

RESEARCH ARTICLE

Reasonable accommodation in Irish equality law: an incomplete transformation

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Abstract

The UN Convention on the Rights of Persons with Disabilities is the first international human rights convention to state expressly that discrimination includes the failure to provide reasonable accommodation. The duty has been described as transformative but has also been critiqued for its lack of structural impact. This paper evaluates the transformative potential of the reasonable accommodation duty encompassed by the Convention, and considers how its potential can be realised. It argues that the duty is transformative because of the substantive equality it provides for individuals, and because it requires both active engagement with persons with disabilities and proactive consideration of barriers to inclusion, in multiple contexts. However, it contends that full realisation of the duty's transformative potential depends on appropriate legislative formulation. This may be a problem in dualist states where application of the Convention is not automatic and pre-existing legislation may be perceived as satisfying the obligation. The paper supports this contention with an analysis of Irish law, arguing that the full transformative potential of the reasonable accommodation duty has not yet been achieved in Ireland, and identifying the reasons for this. The paper examines the practical consequences of inadequate implementation and highlights pitfalls and best practice.

Keywords: human rights; disability; equality; reasonable accommodation; CRPD; Ireland

Introduction

The UN Convention on the Rights of Persons with Disabilities (CRPD)¹ is the first international human rights convention to state expressly that discrimination includes the failure to provide reasonable accommodation. Reasonable accommodation – in the sense of individualised adjustments to systems or processes to enhance equality and fairness – has previously been recognised by other Treaty bodies in the interpretation of their respective treaties.² It has also been recognised in the jurisprudence of the European Court of Human Rights³ and the Committee on the Revised European Social Charter,⁴ though not explicit in either Convention. The express inclusion of the duty to accommodate in the CRPD is central to ensuring that the principle of equality is dynamic and effective in both the public and private spheres. The duty has accordingly been described as ‘transformative’,⁵

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¹United Nations General Assembly *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008) A/RES/61/06.

²Eg UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 5: Persons with Disabilities*, 9 December 1994, E/1995/22.

³*Glor v Switzerland* Application No 13444/04 (ECtHR, 30 April 2009).

⁴*Mental Disability Advocacy Centre v Bulgaria* (2008) Complaint No 41/2007.

⁵KA Loper ‘Equality law and inclusion in education: recommendations for legal reform’ (SSRN Scholarly Paper 2010) [2] ssrn.com/abstract=1712710, accessed 14 May 2020.

and ‘the most fundamental instrumental element of the Convention’.⁶ However, it has also been critiqued as assimilationist, requiring only minimal adaptations rather than structural transformation.⁷

To what extent does the reasonable accommodation duty encompassed by the CRPD truly have transformative potential, and how can this potential be realised? This paper argues that the duty of reasonable accommodation in the CRPD is indeed transformative, not only because of the substantive equality it provides for individuals, but because it requires both active engagement with persons with disabilities and proactive consideration of potential barriers to inclusion, in multiple contexts. These aspects of the duty are often overlooked but have been highlighted by the CRPD Committee in General Comment No 6 on Equality and Non-discrimination (General Comment No 6).⁸ However, the paper argues that realisation of the duty’s transformative potential depends on a proper legislative formulation that appropriately structures the duty and encompasses its essential elements. Without this, the transformative power of the duty is greatly diminished. The risk of non-compliance is particularly acute in dualist states where application of the CRPD is not automatic and pre-existing legislation may already be in place and perceived as satisfying the obligation. The paper supports these contentions by an examination of the Irish law on reasonable accommodation, which pre-dates ratification of the CRPD. It argues that the full transformative potential of reasonable accommodation has not yet been achieved in Ireland, for two main reasons. First, Irish constitutional law has been interpreted as significantly limiting what can be required from duty-bearers. This problem has been ameliorated in the employment context due to EU law but remains a serious issue in relation to goods and services. Secondly, even allowing for constitutional limitations, the Irish statutory provisions on reasonable accommodation fall short of CRPD requirements. Many of the gaps could easily be addressed, but legislative amendments proposed to date have been inadequate for this purpose, perhaps in part due to a mistaken perception of compliance.

The paper is divided into two parts. Part 1 outlines the scope of the duty of reasonable accommodation under the CRPD, identifies its essential components, and assesses its transformative potential. Part 2 examines the implementation of the duty in Irish law, evaluating compliance with the CRPD and making suggestions for realising more of the duty’s transformative potential. Throughout, the paper highlights the practical implications of inadequate implementation, and, through the Irish example, emphasises the importance of reviewing pre-existing legislation to ensure appropriate construction. Although the examples are drawn from Irish law, the paper speaks to broader debates about the nature and implementation of the reasonable accommodation duty, highlighting pitfalls and best practice, which may be of interest to other jurisdictions, particularly dualist states with pre-existing legislation.

1. Reasonable accommodation in the CRPD

(a) *Equality and non-discrimination in the CRPD*

The CRPD is imbued with the concept of substantive rather than formal equality. The CRPD Committee states:

Equality and non-discrimination are at the heart of the Convention and evoked consistently throughout its substantive articles with the repeated use of the wording ‘on an equal basis with others’, which links all substantive rights of the Convention to the non-discrimination principle.⁹

⁶R Kayess and P French ‘Out of the darkness into light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 HRLR 1 at 27.

⁷S Day and G Brodsky ‘The duty to accommodate: who will benefit?’ (1996) 75 Canadian Bar Review 433.

⁸Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018), Article 5: Equality and Non-discrimination, Women and Girls with Disabilities*, 9 March 2018, CRPD/C/GC/6.

⁹*Ibid*, at [7].

The centrality of equality is complemented in the Convention by the strong incorporation of the principle of non-discrimination throughout. Indeed, the CRPD states that its purpose is ‘to promote, protect and ensure the full and equal enjoyment of all human rights... by all persons with disabilities’.¹⁰ It is therefore insufficient to treat persons with disabilities ‘the same’ as persons without disabilities, as more proactive steps may be required to ensure full equality in practice. Effectively, this is an equality convention focusing on disability-specific issues.

The CRPD sets equality at its heart, with non-discrimination as a means to achieve this goal. However, equality in the context of disability may require more than simply neutral treatment. Historically, persons with disabilities have been segregated, institutionalised and marginalised, with continuing exclusionary effects. The equality model adopted therefore needs to incorporate a ‘strengthened vision of substantive equality’,¹¹ one that is transformative ‘by including denial of reasonable accommodation as a form of discrimination’.¹² The CRPD Committee goes further and states that the Convention is based on a new equality model, inclusive equality.¹³ Drawing on the work of Fredman,¹⁴ the CRPD Committee sees inclusive equality as entailing:

(a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.¹⁵

The provision of reasonable accommodation is most obviously encompassed by point (d) of this model but arguably also incorporates elements of the other three aspects. It is therefore considered one of the more important inclusions within the CRPD and, indeed, human rights law more generally.

As well as introducing an innovative and robust model of equality, the CRPD is innovative in its structure, with the inclusion of cross-cutting articles,¹⁶ or articles of general application. These underpin the entire Convention, as they apply to all other articles.¹⁷ Article 5 on equality and non-discrimination is a cross-cutting article,¹⁸ and applies to the realisation of all Convention rights: civil, political, cultural and socio-economic. This is particularly significant given the traditional distinction between civil and political rights, which are considered immediate in nature, and socio-economic rights, which are viewed as programmatic, and can be progressively realised over time. Equality and non-discrimination are civil and political rights, and therefore of immediate applicability. The immediacy of this duty has been applied unconditionally in other denominated human rights treaties,¹⁹ such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). It follows that the non-discrimination duty, including the duty to provide reasonable accommodation, should be unconditional in the CRPD. In this way, even though socio-economic rights are generally considered programmatic, the duty to accommodate acts as a ‘Trojan horse’ to

¹⁰CRPD, Art 1.

¹¹Office of the High Commissioner for Human Rights ‘Equality and Non-Discrimination under Article 5 of the Convention on the Rights of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights’ (A/HRC/34/26, 9 December 2016) [76] (OHCHR Report).

¹²*Ibid.*, at [23].

¹³*General Comment No 6*, above n 8, at [11]; T Degener ‘A human rights model of disability’ in P Blanck and E Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (Oxford: Routledge, 2017).

¹⁴S Fredman *Discrimination Law* (Oxford: Oxford University Press, 2nd edn, 2011) p 25.

¹⁵*General Comment No 6*, above n 8, at [11].

¹⁶CRPD, Arts 3–9.

¹⁷S Quinlivan ‘The United Nations Convention on the Rights of Persons with Disabilities: an introduction’ (2012) 13 ERA Forum 71.

¹⁸References to the principle of equality and/or non discrimination are also made in CRPD, Arts 3, 4, 6, 7, 8 and 9.

¹⁹OHCHR Report, above n 11, at [5].

make elements of socio-economic rights enforceable.²⁰ This highlights both the potentially transformative nature of the duty and the importance of defining the duty as a form of discrimination. The effect is to ensure that the immediacy and justiciability of civil and political rights is now linked to the traditionally programmatic and non-justiciable socio economic rights, making elements of these rights both justiciable and immediate.

(b) Reasonable accommodation and state obligations

Based on the foregoing, the inclusion of the duty to provide reasonable accommodation is undoubtedly critically important, but its application in practice is often ‘imperfect and incomplete or ineffective’.²¹ The CRPD committee highlights that states parties fail to define the duty as a form of discrimination, confuse it with other concepts such as accessibility, or fail to have effective mechanisms of legal redress. This undermines the duty’s transformative potential. It is therefore important to set out the parameters or contours of the duty to accommodate, as enshrined within the CRPD, to ensure correct implementation.

First, states parties have a duty to legislate. Article 5 of the CRPD provides that states parties must ensure that there is ‘effective legal protection against discrimination’,²² while Article 5(3) requires states to ‘take all appropriate steps to ensure that reasonable accommodation is provided’. The CRPD Committee has repeatedly reaffirmed this position: for example, in its concluding observations to Morocco it expressed concern about the ‘absence of recognition in the national legislation of denial of reasonable accommodation as a form of disability-based discrimination’.²³ To Germany, it noted that the CRPD imposes extensive obligations on states parties, including a duty to legislate ‘to ensure that reasonable accommodation provisions are enshrined in law as an immediately enforceable right in all areas of law and policy’.²⁴ It has recently re-stated this requirement in General Comment No 6. This states that, in order to ensure the equal and effective legal protection for persons with disabilities, ‘States parties have positive obligations to protect persons with disabilities from discrimination, with an obligation to enact specific and comprehensive anti-discrimination legislation’.²⁵ Legislation should also ensure that the denial of reasonable accommodation is ‘punishable as a form of discrimination’.²⁶

It must also be emphasised that the CRPD imposes a legal ‘obligation to provide reasonable accommodation in all sectors, at every level of government’.²⁷ The application of the duty in multiple contexts, including healthcare, education, access to justice, the deprivation of liberty, employment, access to goods and services, and respect for privacy and family life, clearly illustrates the duty’s transformative potential, but also the breadth of the legislative obligations. Further, while the state is the primary duty-bearer, its obligations extend beyond its own actions and agents and include an obligation to protect persons with disabilities from the violation of their rights by other actors, including employers, service providers and family members. As Mégret and Msipa note,

In practice, the process of effecting reasonable accommodation potentially reflects a very decentralised, almost localised, even intimate vision of human rights implementation that is a far cry from exclusively state-focused, top down models. It is almost as if the CRPD, through state’s

²⁰G Quinn ‘A short guide to the United Nations Convention on the Rights of Persons with Disabilities’ (2009) 1 EYDL 89 at 100.

²¹General Comment No 6, above n 8, at [3].

²²CRPD, Art 5(2).

²³Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Morocco* (27 Sept 2017) CRPD/C/MAR/CO1 [12(a)].

²⁴Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Germany* (13 May 2015) CRPD/C/DEU/CO/1 [14(b)]. Similar recommendations have been consistently repeated in other concluding observations, eg *Concluding Observations on the Initial Report of Greece* (24 Sept 2019) CRPD/C/GRC/CO/1 and *Concluding Observations on the Initial Report of India* (24 Sept 2019) CRPD/C/IND/CO/1.

²⁵General Comment No 6, above n 8, at [22].

²⁶Ibid.

²⁷OHCHR Report, above n 11, at [64].

accession, spoke directly past the sovereign to the various non-state actors that in practice will have to do much of the work of reasonable accommodation.²⁸

Thus, reasonable accommodation cannot be understood only as a state obligation, as private actors are unavoidably engaged in the enforcement of the Convention. This greatly adds to the duty's transformative effect.

(c) *The scope of reasonable accommodation*

Reasonable accommodation is defined within the CRPD as

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms[.]²⁹

The duty to provide reasonable accommodation has two aspects. The first is a duty to provide a 'modification' or an 'adjustment' that is 'necessary and appropriate' where required 'in a particular case' to ensure that a person with a disability is able to enjoy or exercise her or his rights on an 'equal basis with others'. The second aspect of the duty is a limitation: reasonable accommodation should not impose a 'disproportionate or undue burden' on the duty-bearer. Evaluating this, factors such as cost, potential disruption, and the potential benefit of any proposed accommodation may be considered. If it is determined that providing an accommodation does, in fact, impose a disproportionate or undue burden on a duty-bearer, then they are no longer bound by that duty. Lawson notes that there is significant confusion around the specification and impact of the reasonable accommodation duty,³⁰ which is arguably evident in some decisions of the Irish Superior Courts.³¹ To avoid such confusion, the key aspects of the duty are outlined below. Pre-existing national legislation should be fully reviewed, following ratification of the CRPD, to ensure compliance with the criteria – an obligation emphasised in the Convention itself.³²

(i) *Individualised duty*

The duty to provide reasonable accommodation is 'an individualized, reactive duty',³³ which responds to the specific needs of both the person with a disability and the duty-bearer. The CRPD Committee has described reasonable accommodation as an *ex nunc* duty, that is, it must 'be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights'.³⁴ The duty is generally (though not invariably) triggered by a request for an accommodation.

Because the duty is individually responsive, '[t]here is no "one size fits all" formula to reasonable accommodation, and different individuals with the same impairment may require different accommodations'.³⁵ The accommodation or adjustment must be what is required for a given individual in a

²⁸F Mégret and D Msipa 'Global reasonable accommodation: how the Convention on the Rights of Persons with Disabilities changes the way we think about equality' (2014) 30 South African Journal on Human Rights 252 at 270.

²⁹CRPD, Art 2.

³⁰A Lawson 'Reasonable accommodation in the UN Convention on the Rights of Persons with Disabilities and non-discrimination in employment: rising to the challenges?' in C O'Mahony and G Quinn (eds) *Disability Law and Policy: An Analysis of the UN Convention* (Dublin: Clarus Press, 2017).

³¹Eg *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *Fleming v Ireland & Others* [2013] IESC 19.

³²CRPD, Art 4(1) includes the duty to take all appropriate legislative measures to implement the convention, including modifying existing laws.

³³S Quinlivan 'Reasonable accommodation: an integral part of the right to education for persons with disabilities' in G De Beco et al (eds) *The Right to Inclusive Education in International Human Rights Law* (Cambridge: Cambridge University Press, 2019) p 176.

³⁴*General Comment No 6*, above n 8, at [24(b)].

³⁵UN Committee on the Rights of Persons with Disabilities *General Comment No 4 (2016): Article 24: Right to inclusive Education* (2 September 2016) CRPD/C/GC/4.

‘particular case’ and will depend entirely on that individual’s needs. Impairments are as varied as people: they may be physical, mental, or sensory; they can be intermittent or permanent; they may vary in range or extent. People may also require different accommodations in different contexts. It is the responsive and specific nature of the duty that enables nuanced responses to individual situations.³⁶ The personalised nature of the duty is central to what makes it effective and transformative.

(ii) *Proactive nature*

The duty to accommodate is mostly reactive, as it is activated or enforceable on receipt of a request from a person with a disability. However, it also has a proactive aspect, and will apply:

In situations where a potential duty bearer should have realized that the person in question had a disability that might require accommodations to address barriers to exercising rights.³⁷

Because the proactive reasonable accommodation duty must still be tailored to individual needs, it differs from a general accessibility duty. An employer or business might satisfy general accessibility standards without meeting the duty owed to a particular employee, customer or service user. Nor is it always reasonable to wait for a specific request, as some persons with disabilities may be either unaware of their right to reasonable accommodation or reluctant to ask for it (eg due to a fear of victimisation). Accordingly, where a duty bearer is on notice of a disability, it is good practice to offer accommodations without waiting for a request.³⁸ A proactive reasonable accommodation duty may also require consideration of potential barriers that may affect an individual in future (eg in relation to career progression), where the duty-bearer is or should be aware of these. The proactive element adds to the transformative potential of the duty, as it requires duty-bearers to adjust their mind-sets and reflect actively on the implications of structures and processes for persons with disabilities.

(iii) *Process of dialogue*

As reasonable accommodation is responsive to individual needs, it seems obvious that ensuring an appropriate accommodation requires dialogue between the duty-bearer and the person with a disability.³⁹ This is supported by the Office of the High Commissioner for Human Rights (OHCHR), which notes that, once the duty has been triggered, ‘[b]oth the requesting and the obligated parties should then engage in a dialogue’.⁴⁰ The CRPD Committee suggests that dialogue with the person with a disability is a ‘key element’⁴¹ of the reasonable accommodation duty. Dialogue is central to the transformative potential of the duty in three ways. First, it puts persons with disabilities at the heart of the decision-making process that directly impacts on their participation. This centring of the voice of persons with disabilities helps to dispel views of persons with disabilities as mere quiescent recipients of charity. It also makes the accommodation much more likely to be effective, as persons with disabilities are best positioned to understand what will work for them. Secondly, the duty requires duty-bearers, particularly in the employment context, to consider what a person with a disability can do, with or without a reasonable accommodation. The employer must therefore focus on the individual’s abilities, not their perceived inabilities. Dialogue is essential to establish this information. Thirdly, the process of dialogue, which entails engagement and consultation with persons with disabilities, helps to dispel inaccurate perceptions and normalise discussions about modes of inclusion.

Accordingly, once an accommodation has been requested (and in some cases, even without a request), a duty-bearer should consult with the person with a disability to determine what accommodation is most suitable in the circumstances. The nature of any such consultation will largely depend on the relationship between the person with a disability and the duty-bearer. ‘[F]ormal and

³⁶Quinlivan, above n 33, p 176.

³⁷*General Comment No 6*, above n 8, at [24(b)].

³⁸OHCHR Report, above n 11, at [40].

³⁹Lawson, above n 30; Mégret and Msipa, above n 28.

⁴⁰OHCHR Report, above n 11, at [40].

⁴¹*General Comment No 6*, above n 8, at [26].

extensive⁴² discussions may be appropriate where a relationship is long-term and ongoing, such as in the context of employment or education, while short-term relationships would not require that level of dialogue.

(d) Limits to the duty of reasonable accommodation

The reasonable accommodation duty is not unbounded and is limited by the need to avoid imposing a ‘disproportionate and undue burden’ on the duty-bearer.⁴³ An assessment of the proposed ‘burden’ on a particular duty-bearer is therefore required. This limitation, like the duty itself, is reactive, as it responds to the needs and resources of the duty-bearer. However, some confusion again arises under this heading, as some jurisdictions have interpreted the word ‘reasonable’ (as used in the phrase ‘reasonable accommodation’) as an additional limitation of the duty. This is discussed in more detail below.⁴⁴

(i) ‘Disproportionate or undue burden’

It has been persuasively asserted that the phrase ‘disproportionate or undue burden’ should be considered a single concept, and that the words “[d]isproportionate” and “undue” should be considered synonyms,⁴⁵ and this approach is followed in this paper. As noted above, assessing whether an accommodation imposes a disproportionate or undue burden requires sensitivity to the particularities of the duty-bearer and must be done on a case-by-case basis. Accommodations may vary in terms of cost, duration, disruption and frequency, and the abilities of duty-bearers to provide accommodations are equally varied, depending on their size and resources. Effectively, determining whether an accommodation is ‘disproportionate or unduly burdensome requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned’.⁴⁶

The concept of disproportionate burden includes not merely financial but organisational or administrative aspects. Many accommodations entail little or no financial cost but require a change in practice, such as more flexible working hours or more time for a student to submit coursework. This may cause disruption, which may sometimes be disproportionate. Interestingly, the CRPD Committee argues that consideration should also be given to potential ‘third party benefits’ and other advantages in any assessment of disproportionate burden:⁴⁷ this is essential to avoid reducing the concept to a mere test of economic efficiency.⁴⁸ Direct benefits commonly relate to the individual for whom the accommodation is made, and should be evaluated in terms of their significance to the individual in question. Indirect benefits include potential benefits to third parties, eg providing a ramp may benefit an individual with a mobility impairment, but could also benefit parents with children in pushchairs, or the elderly. Thus, while installing a ramp could be both costly and disruptive, the benefit may be significantly broader than to the individual requesting the accommodation. Accordingly, any assessment of whether the accommodation gives rise to an undue or disproportionate burden should include any ‘reasonably predictable indirect benefits’.⁴⁹

The analysis of a burden would differ for a large publicly-funded organisation and a small private organisation. The same accommodation may thus constitute a disproportionate burden in one context

⁴²Ibid, at [45].

⁴³CRPD, Art 2.

⁴⁴For further discussion, see Mégret and Msipa, above n 28; L Waddington ‘When it is reasonable for Europeans to be confused: understanding when a disability accommodation is reasonable from a comparative perspective’ (2007–08) 29 *Comparative Labour Law & Policy Journal* 317.

⁴⁵OHCHR Report, above n 11, at [31]; and *General Comment No 6*, above n 8, at [25(b)].

⁴⁶*General Comment No 6*, above n 8, at [26(d)].

⁴⁷Ibid, at [26(e)].

⁴⁸Writing in the US context, Schwab and Willborn note that ‘Congress rejected efficiency as the guiding principle for the ADA and... the Act sometimes requires inefficient actions’: SJ Schwab and SL Willborn ‘Reasonable accommodation of workplace disabilities’ (2003) 44 *William & Mary Law Review* 1197 at 1202–1203.

⁴⁹OHCHR Report, above n 11, at [56], see also *General Comment No 6*, above n 8, at [26(e)].

but not another. Accordingly, the OHCHR contends that ‘stricter standards exist for States when justifying a denial of reasonable accommodation’.⁵⁰ This view gains some support from the CRPD Committee,⁵¹ which notes that one must review the impact of the accommodation on the ‘overall assets rather than just the resources of a unit or department within an organisational structure’.⁵²

(ii) ‘Reasonable’: a limitation of the duty?

As noted above, the impact of the word ‘reasonable’ in the phrase ‘reasonable accommodation’ has proved contentious. Does the word ‘reasonable’ modify or qualify the duty to accommodate, or is it a term of art that refers to the actual accommodation concerned? Much of the debate reflects the diversity of legal provisions enshrining the reasonable accommodation duty in national law, which often pre-date the CRPD: for instance, Waddington identifies three different approaches to the impact of the term in the European context.⁵³ This paper suggests that, in the context of the CRPD, the debate is now largely moot. In *HM v Sweden*,⁵⁴ the CRPD Committee suggested that the term ‘reasonable’ related to the nature of the accommodation provided, ie it would be unreasonable if the accommodation provided did not address the barrier to participation. This position has been reinforced in General Comment No 6, which states:

‘Reasonable accommodation’ is a single term, and ‘reasonable’ should not be misunderstood as an exception clause; the concept of ‘reasonableness’ should not act as a distinct qualifier or modifier to the duty. ... — this occurs at a later stage, when the ‘disproportionate or undue burden’ assessment is undertaken. Rather, the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability.⁵⁵

(e) Reasonable accommodation: a transformative duty?

Despite the importance of reasonable accommodation in ensuring that many persons with disabilities can access (among other things) employment, education, goods and services, it has been critiqued as ultimately assimilationist rather than transformative. Long before the CRPD, Brodsky and Day argued, in the Canadian context, that the concept of reasonable accommodation is flawed as it tacitly accepts the dominant social norms, with modifications permitted for those who are ‘different’.⁵⁶ It therefore lacks the capacity to address equality effectively.⁵⁷ Likewise, Waddington and Hendriks contend that, because reasonable accommodation focuses on individual needs, it fails to address the policy that gave rise to the exclusion in the first instance.⁵⁸ Rioux also highlights the failure to achieve systemic change, arguing that there is an assumption that barriers can be addressed without a corresponding change to work or other normative structures.⁵⁹

There is undoubtedly much substance to the assimilationist critique. Reasonable accommodation is aimed at helping individuals with disabilities to comply with existing standards and processes, rather than calling those standards and processes into question. In this sense, it is a less powerful tool than indirect discrimination, where a provision or practice that disadvantages a particular group must be

⁵⁰OHCHR Report, above n 11, at [61].

⁵¹General Comment No 6, above n 8, at [26(e)].

⁵²Ibid, at [26(e)].

⁵³Waddington, above n 44.

⁵⁴UN Committee on the Rights of Persons with Disabilities, ‘Communication No 3/2011’ CRPD/C/7/D/3/2011.

⁵⁵General Comment No 6, above n 8, at [25(a)].

⁵⁶Day and Brodsky, above n 7, at 435.

⁵⁷Ibid.

⁵⁸L Waddington and A Hendriks ‘The expanding concept of employment discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination’ (2002) 18 International Journal of Comparative Labour Law and Industrial Relations 403 at 414–415.

⁵⁹MH Rioux ‘Towards a concept of equality of well-being: overcoming the social and legal construction of inequality’ (1994) 7 Canadian Journal of Law & Jurisprudence 127 at 140.

objectively justified. This enables a degree of structural reconfiguration. However, it must also be noted that, because persons with disabilities do not form a homogenous group, the barriers they face are extremely varied (arguably more so than for other groups). It follows that there will always be cases in the disability context requiring individualised adjustments. Thus, as Fredman argues, systemic change is not always necessary or appropriate, and there are times when accommodation by an existing system is all that is required.⁶⁰ Even apart from its enhancement of substantive equality for individuals, however, this paper contends that reasonable accommodation, as applied by the CRPD, has a transformative potential, though this is not unbounded.

First, reasonable accommodation is transformative of the norms and assumptions that underlie social structures. A duty-bearer cannot simply assume that a person with a disability is incapable and that exclusion or disadvantage is inevitable. Instead, the duty-bearer must consider whether there are adaptations that would enable the person with a disability to participate, socially, economically or otherwise. While primarily individualistic, reasonable accommodation also has a collective dimension, both in the cumulative effects of multiple adaptations and in re-shaping thought-processes. Cumulatively, many small adaptations may have a significant overall impact on accessibility, and this collective aspect is amplified by the consideration (under the disproportionate burden heading) of broader social benefits, rather than the impact on the right-holder and duty-bearer alone. Even more significant, however, is the cumulative impact on attitudes and expectations. Mégret highlights that the CRPD adopts various strategies in order to achieve the goal of equality, including awareness-raising and fostering attitudinal change.⁶¹ Social structures do not exist independently; they are continually shaped by individuals. Changing individual mindsets may therefore have a long-term structural impact. Although the scale of this impact is qualified by the disproportionate burden limitation, it is also greatly enhanced by the sheer range of contexts (outlined previously) in which the CRPD requirement applies.

Secondly, by requiring the duty-bearer to engage in dialogue with the right-holder, reasonable accommodation supports the agency of the person with a disability by positioning them as a stakeholder whose voice must be heard. The right-holder is no longer to be characterised as a passive recipient of paternalistic largesse, but as a thinking, responsible actor whose views carry weight and must be duly considered, even if they are not always decisive. This aspect of the transformative potential is again qualified, however, insofar as the right-holder must ultimately be able to fit within the existing structure, albeit with an accommodation. As Rioux notes, this may particularly exclude persons with intellectual disabilities.⁶²

Thirdly, applying Fredman's equality framework (outlined above), it is evident that all four dimensions of equality are present in reasonable accommodation.⁶³ This includes not merely the redistributive dimension and the accommodation of difference, though these are the most obvious, but also the dimensions of recognition (combatting stereotypes and recognising human dignity) and participation (social inclusion). The application of reasonable accommodation to so many elements of equality, in so many different contexts, greatly enhances its transformative potential.

2. Reasonable accommodation in Irish law

Although Ireland was one of the first states to sign the CRPD, it did not ratify it until 2018, and significant gaps remain in implementation. Ireland has not ratified the Optional Protocol to the CRPD, so individuals cannot complain directly to the CRPD Committee for breaches of the Convention. Ireland's legislative measures on reasonable accommodation pre-date the CRPD, as does the primary

⁶⁰Fredman, above n 14, p 218.

⁶¹F Mégret 'The Disabilities Convention: towards a holistic concept of rights' (2008) 12 International Journal of Human Rights 261.

⁶²Rioux, above n 59.

⁶³Fredman herself argued that 'at least three' elements were present: Fredman, above n 14, p 217.

external influence on the duty, EU Directive 2000/78/EC (the Framework Directive).⁶⁴ As Ireland is a dualist state, ratification of the CRPD had no effect on national law. To date, the influence of the CRPD has been mediated through the Framework Directive, following the decision of the Court of Justice of the EU (CJEU) in *HK Danmark, acting on behalf of Jette Ring (Applicant) v Dansk almennyttigt Boligselskab (Respondent)*.⁶⁵ The CJEU held that, because the CRPD had been ratified by the EU, the Framework Directive must be interpreted in harmony with the CRPD, insofar as it relates to disability. This approach has since been followed in Ireland.⁶⁶ However, the Irish law on reasonable accommodation is unusual in that it is also shaped by a constitutional dimension. Constitutional provisions may invalidate legislation and are not affected by international obligations, other than acts or measures necessitated by EU membership.⁶⁷ This has significantly restricted the full implementation of the principle of reasonable accommodation and has limited its transformative potential.

(a) Legislative background

The first legislative attempt at imposing an obligation to provide reasonable accommodation occurred in the Employment Equality Bill 1996. This obliged employers to provide reasonable accommodation to employees with disabilities, unless this would give rise to ‘undue hardship’ to the employer. Reviewing the Bill’s constitutional validity, the Supreme Court held that it was unlawful to require a particular group (employers) to bear the entire cost of addressing a social need, since this amounted to an unjust attack on their constitutional property rights.⁶⁸ A similar provision of the Equal Status Bill 1997, relating to access to goods and services, also failed.⁶⁹ Thus, the constitutional right to private property limited the scope of equality legislation.

Reasonable accommodation was subsequently re-addressed in the Employment Equality Act 1998 (EEA,⁷⁰ dealing with employment and vocational training) and the Equal Status Act 2000 (ESA,⁷¹ dealing with goods, services and education).⁷² In both Acts, the standard was now placed at the opposite extreme, and reasonable accommodation was only required where it did not entail more than a ‘nominal cost’ to the business, employer or service provider. Following the adoption of the Framework Directive, the standard for reasonable accommodation in the EEA was amended to that of ‘disproportionate burden’.⁷³ However, in the absence of EU intervention beyond the employment sphere,⁷⁴ the ‘nominal cost’ standard has remained in place with regard to goods and services. It might be argued that the ‘disproportionate burden’ standard could also be applied here, as it is more nuanced than the ‘undue hardship’ test rejected by the Supreme Court.⁷⁵ However, this has not been attempted.

⁶⁴Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 27 November 2000, OJ L 303, 02/12/2000 P 0016–0022.

⁶⁵*HK Danmark, acting on behalf of Jette Ring (Applicant) v Dansk almennyttigt Boligselskab (Respondent)* (Case C-335/11 and Case C-337/11) [2013] IRLR 571.

⁶⁶*Nano Nagle School v Daly* [2019] IESC 63 at [23]–[34].

⁶⁷Constitution of Ireland, Art 29.4.

⁶⁸*Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321.

⁶⁹*Re Article 26 of the Constitution and the Equal Status Bill 1997* [1997] 2 IR 387.

⁷⁰Now the Employment Equality Acts 1998–2015.

⁷¹Now the Equal Status Acts 2000–2018.

⁷²Ireland does not yet have legislation providing for reasonable accommodation in other contexts, notwithstanding the requirements of the CRPD.

⁷³EEA, s 16(3), as amended by the Equality Act 2004, s 9.

⁷⁴The CRPD Committee has called on the EU to extend anti-discrimination law to the provision of goods and services (*Concluding Observations on the Initial Report of the European Union* (2 October 2015) at [18]–[19]). To date this has not occurred, although the EU has adopted accessibility requirements in relation to products and services (European Accessibility Act, EU Directive 2019/882).

⁷⁵The Supreme Court’s extremely brief discussion of this point noted that there was no exemption for small firms and that the consideration of ‘financial circumstances’ might require the disclosure of business problems to a third party to establish ‘undue hardship’ ([1997] 2 IR 321 at 368). Arguably, the broader test for disproportionate burden ameliorates these difficulties.

Accordingly, Ireland currently applies a dual standard for reasonable accommodation, which is highly context dependent, and only partially consistent with the CRPD.

The situation was due to be readdressed under the Disability (Miscellaneous Provisions) Bill 2016, which aimed to bring Irish law more into line with the requirements of the CRPD, prior to ratification. The Bill was before the legislature for over three years, though progress stalled and the Bill lapsed following the dissolution of Parliament. Given the need to comply with the CRPD, the Bill may well be revived by the new government. However, although s 4 of the Bill amended the ESA by raising the standard for reasonable accommodation to that of 'disproportionate burden', it did so only in relation to specific categories of service providers. These included certain public bodies, such as state departments (other than Defence), local authorities, universities and institutes of technology, certain education and training boards, the Health Service Executive, and companies in which the Government has a shareholding. Section 4 also captured financial institutions and insurance undertakings (which are covered by EU law), and a few other important but limited service providers (such as communications providers and certain public transport operators). The proposed statutory extension was therefore significant but not exhaustive. It excluded most private enterprises, contrary to the CRPD model previously outlined by Mégret and Msipa,⁷⁶ and would have resulted in a two-tier system in relation to the provision of goods and services.

Another significant exclusion in Irish law relates to the Defence Forces, which are exempted from the scope of the EEA. The breadth of the exclusion (which originally included the police and prison service as well) was challenged as irrational and arbitrary in *Re Employment Equality Bill 1996*. The Supreme Court considered it unnecessary to address this aspect of the Bill, which it had already found to be unconstitutional, but stated that it found it 'difficult to understand why the clerical or civilian members of these services should be exempt'.⁷⁷ The exemption for the police and prison service was removed in 2004,⁷⁸ but the exclusion of the Defence Forces remains unaddressed, and arguably constitutes a breach of both the CRPD and the European Convention on Human Rights.⁷⁹

The Irish legislation is also problematic in other respects. The ESA, s 4, has the merit of defining discrimination as including the denial of reasonable accommodation, but is otherwise conceptually inconsistent with the CRPD. It does not impose a duty to provide reasonable accommodation as such, but rather specifies that discrimination includes 'a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability...'. It then stipulates that a refusal to provide an accommodation is not reasonable unless it would give rise to more than a nominal cost to the service provider.⁸⁰ 'Reasonableness' is thus conceptualised as a limitation of the duty to accommodate, as the obligation is to do 'all that is reasonable', and 'reasonableness' is directly linked to cost. The 2016 Bill took the same approach, providing that a failure by the specified bodies to provide reasonable accommodation would only be reasonable if it would impose a disproportionate burden. This is inconsistent with the approach of the CRPD Committee in General Comment No 6, where 'reasonableness' is not a limitation on the duty, and is not cost-related; instead, cost may be considered as an aspect of 'disproportionate burden'.

A different approach is taken in the EEA, where s 16 requires employers to provide reasonable accommodation (described as 'appropriate measures') to enable persons with disabilities to have access to employment, participate or advance in employment, or undergo training, unless this would impose a disproportionate burden on the employer. 'Appropriate measures' are then defined as 'effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned'.⁸¹ Non-exhaustive examples of appropriate measures are listed ('the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or

⁷⁶Mégret and Msipa, above n 28, at 270.

⁷⁷[1997] 2 IR 321 at 368.

⁷⁸Equality Act 2004, s 25, amending EEA, s 37(5).

⁷⁹*Glor v Switzerland*, above n 3.

⁸⁰ESA, s 4(2).

⁸¹EEA, s 16(4)(a).

integration resources’).⁸² Examples of factors affecting ‘disproportionate burden’ are also provided, and include ‘the financial and other costs entailed’, ‘the scale and financial resources of the employer’s business’, and ‘the possibility of obtaining public funding or other assistance’.⁸³ Cost in the EEA is thus perceived not as a limitation of appropriate measures but as an aspect of disproportionate burden. This approach stems directly from the Framework Directive,⁸⁴ and is consistent with the CRPD. The 2016 Bill proposed to extend the same list of factors to the consideration of disproportionate burden under the ESA, but only in relation to public bodies and specified service providers.

Unlike the ESA, the EEA fails to define the denial of reasonable accommodation as discrimination – a clear breach of the CRPD that remained unrectified in the 2016 Bill. This was problematic, as the EEA provides no forum for redress, and hence no access to remedies, unless a claim relates to discrimination or victimisation.⁸⁵ However, the gap has been addressed in practice through a purposive interpretation of the Framework Directive.⁸⁶

Neither the EEA nor the ESA explicitly encompasses the range of considerations outlined in General Comment No 6. Of particular concern is the emphasis in both Acts on employer costs. As Smith notes, there is no reference to possible employer benefits, such as the incidental facilitation of customers, the retention of competent employees, or increases in productivity.⁸⁷ Nor is there any reference to the costs to the person with a disability of not receiving the accommodation, or to the degree of benefit the accommodation would provide to them.⁸⁸ Accordingly, insofar as the ‘disproportionate burden’ limitation requires a proportionality test (balancing the degree of benefit against the related burden), it remains very incomplete in Irish law, and prioritises economic efficiency over equality of opportunity.⁸⁹ Although the listed factors are not exhaustive, it would be most helpful if the legislation afforded explicit guidance on other relevant considerations.

Overall, though it would undoubtedly have improved the ESA, the 2016 Bill was inadequate to ensure CRPD compliance. This cannot be blamed wholly on constitutional limitations, since these do not affect most of the discrepancies noted above or other gaps discussed below. Rather, the failure to address key issues suggests a failure to perceive the flaws in the current legislation. This may be due to unfamiliarity with CRPD requirements or a lack of scrutiny, perhaps resulting from an assumption of compliance.

(b) Reasonable accommodation in practice

(i) Employment

It is well established in Irish law that consideration of potential reasonable accommodation measures must be ‘meaningful’.⁹⁰ In line with General Comment No 6, the Equality Tribunal, Labour Court and Workplace Relations Commission (WRC) have also repeatedly emphasised the individualised and responsive nature of the duty. However, it is also established that the test for reasonable accommodation is objective and that there is no obligation to satisfy all employee requests.⁹¹ A wide range of accommodations have arisen in the case law, including a phased return to work following sick leave,⁹² alterations to interview procedures⁹³ and selection tests,⁹⁴ the provision of protective

⁸²EEA, s 16(4)(b).

⁸³EEA, s 16(3)(c).

⁸⁴Framework Directive, Art 5.

⁸⁵EEA, s 77. The section also provides for claims relating to a breach of an equality clause or an equal pay clause.

⁸⁶*Complainant v Employer* DEC-E2008-068.

⁸⁷O Smith *Disability Discrimination Law* (Dublin: Round Hall Thomson Reuters, 2010) p 228.

⁸⁸*Ibid.*

⁸⁹*Ibid.*

⁹⁰*An Employee v A Broadcasting Company* EE/2008/359.

⁹¹*Mr B v A Metal Processing Company* EE/2010/909.

⁹²*Feore v Alzheimer Society of Ireland* DEC-2006-101.

⁹³*A Complainant v An Employer* DEC-E2008-068.

⁹⁴*O’Sullivan v Siemens Business Services Ltd* DEC-E2006-058.

equipment,⁹⁵ facilitation of part-time work,⁹⁶ the implementation of a buddy system,⁹⁷ being allowed to sit during work tasks,⁹⁸ working in proximity to toilet facilities,⁹⁹ and being excused from heavy lifting.¹⁰⁰ Nevertheless, a recent National Disability Authority (NDA) report on reasonable accommodation in employment found that complaints regarding alleged breaches of the duty were upheld in only 60% of cases examined.¹⁰¹

Notwithstanding the objective test, it seems reasonable accommodation may be required in some cases even where the benefits are arguably minimal. In *A Solicitor v A Legal Service*,¹⁰² the complainant, who suffered from epilepsy, made repeated requests to work from home, which were rejected by the employer. A medical assessor considered that working at home would contribute only minimally to the plaintiff's health. However, the complainant had previously experienced catastrophic outcomes in relation to her epilepsy and argued that even a minimal contribution was significant in her context. The WRC concluded that, in this specific case, even a minimal reduction in the risk of a life-threatening event amounted to a valid reasonable accommodation. The respondent's failure to consider fully the medical views and to rigorously evaluate the possible impact on the complainant therefore amounted to a breach of the reasonable accommodation duty.

It is also clear that reasonable accommodation is a proactive duty.¹⁰³ Again, this aligns with the view of General Comment No 6 that the reasonable accommodation duty is not limited to situations where an accommodation has actually been requested.¹⁰⁴ In *A Government Department v An Employee*,¹⁰⁵ it was held that the employer had a duty to consider how the employee's known disability might affect her ability to progress in her career, and to engage proactively with her to ensure any potential disadvantage was minimised.

The defence of disproportionate burden also aligns with the CRPD, though (as noted above), the EEA, s 16, lists only three factors for consideration in evaluating whether a burden is disproportionate. In practice, although it has not arisen much in the case law, the principle of disproportionate burden may go beyond financial loss; in *Miaskiewicz v Tesco Ireland Ltd*,¹⁰⁶ the employer claimed that the unravelling of a union agreement would amount to a disproportionate burden, though on the facts the Equality Officer rejected this possibility. In line with General Comment No 6, the case law makes it clear that the resources of the employer as a whole must be considered, not merely those of a particular unit.¹⁰⁷

Although the EEA does not explicitly require consultation with employees with disabilities, this has not caused difficulties until recently. One of the most influential decisions on reasonable accommodation in employment is *A Health and Fitness Club v A Worker*,¹⁰⁸ where the Labour Court addressed the procedure to be followed by an employer under the EEA, s 16. The Labour Court identified a two-

⁹⁵*Conlon v Intel Ireland Ltd* EE/2011/383.

⁹⁶*A Worker v A Company* EE/2011/795.

⁹⁷*Mr B v A Metal Processing Company* EE/2010/909.

⁹⁸*Mr L v A Medical Technology Enterprise* EE/2011/670.

⁹⁹*A Medical Secretary v HSE West* EE/2009/671.

¹⁰⁰*Lesniak v Farringtons Agri Limited (in liquidation)* EE/2010/396.

¹⁰¹A total of 49 out of 82 complaints were successful: National Disability Authority *Reasonable Accommodations: Obstacles and Opportunities to the Employment of Persons with a Disability* (November 2019) (NDA *Reasonable Accommodations*) p 7.

¹⁰²*A Solicitor v A Legal Service* ADJ-00011821.

¹⁰³*A Worker v A Hotel* [2008] ELR 73; *Mr A v A Government Department* DEC-E2008-023.

¹⁰⁴General Comment No 6, above n 8, at [24].

¹⁰⁵*A Government Department v An Employee* EDA 061/2006.

¹⁰⁶*Miaskiewicz v Tesco Ireland Ltd* EE/2011/588.

¹⁰⁷*A Medical Secretary v HSE West* EE/2009/671. The disproportionate burden defence may not always be that significant in practice: the NDA report found that, of 49 unsuccessful claims for reasonable accommodation, only three failed on the disproportionate burden ground: NDA *Reasonable Accommodations*, above n 101, p 8. However, the size of the case sample was small (82 cases).

¹⁰⁸*A Health and Fitness Club v A Worker* EED037 (also known as *Humphries v Westwood Fitness Club* following the Circuit Court appeal, *Humphries v Westwood Fitness Club* [2004] 15 ELR 296). The Circuit Court (Dunne J) also found the employer in breach of the EEA due to its inadequate procedures and failure to consider medical advice.

stage process. First, the employee's capabilities should be assessed in light of their disability and relevant medical evidence. Secondly, if it appeared that the employee was not fully capable of performing the duties of the job, the employer must consider whether the provision of special treatment or facilities could enable the employee to become fully capable, and if so, the costs of such special treatment or facilities. The Labour Court considered that 'such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions'.¹⁰⁹ These principles were reiterated on appeal to the Circuit Court¹¹⁰ and have been at the core of employment decisions regarding reasonable accommodation for over 15 years, enshrining an approach that is broadly consistent with the CRPD. The implied duty of consultation has been rigorously enforced: in *Conlon v Intel Ireland Ltd*,¹¹¹ the WRC emphasised that, in reaching any decision on the employee's capacity and appropriate reasonable accommodations, the employer must engage with the employee and their medical advisers, and afford them the opportunity to influence the outcome. In *Alistair Clews v DSG Retail*, the WRC held that the employer had failed to provide reasonable accommodation, not least because the complainant had not been allowed a full opportunity to participate at every stage of the process.¹¹² In *Miaskiewicz v Tesco Ireland Ltd*,¹¹³ the WRC stated: 'If all of the options that may be available are not adequately considered then it cannot be said that an employer was able to form a bona fide conclusion that they are impossible, unreasonable or disproportionate',¹¹⁴ and that 'any enquiry by an employer can only be regarded as adequate if the affected employee is given the opportunity to influence the decision'.¹¹⁵

More recent case law, however, has undermined this position. In *Nano Nagle School v Daly*,¹¹⁶ the Court of Appeal held that there was no statutory obligation on employers to consult with employees in relation to reasonable accommodation. Ryan P stated:¹¹⁷

... the statutory duty is objectively concerned with whether the employer complied with the obligation to make reasonable accommodation. If no reasonable adjustments can be made for a disabled employee, the employer is not liable for failing to consider the matter or for not consulting. It is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated, the fact that the process of decision is flawed does not avail the employee.

The decision was strongly criticised by academics and practitioners as inconsistent with the CRPD.¹¹⁸ Although technically correct – there is no express statutory consultation duty – the decision raised significant practical concerns. Without a duty of consultation, employers may simply assume that reasonable accommodation is impossible, or may offer inappropriate accommodations, and employees or potential employees may have no opportunity to address this. It also reduces the transformative potential of the reasonable accommodation duty, discussed above. It is clear from previous case law that this danger is very real. In *A Complainant v A Healthcare Company*,¹¹⁹ the employer moved the complainant to a completely different area, based on an assumption by her manager that her multiple sclerosis

¹⁰⁹ *A Health and Fitness Club v A Worker* EED037.

¹¹⁰ *Humphries v Westwood Fitness Club* [2004] 15 ELR 296 at 301.

¹¹¹ *Conlon v Intel Ireland Ltd* EE/2011/383.

¹¹² *Alistair Clews v DSG Retail* EE/2011/449.

¹¹³ *Miaskiewicz v Tesco Ireland Ltd* 2014-DEC-E2014-072.

¹¹⁴ *Ibid*, at [5.3].

¹¹⁵ *Ibid*.

¹¹⁶ *Nano Nagle School v. Daly* [2018] IECA 11.

¹¹⁷ *Ibid*, at [63].

¹¹⁸ C Bruton and K McVeigh 'Effects of the judgment of the Court of Appeal in *Nano Nagle v Daly* on the duty to provide reasonable accommodation' (2018) 15(2) *Irish Employment Law Journal* 36.

¹¹⁹ *A Complainant v A Healthcare Company* EE/2013/205.

would cause her fatigue if she continued in her existing role. There was no medical reason for the transfer, no consideration of any appropriate measures that would have allowed the complainant to remain in her original position, and no attempt to discuss options with the complainant. The lack of consultation was held to amount to a breach of s 16, but the Court of Appeal's decision in *Nano Nagle* could negate a similar approach in future. This is particularly important as procedural breaches are by far the most common basis for a finding of liability in practice. The NDA report found that 27 out of 33 decisions in its sample, where employers were held to have breached their reasonable accommodation duties, succeeded on procedural grounds.¹²⁰ Essentially, employers were held liable for failing to enquire into the extent of the disability, failing to consider whether special treatment and facilities could be provided, or failing to consult with the employee throughout the process.¹²¹ In only four cases in the sample were employers held to have failed to meet the substantive requirements of the duty, while in two further cases employers were held liable due to delays in dealing with the request or implementing the agreed accommodation.¹²²

Although the Supreme Court subsequently overturned the decision of the Court of Appeal,¹²³ the danger has not been fully averted. MacMenamin J, speaking for the majority of the Supreme Court, emphasised that Irish courts 'have always attached importance to fair procedures where employment is at stake'¹²⁴ and disagreed with the Court of Appeal's conclusion on the procedural issue. However, he then qualified his remarks, stating:

I do not go so far as to say there is a mandatory duty of consultation with an employee in each and every case, the section does not provide for this, still less does it provide for compensation simply for the absence of consultation in an employment situation. But, even as a counsel of prudence, a wise employer will provide meaningful participation in vindication of his or her duty under the Act. But absence of consultation cannot, in itself, constitute discrimination under s 8 of the Act.¹²⁵

This approach is likely to result in some uncertainty in practice. If there is no right to compensation for lack of consultation, and failure to consult does not amount to unlawful discrimination, what incentive do employers have to engage in dialogue? The answer appears to lie in the duty of reasonable accommodation itself: failure to consult the employee may mean that the employer does not identify appropriate measures that could be taken in the particular case. The employer might then be liable for failing to provide reasonable accommodation, as courts elsewhere have emphasised that employers cannot plead ignorance as a defence, where this could have been avoided.¹²⁶ Consultation may thus be indirectly enforced. However, an explicit consultation duty would be preferable, to align fully with the CRPD.

One of the most contentious issues in practice has centred on the re-designation of duties as a potential form of reasonable accommodation. This possibility seems implicit in General Comment No 6, which refers to 'reorganizing activities',¹²⁷ though this is not explained in detail. However, the legislative scope for such role redesign under the EEA is unclear. Section 16 states that there is no obligation to hire or retain a worker who is unable or unwilling to perform the duties of the post, but also stipulates that employees must be regarded as capable of performing duties if they

¹²⁰NDA *Reasonable Accommodations*, above n 101, p 8.

¹²¹*Ibid.*

¹²²*Ibid.*

¹²³*Nano Nagle School v Daly* [2019] IESC 63. For a commentary on this case see S Quinlivan and C O'Mahony 'The Irish Supreme Court judgment in *Nano Nagle School v Marie Daly*: a saga of litigation' (2019) 70(4) *Northern Ireland Legal Quarterly* 505.

¹²⁴*Nano Nagle School v Daly*, *ibid.*, at [104].

¹²⁵*Ibid.*, at [105].

¹²⁶*Tarback v Sainsbury Supermarkets Ltd* [2006] IRLR 664 at [69].

¹²⁷*General Comment No 6*, above n 8, at [23].

could do so with reasonable accommodation. It then cites the ‘redistribution of tasks’ as a possible reasonable accommodation. However, because s 16 does not distinguish between the essential or core duties of a post, and duties that are minor or ancillary, it is not clear whether workers must be capable of performing all the duties of a post (no matter how minor or infrequent),¹²⁸ or whether reasonable accommodation might require some duties to be reconfigured prior to the assessment of capacity. In short, does the ‘redistribution of tasks’ also encompass the redistribution of ‘duties’?

This issue was also addressed in the Supreme Court decision in *Nano Nagle School v Daly*.¹²⁹ The appellant, a special needs assistant working with children with disabilities, became paraplegic following a road traffic accident. She wished to return to work but an occupational health assessment showed that she would no longer be able to perform all the functions of her role, even with reasonable accommodation. Much of the litigation centred on whether the school should have considered reconfiguring the role to accommodate Ms Daly’s needs, or whether Ms Daly’s inability to undertake all her original duties precluded the need for such consideration.

The Court of Appeal held that, since no reasonable accommodation could render Ms Daly capable of performing all the duties of the position, the employer could not be obliged to consider providing such reasonable accommodation. Finlay Geoghegan J distinguished between the ‘duties’ of a role (core responsibilities which the employee must be able to discharge), and ‘tasks’ (essentially sub-aspects of particular duties).¹³⁰ She then held that, while some ‘tasks’ might be reconfigured as an aspect of reasonable accommodation, these could not comprise the whole of a particular ‘duty’. ‘Duties’ as such need not be reconfigured, as the section clearly required that employees must be capable of discharging these. This approach was criticised by Bruton and McVeigh as an incorrect interpretation of s 16, which clearly makes the assessment of capability contingent on the potential provision of reasonable accommodation.¹³¹

The Court of Appeal’s decision greatly undermined the efficacy of s 16 and led to an immediate change of practice in the WRC and Labour Court.¹³² However, its approach was subsequently rejected by the Supreme Court. Writing for the majority, MacMenamin J held that there was no distinction between ‘tasks’ and ‘duties’ in s 16.¹³³ The main purpose of the section was to promote access to employment for persons with disabilities. The section achieved this by classifying persons with disabilities as competent to undertake duties if they could do so with reasonable accommodation. He therefore concluded:

What is required by the section, read in its entirety, is that consideration be given to distribution of essential duties, as part of a reasonable accommodation.¹³⁴

Accordingly, the requirement that an employee must be capable of performing the duties of the role must be read as subject to the duty of reasonable accommodation.¹³⁵

There was clearly a policy element to this. MacMenamin J emphasised that employers could not avoid the duty to provide reasonable accommodation by categorising elements of a job as ‘duties’

¹²⁸This danger was highlighted early on in G Quinn and S Quinlivan ‘Disability discrimination: the need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment’ in C Costello and E Barry (eds) *Equality in Diversity: The New Equality Directives* vol 29 (Dublin: Irish Centre for European Law, 2003) p 218.

¹²⁹[2019] IESC 63.

¹³⁰[2018] IECA 11 at [30]–[33] per Finlay Geoghegan J.

¹³¹Bruton and McVeigh, above n 118.

¹³²*Eg Excellence Ltd v Adam Herzyk* EDA1815. The NDA report, which considered 82 recent reasonable accommodation cases, also found that 11 cases failed because the WRC or Labour Court held that the employee would not have been fully competent to undertake the role even with an accommodation (NDA *Reasonable Accommodations*, above n 101, p 8). However, although the cases were concluded prior to the Supreme Court’s decision in *Nano Nagle*, it is unclear whether the 11 cases identified all occurred after the decision of the Court of Appeal.

¹³³[2019] IESC 63 at [100]–[101].

¹³⁴*Ibid*, at [101].

¹³⁵*Ibid*, at [102].

instead of ‘tasks’.¹³⁶ However, he also emphasised that reconfiguring duties did not extend to creating an entirely new position for the employee, and even reallocating tasks might sometimes amount to a disproportionate burden. Whether this was the case was a matter of degree, and should be determined objectively,¹³⁷ and some positions might not be capable of adaptation at all.¹³⁸

The most recent indications, therefore, are that s 16 will be given a purposive interpretation, and that the requirement to be able to perform the duties of role is not a licence for employers to classify jobs in a manner that puts them beyond the reach of persons with disabilities. The Supreme Court ruling suggests that employers must at least consider the possibility of reallocating duties, even if ultimately they are not required to reconfigure roles in all cases. This fits well with the concept of disproportionate burden, as enshrined in the CRPD. However, there are still some important compliance gaps in s 16, most notably the lack of a specific consultation duty, the limited factors listed for consideration in relation to disproportionate burden, and the failure to stipulate that the denial of reasonable accommodation constitutes unlawful discrimination.

(ii) Goods and services

The duty of reasonable accommodation in the ESA differs significantly from that in the EEA. Although the ESA explicitly states that failing to provide reasonable accommodation constitutes unlawful discrimination, the level of obligation is much lower. The duty-bearer is only required to do ‘all that is reasonable’, and even this is only required if it would otherwise be ‘impossible or unduly difficult’ to avail of a service.¹³⁹ Thus, even without the ‘nominal cost’ defence (the constitutional limitation), the scope of the duty is far more restricted than in the employment context.

The ‘impossible or unduly difficult’ standard conflicts with the CRPD requirement that persons with disabilities should be able to exercise their rights on an equal basis with others. In *Connolly v Hughes and Hughes*,¹⁴⁰ a wheelchair user who was a regular customer of a bookshop could no longer browse in certain areas due to structural alterations. The bookshop offered to accommodate him by bringing books to another area for him to view. Although he could not access the service on an equal basis with others, imperfect access was held to be sufficient, as it was not ‘impossible or unduly difficult’ to access the service. As Quinlivan notes, the standard takes no account of the need to ensure the dignity of the individual in their ability to access goods and services, which is arguably part of the rationale for anti-discrimination law.¹⁴¹ It has been justified on the ground that the relationship between a service provider and a customer is shorter and less important than that between an employer and employee.¹⁴² However, this is not always the case: the relationship between an education provider and a pupil, or a health service provider and a patient, is surely as significant as many employment relationships.

As for the EEA, the accommodation provided must be responsive to the individual’s needs, assessed objectively.¹⁴³ This includes a proactive element. In *Two Complainants (A Mother and her Son) v A Primary School*,¹⁴⁴ a school had recognised a pupil’s symptoms as indicating a disability but did not sufficiently prioritise support measures. The Equality Officer held that it was incumbent on the school to seek out facilities for the pupil as without these it was ‘unduly difficult’ for him to avail of education. Similar consultation requirements to the EEA have also been applied,¹⁴⁵ though these

¹³⁶Ibid.

¹³⁷Ibid, at [106].

¹³⁸Ibid, at [107].

¹³⁹ESA, s 4(1).

¹⁴⁰*Connolly v Hughes and Hughes* DEC-S2009-064.

¹⁴¹S Quinlivan ‘Reasonable accommodation in education’ (2015) 4(2) *The Irish Community Development Law Journal* 16 at 25.

¹⁴²*Maguire v Bob’s News and Deli Dublin* DEC-S2004-025.

¹⁴³*Wellard v Killester College* DEC-S2008-024.

¹⁴⁴*Two Complainants (A Mother and her Son) v A Primary School* DEC-S2006-028.

¹⁴⁵*Gallagher and Wilson v Donegal County Council* DEC-S2006-60.

may be undermined following the Supreme Court decision in *Nano Nagle*, as the ESA, like the EEA, lacks an express consultation requirement. The new EEA approach is therefore likely to be followed, making consultation advisable rather than mandatory. Consultation under the ESA may also include an additional dimension: in employment, the primary purpose of consultation is to identify what accommodations meet the individual's needs, whereas under the ESA it may also be needed to evaluate the degree of difficulty being experienced by the person with a disability. In *Maguire v Bob's News and Deli Dublin*,¹⁴⁶ the Equality Officer found that a breach of duty had occurred where a business failed to discuss with a customer who normally used a wheelchair, but who could sometimes walk with a cane, whether it would be 'unduly difficult' for her to shop on her own without assistance. It appears that the onus lies on the person with a disability to show that the 'impossible or unduly difficult' standard is met, as well as that the duty-bearer has failed to do what is 'reasonable'.

As under the EEA, a wide range of accommodations are evidenced in the case law, such as exemption from normal school disciplinary procedures,¹⁴⁷ the provision of more convenient ticket arrangements,¹⁴⁸ more accessible toilet facilities,¹⁴⁹ permitting a guide dog to accompany a visually impaired person onto premises,¹⁵⁰ and the provision of airport assistance to a person with intellectual disabilities.¹⁵¹ However, a key issue concerns the conceptualisation of the ESA duty as being one to do 'all that is reasonable'. In this sense, as previously noted, the term 'reasonable' limits the duty of accommodation in the ESA, contrary to the approach taken in General Comment No 6. The effects of this have sometimes been mitigated by linguistic emphasis ('all that is reasonable') and interpreting this as requiring the duty-bearer to do everything it could reasonably do to accommodate the complainant.¹⁵² More commonly a restrictive approach is taken, and a duty-bearer is only required 'to devise a "reasonable" solution to a problem, not to achieve perfection and not to give in to every demand that is made of it'.¹⁵³ Views of what is 'reasonable' may of course differ: in *Wellard v Killester College*,¹⁵⁴ the complainant's expectation that accessible course material would be available from the start of her course, where the course provider had sufficient notice of her needs, was held to be unreasonable.

The duty to do 'all that is reasonable' has most recently been addressed by the Supreme Court in *Cahill v Minister for Education and Science*,¹⁵⁵ where conflicting views were expressed. MacMenamin J, in the minority, felt that a broad approach was required, stating (albeit obiter):

The legislative object... should be seen as to do everything that is reasonable and practicable, both procedurally, and in substance, ensures the treatment of a person with a disability is placed at the same level as a person without a disability. The obligation is not, therefore, simply to refrain from certain actions, but, where necessary, to engage in positive action. In colloquial terms, it can impose a duty to 'go the extra mile'.¹⁵⁶

However, O'Donnell J considered this too 'open-ended',¹⁵⁷ and a similar view was taken by Laffoy J, for the majority. She concluded:

¹⁴⁶*Maguire v Bob's News and Deli Dublin* DEC-S2004-25.

¹⁴⁷*Mrs A (on behalf of her son) v A Boys National School* DEC-S2009-031.

¹⁴⁸*Thompson v Iarnród Éireann* DEC-S2009-015.

¹⁴⁹*A Patient v The Mater Misericordiae University Hospital* DEC-2009-057.

¹⁵⁰*Maugham v Glimmerman Ltd* DEC-S2001-020.

¹⁵¹*Ms A (on behalf of her sister B) v Aer Lingus* DEC-S2009-038.

¹⁵²See, eg, the comments of MacMenamin J (minority) in *Cahill v Minister for Education and Science* [2017] IESC 29 at [66].

¹⁵³*Deans v Dublin City Council* (unreported, Circuit Court, 15 April 2008) per Hunt J.

¹⁵⁴*Wellard v Killester College* DEC-S2008-024.

¹⁵⁵*Cahill v Minister for Education and Science* [2017] IESC 29.

¹⁵⁶*Ibid.*, at [66].

¹⁵⁷*Ibid.*, at [15].

The standard of reasonableness which is at the heart of s 4(1)... in my view, imports the concept of proportionality. It envisages that a balance is to be maintained between the needs of the disabled person and how those needs are met by the provision of special treatment or facilities to the extent necessary to enable the disabled person to avail of the service, or to do so, without undue difficulty, on the one hand, and the effect of such provision on the service provider in the overall context of the position of the service provider, as the provider of the service, on the other hand.¹⁵⁸

It therefore appears that the term ‘reasonable’ indeed serves to limit the scope of the duty, adding to the hurdles already posed by the ‘impossible or unduly difficult’ standard and the ‘nominal cost’ defence. However, it is worth noting that, although the nominal cost limitation is incompatible with the CRPD, its effects have been somewhat mitigated in practice. The Equality Tribunal and the WRC have both required duty-bearers to quantify potential costs,¹⁵⁹ and to demonstrate that attempts to procure external funding were unsuccessful.¹⁶⁰ What amounts to a ‘nominal’ cost has also been interpreted in light of the size and resources of the duty-bearer,¹⁶¹ and whether it is a public sector or private body.¹⁶² While technically questionable, this does appear to accord with the original legislative intent,¹⁶³ although this approach is not always consistently applied.¹⁶⁴

Conclusion

This paper has outlined the duty of reasonable accommodation encompassed by the CRPD, highlighting its essential elements and transformative potential. Specifically, the paper contends that reasonable accommodation is transformative due to the substantive equality it provides for individuals, the active engagement it requires with persons with disabilities, its role in transforming social norms and structures, and the proactive consideration it mandates in respect of potential barriers to inclusion. In light of these considerations, the paper contends that reasonable accommodation plays an essential role in changing mind-sets, which may have a long-term structural impact, though the scale of this impact is qualified by the disproportionate burden limitation.

The paper has also highlighted the importance of taking the CRPD model, as elaborated in General Comment No 6, as a guide for legislative review and development. The examination of Irish law clearly demonstrates that statutory provisions on reasonable accommodation may vary considerably, and do not necessarily comply with the CRPD or result in an effective and transformative practice. The Irish example demonstrates that the structure and phrasing of the reasonable accommodation duty may be crucial for achieving, or frustrating, its transformative potential. These points provide useful guidance and exemplars for other states and illustrate the strengths and weaknesses of different approaches, but also point to the need to revisit pre-existing legislation, post-ratification, to ensure compliance with the CRPD.

As demonstrated in this paper, neither the EEA nor the ESA is fully compliant with CRPD requirements, though the EEA model comes significantly closer to meeting these, thanks to the Framework Directive. The Irish Constitution has contributed significantly to this non-compliance, by restricting the financial burden that can be placed on private sector duty-bearers outside of the employment context. This greatly hampers the effectiveness of the indirect enforcement model implemented by the CRPD and highlighted by Mégret and Msipa, and undermines its transformative capacity. That said, the Irish legislation could still be considerably improved by remodelling current legislation to comply as far as constitutionally possible with the CRPD duty.

¹⁵⁸Ibid, at [73].

¹⁵⁹*A Complainant v A Local Authority* DEC-S2007-49.

¹⁶⁰*Halliman v Moy Valley Resources* DEC-S2008-025.

¹⁶¹*Wellard v Tesco Ireland Ltd* DEC-S2009-047.

¹⁶²*An Employee v A Local Authority* DEC-E2002-4.

¹⁶³154 *Seanad Éireann* Col 666 (6 February 1998).

¹⁶⁴*Kwirotek v NUI Galway* DEC-S2004-176.

Both the ESA and the EEA show the dangers of failing to address the CRPD criteria sufficiently. The EEA fails to categorise a denial of reasonable accommodation as unlawful discrimination, while the ESA misuses the term ‘reasonable’ to limit the scope of the accommodation required. Even if the ESA is constitutionally restricted to the nominal cost standard (which is questioned), it is possible to remove the additional burden of the ‘impossible or unduly difficult’ test, which is alien to the CRPD. The EEA could expand on the factors relevant to disproportionate burden and emphasise a broader range of considerations, such as the degree of injury or benefit to the person with the disability, and possible benefits to third parties. The same applies to any incorporation of the disproportionate burden test in the ESA, as attempted by the 2016 Bill. Both the ESA and the EEA require the inclusion of an explicit duty to consult with persons with disabilities, to identify their needs and how they can be addressed effectively. Although arguably not required by the CRPD itself, it would be helpful if the EEA distinguished clearly between essential and non-essential job functions, and clarified the role of reasonable accommodation in adjusting these. The 2016 Bill completely failed to address these issues. Although the 2016 Bill has lapsed (for now), there is a clear need to readdress these concerns in a more substantive way, should it be revived by the new government.