# 1. Introduction

***Art 5(2) - “ States Parties shall prohibit all discrimination on the basis of disability …”***

Focus - “on the basis of disability”.

 – who should be covered by discrimination prohibiting disability, ie, who should have the right to sue for discrimination on the basis of disability?

An issue on which there is a long history of struggle in countries around the world – particularly in US and Europe.

Reflect on what lessons can be learned from that history before reflecting on implications for General Comment on Article 5.

# 2. Reflections on Lessons Learned

## 2.1 What Happens When Discrimination Law gets the Definition of Disability Wrong?

The focus shifts from the wrongfulness of the (alleged) discriminator’s conduct to the body/mind of the claimant/victim and the negative impact it has on their life. This has three negative consequences:

**(a) Escape route for discriminators:** If they can escape liability on the basis that the claimant does not come within the statutory definition of disability, they escape scrutiny of the wrongfulness of their treatment of the claimant. Eg, after the first ten years of the Disability Discrimination Act 1995 in the UK, approx a fifth of cases failed on the basis of the definition of disability.

**(b) Trauma for claimants:** When claimants have to show that they are disabled (within the definition of discrimination statutes) they are often required to have personal details about their impairment discussed in court/revealed to somebody who they feel has discriminated against them. Further, where that definition requires them to show that their ability to participate in society / normal day-to-day activities has been hindered, they will be required to go through the demoralising process of proving their limitations. Robert Burgdorf (an architect of the ADA) likened the experience which claimants in disability discrimination cases have to go through to the experiences which rape victims have to go through when questioned about their sexual history.

**(c) Failure to recognise disability discrimination experienced by people who themselves do not have impairments/disabilities**: Definitions which create complex and narrow definitions of disability for purposes of disability discrimination law tend to use it as a gateway through which access to disability discrimination law is restricted (akin to the definitions of eligibility criteria in social welfare law). This focus on the bodies/minds of claimants is often accompanied by a failure to extend protection to people who experience disability discrimination without themselves having impairments/disabilities (eg on the basis of perception, association, having had a disability in the past or expectation of acquiring one in the future).

## 2.2 Examples of How Discrimination Laws get it Wrong

**(a) Too complex:** Definitions of disability in discrimination statues are often complex and thus open up opportunities for alleged discriminators to argue aspects of them have not been satisfied. Eg, as well as impairment, many definitions also require claimants to show that (whether or not in interaction with barriers) their ability to participate in employment/daily activities is hampered. This can (and has) led to a great deal of litigation on – what work/daily activities are (eg whether putting on make-up is a daily activity); what degree of hampering is sufficient to qualify; what is sufficiently long-term to qualify etc. These issues are not what a discrimination case should be focusing on and the risk of it can deter victims of discrimination from challenging discrimination.

**(b) Too narrow:** Definitions may exclude many people who have been discriminated against for disability-related reasons. Eg, people with intermittent conditions; people with progressive conditions before symptoms manifest; people discriminated against by perception, association etc.

**(c) too judgmental:** It is not uncommon for disability discrimination laws to include exceptions from the definition of disability according to which people cannot claim to be disabled (for purposes of bringing disability discrimination cases) if they have undesirable behaviour – eg tendency to violence, theft etc. This means that even where those behaviours are linked to an impairment/disability, they will not be able to bring discrimination cases which scrutinise their treatment at the hands of the alleged discriminator. Eg, if an autistic person is dismissed by an employer because they were violent, they would not be able to bring a discrimination case against them – even where they wished to argue that the violence resulted from the fact that appropriate adjustments were not made for them.

# 3. Looking Forward – the General Comment

## (a) Not restrictive

It would be helpful if the General Comment could stress that prohibitions of disability discrimination should not define disability in such a way as to make it a restrictive gateway to entitlement to sue for discrimination. Care should be taken to ensure that such definitions are therefore not too complex, too narrow or too judgmental.

## (b) “On the basis of” –

This phrase (from Art 5(2)) provides strong grounds for the view (already adopted by the CRPD Committee in numerous concluding observations) that prohibitions of disability discrimination should not be limited to cases in which the person discriminated against has impairments/disabilities. People who are discriminated against because they are wrongly perceived to have an impairment/disability; because of their association with a person who has an impairment/disability; or because they have had or there is an expectation that they will acquire an impairment or disability – are all victims of discrimination “on the basis of disability”. The disability is not their own, but the reason for the less favourable treatment they’ve experienced is nevertheless disability.

## (c) “Disability” – (in the context of “on the basis of disability”)

There is no CRPD definition of disability in the CRPD. Kayess and French (2008) draw attention to the fact that the term ‘disability’ is used in different ways in the CRPD. So, guidance on the meaning of disability is included in preamble para (e) and Article 1 – both of which refer to disability as resulting from the interaction between impairment and social barriers. These provisions are drawing attention to the way in which ‘disability’ is understood in the context of the social model of disability. The term ‘disability’ is used by social model thinkers (eg UPIAS 1976, DPI 1981) as a type of oppression – it is the word used to refer to the disadvantage and exclusion which people with impairments experience because of social structures, systems, discriminatory attitudes etc. Para (e) and Art 1 are not attempting to set out the definition of ‘disability’ that should be used for purposes of discrimination law.

It would be helpful if the General Comment could advise States not to assume that para (e) and Art 1 are the definitions of disability that should be used in discrimination law. Using them is likely to result in requiring a claimant to show (a) that they have an impairment and (b) that, in interaction with attitudinal and environmental barriers, their participation in society is hindered.

This is problematic for three reasons:

First, the second element of such definitions – ie (b) - introduces unnecessary complexity, giving defendants plenty of opportunities to argue that the case cannot be brought because the claimant does not experience the required degree of ‘hindrance’, or because the hindrance they do experience does not affect their participation in society.

Second, it is illogical and perhaps circular to include the second element – (b) - in definitions of disability for purposes of disability discrimination. All that should be necessary is ‘impairment’. Adding the second element requires claimants to show that in general they are hindered in participating in society (or discriminated against) before they can go on to bring a case the point of which is exactly to challenge one specific instance of such hindrance. This places a totally needless and inappropriate hurdle in the way of tackling disability discrimination. Contrary to views that consistency with the social model requires reference to be made to the interaction between impairment and social barriers in discrimination legislation, I would argue that doing so would be inconsistent with the essence of the social model – which is to challenge those social barriers, including through legal prohibitions of discrimination.

Third, including the second element – (b) – makes it very difficult to include claims for discrimination by perception, association and on the basis of past or future impairment/disability.

So, if the guidance in para e and Article 1 cannot sensibly explain the meaning of ‘disability’ in the phrase “on the basis of disability” in Art 5(2), is there anything else in the CRPD that does? The term ‘disability’ is used in another way by the CRPD – to mean the same thing as ‘impairment’ in Art 1. This is illustrated by the phrase ‘persons with disabilities’. It is suggested that it is in this way that ‘disability should be understood in the Art 5(2) phrase – ‘on the basis of disability’.

All that should be included in definitions of disability, for purposes of disability discrimination law, is the concept of ‘impairment’ – whether the term ‘impairment’ or ‘disability’ is used. What exactly that concept means is an important question – and not simply one for doctors – but it is beyond the scope of a general comment on Article 5. A general Comment on this topic (specifically or part of a general comment on Article 1) would, however, be extremely helpful.