MEMORANDUM

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To: Mr Fred-Arne Ødegaard, Head of Unit,
Ministry of Government Administration and Reform, Norway

Date: July 4. 2007. Amended August 7 2007[1]

Re: General issues to be considered in preparation of the new discrimination and accessibility act in Norway

1. Per our meeting in the Ministry of Government Administration and Reform June 27, 2007, we have prepared this memorandum at your request to provide the Norwegian government with information and follow-up ideas (not legal advice) to help (1) achieve optimal statutory provisions as possible, and (2) prepare for future amendments of the Norwegian legislation that may be desirable to achieve the goals of participation and accessibility for all in information society. Although we understand the mandate of the Ministry is limited, we identify general issues that you may want to consider in co-operation with the other ministries. This memorandum was completed before the proposal for a new provision on ICT in the forthcoming discrimination and accessibility act was published and sent on a public hearing July 4 2007.

Background

2. The Ministry of Labour and Social Inclusion has been mandated the overall responsibility for preparing a proposal for legislation to improve the legal safeguard against discrimination for people with disabilities in all sectors in society. A public committee, chaired by Professor Aslak Syse, presented their report in May 2005. A minority in the committee suggested a deadline for universal design of information and communication technology (ICT) to ensure that new solutions are universally designed before January 1, 2009 and existing ICT before January 1, 2019. The committee did not examine the minority proposal. A broad public hearing was completed in December 2006.

3. The Government is following up the committee proposal with the intention to present draft legislation to the Parliament in end 2007 or early 2008. The act is planned to enter into force January 1, 2009.

4. The Ministry of Government Administration and Reform has been mandated to prepare a proposal on how deadlines for universal design of new and existing ICT may be

[1] The memorandum was amended after generous comments by Professor Gerard Quinn (National University of Ireland, Galway) especially on compliance with the new UN convention and the concept of 'anticipatory reasonable accommodation'.

incorporated in a new act on discrimination and accessibility (see Appendix 1) and possibly the sector legislation.

Existing statutory accessibility provisions in Norway

5. Until now, statutory provisions against discrimination and inaccessibility as discrimination have been introduced in the sector legislation and limited to specific sectors of society (employment, education, buildings and outdoor areas, etc). In many legal acts accessibility requirements are not explicit and one has to infer these requirements from the overall purpose of the act. In other cases stated objectives of accessibility are not binding or the provisions neglected (e.g. in the Norwegian Planning and Building Act) (cf. the Syse report from 2005).

6. Norway is the only of the Nordic countries with provision on universal design in the public procurement legislation so far. According to New public procurement legislation in force from 1.1 2007 (corresponding to Directive 2004/18/EC), Article 6, "State, municipal and county authorities and governmental liable bodies shall during the planning of each procurement allow for life cycle costs, universal design and environmental consequences of the procurement." It is not referred to accessibility or usability as such for people with disabilities. It is not referred to requirement for the tenders to be accessible and/or to have an active policy for labour market inclusion of people with disabilities.

7. Norway voluntarily introduced new provisions parallel to the Employment framework directive for equal treatment in employment and occupation (EC(78/2000) in the Norwegian labour code in 2004 (Section 13). So far, neither the government, the Equality and Anti-discrimination Ombud nor the disability-NGOs have launched any information campaigns about the new non-discrimination provisions. The first lawsuit on the basis of the EU regulations emerged in 2006:

- A blind music teacher claimed to have been passed over for the vacancy she had applied for at a college. The college had announced two positions but preferred job-applicants with less experience and formal qualifications. The plaintiff had previously been employed in a temporary position in the same college as a deputy for two years. In 2004 she had complained about unacceptable working conditions (avoided and ignored by colleagues). The plaintiff asserted that this later was used against her, although adverse treatment by the employer as a reaction to a complaint within the undertaking is illegal pursuant to provisions in the Norwegian labour code and parallel to the Employment Directive (Article 11 EC). The Norwegian Association of the Blind and Partially Sighted assisted as intervener (amicus curiae) and argued that the employer had not fulfilled its duty to provide reasonable accommodation, especially with regard to the socio-psychological working environment (Article 5 EC). Several of the differences and difficulties at the work place were related to the visual impairment. The defendant first argued in writing to the plaintiff that they could not employ her as her qualifications were not sufficiently relevant for the position and the visual impairment made it difficult to maintain many of the work tasks. The defendant admitted that this created the presumption that discrimination could have taken place and that it therefore was to the defendant to prove that no discrimination had taken place. Later complaints from pupils and lack of co-operation were presented as the major reasons for not employing her, despite her better formal qualifications. The defendant was asserted that she was unpredictable and the colleagues became uncertain about how to interact with her. Sometimes she reacted if they offered assistance. On other occasions she reacted if they did not offer assistance. Allegedly she created conflicts in the workplace, made up assumptions about defamation and had a temper. The city court ruled in favour of the defendant. The decision not to

appoint her on grounds of lack of personal qualifications was considered valid. It was the opinion of the judge that she was to blame for the escalation of the conflicts. It was argued that her letter to the employer in itself made it impossible to appoint her.

8. The duty to provide reasonable accommodation was not commented by the court. Neither was the prohibition against adverse treatment discussed. Rather the court emphasised the prerogative of the employer to use discretion in the appointment of job seekers and take the personal qualifications of the applicant into consideration.

9. Later the High Court sustained the ruling (2007). The High Court concluded that the plaintiff had not been discriminated against as they found it proved that the employer had placed emphasise on the personal qualifications and not the impairment. The court admitted that it was difficult if not impossible to recapitulate the reasons for the conflict at the workplace but did not discuss the lack of accommodation of the socio-psychological working environment as a reason for the escalation of the conflicts. In practice, the Court ended up referring to the alleged difficult personality of the plaintiff and the prerogative of the employer. It is striking that the decision to a very little extent discuss how new principles such as direct and indirect discrimination and reasonable accommodation, the shadow regulations to the Employment Framework Directive (EC/78/2000), should be interpreted and how they may or may not apply in this case. Rather the Court appears to have emphasised and been more familiar with other relevant sections of the Norwegian Labour Code. Allegedly, the ruling will be appealed to the Supreme Court.

NTNU report 2007: proposal for a legal claim to universal design of ICT

10. The proposal regarding ICT has been drafted on the basis of the 2005 Syse committee report and has been modelled on their proposals, in accordance with mandate in the consequence analysis commissioned by the ministry.

11. The 2005 law proposal does not establish a legal claim to goods and services as such but accessibility to the physical environments through universal design (see Appendix I). It has not been suggested to authorize an *anticipatory duty to accommodation* in those cases universal design will not suffice to ensure that the goods and services will be accessible (cf ADA Title II, Sec 302, 2 and DDA part 111, 21-2). One limit to the proposal is that not all people with disabilities may achieve access to the goods and services even if one manages to formulate more inclusive standards for goods and services. We return to this below.

12. The general accessibility requirements are defined in Section 9 of the law proposal. After the public hearing in 2006 it has been suggested that one should set larger ambitions not only for buildings and outdoor areas, but also transport and ICT. Section 11 will define deadlines for compliance in these key sectors of society. It has no reference to "disproportional burden" or similar wording that would limit the duty to universal design due to monetary costs (different from the general provision in Section 9).

13. The proposal for definition of ICT follows Section 508 in the Rehabilitation Act in the US but has avoided the technology specific references and cultivated a strict focus on functions to avoid that the definition become outdated as the technology changes.

> *Information and communication technology (ICT) refers to technology and systems of technology that is used to create, change, exchange, duplicate and publish information [in the form of text, sound, pictures and /or figures)].*

14. The definition should include ticket kiosks, ATMs and queue systems for general customer services, travel information and transport but will be limited from "embedded ICT":

> *ICT is limited from technology and systems of technology in which the main function is not acquisition, storage, change, administration, control, display, publication, exchange, transfer or receipt of information.*

15. For unknown reasons the two sentences have not become parallel in their reference to the functions that will define ICT but this should not be difficult to correct.

16. ICT that is embedded in the solution to ensure accessibility to transport and buildings, such as captioning and/or reading of stops for public transport and in lifts, or smart house technology, will not be covered by the legal claim. Embedded ICT may, however, be covered by the accessibility requirements to buildings, outdoor areas and transport, also in Section 11 of the law proposal. Administrative regulations and standards will be needed to define the content of accessible ICT more substantially.

17. Exemptions: The only suggested exceptions from a legal claim to universal design of ICT are on grounds of personal privacy or data protection. The statutory provision will not apply in cases in which universal design is "technically impossible". Applications to be exempted from the requirements to universal design of ICT are likely to be considered by a new Directorate for Public Administration (administrative body responsible for the implementation of public ICT policy). Complaints about violations of the provisions will also be considered by the directorate. Complaints about the decisions of the directorate may be brought forward to the Ministry of Government Administration and Reform.

18. Deadlines: It if often argued that the pace of change is considered to be so high in the ICT sector both as regards the change of software and hardware as well as redesign of websites (change of technology platform) that it will suffice to require that enterprises conform to the accessibility requirements in the design, production and purchase of the next version. After the necessary regulations and standards have been developed (18-24 months) the provisions may come into force after another six months. Additionally it has been suggested to introduce a deadline for retrofitting of all existing ICT (8-10 years). A small survey among Norwegian enterprises suggested that most ICT will have been changed anyway by that time. It has been suggested to avoid different deadlines for different types of ICT to keep the Act simple and avoid too complicated provisions.

19. Infrastructure perspective as been an argument for slow reforms: The functions and user interface should not be changed too fast. New ICT has to be compatible to already existing equipment in the enterprise. The human - computer interaction also comprise personnel, knowledge, division of labour and corporate culture. Especially the elderly are assume not to have an interest in large and frequent changes in the functionalities. This has to be balanced against the prospects of profits from improved accessibility and usability by changing the standards, functionality and user interface.

20. *Will the new provisions be enforced?* It is a risk that the new provisions will be neglected in the same way as already existing provisions. If the sector authorities do not change their practice it will require active monitoring and following-up of the sector authorities from the ministries, disability NGOs and the Discrimination Ombud. It would support the enforcement of the new act if the ministry initiates monitoring mechanisms for compliance with the provisions: The ministry may initiate controls and tests, introduce voluntary or compulsory certification of accessibility (by third party or based on self-reported evaluation), annual reports from the enterprises and for public enterprises to use the letters of award to ensure compliance with and avoid violations of the accessibility provisions.

Some critical dimensions to be considered by the Norwegian Government

Compliance with the UN convention

21. The concept of Accessibility is specifically addressed in Article 9, but it is also a guiding principle of the Convention as a whole. The Convention marks the first time that accessibility is mentioned in an international human rights instrument, and it is defined within the Convention a highly comprehensive manner. It follows from Article 4.1 (General obligations) that the State parties shall undertake

22. "(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

23. (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities"

24. Norway will be encouraged to continue its work to take appropriate measures to promote accessibility as defined in Article 9 of the Convention:

> "To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. (...)"

25. It is a question whether the law proposal as it looks today will suffice to comply with the UN convention.

- First, the definition of universal design suggested by the 2005 Committee is narrower than what is commonly referred to: "Design or accommodation of the main solution as regards the physical conditions so that the normal function of the undertaking can be used by as many people as possible". In comparison the Norwegian State Council on Disability (1997) has defined universal design as "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design". See also the recent report on the definition of universal design commissioned by the Ministry of the Environment in Norway and the attached conference paper by R. Brynn, the Norwegian Centre for Documentation on Disability.
- Second, the law proposal does not provide the legal safeguard that people for whom the goods and services would be inaccessible by universal design will be provided accessibility in other ways.
- Third, the law proposal refers to access to "the main solution as regards the physical conditions" not accessibility to goods and services as such.

26. The aforementioned Article 4.1.b of the UN convention is to the effect that the States Parties shall take all appropriate measures (including legislation) to tackle discrimination with respect to the various rights contained in the Convention. So Article 9 (accessibility) must be read in light of the concept of 'reasonable accommodation'. What this effectively means is that where universal design is not (or not temporarily) available then alternative means must be provided. If not, then there is a colourable claim that Norwegian legislation (if enacted in present form) is underinclusive and fails to pass muster under the Convention.

Anticipatory reasonable accommodation

27. Whereas positive actions fall outside the scope of, but does not contradict, non-discrimination law and theory, the principle of reasonable accommodation is closely linked to civil-rights philosophy and non-discrimination.[2] Positive and affirmative actions apply a societal perspective on systematic differences between population groups. In comparison, the principle of reasonable accommodation pursues a more individual perspective which enables individual citizens to challenge actions that adversely impact on them. Rather than to bring about widespread structural change, 'reasonable accommodation' envisages an accumulation of individualised responses by employers and providers of goods and services to the difference of disability (or ethnicity, religion or any other ground covered). Cumulatively this helps bring about structural change, although that is not the primary focus. Of course, the more the would-be discriminator takes a cue from the concept of reasonable accommodation and acts pro-actively without waiting for a complaint, the more structural change is brought about.

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[2] G. Quinn 2007: *Disability discrimination law in the European Union*, f forthcoming bookchapter at Cambridge University Press (in press)

28. The obligations pursuant to the UN Convention will be limited by the principle of 'disproportionate or undue burden' (Art 2). This later principle may ensure that a sensible interventions in the market is undertaken and with the consent of stakeholders.

29. However, bear in mind the British advance on 'anticipatory reasonable accommodation' ('reasonable adjustment' under UK law): Three broad categories of adjustments may be required under Section 3 of the Disability Discrimination Act

- reasonable steps to change practices, policies and procedures which make it impossible or unreasonably difficult for disabled people to use a service;
- reasonable steps to change physical features of premises, where they make it impossible or unreasonably difficult for disabled people to use a service;
- and reasonable steps to provide an auxiliary aid or service where this would enable or facilitate the use of a service by disabled people.

30. The provisions were brought into force by reforms in 1999 and 2004. Because the wording of the duty refers specifically to 'disabled persons', it is said to owe duties to disabled people as a whole and, as a result, should esnure that they have considered and taken steps to esnure the accessibility of their services in advance of disabled customers notifying them of problems. This means that service providers cannot wait until a disabled person try to procure goods or services and discloses a disability, before thinking about what reasonable adjustments could be made to make the goods and services accessible.[3] The DDA Code of Practice regarding accessibility to goods and services reads:

> "6.14. A service provider's duty to make reasonable adjustments is a duty owed to disabled people at large. It is not simply a duty that is weighted in relation to each individual disabled person who wants to access a service provider's services. Disabled people are a diverse group with different requirements that service providers need to consider."
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> "6.16. Service providers should not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should be thinking now about the accessibility of their services to disabled people. Service providers should be planning continually for the reasonable adjustments they need to make, whether or not they already have disabled customers. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. In many cases, it is appropriate to ask customers to identify whether they have any particular requirements and, if so, what adjustments may need to be made. Failure to anticipate the need for an adjustment may render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defence to a claim that it was reasonable to have provided one."[4]

31. The added value of this concept is that

(1) there is no need to wait for a victim to lodge a complaint (the provider should be reasonably expected to anticipate and provide for the needs of an anticipated class of users),

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[3] C. Gooding and C. Casserley 2005: Open for all? Disability Discrimination Laws in Europe relating to Goods and Services. In A. Lawson and C. Gooding (Eds) *Disability Rights in Europe.* Hart Publishing

[4] Disability Rights Commission: Code of Practice. Rights of Access: services to the public, public authority functions, priuvate clubs and premises. 2006 (available from www.tso..shop.co.uk)

(2) the defendant may not be able to defend inaccessibility in the present on the basis of disproportionate burden if 'reasonable accommodation' could in fact have been provided early on.

32. The point of real insight here is that reactive, ad hoc solutions are often, if not usually, too late to be effective. Further, reactive solutions are often more labour intensive.

33. We would respectfully request that Norway follow British best practice in this regard.

34. There are reasons to believe that the European Commission will draft a new Directive on Goods & Services (which must be taken to include the provision of ICT). Of course, the European Court of Justice may infer the principle of anticipatory duty to accommodation from any new Directive. But it would be better if it were put explicitly into any new Directive. It is therefore also recommended that the Commission explicitly inserts this duty in a new Goods and Services directive.

35. It is too early yet to say whether the concept of 'anticipatory reasonable accommodation' will be inferred from the text of the Convention by the new UN Committee. The one thing for sure one may say is that both EU law and Norwegian law will need to pass muster under the Convention. The Commission is presently screening its laws and policies to see to what extent they need modification to enable ratification of the Convention to take place.

Overall objective of the Act

36. The provisions should be designed to achieve the main objectives and in line with the UN convention. All other provisions will follow from the main principle. To what extent the provisions are necessary and sufficient will have to measures against the overall main objective. It may very well be that new and other provisions will have to be considered in addition to universal design and reasonable accommodation when the needs arise. For instance, it may be suitable to introduce an *anticipatory* duty to accommodation (cf our request in paragraph 33) and to amend the labour code and the public procurement regulations.

Gradual improvements

37. The overall objective needs to be realistic and take into consideration the burden on providers and businesses. Therefore, it is suggested to set a reasonable timetable for gradual improvements in accessibility. An example on the need to access all ATMs will illustrate the reasonable and gradual approach.

38. For a building to be accessible not all rooms will normally have to be available. It will suffice that at sufficient number of rooms are available. One may imagine similar issues when it comes to ICT. Should all ATMs both inside and outside a bank be covered by the accessibility requirement or will it suffice that one inside and one outside is complies with universal design standards? The later may reduce the immediate costs for

the enterprise and be more realistic in the short run although the long-term objective may be to achieve accessibility to all ATMs.

Main solution
39. The definition of main solutions (Section 9) will have to be operationalized. It should be broadly based.

Major revision
40. The definition of what constitutes a major revision of ICT will have to be operationalized in the administrative regulations. It also should be broadly conceived so as not to preclude relief on the basis of technicalities.

Definition of space
41. The Norwegian government should make sure that the act also applies to virtual spaces, such as the Internet. See also UN Treaty issues, and note the extra-territorial implications identified below (e.g., Norwegian businesses doing business in the EU or elsewhere).

42. Consider the target.com case: In 2006, a class of blind plaintiffs from the National Federation of the Blind (NFB) filed an action against Target Corporation ("Target") seeking declaratory, injunctive, and monetary relief.[5]

43. Plaintiffs claim target.com, a website owned and operated by Target, is not accessible to blind customers and thereby violates US federal and state laws prohibiting discrimination against persons with disabilities. Target operates approximately 1,400 retail stores nationwide, and more than two hundred stores in California. By visiting target.com, customers may purchase items available in Target stores – refill a prescription, order photos, and so forth.

44. Plaintiffs allege target.com is not accessible to blind individuals because, although designing an accessible website is technologically simple and cost-effective, the site does not appropriately use alternative text or navigation links for use by screen reader software. Target claims the American with Disabilities Act (ADA) title III access provision covers access only to physical and not cyberspaces. In fact, the Target plaintiffs do not claim they are denied physical access to Target stores.

45. To date, the US courts addressing this issue under ADA title III conclude there must be a "nexus" between the challenged lack of service and the place of public accommodation. Target contends title III prohibits discrimination only at their "places" of business or store premises. The court disagreed with this position, concluding ADA title III "applies to the services of a place of public accommodation, not services in a place of public accommodation." (NFB, 2006). In contrast to this decision, in *Access Now v. Southwest Airlines* the court held plaintiff's title III claim failed because the

[5] Plaintiffs were represented by Disability Rights Advocates, a Berkeley-based non-profit law firm; Brown, Goldstein & Levy, a civil rights law firm in Baltimore; and Schneider & Wallace, a civil rights law firm in San Francisco. Peter Blanck subsequently affiliated with plaintiffs as co-counsel pro bono in this litigation.

inaccessibility of southwest.com prevented access to Southwest's "virtual" ticket counters, but these were not physical places and therefore not places covered as public accommodations under title III (Access Now, 2002). In 2007, in another case, Amazon.com (a virtual company with no physical stores) agreed to settled a dispute with NFB and make their website accessible to the blind.

46. In the Target case, two central questions are to be decided that are relevant to the Norway proposal: whether Target treats target.com as an extension of its "places" of business; and if so, does ADA title III cover Target's web-based merchandising strategies. The Target court aptly noted, "it is ironic that Target, through its merchandising efforts on the one hand, seeks to reach greater numbers of customers and enlarge its consumer-base, while on the other hand it seeks to escape the requirements of the ADA." (NFB, 2006, n. 4).

Undue burden (Section 9 and 10 in the Norwegian law proposal)

47. In large companies or enterprises based on franchises it may be an issue what is the relevant financial entity to consider when judging whether the duty to universal design or reasonable accommodation represents and undue or disproportional burden. For instance, the owner of a 7-11 kiosk or McDonald restaurant may argue that he or she runs a small enterprise (e.g., franchise) with a limited budget. It may be argued against this that the parent company, franchise chain or the industrial group as a whole is the relevant unit to consider. When the larger company issues a new franchising agreement the company should have an obligation include the accessibility requirements in the contract and accessibility requirements should be taken into consideration when determining the financial conditions for the franchise. If the smaller division or franchise cannot afford to pay the accommodation (retrofitting) to make the place accessible the parent company should be considered the legal entity to be held responsible.

48. Enterprises also may make the opposite argument. For instance in the shipping industry, the parent company may have large debts due to the long term investments in the building and rebuilding of ships. At the same time each ship – whether a cargo or a cruise line – may have considerable revenue. The notion is to carefully examine company form in assessing undue financial or administrative hardship.

Extraterritoriality

49. Will foreign businesses – otherwise public accommodations – doing business in Norway "cyberwaters" and without a physical presence in Norway be covered by the law proposal? Will, e.g., foreign companies with a web site addressing the Norwegian market be required to abide by Norwegian accessibility legislation? Assume local law will apply but does this have implications for other treaties or trade agreements?

50. In a related vein, consider the U.S. Supreme Court decision in *Spector v. Norwegian Cruise Line Ltd.* (2005), in which the Court held ADA title III (access provisions) applies to foreign-flag cruise ships operating in U.S. waters. In *Spector*, Norwegian Cruise Line, a Bermuda Corporation with a place of business in Florida, operated cruise ships from U.S. ports and provided passengers with cabins, restaurants, and recreation. Although

most passengers were U.S. residents, many were not. The tickets specified disputes between passengers and the cruise line were governed by U.S. law (Spector, 2005). ADA title III does not contain an access provision for foreign-flag cruise ships (interestingly, paralleling a lack of provisions for web access), but the U.S. Department of Justice interpreted title III to apply to U.S.- and foreign-flagged cruise ships in U.S. waters as covered public accommodations. The U.S. Supreme Court concluded title III may apply to foreign-flagged vessels in U.S. waters affecting the access rights of U.S. and non-U.S. citizens covered by the law: "This Court has long held that general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake." (Spector, 2005, p. 2177). As such, title III's access provisions may prohibit foreign e-businesses from discriminatory access practices toward persons with disabilities in U.S. cyberplaces, particularly when not posing an undue burden. Is such a concept and provision useful to be explicitly made in the new Norwegian law?

Good faith attempt

51. More moderate sanctions, for instance, may include orders to comply within a certain deadline, but no fines or a postponement of the duty to abide the accessibility provisions, for enterprises that prove they have made "good faith" or reasonable attempts to achieve accessibility but have failed to do so. On the other hand, such a clause may weaken the regulations and be exploited by the enterprises to excuse themselves for not abiding the accessibility requirements and postpone compliance with the regulations. Such a clause therefore should just be an affirmative defense to a charge of discrimination and not a complete rationale for non-compliance.

Legal standing

52. Who may raise complaints (legal standing)? Citizens only, NGOs or DPOs (disabled persons organizations), interested parties, parents etc.? Who may take cases to the court (need a lawyer or any citizen by themselves, Ombudsperson?)? When can you bring a case (jurisdiction)? In the USA you must have tried to use the services and found it inaccessible before you can litigate, and then reasonably be said that you want to use them in the future again. It will not suffice that NGOs test, e.g., web sites and find them inaccessible. The litigation will have to be based on de facto attempts of using the services or purchasing the goods. In contrast, the EU has endorsed the concept of anticipatory discrimination and accommodation; are these concepts applicable to the new law?

Copy right

53. The Copyright Directive (EC 2001) ensures that Member States may provide for exceptions or limitations in copy rights for the benefit of people with disabilities, which are directly related to the disability and o a non-commercial nature, to the extent required by the specific disability (Art 5.3.b). Israel has solved the disputed by anticipating that information will have to be made available in different formats. The State has agreed to pay for more copies than they actually buy ("buy one, pay for five").

Standards

54. The law should avoid limiting itself only to already known accessibility standards such as the W3C standards (of course these are excellent guidelines). The technology will continue to develop and it is impossible to anticipate the technological development. Therefore, the standards set should be general enough to accommodate later technology developments. It should be noted that too detailed standards may become a barrier for future accessibility improvements rather than guidelines to ensure necessary and sufficient minimum criteria to abide the accessibility requirement. The real test is equal access, the standards should not limit ways to achieve this goal.

55. In writing the standards it is important to consult with core interest groups to ensure that not only the interests of the more vocal groups in the business community and among disability NGOs will be taken into account. For instance, the needs of people who have hearing impairments are less responded than those with visual impairments. The law should encourage equal access across the spectrum of people with disabilities.

Invitation to further cooperation with the Digital Freedom Project

56. Blanck (Burton Blatt Institute, http://bbi.syr.edu), Rimmerman and Halvorsen, together with professors Gerard Quinn (National University of Ireland) and Bjørn Hvinden (NOVA), head the international research project Digital Freedom in the 21st Century for People with Disabilities, funded by the Research Council of Norway.

57. We enclose for reference: (1) a background paper by Peter Blanck on eAccessibility (forthcoming), (2 and 3) two presentations by Arie Rimmerman on accessible eGovernment and accessibility in general and (4) a recent paper on the UN convention by Gerard Quinn.

58. Peter Blanck and the Burton Blatt Institute will host the next seminar of the Digital Freedom project in *New York September 24-27, 2007.* We would be delighted and think it important if the ministry has the opportunity to be represented in the seminar. We expect a large number of international experts to attend. The timing is excellent in terms of the development of the new Norwegian law. We would be pleased to discuss the draft law proposal with you in further detail. Professor Gerard Quinn, co-director of the legal part of Digital Freedom project, will also chair one the sessions during the Ministerial conference in *Lisbon December 2-3, 2007.*

59. Lastly, it would be useful to include in the new law or agreement with the ministry or government a monitoring mechanism that provides periodic input into how the law's ICT equal access provisions are working; are they effective, is a benefit/cost analysis possible, can information regularly be made available to the disability community and the business community? Also, how can policy makers assess the impact of the law, and so forth. We believe that the Digital Freedom Project consortium may be in excellent position to help address such important questions. It will be crucial to commission such policy and research questions with the passage of the new law so that both prospective and retrospective information may be available in a timely fashion, as well as to other countries seeking to do business in Norway. We would be delighted to discuss this possibility further as you wish.

Appendix I

The Syse committee proposal of 2005:
Draft statute – Act relating to prohibition against discrimination on the basis of disability (Discrimination and Accessibility Act)

In Norwegian, the basis for discrimination is nedsatt funksjonsevne. It is difficult to find a precise English term for this central concept. In the WHO's terminology, the closest equivalent is strictly speaking impairment. However, since all legislation from English-speaking countries in this field uses the term disability, we have used the latter term to translate "nedsatt funksjonsevne". The Norwegian term "nedsatt funksjonsevne" denotes individual physical, mental and cognitive impairments without specifying degree or duration or requiring that the impairment has resulted in any impedimental consequences for the person concerned. Section 4, sixth paragraph, entails that the Act also protects against discrimination on the basis of past, future and assumed impairments and impairments of other persons. Disability thus denotes the protected ground, not a protected group. The purpose of this interpretation of disability as the protected ground is to ensure broad protection against discrimination on the basis of disability where the focus is on the discrimination itself and not on individual biological or medical conditions and their consequences.

Section 1 Purpose
The purposes of the Act are to ensure equality and promote equal opportunities for social participation for all persons regardless of disabilities and to prevent discrimination on the basis of disability.

The Act shall help to dismantle disabling barriers created by society and prevent new ones from being created.

Section 2 Scope and extent
The Act shall apply in all areas of society with the exception of family life and other circumstances of a personal nature.

The Act shall apply in the Realm with the exception of Svalbard and Jan Mayen. The King may issue regulations concerning application of the Act in Svalbard and Jan Mayen, and may provide special rules giving due consideration to local conditions. The King may decide whether and to what extent the provisions of this Act shall apply to persons on board Norwegian ships engaged in foreign trade, to Norwegian civil aircraft in international traffic and to installations and vessels at work on the Norwegian continental shelf.

Section 3 Activity obligation
Public authorities and organizations of employers and employees shall make active, targeted and systematic efforts within their spheres of operation to promote the purposes of the Act.

Employers in the public and private sectors shall make active efforts to promote the purposes of the Act within their undertakings.

Section 4 Prohibition against discrimination
Direct and indirect discrimination on the basis of disability is prohibited.
For the purposes of this Act, direct discrimination shall mean that the purpose or effect of an act or omission is such that persons on the basis of disability are treated less favourably than other persons are, have been or would have been treated in a comparable situation.

For the purposes of this Act, indirect discrimination shall mean any apparently neutral decision, condition, practice, act or omission that results in persons on the basis of disability being placed in a particularly unfavourable situation compared with other persons.

For the purposes of this Act, indirect discrimination in connection with employment shall mean any apparently neutral decision, condition, practice, act or omission that in fact has the effect that a job applicant or employee is placed in a less favourable situation than other job applicants or employees on the basis of disability.

Different treatment that is necessary in order to achieve a legitimate aim and which does not involve disproportionate intervention in relation to the person or persons so treated is not regarded as discrimination pursuant to this Act.

The prohibition against discrimination in the present section applies to discrimination on the basis of present disability, past disability, possible future disability or assumed disability as well as discrimination on the basis of other persons' disability.

It is prohibited to be an accessory to any breach of the prohibition against discriminateon laid down in the present section.

Discrimination owing to inadequate physical accommodation is exhaustively regulated in sections 9 and 10.

Section 5 Prohibition against harassment
Harassment on the basis of disability is prohibited.

For the purposes of this Act, harassment shall mean acts, omissions or remarks that seem or aim to seem offensive, frightening, hostile, degrading or humiliating.

The prohibition against harassment laid down in the present section applies to harassment on the basis of disability, past disability, possible future disability or assumed disability and harassment on the basis of other persons' disability.

It is prohibited to be an accessory to any breach of the provision laid down in the first to the third paragraph.

Employers and the managements of organizations or education institutions shall within their spheres of responsibility take precautions against and seek to prevent the occurrence of harassment in breach of the present section.

Section 6 Prohibition against instructions
It is prohibited to instruct anyone to carry out acts of discrimination or harassment in breach of sections 4 and 5. It is also prohibited to instruct anyone to carry out acts of reprisal in breach of section 7.

It is prohibited to be an accessory to any breach of the provision laid down in the first paragraph.

Section 7 Prohibition against reprisal

It is prohibited to carry out reprisals against anyone who has made a complaint concerning a breach of the provisions of sections 4, 5, 6, 9 or 10 or who has let it be known that a complaint may be made. This shall not apply if the complainant has acted with gross negligence.

The first paragraph applies correspondingly to witnesses in a complaint case.

It is also prohibited to carry out reprisals against anyone who has omitted to comply with an instruction that is in breach of section 6.

It is prohibited to be an accessory to any breach of the prohibition against reprisal laid down in the present section.

Section 8 Positive action
Specific measures that help to promote the purpose of the Act shall not be regarded as discrimination pursuant to this Act. Such measures shall cease when the purpose of it has been achieved.

Section 9 Obligation regarding general accommodation (universal design)
Public undertakings shall make active and targeted efforts to promote universal design within the undertaking. The same applies to private undertakings that offer goods and services to the general public.

By universal design is meant design or accommodation of the main solution as regards the physical conditions so that the normal function of the undertaking can be used by as many people as possible.

Public undertakings and private undertakings that offer goods and services to the general public are obliged to ensure that universal design is applied to the normal functions of the undertaking provided this does not entail an undue burden for the undertaking. When assessing whether the design or accommodation entails an undue burden, particular importance shall be attached to the necessary costs associated with the accommodation, the undertaking's resources, the consequences of the accommodation in dismantling disabling barriers, whether the normal function of the undertaking has a public character, safety considerations and the consideration of cultural heritage.

Breach of the obligation to ensure the application of universal design pursuant to the third paragraph is regarded as discrimination if a person with a disability is adversely affected by the inadequate accommodation.

It is not regarded as discrimination pursuant to the fourth paragraph if the undertaking meets specific provisions laid down in statutes or regulations concerning the obligation to implement universal design.

Section 10 Obligation regarding individual accommodation
Employers are obliged within reason to individually accommodate workplaces and tasks in order to ensure that employees or job applicants with a disability are able to take up or continue employment, have access to training and other forms of competence development as well as perform work and have a potential for progress in their work equal with other employees.

Schools and other educational institutions are obliged within reason to individually accommodate the educational institution and the teaching in order to ensure that pupils or students with disabilities are given equal opportunities for education and training.

Municipal authorities are obliged within reason to individually accommodate day care facilities in order to ensure that children with disabilities are given equal opportunities for development and activity.

Municipal authorities are obliged within reason to individually accommodate public services such as day centres, respite care facilities, etc. that are of a permanent nature for individuals and particularly serve persons with disabilities.

The obligation pursuant to the first to the fourth paragraph does not include accommodation entailing an undue burden. When assessing whether an accommodation entails an undue burden, particular importance shall be attached to the necessary costs of the accommodation, the undertaking's resources and the effect of the accommodation in relation to the dismantling of disabling barriers.

Breaches of the obligation within reason to individually accommodate pursuant to the first to the fifth paragraph shall be regarded as discrimination.

Section 11 Obligation to implement universal design to buildings and constructions, etc.

Buildings, constructions and developed outdoor areas intended for the use of the general public that are erected or completed following major alterations (general renovation) after 1 January 2009 shall be subject to universal design.

Buildings, constructions and developed outdoor areas intended for the use of the general public shall be subject to universal design from 1 January 2019.

The planning and building authorities shall ensure that the requirements of the first and second paragraphs are observed when dealing with plans and applications for building permission pursuant to the Planning and Building Act.

The planning and building authorities may grant exemptions from the obligation pursuant to the first and second paragraphs where there are conservation considerations or other particularly weighty grounds.

Appeals against such exemptions may be brought before the Equality and Anti-Discrimination Tribunal by organizations representing persons with disabilities. The Equality and Anti-Discrimination Tribunal may decide that such exemptions shall be revoked.

The King may issue regulations with further provisions concerning the obligation to implement universal design pursuant to the first and second paragraphs.

Pursuant to section 12 of the Equality and Anti-Discrimination Ombud Act, the state planning and building authority may institute legal proceedings for full review of revocation decisions made pursuant to the fifth paragraph.

Section 12 Burden of proof

If there are circumstances that give reason to believe that there has been a breach of any of the provisions of sections 4, 5, 6, 7, 9 or 10, such a breach shall be assumed to have taken place unless the person responsible for the act, omission or remark produces evidence showing that no such breach has taken place.

Section 13 Employers' obligation to disclose information in matters concerning appointments

A job applicant who believes himself or herself to have been discriminated against in breach of section 4, first paragraph, or section 10, first paragraph, may demand that the employer provide information in writing concerning the education, practice and other clearly ascertainable qualifications of the appointee for the post in question.

Section 14 Right of organizations to act as an agent, etc.

An organization whose purpose is, wholly or partly, to oppose discrimination on the basis of disability may be used as an agent in administrative proceedings pursuant to this Act.

A person appointed by and associated with an organization whose purpose is, wholly or partly, to oppose discrimination on the basis of disability may be used as a legal representative in cases brought before the courts pursuant to this Act. This shall not apply in such cases as referred to in section 44, first paragraph, of the Civil Procedure Act.

The court may refuse to approve such an authority to conduct legal proceedings for another person if, in the view of the court, there is a risk that the legal representative is not sufficiently qualified to satisfactorily defend the interests of the party concerned.

In addition to the authority referred to in section 46 of the Civil Procedure Act, a legal representative shall at the same time present a written orientation from the organization concerning the legal representative's qualifications.

Section 15 Enforcement

The Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal shall, with the exception of section 16, monitor compliance with and help to implement this Act, cf. the Equality and Anti-Discrimination Ombud Act.

The planning and building authorities shall oversee and help to implement this Act in accordance with section 11.

Section 16 Compensation

A person who wilfully or through gross negligence acts in breach of section 4, section 5, first to fourth paragraph, or section 7 may be ordered to pay compensation to the aggrieved person. Such compensation shall be stipulated in the amount that is found reasonable in view of the circumstances of the parties and other facts of the case.

A job applicant or employee may demand compensation in respect of a breach of section 4, section 5 first to fourth paragraph or section 7 in connection with employment regardless of the guilt of the employer. The same applies for a person who applies for membership of or who is a member or participant of an employee, employer or professional organization.

Compensation in respect of a breach of the obligation regarding individual accommodation pursuant to section 10 may nevertheless be demanded pursuant to the provisions of the first and

second paragraphs if an order to stop, rectify, etc. pursuant to the Equality and Anti-Discrimination ombud Act cannot remedy the consequences of the discrimination.

Compensation for financial loss resulting from breaches of this Act, may be demanded pursuant to the general principles of the law of damages.

Section 17 Commencement
The Act shall enter into force on the date decided by the King.

Appendix II

The 2005 Syse Committee's presentation of their reasons for the design of the draft accessibility provisions (Section 9-11) (English Summary)

"The Committee has proposed that such accessibility requirements be laid down in three separate provisions. In section 9, public undertakings and private undertakings that offer goods and services to the general public are required to make active and targeted efforts regarding *general accommodation* (universal design). By *universal design* is meant "design or accommodation of the main solution as regards the physical conditions so that the normal function of the undertaking can be used by as many people as possible". Public undertakings and private undertakings that offer goods and services to the general public are furthermore obliged to ensure that universal design is applied to the normal functions of the undertaking provided this does not entail an undue burden for the undertaking. When assessing whether the design or accommodation entails an undue burden, particular importance shall be attached to the necessary costs associated with the accommodation, the undertaking's resources, the consequences of the accommodation in dismantling disabling barriers, whether the normal function of the undertaking has a public character, safety considerations and the consideration of cultural heritage. Breach of the obligation to ensure the application of universal design pursuant to the third paragraph is regarded as discrimination if a person with a disability is adversely affected by the inadequate accommodation. It is not regarded as discrimination if the undertaking meets specific provisions laid down in statutes or regulations concerning the obligation to implement universal design.

In section 10, obligations regarding individual accommodation within reason are imposed in four situations on the basis that such accommodation is most appropriate in relations involving a *special responsibility* regarding the person with a disability, that the relation has a permanent character and that the arena concerned constitutes *an essential part of the life of the individual* . Persons subject to the Act are, respectively, employers (in order to ensure that employees or job applicants with disabilities are able to take up or continue employment, have access to training and other forms of competence development as well as perform work and have a potential for progress in their work on an equal footing with other employees), schools and other educational institutions (in order to ensure that pupils or students with disabilities are given equal opportunities for education and training), and municipal authorities (firstly, in order to ensure that pre-school children with disabilities are given equal opportunities for development and activity, and, secondly, to ensure accessibility to day centres, respite care facilities, etc. of a permanent nature and are particularly designed for persons with disabilities). Here too, it is proposed that the obligation does not include accommodation entailing an undue burden. Breaches of the obligation to individually accommodate within reason, pursuant to section 10, shall be regarded as discrimination.

In cases involving breaches of the accommodation obligations pursuant to sections 9 and 10, compensation shall not be the normal reaction. Accessibility will only be improved if *the Equality and Anti-Discrimination Tribunal* uses its decision-making powers to order stoppage, rectification, etc. This is made clear in the proposed statute.

The Committee assumes that section 11 contains the most controversial proposals. Here are laid down clear obligations that "buildings, constructions and developed outdoor areas intended for the use of the general public" shall be subject to universal design from specified dates. These dates are not the same for new and existing buildings, etc. The Committee has assessed that the proposed statute can be adopted and enter into force on 1 January 2007 at the earliest. The date

for enforcement in relation to new buildings, etc. has therefore been set to 1 January 2009. Buildings, etc. erected or completed following major alterations (general renovation) and that are designed for the use of the general public shall, after this date, be subject to universal design. In the case of buildings, constructions and developed outdoor areas completed prior to this date and intended for the use of the general public, the requirement regarding universal design commences on 1 January 2019. This will involve an obligation to make necessary alterations before the final date for compliance with the obligation unless major alterations are carried out before this date. The Committee has proposed that the ordinary planning and building authorities shall have responsibility for ensuring that the requirements of the first and second paragraphs are observed by processing plans and applications for planning permission pursuant to the Planning and Building Act. During its work, the Committee has had necessary contact with the Committee preparing a new Building and Planning Act, which is due to submit its findings in 2005. The Committee regards it as desirable that corresponding obligations are laid down in this Act, which is the main legal instrument for the ordinary planning and building authorities. It provides for restrictive granting of dispensations when there are important conservation considerations or other special considerations (safety regulations, and escape routes in the event of fire, etc.). Dispensations from the planning and building authorities may be brought before the Equality and Anti-Discrimination Tribunal by representative organizations for persons with disabilities, see section 14. The state planning and building authority can institute legal proceedings regarding the validity of such a revocation decision. "