

## Reasonable adjustments and complaints

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# What will I cover to answer the question?



- The law and the responsible parties
- What are the obligations that arise?
- The duty to make reasonable adjustments
- What are the consequences of getting it wrong?
- Practical issues

## The law governing this matter

- The Equality Act 2010 is the main piece of legislation in this area
- Part 3 of the Act places service providers and those exercising public functions under certain obligations
- The Equality and Human Rights Commission has produced a useful Code of Practice in this area

## Service providers

- This is widely defined and includes those providing goods, facilities or services to the public at large or any section thereof, whether a public, voluntary or private body
- All service providers have the same legal duty albeit the way it is applied may differ
- The obligations also extend to those providing public functions (ie activities on behalf of the State)

## Disabled service users

- It is only persons who satisfy the Act's definition of "disability" who are protected, ie those with
  - "a physical or mental impairment [having] a substantial and long term adverse effect on [his/her] ability to carry out normal day-to-day activities"

## Substantial long term effects

- “Long term” means has lasted 12 months or is likely to do so or is likely to last for the rest of the person’s life
- “Substantial” means not minor or trivial
- Ignore effects of medical treatment in assessing the effects
- Note other provisions, including deemed disabilities, past disabilities, progressive conditions etc

## Obligations upon service providers

- Service providers must not discriminate against a disabled service user in terms of the provision of the service
- The obligation not to discriminate extends to the decision to provide the service, the quality of the service and beyond
- It is unlawful to subject disabled service users to a detriment (as widely defined)



## The duty to make reasonable adjustments

“The policy of the Act is not a minimalist policy of simply ensuring some access is available to disabled people; it is, so far as reasonably practicable, to approximate access enjoyed by disabled people to that enjoyed by the rest of the public. The purpose of the duty is to provide access to services as close as is reasonably possible to get to the standard normally offered to the public at large.”

Equality Commission Code para 7.4

# The duty to make reasonable adjustments

- The duty comprises three requirements:
  - The first is that, where a **provision, criterion or practice** puts disabled people at a substantial disadvantage compared to persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid that disadvantage.

# Failure to make reasonable adjustments



- The duty comprises three requirements:
  - The second is that, where a **physical feature** puts a disabled person at a substantial disadvantage compared with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage or adopt a reasonable alternative method of providing the service.

# Failure to make reasonable adjustments

- The duty comprises three requirements:
  - The third is that, where the disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to provide the auxiliary aid.

# Failure to make reasonable adjustments



- Compare the position in relation to employment - The Equality and Human Rights Commission Code (@6.2):

“The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers unfairly and means taking additional steps to which non-disabled workers are not entitled.”

# Failure to make reasonable adjustments



- The duty is owed to disabled people generally and is anticipatory in nature
- Consider, in advance, what barriers might impede disabled people in relation to your service and how these can be overcome
- The duty requires service providers to take more favourable steps towards disabled service users

## Failure to make reasonable adjustments

- “Because this is a duty to disabled people at large, it applies regardless of whether the service provider knows that a particular person is disabled or whether it currently has disabled customers.” (Para 7.22 of the Code)
- The duty is a continuing duty that evolves and should be kept under review taking account of disabled service users’ views and other interested parties while bearing in mind advancing technologies

# Failure to make reasonable adjustments

- What steps are *reasonably required* to remove the substantial disadvantage?
  - Ensure information is in an accessible format.
  - Waive, amend or abandon provisions, criteria or practices
  - Provide and maintain suitable auxiliary aids (eg sign language interpreter, extra staff to help, readers etc)
  - Remove or alter physical features
  
- It may still be reasonable to make the adjustment even if success is not guaranteed

# Failure to make reasonable adjustments



- The Equality Commission Code (@ paras 7.29/30) suggests in determining whether the adjustment is reasonable the following should be considered:
  - The type of service being provided
  - The nature, size and resources of the service provider
  - The effect upon the individual of the adjustment
  - Whether the step would be effective in preventing the disadvantage
  - Whether the step is practicable and any disruption caused
  - The availability of other financial resources

# Failure to make reasonable adjustments



- Lewison LJ in *Paulley* (2015 @ 42)

“It is common ground that the question whether a particular adjustment is reasonable is to be judged objectively; it is not simply a question of deciding whether the process of reasoning by which a possible adjustment was considered was reasonable. The focus is on the practical result of measures that can be taken.”

# Failure to make reasonable adjustments



- Elias LJ in *Griffiths* (2015 @ 65)

“Any modification of or alteration to the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.”

# Failure to make reasonable adjustments



“Service providers should bear in mind that there are no hard and fast solutions. Actions which may result in reasonable access to services being achieved for some disabled people may not necessarily do so for others.”

Equality Commission Code para 7.34

# Bear in mind the other types of claims



- Direct discrimination “on the grounds of disability”
- Indirect discrimination
- Discrimination for a reason arising from disability
- Victimization
- Harassment

## Who is liable?

- The service provider is principally liable
- That covers decisions, acts and omissions of employees
- The employee who carries out the act could potentially be personally liable: this can be a powerful way to encourage compliance with legal obligations

## The defence

- The service provider is liable for unlawful acts of staff unless the provider took “all reasonable steps” to prevent the unlawful act
- It is no defence to say that taking steps would not have prevented the act
- Did the service provider do all that was reasonable?

## The defence

- This will generally require:
  - A comprehensive policy that ensures equality of access and enjoyment of the service by all groups of society
  - Don't ignore it – publicise, monitor and police it
  - Train all staff: do they know their obligations?
  - Set a good example and involve representative groups
  - Address discrimination issues via the disciplinary and performance management processes
  - Review all practices to ensure equality of access etc

## The remedy

- ❑ Failure to comply with the law can give rise to legal action, in addition to reputational damage or the involvement of the Ombudsman's (if applicable)
- ❑ The Equality Commission can become involved
- ❑ Legal proceedings can be raised within the Sheriff Court
- ❑ Remedies can include interdict and compensation (including for injury to feelings)

## Practical Pointers

- ❑ Consult with service users and representative groups to ensure all possible adjustments are considered
- ❑ Draw disabled service users' attention to the adjustments you make so they know they can access the service
- ❑ Keep the position under review and carry out expert audits
- ❑ The service provider must pay for any adjustment

# Practical Pointers



- Train staff so they know how to respond to requests for reasonable adjustments and to be anticipatory
- Properly maintain auxiliary aids and have contingency plans in the event of failure
- Encourage employees to develop their skills in this area and ensure all staff are aware of the issues

## The question asked...

- Dealing with complaints from people with potential or diagnosed mental health conditions and autistic preference disorders:
  - What policies should you have?
  - Is knowledge of the disability relevant?
  - What are the reasonable adjustments for disabled service users in these cases?
  - How do you decide what is reasonable in all the circumstances (avoiding reliance on cost alone)?

## The question asked...

- Responding to complex clinical matters in a non-clinical setting:
  - Sensitivity needed
  - Understand your legal obligations (and use the Code)
  
- It's never too late to get specialist legal advice...

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