Good Practice for Providing Reasonable Access to the Physical Built Environment for Disabled People

An analysis of the legislative structures and technical expressions of discrimination and disability in the context of the built environment in six European and two non-European states

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The Disability Press

The Disability Press seeks to provide an alternative outlet for work in the field of disability studies. The Disability Press acknowledges and draws inspiration from the work of all those countless disabled individuals and their allies who have, over the years struggled to put this particular issue on to the political agenda. Its establishment is a testament to the growing recognition of ‘disability’ as an equal opportunities and human rights issue.

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Executive Summary

This report:

- Examines the legislative structures and technical expressions of discrimination and disability in the context of the built environment

- Focuses upon the United Kingdom, Malta, Ireland, France, Italy and Sweden in Europe and contrasts them with the non-European states of Australia and the United States of America

- Reveals three observable approaches to help prevent the built environment from discriminating against disabled people

- Shows how the United Kingdom, Malta and Ireland take a path of amicable cooperation and negotiation to establish 'reasonable' adjustments to improve access to new and old buildings

- Demonstrates the way in which France and the United States of America tend to adopt a prescriptive course of technical detail and legal compliance to enhance access

- Explains how Australia follows an intermediate route of cooperation and human rights legislation to achieve the same goals

- Notes how Italy and Sweden are embedded in cultural and political systems that render their approaches too specific to be applied elsewhere

- Evaluates the strengths and weakness of each approach

- Recognises the mistakes that have to be avoided

- Makes tangible recommendations on how to make further progress

1. Introduction

This report is the first part of a two stage project to help the European Community address a pan-European strategy to assess the policy, technical expression and business case implications behind the provision of access and accommodation for disabled people. In particular, this report aims to provide an understanding of the legislative and structural manifestations of discrimination and disability in the context of the built environment within specific member states of the EU and beyond. For the purposes of this report, the focus of the study is concerned only with issues relating to physical or visual impairment or a combination of the two.

Through comparisons of the policy implementations and recommendations of the United Kingdom, Ireland, Sweden, Italy and France with those from Malta, one of the new member states, and the non-member countries of Australia and United States of America, the report will provide the platform upon which an agenda of good practice can be formulated and initiated. In this respect, a primary objective is to define the parameters of what can be seen as 'reasonable' in terms of accessibility for disabled people and what enforcement procedures ought to be set in place by the EU and all its Member States to attain this objective.

The choice of nations has initially been made to encompass a broad spectrum of democracies. On one side of the coin, there are the left-of-centre democracies represented by the more socially minded nations of Australia and Sweden. On the other side, are the free-market, right-of-centre countries such as the United States and, to a lesser extent, the UK. On a secondary level, France has been included to provide an example of the practices of the older Member States of the EU, whereas Italy provides a Mediterranean example. The inclusion of Ireland, however, is designed to give an illustration of a Member State that has received substantial structural support from the EU. Finally, Malta has been chosen as an exemplar of the newer Member States while Australia and the United States have also been selected because of their more advanced approach toward access.

Notably, the project is a joint participation by the University of Leeds and the University of Malta headed by Professor Steven Male in Leeds and Doctor Joseph Spiteri in Malta. The Centre for Disability Studies, an interdisciplinary centre for teaching and

research in the field of disability studies at the University of Leeds, has been recruited to examine the legislative issues relating to access. The Centre incorporates and develops the work of the Disability Research Unit (DRU) and aims to promote international excellence within the field.

2. The EU Institutions

As Hornbeek (2004) states, statutory policy making within the EU is shared or 'mixed' in the three main institutional bodies that constitute:

- the European Parliament;
- the Council of the European Union and;
- the European Commission

The European Parliament represents, and is directly elected by, the citizens of the EU. In the recent past, the perception was that the European Parliament lacked any real legislative powers. Of late, favourable comparisons are frequently being drawn between the European Parliament and national legislatures (Earnshaw & Judge, 1996). As with national bodies, the European Parliament conducts its business throughout most of the calendar year.

By contrast, the Council of the European Union meets three times a year and consists of the Heads of Government of the individual member states (Chalmers, 1998). Primarily, the Council is the "forum for interstate bargaining and the representation of national interests" (Edwards, 1996:127) whereas the third institution, the European Commission, seeks to uphold the interests of the Union as a whole. Often the Commission is mistakenly seen as the civil service or bureaucracy of the EU. It is not. Rather it is an autonomous political institution comprising of twenty members "chosen on the grounds of their general competence and whose independence is beyond doubt" (Article 213 EC).

Taken as a whole, this so-called 'institutional triangle' produces the policies and laws (ie. directives, regulations and decisions) that are applied throughout the EU (Europa, 2005). A main avenue for achieving this is through the 'co-operation procedure'. Under the terms of the 'co-operation procedure', the Council—after receiving a proposal for legislation from the Commission—has to adopt a

'common position' by a qualified majority before the proposal can be submitted to Parliament. If the Parliament approves the common position or does nothing within three months, the Council is allowed to adopt the proposal into law. Alternatively, if the Parliament—through an absolute majority of MEPs—recommends "amendments to or rejects the common position then the Council may override the Parliament only by unanimity" (Edward & Lane, 1995:28). Failing a unanimous decision in the Council, the Commission has to re-submit its proposal after 'taking account' of the Parliament's proposed amendments. The proposal may then be adopted into law by the Council after a qualified majority vote in favour of the renewed submission.

Another way in which the Parliament, the Council and the Commission produce policy laws is via the 'co-decision procedure'. With the 'co-decision procedure', the route taken is identical to the 'co-operation procedure' up until the second reading (Chalmers, 1998) if and when the Parliament amends or rejects the Council's common position (Edward & Lane, 1995). When Parliament rejects a common position or when the Council refuses to accept its amendments, a Conciliation Committee comprising of representatives from the Council and fifteen MEPs has to be convened. On being assembled, the role of the Committee is to reconcile the opposing views of the two institutions. If a joint text is approved, "it may be adopted by a qualified majority vote in the Council and by simple majority vote in Parliament" (Edward & Lane, 1995:28). If a joint text is not approved, the Council is empowered to re-confirm its common position by majority vote. As a result, the proposal will be adopted into law unless the Parliament rejects it by an absolute majority of MEPs.

The European Court of Justice (ECJ) also has a vital role to play. Overwhelmingly, it is the function of the ECJ to "ensure that in the interpretation and application of this Treaty [on European Union (TEU)] the law is observed" (Article 220 EC). Comprising of 15 judges and 8 advocates general (appointed by common accord of the governments of the Member States), the ECJ performs a policy role on two prominent levels that specifically relate to this report. On the first level, there are the infringement cases where the ECJ is empowered by Articles 226 to 228 EC to determine whether a Member State has acted in breach of Community law (Forwood, 2001). Usually actions tend to be instigated by the Commission but they can, nonetheless, be brought by another Member State. If

the ECJ finds that an obligation has not been adhered to or fulfilled, the investigated Member State must comply without delay. If, however, new proceedings are initiated by the Commission and the ECJ finds that the concerned Member State has still not complied with its judgement then fixed or periodic penalties may be imposed (Eurolegal Services, 2005).

On a secondary but possibly more important level, the ECJ is in a position to make preliminary rulings. Naturally, the ECJ is not the only judicial body required to apply Community law. The courts of each Member State also apply Community law. With regard to this, the 'preliminary ruling mechanism' enables any national court to stay its proceedings and ask the ECJ for a preliminary ruling on a matter which necessitates the national court to address a question of Community law relating to its final decision. Crucially for the ensuing discussion on access to the built environment, that "question may relate to the interpretation of the Treaties or the interpretation or validity of any secondary legislation or measures" (Forwood, 2001:235). As will become clear, ECJ rulings thus have an important ramification upon the way in which the EU has approached policy issues of discrimination and disability within Member States.

3. The Scope and Extent of EU Legislation

In the main, policy emanating from the European Union and its institutions can be developed in four principal ways. Each has a varying degree of impact and potency (Craig & de Búrca, 1998). According to Article 249 EC of the TEU, the European Parliament acting jointly with the Council and the Commission is empowered to:

> …make regulations and issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force. (Craig & de Búrca, 1998:105-106)

Clearly there is a major difference in the effectiveness of each level of policy making. Regulations, for example, are measures of general application (Cosma & Whish, 2003) and, for the most part, can be seen to be analogous to domestic legislation. In some instances, though, it can differ from domestic legislation in that it is possible for regulations to only affect a few people or be operative for only a short period of time. In this sense, such regulations may "be indistinguishable from measures which would be regarded as administrative or executive acts within national legal systems" (Craig & de Búrca, 1998:106).

With regard to a directive, details laid down are less binding. Significantly, directives differ from regulations in that they can be addressed to a single Member State and they are only binding as to the end to be achieved. It is also the case that a directive leaves some choice as to the form and method of enactment open to the Member State(s) concerned (Craig & de Búrca, 1998). Yet importantly, both regulations and directives enhance flexibility in that EU institutions and their authorities "can adopt the measure they find most suitable for the specific purpose" (Cosma & Whish, 2003:36). In sum, both are seen to be commendable tools by which policy boundaries can be firmly established. To this end, directives are especially useful in helping to harmonise laws in specific areas. Nevertheless, the making of new policy through the use of regulations and directives is generally a slow process (Craig & de Búrca, 1998; Cosma & Whish, 2003) due to issues of compatibility with the disparate legal systems deployed by Member States.

Conversely, a decision, the third facet of the policy making process, is taken to be binding in its entirety only "upon those to whom it is addressed" (Article 249 EC). Therefore, decisions can be tailored to fit the legal requirements of the addressee. Partly as a consequence, decisions thus represent a faster course of action for the making and application of EU policies. Pursuant to Article 251 EC, for example, decisions must be published in the Official Journal and "take effect in the specified date therein or, in the

absence of any such date, on the twentieth day following that of their publication" (Craig & de Búrca, 1998:109).

Finally, recommendations and opinions are also recognised as policy making instruments. Even so, neither have any binding force. Certainly, this apparent 'lack' precludes these measures from having a direct impact. However, recommendations and opinions are not immune from the judicial process. Accordingly, national courts are able to make reference to the ECJ concerning their interpretation or validity (Craig & de Búrca, 1998). And because of the involvement of national courts, recommendations and opinions can also be viewed as prime examples of what is commonly referred to as 'soft law' (Cosma & Whish, 2003). Moreover, the inclusion of the specialised legal knowledge of the national courts makes the use of 'soft law' the preferred approach to policy making in the EU. Indeed, an incentive to use 'soft law' can be found in Article 211 EC which specifically:

> …imbues the Commission with a general power to formulate recommendations or deliver opinions on matters dealt with in the Treaty, either where it expressly so provides, or where the Commission believes that it is necessary to do so (Craig & de Búrca, 1998:109).

4. The EU Principle of Subsidiarity

Tied to these mitigating factors for the use of 'soft law' is the principle of subsidiarity. For the EU to carry out its business effectively, notions of subsidiarity are aligned to ideas of intercultural pluralism to regulate the exercise of powers through the Union. In this respect, Kraus (2003) sees subsidiarity as little more than:

> …the reflection of an intergovernmental compromise articulated in deliberately vague terms. In the Maastricht negotiations, the principle …became the symbol of an unstable balance between the attempts to strengthen the EU's supranational level and the need to take into account the strong variation in the propensity of Member States to intensify the dynamics of political integration (2003:678).

Three contending interpretations and approaches have emerged out of the vague nature of such protestations. On one level, there is the Christian Democratic position which argues that power should be exercised by organisations and groups at the lowest possible level of governance. From this perspective, individuals and social groups should be empowered rather than the state (Northern Ireland Executive, 2005). On another level, though, federal states such as Germany and Belgium have tended to see subsidiarity as a means to work against centralising tendencies through the separation of legislative powers both horizontally (ie. between the different EU institutions) and vertically (ie. between local, regional, national and European institutions) (Klaus, 2003; Northern Ireland Executive, 2005). As a result, this stance places great emphasis upon a written EU constitution and a clear explanation of who does what—and how—in relation to European governance.

Finally, there are the arguments defending national sovereignty. In this instance, the principle of subsidiarity simultaneously represents the means by which EU powers can be curtailed whilst preserving those of the Member States. From this position, subsidiarity thus provides the mechanism for Member States to control the EU and render it incapable of replacing them. Indeed, this stance was famously championed by the UK at Maastricht in 1992 (Northern Ireland Executive, 2005).

As a consequence, the different stances taken by different Member States have resulted in disparate ways in which EU directives and rulings have been applied on an individual basis. All-in-all, it is clearly apparent that these contending positions have seriously impacted upon the ability of the EU to uniformly implement legislation on a pan-European scale. To add to the dilemmas, the EU is not a level playing field upon which every Member is building upon. In truth, disability is an area in which "all Member States already have an array of social policies, often of great vintage, although most would not be described as 'equal treatment' policies" (Mabbett, 2005:99).

5. EU Legislation and the 'Soft Law' Approach to Access

Given the aforementioned temporal considerations, perceived legal/policy incompatibilities and possible conflicts over national sovereignty, the EU tends to take the 'soft law' approach to widening access for disabled people. Concomitant with the findings of this report, 'soft laws' are "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects" (Snyder, 1993:2). Invariably manifestations of 'soft law' take the form of codes of conduct, frameworks, resolutions, communications, circulars, guidance notes and declarations. For lawyers, 'soft law' remains a highly contested concept in that it illusively "lies somewhere between general policy statements (and Commission discretion), on the one hand, and legislation, on the other" (Cini, 2001:194).

Such quasi-legal measures are intended to exert an influence upon their recipients. According to Cosma & Whish (2003), it is intended that these 'soft laws' exert a sense of obligation to comply upon the individuals or governments concerned. Should they not exert this sense of obligation, juridical methods are seen as the answer. For many commentators, and indeed by the EU itself, access to the court system is—when taken in conjunction with the role of the ECJ—the 'gold standard' for rights (Mabbett, 2005). Consequently, access to a hearing is seen as promoting enforcement given that the most effective 'watchdogs' in respect of infringed human rights are the intended beneficiaries of those rights (Cooper & Whittle, 1998).

Taken in this context, Article 13 EC of the TEU provides an important focal point for EU harmonisation. Under the Article, inserted into the Treaty at Amsterdam (1997), it was stipulated that:

> …the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 EC).

The adoption of Article 13 EC was highly symbolic. For the first time, disabled people were explicitly recognised at the heart of the European project. Although this adoption did not confer additional rights for disabled citizens, it did, nonetheless, provide a legal basis by which Community institutions were able to promote new

legislation and action to ensure that a better account can be taken of the needs of disabled people (Morgan & Stalford, 2005). Similarly, it also provided the platform from which individuals could press legal claims for their rights to be recognised and enforced.

More recently in a Communication issued by the Commission on the 30th of October, 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, it was proposed that the Commission should seek to achieve three complimentary and mutually supportive operational objectives to implement the:

- full application of the Equal Treatment in Employment and Occupation Directive, and launch of the debate on the future strategy to combat discrimination;
- successful mainstreaming of disability issues in relevant Community policies within existing processes (European strategies for employment and social inclusion, etc.);
- greater accessibility to goods, services and the built environment

(COM(2003) 650 final).

Besides the reference to the Council Directive of 27 November, 2000, establishing a general framework for equal treatment in employment and occupation, two significant aspects for this report are highlighted by the Commission's Communication. First, the reference to 'mainstreaming' supports the previously recounted rights based approach to which legal recourse is but one aspect. In general, however, 'mainstreaming' is also about the encouragement and mobilization of affected and interested 'stakeholders' within Member States (Hvinden, 2003) and, as such, is seen to require:

> …well-informed policy-making and wide participation in the policy-making process to ensure that disabled people, and their diverse needs and experiences, are at the heart of policy-making each time it has an impact, directly or indirectly, on their lives (COM(2003) 650 final).

Second, the Communication directly refers to greater accessibility to the built environment. In this respect, it is tentatively suggested that the Commission itself ought to take further action in the promotion of European standards with respect to all aspects of the

built environment, including the planning, design, construction and use of buildings (COM(2003) 650 final).

6. The Social Model of Disability

Taken in conjunction with the above policy statements and recommendations emanating from the EU, the desire to include disabled people in the policy-making process clearly indicates the influence of the social model of disability. In its purest form, the social model of disability expresses the conviction that:

> …the problem is <u>not</u> located in the individual, but in a society (economy, culture) that fails to meet the needs of people with impairments. *Impairment* is the term used for an individual's condition (physical, sensory, intellectual, behavioural). *Disability*, in complete contrast, is social disadvantage and discrimination. The social model message is simple and strong: if you want to make a difference to the lives of disabled people, you must change society and the way society treats people who have impairments …[through] a commitment to removing *disabling barriers* that prevent disabled people's participation in society (Stone, 1999:2-3).

Under these terms, 'impairment' is the 'condition' whereas 'disability' is the social consequence of living with a *perceived* impairment in a disabling society (Barnes, 1991; Clark & Marsh, 2002). Ultimately, it is this definition and the belief that society (in the guise of the built environment) discriminates that will provide the framework by which the ensuing sections of this report can judge the efficacy of the initiatives undertaken by the individual countries selected. For the sake of clarity and consistency, the phrase disabled people (which reinforces the belief that society disables) will be used throughout the rest of this report except where direct quotes are given.

7. Supporting Legislation and Interpretations of 'Reasonable' by Individual Members

7:1. *United Kingdom*

A key piece of legislation in the UK is the Disability Discrimination Act (DDA) 1995. Starting from the 2nd of December 1996, the DDA made it unlawful for an employer of 15 or more staff to treat someone with a disability less favourably than someone else because of their disability. From the 1st of October 1999, "service providers have had to make reasonable adjustments for disabled people in the way they provide services" (Disability Rights Commission, October 2003 SP5:5). Finally, since the 1st of October 2004, employers were legally compelled by the DDA to make reasonable adjustments to existing physical features of their premises with an aim to overcome barriers to access (Disability Rights Commission, October 2003 SP7). As a consequence, employers in the UK today are bound by the DDA to make reasonable adjustments to both working conditions and/or to the physical environment where such adjustments would overcome the practical effects of a disability.

Taken in this context, anticipating adjustments and building this into planning is deemed to be an act of good practice since potential difficulties are due to physical features and not due to the impairment of the individual. In this respect, physical features are defined under the DDA as:

> …anything on the premises arising from a building's design or constructions or the approach to, exit from or access to such a building; fixtures, fittings, furnishings, equipment or materials and any other physical element or quality of land in the premises …whether temporary or permanent (DDA, 1995 cited by the Disability Rights Commission, 2003 SP5:6).

Yet when directly addressing service providers, the Department for Work and Pensions (DWP) recommend that a common sense approach should be taken since:

> …different people have different needs and some organizations can afford to do more than others …It's all about doing what is practical in your individual situation and making use of what resources you have. You [the service provider] will not be required to make changes that are impractical or beyond your financial means (16th March 2005).

As the Disability Rights Commission (DRC) point out, the issue of 'reasonableness' is critical in determining how far businesses are

required to go in altering their premises. With this in mind, the criteria for making the requisite changes depend upon how effective such changes will be in overcoming the difficulties posed or the extent to which they may be realistically possible. Similarly, financial costs of making adjustments and the extent of any disruption caused have to be considered. So too, has the extent of the financial resources of a business let alone the amount that may have already been spent. Finally, the availability of financial or other assistance has to be included in the discussion as to what is reasonable or not (DRC, August 2004 SP12). As a consequence, examples of reasonable change may relate to:

- keeping windows, lamps and blinds clean as well as using extra lighting to highlight internal steps or safety hazards
- providing space for wheelchair users to pull up alongside companions seated within flexible chairs with and without armrests
- installing a permanent or temporary ramp (alongside steps) or providing an alternative entrance accessible for all users
- putting door handles that are easier to grip at an accessible height for all users
- lowering the counter height for wheelchair users or provide a lap tray or clipboard if a lower counter section is not available
- using matt paint in contrasting colours or different tones to make walls, ceilings and doors more easily distinguishable
- using alternative, accessible locations either through appointment or perhaps on a regular basis

(DRC, October 2003 SP5; DWP, 21st March 2005)

Such provisions, provisos and adjustment are, of course, mainly applicable to existing buildings. When it comes to new buildings or the building of extensions, the situation is different again. In general, Part M in the requirements of The Building Regulations (2000) apply if a non-domestic building or a dwelling is newly erected; if an existing non-domestic building is extended or undergoes a material alteration; or if an existing building or part of an existing building undergoes a material change of use to a hotel or boarding house, institution, public building or shop. In particular, section M1 of Part M stipulates that 'reasonable' provision has to be made for people to gain access to, or use, a new building and its facilities unless it is an extension of or material alteration of a dwelling. Similarly this stipulation does not apply to any part of a

building which is used solely to enable the building or any service or fitting in the building to be inspected, repaired or maintained. With regard to access to extensions to buildings other than dwellings, section M2 states that suitable independent access has to be provided to the extension where 'reasonably practicable'. This requirement, though, does not apply where suitable access to the extension is provided through the building that is extended (Office of the Deputy Prime Minister, 2004).

In relation to sanitary conveniences in these extensions, section M3 notes that if sanitary conveniences are to be provided in any building which is to be extended, 'reasonable' provision has to be made within the extension for sanitary conveniences. Yet this does not apply:

> …where there is reasonable provision for sanitary conveniences elsewhere in the building, such that people occupied in, or otherwise having occasion to enter the extension, can gain access to and use those sanitary conveniences (Office of the Deputy Prime Minister, 2004:5).

As before, it is noticeable the issue of what constitutes 'reasonable provision' tends to dominate the discussion despite the comprehensive statements describing the stance of the UK in its attempt to widen and improve a disabled person's access to the built environment.

7:2. *Malta*

On the 17th of January 2000, the Parliament of Malta passed the Equal Opportunities (Persons with Disability) Act (EOA). With the EOA, Malta took the first steps to end the forms of discrimination that disabled people have been confronted with every day. Taken in this context, the EOA focussed upon the key areas of:

- employment
- education
- goods and services
- accommodation
- access
- insurance

(KNPD, 2001; 2005a)

With specific reference to the issue of access, or rather the problems surrounding access to the built environment, Title 3 of the Act stipulates that it shall be illegal for any person to discriminate against a disabled person (or any of their family members) by:

- refusing to allow access to, or the use of any premises, or of any facilities within such premises, that the public is entitled or allowed to enter or use
- insisting on different terms and conditions upon which access or usage is granted
- requiring an individual to leave a premises or cease to use the said facilities or to unjustifiably restrict its use in any way

Similarly, Title 3 states that discrimination can also be unlawful in relation to the provision of the means of access to public premises (Government of Malta, 2000). Nevertheless, the EOA makes a distinction between discrimination that can be avoided and discrimination that, for some valid reason, cannot be avoided (KNPD, 2005a). In sub-article (2) of Title 3, the distinction is made where:

- such premises or facilities are designed or constructed in such a way as to render them inaccessible to a disabled person
- any alteration of a premises or facility would impose unjustifiable hardship on whoever is required to provide such an access

(Government of Malta, 2000)

Commendably, some would argue, the legislation thus allows for extenuating circumstances in that the terms ‘unjustifiable’ and ‘hardship’ are prominently inserted. As with the UK, the use of these terms is entirely subjective and naturally open to individual interpretation and contestation. More controversially, though, the reference to the ‘design’ of a building is seen as a mitigating factor rather than being problematic. It appears that a building has a built in immunity from the EOA simply because the architect has designed the building in a particular way. Furthermore, under Part IV of the Act, the test for what is seen to be ‘reasonable’ or not extends to:

a) the nature and cost of the actions in question
b) the overall financial resources of the person, body, authority or institution concerned and the impact of such actions upon the operations of the aforementioned person, body, authority or institution
c) the availability of grants from public funds to defray the expense of the said actions

(Government of Malta, 2000; KNPD, 2005a)

Here again the notion of 'reasonableness' is subjective (KNPD, 2005e) and, as such, is laid open to controversy and debate. As a partial solution to the problem, Article 21 of the EOA has granted legal status to the Kummissjoni Nazzjonali Persuni b'Dizabilita (KNPD) which is alternatively known as the National Commission Persons with Disability. In general terms, the overarching aim of the KNPD is to work towards the elimination of discrimination against disabled people. In this respect, the function of the KNPD is to identify, establish and update all national policies that directly or indirectly relate to disability issues. To achieve these objectives, the KNPD has been officially assigned the tasks of:

- monitoring the provision of services offered by the government and its agencies
- carrying out general investigations with a view to determining whether the provisions of the Act are being adhered to
- investigating complaints made against any failure to adhere to the Act and, where necessary, acting in a conciliatory role in relation to these complaints

(Government of Malta, 2000; KNPD, 2001; 2005b)

Undoubtedly, conciliation is the key role that the KNPD has to play. On the technical side of the equation, however, there is little detail in the EOA to help establish what is actually required to make a building fully accessible. Poignantly, though, the KNPD is officially required to "work towards the elimination of discrimination against people with disabilities" (Government of Malta, 2000:13). Accordingly, the KNPD has produced detailed guidelines on what is required to achieve equal access to the built environment. With regard to entrances for buildings, for example, the KNPD advise that an approach should preferably be level but where this is not possible the slope should not be steeper than 1:16 if the ramp is

less than 500mm vertical height or 1:10 if less than 100mm. Likewise, the horizontal length of a ramp should be restricted to 12 metres and longer ramps should have intermediate landings. Width-wise, ramps should have flights of at least 1200mm and unobstructed widths at least 1000mm (KNPD, 2005c).

By and large, the guidelines issued by the KNPD comprehensively set out exactly what employers and businesses alike should do. Nevertheless, these are only guidelines and are not legally binding in themselves. Conversely, it is important to note that the KNPD has also been charged with the responsibility to provide, where appropriate, legal and financial assistance to disabled people in enforcing their rights under the EOA. As will become clear later, this aspect of the KNPD's remit has important ramifications in the enforcement of Malta's significant attempts to provide access for all.

7:3. *Ireland*

Due to the close proximity and shared, but not always harmonious, history of the two countries, it is hardly surprising that the situation in Ireland is not entirely dissimilar to that of the UK. Ireland has taken numerous steps to introduce an equality framework aimed at promoting social inclusion. Essential elements of which are:

- the Employment Equality Act 1998
- the Equal Status Act 2000
- the Equality Act 2004
- the Education for Persons with Special Educational Needs Act 2004

(Department of Justice, Equality and Law Reform, 2005)

Considering the remit of this report, two pieces of legislation contained within this framework are of particular relevance. To begin with, the Equal Status Act (2000) outlaws discrimination in the disposal of goods and delivery of services. This makes it illegal for people to discriminate when they are providing goods or services to the public. In total, the legislation outlaws discrimination on nine grounds including that of disability (O'Herlihy & Winters, 5-8 April, 2005). Similarly, the Employment Equality Act (1998) prohibits discriminatory practices in relation to and within employment. Again, this Act makes direct and indirect discrimination illegal on nine grounds including disability.

Together, these two Acts seek to cleanse decision-making processes of bias against disabled people. In themselves, though, they do not achieve substantive equality in that they do not accord specific rights to services for disabled people. In a similar vein, the Disability Bill of 2001 had to be withdrawn—as a result of pressure from disability rights movements—because it too set out "service provision *goals* rather than enshrining rights in the fields of transport, health, advocacy and so on" (De Wispelaere & Walsh, 2005:5).

To compound issues, the Comhairle (Amendment) Bill (2004) merely defined 'disability' as relating to:

> …a substantial restriction in the capacity of a person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment (Houses of the Oireachtas, 2004:14-18)

At first glance this appears to go against the social model of disability in that a perceived impairment appears to be the cause of an individual's inability to take part in the general socio-economic activities of the state. Such fears and accusations, however, have been partially allayed by the fact that these legal developments were not solely considered and enacted from above. Alongside the legislative process, an official consultative process to discern the views and needs of disabled people was set in motion during the year 2003. As a result, the Disability Legislation Consultation Group (DLCG) added shape and form to the final draft of the Disability Bill of 2004 which is still under discussion. As part of the process, the DLCG report, 'Equal Citizens: Proposals for Core Elements of Disability Legislation (2003)', was presented to government in 2004. Primarily, the report focussed on the issue of accessibility to the built environment, thus reinforcing the belief that society disables. It recommended that the accessibility of public and private services provided should be legislatively guaranteed in the broadest possible definition so that it included the right to physical, information and communications accessibility. According to the report, all bodies public and private that come into contact with the public have to be covered (O'Herlihy & Winters, 5-8 April, 2005).

Partly as a consequence of this DLCG report, the Disability Bill of 2004 proposed that access to public buildings must be compliant with Part M of the Building Regulations by 2015 and that heritage sites should be made accessible to all. Indeed, Parts M1-M3 of the Building Regulations (Amendment) Regulations (2000) specify that 'adequate provision' has to be made to enable disabled people independent access to a building; to 'adequately' provide sanitary conveniences for disabled people; and, last but not least, to provide disabled people with 'adequate' seating arrangements at entertainment and sporting venues (Minister for the Environment and Local Government, 2000). Finally, the Bill also required the creation of a Centre for Excellence in Universal Design (CEUD). Ultimately, the role of the centre would be to ensure that universal design plays a key role in a number of key areas including standards development, education, training and professional development. The centre would also engage in practical and theoretical work in respect of matters relating to universal design (O'Herlihy & Winters, 5-8 April, 2005).

Taken as a whole, the framework for establishing equality for disabled people in Ireland consists of six draft sectoral plans to address the issue of accessibility to the built environment. Not only do these measures cover all transport providers who will be charged with providing the highest possible degree of accessibility (Department of Transport), they also address the provision of access to appropriate health and personal social services for disabled people. More to the point, the plan of the Department of the Environment, Heritage and Local Government, if or when it is fully implemented, will have the most impact on built environment accessibility. Fundamental to the plan are substantive proposals "to promote universal access to public spaces, buildings and services owned and operated by local authorities; to review and update the standards set out in Part M; promote universal access to heritage sites and make improvements to facilitate greater access to the built environment" (O'Herlihy & Winters, 5-8 April, 2005:5).

Yet despite this drive towards equality, Irish legislation still carries a loose proviso that a Minister may exclude a public building from the scope of the requirements of Part M if he or she is satisfied that the building:

- is being used as a public building on a temporary basis

- will no longer be used as a public building after three years, or
- would not justify refurbishment on cost grounds because of its infrequency of use by disabled people

(Department of Justice, Equality and Law Reform, 2005)

As with the UK, alternative interpretations are possible. More questions than answers stand out. How long is temporary? What constitutes frequent or infrequent use? Clearly the answers are open to individual interpretation as opposed to objective fact.

7:4. *France*[1]

The French Constitution states that any citizen has to be equally treated by the law regardless of their origin, race or religion. With regard to disabled people and the issue of discrimination, Laws 75-534 and 91-663 published in *Le Journal Officiel de la République Française* (JO) theoretically introduced essential legislation designed to prevent the denial of access to the built environment (Legifrance, 2005). To achieve this, Article R.111-19 of the Code of Construction and Dwelling has been significantly modified under Article R.111-18-4 (Sub section 2) to encompass:

- all buildings, 'locales' and enclosures in which people are admitted freely or paying a fee or in which meetings are held which are open to all or those with an invitation whether paying or not
- scholarly 'locales', universities and training centres
- apparatus (referred to as 'installations') open to the public, public or private spaces which serve establishments receiving the public or which are converted to be used by the public (ie. the installation of street furniture)

(CETE, 2004; Legifrance, 2005)

In addition, Article R. 111-19-1 stipulates that all establishments and installations covered by Article R.111.19 must be freely accessible to disabled people while the recently implemented Law 2005-102 (2005) has actually imposed an obligation to render establishments open to the public fully accessible within ten years. In this respect, establishments and installations can only be

[1] All translations from French to English were kindly undertaken by Helen Burrell of the British Library in Boston Spa, West Yorkshire.

deemed to be accessible to disabled persons when they provide the opportunity for such individuals (particularly those in wheelchairs) to freely enter, get around, exit and equally benefit from all services offered to the public by the said establishment or installation.

Through a joint decree of the Minister for Construction, the Minister for the Handicapped and, if need be, of interested Minister(s), architectural regulations and the amendments assuring the accessibility of these establishments or installations for disabled people have to satisfy specific obligations relating to negotiable routes, elevators (lifts), stairs, car parks, lavatories and telephones.

For this report, negotiable routes, lifts, stairs and lavatories are the primary areas of focus. Starting with the demand for negotiable routes, it is decreed that access must be provided through the usual or at least one of the usual routes into the establishment concerned. In case of a significant incline, the route must lead as directly as possible to the principal or one of the principal entrances. The floor must be non-moving, non-slippery and without obstacles to a wheel. It is preferred that routes should be horizontal and without ledges. If a slope is inevitable, any gradient must be covered by a sloping surface if there is no lift and it should not exceed a gradient 2% across the width and 5% in the direction of the route (CERTU, 2003). Moreover, rest landings at the front of all doors and outside of the clearance of these doors are a necessary provision. Likewise, landings have to be established above and below each slope (or every 10m in ramps that are between 4-5% above and below each sloping surface) and at the interior of any airlock (CETE, 2004; CERTU, 2003; Legifrance, 2005).

A lift, on the other hand, is regarded as negotiable for disabled people when its general characteristics permit access and use by, for instance, a wheelchair user. Current legislation fixes the minimum size of door entry, interior dimensions and accessibility of control panels. Additionally, the length of time the doors remain open must allow for the passage of a wheelchair while sliding doors are considered to be obligatory. Generally, the provision of a lift is decreed to be compulsory if:

- the establishment or installation can receive fifty people in a basement or on a floor

- the establishment or installation receives less than fifty people (or one hundred in scholarly establishments) where certain services are not offered on the ground floor

(CETE, 2004; Legifrance, 2005)

Moving on to stairs, the Decree No 94-86 dictates that staircases must be usable by persons of reduced mobility except when a lift is provided as an alternative. The minimum width of a staircase has to be at least 1.20m if it carries no wall, 1.30m if it carries a wall on one side only and 1.40m if the staircase is contained within two walls. Similarly, the maximum height of each individual step has to be 16cm whereas the minimum breadth of the platform must be 28cm. Edges of all steps have to be clearly visible and any staircase of more than three steps is required to carry graspable handrails on each side (CETE, 2004).

Where toilets are set aside for public use, French legislation is insistent that each accessible level must carry at least one toilet adapted for disabled people getting around in a wheelchair. Adapted toilets must be installed in the same place as other toilets if these are grouped together. Cubicles are required to provide an accessible space (of 1.30m x 0.80m) away from the swing of the door and free from any fixed or mobile obstacles yet still be situated at the side of the lavatory bowl. A lateral support bar must also be installed to facilitate transfer onto the toilet (CETE, 2004; Legifrance, 2005). If, however, there are separate lavatories for each sex, then a separate accessible toilet must be adapted for each sex. In all cases, sinks or at least one sink per group must be accessible to disabled people. Correspondingly, all of the related sanitary apparatus such as the mirror, soap distributor and hand dryer have to be easily accessible as well (Legifrance, 2005).

More generally, it is decreed that where the function of an establishment or installation encourages individuals to use tables, desks or booths, one of each, at least, has to be made usable for disabled people. In these instances, the different control systems and service systems such as buttons, switches, handles, ticket distributors, automated teller machines put at the disposal of the public must also be equally as usable for disabled persons. Indeed, all establishments or installations welcoming the seated public in France must be equipped or modified to receive disabled people under the same conditions of access and use offered to those not disabled. To this effect, some spaces accessible by a

negotiable route have to be adapted. In restaurants as well as in multi-purpose rooms not carrying specific adjustments, it is possible for these spaces to be cleared upon the arrival of a disabled person. Nevertheless, it is stipulated that for establishments of fifty or less seats, the availability of at least two of these spaces is required. Above fifty but below a thousand seats, one additional space per group of fifty (or a fraction of fifty) has to be provided. For around three hundred seats, these amendments should be positioned in different parts of the room (Legifrance, 2005).

In relation to hotel accommodation, all establishments have to contain adapted and accessible rooms. Bedrooms are only considered to be adapted and accessible if the room allows a disabled person to freely circulate around the room and gain access to equipment and furniture without obstruction. To achieve this, it is recommended that facilities within the room are at least 0.90m in width away from any possible obstacles. By the same token, it is also necessary to provide an area (approximately 1.50 in diameter) that allows for the rotation of a wheelchair unhindered by the bedroom furniture (CETE, 2004).

Where a bedroom has an en suite bathroom, the bathroom must respond to the same characteristics as the bedroom. If, however, there is only one bathroom per floor, it too must be adapted and be accessible from the bedroom by a negotiable route. Furthermore, if a single floor has one or several adapted and accessible bedrooms without an accessible toilet, it is imperative that an independent accessible toilet is adapted for use on this floor. In the final analysis, at least one accessible bedroom has to be provided by an establishment that has twenty bedrooms or less. If the establishment has no more than fifty bedrooms, two accessible bedrooms have to be available. In establishments with over fifty bedrooms, one extra adapted room per fifty or fraction of fifty has to be provided (CETE, 2004; Legifrance, 2005).

On a sporting or on a ‘socio-educational’ front, establishments with changing rooms have to provide at least one adapted cubicle for each sex. Both or all have to be accessible by a negotiable route. Where there are showers, at least one shower must be adapted and again accessible by a negotiable route. Adapted showers must carry a seated area and a bar/rail. As is the case with lavatories, adapted cubicles and showers must be installed in the

same place as other cubicles or showers if they are grouped together. Finally, in swimming baths, French legislation specifically states that at least one pool has to be made accessible by a negotiable route. What is more, pools should be made more accessible with the establishment providing the means to lower disabled people into the water and subsequently raise them out (CETE, 2004; Legifrance, 2005).

Legislation in France appears to be fairly advanced and comprehensive. As with the UK, however, there are provisos and caveats that serve to obfuscate the application of Decree 94-86 of 26th January 1994 Article 3. In this respect, the use of the phrase 'negotiable' in the context of accessible routes could allow for ambiguity and give room for alternative interpretations as to what is and what is not accessible. That said, it is also true that the Local Advisory Commissions of Civil Protection, Safety and Accessibility (which are specifically convened to give an opinion to the mayor on relevant building permits) are comprised of individuals from a variety of backgrounds and different impairment groups. Nevertheless, the opinion of these Commissions is not binding upon the mayor in question. Consequently, differences of interpretation and application—albeit at the behest of the mayor—can still persist.

7:5. *Italy*[2]

In Italy there is only a limited amount of legislation that deals with issues of disability and access to the built environment. To complicate issues further, such legislation comes, on the one hand, from the central government (out of any of its offices) and, on the other, from regional assemblies that have gained more autonomy in legislative matters since the start of the 'devolution process' in the 1990s. With the possible exception of the Decreto Ministeriale 14 giugno 1989, n.236, this has meant that national legislation has been broad in scope and tends not to go into any great detail about 'adjustments' and the form they should take.

Instead, National legislation in Italy attempts to define good practice in terms of accessibility through a number of relevant definitions. If, for example, a case went to court, the judge would have to consider national legislation alongside the apposite

[2] All translations from Italian to English were kindly undertaken by Marta Bolognani of the University of Leeds.

regional laws and regulations (Tremante, 2005). Because of this regional equation, variations on what is required and what is not required in terms of adjustment to the built environment can be quite substantial depending upon the area concerned. In the first instance, however, the piece of legislation that outlines all the main issues—such as the relevant definitions—of social integration for disabled people is the Legge 5 febbraio 1992, n.104. In Arts. 23, 24 and 26 of this law, access is discussed. This is an elaboration of the previous piece of legislation on access and disability of the Legge 9 gennaio 1989, n.13 which focuses on private buildings. Both pieces of legislation consider potential difficulties in terms of physical features in the built environment and not in relation to the perceived 'impairment' of the individual. What is more, they also consider properties or premises, in the light of their social function.

With this in mind, the recommended level of adjustments or anticipating planning can be found in the list of technical prescriptions of the Ministero dei lavori Pubblici (Decreto Ministeriale 14 giugno 1989, n.236) and is based on:

- whether or not the adaptation of the structure would suffer from the adjustments (Art. 6.1)
- whether the costs will be contained (Art. 6.1)
- whether adjustments will affect a building listed as a protected historical, archeological or cultural one (Art. 6.2)
- whether the adjustments are compatible with the building plan (Art.7.1)

Noticeably Italian legislation does not contemplate what is considered to be reasonable. Rather, the debate in Italian circles surrounds the term 'fruibilita' which describes the 'functionality' of the adjustment. Even so, it is still obvious that costs, and therefore costs to owners, businesses and employers, are still a major consideration.

Nonetheless, the prescriptions of the Ministero dei lavori Pubblici in the above legislation decrees that at least 5% of each council subsidised residential unit (Art. 3.3a) and buildings where social, educational, health, cultural and sport activities take place (Art. 3.3b) has to be accessible to disabled people. Accessibility criteria for inside these premises state that:

- doors must be accessible by a wheel chair user from both sides
- floor ramps should be placed where floors are not on one level
- windows have to guarantee visibility to impaired people and be easy to open or close
- permanently situated furniture should be placed in a way that does not impede the movement of wheelchairs
- electrical terminals must be reachable by people in wheelchairs
- toilets should have enough space for a wheelchair user and the cubicle must have graspable hand rails
- all kitchen appliances have to be on one side
- balconies should be on the same level of the rest of the indoor area
- routes in corridors must lead as directly as possible to the principal entrances
- stairs should be as regular as possible and non-slippery
- the inclination of ramps should be worked out according to the needs of the user
- space in lifts needs to be comfortable for a wheelchair user

(Decreto Ministeriale 14 giugno 1989, n.236: Arts. 4. 1.1—4. 1. 12)

The generality of such regulations is immediately apparent. It is plain to see that these guidelines offer plenty of room for manoeuvre in either direction. In so doing, enforcement, adjustment and compliance is unnecessarily complicated. By way of an illustration, an employer, business or owner could argue that they have adhered to the criteria given since the lack of detailed recommendations on how to achieve the objective does not stipulate how much leeway is necessary to make a lift 'comfortable' for a wheelchair user. The space may be comfortable for some users, but this is not necessarily the same for others. Consequently, it is hard to discern whether a property owner has been diligent or not. Conversely, though, a wheelchair user could use the same guidelines to argue that the owner or employer has been negligent since the space provided was uncomfortable and therefore did not meet the given requirements.

7:6. *Sweden*[3]

Sweden is often portrayed as an ideal country for disabled people. This is certainly the official view of the 1994 Government Commission on Planning and Building who claimed that Sweden, in comparison to other countries, places a high premium on accessibility and usability. In the Commissions own words, Swedish requirements may even be "the highest in the world when regarding housing" (SOU 1994:36:320). Whether, the Swedish view of its own excellence is true in an international comparison or not, this statement illustrates a basic problem in examining laws and regulations appertaining to access and adjustment to the built environment in Sweden.

To date, the most recent anti-discrimination law enacted in Sweden (SFS 2003:307) has its background in two EU Directives on discrimination. Both Directives pay particular regard to Article 13 of the TEU. Directive 2000/43/EC, for example, is specifically aimed at eradicating ethnic discrimination, while the other, Directive 2000/78/EC, relates directly to equal treatment in the labour market (Prop 2002/03:65). Such legislative reform also includes necessary amendments to existing anti-discrimination laws in Sweden. Nevertheless, Swedish law still does not address grounds for discrimination on the basis of accessibility to the built environment.

Consequently issues of accessibility are dealt with by existing building regulations. In Sweden today, legislation concerning planning and building is divided into two major Acts. The first of these Acts is specifically concerned with building construction (SFS 1994:847), whereas the second concentrates on planning and building (SFS 1987:10). Indeed, the law on building constructions (SFS 1994:847) is, in essence, an attempt to integrate the EU directive (89/106/EEC) on construction and building products into Swedish law. It comprises of the six basic requirements on products under the directive and adds three other requirements tailored to Swedish needs. In particular, one of these extra requirements is primarily focused upon accessibility and usability. Using framework paragraphs to provide a general

[3] All translations from Swedish to English were kindly undertaken by Susanne Berg of the Independent Living Institute. Indeed Susanne played a major part in the overall interpretation of Swedish law and attitudes relating to access to the built environment.

description of the legal demands, the overall content of the Act is designed to be expanded upon in more detail through further government regulations, guidelines issued by the National Board on Housing and Planning (BFS 1993:57) and, of course, future court decisions.

Taken in this context, SFS 1987:10 specifically deals with issues surrounding planning, building permits and, ultimately, with the imposition of sanctions. In truth, SFS 1987:10 is the main legislation since SFS 1994:847 was only enacted after the EU directive on construction and building products. Prior to the enactment of SFS 1994:847 and, of course, the changes in the planning and building law introduced by SFS 1987:10, building permits were given on the basis of construction drawings of the intended building. In most municipalities, these drawings and the application for a permit were referred to representatives from local disability organisations. At this juncture, they had the opportunity to argue for access before applications were approved. Later, when the building has been constructed without alteration and the municipality has inspected it, a certificate of approval was provided.

With the legal changes of the 1990s, however, the focus of the responsibility for fulfilling the technical requirements of the construction changed. Accountability in Sweden now rests solely on the builder. Building permits are provided on the basis of design submissions and the proviso that the building does not breech the regulations of detailed planning programmes or area directions applicable to the *outside* of the building concerned (SFS 1987:10). Permits are thus given without any substantive knowledge of the interior design of the building. As such, accessibility of the building is not a major concern during this stage of the planning/building procedure.

To make matters worse, there is an implicit assumption that the builder has the necessary knowledge and training to follow Swedish legal requirements. When it comes to issues of access, however, responsibility is often passed to accessibility consultants. At present in Sweden, these consultants are not officially recognised or certified as a profession. Consequently, there is no final inspection, nor is there a certificate of approval. Nevertheless, if the municipality is aware of any contraventions of the legal building requirements it can demand alteration of the

flawed construction. The municipality can also fine the builder or, in some cases, forbid the use of the building or part of the building.

In theory, the Swedish system can be viewed positively. Essentially, the builder has a clearly defined responsibility for fulfilling legislative requirements while the municipality has the ultimate authority to prohibit breeches of the law. In reality, there are several weaknesses in the system. For example:

- 'accessibility' is not defined in a clear way
- the lack of a professional qualification/certification for accessibility consultants has meant that their opinions and advice vary over a wide scale
- the authority of the municipalities to sanction constructors and builders is compromised by the fact that many municipalities are major owners of buildings and significant employers of builders
- court cases can only be initiated if the municipality sanctions the builder and he appeals this decision to the administrative court

Taking some of these contentions separately, it is noticeable that the guidelines set out by the Swedish National House of Boarding and Planning (NBHP) defines 'accessibility' in terms of 'functional' requirements. The NBHP interprets this as requirements which do not call for fixed measures. Accordingly, the NBHP state that it "shall be possible for at least one toilet intended for the public to be used by a person sitting in a wheelchair" (BFS 1993:57 sec. 3. 121). To add insult to injury, it is also the case that consultants who are 'less demanding' in their calls to make buildings more accessible are the ones generally employed by builders. Finally, the reliance upon a dispute between the municipality and the builder to initiate court proceedings has meant that the interests of disabled people are not represented formally within the legal system. In the end, the court process procedurally favours the objections and opinions of the municipality and the 'offended' builder at the expense of the experiences of disabled people.

From a wider perspective, it is clear that the legal concept of being 'reasonable' is frequently used in connection with existing buildings or constructions in Sweden. Even though alterations of existing buildings or additions to existing premises are covered under the same demands for 'accessibility' as new buildings, this only applies

to the actual part altered or added. Only in cases where an alteration or addition has the effect of prolonging the 'life-time' of the building or changing the function of the building in a significant way, do the requirements for accessibility cover other areas of the building. Even then, there is the caveat that the demands have not to be "obviously unreasonable" (SFS 1994:1215 14-15). Redesigning and building apartments from an attic floor, for instance, requires accessibility to the actual dwellings. Yet whether the builder will be obliged to install a new lift (if changing from two to three-storeys) or alter an existing lift (in case of a multi-storey building) so it reaches the new floor, depends on how 'reasonable' each demand is in relation to the specific situation.

8. Financial Assistance and Enforcement by Individual Members

8:1. *United Kingdom*

Significantly the use of the provisos 'reasonable', 'practical' and 'impractical' throughout the majority of UK legislation serves to dilute the true extent of the requirements laid down by the DDA. Numerous permutations merge together so that businesses are relieved of the obligation to make substantial improvements to both their services and their properties. Alterations may be deemed to be ineffective, too costly or too disruptive. Similarly, modifications may be seen as unfeasible and unnecessarily add to the amount already spent on improving access. To compound issues, this dilution of the DDA is reinforced by the DWP's assertion that there is no specific 'rulebook' (DWP, 16th March 2005) to relate to. Effectively, this negates the possibilities of a consistent implementation of a policy agenda aimed at significantly improving access to the built environment.

To make matters worse, the reference DWP literature makes to the availability of financial or other assistance is primarily limited to more favourable tax treatment rather than full financial assistance. For example, the Inland Revenue (HM Revenue and Customs, 2005) argues that the cost of building or installing a permanent ramp to facilitate access would not normally be allowable for tax relief. However, relief would be forthcoming for the expenditure at the rate of 4% a year under the Industrial Buildings Allowance (IBA) or the Agricultural Buildings Allowance (ABA) if the work is

carried out on an industrial or agricultural building or a 'qualifying hotel' (which, characteristically, has to be in a building of a permanent nature, open for at least four months in the season running from the beginning of April to the end of October, have at least 10 letting bedrooms that comprise of the majority of sleeping accomodation and, finally, the services provided for guests must normally include the provision of breakfast and an evening meal, the making of beds and the cleaning of rooms).

When it comes to adjustment of toilets and washing facilities, a similar situation arises. For instance, the costs of making building alterations to widen a doorway to facilitate wheelchair access would not normally be allowable for tax purposes if the building being altered is a commercial building, such as a shop or office. But in the case of an industrial or agricultural building or qualifying hotel, the alteration costs would qualify for IBA or ABA capital allowances at 4% a year. Even so, minor adjustments, such as changing doors on cubicles from opening inwards to opening outwards, would normally be wholly deductible for tax purposes as revenue expenditure. In addition, the cost of any new sanitary ware would qualify for 'plant and machinary capital allowances' (PMA) and the costs of altering the premises, which are 'incidental' to the installation of that sanitary ware, would also qualify for allowances at the plant and macinary rate of 40% of the up-front cost of the items in the year when the expenditure is incurred. Likewise, the costs of permanent signs in toilets and elsewhere, the replacement of handrails and the installation of new, or the replacement of old, lifts would also qualify for PMAs (HM Revenue and Customs, 2005).

Set against this background, favourable tax incentives may not provide enough incentive for some employers to make alterations. With the possible exception of the DRC, matters are made worse by the lack of an officially recognised regulatory body in the UK responsible for overseeing such decisions. Instead, the test for 'reasonableness' is operated by the service provider and can be challenged by building users on an individual basis through appeals to the DRC or through the law courts.

8:2. *Malta*

In trying to fulfil its remit, the KNPD has made significant steps forward in its attempt to gain equal access for all. Firstly, the

KNPD has reached an agreement with the Malta Development Corporation (MDC) whereby all new industrial developments, including extensions and modifications, shall conform to the 'Access for All' guidelines (cited in section 7:2) subject to the proviso of 'reasonable provision' (KNPD, 2005d). Indeed, the notion of 'reasonable provision' was defined and agreed upon by the KNPD and MDC on the 15th June, 2001. In the main, their agreement states that industrial development of new large premises (approximately greater than 300sq m) have to be fully accessible for all whereas the industrial development of new small premises (less than 300sq m approx.) must:

a) have the ground floor fully accessible to all
b) have a lift shaft (in accordance with the 'Access for All' guidelines) ready for the future installation if the building extends to a second level only
c) be fully accessible to all if the building extends to more than two levels

With applications for extensions or modifications of existing industrial premises, the agreement goes on to emphasise that the alteration shall:

a) have the ground floor fully accessible to all
b) be exempted from having a lift shaft or a lift if the building extends to a second level only
c) have a lift shaft (in accordance with the 'Access for All' guidelines) ready for the future installation if the building extends to a third level only
d) be accessible to all if the building extends to more than three levels

(KNPD, 2005d)

On the whole, it is clear that Malta offers widespread guidance as to what is required by the EOA. Commendably, the agreement between the KNPD and the MDC has enabled a coordinated and consistent approach to the issues of access: a point that is amply demonstrated by the fact that the Planning Authority of Malta has clearly advertised and adopted the KNPD/MDC agreement in its Circulars PA 3/99, PA 4/01 and PA 2/02 (Malta Planning Authority, 1999; 2001; 2002).

Despite the agreement, it is still evident that the 'Access for All' guidelines are not legally binding in the strictest sense. This, of course, could be highly problematic, yet it appears that the KNVP are successfully overcoming such an obstacle. After the first year of the EOA, for example, the KNPD reported that it had received 92 (48 related to access) complaints about discrimination of which 36 cases (10 related to access) were already closed and 56 (38 on access) were still pending. Of the closed cases (26% of the total received), it was established that a little over a third of these (14) were the result of discriminatory practices. In all of these 36 closed cases, 'reasonable' solutions acceptable to the complainant, the subject of the complaint and the Commission itself have been found (KNPD, 2001).

By the end of the fourth year of the EOA, the work of the KNPD again looks impressive. During this year, the KNPD worked on 49 cases which were still pending from the three previous years and started to investigate 59 new cases. So far, 58 (52%) of these cases have been settled, 9 (8%) have come to a temporary agreement while 40 (36%) are still being discussed (KNPD, 2005e). Notably during these years, the KNPD received a complaint that the Mgarr Local Council was not accessible. In response to the KNPD's investigations the Council proposed to build a small extension to accommodate a lift so that the building would be accessible to everyone. Similarly, issues have been resolved relating to access to the Cospicua and Mosta Parish Churches and a compromise has been met with the owner of the Mama Mia restaurant who applied for exemption on the grounds that it was impossible to make Mama Mia's accessible but eventually agreed to make his other restaurant, the Manhattan, fully accessible.

On the reverse side of the coin, 4 (4%) of the cases investigated by the KNPD have not been resolved and, as a consequence, the complainants and/or the KNPD have taken the final option of going to court. Certainly, this was the situation with the University of Malta where the KNPD had no alternative but to institute judicial proceedings to make further advances in the improvement of access to University owned buildings (KNPD, 2005e). All-in-all, however, it is apparent that substantial progress is being made in improving access to the built environment in Malta and the final recourse to civil courts only helps to substantiate the efforts of the KNPD and the Maltese Government even further.

8:3. *Ireland*

Despite the introduction of Part M of the Building Regulations in Ireland, and notwithstanding recent revisions made to the regulation, the effectiveness of Part M at improving access to buildings has been strongly criticised by disabled people. In response to these concerns, the National Disability Authority (NDA) has recently commissioned independent research into the effectiveness of Part M. Preliminary findings from this research have given the NDA serious concern over the lack of rigour behind the monitoring mechanisms deployed. The findings suggest that for many disabled people, Part M has failed to improve access to the built environment (O'Herlihy & Winters, 5-8 April, 2005).

That said, significant progress has been made in other areas. The NDA, for instance, has been charged with improving accessibility to public buildings while the proposed introduction of a Disability Access Certificate (which is intended to promote the consideration of access in the design stage) represents another initiative of the Irish Government to realise the accessibility goal. There is also some evidence of the government putting into practice the 'Commission on the Status of People with Disabilities'' 1996 recommendation that universal access becomes a key guiding principle in all relevant legislation, policy and practice. Indeed, "the recently published National Play Policy recognises universal design principles as a key element in ensuring that all new local play facilities cater for children with disabilities and their families" (O'Herlihy & Winters, 5-8 April, 2005:3).

In terms of enforcement, equality legislation in Ireland also provides a disabled person with a system of redress if he/she is discriminated against in respect of built environment accessibility. With this in mind, compulsory provision has been made for public bodies to appoint 'inquiry officers' to process complaints about any failure by a public body to provide access as stipulated in sections 23 to 28 of the 2004 Disability Bill. Furthermore, each of the six Sectoral Plans, must establish a complaints mechanism for individuals unable to access a service specified. Any person who is not satisfied with the outcome of a complaint, has the final option of appealing to the Ombudsman. Under the proposed legislation:

> …the Ombudsman will be given new powers to investigate any failure by a public body to comply with the access requirements of Part 3 …[of the Disability Bill, 2004] or any commitment made in a Sectoral Plan (Department of Justice, Equality and Law Reform, 2005:9).

In the final analysis, however, equality legislation in Ireland still tends to be beset with problems: not least by the fact that much of the legislation contains the caveat that service providers need only make 'adequate' accommodation for disabled people.

8:4. *France*

In the French case, enforcement issues tend to be complicated and scarcely free from confusion and misinterpretation. In all circumstances, set procedures have to be followed before a building or alteration project can be undertaken. If, in the first instance, the proposed works are not subject to the granting of a local building permit, then Art. R.111-19-4 of the 'Code for Construction and Dwelling' decrees that the authorisation to commence cannot be given unless the projected works conform to the guidelines previously set out in section 7:4 of this report. To establish this, Art R.111-19-5 of the same Code stipulates that the request for authorisation must be supported by the necessary plans and documents so that the competent authority may be assured that the project of work respects the given rules of accessibility (Legifrance, 2005). For works specifically concerning accessibility to public buildings and, of course, new buildings designed for public use, the submitted plans and documents have to be accompanied with a request for a building permit provided for under Art. L.111-8-1 of the 'Code for Construction and for Habitation'. Furthermore, Decrees 94-55 and 95-260 (JO) insist that specially convened Local Advisory Commissions such as the Commission of Security of Paris, the Hauts-de-Seine, the Seine-Saint-Denis and the Val-de-Marne thoroughly review all applications and technical details before authorisation for construction can begin and, indeed, before such establishments can open their doors to the public upon completion.

Clearly, French legislation is attempting to overcome discrimination by the denial of access through mandatory alterations to existing building regulations. Nevertheless, there is scope for confusion within the French system. Besides the aforementioned uncertainty

that surrounds the use of the term ‘negotiable’, Art. R.111-19-3 states that in cases of severe ‘material difficulty’, or with regard to existing buildings by reason of difficulties linked to their characteristics or to the nature of the work carried out, there is the facility to award some dispensation to the guidelines after consultation with the relevant commissions concerned. As with the discussion of ‘reasonable’ in the UK, ‘material difficulty’ is somewhat elusive and subjective. What, for instance, is the exact definition of ‘difficulty’? How can it be realistically measured? There appears to be more questions than answers attached to such a definition.

In a possible move to counter the excuse that building adjustment may cause ‘material difficulty’ to owners and businesses, there is a funding envelope known as FISAC (Fonds d’Intervention pour la Sauvegarde Commerce et de l’Artisanat) which can be used for accessibility adjustments in France. For employers, there is also financial support (administered by the agency l’Agefiph) to improve the working environment. Primarily, though, FISAC is the main fund relevant to this report. In the main, FISAC is an investment fund for commercial and craft-ware businesses. Part of its funds can be utilised for retrofitting works and study towards accessibility improvement. In the city of Grenoble, for instance, FISAC provided 20,000 Euros over a three year period for such endeavours. The city itself also contributed. Even so, the amount is still miniscule and represents only a fraction of the total costs that would be involved if access throughout the city were to be improved.

On the other side of the coin, the penal code of France includes Articles 225-1 and 225-2 which specifically declare that discrimination is prohibited on grounds of ‘deficiencies’, physical appearance and ‘handicap’. The penalties for discrimination can amount to a ceiling of 45,000 Euros. By law an individual can sue an owner or manager under this legislation. In a recent example SNCF, the French railway operator, was fined 2000 Euros for not offering a suitable seat to an individual needing respiratory assistance with a plug-in facility (Cour d’appel de Paris, 14/03/2005). Although not directly related to access to the built environment, this example is useful in that it demonstrates the possibility that individuals and disability organisations (Article 7, Law 91-663) can go to the courts to pursue claims of discrimination. That said, there have been few cases relating to

accessibility to public buildings even though legislation actually extends the possibility for disability associations to sue by law.

8:5. *Italy*

In Italy, the costs of eliminating barriers to access in private buildings is covered by a special fund at the Ministero dei Lavori Pubblici (legge 9 gennaio 1989, n.13). This fund is annually shared by the Italian regions that have applied for assistance. Mayors of each region are delegated to give out the monetary contributions to individuals needing help. Priority is initially given to the most serious cases and then according to the chronology of the applications. The applications that cannot be satisfied in a year will be valid for the year after (Art. 10). Even so, a lack of adjustment to a building can be condoned if it can be proved that it is a technical impossibility to make the necessary alterations (Decreto del Presidente della Repubblica, 24 luglio 1996, n. 503, titolo IV, Art. 19, 2) or if the consequence is that the historical value of the property would be damaged (Art. 19, 2). In the end, the local council is responsible for approving or discarding the plan. Any discard of planning permission has, nonetheless, to be justified under the given criteria (Art. 21, 2).

On the negative side of the equation, the fund distributed by the Ministero dei Lavori Pubblici is currently considered insufficient to cover all the applications for adjustments. As a result, some—but not all—regions cover part of the expenses with their own funding. Others simply leave applications for years. By contrast, individuals who are able to afford the expenses of the adjustments are left to do so without assistance (legge 9 gennaio 1989, n. 13, art. 2.2).

Overall, the law in Italy tends to concentrate on private buildings and is widely considered difficult for businesses, employers and disabled people to understand, let alone to utilise (Tremante 2005). There are, however, a number of court decisions that have helped to resolve individual disputes where the application of the law appears too ambiguous. In the main, though, Italian judges have sided with people requiring adjustments, thus showing an empathy with the principles outlined in the legge-quadro. Surprisingly, there has only been one intervention by a higher legislative body (Corte di Cassazione) that has responded to the charge that the legge-quadro and related pieces of legislation are

too broad. Even more surprising, was the fact that this attempt at improving the law took a more conservative direction than the judges had done in the past. Indeed, the intervention ultimately denied individuals the recourse to demand—as of right—the adjustment to a block of flats if it is likely to undermine just one single tenant's comfortable use of the premises (Cassazione II sezione civile, 25 giugno 1994, n. 6109).

On the other hand, although there is not a clear and homogenous piece of legislation on the matter, courts are given considerable powers to implement adjustments even in buildings where there are no disabled people (Tremante 2005). Collectively, it is true that Italian judges unanimously favour interventions that will endorse the integration of disabled people. Ironically, this is only made feasible by the generality and ambiguous nature of Italian law which allows for a broad interpretation of the respective legislation in its wider constitutional sense (Tremante 2005). Nevertheless, the main obstacle—as in many of the countries studied in this report—is the availability of adequate funding.

8:6. *Sweden*

On the whole, it is worth repeating that the requirements provided under the Swedish building and construction legislations generally only apply when new buildings are constructed or when old buildings are altered. They are proactive not retroactive. Even so, the legislation on planning and building (SFS 1987:10) does incorporate a retroactive requirement concerning public premises and areas. The requirement was enacted in 2001 and, accordingly, it was decreed that obstacles for accessibility and usability that can easily be remedied must be amended in accordance with guidelines provided under the law (SFS 1987:10). As always, though, caveats and provisos are in abundance: not least in the NBHP guidelines which define 'easily amended obstacles' as those "obstacles which, in consideration of the benefit of the measure and prerequisites of the place, could be viewed as reasonable to amend. The economic consequences must not be unreasonably onerous" (BFS 2003:19 5).

More recently, it is worth noting that Sweden has now assigned a Government Commission on Discrimination with the task of analysing the need for more comprehensive anti-discrimination

legislation in Sweden. One possible reason for the appointment of such a commission is that the government of Sweden believes it to be unacceptable and impractical to provide different levels and measures of protection as a consequence of different areas of discrimination. Overwhelmingly, the government believes each and every citizen should be protected equally and this protection should cover the same areas in society. As a result, a main task of the commission is to:

> …consider whether existing protection for people with disabilities from disadvantage on account of inadequate accessibility should be extended from working life and higher education to other areas of society (Dir 2002:11).

By the 1st July 2005 it is expected that the commission will report its findings to the government. A critical influence upon its findings will be the nature of Swedish legislation on discrimination. In all three of the enacted laws so far, government authorities have been given an obligation to act on behalf of an individual if s/he asks for help. As a direct consequence, an individual can use the legal tool of suing a 'perpetrator' of an act of discrimination in a civil action without economic risk. If or when the authority steps in, the law recommends that a possible conciliation is sought. If this is not possible, the authority can then act as a legal representative. Crucially, if the case is lost on behalf of the individual, they will not have to carry the financial costs of the opponent as this would be the responsibility of the government.

Unlike many other countries investigated in this report, it could be argued that the reasons for this course of action are twofold. First, there is the peculiarly Swedish need for consensus around issues of social conflict. It is not unusual in Sweden for such conflicts to be resolved by agreements between the conflicting partners. Second, there is the belief in Sweden that "the goal of social justice is largely viewed in terms of the re-distribution of resources" (Berg, 2005:32). More specifically, the welfare state is thus required to step in and act on behalf of its 'vulnerable" citizens'. In so doing, economic status/position is effectively rendered as unimportant as possible. As a complete package, it is hoped that these prevalent attitudes will reinforce existing legislation in Sweden and significantly help the commission to inform its government as to what should be done to enhance the right of a disabled person to equitable access to the built environment.

9. Contrasting Attitudes From Beyond

9:1. *Australia*

1993 was a significant year for disabled people in Australia (Small, Spring 2000). Sydney was selected to host the 2000 Olympic and Paralympic Games while in March of that year the Disability Discrimination Act of Australia (DDAA) came into force. Under the Act it became unlawful for public places to be inaccessible to disabled people. Places used by the public range from public paths, parks, pedestrian malls and walkways to educational facilities, libraries dentists sports clubs, hospitals and so on. The list is extensive and applies to existing places as well as places under construction (HREOC, 2005).

More specifically, the Act states that *every* area open to the public should be open to disabled people. Disabled people should expect to enter and make use of places used by the public if people who are not disabled can do so. For instance:

- places used by the public should be accessible at the entrance and inside
- facilities in these places should also be accessible (wheelchair accessible toilets, lift buttons within reach, tactile and audible lift signals for people with vision impairments)
- rather than being confined to a segregated space or the worst seats, all areas within places used by the public should be accessible to disabled people

(HREOC, 2005).

While it has been widely recognised that changes will not happen over night, it is—all the same—emphasised that a disabled person has every right to complain to the Australian Human Rights and Equal Opportunity Commission (HREOC) if they are discriminated against when a place used by the public is inaccessible. Furthermore, section 15 (Employment) of the DDAA stipulates that building access in non-public spaces could also be the subject of complaints if their inaccessibility results in discrimination against an employee. In general, though, possible areas of discrimination that could result in a complaint include:

- failure to provide equitable physical access to a building or the different levels of a building
- failure to ensure facilities such as vending machines or counters within buildings are accessible or usable by disabled people
- failure to provide suitable parking facilities for vehicles used by disabled people requiring a disabled person to gain access through a distant side entrance

(HREOC, March 1998).

Nevertheless, the DDAA still contains a disclaimer covering access if the provision of access proves to be too difficult. The DDAA recognises that, in certain circumstances, providing equitable access for disabled people could cause major difficulties or excessive costs to a person or organisation. Consequently, the DDAA does not require access to be provided to the premises if it would impose what is termed an 'unjustifiable hardship' on the person who would have normally been required to provide that access (Small, Autumn 2003; 2005). In this instance, circumstances relevant to unjustifiable hardship may incorporate technical limits; topographical restrictions; safety design; cost; construction issues or even delivery access (HREOC, March 1998).

In order to arrive at a satisfactory agreement to disputed claims over 'unjustifiable hardship', HREOC considers all the circumstances of each claim, on a case by case basis. Integral to this process is the Commission's investigation into the benefits and detriments adjustment or non-adjustment would have on all the parties concerned. Not only do the effects of the relevant impairment have to be taken into account, but so too do the financial circumstances and any Action Plan given to HREOC by the organisation or individual affected by the demands for adjustment (Women With Disabilities Australia, 2005). Crucially, if adjustments do cause hardship it is up to the organisation or person affected to demonstrate that they are unjustified (HREOC, 2005). Yet because each scenario is different there are no hard and fast criteria to determining unjustifiable hardship. It is a case of having to evaluate each instance in its entirety (Women With Disabilities Australia, 2005).

Set against this backdrop, no-one can really say with any degree of surety what a developer must do technically in order to comply with anti-discrimination law. Certainly since the DDAA came into force, complaints to HREOC "have shown significant inconsistencies between anti-discrimination law and current building law in Australia" (Small, Autumn 2003:25). Specific to this report, these inconsistencies have inevitably related to both the quality of access provided (in terms of the location of accessible doorways) and the quality of facilities provided such as the site and situation of accessible toilets for both sexes (Small, Autumn 2003; 2005).

To address these inconsistencies, and to minimise duplication of regulation, progressive changes since 1995 allowed for the development of 'Disability Standards for Access to Premises' (Premises Standard). So much so, that by the end of the year 2000, the Australian Government had effectively amended the DDAA to allow for the development of prescribed national minimum standards (ABCB, February 2004) contained within the Premises Standard itself. In so doing, the amendment provided a basis from which, on the one hand, clarification could be given to accessibility requirements under the DDAA while on the other, the amendment also helped to facilitate a degree of consistency between building laws and the DDAA (Small, Autumn 2003; 2005). Furthermore, it is hoped that the Premises Standard will, in the long term at least, construct the access provisions contained within a revised Building Code of Australia (BCA) (Ozdowski, July 2003). Simultaneously, this would, in theory, close any potential 'loopholes' and thus ensure compliance with the DDAA yet again.

In this respect, it is significant that the BCA is produced and maintained by the Australian Building Codes Board (ABCB) on behalf of the Australian Government and the various State and Territory Governments within the country as a whole (ABCB, February 2004). Each has a statutory responsibility for building control and regulation within their jurisdiction (Small, Autumn 2003; 2005). In sum, the BCA is a uniform set of performance and technical requirements for the design and construction of buildings and other related structures throughout Australia (ABCB, February 2004; Small, Autumn 2003; 2005). For all intent and purpose, the aim of the BCA is to provide a national code of practice which can be adopted into regional building regulations and subsequently

"administered at a State and Territory level" (Small, Autumn 2003:26).

For the most part, the objective of the BCA is to maintain acceptable standards of building construction by promoting a performance-based code that details mandatory 'Performance Requirements' and technical specifications ('Deemed-to-Satisfy Provisions') to which buildings and other structures within Australia must meet (ABCB, February 2004; Small, Autumn 2003; 2005). Indeed, Performance Requirements must be satisfied by the design and construction of the building and this could vary depending on the building classification. There may, for instance, be different requirements depending on whether the building is a theatre, an office building or a hospital (Small, 2005).

Intrinsically, the aforementioned 'Deemed-to-Satisfy Provisions' are but one of two ways in which 'building solutions' can meet Performance Requirements. In their simplest form, 'Deemed-to-Satisfy Provisions' are detailed prescriptive technical requirements of how a building is to be constructed and equipped within the terms of the BCA. They include reference to technical details found in Australian Standards such as AS 1428.1, which is currently the main Australian Standard covering access related issues for disabled people (Small, Autumn 2003; 2005). The second way of meeting Performance Requirements is through the imaginatively termed 'Alternative Solution'. Although self-explanatory, the purpose of an Alternative Solution is to allow for the introduction of new ways of achieving the required levels of performance. Even so, the onus still rests firmly "on the building applicant to show that the Alternative Solution complies with the Performance Requirements" (Small, Autumn 2003:26).

In an attempt to provide another avenue of flexibility (in terms of reacting to hitherto unrecognised areas of discrimination being experienced and in terms of discovering 'justifiable' means of achieving a solution), the BCA itself is amended each May to reflect changes in building practices, usage and technology. Through its Building Codes Committee, the ABCB drafts a Regulation Document and a Regulatory Impact Statement (RIS) to look at "the benefits and costs associated with the proposed changes and, like the proposals themselves, will be available for a period of public comment before finalisation" (Ozdowski, July 2003:2). Taken in this context, a RIS is an obligatory requirement

for any new regulation or when change to an existing regulation occurs (Small, Autumn 2003; 2005). First and foremost, however, the main purpose of a RIS is to assess a proposed regulation in an attempt to ensure it is the best way of achieving the desired goal of equal access.

Taken as a whole, this embryonic development of disability standards for access in Australia is intended, in the long term, to leave owners and developers of buildings used by the public with no alternative but to meet the objectives of the DDAA as they apply to buildings. In attempting to fulfil the requirements set out in the Premises Standard, it is believed that owners and developers will be compelled to achieve the standards and goals laid down in the BCA and the DDAA. By virtue of the fact the Premises Standard, the BCA and the DDAA are all calling for identical action and adjustment, consistency is—in effect—secured across the board. Conversely, had the Premises Standard not been developed—nor subsequently aligned to a BCA subject to review every May—the continued absence of uniform regulations would, inevitably, have left disabled people, owners and developers entirely reliant on the individual complaints mechanism of the DDAA to define compliance (Small, 2005).

In the final analysis, there are pertinent courses of action that can be taken from the Australian approach. Compliance can be achieved through conformity between building standards and anti-discrimination legislation. At least in this way anti-discrimination legislation relating to access can be enforced through the daily activities of building surveyors (whether they are employed by local government or operate as a private concern) who are initially responsible for the issue of 'Building Approval' to allow building to commence and, on completion of a building, to issue 'Occupation Certificates' as an endorsement of quality. In each case, adherence to the BCA is a prerequisite for approval.

Correspondingly, there are the added facilities of individual action through the law courts or appeal to HREOC should discrimination still be found to exist. With regard to HREOC, every single complaint initiates a standard process. On receipt of a complaint, HREOC assesses the validity of the objection on the basis of:

1) whether there is evidence of the complainant themselves being covered by the relevant legislation on offer

2) whether the issue of alleged discrimination is in itself covered by legislation
3) whether there is real evidence of detriment to the complainant (or to the client an advocacy group is acting on behalf of)

Once these three criteria have been satisfied, HREOC will proceed to write to the body or bodies complained against and seek a response to clarify the situation. If a complaint is still seen to be legitimate once a response has been received and evaluated, HREOC will proceed to seek conciliation in an attempt to rectify the area of concern. In the event of satisfactory conciliation, confidentiality will be kept on all sides. Conversely, if the complaint is found to have no substance at all, the president of HREOC will terminate the complaints procedure. Should, however, no conciliation be achieved then the president will not only terminate the procedure but also advise the complainant of their right to level a complaint in the Federal Court.

The Federal Court of Australia is a 'cost jurisdiction'. In other words, if a complainant loses, they could have legal costs awarded against them. Nevertheless, it is usual for the complainant to either represent themselves or, alternatively, recruit the services of a '*pro bono*' lawyer or barrister acting on behalf of a specialist network on discrimination or through lawyers donating their time to legal 'pools' operating along the lines of the 'Public Clearing House' in New South Wales. Whichever way, no legal costs are involved in the complainants representation. Because of this, the possibility of costs being awarded against a complainant are minimal and, in practice, rarely imposed. As a direct and intended consequence, legal actions in such instances are encouraged by the removal of a financial penalty on the complainant should they happen lose the legal argument.

Clearly, Australia is making a concerted and on-going effort (through conformity between the DDAA and BCA, complaint action to HREOC and, as a last resort, legal redress) to prevent discrimination arising out of a lack of access to the built environment. Yet having said this, the problem of what is or is not 'reasonable' still persists: albeit under the new title of 'unjustifiable hardship'. Moreover, the situation is made worse by the lack of any real financial support for owners and business to make adjustments to improve access to existing buildings. At best,

employers (and only employers) could merely hope to obtain a maximum of $5000 (Australian) from regional funds for adaptation. Being realistic, this is barely adequate to alter a new building let alone older buildings. To compound issues, Australia—as in any other country—is confronted with the inescapable fact that there are good, efficient surveyors and surveyors that are a little less diligent in their application. Consistency of application is not, therefore, always guaranteed.

9:2. *United States of America*

The final example given in this report is that of the United States of America (USA). In spite of the differing State legislatures, it is apparent that a plethora of policies attempting to overcome discrimination against disabled people are emerging throughout the USA. In the eyes of many, the policies of the USA represent a vanguard of reform that other countries need to follow. Of pivotal importance to such policies, is the Americans with Disabilities Act (ADA) which was signed into law by President George Bush on the 26th July 1990 (Consumer Law Page, 2005a). Significantly, the ADA is a Federal Act and, as a direct consequence, should apply equally to all of the States within the USA. Primarily, the ADA accords civil rights protections to disabled people similar to those accorded to Americans on the basis of race, colour, sex, national origin, age, and religion. In short, the ADA guarantees equal opportunity for disabled people in public accommodations, employment, transportation, State or Local Government services, and telecommunications (Consumer Law Page, 2005b).

With respect to the term ‘public accommodation’, Title III of the Act lays down specific objectives and technical details on how equality of access to the built environment can be achieved. Essentially, the objective of Title III is to prohibit discrimination by private entities and not-for-profit service providers operating public accommodations. This includes private entities that offer licences and exams; private schools or colleges; banks; restaurants; theatres; hotels; private transportation; supermarkets and shopping malls; museums; health clubs, recreational facilities and sports arenas; doctor, lawyer and insurance offices and other commercial facilities. Only private clubs and religious organisations are exempt (Reasonable Accommodations, 2005).

In its purest form, Title III stipulates that public accommodations must not exclude, segregate or treat disabled people unequally. All new construction and modifications must be accessible to disabled people. For existing facilities, barriers to services have to be removed if this is readily achievable (Job Accommodation Network, 2005). To realise this commendable objective, the ADA purports a whole raft of detailed specifications similar to those discussed in France and, less bindingly, to those discussed in Malta. In Appendix A of Title III (entitled the ADA Accessibility Guidelines for Buildings and Facilities), it specifies that ramps, for instance, should have a maximum slope of 1:12 while the maximum rise for any run shall be 30 inches (760mm). Correspondingly, the minimum clear width of a ramp should be 36 inches (915mm), whereas landings (which must be placed at the bottom and top of every ramp) must:

- be at least as wide as the ramp run leading to it
- have a minimum length of 60 inches (1525 mm) clear
- have a minimum size of 60 inches by 60 inches (1525 mm X 1525 mm) where a ramp changes direction
- have a minimum manoeuvring space of at least 60 inches (1525 mm) to the front of the door and a minimum of 18 inches (455 mm) to the opposite side of the door should the landing be located at a doorway and the door opens onto the landing

(US Department of Justice, 2005)

Where, of course, the door opens inside and not onto the landing the approach has to have minimum clearance of 48 inches (1220 mm) to the front door (US Department of Justice, 2005). Similar specifications are also laid down for side approaches to the door and for approaches to sliding doors and so forth.

Without doubt the ADA—in conjunction with its legally binding Accessibility Guidelines for Buildings—provides a whole gamut of technical details for new buildings, extensions or alterations to existing buildings that are designed to improve access for disabled people. The scope of such legislative detail is so broad and extensive that the legislation even extends to the position of mirrors in lavatories which should be mounted with the bottom edge of the reflecting surface no higher than 40 inches (1015 mm) above the floor (US Department of Justice, 2005). Nonetheless, there are exceptions built into the US legislation. One such

exception relates to historical buildings. Under part 4.1.7 of Title III, exemption is given to buildings and facilities listed or eligible for listing in the National Register for Historic Places if the required alterations would threaten or destroy the historic significance of the building or facility (US Department of Justice, 2005). Clearly such an exemption is open to interpretation as to what this historical significance actually constitutes.

Other exemptions also contain similarly subjective elements. For example, Title III states that:

> An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by …[disabled people], including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration (US Department of Justice, 2005: Section 36.403).

As with the earlier discussions in this report, the language of these proclamations leaves the ADA open to controversy and debate. The use of the phrases 'maximum extent feasible' and unless the 'cost and scope …is disproportionate' does not exclude the US model from a similar loss of focus experienced by other countries who utter comparable phrases such as 'unjustifiable hardship' (Australia, Ireland and Malta), 'material difficulty' (France), 'reasonable' or 'reasonableness' (Malta and the UK) and 'practical/impractical' (UK). As with the other countries mentioned, this inevitably leads to problems of enforcement.

On this score, the Civil Rights Division of the US Department of Justice is the main body responsible for the enforcement of public accommodations covered by Title III of the ADA. Any individual who believes that he or she has been subjected to discrimination prohibited by the Act may request the Department of Justice to institute an investigation (US Department of Justice, 2005). Complaints must be filed within 180 days of the date of the discrimination (Reasonable Accommodations, 2005). Where the Attorney General has reason to believe that there may be a violation, he or she may initiate a compliance review. Following a

compliance review, the Attorney General may commence a civil action in any appropriate US district court should the Attorney General believe that:

a) any person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act; or
b) any person or group of persons has been discriminated against in violation of the Act and the discrimination raises an issue of general public importance

(US Department of Justice, 2005)

In a civil action, the court may grant any equitable relief that the court considers to be appropriate. Accordingly, the court may:

- grant temporary, preliminary or permanent relief
- provide auxiliary aid of service, modification of policy, practice or procedure or method
- make facilities readily accessible to and usable by disabled people
- award other relief as the court considers to be appropriate, including monetary damages to persons aggrieved
- vindicate public interest and assess a civil penalty in an amount not exceeding $50,000 for a first violation and not exceeding $100,000 for any subsequent violation

(US Department of Justice, 2005)

Finally as an alternative, private lawsuits may also be brought to Federal court without a 'right to sue' letter (Reasonable Accommodations, 2005). Upon timely application, the court may, in its discretion, permit the Attorney General to intervene if the Attorney General certifies that the case is of public importance. In so doing, the aggrieved party is thus relieved of the burden of court costs should the case be lost.

When considered as a whole, these measures set out in the ADA have led the Center for an Accessible Society to declare that after 10 years progress:

> The ADA has profoundly changed how [US] society views and accommodates …[disabled people]. Universal design—the practice of designing products, buildings and public spaces and programs to be usable by the greatest number of people—has helped create a society where curb cuts, ramps,

> lifts on busses, and other access designs are increasingly common (Center for an Accessible Society, 2005:1-2).

This is not to suggest, however, that the US model is without its problems. Far from it, if the National Council on Disability (NCD) is to be believed. In contrast to the Center for an Accessible Society, the NCD argues that:

> Enforcement efforts are largely shaped by a case-by-case approach based on individual complaints rather than an approach based on compliance monitoring and a cohesive, proactive enforcement …Critically, many of the shortcomings of federal enforcement of the ADA …are inexorably tied to chronic underfunding and understaffing of the responsible agencies. These factors, combined with undue caution and a lack of coherent strategy, have undermined the federal enforcement of ADA in its first decade (National Council on Disability, 2005:6).

From this perspective, it is obvious that improvements can still be made to the American model yet, as with many of the other countries examined, there are pertinent lessons that can be taken on board in the final sections of this report.

10. Lessons to be Learnt: Examples of Good Practice

The purpose of this report has been to help inform and implement a pan-European strategy intended to provide equal access for disabled people to the built environment. Even with this concise examination of the selected countries, several important lessons have come to the fore. From the previously described reasons of 'subsidiarity', the cumbersome EU legislative process and the incompatible legal systems of the Member States, it is clear that the EU will not contemplate or attempt to enforce binding and intractable legislation on all its Members. Accordingly, a minimum requirement for individual Members to implement a disability discrimination act along the lines of the DDA (UK), EOA (Malta), DDAA (Australia) and the ADA (US) seems to be an imperative. At least this would give direction and clarity to rules, enterprises and agencies subject or dedicated to the implementation or enforcement of anti-discriminatory practices and obstacles.

On its own, however, an Act of this kind would not be enough without specific technical detail being written into the law. Ireland and the UK, for example, have tended to loosely associate legislation with the Part M of the Building Regulations applicable to each country. Enforcement and compliance is, therefore, left to building inspectors and consultants which, in turn, leaves questions of rigour and consistency open to debate. On the plus side, the UK Government and the DRC do—in all sincerity—believe that these arrangements allow for flexibility and give organisations or businesses the room to anticipate for adjustments according to individual need. Nevertheless, this is left to subjectivity and, like the Swedish model which has no anti-discrimination legislation relating to the built environment, relies heavily on trust and benignly assumes that employers, businesses and builders will (and are able to) comply with exactly what is required of them.

More progressively, Malta has taken significant steps by officially empowering the KNPD to proactively identify, establish and update all national policies that directly or indirectly relate to disability issues. In terms of access to the built environment, this has meant that the KNPD have promoted an abundance of technical and detailed—but not legally binding—guidelines to inform businesses and employers of the necessary changes and adjustments required. In addition, the KNPD have managed to reach an agreement with the Development Corporation of Malta where all new industrial developments shall conform to KNPD's own 'Access for All' recommendations.

Although conciliation and guidance is a major task, it is still vital to note that the KNPD also has the power to enforce. Indeed, their guidelines are reinforced by their other remit to provide legal and financial assistance to disabled people so that their rights under the EOA are respected to the fullest extent. In a similar vein, Australia has empowered HREOC to safeguard the rights and opportunities of disabled people. Moreover, Australia appears to have taken a step further forward than Malta in that HREOC are beginning to achieve consistency and legal status between the DDAA and the Building Code of Australia which is applicable throughout the Australian Commonwealth. Crucially, the introduction of a Premises Standard has introduced mandatory Performance Requirements. As a consequence, Australia is now

on the verge of creating a national code of practice that can be adopted and enforced by regional policies, practices and agencies.

Nonetheless, Australia's '*pro bono*' system of legal support seems a little inadequate despite HREOC's commendable willingness to initiate a review process for every single complaint received. An introduction of the Swedish sense of responsibility to redistribute resources toward its citizens could represent a solution to the problem in that this would require the Commonwealth of Australia or the Nation State (if adopted elsewhere) to step in and represent its citizens. Even so, the use of ambiguous language does not help enforcement. Typically, phrases such as 'reasonable adjustment', 'practical' and an emphasis on 'reasonableness' are bandied about in the UK. In Malta, we get 'unjustifiable hardship' and 'reasonable provision'. The terms 'obviously unreasonable' and 'easily amended obstacles' are common to Sweden, whereas in Italy and Australia the onus centres on what is 'functional' and 'justifiable' or 'unjustifiable' respectively. All help to confuse and conceal the true meaning and direction of disability legislation.

With regard to France and the USA we also encounter vague, indefinite terminology. In France, talk is of what is 'negotiable' and 'material difficulty' in relation to the costs of alterations. USA follows a familiar path with the introduction of the caveats pertaining to 'cost and scope'. To a larger degree than in the other countries studied, however, France and the USA have tried to minimise such confusion. They have done so by giving clear and explicit technical detail as to what has to be done to comply with their anti-discriminatory legislation. Both the ADA and the legal constitution of France include detailed diagrammatic examples of what is acceptable and, especially in the ADA, what is not acceptable. In so doing, requirements on employers, businesses and organisations are plainly evident. Avenues for non-compliance are severely restricted as a result.

Naturally, financial costs on employers, businesses and organisations have to be considered. And here we can learn from the negative practices of our sample countries. The UK's limited use of tax relief is simply inadequate. So too is France's funding envelope of FISAC and Italy's fund distributed by the Ministero dei Lavori Pubblici. More money has to be readily made available to enable responsible employers and so forth to achieve the required objectives. Arguably, it is in this area that the EU can take the lead

without directly infringing upon the national sovereignty of Member States. By providing a centrally administered and readily available fund for improvement/adjustment, the EU would be making a concerted declaration of intent even though there may be some indirect consequences attached to the problem of raising funds from the individual Members. Ultimately, a direct consequence of this availability of funding would be to make enforcement of regulations and requirements much easier as it would only be the irresponsible who would avoid making the necessary alterations. The excuse of 'affordability' would have been removed altogether.

Finally, one more lesson can be learnt from a negative example. The withdrawal of the Irish Disability Bill of 2001 has important ramifications for future legislation introduced by the EU or by Member States. The Irish Disability Bill only dealt with eliminating discriminatory decision-making from above. Regrettably, a rights-based approach to disability (Barnes & Oliver, 1995) had been ruthlessly discarded. To avoid this happening again, it is important that the claims of disabled people become enshrined in the legal system so disabled service-users can seek legal redress. This is the only way in which it is possible for disabled people to be guaranteed that they will receive the services or regulatory provision they are entitled to (De Wispelaere & Walsh, 2005:5). Likewise, this is the only way that the earlier recited EU objective of ensuring "disabled people, and their diverse needs and experiences, are at the heart of policy making" (COM (2003) 650 final).

Recommendations

- Access should be formally established as a right and not a benevolent demonstration of being reasonable
- Detailed technical requirements for new buildings, extensions and adjustments to old should be published, legislated for and made readily available
- Full financial support should be made readily available to make adjustment
- Legally empowered enforcement agencies should be financed and actively encouraged to immediately investigate and, if necessary, prosecute reported contraventions of the above technical requirements
- If enforcement agencies are seen or deemed to fail the plaintiff, organised legal challenges to both national courts and the ECJ should be encouraged and fully funded win or lose

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