘disproportionate’ and ‘undue burden.’ Relevant comments by the CRPD Committee on these concepts are referred to. In addition, academic literature and case law are highlighted, where appropriate, to determine the factors that these principles entail. Finally, several examples are drawn from national legislative provisions.

2.1 Disproportionate and Undue Burden

The duty to reasonably accommodate persons with disabilities under the CRPD is not absolute. It is subject to the limitation that a duty bearer is not required to make a reasonable accommodation where such an accommodation would result in a disproportionate or undue burden. It is important to note that the limitation contained in Article 2 CRPD does not always exempt the duty-bearer from the obligation to provide a reasonable accommodation. Rather, it simply limits the duty. In other words, if there are two (or more) accommodation options, both (each) of which can achieve the same result, the duty bearer is entitled to opt for the less burdensome accommodation. It is unlikely that no accommodation would be possible at all to enable a person with a disability to participate in a given environment/activity, but of course that depends on the circumstances of the case.

Waddington and Broderick note that, ‘in most cases, once a disproportionate burden or lack of reasonableness has been established, the duty to accommodate seems to be removed

⁹¹ On this point, see, for example, S. Coate and G.C. Loury, ‘Will Affirmative-Action Policies Eliminate Negative Stereotypes?’ (1993) 83(5) *The American Economic Review* 1220.

⁹² A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 156. On the weaknesses of the reasonable accommodation as a legal tool to ensure equality, see *ibid*, p. 156-157; See also S. Day and G. Brodsky, ‘The Duty to Accommodate: Who Will Benefit?’ (1996) 75 *Canadian Bar Review* 433.

⁹³ A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 120.

altogether.’ The authors note that ‘one interesting exception to this can be found in Austrian legislation which, in such a situation, still requires the duty bearer to improve the situation of the affected individual with a view to achieving equal treatment.’⁹⁴

2.2 Drafting History of the CRPD

The drafting history of the CRPD reveals that many delegates were confused about the necessity for the use of qualifying language (the defence of disproportionate/undue burden) in the reasonable accommodation provision, since they felt that qualifying language already existed in the form of the term ‘reasonable.’ Confusion has also arisen in this regard in the EU,⁹⁵ whereby many EU Member States have interpreted the word ‘reasonable’ itself as a limitation to the duty to accommodate. According to the *travaux préparatoires* of the CRPD, the Coordinator of the fourth session of the Ad-Hoc Committee, Ambassador Don MacKay (New Zealand) expressed the view that the term ‘reasonable accommodation’ is a ‘single term’ and that the word ‘reasonable’ was not intended to be an exception clause in and of itself. This would seem to imply that the only limitation to the accommodation duty contained in Article 2 CRPD is that of ‘disproportionate’ or ‘undue burden.’⁹⁶

In its General Comment No. 4 (on education), the CRPD Committee has confused matters somewhat by commenting on the notion of ‘reasonableness’ and has affirmed that: “Reasonableness” is understood as the result of a contextual test that involves an analysis of the relevance and the effectiveness of the accommodation, and the expected goal of countering discrimination.’⁹⁷ This equates to the analysis above in section 1 of the report (the goal of ‘effectiveness’ of accommodation measures). The Committee notes that the availability of resources and financial implications is taken into account when assessing disproportionate burden.⁹⁸ While this is somewhat confusing for States Parties to the CRPD in drafting their own laws on reasonable accommodation, it does not appear that the Committee’s comments change anything from a legal perspective. The term ‘reasonable accommodation’ as a whole relates to the entire definition contained in Article 2 CRPD, namely that the accommodation must be effective in allowing an individual with a disability to participate in whatever activity/environment is in question, whilst at the same time not resulting in an excessive burden for the duty-bearer.

During the negotiation sessions leading to the adoption of the CRPD, several delegates felt uncomfortable with the use of the word ‘burden’ and the meaning of the term ‘disproportionate.’ On the whole, delegates felt that the term ‘disproportionate burden’ set a threshold that was too low and preferred language such as ‘undue hardship,’ which was seen as setting a higher threshold. The Australian delegate, for instance, commented that the

⁹⁴ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 13.

⁹⁵ On this point, see L. Waddington, ‘When is it Reasonable for Europeans to be Confused: Understanding when a Disability Accommodation is ‘Reasonable’ from a Comparative Perspective,’ (2008) 29(3) *Comparative Labor Law and Policy Journal* 101.

⁹⁶ Note that the CRPD Committee itself confusingly refers to reasonableness when referring to the proportionality test (see, for instance, para. 10.5, *Jungelin v Sweden*).

⁹⁷ UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 on the Right to Inclusive Education, UN Doc. CRPD/C/GC/4 (2016), para. 27.

⁹⁸ *Ibid.*

standard of disproportionate burden ‘is underdeveloped and does not have the clarity and depth of interpretation that is provided by better developed standards, such as “unjustifiable hardship” and “undue hardship.”’⁹⁹ In a Position Paper submitted during the eight session of the Ad-Hoc Committee, the Australian delegate pointed to the fact that, although the standard of disproportionate burden is used in Article 5 of the EU Employment Equality Directive, ‘generally there is no clear understanding or jurisprudence of what the standard means in practice’ and thus it has ‘very real potential for subjective application and for States Parties to the Convention to set their own standards on what constitutes a disproportionate burden.’¹⁰⁰

2.3 Is there a difference between ‘disproportionate’ and ‘undue’ burden?

Notwithstanding the preferences of delegates for using other terms, Article 2 of the Convention states that the denial of reasonable accommodation may be justified if it constitutes a ‘disproportionate’ or ‘undue burden.’ No guidance is contained in the CRPD regarding the meaning of these two terms, and the CRPD Committee has not addressed the concepts in detail to date. The drafting history of the CRPD seems to indicate that there was not intended to be a difference between the concepts of ‘disproportionate’ or ‘undue’ burden - in other words that they are interchangeable terms when applying them in the national context. This seems to be evident in the diverse formulations in national laws, which use various terms to refer to the defence to the duty to accommodate.¹⁰¹ The CRPD Committee itself appears to refer interchangeably to the terms. For example, in *Jungelin v Sweden*,¹⁰² the Committee refers at one point in the decision to ‘undue burden.’¹⁰³ At another point in the same judgment, the CRPD Committee comments on notions of ‘reasonableness and proportionality.’¹⁰⁴ From the analysis above, it would appear that the underlying test for the defence is one of ‘proportionality.’ In other words, the decision as to whether to grant an accommodation in a particular case ‘will rest on an underlying proportionality test, which seeks to balance the rights of, and burdens and benefits to, all persons affected by the proposed accommodation.’¹⁰⁵

2.4 Factors considered under the Disproportionate or Undue Burden Test

⁹⁹ Position Paper of People with Disability Australia (Incorporated) and the Australian National Association of Legal Centres, available at www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8naclc2.do.

¹⁰⁰ Ibid.

¹⁰¹ However, the majority of European Union countries refer to the test of ‘disproportionate burden,’ since that is the limitation set out in the Employment Equality Directive.

¹⁰² *Marie-Louise Jungelin (represented by the Swedish Association of Visually Impaired Youth (US) and the Swedish Association of the Visually Impaired (SRF) v Sweden*, Communication No. 5/2011, views adopted by the Committee at its twelfth session (15 September–3 October 2014), adopted 2 October 2014.

¹⁰³ See para. 10.6 of *Jungelin v Sweden*: The Committee considers that the Labour Court thoroughly and objectively assessed all the elements submitted by the author and the Social Insurance Agency before reaching the conclusion that the support and adaptation measures recommended by the Ombudsman would constitute an undue burden for the Social Insurance Agency.

¹⁰⁴ See para. 10.5 of *Jungelin v Sweden*.

¹⁰⁵ A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 176.

The CRPD Committee has stated that ‘the definition of what is proportionate will necessarily vary according to context’¹⁰⁶ (and the Committee has not elaborated much beyond that). Nonetheless, it is possible to make some general observations on the defence to the accommodation duty. It is clear from a review of legislation, case law and academic literature that several factors come within the defence to the duty to accommodate.¹⁰⁷ The factors subsumed within the disproportionate/undue burden test can be summarised as follows:

2.4.1 Cost (Economic and Non-Economic)

The drafting history of the CRPD reveals that most states ‘associated the notion of disproportionate burden with the resource implications of the duty to accommodate.’¹⁰⁸ The European Disability Forum stated that the duty to accommodate ‘needs to be qualified by type of entity, size of entity, financial capacity and the cost of the reasonable accommodation.’¹⁰⁹ There was general agreement among delegates that the availability of state funding should limit the use of disproportionate burden as a reason for entities not to provide reasonable accommodations. The final text of the CRPD does not include these factors explicitly; however when examining various legislative provisions at the national level (outlined below), it is clear that these factors are generally subsumed within the defence to the reasonable accommodation duty.

Lisa Waddington outlines the fact that the cost of a requested accommodation is the ‘primary factor; that has been taken into account in national legislation and case law in determining whether the accommodating party can avail of a defence to the duty to accommodate.’¹¹⁰ Costs will not merely be financial in nature. Rather, they should ‘extend to a consideration of the manner in which the accommodation alters the nature of the entity’s business or causes excessive difficulties for an entity.’¹¹¹ Thus, financial costs should be taken together with other factors such as the activities and size of the undertaking, as well as other organisational factors (negative impact of the requested accommodation on the entity in question).

Costs will also be balanced against the availability of public subsidies, or any other assistance available from the state to aid in the provision of reasonable accommodations/to compensate the duty-bearer.

2.4.2 Benefits to the Person with a Disability and Third-Party Benefits

In determining whether an accommodation constitutes a disproportionate burden or not, the cost factor may be weighed against the benefits that a disabled person receives on the

¹⁰⁶ UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 on the Right to Inclusive Education, UN Doc. CRPD/C/GC/4 (2016), para. 29.

¹⁰⁷ Ibid.

¹⁰⁸ See, for example, the comments of Israel in the Fourth Session of the Ad Hoc Committee on Article 5 CRPD, Volume 5(10), September 3, 2004, available at www.un.org/esa/socdev/enable/rights/ahc4sumart07.htm. accessed 18 June 2017.

¹⁰⁹ Third Session of the Ad Hoc Committee, volume 4(2), May 25, 2004, available at www.un.org/esa/socdev/enable/rights/ahc3sum7.htm accessed 23 June 2017.

¹¹⁰ L. Waddington, ‘Reasonable Accommodation’ in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, Oxford, 2007), p. 731.

¹¹¹ A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 176.

granting of a reasonable accommodation. Benefits to other parties may also be considered in the proportionality test. De Campos Velho Martel notes that ‘a serious cost-benefit analysis of reasonable accommodation includes more than just economic factors [...] It must also include the costs of stigma and the benefits of inclusion, not only to the person requesting the accommodation, but also to third parties.’¹¹²

While the issue of third party benefits¹¹³ may be relevant¹¹⁴ in determining whether a burden is ‘disproportionate’ or ‘undue,’ not many European legislative provisions refer to the criterion of third-party benefits. Lisa Waddington¹¹⁵ refers to the non-binding Belgian Guide to Reasonable Accommodations for Persons with a Disability at Work as one of the few examples of European instruments that take into consideration the potential benefits to others arising from the adoption of accommodation measures. While the Guide is a little outdated now, it serves to illustrate relevant considerations on third party benefits. The guide refers, at paragraph 3.1.4 thereof to the fact that, beyond facilitating the disabled individual in question, ‘certain accommodations may offer support for a larger group of employees and/or for external visitors.’ In that regard, it gives the specific example that ‘widening the entrance to a business to permit access by an employee in a wheelchair also offers greater ease to other employees and visitors (persons in wheelchairs, persons with prams, large persons etc.’

An interesting case has arisen in the Belgian context, in the form of the 2009 judgment of the President of the First Instance Court of Ghent,¹¹⁶ which illustrates how the duty to provide reasonable accommodation, and the disproportionate burden defence, operates at the national level in the field of education. In that case, the applicants (parents of three children with hearing impairments attending mainstream school) claimed that an allocation of 5-9 hours a week of interpretative assistance in the school was insufficient for their children to follow the required educational courses. As a result, they brought a case against their childrens’ respective schools and the Flemish Community claiming that the refusal to grant their

¹¹² De Campos Velho Martel L., ‘Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective’ (2007) *International Journal on Human Rights* available at www.surjournal.org/eng/conteudos/getArtigo14.php?artigo=14, citing Sunstein, ‘Cost-Benefit Analysis Without Analyzing Costs of Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms. University of Chicago Law & Economics, Olin Working Paper n. 325; University of Chicago, Public Law Working Paper n. 149 (2007), p. 2-4, available at: <http://ssrn.com/abstract=959712>, accessed 19 June 2017.

¹¹³ On the issue of reasonable accommodation and third-party benefits, see further EF Emens, ‘Integrating Accommodation’ (2008) 156 *University of Pennsylvania Law Review* 839.

¹¹⁴ It is interesting to note that the factor of third party benefits has been mentioned in a joint *dissenting* opinion by five CRPD Committee members in *Jungelin v Sweden*. The dissenting members of the Committee stated that even if reasonable accommodations are in principle an individual measure, ‘the benefit for other employees with disabilities must also be taken into account when assessing reasonableness and proportionality in compliance with Articles 5, 9 and 27.’ Joint opinion of Committee members Mr. Carlos Rios Espinosa, Ms. Theresia Degener, Mr. Munthian Buntan, Ms. Silvia Judith Quan-Chang and Ms. Maria Soledad Cisternas Reyes (dissenting), para. 5.

¹¹⁵ L. Waddington, ‘Reasonable Accommodation’ (2007) in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, Oxford, 2007), p. 727.

¹¹⁶ Belgium, Court of First Instance of Ghent (*tribunal de première instance – Rechtbank van eerste aanleg*), (emergency proceedings), *Marie Gerday (representing her son Dylan Moens) v. Sint-Bavohumaniora and the Flemish Community ; Ronny Van Landuyt and Carine Van De Ginste (representing their daughter Sylvie Van Landuyt) v. Maria Assumpta and the Flemish Community; Yalçin Batur and Sandra Roose (representing their daughter Charlotte Batur) v. Schoolcomité van het Sint- Franciskusinstituut and the Flemish Community*, Judgment of the President, 15 July 2009.

children additional assistance hours amounted to a denial of reasonable accommodation. Furthermore, they argued that the procedure established by the Flemish Government with regard to providing interpretative assistance constituted a denial of reasonable accommodation, in and of itself. The Belgian court stated that the notion of financial burden is only one element that must be considered in assessing the ‘reasonableness’ of a requested accommodation¹¹⁷ (presumably, by ‘reasonableness’ the Court here is referring to the proportionality defence on the whole). Furthermore, the Court stated that reasonableness is to be set against the advantages resulting from the provision of such accommodation. The judge held the Flemish community liable for a failure to provide reasonable accommodation. The Court also referred to an opinion of the Dutch Equal Treatment Commission of 9 February 2005, in ruling that the manner in which a request for reasonable accommodation is handled may, in itself, amount to a denial of such accommodation. In the instant case, the procedure established by the Flemish Government in the allocation of assistance with regard to interpretation did not take account of the individual needs of each child. Accordingly, the Court ordered the Flemish Community to put an end to the above-mentioned denials of reasonable accommodation and to provide the plaintiffs with assistance hours corresponding to 70 % of their school time within five months of the notification of the judgment.¹¹⁸ While the case relates to the public sector, guidance can be drawn from the judgment for the interpretation of the defence to the reasonable accommodation duty as it applies to the private sector.

2.4.3 Non-financial considerations

Non-financial considerations have also been taken into account in certain jurisdictions. Waddington cites the German Social Law Code on the Rehabilitation and Participation of disabled persons as taking into account such considerations.¹¹⁹ That code factors in, among others, health and safety rules laid down by national law in determining whether a requested accommodation imposes a disproportionate burden on an employer. Waddington also cites¹²⁰ the Preparatory Works to the Finnish Non-Discrimination Act,¹²¹ which state that an ‘arrangement’ might be unreasonable if it could ‘endanger compliance with workplace safety legislation.’

2.5 The Meaning of ‘Disproportionate Burden’ in EU Law

¹¹⁷ The Court referred to United States, Court of Appeals, 7th Circuit, *Vande Zande v. State of Wisconsin Department of Administration*, 44 F. 3d 538, 3 A.D. Cas. 1636, 5 January 1995.

¹¹⁸ The whole of this paragraph is taken directly from L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p.129.

¹¹⁹ L. Waddington, ‘Reasonable Accommodation’ in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), at page 730, citing the German Social Law Code, Book Nine 9 (SGB IX), Rehabilitation and Participation of Disabled Persons, of 19 June 2001, Section 81(4) SGB IX.

¹²⁰ L. Waddington, ‘Reasonable Accommodation’ in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), at page 737.

¹²¹ Preparatory Works to the Finnish Non-Discrimination Act, HE 44/2003 [Government Proposal 44/2003] concerning Section 5 of the Act.

The reasonable accommodation duty in the EU context is set out in Article 5 of Council Directive 2000/78/EC¹²² (the Employment Equality Directive). Recital 21 provides guidance on whether a particular accommodation amounts to a disproportionate burden for employers. It states that ‘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’ should be taken into account.’

As Ferri and Lawson point out, ‘it is clear from this recital that 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.’¹²³ However, ‘it does not clarify how decisions should be made about the point at which the cost of an accommodation should be regarded as not sustainable.’ Nor does it ‘clarify the nature of non-financial considerations (if there are any) which may render the making of an accommodation disproportionately ‘burdensome’ to an employer.’¹²⁴

The issue of disproportionate burden is also addressed in Article 4b of the 2008 European Commission proposal for a Non-Discrimination directive to protect people from discrimination on the ground of disability, as well as discrimination on a number of other grounds (henceforth 2008 proposal). That proposal, if adopted, would extend the duty to provide reasonable accommodation further into the private sector (to areas including healthcare and access to goods and services). Article 4b of the 2008 proposal contains a list of factors that are to be taken into account in determining the existence of a disproportionate burden. The list is quite extensive, even including considerations of the negative impact on the disabled person of not providing the accommodation measure:

- The size, resources and nature of the organisation or enterprise;
- The negative impact on the person with a disability of not providing the measure;
- The estimated cost;
- The estimated benefit for persons with disabilities generally, taking into account the frequency and duration of use of the relevant goods and services and the frequency and the duration of the relationship with the seller or provider;
- The life span of infrastructure and objects which are used to provide a service;
- The historical, cultural, artistic or architectural value of the movable or immovable property in question; and
- The safety and practicability of the measures in question.

Notably, in both the Employment Equality Directive and the 2008 proposal, it is explicitly stated that the burden shall not be deemed disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

2.6 National Legislation in EU Member States and Other

¹²² European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303, 02/12/2000 Pp0016–0022).

¹²³ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 53.

¹²⁴ *Ibid.*

National legislation in EU Member States setting out a duty to reasonably accommodate almost always¹²⁵ provides for a defence or justification. The most common term employed in Member States laws is that of ‘disproportionate burden,’ since most states follow the language of the Employment Equality Directive. Defences or justifications in respect of a failure to provide a reasonable accommodation are ‘sometimes referred to in other terms, relating, for example to lack of reasonableness or high cost or other factors.’¹²⁶

There is some diversity in the factors included in the defences to the reasonable accommodation duty at the national level, and it has been observed that ‘European countries have not responded to the challenge of developing these concepts in identical ways, which has made their application even more challenging.’¹²⁷ To date, the CRPD Committee has not provided guidance on the terms ‘disproportionate’ or ‘undue’ burden and it is not certain whether the Committee will provide any concrete guidance on the terms in its impending General Comment on Article 5 CRPD, since the outline of the draft General Comment¹²⁸ contains no reference to the concepts of ‘disproportionate/undue burden.’ Indeed, in the individual communication *Jungelin v Sweden*, the Committee has stated that ‘when assessing the reasonableness and proportionality of accommodation measures, States enjoy a certain margin of appreciation.’¹²⁹ The Committee considers that ‘it is generally for the courts of States [P]arties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.’¹³⁰ Thus, it is important to note that the factors included under the terms ‘undue’ and ‘disproportionate burden’ in national contexts are simply useful as guides and each assessment of the defence will be contextual.

Particular emphasis is placed in most countries laws on the costs of the accommodation and the subsidies available to cover those costs. For example, Article 11(3) of the Estonian Law on Equal Treatment states that:

‘Upon determining whether the burden on the employer is disproportionate as specified in subsection 2, the financial and other costs of the employer, the size of the

¹²⁵ Among other examples, it is notable that in Slovakia, the law makes no reference to a justification test in the context of non-employment related reasonable accommodations. In a similar vein, no provision is made under Romanian law for any justifications or defences with regard to the obligations having similar effect to reasonable accommodation contained in national legislation in that jurisdiction. Information taken from L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p.13.

¹²⁶ Ibid.

¹²⁷ De Campos Velho Martel L., ‘Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective’ (2007) *International Journal on Human Rights* available at www.surjournal.org/eng/conteudos/getArtigo14.php?artigo=14, citing L. Waddington, ‘When is it Reasonable for Europeans to be Confused: Understanding when a Disability Accommodation is ‘Reasonable’ from a Comparative Perspective,’ (2008) 29(3) *Comparative Labor Law and Policy Journal* 101.

¹²⁸ Available on the CRPD Committee’s website, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>, accessed 19 June 2017.

¹²⁹ See *Jüingelin v. Sweden*, para. 10.5.

¹³⁰ Ibid.

agency or enterprise and the possibilities to obtain public funding and funding from other sources shall also be taken into account.’¹³¹

Similarly, Section 16 of the Irish Employment Equality Act states that, in determining whether the measures would impose a disproportionate burden, account shall be taken of the financial and other costs entailed, the scale and financial resources of the employer’s business, and the possibility of obtaining public funding or other assistance.’¹³²

It is notable that laws existing before the entry into force of the CRPD reflected similar considerations, privileging financial costs in defining ‘undue burden.’¹³³ Notably, the commentary to the Czech Anti-Discrimination law also includes among the relevant factors the size of the employer, and affirms that providing the same reasonable accommodation for a company with high turnover can be considered as an ‘unreasonable burden’ for a little sole-trader.¹³⁴

In **Hungary**, it has been noted that the reasonable accommodation duty in the employment context ‘sets a very high bar for the “undue” or “disproportionate” hardship element of reasonable accommodation, providing that the burden of a reasonable accommodation shall be regarded as disproportionate only if it would make the continued operation of the employer impossible.’¹³⁵

Ferri and Lawson point to the fact that, in other States (such as Austria, the Czech Republic, Malta, Norway, Slovakia and Slovenia), ‘national laws prescribe a more general evaluation to assess whether the accommodation entails a disproportionate burden,’ which seems ‘more in line with Article 2 of the CRPD,’ as it includes ‘a more comprehensive evaluation in which the right of the disabled person is central.’¹³⁶ In some countries, the domestic laws contain a wider evaluation to assess whether a disproportionate burden arises (outside of cost factors) and in those countries several factors, such as the ‘activities of the undertaking, the difference the accommodation makes to the disabled person, and the benefit the accommodation makes to others’ are considered.¹³⁷ Ferri and Lawson cite,¹³⁸ for example, Norwegian legislation,

¹³¹ Estonian Law on Equal Treatment (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315. Information and translation taken from L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016).

¹³² Ireland, Employment Equality Act 1998-2004 (as amended).

¹³³ For instance, the Israeli Equal Rights for People with Disabilities Law (1998) 5758 defined ‘undue burden’ in the employment context as a burden that is unreasonable in the circumstances having regard to, *inter alia*, the cost and nature of the adjustments, the size and structure of the business, the scope of its operations, the number of employees, the make-up of the workforce, and the existence of external or state funding for the purpose of carrying out adjustments. Information taken from United Nations Enable, The Concept of Reasonable Accommodation in Selected National Disability Legislation Background conference document prepared by the Department of Economic and Social Affairs (Seventh session New York, 16 January - 3 February 2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>, accessed 20 June 2017.

¹³⁴ The Czech Republic, Commentary to the Anti-discrimination law (*Komentář k zákonu č. 198/2009 Sb. o rovném zacházení a právních prostředcích ochrany před diskriminací*), 2010.

¹³⁵ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 109.

¹³⁶ *Ibid*, p. 74.

¹³⁷ *Ibid*, p. 10.

where in assessing whether the arrangement involves an ‘undue burden,’ factors taken into account (besides the costs of the actual accommodation and the resources of the enterprise), include the effects that the dismantling of disabling barriers will have, and whether the accommodation can benefit other employees other than the disabled person. According to the authors, this provision ‘seems to imply that an expensive accommodation is more likely to be required if it would lead to a significant advantage for a disabled individual, while also benefiting other people.’¹³⁹ The relevant law in the Czech republic considers organisational factors (‘any disruption to the natural or legal person’s activities which the accommodation may cause’) and the extent to which the measure would accommodate the needs of the disabled person (effectiveness), as well as the ‘adequacy of other alternative provisions or arrangements to accommodate the needs of the disabled person.’¹⁴⁰

Waddington and Broderick point to the fact that the Austrian Federal Disability Equality Act defines an unjustified failure to make a reasonable accommodation as a form of (indirect) discrimination. When assessing whether a burden is disproportionate, Section 6 of the Act specifies that the following criteria must be taken into account in particular:

- The efforts made to eliminate the conditions constituting the disadvantage;
- The economic capacity of the entity;
- The public financial assistance available for the necessary improvements;
- The time span between the coming into force of the Act and the alleged discrimination; and
- The effect of the disadvantage in relation to the general interests of the individuals protected by the Act.¹⁴¹

It is notable that, similar to the Employment Equality Directive and the 2008 proposal by the European Commission for a non-discrimination Directive, the Greek Anti-Discrimination Law 3304/2005¹⁴² also provides that the burden is not deemed disproportionate when it is sufficiently remedied by measures existing within the framework of disability policy.

It is also noteworthy that some countries have integrated accessibility considerations into the duty to reasonably accommodate disabled persons. For instance, in the employment context, both Austrian and Slovakian legislation affirm that an accommodation shall not be regarded as disproportionate if it is required under separate legislation, such as legal requirements concerning the accessibility of buildings.¹⁴³

¹³⁸ Ibid, p. 75.

¹³⁹ Ibid.

¹⁴⁰ Czech Republic, Anti-discrimination law (*Antidiskriminacní zákon*), No. 198/2009 SB.

¹⁴¹ Austria, Federal Disability Equality Act, (*Bundes-Behindertengleichstellungsgesetz*) BGBl. I No. 82/2005, Article 6.

¹⁴² Antidiscrimination Law 3304/2005 on the Application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation (that transposes EU Directives 2000/43 and 2000/78), OJ 16 A /27.07.2005

¹⁴³ Section 7c of the Austrian Act on the Employment of People with Disabilities reads as follows: ‘...it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent they have been obeyed’. Section 7(3) of The Slovakian Act on Equal Treatment in Certain Areas and Protection against Discrimination, 2004 reads as follows: ‘The measure shall not be considered as giving rise to disproportionate burden if its adoption by the employer is mandatory under separate provisions.’ Information taken from D. Ferri

2.7 United States Legislation

The Americans with Disabilities Act prohibits discrimination against persons with disabilities in employment, public accommodations, services provided by state and municipal governments, public and private transportation, and telecommunications. With regard to job application procedures, hiring, advancement, or discharge, employee compensation, job training, and other terms, conditions, and privileges of employment, discrimination is defined as including ‘*not making reasonable accommodation* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.’¹⁴⁴

The defence to the reasonable accommodation duty in US law is that of ‘undue hardship.’¹⁴⁵ The Act defines the concept of ‘undue hardship’ as ‘an action requiring significant difficulty or expense, when considered in light of ... factors to be considered ... (i) nature and cost of the accommodation needed... (ii) overall financial resources of the facility... (iii) overall financial resources of the covered entity; (vii) type of operation.’¹⁴⁶

According to the federal Equal Employment Opportunities Commission, which issued *Enforcement Guidance* in March 1999 to clarify the duty to reasonably accommodate in the context of employment, undue hardship should be determined on a case-by-case basis, relying on several factors, including:

- The overall financial resources of the facility making the reasonable accommodation; the number of employees at this facility; the effect on expenses and resources of the facility;
- The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- The type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- The impact of the accommodation on the operation of the facility.

According to the guidelines, employers should determine whether funding is available from an outside source, such as a state rehabilitation agency, in order to help to offset the cost of making a reasonable accommodation. The employer is also meant to consider whether tax credits are available, or whether he/she is eligible for tax deductions, and should determine whether the employee is willing to pay the portion of the costs that would impose an undue burden. Before an employer may claim that he/she is unable to accommodate the disabled

and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 109.

¹⁴⁴ Emphasis added.

¹⁴⁵ The Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009. The ADA is codified at 42 U.S.C. 12101 et seq. See paragraph 102 (a)(5)(a) of the Act.

¹⁴⁶ *Ibid*, paragraph 101(11).

person, the employer is obligated to ensure that no reasonable accommodation exists that would impose an undue hardship.¹⁴⁷

2.8 CRPD Committee Decisions

As mentioned above, in *Jungelin v Sweden*, the CRPD Committee affirmed that States Parties enjoy a margin of discretion in the formulation of reasonable accommodation duties, in particular with regard to decisions as to when a burden will be regarded as ‘undue’ or ‘disproportionate.’ The Committee therefore appears to indicate that it will not interfere unduly with the national courts decision on the defence to the accommodation duty. This is particularly the case where the national court thoroughly assesses the claim of denial of reasonable accommodation. In *Jungelin v Sweden*, the Committee considered that the Labour Court had ‘thoroughly and objectively assessed all the elements submitted by the author and the Social Insurance Agency before reaching the conclusion that the support and adaptation measures recommended by the Ombudsman would constitute an undue burden for the Social Insurance Agency.’ The Committee further considered that the author of the claim had not provided any evidence, which would enable it to conclude that the assessment conducted was manifestly arbitrary or amounted to a denial of justice. Consequently, the Committee was of the view that it could not establish a violation of articles 5 and 27 of the Convention.¹⁴⁸

However, the Committee has made it clear in other decisions, such as *HM v Sweden*,¹⁴⁹ that it will interfere at the national level, and may find non-compliance with Article 5, where the state has not obliged state organs or private entities to deviate from conventional practices in order to accommodate the needs of a particular disabled person.

In the CRPD Committee’s decision in *Michael Lockrey v Australia*,¹⁵⁰ the Committee provided some general guidance on the concepts of ‘reasonableness and proportionality’ of accommodation measures, and repeated what it had said above in the *Jungelin* decision:

States [P]arties must ensure that such an assessment is made in a thorough and objective manner, covering all the pertinent elements, before reaching a conclusion that the respective support and adaptation measures would constitute a disproportionate or undue burden for a State [P]arty.¹⁵¹

In the *Lockrey* decision Committee also clearly emphasised the ‘effectiveness’ of reasonable accommodations in allowing participation of the disabled person in the activity concerned (as mentioned in section 1 of the report). In the *Lockrey* case, the Committee considered that the adjustments provided by the State Party for people with hearing impairments did not enable the author to participate in a jury on an equal basis with others. The Committee also emphasised the fact that, if a State Party argues that the reasonable accommodation claimed by an individual has a disproportionate or undue burden (such as in this case, where the State party argued that the use of stenographers had ‘an impact on the complexity, cost and

¹⁴⁷ Paragraph 102(a)(5)(A). Information taken from United Nations Enable, The Concept of Reasonable Accommodation in Selected National Disability Legislation Background conference document prepared by the Department of Economic and Social Affairs (Seventh session New York, 16 January - 3 February 2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc7bkgndra.htm>.

¹⁴⁸ *Jungelin v Sweden*, para. 10.6.

¹⁴⁹ UN Committee on the Rights of Persons with Disabilities, *HM v Sweden*, UN Doc CRPD/C/7/D/3/2011 (2012).

¹⁵⁰ UN Committee on the Rights of Persons with Disabilities, *Michael Lockrey v Australia*, UN Doc. CRPD/C/15/D/13/2016 (30 May 2016).

¹⁵¹ *Ibid*, para. 8.4.

duration of trials,'), it must provide 'data or analysis to demonstrate that it would constitute a disproportionate or undue burden.'¹⁵²

Section 3: The Working Visit to Georgia: Progress, Challenges and Recommendations

Georgian legislation already contains a prohibition of disability-based discrimination under Article 1 of the Law on the Elimination of all Forms of Discrimination. Under the Law on the Elimination of all Forms of Discrimination, various forms of discrimination are covered (it would appear that direct discrimination, indirect discrimination, multiple discrimination, incitement to discrimination are covered and it also appears that discrimination on the basis of a perceived characteristic/discrimination by association are covered).¹⁵³ To date, however, the law does not cover a denial of reasonable accommodation as a form of discrimination.

This section of the report outlines the discussions that were held during the working visit to Georgia. It includes information on progress made in the Georgian context, challenges encountered with respect to the reasonable accommodation duty and disability discrimination claims generally. Finally, it includes recommendations specific to the insertion of the reasonable accommodation duty in Georgian legislation.

3.1 Working Visit to Georgia

During the working visit to Georgia, discussions were had with the PDO and other relevant stakeholders in order to assess all stakeholders' understanding of the CRPD related to non-discrimination and reasonable accommodation. In addition, discussions revolved around the challenges that the PDO faces in its pursuit of cases related to discrimination against persons with disabilities and/or the reasonable accommodation duty. I also worked with the PDO and all relevant stakeholders to identify, and advise on, challenges arising in the Georgian context regarding application of the concept of reasonable accommodation/disproportionate burden and regarding the necessary legislative changes. The following is a summary of my observations and recommendations:

3.2 Progress and Challenges Identified during the Working Visit to Georgia

¹⁵² Ibid, para. 8.5. In the *Lockrey* communication the State Party did not provide any argument 'justifying that no adjustment, such as a special oath before a court, could be made to enable the person assisting with steno-captioning to perform his or her functions without affecting the confidentiality of the deliberations of the jury.' The Committee therefore found that the State party had not taken the necessary steps to ensure reasonable accommodation for the author and concludes that the refusal to provide steno-captioning, without thoroughly assessing whether that would constitute a disproportionate or undue burden, amounts to disability based discrimination, in violation of the author's rights under article 5 (1) and (3) of the Convention.

¹⁵³ I note that it 'appears' that these two forms of discrimination are covered, since it is not entirely clear to me from the wording of the translated legal provisions if they are both covered.

Positive Aspects:

Many positive changes are being contemplated in Georgian legislative and policy spheres as a result of the current Government's stated commitment to human rights issues. The ratification of the CRPD by Georgia in 2014 has been the first positive step in protecting disability rights. The proposed ratification of the Optional Protocol to the CRPD (OP-CRPD) would serve to enhance the implementation of the Convention as it would give an opportunity to disabled people to have recourse to the CRPD committee regarding individual violations of their rights. The Georgian Government has stated that the OP-CRPD will be ratified in the near future.

In addition, proposals are on the table to amend the Georgian Constitution to include a commitment to ensuring 'special conditions' for persons with disabilities in the Constitution. The plan of the Georgian Government is to carry its commitment to disability rights through to law and policy making process and to ensure that the general principle on 'special conditions' to be inserted in the Constitution will be elaborated on, and made more concrete, in laws and strategies/action plans.

3.3 Recommendations in the Georgian Context

Insertion of a Reasonable Accommodation Duty in Georgian Legislation

A clear and Unambiguous Formulation of Reasonable Accommodation linked to a Broad Range of Rights

A 2009 report of the EU Network of Legal Experts in the Non-Discrimination field noted two particularly challenging aspects of transposing the reasonable accommodation duty contained in the EU Employment Equality Directive into national laws. The first of these concerns the actual formulation of reasonable accommodation duties.¹⁵⁴ The Georgian legislator should therefore pay particular attention to ensuring the formulation of any reasonable accommodation duty that it enacts in a clear and unambiguous manner. In addition, any reasonable accommodation duty enacted in national legislation should cover the full range of rights under the CRPD.

States Parties are required by Article 5(2) of the CRPD to prohibit discrimination on the basis of disability. As this includes a prohibition of the denial of reasonable accommodation (according to Article 2), the CRPD requires States Parties themselves to provide reasonable accommodation, as well as to *ensure*¹⁵⁵ that a wide array of social actors, including employers, schools, healthcare providers and suppliers of services, managers of detention facilities, etc., reasonably accommodate persons with disabilities. The duty to provide reasonable accommodation under the CRPD spans all human rights. These rights are both civil and political, such as the right to liberty, as well as economic, social and cultural, such

¹⁵⁴ L. Waddington and A. Lawson, Disability and Non-Discrimination law in the European Union: Analysis of disability discrimination law within and beyond the employment field (Network of Legal Experts in the Non-Discrimination Field, 2009), available at www.ec.europa.eu/social/BlobServlet?docId+6154&langId=en, available 21 June 2017.

¹⁵⁵ See Article 5(3) CRPD.

as the right to education. At present, not all European Union countries extend the reasonable accommodation duty to all areas of life/to all rights. To date, employment is the only field to which the reasonable accommodation duty must be applied under EU law (as distinct from States Parties' obligations under the CRPD). There was a proposal by the European Commission in 2008 to extend the reasonable accommodation duty under EU law to the fields of social protection, including social security, healthcare and social housing; education; and access to, and supply of, goods and services, including housing. However, that proposal has not yet made it into law. Thus, the material scope of the CRPD is much broader than the scope of the 2008 proposal by the European Commission and current EU law (in the form of the Employment Equality Directive). Despite the fact that the reasonable accommodation duty under existing EU law is limited in scope, several EU Member States have extended the reasonable accommodation duty outside the field of employment, and some (most notably, Spain) even extend the reasonable accommodation duty to all areas of life. Those EU Member States that have not yet extended the reasonable accommodation duty to the broad range of rights covered by the CRPD are required to do so under the Convention. To be fully in compliance with the CRPD, Georgia is required to ensure that the reasonable accommodation duty is extended to all rights covered by the CRPD.

As to the actual formulation of the duty itself, this is entirely at the discretion of the Georgian legislator. Waddington and Broderick have noted that, 'in general, where the duty to reasonably accommodate is contained in national legislation, specific fields are listed as being covered by the duty.'¹⁵⁶ However, the authors have pointed to the fact that Croatian, Cypriot and Spanish legislative provisions are 'noteworthy for adopting a very broad approach in their legislation,' referring to reasonable accommodation duties in the context of participation in 'public and social life' (Croatia), 'human rights and fundamental freedoms' (Cyprus) and 'all human rights' (Spain).¹⁵⁷ Spanish law, in particular, adopts an approach to reasonable accommodation that is similar to the CRPD's approach to the reasonable accommodation duty. Article 2(m) of General Law on the Rights of Persons with Disabilities and their social inclusion defines reasonable accommodations 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.¹⁵⁸

A very straightforward approach has been adopted by the Italian legislator, where the employment-related reasonable accommodation duty introduced in non-discrimination legislation in 2013 places an obligation to adopt reasonable accommodations 'as defined by the UN Convention on the Rights of Persons with Disabilities.'¹⁵⁹ Since the reasonable

¹⁵⁶ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 98.

¹⁵⁷ Ibid.

¹⁵⁸ Spain, General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013), Article 2(m).

¹⁵⁹ Law decree 28 June 2013 No. 76, OJ No. 150 of 28 June 2013, then converted into Law 9 August 2013, No. 99, OJ No. 196 of 22 August 2013, page 1, concerning 'Preliminary Urgent Measures for the promotion of employment, in particular of youngsters, of social cohesion and on and other Urgent financial measures.' Information taken from D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in*

accommodation duty under the CRPD spans all human rights, it is recommended that specific rights are not listed as being covered by the reasonable accommodation duty. Rather, the reasonable accommodation duty should cover ‘all human rights.’

In several EU Member States, the laws in question do not use the explicit language of ‘reasonable accommodation.’ Finnish law refers to ‘due and appropriate adjustments’ (Finland), Dutch law refers to ‘effective accommodation’¹⁶⁰ and Slovenian law refers to ‘appropriate accommodation.’¹⁶¹ Waddington and Broderick note that ‘this terminology emphasises the goal which the accommodation or adjustment must achieve, and clearly separates the obligation to accommodate from the defence’ to the accommodation duty.¹⁶²

In many EU Member States, ‘the legislative definition of a reasonable accommodation is closely interlinked with the defence, whereby a reasonable accommodation is defined as a measure which both accommodates the disabled individual and does not impose a disproportionate or undue burden on the entity concerned.’¹⁶³ Waddington and Broderick have pointed to the fact that the Dutch approach towards assessing a claim for reasonable accommodation is ‘particularly useful.’¹⁶⁴ Dutch legislation on reasonable accommodation ‘separates the assessment of the “effectiveness” of any considered accommodation from the question of the existence of a “disproportionate burden” on the duty bearer.’¹⁶⁵ According to the authors, ‘this could mean that an accommodation may be regarded as “effective” but nevertheless not required because it would lead to a ‘disproportionate burden.’ The authors have claimed that the ‘two-stage test also allows for the consideration of various accommodation measures, and any accommodation which can be regarded as “effective” can pass on to the second “disproportionate burden” part of the test.’ Such a clear two-stage text ‘is not set out in the legislation of other Member States, even though it facilitates and structures the analysis of the application of the accommodation duty.’¹⁶⁶

Classification of the Reasonable Accommodation Duty as Direct Discrimination, Indirect Discrimination or a Sui Generis Form of Discrimination?

There has been much debate as to whether to classify the refusal to provide reasonable accommodation as direct discrimination, indirect discrimination or as a third, *sui generis*¹⁶⁷ form of discrimination. In many EU Member States, the form of discrimination (relating to

Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway (European Commission, 2016), p. 59.

¹⁶⁰ According to the Dutch Government, the latter term ‘effective accommodation’ conveys the idea (more clearly than does ‘reasonable’) that an accommodation must aim to enable a person with disability to exercise their right to work. Explanatory Memorandum to the DDA, *Tweede Kamer*, 2001-2002, 28 169, No. 3, p. 25.

¹⁶¹ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 14.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, p. 14.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Information taken from D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007).

denial of reasonable accommodation) is not specified,¹⁶⁸ but even where the form of discrimination is not specified, compliance with the CRPD simply requires that domestic laws explicitly state that the denial of reasonable accommodation is discrimination.

In some countries, denial of reasonable accommodation is considered as a form of direct discrimination. This is the case in Greece and Malta, for example.¹⁶⁹

Section 6 of the Austrian Federal Disability Equality Act classifies denial of reasonable accommodation as a form of indirect discrimination, but provides that: ‘It shall not be deemed indirect discrimination if the removal of conditions which constitute the disadvantage, especially of barriers, would be illegal or would pose a disproportionate burden on the employer.’

UK and Swedish legislation define denial of reasonable accommodation as a separate, *sui generis* form of discrimination. Also, in the Dutch decision of the Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB)*), ETC 2004-140, the Commission affirms that reasonable accommodation: ‘Concerns a *sui generis* form of (making a) distinction, which does not yet occur in the other equal treatment laws.’¹⁷⁰

In order to avoid a situation of indirect discrimination, whereby certain provisions or practices put disabled people at a disadvantage, it is sometimes claimed that the solution may be to provide a reasonable accommodation. This is specifically the case in EU law, which came into force before the entry into force of the CRPD. In other words, EU law provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless: (ii) as regards persons with a particular disability, the employer or any person or organisation to whom the Directive applies, is obliged, under national legislation, to take appropriate measures to provide reasonable accommodation.¹⁷¹ This clearly creates a link between indirect discrimination and reasonable accommodation.

However, to avoid any confusion with the legal tool of indirect discrimination, which (as shown above) is different from the reasonable accommodation duty, it would seem most appropriate to regard the denial of reasonable accommodation as a *sui generis* form of discrimination.

Definition of Disability

Another challenging issue identified by the 2009 report of the EU Network of Legal Experts in the Non-Discrimination field concerns the definition of disability itself and, more

¹⁶⁸ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 14.

¹⁶⁹ Information taken from D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 85.

¹⁷⁰ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 110.

¹⁷¹ See Article 2(b)(ii) of the Employment Equality Framework Directive.

specifically, the requirement not to restrict entitlement to reasonable accommodation to a certain category, or certain categories, of disabled people (such as those who are severely disabled).

The CRPD does not contain a formal definition of ‘disability.’ However, it does outline the personal scope of the Convention in Article 1 and this should provide guidance in the Georgian context: ‘[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 the individual communication *SC v Brazil* (which was ultimately deemed inadmissible),¹⁷² the CRPD Committee affirmed that persons with disabilities include, *but are not limited to*, 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.¹⁷³ This implies a very expansive interpretation of Article 1 CRPD.

The CRPD Committee has recently expressed concern¹⁷⁴ about Article 4 of the Spanish General Law on the Rights of Persons with Disabilities and their social inclusion, which provides that ‘persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 per cent.’ In assessing entitlement to reasonable accommodation under Spanish law, this implies that only people who fall under the minimum threshold of 33% are entitled to be provided with reasonable accommodation. The CRPD Committee has recommended that the Spanish Government ‘ensures protection from denial of reasonable accommodation, as a form of discrimination, regardless of the level of disability.’¹⁷⁵

If the Georgian legislator intends to introduce a definition of disability into national legislation related to the discrimination norm/reasonable accommodation duty, it must be consistent with the social model of disability and the human rights-based model of disability.

It is advisable to ensure that a wide range of individuals are protected from discrimination on the ground of disability. Waddington and Broderick have noted that ‘any definition of disability included within non-discrimination legislation should be broad. There should be no link between such a definition and definitions of disability used for other legal purposes.’ In particular, ‘protection from discrimination, and entitlement to claim a reasonable

¹⁷² UN Committee on the Rights of Persons with Disabilities, *S.C. v Brazil*, Communication No. 10/2013. UN Doc. CRPD/C/12/D/10/2013., para. 6.3.

¹⁷³ Emphasis added. *Ibid*, para. 6.3. The CRPD Committee also drew attention to the relationship between illness and disability, explaining that

‘... the difference between illness and disability is a difference of degree and not a difference of kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A human rights-based model of disability requires the diversity of persons with disabilities to be taken into account (preamble, paragraph (i)) together with the interaction between individuals with impairments and attitudinal and environmental barriers (preamble, paragraph (e)).’

¹⁷⁴ UN Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Spain. UN Doc. CRPD/C/ESP/CO/1 (2011), para. 11.

¹⁷⁵ *Ibid*, para. 20.

accommodation, should not be restricted to persons who have been officially recognised as having a disability for the purposes of claiming a disability pension or other disability-related benefit.¹⁷⁶

Clarification of the Concepts of Direct and Indirect Discrimination in Georgian Legislation

Direct discrimination is commonly defined as occurring where an individual experiences less favourable treatment on the grounds of a prohibited criterion than another individual experiences in a comparable situation. Thus, in order to apply the direct discrimination norm, there must be an actual or hypothetical comparator, as well as a comparable situation, which may be either past, present, or even hypothetical.

Indirect discrimination is an effect-related concept, which is generally defined as arising where legal provisions, criterion or practices are neutral *prima facie* (in other words, they do not distinguish directly on prohibited grounds), but where they put persons protected by the general prohibition of discrimination at a particular disadvantage compared with other persons. Indirect discrimination can be objectively justified by a legitimate aim and where the means of achieving that aim are proportional.

The concepts of direct and indirect discrimination, as formulated in Article 2 and Article 3 of the Georgian Law on Elimination of All Forms of Discrimination, respectively, are confusing. In particular, Article 2 (which is supposed to contain the direct discrimination prohibition) is badly worded, and would appear to also include the concept of indirect discrimination in the second part of the definition. Article 2, para. 3 is also not clearly worded in accordance with usual definitions of indirect discrimination. This unclarity may cause further confusion between the various forms of discrimination, especially now that it is envisaged to include denial of reasonable accommodation as a form of discrimination in Georgian legislation. It is recommended that this confusing wording should be revisited by the Georgian legislator.

Differentiation between Indirect Discrimination and Reasonable Accommodation

From the perspective of judges and lawyers litigating disability cases, it is particularly important to understand the difference between instances of indirect discrimination and denial of reasonable accommodation. As outlined earlier in this report, in order to establish indirect discrimination, a complainant has to identify a group of individuals in order to make a comparison, and this is different from the individualised reasonable accommodation duty, where no such comparison is necessary.

During my meeting with the judges at first instance and appeal court judges, it became clear that they sometimes look to the pronouncements of the European Court of Human Rights (ECtHR) on indirect discrimination as guidance on the concept of indirect discrimination. While this is not problematic *per se*, it may cause confusion in the disability context. Therefore, it is necessary to ensure a clear understanding of the difference between indirect

¹⁷⁶ L. Waddington and A. Broderick, Promoting Equality and Non-Discrimination for Persons with Disabilities (Council of Europe, 2017), p. 26.

discrimination and reasonable accommodation.¹⁷⁷

While the case law of the ECtHR can sometimes prove enlightening, it is of even more importance to monitor the interpretation of the reasonable accommodation duty under the CRPD, by the CRPD Committee, and academic commentary related to that interpretation. This will guide all stakeholders on the difference between indirect discrimination and reasonable accommodation, and will ensure that there is a consistent understanding of the relevant concepts. The forthcoming CRPD Committee General Comment on equality will hopefully further clarify the distinction between indirect discrimination and reasonable accommodation.

During my visit, it was suggested by some stakeholders that perhaps it may be useful for research to be commissioned on the current approach of judges towards various forms of discrimination in court judgments. This would help to identify the barriers in practice to the application of the non-discrimination norm in disability cases, and would help to identify the gaps in understanding so that a correct application of denial of reasonable accommodation as a form of discrimination can be ensured.

Interpretation of Disproportionate/Undue Burden

To date, neither the CRPD Committee nor the Court of Justice of the EU (CJEU) has offered additional guidance on what might be considered a disproportionate burden/undue burden. To date, this task has been left to Member States and their domestic courts and tribunals. Since the term ‘disproportionate burden’ occurs more commonly in EU Member States laws, I will focus mainly on that concept.

In some States (Croatia, Denmark, Italy and the Netherlands), legislation does not define what a disproportionate burden is. In some countries, it is up to the courts to determine what factors are to be considered in deciding whether a burden is disproportionate. However, when evaluating whether the burden placed on the employer is disproportionate, the courts take into consideration the costs of the accommodation and subsidies available, among other factors. Several courts have carried out a sort of cost-benefit analysis. In a German case, the Baden-Württemberg Land Labour Court weighed the financial investment against the length of the work relationship in case of fixed-term contracts.¹⁷⁸ The Czech Ombudsman has stated that a compromise between the highest effectiveness and lowest costs must be reached.¹⁷⁹ Austrian courts have ruled that companies with greater number of employees have stricter

¹⁷⁷ Of particular interest in the present context is the ECtHR’s first disability equality judgment in the field of non-compulsory education, *Çam v Turkey*, specifically on a denial of reasonable accommodation. The Court in *Çam* held unanimously that there had been a violation of Article 14, in conjunction with Article 2 of Protocol No 1 ECHR (on the right to education), on account of the refusal of the Turkish National Music Academy to enrol the applicant as a student at the Academy due to her visual impairment. See the views of Joseph Damamme, ‘Disability Discrimination because of Denial of ‘Reasonable Accommodations’: A very Positive Connection between the ECHR and the UNCRPD in *Çam v Turkey*’, (Stasbourg Observers, 1 April 2016) <<https://strasbourgobservers.com/category/cases/cam-v-turkey/>> accessed 21 June 2017.

¹⁷⁸ Landesarbeitsgericht Baden-Württemberg, LAG Baden-Württemberg, 22 June 2005, Az: 2 Sa 11/05. Information taken from D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016).

¹⁷⁹ Ombudsman, Report from inquiry No. 93/2011/DIS/AHŘ. Ibid.

duties to reasonably accommodate disabled individuals.¹⁸⁰ However, Austrian courts have also stated that an employer is not obliged to create a ‘new’ job in a company, specifically for a disabled employee.¹⁸¹

When national courts are deciding in a concrete case about the duty to accommodate and are applying the defence to the duty, the size, in particular, of the public or private entity concerned will be relevant. Anna Lawson points to the fact that the reasonable accommodation duty ‘requires assessments of the level of any potential burden to be conducted in a manner that is sensitive to the circumstances of the particular duty-bearer.’ Thus, she argues that:

‘A financial cost that represents a small fraction of the annual budget of a large, wealthy organisation might nevertheless represent so large a sum as to threaten the financial health of a small and poorly resourced organisation. Clearly, an adjustment that might represent an undue burden for the latter might well not do so for the former.’¹⁸²

In the employment context, she also argues that:

‘If one modification would impose too heavy a burden on a particular employer, consideration should be given to whether the disadvantage in question might effectively be tackled by other measures – a process which will require on-going dialogue between the employer, the disabled employee and potentially also others with expertise in relevant types of equipment or facility.’¹⁸³

Section 2 of this report set out the most commonly occurring criteria taken into account in assessing what a disproportionate burden is in the context of providing a reasonable accommodation. These criteria should be taken into account, in the first instance, by duty-bearers when the disabled person requests an accommodation measure. Where, after constructive dialogue, the duty-bearer and the disabled individual cannot agree on the provision of an accommodation measure, the claim may then proceed to legal means. In that instance, the criteria set out in section 2 of this report may guide the judiciary when they are deciding in a case concerning the reasonable accommodation duty. However, as noted in section 2, the criteria outlined above merely constitute guidance as to the types of criteria applied in national contexts, and it will be for the relevant Georgian authorities to draw up their own criteria. Whatever criteria are deemed appropriate in a Georgian context, the judiciary should bear in mind that the application of these criteria will be sensitive to the context arising in a particular case.

Setting out Guidance (on Reasonable Accommodation/Disproportionate or Undue Burden) in Accompanying Documents

Many countries legislative provisions on reasonable accommodation are accompanied by

¹⁸⁰ OGH 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions]. Ibid.

¹⁸¹ See, Administrative High Court VwGH Nr. 2006/12/0223, 17 December 2007. Ibid.

¹⁸² A. Lawson, ‘Reasonable Accommodation in the Convention on the Rights of Persons with Disabilities and Non-Discrimination in Employment: Rising to the Challenges?’ in C. O’Mahony and G. Quinn, *Disability Law and Policy: An Analysis of the UN Convention* (Clarus Press, 2017), p. 363.

¹⁸³ Ibid.

guidance documents. Waddington and Broderick have asserted that ‘such guidance on assessing the extent of the duty is both helpful in and of itself (since this is a complicated area) and valuable because it reveals the multi-natured assessment which must take place in the provision of reasonable accommodations.’¹⁸⁴

The majority of guidance documents in other countries are not binding, however some are. For instance, the Belgian Cooperation Agreement¹⁸⁵ contains a non-exhaustive list of criteria to be taken into account in the assessing the disproportionateness of any burden on duty-bearers. Such criteria include the financial impact of the measure, as well as its organisational impact, the frequency of use of the accommodation, the impact of the accommodation on the quality of life of other persons with disabilities, the impact on the general environment or other people, the lack of appropriate alternatives, as well as the non-application of existing compulsory rules.

If the relevant terms are not defined in legislation itself, it is advisable that the Georgian legislator would ensure that the proposed legislative provision on reasonable accommodation is accompanied by an explanatory note, setting out clearly the definition of reasonable accommodation and the criteria by which the concept of disproportionate burden/undue burden is generally understood, as well as a definition of disability. One of the judges whom I spoke with suggested that the explanatory note could also contain an explanation of the various forms of discrimination (including, but not limited to, denial of reasonable accommodation) that are experienced by disabled persons and practical examples of these.

Burden of Proof

Generally speaking, when a court or other competent authority hears facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the non-discrimination norm. A similar burden of proof applies in the context of the reasonable accommodation duty. Thus, once a case of potential discrimination has been established, the burden of proof will shift to the respondent/duty-bearer to show that the accommodation requested by the disabled person did not constitute a disproportionate/undue burden.

Extension of the Reasonable Accommodation Duty beyond Disability?

The concept of reasonable accommodation did not originate in the context of disability. The term reasonable accommodation was used in the United States Civil Rights Act of 1968 to refer to discrimination on the grounds of religious practice. The concept of reasonable accommodation was first applied to the disability context in the United States Rehabilitation Act of 1973.

¹⁸⁴ L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 13.

¹⁸⁵ Belgium, Protocol between the Federal State, the Flemish Community, the French Community, the German-speaking Community, the Walloon Region, the Brussels- Capital Region, the Joint Community Commission, the French Community Commission in favor of people experiencing disability (*Protocole du 19 juillet 2007 entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Région wallonne, la Région de Bruxelles-Capitale, la Commission communautaire commune, la Commission communautaire française en faveur des personnes en situation de handicap*), 19 July 2007.

During my visit to Georgia, one stakeholder suggested that the reasonable accommodation duty should be extended beyond disability. This has been done in some European Union countries and in other jurisdictions, most notably in Canada. However, it is certainly not universal practice. Since advice in this regard is not within the context of my current mandate and since I have been asked to advise on CRPD obligations, I will not elaborate further on this point, except to say that the issue has been raised by some stakeholders.¹⁸⁶

Training for Judges

During my visit to Georgia, I met with one of the trainers of the High School of Justice. I did not have full access to the training syllabus, due to translation issues, and I do not have information on exactly how many hours are spent training judges on disability discrimination issues. Nonetheless, it became apparent that while the training activities on disability issues cover many important grounds, there is not enough training currently being provided for judges on the interpretation of the reasonable accommodation duty, and its application in concrete cases. It is therefore recommended that this particular component of the training programme is extended significantly to cover, among others, the types of issues outlined in this report. It is also advisable that literature is made available to both those involved in the training school and all those involved in concrete cases before the courts.¹⁸⁷

Before training is given to judges specifically on the reasonable accommodation duty, it is advisable that the different forms of discrimination should be set out for judges, with practical examples applied to disability, and that each form should be distinguished from the next. It is recommended that judges are exposed to the social model of disability, and particularly its application to the reasonable accommodation duty. It is also advisable that judges are given training that includes best practice examples by courts in other jurisdictions, particularly European Union countries, related to the reasonable accommodation duty in the CRPD. It is also advisable that judges are given training on the application of the reasonable accommodation duty to various types of disabilities, and the open-ended forms of reasonable accommodations that may arise in concrete cases before the courts.

Linking Denial of Reasonable Accommodation to Effective Remedies

It is important to ensure that effective remedies are put in place in order that persons with disabilities can obtain redress where reasonable accommodations have been unfairly denied to them. The CRPD Committee has expressed its concerns regarding the enforcement mechanisms available to disabled people who have been discriminated against, including denial of reasonable accommodation.¹⁸⁸

The classification of the breach of the duty to accommodate will have consequences for the remedies available to potential victims and therefore the sanctions imposed on the duty-

¹⁸⁶ For further information on extending the reasonable accommodation duty beyond disability, see the report of the European Network of Legal Experts in the Non-discrimination field, *Reasonable Accommodation beyond Disability in Europe?*, Report written by Emmanuelle Bribosia and Isabelle Rorive and supervised by Lisa Waddington (2013).

¹⁸⁷ The literature contained in the bibliography of this report would provide a good starting point for training the judges on the relevant issues.

¹⁸⁸ Un Committee on the Rights of Persons with Disabilities, concluding observations on the initial report of Spain, UN Doc. CRPD/C/ESP/CO/1 (2011), para 13; UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the Czech Republic, CRPD/C/CZE/CO/1 (2015), paras 11-12.

bearer(s). In other words, the failure to accommodate must be defined explicitly as a form of discrimination if Georgian law is to be in compliance with the CRPD, and if the discrimination-specific remedies available in cases of discrimination are to be applicable.

The Georgian legislator should consider whether only financial compensation (in the form of damages) is appropriate, in light of the CRPD Committee's concluding observations, which clarify that states should not restrict remedies for disability discrimination to monetary damages. Rather, states are expected to ensure that remedies available in the event of a denial of reasonable accommodation include injunctive relief. In its Concluding Observations on the Austrian initial State Party report, the Committee urged Austria to strengthen its discrimination laws by 'broadening the scope of available remedies to include other remedies that require a change in the behaviour of people who discriminate against persons with disabilities, such as injunctive powers.'¹⁸⁹ Similarly, in its Concluding Observations on Belgium, the Committee urges the State Party 'to review the remedies provided for by [...] law to ensure that complainants are able to seek injunctions and can receive damages once their claims for discrimination have been proven in court.'¹⁹⁰

Waddington and Broderick explain that in a large number of EU Member States, damages (in the form of monetary compensation) are applicable in instances of breach of the accommodation duty. This is the case in Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Hungary, Ireland, Latvia, Luxembourg, Portugal, Romania, the Netherlands, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (with the exception of denial of reasonable accommodations in education). In some instances, the compensatory damages are available under the applicable non-discrimination laws or specialised disability laws. In other instances, such as in Hungary, failure to provide a reasonable accommodation (if regarded as discriminatory conduct by the relevant domestic authority) 'may be compensated through the civil courts based on a claim under the relevant Civil Code.' In addition to compensatory damages, courts or semi-judicial bodies in many EU Member States can order the requested accommodation to be carried out. This is the situation in Belgium, Croatia, the Czech Republic, Finland, Ireland, the Netherlands, Romania, Slovakia, Sweden and the United Kingdom. Under Austrian legislation, entities cannot be forced to provide reasonable accommodations, even though compensatory damages are available. In some Member States, 'remedies can only be sought through the court system, whilst in others, such as the Netherlands and Romania, equality or human rights commissions can also issue (non-binding) opinions or rulings in response to a complaint. This would seem to provide victims with greater choice in deciding whether, and how, to proceed with a claim based on a failure to provide an accommodation.'¹⁹¹

Linking the Mandate of the PDO to the Reasonable Accommodation Provision

It is particularly important that the PDOs mandate is extended to the reasonable accommodation duty, in whichever law that duty is inserted. The PDO provides vital support to victims of discrimination, and this support is particularly important in cases of disability discrimination, due to the ratification of the CRPD by Georgia and the knowledge that the

¹⁸⁹ UN Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Austria, CRPD/C/AUT/CO/1 (2013), paras 12-13.

¹⁹⁰ UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Belgium, CRPD/C/BEL/CO/1 (2014), para 12.

¹⁹¹ This whole paragraph has been drawn from L. Waddington and A. Broderick, major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States* (European Commission, 2016), p. 14.

PDO has on the types of claims and rights issues involved. The PDOs involvement in disability discrimination cases, and extension of its mandate to claims involving denial of reasonable accommodation, should serve to ensure the effective application and implementation of the accommodation duty.

Enforcement Mechanisms

Any enforcement mechanisms created in conjunction with the new legislative provision(s) on reasonable accommodation should be inclusive and accessible, including access to legal aid, so that disabled individuals can effectively/easily challenge a denial of reasonable accommodation. The Georgian government should ensure that all barriers to enforcement of reasonable accommodation duties are eliminated. This includes the provision of effective disability-sensitive training of the judiciary, lawyers and all staff associated with the judicial services. Article 13 CRPD should be borne in mind - it provides as follows:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Disabled persons should have access to legal and financial assistance, in formulating complaints, to help individuals with disabilities enforce their rights.

Monitoring Activities/Collection of Data

During my visit, I observed that there does not appear to be up-to-date statistical information available to the Georgian Government regarding the number of disabled persons, disaggregated according to type of disability. Data should be collected in that regard and should be used to inform legislation and policy making. This is essential in order to adequately implement CRPD provisions, in particular concerning reasonable accommodation and accessibility.

Any monitoring activities should seek to identify differences in the situation of persons with different kinds of disability, should consider the impact of disability non-discrimination legislation and measures to promote equality.

Adoption of Laws and Policies based on the Social Model

The clear shift endorsed by the CRPD towards the social model of disability (and away from the medical model) must be secured at all levels of law and policy making in Georgia. While I have been informed that this is what the Government has been trying to ensure in recent legislative and policy reforms, I do not have access to translated versions of the relevant laws and policies (which was outside the scope of my mandate), and thus I make this as a general point for consideration in all CRPD related reforms undertaken by the Georgian government.

Systemic Integration of an Equality Perspective in all Laws and Policies

Equality action planning and equality reviews should be ensured at key stages of the process of reforming Georgian legislation to ensure compliance with the CRPD. In the aftermath of legislative amendments, impact assessments should also take place to ensure effective CRPD implementation.

Training for All Stakeholders

It may be useful to set up further, and ongoing, training activities and events to all stakeholders involved in implementing the CRPD, and specifically the duty to provide reasonable accommodation.

Training should be provided for all stakeholders on the human rights-based model and the social model of disability and the importance of the reasonable accommodation duty (together with accessibility and other measures) in ensuring implementation of substantive CRPD rights.

Collaboration with the Private Sector

In order to ensure effective implementation of the CRPD on the whole, and understanding of the reasonable accommodation duty, technical assistance, guidelines and information should be provided to the private sector on the application of the reasonable accommodation duty. This is crucial to advancing the effectiveness of non-discrimination legislation, but reducing the dependency on legal actions to enforce rights.

Providing State Support

The effectiveness of the implementation of the reasonable accommodation obligation would be enhanced by putting in place policies designed to provide access to financial aid in order to support the provision of reasonable accommodations on the part of public and private entities. Georgia should consider whether financial supports or subsidies will be put in place in order to offset the cost of reasonable accommodations and other disability-related adaptations.¹⁹² Such supports are provided in many countries – see, for example, the UK Access to Work scheme, where supports are available in the context of the provision of reasonable adjustments (accommodations) to access employment. Ferri and Lawson draw attention to the fact that a 2011 UK report notes that for every £1 paid by the UK government to the Access to Work scheme, it received £1.48 back and that ‘the social return on the investment is even higher.’¹⁹³

¹⁹² See A. Lawson, ‘Reasonable Accommodation in the Convention on the Rights of Persons with Disabilities and Non-Discrimination in Employment: Rising to the Challenges?’ in C. O’Mahony and G. Quinn, *Disability Law and Policy: An Analysis of the UN Convention* (Clarus Press, 2017), p. 373.

¹⁹³ D. Ferri and A. Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016), p. 90, citing Sayce, L. ‘Getting In, Staying In and Getting On: Disability Employment Support Fit for the Future’ (Department for Work and Pensions, 2011) p. 7, available at <https://www.gov.uk/government/publications/specialist-disability-employment-support>, accessed 22 June 2017.

In most states, national legislation places a maximum amount/cap on the subsidy available. Ferri and Lawson refer to Finland, where subsidies are available in respect of adaptations to the working environment, to a maximum amount of 4000 euros. With regard to reasonable accommodations in employment (in the form of personal assistance), the maximum subsidy is 20 euros per hour (for a maximum of 20 hours/month for 18 months).¹⁹⁴

A Wide-Ranging Action Plan addressing Equality and Reasonable Accommodation

The Georgian Government should ensure the adoption of a wide ranging action plan or strategy to implement the UNCRPD. Such an action plan should pay specific attention to combating discrimination and promoting equality, including denial of reasonable accommodation, as well as addressing this as a cross-cutting issue over the substantive Convention rights.

Consultation with DPOs and the Role of DPOs and Equality Bodies in Awareness Raising

Awareness Raising

Equality for persons with disabilities cannot be achieved through legislative measures and court actions alone. Alongside the duty to formulate and introduce reasonable accommodation duties, Article 5(3) requires States to ‘take all appropriate steps to ensure that reasonable accommodation is provided’ in practice. Lawson has argued¹⁹⁵ that, in conjunction with the obligations contained in Article 8 CRPD (on awareness-raising) this may entail a duty to raise awareness of the existence and nature of the duty to reasonably accommodate persons with disabilities. In its concluding observations to Tunisia, the CRPD Committee recommended that the State party should make greater efforts to raise awareness of non-discrimination among members of the legal profession, particularly the judiciary, and persons with disabilities themselves, including through training programmes on the concept of reasonable accommodation.¹⁹⁶

It is recommended that the relevant domestic authorities should make sure that non-financial measures, including awareness-raising measures are adopted, and that public authorities also support awareness-raising campaigns targeted at eliminating disability-based discrimination and promoting equality. For instance, in Belgium, the Federal Government has published an accessible brochure on reasonable accommodation in the field of employment. The Belgian Equality Body, UNIA, has published practical booklets on reasonable accommodation, covering ten areas including culture, public services, hotels, restaurants, housing and sport. The booklets aim to increase the awareness of persons with disabilities and suppliers of goods and services about reasonable accommodation.¹⁹⁷

¹⁹⁴ Ibid, p. 90.

¹⁹⁵ Ibid, p. 372; See also generally, A. Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Hart Publishing, 2008).

¹⁹⁶ UN Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Tunisia, UN Doc. CRPD/C/TUN/CO/1 (2011), para. 13.

¹⁹⁷ L. Waddington and A. Broderick, *Promoting Equality and Non-Discrimination for Persons with Disabilities* (Council of Europe, 2017), p. 24.

Systemic Integration of an Equality Perspective in all Laws and Policies

Equality action planning, equality reviews and impact assessment at key stages of the process of reforming Georgian legislation to ensure compliance with the CRPD. In the aftermath of legislative amendments, impact assessments should also take place to ensure compliance with

Consultation with Disabled Persons Organisations (DPOs)

Ferri and Lawson note that in the majority of EU Member States there is no explicit requirement on duty-bearers to consult the disabled person regarding reasonable accommodation. Thus, as the authors note, ‘whilst a failure to consult the disabled person would not itself amount to a breach of the reasonable accommodation duty, the absence of consultation carries with it a risk that accommodations will be made which are not appropriate in the individual case and which are not effective in addressing.’¹⁹⁸ Explicit requirements to consult the disabled person are rare in national law, but can be found in Danish, UK and Norwegian laws/codes of practice or case law.¹⁹⁹

All Forms of Disability-Based Discrimination

Since the Georgian statute is a multi-ground statute, it is important that the specificities of disability-based discrimination are addressed, in particular reasonable accommodation. However, to be fully in compliance with the CRPD, it is advisable that the Georgian legislator would not stop at including denial of reasonable accommodation in Georgian laws, and should ensure that all forms of disability-based discrimination under the CRPD are included in domestic law.

Other than specifying that a denial of reasonable accommodation is a form of discrimination, it is not explicit on the face of the Convention which other forms of discrimination should be prohibited by States. The Convention clearly prohibits direct discrimination. Moreover, the concept of indirect discrimination is implicit in the word ‘effect’ in Article 2 CRPD. In addition, Broderick and Waddington argue that ‘since the definition of discrimination under the UNCRPD covers “all forms of discrimination,” it can be taken to mean that harassment is covered, as well as an instruction to discriminate.’²⁰⁰

In addition to being experienced by a person with disabilities, the above-mentioned forms of discrimination can take more complex forms. Waddington and Broderick clarify as follows: ‘For example, a person can experience direct or indirect disability discrimination because they associate with a person with a disability, or experience harassment because they are perceived to have a disability.’²⁰¹ Therefore, in addition to direct and indirect discrimination, denial of reasonable accommodation, harassment and instruction to discriminate, the following forms of disability discrimination are also explicitly or implicitly covered by the Convention: Discrimination by association; Multiple discrimination; and Discrimination

¹⁹⁸ L. Waddington and A. Broderick, *Promoting Equality and Non-Discrimination for Persons with Disabilities* (Council of Europe, 2017), p. 10.

¹⁹⁹ Ferri D. and Lawson A., major thematic report written for the European Network of Legal Experts on Gender Equality and Non-Discrimination, *Reasonable Accommodation for Disabled People in Employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016).

²⁰⁰ L. Waddington and A. Broderick, *Promoting Equality and Non-Discrimination for Persons with Disabilities* (Council of Europe, 2017), p. 24.

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based on perceived or past disability.²⁰² This requirement to ensure wide coverage is evidenced by the CRPD Committee's concluding observations.²⁰³ In light of these comments, it is advisable that, in addition to including a denial of reasonable accommodation in its laws, the Georgian legislator would consider at some point extending the prohibition of disability-based discrimination to the forms of discrimination that are not already covered in Georgian legislation.

Summary of Recommendations

- Insert a reasonable accommodation duty in Georgian legislation, applying both to public and private sector entities, and to the broad range of rights covered under the CRPD.
- Denial of the duty to reasonably accommodate should be formulated explicitly as a form of (*sui generis*) discrimination.
- Insert the reasonable accommodation provision in the The Law of Georgia on the Elimination of All Forms of Discrimination.
- If the reasonable accommodation provision is not inserted in the aforementioned law, insert the reasonable accommodation in the Law on Social Protection of Persons with Disabilities, ensuring that all human rights covered under the CRPD are covered.
- Do not insert reasonable accommodation duties in a wide range of laws, as this results in incoherent application of the principle.
- Ensure a clear and unambiguous formulation of the reasonable accommodation duty linked to a broad range of rights
- Ensure that any definition of disability included in national legislation connected to the non-discrimination norm/reasonable accommodation duty is consistent with the social model of disability and the human rights-based model of disability.
- Ensure that a wide range of individuals are protected from discrimination on the ground of disability and that entitlement to reasonable accommodation is not restricted to a certain category, or certain categories, of disabled people.
- The concepts of direct and indirect discrimination in Georgian legislation may need to be reformulated.
- Ensure that all stakeholders are clear and consistent in their use and application of the legal tools of indirect discrimination and reasonable accommodation.
- It may be useful for some research to be commissioned on the current approach of judges towards various forms of discrimination in court judgments.
- If relevant terms are not defined in legislation itself, it is advisable that the Georgian legislator would ensure that the new legislative provision(s) regarding reasonable accommodation are accompanied by an explanatory note, setting out clearly the definition of reasonable accommodation and the criteria by which the concept of disproportionate burden/undue burden is generally understood, as well as setting out a definition of disability.
- It is recommended that the training programme at the High School of Justice is extended to cover, among others, the types of issues outlined in this report. It is also advisable that literature is made available on the reasonable accommodation

²⁰² Ibid.

²⁰³ UN Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Spain, UN Doc. CRPD/C/ESP/CO/1 (2011), para. 20.

duty/disproportionate burden defence to those involved in the training school and all those involved in concrete cases before the courts.²⁰⁴

- It is recommended that judges are exposed to the social model of disability, and particularly its application to the reasonable accommodation duty.
- It is also advisable that judges are given training to include examples of judgments by courts in other jurisdictions, particularly European Union countries, related to the reasonable accommodation duty in the CRPD.
- Effective remedies must be put in place in order that persons with disabilities can obtain redress where reasonable accommodations have been unfairly denied to them.
- The Georgian legislator should consider whether only financial compensation (in the form of damages) is appropriate, in light of the CRPD Committee's concluding observations, which clarify that states should not restrict remedies for disability discrimination to monetary damages.
- It is particularly important that the PDOs mandate is extended to application of the reasonable accommodation duty, in whichever law that duty is inserted.
- It is vital that the PDO resubmits its proposals on legislative amendments (already submitted 2 years ago but not yet implemented) and includes proposals on insertion of a reasonable accommodation duty in Georgian legislation.
- Any enforcement mechanisms created in conjunction with the new legislative provision(s) on reasonable accommodation should be inclusive and accessible, including access to legal aid.
- All barriers to enforcement of reasonable accommodation duties should be eliminated. This includes the provision of effective disability-sensitive training of the judiciary, lawyers and all staff associated with the judicial services.
- The Georgian Government should ensure that up-to-date statistical information is available regarding the number of disabled persons, disaggregated according to type of disability. Data collected should be used to inform legislation and policy making.
- The clear shift endorsed by the CRPD towards the social model of disability (and away from the medical model) must be secured at all levels of law and policy making in Georgia.
- The Georgian Government should ensure the adoption of a wide-ranging action plan or strategy to implement the CRPD. Such an action plan should pay specific attention to combating discrimination and promoting equality, including denial of reasonable accommodation.
- Equality action planning and equality reviews should be ensured at key stages of the process of reforming Georgian legislation to ensure compliance with the CRPD. In the aftermath of legislative amendments, impact assessments should also take place to ensure effective CRPD implementation.
- Training should be provided to all stakeholders on the human rights-based model and the social model of disability, and the importance of the reasonable accommodation duty (together with accessibility and other measures) in ensuring implementation of the CRPD.
- Technical assistance, guidelines and information should be provided to the private sector on the application of the reasonable accommodation duty.
- It is advisable to put in place supports or subsidies in order to offset the cost of reasonable accommodations and other disability-related adaptations.
- DPOs should be consulted to ensure that the views of disabled persons are taken into account in decision-making and implementation measures related to the reasonable accommodation duty, as required by Article 4(3) CRPD.
- A meeting, or series of meetings, should be set up between the PDO, PROLoG and

²⁰⁴The resources listed in the bibliography can be used as a good starting point.

the relevant authorities to discuss the legislative changes on reasonable accommodation before they are enacted.

- The relevant domestic authorities should make sure that non-financial measures, including awareness-raising measures, are adopted, and that public authorities also support awareness-raising campaigns targeted at eliminating disability-based discrimination arising, among others, from a denial of reasonable accommodation. This can be done at the level of Government, or through equality bodies or DPOs.
- The Georgian legislator should ensure that all forms of disability-based discrimination under the CRPD are included in domestic law, including direct discrimination, indirect discrimination, harassment, instruction to discriminate, discrimination by association, multiple discrimination and discrimination based on perceived or past disability.

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