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Disability in Times of Emergency: Exponential Inequality and the Role of Reasonable Accommodation Duties

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1. Introduction

There is ample evidence that people with disabilities have been disproportionately adversely affected by the COVID-19 pandemic. This relates not only to the risks of contracting the virus and death, but also to their opportunities to access basic necessities such as food, healthcare and essential public health information. In this chapter we reflect on the value of legislation which prohibits disability discrimination in such an unprecedented situation. Specifically, we explore whether the reasonable accommodation duty, which is found in disability equality law, is 'fit for purpose' in times of crisis and whether variations of the classic reasonable accommodation duty might be better suited to the task.

Modern disability equality law, at the national and supranational (eg EU and UN) level, goes beyond the prohibition of direct and indirect discrimination, and establishes an obligation to accommodate the needs of disabled individuals. The reasonable accommodation obligation requires duty-bearers, such as employers or service providers, not to ignore disability, as is the case with regard to most protected grounds covered by non-discrimination law, but specifically to take disability into account, and to make an adjustment, alteration or accommodation to their standard practices, policies and structures in order to meet the needs of a particular disabled individual.

One limitation of the 'traditional' reasonable accommodation duty is that it is ex post, in that it is triggered only when an individual with a disability indicates that they are facing a barrier. This allows duty-bearers to ignore the needs of disabled people up until the point that an

accommodation request is made, and not to consider in advance the impact of their policies, even on broad groups of disabled people who have predictable needs, such as blind people or people who use wheelchairs. Other types of reasonable accommodation, adjustment or modification duty adopt a different, more pro-active or ex ante approach. One example is the anticipatory reasonable adjustment duty in the Equality Act 2010 (as applicable in England, Scotland and Wales) ('EqA'). This requires duty-bearers to consider the needs of disabled people, to the extent that they are reasonably foreseeable, in advance of an individual request being made. Duty-bearers are therefore required to provide reasonable adjustments, such as rendering buildings accessible to wheelchair users and providing basic information in Braille and easy to read text, as part of delivering their services or public functions. In this chapter, we reflect on both types of reasonable accommodation duty, reflecting on their respective relevance and contribution in times of crisis.

The chapter begins by presenting evidence of the disproportionately negative impact (or 'exponential inequality') COVID-19 has had on disabled people, drawing on research from across Europe. Secondly, it explores the 'traditional' ex post reasonable accommodation duty, and discusses how it applies to situations of (extreme) disadvantage experienced by disabled people. Thirdly, it reflects on the ex ante anticipatory reasonable adjustment duty in the EqA and its use during the pandemic. We conclude that the latter group-based type of discrimination prohibition seems to have proved much more useful to disabled people during the COVID-19 emergency than the former and reflect on some of the implications of this finding.

2. Exponential Inequality: The Disproportionate Impact of the COVID-19 Emergency on Disabled People

In this section, we draw attention to the disability-related impact of the COVID emergency, drawing on evidence from countries in the EU and the UK. Our aim is not to present an

exhaustive account – a project which would be well beyond the scale of what is possible here. Rather, we wish simply to provide readers with an indication of some of the ways in which disabled people were disproportionately – or unequally – affected by this global crisis. We also reflect briefly on the possible causes of this inequality before moving on to our analysis of the effectiveness of reasonable accommodation and related non-discrimination obligations in times of crisis.

While the COVID-19 emergency has touched all population groups, there is growing evidence that it has hit people with disabilities disproportionately hard. The fact that this data has been slow to emerge is itself significant. Writing of the UK, but making observations replicated across many countries,[1] Shakespeare et al note that: 'this population is strangely missing from important analyses which have been published during the Pandemic', including ones which investigate the impact of the crisis on children and its racial and gender disparities, including in the context of care.[2] It is an omission which they rightly describe as 'astounding', especially in light of the important work done by disabled people's organisations throughout the pandemic to draw attention to the particular disability-related impact of the crisis.[3]

Statistics on the proportion of COVID-related deaths of people with disabilities, compared with those of people without disabilities, are not available at the EU level. Nor are they available from most European countries. Where such data is available, however, a clear disability gap is

[1] See eg the Global COVID-19 Disability Rights Monitor <https://www.covid-drm.org/> accessed 5 April 2022.
[2] Tom Shakespeare et al, 'Disabled People in Britain and the Impact of the COVID 19 Pandemic' (2021) 56 Social Policy and Administration 103 (hereafter Shakespeare et al, 'Disabled People in Britain').
[3] See for relevant UK examples, Greater Manchester Coalition of Disabled People, 'Greater Manchester Disabled People's Panel: GM Big Disability Survey: Covid-19' (2020) <13a Appendix 1 - GM Disabled Peoples Panel 2020-21.pdf (greatermanchester-ca.gov.uk)> accessed 11 March 2022; Inclusion London, 'Abandoned, Forgotten, Ignored: The Impact of the Coronavirus Pandemic on Disabled People: Interim Report' (2020) <https://www.inclusionlondon.org.uk/wpcontent/uploads/2020/06/Abandoned-Forgotten-and-Ignored-Final-1.pdf> accessed 11 March 2022; Inclusion Scotland, 'Rights at Risk: Covid-19, Disabled People and Emergency Planning in Scotland' (2020) <Rights At Risk – Covid-19, disabled people and emergency planning in Scotland – a baseline report from Inclusion Scotland. (October 2020) – SCVO> accessed 11 March 2022; Glasgow Disability Alliance, 'Supercharged: A Human Catastrophe' (2020) <https://gda.scot/wp-content/uploads/2020/08/GDA-Supercharged-Covid-19Report.pdf> accessed 11 March 2022.

evident. In Croatia, for example, amongst those who had died of COVID-19 prior to January 2021, 38% were disabled people – a figure significantly higher than the proportion of disabled people in the general Croatian population.[4] In the UK, nearly six in ten COVID-related deaths between January and November 2020 were of disabled people.[5] Despite making up only 17% of the population, disabled people made up 60% of those who died from COVID-19 in the UK during this period. This data also suggests that the risk of COVID-related death is three times higher for more severely disabled people.

These figures are stark. Still more shocking is an earlier report of Public Health England,[6] according to which, of the deaths from COVID-19 between 21 March and 5 June 2020 amongst people aged between 18 and 34, there were six times as many deaths of people with learning disabilities than of non-disabled people. Also significant is its indication that a third of the people with a learning disability who died of COVID-19 over this period lived in residential care. In the Netherlands too, research indicates a significantly higher COVID death rate for people with intellectual disabilities – in this case, one that is four times higher than the death rate amongst the general population.[7] The Dutch study also revealed that, up to July 2021, 83% of people with an intellectual disability who tested positive for COVID-19 lived in a group home, compared to 16% who lived in their own apartment,[8] suggesting that institutional settings were a particular hotbed of infection.

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[4] Ombudsman for persons with disabilities, 'Recommendations for persons with disabilities and the public regarding coronavirus' <https://posi.hr/koronavirus/> accessed 11 March 2022.
[5] Office for National Statistics, 'Updated Estimates of Coronavirus (COVID-19) Related Deaths by Disability Status, England' <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/coronaviruscovid19relateddeathsbydisabilitystatusenglandandwales/24januaryto20november2020> accessed 11 March 2022.
[6] Public Health England, 'COVID 19 Deaths of People Identified as Having Learning Disabilities' (2020) <https://www.gov.uk/government/publications/covid-19-deaths-of-people-with-learning-disabilities> accessed 11 March 2022.
[7] Sterker Op Eigen Benen and Radboud UMC, 'Factsheet No. 17, Update 2 July 2021', COVID-19 in people with intellectual disabilities (Academic Hospital Radboud, Nijmegen) (2021) 2 <https://0da93f8e-6ee7-45d9-be21-eecb55ca3e69.filesusr.com/ugd/d45b6c_424aa975d61c43288eed70c84d4ea798.pdf> accessed 11 March 2022.
[8] Ibid 3.

Data from elsewhere also suggests that a significant number of COVID-related deaths were of people living in care homes, many of whom are disabled people. Thus, in Slovenia, 51% of people who died with COVID-19 were residents of long-stay institutional care for older and disabled people.[9] In France the figure was 43%[10] and in Austria 44%.[11]

In relation to access to healthcare for COVID-19, Austria introduced triage checklists which gave many disabled people low priority on the basis of issues such as daily life activity and frailty level.[12] In Slovenia, following public concern about what were termed the 'registers of the written off'[13] the practice of determining in advance that certain care home residents would not be moved to hospital should they contract COVID-19 complications, carried out between March and June 2020, was overturned in July of that year.

The pandemic has also disproportionately impacted disabled people because of withdrawal of, and disruption to, the health-related services on which they depend. Shakespeare et al note that people with disabilities in the UK told them of the cancellation of routine physiotherapy, speech and language therapy, occupational therapy and annual check-ups.[14] Similarly, a Portuguese survey found that, after the two lockdowns (in April-May 2020 and October 2020), many healthcare services (such as physiotherapy, speech therapy, occupational therapy, medical

[9] Nacionalni Inštitut za javno zdravje, 'Epidemiološko spremljanje umrlih - covid-19' (2021) <https://www.nijz.si/sites/www.nijz.si/files/uploaded/umrli_COVID-19_01022021.pdf> accessed 11 March 2022.
[10] Adelina Comas-Herrera et al, 'Mortality Associated with COVID-19 in Care Homes: International Evidence' (2021) International Long-Term Care Policy Network, CPEC-LSE 1 <https://ltccovid.org/wp-content/uploads/2021/02/LTC_COVID_19_international_report_January-1-February-.pdf> accessed 11 March 2022.
[11] Ibid.
[12] Österreichischer Behindertenrat, 'Triage: Menschen mit Behinderungen mehrfach gefährdet' (2020) <https://www.bizeps.or.at/triage-menschen-mit-behinderungen-mehrfach-gefaehrdet/> accessed 11 March 2022.
[13] Vasja Jager, 'Were the elders written off in advance?' (*Mladina*, 15 May 2020) <https://www.mladina.si/198410/so-bili-starostniki-ze-vnaprej-odpisani/?fbclid=IwAR3xVmY6lW1JNNqytbcMugcngZcT5ZT_atRwhB_AiLHRRjvy4yq5CWSUIvs> accessed 11 March 2022.
[14] Shakespeare et al, 'Disabled People in Britain' (n 2) s 3.1.

appointments and nursing care) remained largely suspended or only partially operational.[15] One study, in May 2020, estimated that the COVID-19 crisis meant that up to 2.2 million people in Europe had had to interrupt rehabilitation treatment.[16]

Another issue, particularly prominent in the UK, was a lack of accessibility of important government communications about COVID-19.[17] Some of the televised COVID-19 briefings from Downing Street were not sign-language interpreted. Further, while these televised broadcasts were helpful in that they could reach people who could not access the internet, Shakespeare et al report that they 'were not sufficient to help people with learning difficulties in particular to understand what they should do differently'.[18] Although issues concerning inaccessible government COVID-related communication have had a particularly high profile in the UK, some people with disabilities also encountered similar problems in other countries. In Portugal, for example, a survey found that only 80% of disabled people and care-givers found government information accessible in the first wave of the pandemic, and 69% in the second wave.[19]

A combination of factors intensified the difficulties associated with lockdowns and social distancing experienced by many people with disabilities. Shakespeare et al note that their interviewees drew attention to the major disruption to the provision, repair and service of assistive equipment and technologies essential to their daily lives. According to one of the participants:

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[15] Disability and Human Rights Observatory, 'Deficiência e Covid-19 em Portugal' (Pessoas com Deficiência em Portugal - Indicadores de Direitos Humanos, 2020) <http://oddh.iscsp.ulisboa.pt/index.php/pt/2013-04-24-18-50-23/publicacoes-dos-investigadores-oddh/item/483-relatorio-oddh-2020> accessed 11 March 2022 (hereafter Deficiência e Covid-19 em Portugal).
[16] Stefano Negrini et al, 'Up to 2.2 million People Experiencing Disability Suffer Collateral Damage each day of COVID-19 Lockdown in Europe' (2020) 56 European Journal of Physical and Rehabilitation Medicine 361.
[17] Shakespeare et al, 'Disabled People in Britain' (n 2) s 3.4.
[18] Ibid.
[19] Deficiência e Covid-19 em Portugal (n 15).

> I've … been stuck upstairs for fourteen weeks because my [stair]lift has broken down and the local authority has been arguing with me about replacing the lift. They're wanting me to live downstairs. I've stayed in my bathroom, my study and my bedroom after fourteen weeks.[20]

They also found that day centers and large parts of the social care system often became unavailable. The result, for a significant number of the interviewees, was increased social isolation and dependence on family.

Similar developments are noted in a study carried out by the European Disability Expertise network. In many countries people with disabilities (together with older people) were advised to adopt more extreme social isolation or distancing measures than the rest of the population, but often without mechanisms to ensure their continued access to food, basic necessities, personal assistance and social care services.[21] In addition, facilities important to the lives of many disabled people closed. For example in Ireland, over 1,000 day centers (offering disabled people opportunities for employment, training and socializing) ceased offering services from mid-March 2020 to the end of the summer, and even then services were only partially resumed.[22] Poverty is also an important factor, as stressed by the National Council for Disability in Romania, which reported that some of its members were plunged into unprecedented levels of poverty, including not having access to basic necessities such as food.[23]

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[20] Shakespeare et al, 'Disabled People in Britain' (n 2) s 3.2.

[21] See the country reports of the European Disability Expertise network <https://ec.europa.eu/social/main.jsp?catId=1532&langId=en> accessed 29 June 2022.

[22] Health Services Executive and New Directions Subgroup, 'Framework for the Resumption of Adult Disability Day Services: Supporting People with Disabilities in the Context of COVID-19: The Next Year' (2020) 10 <https://www.hse.ie/eng/services/news/newsfeatures/covid19-updates/partner-resources/framework-for-resumption-of-adult-disability-day-services.pdf> accessed 11 March 2022. See also Dáil Éireann, 'Select Committee on COVID 19 Response' (2020) 28 Comments from Deputy Pauline Tully <https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid_19_response/2020-09-30/> accessed 11 March 2022.

[23] 'COVID-19 and People with Disabilities: Assessing the Impact of the Crisis and Informing Disability Inclusive Next Steps – Romania' (European Commission Report, November 2021) <https://ec.europa.eu/social/main.jsp?catId=1532&langId=en> accessed 29 June 2022.

Compliance with some of the social distancing measures put in place was difficult or impossible for many disabled people. Despite this, exemptions or accommodations to rules (eg to the wearing of face masks, for people with hearing impairments) were sometimes not made. In Germany, for example, some grocery stores required customers to use trolleys, but made no reasonable accommodation for people who could not use them for disability-related reasons.[24] Also in Germany, as in many other countries, people with visual impairments encountered difficulties complying with social distancing rules, and additional difficulty navigating the public realm, because they were not able to be guided by strangers.[25]

Shakespeare et al note that many of their interviewees who were unable to conform to COVID-related guidelines for disability-related reasons encountered increased hostility and stigmatization and/or changed their lifestyle so as to cut out activities they would previously have carried out on their own. In the words of one of them:

> You know, it's the social distancing. [Learning disability], dementia, blind. Oh, yeah. Blind. Yeah. assistance. Dogs are not trained in social distancing. Don't jump the queue and go straight for the door. Can you imagine the social consequences of that? So I've got any number of blind friends with assistance dogs, who are normally really independent, who are now not going out except with family, because they're saying the risk of them bluntly being thumped is too high.[26]

[24] See des Bundes, 'Diskriminierungserfahrungen im Zusammenhang mit der Corona-Krise' (2020) 4 <https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Dokumente_ohne_anzeige_in_Publikationen/20200504_Infopapier_zu_Coronakrise.pdf?__blob=publicationFile&v=2> accessed 31 May 2022.
[25] See Deutscher Blinden- und Sehbehindertenverband, 'Corona-Ratgeber' (2020) <https://www.dbsv.org/corona.html> accessed 11 March 2022.
[26] Shakespeare et al, 'Disabled People in Britain' (n 2) s 3.1.

There are also reports of disabled people experiencing harassment and hostility in connection with disability-related exemptions to COVID-19 rules, such as the wearing of face masks.

The pandemic therefore seems likely to have had a particularly intense impact on the social isolation of people with disabilities – a problem even before COVID-19. The percentage of persons with disabilities in the EU declaring feeling lonely all of the time or most of the time prior to the pandemic was 11.9% – significantly higher than the percentage of persons without disabilities, which was 2.9%.[27]

It might be tempting to explain the significantly higher COVID-19 death rate of disabled people in terms of pre-existing co-morbidities which meant that disabled people were more likely to experience a worse outcome from COVID-19 than non-disabled people. In this respect, Mladenov and Brennan argue that 'government communications and the mainstream media have focus[ed] on the (presumed) enhanced susceptibility of disabled bodies to the virus'.[28] However, this explanation for the adverse outcomes experienced by disabled people is too simplistic. The research identified above has revealed how the pandemic has adversely affected disabled people across Europe in a variety of ways. In addition to any increased health vulnerability, the COVID-related risk to disabled people is increased by pre-existing inequalities. Examples of socioeconomic factors that are particularly relevant to people with disabilities, as well as many older people, and which exacerbate risks of transmission and infection and other forms of disadvantage and exclusion, include living in care homes and other congregated institutional settings; more limited access to public health information, including online information, and to hygiene facilities, such as hand-basins (which again may not be accessible to them); the increased need for physical contact with environmental features, such

[27] Stefano Grammenos, 'European comparative data on Europe 2020 and persons with disabilities: Labour market, education, poverty and health analysis and trends' (*European Commission*, 2021).
[28] Teodor Mladenov and Ciara Siobhan Brennan, 'The Global COVID-19 Disability Rights Monitor: Implementation, Findings, Disability Studies Response' (2021) 36 Disability and Society 1356.

as handrails, in order to get around; the need for close contact with carers, personal assistants or assistants in shops, transport settings and other facilities – particularly where there is no or limited access to personal protective equipment; more limited access to ICT based services such as online shopping, online education and teleworking facilities (because of inaccessibility or being on the wrong side of the digital divide), which thus increases the need to venture into public places; and inability to comply with guidance about wearing face masks (eg because of breathing difficulties) or social distancing (eg because systems depend on markings that are not accessible).[29]

Disadvantages and discrimination experienced in a pre-COVID-19 world have been augmented and increased during the pandemic. COVID-19 has therefore not only created new risks, but importantly 'exposed and magnified existing failings and inequalities'. Disabled people were often 'not protected and the response of the state has compromised their human rights'.[30] This is particularly so for people experiencing intersectional disadvantage – along lines of age, ethnicity and gender, as well as disability. In the words of the UN Committee on the Rights of Persons with Disabilities (CRPD Committee):

> Pre-existing discrimination and inequality means that persons with disabilities are one of the most excluded groups in terms of health prevention and response

[29] For further information, see eg European Parliament Disability Intergroup, 'Summary Report of a Meeting of the European Parliament Disability Inter-Group: Impact of Covid-19 Outbreak to Persons with Disabilities' (30 April 2020); World Health Organisation, 'Disability considerations during the COVID-19 outbreak' (26 March 2020); International Disability Alliance, 'Toward a disability-inclusive COVID19 response: 10 recommendations from the International Disability Alliance' (19 March 2020); António Guterres, 'Policy Brief on Persons with Disabilities and COVID-19' (6 May 2020); Office of the United Nations High Commissioner for Human Rights, 'Joint Statement: Persons with Disabilities and COVID-19 by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility' (1 April 2020).

[30] Shakespeare et al, 'Disabled People in Britain' (n 2) s 4.

> actions and economic and social support measures, and among the hardest hit in terms of transmission risk and actual fatalities.[31]

3. Ex Post Reasonable Accommodation Duties

The right of a disabled person to a reasonable accommodation is found in EU law, and across national and international non-discrimination and disability rights legislation. Under EU law, the obligation to provide a reasonable accommodation to disabled individuals was established by the Employment Equality Directive of 2000 (the Directive), Article 5 which provides:

> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

The obligation to make a reasonable accommodation on the grounds of disability is based on the recognition that, on occasions, the interaction between an individual's impairment and the physical or social environment can result in the inability to perform a particular function, job or activity in the conventional manner. The characteristic of impairment is relevant in that it can lead to an individual being faced with a barrier that prevents him or her from benefiting from an employment or other opportunity that is open to others who do not share that characteristic. This barrier can be removed through an individualized and tailored reasonable

[31] The United Nations Committee on the Rights of Persons with Disabilities, 'Statement on COVID-19 and the human rights of persons with disabilities' (9 June 2020).

accommodation.[32] "Recital 20 of the Directive provides some guidance on what amounts to an accommodation. It states:

> [a]ppropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example, adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training and integration resource'.

The duty to provide an accommodation to a disabled individual is not absolute, being lifted if providing the accommodation would result in a disproportionate burden for the employer. Recital 21 of the Directive refers to some factors which should be taken into account to determine whether a measure amounts to a disproportionate burden. These are 'the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance'. A further limitation is that the duty, under EU law, is confined to the spheres of employment and vocational training.

The duty to provide a reasonable accommodation is also established in the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the EU is a party. Article 2 CRPD defines 'discrimination on the basis of disability' and includes within that definition the denial of reasonable accommodation. Article 5(3) of the CRPD links the equality and non-discrimination norms with the duty to accommodate, and provides that: 'In order to promote equality and eliminate discrimination, states parties shall take all appropriate steps to ensure that reasonable accommodation is provided'. Article 5(3) should be read together with the definition of reasonable accommodation in Article 2, which provides:

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[32] Text in this paragraph draws on Lisa Waddington, 'Reasonable Accommodation' in Dagmar Schiek et al (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart 2007).

> ‘Reasonable accommodation’ means 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.

The CRPD therefore explicitly defines an unjustified denial of a reasonable accommodation as a form of discrimination, and extends this duty to all human rights and fundamental freedoms.

The reasonable accommodation duty articulated in the CRPD and EU law is ex post, meaning that it is only triggered once a person with a disability requests an accommodation or otherwise indicates that they are experiencing problems, or the duty bearer becomes aware of this through some other means. It imposes no obligation to consider the predictable needs of groups of people with impairments, such as people who use a wheelchair or who are blind, in advance, and take action to meet those needs before a specific request.

So what does this mean in the context of emergency situations such as COVID-19? Is the reasonable accommodation duty relevant or helpful to disabled people in this context? There are certainly a number of ways in which the duty might be relevant. For example, disabled employees (within the meaning of EU or national law) may request to work from home, or to be excused from carrying out certain tasks, where COVID-19 poses a particular risk to their health. Workers who have a family member with a disability whom they live with and who would be particularly susceptible to COVID-19, including many persons with intellectual disabilities, may also wish to claim this right. The CJEU held in *Coleman*[33] that certain protections under the Directive applied to people who associated with persons with disabilities,

[33] Case C-303/06 *Coleman v Attridge Law* [2008] IRLR 722.

including family members, and, in the *CHEZ* ruling,[34] that 'discrimination by association' extended to indirect discrimination, as well as direct discrimination and harassment. However, the reasonable accommodation duty under the Directive does not seem to extend to non-disabled people, so there may not be a right to claim such an accommodation for 'carers' or other family members. Moreover, an employer is only obliged to provide an accommodation if it does not amount to a disproportionate burden. There are, therefore, important limitations. Nevertheless, this right should serve to give some disabled workers priority in relation to requests to work in a way that reduces their risk of contracting COVID-19. As a matter of good practice, employers may also choose to consider the situation of workers who live or otherwise regularly associate with a disabled person in this context, although there does not seem to be an EU law duty to accommodate such workers. In the future, however, such workers could request flexible working arrangements and carer's leave under national legislation implementing the new Work-life Balance Directive.[35]

Given that European countries went through a period of lockdown in Spring 2020, when all but essential workplaces were closed, workers may have been able to request an accommodation in the form of working from home before work resumed in a more face-to-face manner. The first lockdown would thus have given many disabled people a period during which they had the de facto accommodation they required, as well as enabling them to make a timely request for the continuation of such working arrangements. In such an exceptional scenario, the ex post nature of the duty was not problematic.

On the other hand, there are many situations in the current pandemic where an ex post duty involves delays, meaning that barriers are created before the duty to remove them is triggered.

[34] Case C-83/14 *CHEZ v Komisia za zashtita ot diskriminatsia* [2015] IRLR 746.
[35] Council Directive (EU) 2019/1158 of 12 July 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 79.

Potential examples include online platforms and websites being set up in ways that are inaccessible for people with visual and other impairments, or new systems for organizing public space which unintentionally restrict or exclude access for some disabled people. In such cases, where an ex post duty applies, an individual must first experience a barrier or disadvantage before requesting an accommodation, and the type of accommodation which can be required of a duty-bearer will be assessed in the light of the circumstances applying at that time. The fact that the duty-bearer could have avoided creating the barrier by choosing a different system, or adapting the design, will not be relevant, thus reducing the potential impact and value of the duty - particularly in times of crisis when circumstances for duty-bearers (as well as claimants) are likely to be particularly challenging.

Lastly, it should be noted that in one respect the current crisis may have opened up opportunities for disabled people, for whom working at home is more practical, by increasing the likelihood that relevant types of accommodation will be regarded as appropriate or reasonable in the future. Working from home may be important for people with mobility impairments who find travel difficult or inaccessible; people who require frequent breaks for work for health-related reasons; people who need to remain close to medical equipment at home; and people with unpredictable medical conditions, for whom working consistently on site might be difficult or impossible. The crisis is likely to have made working from home more acceptable, and may lead to employers rethinking how essential work tasks can be carried out, and broadening their view of workplace accommodations. Indeed, working from home may become far more ‘normalized’ in the future, opening up this possibility to both non-disabled and disabled workers, and reducing possible stigma associated with disability-specific

accommodations. The same may be true of having flexible working hours, which have also become more common for non-disabled workers during the current crisis.[36]

Taking a broader perspective, the COVID-19 crisis may have led to more providers of goods and services establishing a permanent online presence, which could reduce barriers to shopping, consumption and participation for some disabled people, and particularly those with mobility-related impairments. At the same time, inaccessible online platforms and the digital gap (in terms of equipment, skills and access to Wi-Fi) which disabled people experience may have meant that some disabled individuals experience greater barriers to (online) participation.

4. Ex Ante Reasonable Accommodation Duties

4.1 EqA's Anticipatory Reasonable Adjustment Duty

Unlike the ex post reasonable accommodation duty, ex ante or anticipatory reasonable accommodation duties are required neither by EU law nor by the CRPD. This does not mean that they are incompatible with such bodies of law, however. EU law is largely silent on disability discrimination prohibitions outside employment and, in any case, only sets minimum requirements under the Employment Equality Directive. The CRPD includes a general obligation to prohibit disability discrimination and, as explained in the previous section, explicitly specifies that this must include prohibitions of failure to provide ex post reasonable accommodation. It also requires States to ensure progress toward ensuring that facilities and services open to the public, as well as information, communication and technologies, are made accessible. Ex ante reasonable accommodation duties arguably provide a useful way of supporting such efforts.

[36] Lisa A Schur, Mason Ameri and Douglas Kruse, 'Telework After COVID: A "Silver Lining" for Workers with Disabilities?' (2020) 30 Journal of Occupational Rehabilitation 521; Peter Blanck, 'Disability Inclusive Employment and the Accommodation Principle: Emerging Issues in Research, Policy, and Law' (2020) 30 Journal of Occupational Rehabilitation 505.

An ex ante version of the reasonable accommodation duty was introduced into UK law by the Disability Discrimination Act 1995. This legislation continues to apply in Northern Ireland but is now replaced, in Great Britain, by the EqA – a statute which also includes this 'anticipatory reasonable adjustment duty'.[37] What makes disability discrimination prohibitions, such as the EqA's anticipatory reasonable adjustment duty, ex ante or anticipatory in nature is the obligation they impose on duty bearers to take steps to remove disability-related disadvantage even before any disabled person has encountered a problem or made a request for an accommodation or adjustment. While other such duties exist,[38] it is the EqA's anticipatory reasonable adjustment duty that provides the focus of this section.[39]

The duty can be summed up as imposing, on an ongoing or continuous basis, obligations: first, to identify and anticipate possible ways in which disabled people generally (or broad groups of disabled people such as those with particular types of impairment), might be disadvantaged by provisions, criteria and practices, the absence of appropriate auxiliary aids or services or aspects of the physical environment; and, second, to take reasonable steps to remove, prevent or mitigate these potential problems so that they do not in fact subject disabled people to a substantial disadvantage.[40] Despite being anticipatory or ex ante – in that action is required before a disabled person requests it – the duty gives rise to liability for unlawful discrimination only if a disabled person does in fact experience a detriment because of the breach.[41] It applies

[37] In particular, see Equality Act 2010, s 20 as modified by various schedules, such as sch 2.
[38] See eg, the analogous duty in the US duty to make reasonable modifications set out in the Americans with Disabilities Act of 1990, 42 USC § 12131(2) (for public bodies) and § 12182(b)(2)(A)(ii) (for private bodies providing services to the public). See also the accessibility duty in the Norwegian legislation, Lov (Nr 61 av 2013) om forbud mot diskriminering på grunn av nedsatt funksjonsevne (diskriminerings- og tilgjengelighetsloven) (the Anti-Discrimination and Accessibility Act) ch 3.
[39] See further Anna Lawson and Maria Orchard, 'The Anticipatory Reasonable Adjustment Duty: Removing the Blockages?' (2021) 80 Cambridge Law Journal 308.
[40] See generally Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice: Services, Public Functions and Associations' (Statutory Code of Practice, 1 January 2011), in particular ch 7.
[41] Equality Act 2010, s 21(2). Cf the question of whether the High Court might be able to issue declaratory and injunctive relief, even where the claimant cannot demonstrate detriment, contemplated by Fordham J in *R (on the application of Rowley) v The Cabinet Office* [2021] EWHC2108 (Admin) [58].

in connection with the provision of services to the public and the discharge of public functions, but not employment under the EqA.

The anticipatory reasonable adjustment duty was described by key figures in the Disability Rights Commission (now replaced by the Equality and Human Rights Commission (EHRC)) as 'immensely significant' and 'a major driver in encouraging service providers to think in advance about removing barriers experienced by disabled customers or potential customers'.[42] Despite giving rise to a number of high-profile cases over the years, however, this duty has struggled to gain profile and visibility. Lack of awareness of it was highlighted as a problem by the House of Lords Select Committee on the Equality Act 2010 and Disability.[43] Nevertheless, as discussed below, hundreds of people relied on it to commence actions for disability discrimination during the COVID-19 emergency.

We use the remainder of this section to reflect on the fascinating phenomenon of this turn to the anticipatory reasonable adjustment duty during the pandemic. What happened? Why did it happen? How successful were these initiatives and what do they tell us about the robustness of this aspect of the EqA as a means of enforcing equality standards in times of crisis? Our reflection on these questions is informed by the explanations and perspectives of three key informants who provided their insights in a group interview carried out by Anna Lawson on 2 September 2021.[44] Each of these participants preferred to be identified and named, rather than for their identities to be disguised. They are Catherine Casserley (barrister at Cloisters Chambers), Chris Fry (founder of Fry Law) and Fazilet Hadi (Head of Policy and Research at Disability Rights UK). As professionals actively involved in using litigation or other strategies

[42] Caroline Gooding and Catherine Casserley, 'Open for All? Disability Discrimination Laws in Europe Relating to Goods and Services' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005) 135, s 4.2.
[43] House of Lords Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: The Impact on Disabled People* (2015–16, HL 117) [202]–[208].
[44] Ethical approval for this research was granted by the Business, Environment and Social Science (Area) Faculty Research Ethics Committee at the University of Leeds – ref: LTLLAW-050.

to secure compliance with the EqA during the COVID-19 emergency, all three provided valuable insights from inside the developments in question. These insider perspectives greatly enriched the current analysis but, unless an opinion expressed in the discussion below is specifically attributed to one of the participants, it should not be assumed that they are in agreement with it.

4.2 COVID-19 Disability-Related Litigation and the Anticipatory Reasonable Adjustment Duty

4.2.1 Types of covid-related disability discrimination litigation

As the three participants observed, during the COVID-19 emergency, the EqA was used in three main types of case. First, it was used in cases challenging the inaccessibility of COVID-related government information. Second, it was used in cases challenging COVID-related guidance on access to healthcare and hospital visits. Third, it was used in cases concerning access to the services of supermarkets for purposes of buying food and other basic necessities.

Litigation of the first type has resulted in one reported case – *R (on the application of Rowley) v Minister for the Cabinet Office*[45] – relating to the lack of British Sign Language (BSL) interpretation for several of the government's televised briefings on COVID-19. The judgment in this case is interesting and relevant, and will be considered more fully below. The case is also significant because it is the first of many on the same point. According to Chris Fry, there are approximately 270 other similar cases on Fry Law's books which are still pending.[46]

Also noteworthy is the high-profile settlement of a case brought by a visually-impaired woman on the government's 'Extremely Clinically Vulnerable' list. In this case, Sarah Leadbetter

[45] [2021] EWHC 2108 (Admin).
[46] Interview with Chris Fry, Founder, Fry Law (2 September 2021).

successfully challenged the government's practice of providing her with information about 'shielding' in formats that were inaccessible to her.[47] The settlement included government commitments to make improvements in this regard.

The primary example of cases of the second type was the initiation of judicial review proceedings by Fleur Perry and Mark Williams, challenging NHS England's Visitor Guidelines. These provided that there should be no visitors to hospital patients, except in a small number of specific situations, none of which applied to disabled people with high support needs wishing to be visited by a person familiar with those needs and able to fulfil them. This case did not proceed to court because NHS England agreed, after receiving pre-action letters, to change its Guidelines.[48]

In relation to the third type of case, hundreds of disabled people turned to EqA litigation during the first UK COVID-19 lockdown, in the Spring of 2020, to challenge the failure of supermarkets to make adjustments to policies and practices (such as inaccessible websites or rules prohibiting more than one person entering at a time) which severely disadvantaged disabled customers.[49] These cases were supported by Fry Law and, according to Chris Fry:

> We had about 700 supermarket cases at one point, and so we worked very intensively (alongside junior barristers from Cloisters and some other people who provided help pro bono) to write lots of letters to supermarkets threatening legal action.[50]

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[47] See also a similar case brought on behalf of Dan Williams, Chris Fry, 'Second Discrimination Case Launched Against the PM' (*Fry Law Briefing*, 19 May 2020) <https://www.frylaw.co.uk/archives/articles/second-discrimination-case-launched-against-the-pm/> accessed 10 March 2022.

[48] John Pring, 'Coronavirus: Success for Disabled Duo After NHS England Backs Down on Visitor Policy' (*Disability News Service*, 2020) <https://www.disabilitynewsservice.com/coronavirus-success-for-disabled-duo-after-nhs-england-backs-down-on-visitor-policy> accessed 11 March 2022.

[49] John Pring, 'Coronavirus: Supermarkets face 'biggest class action of its kind' over discrimination claims' (*Disability News Service*, 23 April 2020) <https://www.disabilitynewsservice.com/coronavirus-supermarkets-face-biggest-class-action-of-its-kind-over-discrimination-claims/> accessed 11 March 2020.

[50] Interview with Chris Fry, Founder, Fry Law (2 September 2021).

He went on to explain that most of these cases were dropped after one major supermarket agreed to change its policies and make adjustments for disabled customers.

The principal focus for COVID-related disability discrimination cases against supermarkets is now blanket rules requiring the wearing of facemasks, with no exemptions for disabled people. In April 2021, the Equality and Human Rights Commission issued a statement reminding retailers of the fact that failure to make adjustments to such rules for disabled people is likely to constitute unlawful discrimination.[51] It also reported that it had written directly to a number of companies with such blanket policies (including 'a popular technology store, a luxury department store and a bus company'[52]), reminding them of their legal obligation to make (anticipatory) reasonable adjustments under the EqA.

Thus, many COVID-related disability discrimination cases have been settled or dropped. It seems likely that the anticipatory reasonable adjustment duty would have played an important role in most of these, had they proceeded, alongside other EqA obligations (such as the Public Sector Equality Duty and the prohibition of indirect discrimination). To date there is only one case in which judgement has been issued – *R (on the application of Rowley) v Minister for the Cabinet Office*[53] – and it was the anticipatory reasonable adjustment argument which proved key to this ruling. This case will therefore now be considered in more depth.

4.2.2 Rowley v The Cabinet Office

In this case, Katie Rowley (a Deaf BSL user) challenged the government's failure to provide any BSL interpretation for two of the televised Westminster Government briefings on COVID-

[51] Equality and Human Rights Commission, 'Equality Regulator Warns Against Blanket 'No Masks, No Entry' Policies' (9 April 2021) <https://www.equalityhumanrights.com/en/our-work/news/equality-regulator-warns-against-blanket-%E2%80%98no-mask-no-entry%E2%80%99-policies> accessed 11 March 2020.
[52] Ibid.
[53] [2021] EWHC 2108 (Admin).

19, broadcast when she was pregnant and living alone. She also challenged its failure to provide on-platform sign-language interpretation for other such briefings. Chris Fry and Catherine Casserley (two of the interviewees in this study) were the legal team acting on behalf of Ms Rowley. The two EqA obligations they argued had been breached were the anticipatory reasonable adjustment duty[54] and the Public Sector Equality Duty.[55]

The most important aspect of the case, for current purposes, is the question of whether the absence of BSL from two of the televised briefings amounted to unlawful discrimination, contrary to the anticipatory reasonable adjustment duty. Fordham J approached this issue methodically, setting out what he described as a 'stepped approach',[56] and drawing extensively on quotes from the EHRC's Code of Practice as well as previous authorities.[57]

It was accepted by both sides that Ms Rowley was a disabled person, for purposes of the EqA and that the government was a provider of services (in terms of providing information about COVID-19) and therefore under a duty to make reasonable adjustments by virtue of s 29(7)(a).[58] Fordham J ruled that the duty had been triggered by the 'comparative substantial disadvantage' test - because Deaf BSL users would have poorer access to the relevant briefings (where the auxiliary service of BSL was not available) than people who were not disabled. On the question of whether providing BSL for these sessions was a reasonable step required of the government by the anticipatory reasonable adjustment duty – the most significant aspect of the decision, to which we will return below – he found that the government had indeed breached the duty. Because Ms Rowley had experienced detriment as a result of this breach, her claim was successful.

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[54] Equality Act 2010, s 29(7)(a).
[55] Equality Act 2010, s 149(1).
[56] [2021] EWHC 2108 (Admin) [19].
[57] Ibid [21]–[38].
[58] Albeit that it was also discharging a public function. See Equality Act 2010, s 29(7)(b).

The particular context of the COVID emergency featured in the two most contested aspects of this ruling. The first of these concerned the question of whether or not Deaf BSL users had been placed at a 'substantial disadvantage' by the absence of BSL interpretation of the two COVID briefings in question. Fordham J held that such a disadvantage had been established and that it was 'serious' in nature and extent.[59] He pointed out that the briefings were intended to inform the public about 'a subject matter of the greatest public interest and a vital concern – the pandemic'[60] and that:

> In the context of the pandemic, … the circumstances were unprecedented and challenging for Government; but they were also unprecedented and challenging for the public, who needed access to information, to help them to understand and to adhere and to manage their conduct and expectations for the future.[61]

The absence of BSL interpretation resulted in 'a clear barrier' to Deaf BSL users and represented 'a failure of inclusion, suggestive of not being thought about, which served to disempower, to frustrate and to marginalise'.[62] It disadvantaged them because it had the 'substantial, foreseeable and palpable effect' of causing them 'exclusion, and a justified sense of grievance, about which a reasonable person would certainly have good reason to complain, and about which affected people would reasonably say that they would have expected and urged – let alone preferred – to have been treated differently'.[63]

The second aspect of Fordham J's ruling in favour of Ms Rowley to which the context of the national emergency was relevant, was the question of whether the government had taken reasonable steps to avoid disadvantaging Deaf BSL users even though there had been no BSL

[59] [2021] EWHC 2108 (Admin) [28].
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.

interpretation of these two briefings. The government argued that it had discharged its anticipatory reasonable adjustment duty because it had entered into an arrangement with the BBC (the broadcaster) for the provision of BSL interpretation for the televised briefings and was entitled to rely on the BBC to ensure this was provided. Prior to the first of these two briefings – a new type of briefing led by government scientists and without a government minister present – the government had been unaware that there would be no BSL interpretation.[64] It also relied on the fact that subtitles had been provided, even though BSL was absent.

Fordham J rejected these government arguments, despite the emergency context – a context which the government argued (and he accepted) was an important contextual factor. In his words:

> Events were unfolding at speed – sometimes day by day, sometimes hour by hour – in circumstances which were quite exceptional. The Government response to the pandemic was evolving, often at pace, with decisions made and reviewed on an ongoing basis. Government was making difficult judgment calls, including about medical and scientific issues. It was doing so after taking advice from relevant experts, in the context of powerfully expressed conflicting views about many of the measures being taken and about how various balances should be struck. It was identifying appropriate measures and policies to address the pandemic. That included broad political questions as to how to respond to the needs of particular groups. Government was acting under huge pressure, responding to this public health and economic emergency.[65]

[64] Ibid [34].
[65] Ibid [11]–[12].

In light of this, he stressed that it was 'wrong to "zoom-in" on one aspect of accessibility of one species of communication, without appreciating the "overall picture" or 'to use "hindsight"' or be 'wise after the event'.[66]

The government's defense, based on its arrangement with the BBC was rejected because, while it was 'entirely appropriate' for such arrangements to be made, it remained the responsibility of the government, as service provider, 'to ensure delivery of the discharge of the reasonable adjustments duty'.[67] The nature of this agreement, however, was informal and undocumented and this 'Undocumented informality produced an unknown, unknowable, uncontrollable and unalerted Gap' in the provision of BSL interpretation of government briefings.[68] In considering the reasonableness of the steps taken by the government, Fordham J placed particular stress on the proactive and anticipatory nature of the duty, and the fact that the government should have been aware that failure to provide BSL interpretation would cause disadvantage. Subtitles were not an adequate substitute – dismissing the idea that they were, Fordham J described it as 'a stereotypical opinion' amounting to 'prejudice'.[69]

In response to the government's reliance on the particular difficulties caused by the COVID-19 emergency, he observed that:

> It is right, of course, that Government was dealing with an unprecedented public health and economic emergency … But that was also the context for the public and for Deaf BSL users. Yes, this increased the burden of the challenges on Government. Yes, this informs the appreciation which any Court must have when considering actions in extremely challenging circumstances. However, it

[66] Ibid [12].
[67] Ibid [35].
[68] Ibid.
[69] Ibid [35] (referring to Equality and Human Rights Commission, 'Technical Guidance on the Public Sector Equality Duty' (2014) [3.38]).

> also increased the importance of information and its accessibility, particularly for groups and subgroups of people with different disabilities.[70]

There was, he stated, no evidence that BSL interpretation would have been impractical or that 'anything would have been sacrificed, or detracted from' had it been provided.[71] In short, he found that:

> Secure and clear arrangements had not been made. The problem was not anticipated. Those are features not of excusability, but rather of non-compliance.[72]

Additional arguments that the government had not given 'due regard' to the importance of ensuring its briefings included on-platform BSL interpretation (whereby the BSL interpreter is physically present with the speakers and thus filmed with them) did not succeed – for reasons unconnected with the emergency context in which the briefings took place. The Public Sector Equality Duty argument on this point failed because the government submitted an equality impact assessment to the Court demonstrating that it had given 'due regard' to this issue – albeit that this was 'produced in the context of the judicial review proceedings, and "at the door of the Court"'.[73] The claim based on the anticipatory reasonable adjustment duty on this point also failed. This was because, although Fordham J accepted that on-platform provision approximated most closely to the type of access to the information granted to other members of the public,[74] the government demonstrated that it presented difficulties for the presentation of the type of detailed data slides commonly shown in briefings. Accordingly, the provision of

[70] Ibid [35].
[71] Ibid.
[72] Ibid.
[73] Ibid [43] (Fordham J).
[74] Ibid [55].

in-screen BSL interpretation was a reasonable alternative means of making the service available to Deaf BSL users and there was therefore no breach of the duty.[75]

4.3 Implications of the Anticipatory Reasonable Adjustment Duty Litigation in Times of Crisis

4.3.1 The Rowley reasoning relating to the emergency context

As explained above, the COVID emergency and all the demands it placed on the government, were recognized by Fordham J in *Rowley* to be an important contextual factor. This said, it seems clear that it was not a factor that in any way weakened or undermined the claimant's case. Fordham J repeatedly acknowledged the significance of the emergency for individuals, particularly Deaf BSL users – and the government's reliance on communication with the public as a key means of containing and responding to the crisis. His approach is refreshingly free of the deference to government during a crisis that might perhaps have been expected. Instead, it demonstrates a solid grasp of the policy behind the EqA's anticipatory reasonable adjustment duty and a meticulous application of the EqA, guided by the relevant code of practice as well as by previous cases.

The extent to which this strong approach to the application of equality law was enabled by the anticipatory or proactive nature of the applicable duty is a question worth pondering. In other words, if the relevant duty had been ex post or reactive in nature, would more weight have been attached to the demands the emergency was placing on government and would it have been more difficult for the claimant to succeed? The answer seems likely to be yes. When asked how significant she considered the anticipatory nature of the duty to have been to the upholding of equality standards in this case, Catherine Casserley responded that it had been 'extremely

[75] Ibid [56] [57].

significant indeed' and that 'a lot of weight was placed on the fact the government should have been planning in advance for BSL and putting in place systems to make sure it happened'[76] – a view shared by Chris Fry.

4.3.2 The rise of collective legal action

The EqA's anticipatory reasonable adjustment duty is, as explained at the beginning of this section of the chapter, group oriented. It is triggered by the likelihood of group disadvantage. It might therefore be expected that it will, from time to time at least, be relied on in class actions where many individuals experience similar sorts of disadvantage. Until the COVID-19 crisis, however, this did not happen. What then was it about the emergency which led so many disabled people to bring essentially the same case for breach of the anticipatory duty?

The numbers of disabled litigants involved is staggering. As mentioned above, Fry Law was at one point dealing with 700 cases against supermarkets in connection with access to food and other groceries, as well as nearly 300 cases against the government in connection with BSL interpretation for the televised COVID briefings. This sort of mass mobilization behind litigation is unprecedented in UK disability equality legal history. The pandemic, and policy responses to it, are themselves key to understanding why this happened at this time. In the words of Catherine Casserley, 'The emergency meant that lots of disabled people were all experiencing the same problems at the same time'.[77] Chris Fry, known amongst the disability community for his work on disability discrimination cases, added that:

> We just kept getting call after call from disabled people all with the same problems and the same questions. This gave Cathy [Casserley] and me the idea of using online and social media platforms to get advice out to people on mass.

[76] Interview with Catherine Casserley, Barrister, Cloisters Chambers (2 September 2021).
[77] Ibid.

> So we set up 'Disability Rights TV' which was on twice a week at the beginning but which is now about once a month.[78]

The shared nature of the hardship experienced by many disabled people at the same time, together with access to online legal advice and information, thus seem to be two important explanations of the impressive numbers of disabled people who turned to disability discrimination litigation during COVID-19. Another factor, suggested by Fazilet Hadi, was the fact that during the lockdowns, online collaboration, support and communication between different disabled people's organisations across the country increased dramatically – a development which she attributed to the general increase in online activity, the reduction in the face-to-face activities of these organisations and a focus on particular issues of shared concern.[79] This increase in civil society collaboration was significant at many levels. For present purposes, however, particularly relevant was the platform the collaboration provided to identify key concerns for disabled people, to share information (eg about the opportunities to seek legal information and advice through Disability Rights TV) and to strengthen a sense of solidarity.

Another factor, perhaps the most important one, which helps to explain the phenomenon of mass disability discrimination litigation during the COVID-19 crisis, articulated by Catherine Casserley, was the fact that 'Disabled people were desperate. As with any crisis, disabled people are always hit very hard.' Litigation provided a means of trying to make their voices heard and push for change. The fact that Fry Law (the firm which supported the hundreds of BSL and supermarket claims) operated on a 'no win no fee' basis, helped reduce the financial barriers facing potential claimants. However, as Chris Fry noted:

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[78] Interview with Chris Fry, Founder, Fry Law (2 September 2021).
[79] Interview with Fazilet Hadi, Head of Policy and Research, Disability Rights UK (2 September 2021).

> We were delighted that the cases against supermarkets resulted in a change early on – so that it became easier for disabled people to access groceries. And that's why we did that work. But it did create a bit of a financial headache for us. As we are paid on a 'no win no fee' basis, and had put a lot of time into writing letters in these 700 cases which then of course didn't make it to court or to a 'win', we didn't end up getting any money for all the work we'd put in.[80]

The multiplicity of very similar claims demonstrates the need for an effective class action mechanism in UK equality law. The absence of such a mechanism presented practical and financial problems which undermine the impact and effectiveness of equality law and the pursuit of justice. In relation to the BSL cases, for example, Chris Fry explained that:

> It costs money to initiate each case in court. Because of this, we decided to start off with one case – *Rowley* – and see how it went before launching all the others. Now that *Rowley* has been successful, we want to lodge the rest but the government is raising procedural objections which is making this difficult. For example, it's insisting that we lodge (and therefore pay for) each case separately rather than lodging some of them together.[81]

4.3.3 Achieving success or reflecting failure

On the face of it, the anticipatory reasonable adjustment duty appears to have achieved success in upholding equality standards in the COVID emergency, both in the private and public sectors. In the private sector, it was referred to in solicitors' letters threatening litigation, which quickly brought about a change in policy and practice in some supermarkets, thereby removing some of the barriers to accessing groceries faced by disabled people. In the public sector, it

[80] Ibid.
[81] Ibid.

helped achieve changes in government practice (eg to the formats used to communicate with blind people about 'shielding') through cases settled at a relatively early stage. It was also used in *Rowley* to hold the government to account for its failure to make adequate provision for BSL interpretation of key televised briefings on the emergency.

These successes are important. Disabled people would clearly be in a weaker position to challenge the inequalities they experience without the EqA and the anticipatory reasonable adjustment duty. However, their success should be judged in light of the following questions asked by Fazilet Hadi:

> Should we flip this around? Given that there were many other terrible things for disabled people that happened during the crisis …, isn't it surprising that there hasn't been more litigation challenging more issues? And if the anticipatory reasonable adjustment duty was really successful, wouldn't we expect it to be shaping practice and policy on a continuing basis so that government, supermarkets etc would have got things right in the first place?[82]

These questions bring to the fore a key point – equality law standards will have little chance of ensuring equality considerations are prioritized in times of emergency unless they are effectively embedded and enforced in more ordinary times.

5. Conclusion

In conclusion, it is clear that the COVID-19 emergency has already had the effect of exponentially increasing the inequality experienced by disabled people across Europe. This has in large part been due to pre-existing forms of inequality and marginalization, such as reliance on models of institutional living and the predominance of inaccessible information – issues

[82] Interview with Fazilet Hadi, Head of Policy and Research, Disability Rights UK (2 September 2021).

which equality law arguably could and should have been doing more to challenge and contest prior to the COVID-19 crisis.

There has been surprisingly little evidence of COVID-related litigation based on the traditional ex post reasonable accommodation duty. This may of course be because individual adjustments are being made for disabled people in contexts such as employment. It may also be because disabled people who are not being accommodated in the ways they need are being advised against bringing cases based on the ex post duty because of uncertain prospects of success. The fact that this duty focuses on the circumstances existing at the time the disabled person encounters the problem and makes a request for accommodation, is likely to work against disabled people in times of emergency. At such times, duty-bearers are likely to be dealing with complex and demanding situations which judges are likely to view as making the implementation of requested accommodations less practicable.

The ex ante anticipatory reasonable adjustment duty in the EqA, by contrast, has been heavily used during the COVID-19 crisis. The fact that it focuses attention on what duty-bearers should have been doing to avoid creating disadvantage, rather than on simply what they can do to remove it once in place, is perhaps more useful in times of crisis than the narrower temporal focus of the ex post duty. Nevertheless, it too is limited by the need to show that the claimant has actually experienced a detriment or disadvantage before liability can be established. Furthermore, the exponential increase in litigation based on the anticipatory reasonable adjustment duty would not have been necessary had there been greater awareness and embedding of that duty in the day-to-day operations of duty-bearers.

In short, reasonable accommodation duties and equality law more generally have clearly not been enough to prevent a widening and deepening of disability-related inequality as a result of the COVID-19 emergency. This said, it has provided some protection and a mechanism through

which disabled people have been able to challenge the exclusion and injustice they experienced. Without it, their position would have been worse. There is, however, much more that needs to be done to build a legal framework that robustly embeds disability equality into emergency and non-emergency times.