

University of Leeds – Written Evidence (EQD0125)

**Written Evidence submitted jointly by:
The Centre for Disabilities Studies, University of Leeds and
The Centre for Law & Social Justice, University of Leeds.**

The Centre for Disability Studies, University of Leeds, draws together academics and postgraduate students from a wide range of disciplines across the University. We have a long history of working across disciplines, and with disabled people and their organisations, to expose disabling barriers and work towards more inclusive approaches and enabling systems. Many of our members are also members of other University centres, including the Centre for Law and Social Justice.

The Centre for Law & Social Justice, School of Law, University of Leeds supports scholars, activists, organisations and practitioners who are interested in and engage with issues of equality, welfare, and social justice. Our work considers the extent to which law can address these inequalities and help ensure that resources are shared more equitably. One focus of the work of the Centre is disability rights and equality law.

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Executive summary

We recommend the following key issues for consideration by the Select Committee:

- The definition of disability and the need for the current specific exclusions from it.
- Gaps in protection for volunteers and air passengers.
- Lack of implementation of important provisions (including taxi accessibility regulations, common parts and dual discrimination).
- Evidence of on-going lack of implementation of reasonable adjustment duties and confusion about the anticipatory reasonable adjustment duty.
- The value of a new code (or codes) of practice specifically on reasonable adjustments.
- Strengthening codes of practice by returning to the former practice of making them 'statutory'.
- Making reference, in codes of practice, to existing standards as (partial) guides to 'reasonableness'.
- The potential negative impact on the Public Sector Equality Duty general duty of recent changes to judicial review cases
- The fact that the general duty to have 'due regard' is rather weak unless accompanied by strong specific duties and the relative weakness of the specific duty in England
- Considering whether there would be value in introducing a quick, low cost and accessible mechanism for arbitrating on violations of the Equality Act 2010.

Full responses to the Select Committee’s questions:

A. General

1. *Has the Equality Act 2010 achieved the aim of strengthening and harmonising disability discrimination law? What has been the effect of disability now being one of nine protected characteristics?*

(1) The Equality Act 2010 (EqA) has strengthened and harmonised disability discrimination law in important respects, including by:

- Introducing discrimination arising in consequence of disability.
- Introducing indirect discrimination.
- Harmonising and strengthening justification defences.

However, we have some concerns about the effectiveness of the Act. These are set out at relevant points throughout this submission. Our concerns about the definition of disability – a gateway to the EqA for disabled people – are not relevant elsewhere and are therefore discussed here.

(2) We are disappointed that the Equality Act retained, in what is now s 6(1)(b), the requirement that, to qualify as ‘disabled’ for purposes of the Act, a person must have an impairment which ‘has a substantial ... adverse effect on [their] ability to carry out normal day-to-day activities’. We believe this requirement is inconsistent with EU law – namely the Court of Justice’s interpretation of ‘disability’ (for purposes of the Employment Equality Directive 2000/78/EC) in cases such as *Ring and Werge*, *Z v A Government Department and the Board of management of a community school*, and *Kaltoft*. Before these cases, EU law had included a similar condition to that now found in s 6(1)(b) EqA, but a different approach was adopted in order to achieve consistency with the UN Convention on the Rights of Persons with Disabilities (CRPD). Thus, there are obvious questions about the consistency of the EqA’s definition of disability with the CRPD as well as with EU law.

(3) Section 6(1)(b) EqA also requires that the ‘adverse effects on normal day-to-day activities’ should be ‘long term’. This element of the definition has caused some difficulties in practice and seems to operate particularly harshly for people with mental health conditions. For example, in the case of *Mullen* [2015], a woman was not able to bring a disability discrimination claim against her employer because her ‘impairment’ was not judged to be sufficiently long term – due to uncertainty about when her depression and anxiety might return and how long it might continue.

(4) We urge the Select Committee to recommend that the requirement in s 6(1)(b) of the EqA be repealed.¹ Examples of disability equality legislation with definitions of disability which do not include such a requirement can be found in Ireland² and in Australia.³ Further,

¹ See calls for similar amendments made in Disability Rights Commission, *Consultation on Definition of Disability in Anti-Discrimination Law* (London, DRC, 2006).

even in the EqA, there are situations where the requirement for a substantial adverse effect does not apply – eg in cases of severe disfigurement⁴ or where there has been a diagnosis of HIV infection, cancer or multiple sclerosis.⁵ Removing this requirement for all cases would make disability discrimination claims available to people who experience discrimination because of impairments with only very minor effects on their daily lives or because of an impairment which might affect them in the future (due, for instance, to a genetic predisposition⁶).

(5) We are concerned that the specific exclusions from the meaning of the EqA (contained in the 2010 Regulations) may be operating unfairly to exclude disabled people from the EqA and potentially therefore conflict with the CRPD. A recent example is *X v GB of a School*,⁷ where it was held that a 6 year old girl with Autism was not disabled because she had a ‘tendency to physical abuse’. Because of this, she was unable to challenge her exclusions from school as disability discrimination. We recommend that the purpose of and need for these exclusions is reconsidered, in light of the CRPD.

2. Are there gaps in the law on disability and equality not covered by the Equality Act 2010 or other legislation?

(6) In relation to the definition of disability, we have identified a number of gaps above, where people who experience disability discrimination would not be able to challenge it using the EqA. In particular:

- Discrimination because of future disability (eg genetic discrimination);
- Discrimination because of a condition which cannot be shown to have ‘long term’ or ‘substantial’ effects on day-to-day activities; and
- Discrimination because by somebody who falls within one or more of the specific exclusions in the 2010 Regulations.

(7) In addition, there are important gaps in the reach of the EqA in relation to:

- Volunteers – *X v Mid Sussex CAB*
- Air passengers – *Stott v Thomas Cook Air Tours*

(8) There are also important gaps because certain provisions in the EqA have not yet been brought into force. We are particularly concerned that the following have not yet been implemented or acted upon:

- The provisions on taxi accessibility regulations;
- The provisions on common parts; and

² Irish Employment Equality Act 1998, s 2(1).

³ Australian Disability Discrimination Act 1992, s 4.

⁴ EqA, sch 1, 3.

⁵ See EqA, sch 1, 6.

⁶ For criticism of the omission of this issue from the EqA, see RH Wilkinson, ‘The Single Equality Bill: A Missed Opportunity to Legislate on Genetic Discrimination?’ (2009) 3 *Studies in Ethics, Law, and Technology*.

⁷ [2015] UKUT 0007 (AAC).

- The provision on dual discrimination.

B. Reasonable Adjustment

3. *Are the reasonable adjustment duties known and understood by disabled people, employers, service providers and others who have duties under them?*

(9) A range of studies highlight inadequate implementation of reasonable adjustments. While lack of understanding seems to be an important factor, there are others and the relative significance of lack of understanding in causing poor implementation is not always evident. Some of these studies are outlined in paragraphs 10 – 16 below.

(10) In the employment context, Mark Bell has recently drawn attention to a trend toward more narrow and restrictive judicial interpretations of the reasonable adjustment duty and the difficulties this causes for workers with mental health conditions.⁸

(11) In the local authority context, Rupert Harwood argues that, although reasonable adjustment practice was generally good across the 33 local authorities he studied, there was evidence this was deteriorating because of spending cuts.⁹

(12) In the services context, research by MA Rankin found that business focus on disability had deteriorated between 2008 and 2013 and that there was a perception amongst interviewees of poorer accessibility and poorer implementation of anticipatory reasonable adjustment duties.¹⁰

(13) A number of studies have drawn attention to barriers to healthcare resulting from inadequate implementation of reasonable adjustment duties in the health system.¹¹

(14) In the education context, several studies raise concerns about the adjustments and support being made for disabled pupils.¹²

(15) In the justice context, various studies draw attention to the barriers to accessing and participating in the justice system on an equal basis with others because adjustments are not made.¹³

⁸ M Bell, 'Mental Health at Work and the Duty to Make Reasonable Adjustments' [2015] *Industrial Law Journal* 194.

⁹ Rupert Harwood, 'The dying of the light': the impact of spending cuts, and cuts to employment law protections, on disability adjustments in British local authorities' (2014) 29 *Disability and Society* 1511, 1517-1518.

¹⁰ M-A Rankin, 'Missing Out' (Really Useful Stuff, December 2013).

¹¹ See generally A Roulstone, S Woodin, A Lawson and M Priestley, *United Kingdom ANED Country report on Accessibility to Healthcare* (ANED, 2015) available at <http://www.disability-europe.net/content/aned/media/ANED%202014%20-%20Task%203%20-%20UK%20-%20final.doc> accessed 4 September 2015.

¹² See eg C Kulz, 'Mapping the Exclusion Process: Inequality, Justice and the Business of Exclusion' (Communities Empowerment Network, March 2015); and Department for Education, 'The Special Educational Needs and Disability Pathfinder Programme Evaluation: Final Impact Research Report' (London, July 2015), 15, 97.

¹³ See eg National Appropriate Adult Network, 'There to help: Ensuring provision of appropriate adults

(16) Although we have not been able to find any research on this, we are aware of considerable confusion amongst duty bearers, disabled people and others about the anticipatory reasonable adjustment duty. In particular, there is a tendency to attribute any anticipatory power to the Public Sector Equality Duty (PSED) and totally to overlook the existence of the anticipatory reasonable adjustment duty. The fact that breach of the anticipatory reasonable adjustment duty, unlike the PSED, amounts to discrimination under the EqA is generally not understood.

4. *Should the law be more explicit on what constitutes a reasonable adjustment? If so, in what way?*

(17) We believe that guidance in codes of practice could be strengthened. Alongside the current codes, which integrate guidance on reasonable adjustments into more generic guidance, we suggest that there is a need for a separate code on reasonable adjustments – or possibly one on anticipatory reasonable adjustment and one on reactive reasonable adjustment.

(18) We are concerned that the profile and impact of the guidance in the newer codes of practice has been seriously damaged by the fact that they have not been endorsed by Parliament – and thus not become statutory codes. We recommend this is changed and that new codes of practice are laid before Parliament.

(19) We recommend that, in new codes of practice on reasonable adjustment, reference is made to standards (where they exist). There could, for example, be a statement that compliance with such standards will help satisfy anticipatory reasonable adjustment duty, whilst making it clear that more may sometimes be needed.

(20) We are excited by the introduction of the Accessible Information Standard by NHS England. The impact of this on enhancing accessible interaction and communication should be monitored with a view to recommending the rolling out of similar approaches in other sectors.

C. Public Sector Equality Duty

for Mentally Vulnerable People Detained or Interviewed by the Police’, (August 2015); C Paskell et al, CLA Mandatory Gateway: Findings from interviews with users, *MoJ Analytical Series*; P Swift, K Johnson, V Mason, N Shiyab and S Porter, *What Happens when People with Learning Disabilities Need Advice about the Law?* (Nora Fry Institute, 2013); and A Lawson, ‘Disabled People and Access to Justice: From Disablement to Enablement?’ in P Blanck, E Flynn and G Quinn (eds) *Disability Law* (Ashgate, forthcoming).

5. How effective has the public sector equality duty been in practice? How do you assess its contribution to the aims of the Equality Act 2010?

(19) One of the core strengths of the Equality Act 2010 is the move towards transformative equality contained in the PSED.¹⁴ There has been some uncertainty in the case law regarding the degree of analysis required of decision-makers in order to comply with the Duty.¹⁵ We hope that the more robust standard of review adopted by the Court of Appeal in *Bracking*¹⁶ will be influential. Recent cases have focused on challenging proposed cuts and the focus of the PSED case law has thus been on the ‘elimination of discrimination’ ground.¹⁷ Given concern about intensifying negative attitudes toward disabled people and disability harassment, there is potential for more use of the PSED’s grounds of advancing equality and fostering good relations.

(20) We are concerned about the potential impact on the PSED and its enforcement of enhanced court fees and the requirement in the Criminal Justice and Courts Act 2015 that in order to bring a judicial review case it must be ‘highly likely’ that proper consideration of the PSED would change the outcome for the applicant.¹⁸ This high threshold, coupled with increased costs of litigation, is likely to operate as a disincentive. Similarly, a cap on recoverable costs may prevent applicants from bringing cases¹⁹ and the imposition of costs on interveners may have a chilling effect on the ability of non-governmental organisations and the EHRC to intervene in proceedings.²⁰

(21) The general duty to have ‘due regard’ is rather weak – particularly if not accompanied by strong specific duties. We are very concerned that the specific duties in England are weaker than those accompanying the Disability Equality Duty and that the removal of the requirement to ‘involve’ disabled people is a retrogressive step when judged against Article 4(3) of the CRPD.

(22) We welcome the full review of the PSED due in 2016 and urge that care is taken to ensure that the independence and rigour of that review is beyond reproach. We note Aileen McColgan’s concerns that the composition of the 2012 ‘Independent Steering Group’ originally tasked with evaluating the PSED was composed largely of people who could ‘reasonably be regarded as having an interest in the evisceration of the duty.’²¹

¹⁴ Bob Hepple, ‘Equality Law Under the Conservative Government’ (Keynote presentation, ‘The Equality Act 2010: Five-years On’ Conference, Chester University 22 June 2015) <http://www.chester.ac.uk/node/31620> accessed 26 August 2015.

¹⁵ Aileen McColgan, ‘Litigating the Public Sector Equality Duty: The story so far’ (2015) 35 *Oxford Journal of Legal Studies* 453, 473.

¹⁶ *R (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 (CA)

¹⁷ Aileen McColgan, ‘Litigating the Public Sector Equality Duty: The story so far’ (2015) 35 *Oxford Journal of Legal Studies* 453, 479.

¹⁸ Criminal Justice and Courts Act 2015 s 84.

¹⁹ Criminal Justice and Courts Act 2015 s 88.

²⁰ Criminal Justice and Courts Act 2015 s 87.

²¹ Aileen McColgan, ‘Litigating the Public Sector Equality Duty: The story so far’ (2015) 35 *Oxford Journal of Legal Studies* 453, 454.

6. What has been the impact of the different approaches in England, Wales and Scotland to the specific duties designed to support the general public sector equality duty? Have the specific duties supported implementation for disabled people?

(23) The specific duties in England are very light-touch and we are concerned that this significantly hampered the progress that had been made under the Disability Equality Duty. The Scottish²² and Welsh²³ Regulations go much further in prescribing what public bodies must do to meet their equality obligations.²⁴ Unlike the English Regulations, the Welsh and Scottish Regulations require public authorities to conduct equality impact assessments in respect of new or amended policies or practices and to take these assessments into account in decision-making.²⁵ Research by the EHRC has shown that the PSED Regulations in Wales are working well by raising the profile of the equality agenda, providing clarity about what must be done to implement the duty, and showing that all organisations involved in the research were able to demonstrate at least one example of evidence showing progress towards the general Duty.²⁶ By contrast, 2012 research conducted by the EHRC on implementation of the PSED in England showed only 50% of public authorities had met their obligation to publish equality information on their workforce and service users.²⁷

(24) A further significant issue of concern is the failure of the English Regulations to specify the need for public authorities to involve or engage with stakeholders when determining their equality objectives as is required under the Scottish and Welsh Regulations.²⁸ The need for involvement of disabled people in setting equality objectives was a key strength of the proceeding Disability Equality Duty.²⁹ Further, as noted above, ‘involvement’ of disabled people in decisions and policy-making affecting them is required by Article 4(3) of the CRPD and there is therefore an argument that the new specific duties represent a retrogressive step in UK progress toward CRPD implementation.

²² The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 SI 2012/162.

²³ The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 SI 2011/1064 (W.155).

²⁴ (Scotland) Regulations 2012 SI 2012/162 s 3-5; (Wales) Regulations 2011 SI 2011/1064 (W.155) s 3-4.

²⁵ (Scotland) Regulations 2012 SI 2012/162 s 5; (Wales) Regulations 2011 SI 2011/1064 (W.155) s 8.

²⁶ EHRC ‘Review of the Public Sector Equality Duty (PSED) in Wales’ (EHRC, NatCen, 2014) 5, <<http://www.equalityhumanrights.com/publication/review-public-sector-equality-duty-psed-wales-full-report>> accessed 27 August 2015

²⁷ EHRC ‘Publishing equality information: Commitment, engagement and transparency: Assessment of public authorities’ implementation of the specific duty to public equality information’ (EHRC, December 2012) <<http://www.equalityhumanrights.com/private-and-public-sector-guidance/public-sector-providers/public-sector-equality-duty/monitoring-and-enforcement>> accessed 27 August 2015

²⁸ (Scotland) Regulations 2012 SI 2012/162 s 5; (Wales) Regulations 2011 SI 2011/1064 (W.155) s 4(2).

²⁹ Disability Discrimination Act 1995 s 49A, as amended by the Disability Discrimination Act 2005. For research showing benefits of involvement see Caroline Gooding ‘Promoting Equality?: Early Lessons from the Statutory Disability Duty in Great Britain’ in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law*, Volume 1 (Hart Publishing, Oxford 2009) 39-41; and J Ferrie et al, ‘An In-Depth Examination of the Implementation of the Disability Equality Duty In England – Executive Summary’, (Office for Disability Issues, December 2008), <<http://socialwelfare.bl.uk/subject-areas/services-client-groups/adults-disabilities/officefordisabilityissues/indepth08.aspx>> accessed 27 August 2015.

D. Oversight and Enforcement

7. Does the division of responsibilities between Ministers and government departments affect the effective implementation of the Equality Act 2010 in respect of disability?

(25) We would urge the Committee to take note of Article 33 of the CRPD when considering this issue, in particular, its requirement for a ‘focal point’ and effective co-ordination mechanism across government.

10. Are the current enforcement mechanisms available to private individuals (through Employment Tribunals, County Courts and, in Scotland, Sheriff Courts) accessible and effective for people with disabilities, employers and providers of goods, facilities and services?

(26) We are very concerned that the introduction of Employment Tribunal fees after 29 July 2013 has had a significant impact on disabled (and other) people. We are also seriously concerned about the impact of changes to entitlement and application methods for legal aid. An indication of some of these impacts is provided in an EHRC report on the subject due to be published in September 2015.

We urge the Committee to reflect on quick, low cost and accessible methods being used in other countries (eg Norway) to enforce equality claims and consider recommending action on this issue in the UK.

4 September 2015