

Accessibility and Equality Act – review and commentary.

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1 Introduction

1.1 What is the Equality Act and why is it relevant?

These are the basics of the Act, accessible to every reasonable man in the public domain. It is not in legalese and is easily accessible in a millisecond Google search.

The rules on accessibility are quite clear. The risks and the implications of non-compliance are far-reaching.

The Act came into force in 2010, bringing together and superseding the below Acts of Parliament:

- 1) Equal Pay Act 1970
- 2) Sexual Discrimination act 1975
- 3) Race Relations Act 1976
- 4) Disability Discrimination Act 1995
- 5) Employment Equality (religion or belief) Regulations 2003
- 6) Employment Equality (sexual orientation) Regulations 2003
- 7) Employment Equality (age) Regulations 2003
- 8) Equality Act 2006 Part 2
- 9) Equality Act (sexual orientation) Regulations 2007

The Equality and Human Rights Commission have written clear guidance: 'if a person or an organisation who has duties under the Equality Act 2010's provisions on services, public functions and associations does what this guidance says they must do, it may help them to avoid an adverse decision by a court in proceedings brought under the Equality Act 2010.'*

*Equality Act 2010 Guidance for Service Users Vol 1 of 7.

1.2 To whom does it apply?

Taking an overview of the guidance as a whole, the guidance discusses the deliverance of services: staff, places, adverts and marketing; written materials; websites; telephone services and call centres. This also applies in the same way to a business, a public sector organisation, a voluntary or community sector organisation, or an association or club.

It also applies to voluntary or community sector organisations including a charity or religion or belief organisation, which is providing goods, facilities or services to the public or a section of the public.

Organisations like this are sometimes called 'third sector organisations.' These are organisations that are not operating for profit in the private sector.

They are not public bodies like local councils or government departments operating the public sector, although they may receive money from public bodies and may help deliver public services.

In the guide to the Act, a charity means an organisation which has been set up for charitable purposes only. They take a distinctive legal form and have a special tax status. Charities must do good to the public, not to a specified individual. Their aims, purposes or objectives must be only those which the law recognises as charitable. Registered charities must obey a number of regulations and rules set out in charity law.

Does equality law apply? If a voluntary or community sector organisation or charity or religion or belief organisation provides any goods, facilities or services to members of the public, it must make sure it does what equality law says it must do.

It doesn't matter whether the service the organisation provides is free (as many charitable services are) or if people have to pay towards it. The size of the organisation does not matter either.

Equality law effects everyone responsible for running an organisation or who might do something on its behalf, including staff or volunteers if the organisation has them.

2 Website and Internet Services

2.1 Summary

Websites and internet services being relevant, it has the following to say:

'if someone provides services through a website – such as online shopping, direct marketing or advertising – they are known as an Information Society Service Provider (ISSP).

This applies if they have a one-page website which they maintain themselves. It also applies if they have a very sophisticated website maintained by a professional web design company. And it applies to anything in between. If you believe that you have been unlawfully discriminated against by an ISSP, and the ISSP is established in the UK, you can bring a claim in the UK courts against the UK-based ISSP. You do not have to be in the UK, so long as you are in a European Economic Area (EEA) member state (UK as of / Apr. 2020).

An ISSP must make sure:

- It does not allow discriminatory advertisements and information to appear on its website (whatever the advertisement is for).
(example: a local newspaper accepts an advertisement which says that jobs at a particular company are only open to people of a particular ethnic or national origin. The newspaper puts it on its website. The advertisement directly discriminates because of race, and the newspaper as well as the advertiser may be liable for discrimination: the advertiser as an employer and the newspaper as an ISSP)
- That it does not accept requests for the placing of information that unlawfully discriminates against people because of a protected characteristic in using a service.
(example: an online holiday company established in the UK refuses to take bookings for shared accommodation from same-sex couples. A lesbian or gay couple could bring a claim for direct discrimination because of sexual orientation in the British courts regardless of whether the couple were in the UK or another EEA member state)
- That it makes reasonable adjustments to make sure that its website is accessible to disabled people

2.2 Reasonable Adjustments

Where this is a reasonable adjustment (and, as with other written information it is likely to be), a website must be accessible to all users – this will include, for example:

- People with visual impairments, who use text-to-speech software
- People with manual dexterity impairments, who cannot use a mouse
- People with dyslexia and learning difficulties

In making reasonable adjustments, a service provider is not allowed to wait until a disabled person wants to use their services. They must think in advance about what people with a range of impairments might reasonably need. If they have not done this, and a disabled person wants to use a service, then the service provider must make reasonable adjustments as quickly as possible (could the defendant not then say they'll make reasonable adjustments to keep themselves from litigation before it happens? Countering the best way to do this is to use a service like Sitemorse anyway).

If you want to know more about how service providers can make their websites accessible for disabled people with a range of impairments, the Royal National Institute of Blind People provides information (website).

'Equality and Good practice: what to look for

Even if, in an organisation's circumstances, it is not a reasonable adjustment for it to make its website fully accessible to as many people as possible, an organisation can choose to do this.'

Exceptions:

Where a service provider only has a limited role, it is excused from the responsibilities for an ISSP. An example of this is, if it only temporarily storing information and does not start sending it, decide who to send it to or change the information it is sending. This covers, for example, websites that temporarily transmit or store messages between users.

If an ISSP is not based in the UK, then the laws of the country where it is based will apply to it, rather than UK equality law.

2.3 When a service provider is responsible for what other people do (Under Vol 3)

It is not just the people in charge of the organisations providing goods, facilities or services to the public or carrying out public functions who must avoid unlawful discrimination, harassment and victimisation.

If another person who is:

- Employed by the service provider, or
- Carrying out a service provider's instructions (who the law calls the service provider's agent)

Does something that is unlawful discrimination, harassment or victimisation, the service provider can be held legally responsible for what they have done.

2.4 When a service provider can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation

A service provider is legally responsible for acts of discrimination, harassment and victimisation carried out by its workers in the course of their employment.

A service provider will also be legally responsible as the 'principal' for the acts of their agents done with their authority. Their agent is someone a service provider has instructed to do something on their behalf, even if they do not have a formal contract with them.

As long as:

- The worker was acting during the course of their employment - in other words, while they were doing their job, or
- The agent was acting within the general scope of their principal's authority – in other words, while they were carrying out the service provider's instructions.

It does not matter whether or not the service provider:

- Knew about, or
- Approved of

What their worker or agent did.

However, a service provider will not be held legally responsible if they can show that:

- They took all reasonable steps to prevent a worker employed by them acting unlawfully.
- An agent acted outside the scope of their authority (in other words, that they did something so different from what the service provider asked them to do that they could no longer be thought of as acting on the service provider's behalf).

2.5 How a service provider can reduce the risk that they will be held legally responsible

A service provider can reduce the risk that they will be held legally responsible for the behaviour of their workers or agents if they tell them how to behave so that they can avoid unlawful discrimination, harassment or victimisation.

This does not just apply to situations where a service provider and their staff are dealing face-to-face with you, but also to how they plan their services.

When a service provider is planning their services, they need to make sure that their decisions, rules or ways of doing things do not cause:

- Direct discrimination, or
- Indirect discrimination that they cannot objectively justify, or
- Discrimination arising from disability that they cannot objectively justify, or
- Harassment

And that they have made reasonable adjustments for disabled people.

Under the Act, there is the 'duty to make reasonable adjustments to remove barriers for disabled people.'

Equality law recognises that bringing about equality for disabled people may mean changing the way in which services are delivered, providing extra equipment and/or the removal of physical barriers.

There is a duty to make reasonable adjustments.

The duty to make reasonable adjustments aims to make sure that a disabled person can use a service as close as it is reasonably possible to get the standard usually offered to non-disabled people.

When the duty arises, you are under a positive and proactive duty to take steps to remove or prevent these obstacles.

If you are providing goods, facilities or services to the public, or a section of the public, or carrying out public functions, or running an association and you find there are barriers to disabled people in the way you do things, then you must consider making adjustments (in other words, changes). If those adjustments are reasonable for you and your organisation to make, then you must make them.

2.6 The duty is 'anticipatory'

This means that you cannot wait until a disabled person wants to use your services, but must think in advance (on an ongoing basis) about what disabled people with a range of impairments might reasonably need, such as people who have visual impairment, a hearing impairment, a mobility impairment or a learning disability.

Many of the adjustments you can make will not be particularly expensive, and you are not required to do more than it is reasonable for you to do. What is reasonable for you to do depends, among other factors, on the size and nature of your organisation and the nature of the goods, facilities and services you provide.

If, however, a disabled person can show that there were barriers you should have identified and reasonable adjustments you could have made, they can bring a claim against you in court, and you may be ordered to pay them compensation as well as make the reasonable adjustment.

As well as being something you are required by equality law to do, making reasonable adjustments will help a wider range of people use your services.

Once you have made a reasonable adjustment, don't forget to tell people about it. For example, put up a sign at your premises, include in it information you publish (make sure you provide alternative formats if appropriate) and put it on your website. This is not just because it will bring more customers; it is an essential part of meeting the duty, if the adjustment is not reasonably apparent to disabled people, they may still think that they cannot use your services and in some circumstances, this could mean you have not met the duty.

The guidelines go on to look at the following points:

- The 3 requirements of the duty
 - Are disabled people at a substantial disadvantage?
 - Working out what needs to change
 - What is meant by 'reasonable'
 - The continuing duty on organisations
 - Who pays for reasonable adjustments?
 - When the duty is different (associations; rented premises; transport)
-

3 The 3 requirements of duty

The duty contains three requirements that apply in situations where a disabled person would otherwise be placed at a substantial disadvantage compared with people who are not disabled.

- The first requirement involves changing the way things are done (equality law talks about where the disabled service user is put at a substantial disadvantage by a provision, criterion or practice of the service provider).
- Does your organisation have rules or ways of doing things, whether written or unwritten that present barriers to disabled people?

A practice may have the effect of excluding disabled people from enjoying access to your services. Or it may create a barrier or hurdle that might put disabled people at a substantial disadvantage to access your services. It might be reasonable for you to stop the practice completely or to change it so it no longer has that effect.

You must ask yourself:

- Could you be more flexible about where or how you provide your services? Could you or your staff change a policy, criterion or practice where this is needed to remove a barrier?
- Do you insist on particular forms of communication, such as putting requests in writing? Or particular proof of identity such as a driving licence?

In addition, where you provide information to customers or clients, you must take steps to ensure that the information is provided in an accessible format.

- The second requirement involves making changes to overcome barriers created by the physical features of your premises (N/A).
- The third requirement involves providing extra aids and services, such as providing extra equipment or providing a different, or additional, service (which equality law calls axillary aids or auxiliary services). You must take reasonable steps to provide axillary services if this would enable, or make it easier for, disabled people to make use of any of your series.

What kind of equipment or service will depend very much on the individual disabled person and what your organisation does? However, you may be able to think in advance about some things that will help particular groups of disabled people.

Technological solutions may be useful in overcoming communication barriers, but sometimes a person offering assistance is what is needed.

4 Are disabled people at a substantial disadvantage?

Questions:

- The way you do things
- Any physical features of your premises
- Absence of axillary aid or service

Puts disabled people at a substantial disadvantage compared with people who are not disabled.

Anything that is more than minor or trivial is a substantial disadvantage.

If a substantial disadvantage does exist, then the duty to make reasonable adjustments does arise.

The aim of the adjustments you make is to remove the substantial disadvantage.

But you only have to make adjustments that are reasonable for you.

5 Working out what needs to change

If you look at the definition of disability, you will immediately realise that disabled people are a diverse group with different requirements. No single aspect of the way you deliver your services will create barriers for all disabled people, or, in most cases, for disabled people generally.

A practice, or a feature of your premises which is a barrier for people with a particular impairment may present no difficulties for others with a different impairment.

Remember, the duty is a duty to disabled people in general. You must make reasonable adjustments, even if you do not know that particular customer, client, service user or member is a disabled person or even if you believe you currently have no disabled customers, clients, service users or members.

On the other hand, once you are aware of the requirements of a particular disabled person who uses or seeks to use your services, it might then be reasonable for you to take a particular step to meet these requirements. This is particularly so when somebody has pointed out the difficulty they face in accessing services, or has suggested a reasonable solution to that difficulty.

You are not expected to anticipate the needs of every individual who may use your service. You are required to think about and take reasonable steps to overcome features that may create a disadvantage for people with a particular kind of impairment e.g. people with visual impairments, hearing impairments, mobility impairments, learning disabilities and mental health conditions.

6 What is meant by reasonable?

You only have to do what is reasonable. When deciding whether an adjustment is reasonable, you can consider:

- How effective the change will be in assisting disabled people in general or a particular customer, client, service user or member.
- Whether it can actually be done
- The cost
- Your organisation's resources and size.

Your overall aim should be, as far as possible, to remove any disadvantage faced by disabled people.

You can consider whether an adjustment is practicable. The easier the adjustment is, the more likely it is to be reasonable. However, just because something is difficult does not mean that it cannot be reasonable. You need to balance it against other factors.

If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as impracticability or lack of effectiveness) made it unreasonable.

Your size and resources are another factor. If an adjustment costs a significant amount, it is more likely to be reasonable for you to make it if you have substantial financial resources. Your organisation's resources must be looked at across your whole organisation, not just the branch or section that provides the particular service.

This is an issue which you have to balance against the other factors.

In changing policies, criteria or practices, you do not have to change the basic nature of the service you offer.

If, having taken all the relevant issues into account, you decide that an adjustment is reasonable, then you must make it happen.

7 The continuing duty on organisations

The duty to make reasonable adjustments is a continuing duty. You should keep the duty and the ways you are meeting the duty under regular review in light of your experience with disabled people wishing to access your services. It is not something which simply needs to be considered once and once only, and then forgotten.

What was originally a reasonable step to take may no longer be sufficient, and the provision of further, different adjustments might then have to be considered.

Equally, a step that might previously have been unreasonable for a service provider to have, could subsequently become a reasonable step in light of changed circumstances. For example, technological developments may provide new or better solutions to the problem of inaccessible services.

8 Who pays for reasonable adjustments?

If an adjustment is reasonable, you must pay for it. You are not allowed to ask a disabled person to pay for it, even if you have made it in response to their request and even if it has cost you extra to provide it.

Even if you charge other people for a service, such as delivering something to their home, if the reason you are providing a service to a disabled person is a reasonable adjustment, you must not charge the disabled person for it. But if the disabled person is using the service in exactly the same way as other customers, clients, service users or members. Then you can charge them the same as you charge other people.

9 What to do if someone says they've been discriminated against?

Key applicable points:

- Where claims are brought
- Time limits for bringing a claim
- The standard and burden of proof
- What the court can order you to do

This is applicable if you are:

- A service provider
- Carrying out public functions
- An association including private clubs and political parties
- A premises provider, whether you provide housing or commercial premises
- In some circumstances, an education provider

Any claim against you that someone has been discriminated against (including that there has been a failure to make reasonable adjustments), harassed, or victimised on the basis of a protected characteristic will be brought against you in the County Court in England and Wales and the Sheriff in Scotland.

If you are a public authority, a person who wishes to claim discrimination may also bring a claim for judicial review in the High Court in England and Wales or the Court of Session in Scotland. Different procedures and time limits apply to bringing such claims.

10 Time limits for bringing a claim

If someone wants to bring a claim of unlawful discrimination, harassment or victimisation relating to equality law, they must bring it within six months of the act they are complaining about.

If the person is complaining about behaviour over a period of time, then in certain circumstances the six months begins at the end of the period of time.

If the person is complaining about a failure to do something, for example to make reasonable adjustments, then the six-month period begins when the decision was made not to do so. If there is no solid evidence of a decision, then the decision was assumed to have been made either:

- When the person who fails to do the thing, does something else which shows they don't intend to do it
- At the end of the time when they might reasonably have been expected to do the thing.

A court can hear a claim if it is brought outside this time limit if the court thinks it would be 'just and equitable' for both sides to do this.

11 The standard and burden of proof

The standard of proof in discrimination cases is the usual one in civil (non-criminal) cases. Each side must try to prove the facts of their case are true on the balance of probabilities, in other words, that it is more likely than not, in the view of the court or tribunal that their version of events is true.

If someone is claiming unlawful discrimination, harassment or victimisation against you, then the burden of proof begins with them. They must prove enough facts from which the court can decide, in absence of any other explanation, that the discrimination, harassment or victimisation has taken place.

Once they have done this, then, in the absence of any other explanation, the burden of proof shifts onto you that someone whose actions or omissions you were responsible for did not discriminate, harass or victimise the person making the claim.

12 Further questions which need to be explored

These are questions of law and need to be explored in more detail. Yes, we have buckets of US case-law but as such nothing to go on thus far in the UK.

We cannot expressly base ourselves on the US case law due to the differences in our corresponding legal systems. However, we can look at the following as potentials, and remind ourselves of similar cases, remembering that in the English Legal System it is the principle which can be applied to the facts of the case and not the other way around.

12.1 Can it be Misrepresentation?

What is misrepresentation?

It is an untrue statement of fact or law made by Party A (or its agent) to Party B which induces Party B to enter into a contract with Party A thereby causing Party B loss. An action for misrepresentation can be brought in respect of misrepresentation of fact or law.

There are three types of misrepresentation:

1) Fraudulent misrepresentation:

Where a false representation has been made knowingly, without belief in its truth, or recklessly as to its truth.

2) Negligent misrepresentation:

A representation made carelessly and in breach of duty owed by Party A to Party B to take reasonable care that the representation is accurate. If no 'special relationship' exists, there may be a misrepresentation under Section 2(1) of the Misrepresentation Act 1967 where a statement is made carelessly or without reasonable grounds for believing its truth.

3) Innocent misrepresentation:

A representation that is neither fraudulent nor negligent.

The remedies for misrepresentation are rescission and/or damages. For fraudulent and negligent misrepresentation, the claimant may claim rescission and damages. For innocent misrepresentation, the court has discretion to award damages in lieu of rescission but not both.

For our purposes we are looking mainly at negligent misrepresentation. They have been TOLD yet they choose to ignore.

In terms of accessibility, this can be applied to Accessibility Statements. An Accessibility Statement may be knowingly or otherwise misrepresentation. It is information accessible in the public domain. Regarding an Accessibility Statement this is even more pertinent as it is information to which one has direct access or has been advised of, and yet the organisation is making claims of compliance for instance, to the contrary.

It is undeniable that there exist many tools, service and products that offer accessibility testing and an organisation has a duty of care to ensure they are using the relevant tools available to validate their claims. There remains, unfortunately, no excuse.

In simple terms of online misrepresentation, one can cite such examples of Kellogg's UK, who were recently hit with a ban by the Advertising Standards Authority for their claims of the health benefits of their "Special K" product. They recently claimed that Special K porridge was "full of goodness" and that their Nutri K Flakes were "nutritious". However, the company failed to back up this message with any specific health benefits or related ingredients despite the fact that the branding on the Special K website is all about health and nutrition. Their latest range is called 'nourish' cleverly uses this disclaimer to back it up: "Special K Nourish is a source of vitamin D and vitamin B2. Enjoy as part of a varied and balanced diet and a healthy lifestyle." Other examples include the painkillers, Nurofen. In a recent advert for Nurofen Back and Joint Pain, the company suggested that the product had a special mechanism to target this area of the body, which it obviously does not. In a landmark ruling, the Advertising Standards Authority banned the advert completely. Nesquik and Vitaminwater have also had similar rulings for misrepresentation.

12.2 Due Diligence – where is it?

Again, based on the ‘reasonable man’ theory, the company will be expected in light of the above to have done its due diligence in terms of its website accessibility.

Should it have employed a person or agent to do this for it, it is still ultimately responsible.

14 Document History

Amendment history

Date Issued	Version No.	Reasons for change
15/01/2020	0.01	First draft
07/02/2020	0.02	Additional material
17/02/2020	0.03	Review, PS
19/04/2020	1.00	Internal draft
27/04/2020	1.01	Inc of misrepresentation

Distribution list

Name	Organisation/role	Relevant sections

Related documentation

Reference No	Title	Author	Version and date
	Equality Act 2010	UK Gov	2015
	Equality Act Guidelines	UK Gov	16 June 2015
	EU Directive on the accessibility of public sector websites and mobile apps (Directive (EU) 2016/2102 using European standard EN 301 549 V1.1.2 (2015-04)).	EU	2016
	WCAG 2.1	Accessibility Guidelines Working Group	5 June 2018

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