

Weightmans Guidance Note [Autumn 2016]

**A Brief Guide to
Service Provider's Duties Towards
Disabled Customers under
The Equality Act 2010**

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1) Introduction

1.1) All anti-discrimination law in England, Scotland and Wales can be found in The Equality Act 2010. The Act provides people who have one or more 'protected characteristics' - including those with a disability - with protection against various forms of discrimination in various contexts, including with regard to the provision of goods and services (e.g. in their capacity as disabled customers).

1.2) In order to be protected against disability discrimination under the Equality Act (and save for certain exceptions), a customer must normally be personally disabled or else must have had a disability in the past. However, in many cases a service provider may not know whether a particular customer is disabled and, as a consequence, whether he or she is entitled to protection under the Equality Act. However, and unless what is being requested or complained about is unreasonable, it makes sense for a service provider not to unduly worry about the issue of a customer's disabled status:

- from a commercial perspective, if a requested adjustment to a particular service is reasonable or else a complaint is easily addressed, and if it would facilitate the customer's use of the service being provided, then it would make sense to accommodate the customer, irrespective of his or her disabled status; and
- from a corporate reputation perspective, a service provider may risk being criticised for demanding proof of a customer's disability before implementing what might be regarded as a comparatively simple and inexpensive request.

1.4) The Equality Act is accompanied by a Statutory Code of Practice for Services, Public Functions and Associations ('the Code of Practice') which provides practical guidance on the disability provisions of the Equality Act (amongst other matters). Although the Code of Practice is not law, Courts and Employment Tribunals are expected to take it into account when interpreting the Equality Act. This guidance note includes advice given in the Code of Practice.

1.5) This guidance note focuses on the obligations owed towards disabled customers and service users by service providers and those exercising public functions. The term 'service provider' within this note includes those providing goods, facilities and services, and also those providing a service when exercising a public function, unless otherwise stated. 'Customer' includes service users. This note is up-to-date as at the start of [September 2016](#).

2) The meaning of "disability"

2.1) In order to be protected against disability discrimination under the Equality Act, a person must either currently have a disability or must have previously had* a disability, as defined in the Act.** According to the Equality Act, a person has a disability if he or she:

- has a physical or mental impairment, which has a
- substantial and

- long-term
- adverse effect on the person's ability to carry out normal day-to-day activities.

*[The Equality Act also provides protection against discrimination in respect of a past disability, even if that person is no longer disabled].

**[However, both disabled and non-disabled people are protected against victimisation under the Equality Act. Furthermore, the Equality Act also protects non-disabled people against direct discrimination or harassment by association and by perception].

2.2) All four elements of the statutory definition of a disability must be satisfied. Determining whether an individual is disabled should normally be undertaken by a suitably qualified medical expert. (However, and as mentioned previously, it will often be unnecessary and/or impractical for a service provider to concern him or herself with whether a particular customer is in fact disabled as defined in the Equality Act).

3) The meaning of “discrimination” under The Equality Act 2010

3.1) Types of Discrimination

The Equality Act makes it unlawful for a service provider to discriminate against a disabled person in the following ways:

a) Direct disability discrimination:

i) A service provider directly discriminates against a disabled person (e.g. a disabled customer) if, because of his or her disability, the service provider treats the disabled person less favourably than it treats or would treat others. (It makes no difference that the discriminator is also disabled: it's still discrimination).

ii) For there to be direct discrimination the reason for the less favourable treatment must be the disability itself and not merely something related to the disability. (If it's the latter, this won't amount to direct discrimination although it might instead fall within one of the other forms of outlawed discrimination which are explained below). In deciding whether a service provider has treated a disabled customer 'less favourably', a comparison must be made with how they have treated other customers (or else would have treated them) in similar circumstances.

iii) Under the Equality Act it is not possible for a service provider to balance or eliminate less favourable treatment by offsetting it against other more favourable treatment (e.g. by offering an alternative service at a discount). Furthermore, direct discrimination is unlawful, irrespective of the service provider's motive or intention and regardless of whether the less favourable treatment is conscious or unconscious. Service providers may act out of good intentions or simply be unaware that they are treating the disabled customer differently because of a protected characteristic.

iv) It is not direct discrimination to treat a disabled person more favourably than a non-disabled person (e.g. by making reasonable adjustments for the disabled person, as described below).

v) The protection against direct disability discrimination is extended to people who are not personally disabled in two circumstances:

- *Direct discrimination by Association*: this occurs when a non-disabled customer is treated less favourably by a service provider because of that customer's association with someone who is disabled, rather than because the customer is personally disabled. For example, it would be unlawful for a shop keeper to treat a non-disabled customer less favourably because they had written a letter of complaint to a local newspaper about the shop being inaccessible for their disabled wife; and
- *Discrimination by perception*: it is also direct disability discrimination if a service provider treats a customer less favourably because the service provider mistakenly thinks that the customer is disabled, even though he/she is not.

b) Indirect disability discrimination:

i) For indirect discrimination to arise, four requirements must be met:

- the service provider must apply (or intend to apply*) a provision, criterion or practice** equally to everyone within the relevant group, including a particular customer;
- the provision, criterion or practice must put (or would put, if applied) people who share the customer's particular disability at a particular disadvantage when compared with people who do not have that particular disability;
- the provision, criterion or practice must put (or would put) the particular disabled customer (who is raising the complaint) at that disadvantage; and
- the service provider cannot justify the application of the provision, criterion or practice by showing that it's a proportionate means of achieving a legitimate aim.

*(This allows challenges to provisions, criteria or practices which have not yet been applied but which would have a discriminatory effect if they were).

** (The term 'provision, criterion or practice' should be construed widely so as to include formal or informal policies, rules, practices, conditions, and provisions).

ii) A 'disadvantage' could include anything which a reasonable person might complain about. As with direct discrimination, the disabled customer does not have to experience any actual disadvantage (financial or otherwise) for the treatment to be less favourable: it is sufficient if the disabled customer could reasonably say that they would have preferred to have been treated differently.

iii) Indirect discrimination is unlawful, even where the discriminatory effect of the provision, criterion or practice is not intentional, unless it can be objectively justified. The Equality Act defines objective justification as a "proportionate means of achieving a legitimate aim". If challenged in the courts, it is for the service provider to justify the provision, criterion or practice by producing evidence to support their assertion that it is justified; generalisations will not be sufficient. The more serious the disadvantage caused by the discriminatory provision, criterion or

practice, the more convincing the objective justification must be. In a case involving disability, if the service provider has not complied with its anticipatory duty to make reasonable adjustments (as explained below) then it will be difficult for the service provider to show that the treatment was proportionate.

c) Discrimination arising from disability:

i) The treatment of a disabled person (such as a disabled customer) will amount to discrimination arising from disability where:

- the service provider treats the disabled customer unfavourably because of something arising in consequence of* the customer's disability; and
- the service provider cannot justify** the unfavourable treatment (i.e. show that the treatment is a proportionate means of achieving a legitimate aim),

unless the service provider does not know, and could not reasonably be expected to know, that that the customer has the disability***.

*(There must be a connection between whatever led to the unfavourable treatment and the consequences of the particular disability. Some consequences may be obvious, such as an inability to walk unaided. Others may not be obvious, such as an inability to understand the implications of a financial agreement).

** (It is for the service provider to justify the treatment and, as before, he/she must produce evidence to support their assertion that it is justified and not rely on mere generalisations).

*** (A service provider must do all they can reasonably be expected to do to find out if a person has a disability. What is reasonable will depend on the circumstances and is an objective assessment. Service providers should, however, consider issues of dignity and privacy and ensure that personal information is dealt with confidentially).

ii) Discrimination arising from disability differs from direct disability discrimination as follows:

- direct discrimination occurs when the service provider treats someone less favourably because of their disability itself;
- by contrast, in discrimination arising from disability the disabled person is treated unfavourably because of something arising in consequence of their disability, rather than the disability itself.

iii) Discrimination arising from disability differs from indirect disability discrimination as follows:

- Indirect discrimination occurs when a disabled person is (or would be) disadvantaged by an unjustifiable provision, criterion or practice which is applied to everyone and which puts (or would put) people sharing the disabled person's disability at a particular disadvantage compared to others, and which in fact puts (or would put) the disabled person at that disadvantage;

- By contrast, discrimination arising from disability only requires the disabled person to show that they have experienced unjustifiable unfavourable treatment because of something connected with their own disability and that the service provider knew (or ought reasonably to have known) that the disabled person had the disability. In other words, it's a narrower test.

iv) In the case of discrimination arising from disability, and unlike with direct and indirect disability discrimination, there is no requirement for the disabled person to establish that their treatment is less favourable than that experienced by a non-disabled comparator. Instead, the focus is on whether the treatment amounts to a detriment and, if so, whether it can be justified.

v) Finally, service providers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (as explained below). Again, if a service provider has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment then it will be very difficult for them to show that the treatment was objectively justified.

d) Failure to comply with the duty to make reasonable adjustments:

According to the Equality Act, an employer discriminates against a disabled person if it fails to comply with the duty to make reasonable adjustments. This duty is explained in detail in paragraph 3.2 below.

e) Harassment:

i) The Equality Act prohibits three types of harassment, including harassment related to a 'relevant protected characteristic' such as disability. Such harassment is defined as follows:

A person (A) (e.g. a service provider) harasses another person (B) (e.g. a disabled customer) if A engages in unwanted conduct related to disability and that conduct has the purpose or effect of:

- violating B's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

ii) In determining whether harassment has occurred, a Tribunal will have regard to all the circumstances of the case including, in particular, the perception of B and whether it is reasonable for A's conduct to have had that effect. Unlike direct discrimination, harassment does not require a comparative approach – it is not necessary for the service user to show that another person was, (or would have been), treated more favourably.

iii) Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour. It's not necessary for an express objection to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can amount to harassment.

iv) In most cases B will be a disabled person and the unwanted conduct will relate to his or her personal disability. However, non-disabled people are also protected under the Equality Act against harassment by reason of the fact that they associate with a disabled person or are wrongly perceived to be disabled.

f) Victimisation:

i) The Equality Act protects employees who stick up for their own rights, or for the rights of another, not to be discriminated against. According to the Equality Act:

Person A (e.g. a service provider) victimises person B (e.g. a disabled customer) if A subjects B to a detriment because either B does a protected act or else A believes that B has done, or may in future do, a protected act, namely:

- bringing proceedings under the Equality Act;
- giving evidence or information in connection with proceedings under the Act;
- doing anything else for the purposes of or in connection with the Act; and/or
- making an allegation (whether or not express) that A or another person has contravened the Equality Act.

ii) A 'detriment' in the context of victimisation could take many forms and generally amounts to anything which the service user concerned might reasonably consider changed their position for the worse or put them at a disadvantage. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.

iii) Victimisation does not require a comparator. Only individuals (and not organisations) are protected from victimisation. An individual need not have a particular protected characteristic in order to be protected against victimisation under the Act; to be unlawful, victimisation must simply be linked to a 'protected act'.

iv) An individual cannot claim victimisation where they have acted in bad faith, such as maliciously giving false evidence or information or making a false allegation of discrimination. However, if an individual gives evidence, provides information or makes an allegation in good faith but it turns out that it is factually wrong or provided in relation to proceedings which are unsuccessful then they will still be protected from victimisation.

3.2) **The duty to make reasonable adjustments:**

a) Introduction:

The duty to make reasonable adjustments requires service providers to take positive steps to ensure that disabled people can access services. This goes beyond simply avoiding discrimination. It requires service providers to anticipate the needs of potential disabled customers by making reasonable adjustments to the services being provided. The purpose of the duty to make reasonable adjustments is to provide access to a service which is as close as is reasonably

possible to the standard normally offered to the public at large (and their equivalent in relation to the exercise of public functions).

b) The duty:

The Equality Act explains that a service provider (including those exercising public functions) discriminates against a disabled person (such as a disabled customer) if it fails to comply with the duty to make reasonable adjustments, and that this duty imposes three requirements on a service provider, namely:

i) Where a **provision, criterion or practice** applied by or on behalf of a service provider puts disabled people (e.g. disabled customers) at a substantial (i.e. more than minor or trivial) disadvantage in relation to a relevant matter (i.e. the provision of the service by the service provider) in comparison with persons (e.g. fellow customers) who are not disabled, then the service provider must take reasonable steps to avoid that disadvantage;

ii) Where a **physical feature** of premises occupied by a service provider puts disabled people at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then the service provider must take reasonable steps to avoid that disadvantage or else adopt a reasonable alternative method of providing the service (or exercising the function); and

iii) Where disabled people would, but for the provision of an **auxiliary aid or service**, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then the service provider must take reasonable steps to provide the auxiliary aid or service.

The Code of Practice provides the following two examples:

- A museum has procedures for the evacuation of the building in the event of a fire or emergency. Visitors are required to leave the building by designated routes. If the museum will not modify its procedures to allow visitors with mobility or sensory impairments to be evacuated safely then this is likely to be a failure to make a reasonable adjustment;
- A prison has a policy of opening its library and health centre every morning from 10 a.m. until 11 a.m. This means that disabled prisoners who have morning medical appointments at the health centre are not always able to use the library. The prison therefore allows the library to open for an hour in the evening as well. This is likely to be a reasonable adjustment for the library to make.

c) 'Physical features':

i) The Equality Act and the Code of Practice explain that reasonable adjustments to overcome physical features would include:

- removing the physical feature in question;
- altering it; or
- providing a reasonable means of avoiding it.

(Where the substantial disadvantage caused by a physical feature cannot be avoided, service providers should consider whether there is a reasonable alternative method of making services available to disabled people).

ii) Where there is a physical barrier, the service provider's aim should be to make its services accessible to disabled people and, in particular, to provide access to a service as close as is reasonably possible to the standard normally offered to the public at large. When considering which option to adopt, service providers must balance and compare the alternatives to determine which option will, as far as is reasonably practicable, enable disabled customers to enjoy the level of access enjoyed by the rest of the public.

iii) The Code of Practice provides a non-exhaustive list of physical features, explaining that these would include: steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, public facilities (such as telephones, counters or service desks), lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items (such as equipment and display racks). Physical features also include the sheer scale of premises (for example, the size of a shopping centre). For example:

- A large out-of-town shopping centre provides motorised mobility scooters as a reasonable adjustment for people with mobility impairments who would otherwise experience a substantial disadvantage in accessing the shops in the town centre.

d) 'Auxiliary aids or services':

i) An auxiliary aid or service is anything which provides additional support or assistance to a disabled person. Examples include:

- a special piece of equipment;
- the provision of a sign language interpreter, lip-speaker or deaf-blind communicator;
- extra staff assistance to disabled people;
- an electronic or manual note-taking service;
- an induction loop or infrared broadcast system;
- videophones;
- audio-visual fire alarms;
- readers for people with visual impairments;
- assistance with guiding; and
- telephone services to supplement other information.

ii) Service providers should ensure that any auxiliary aids they provide are properly maintained. It would also be advisable to have in place contingency arrangements in case of an unexpected failure of an auxiliary aid. A failure to ensure the auxiliary aid is in operation may constitute a failure to make an adjustment.

e) Can a failure to make a reasonable adjustment be justified?

The Equality Act does not permit a service provider to justify a failure to comply with a duty to make a reasonable adjustment: it is the question of 'reasonableness' which alone determines whether the adjustment has to be made.

f) To whom is the duty to make reasonable adjustments owed?

In relation to services and public functions, the duty to make reasonable adjustments is owed to disabled people generally. It is not simply a duty that is weighed in relation to each individual disabled person who wants to access a service provider's services or who is affected by the exercise of a public function. As such, the duty applies regardless of whether the service provider knows that a particular person is disabled or whether it currently has disabled customers, etc. When disabled customers request services, the service provider must already have taken all reasonable steps to ensure that they can be served.

g) The duty to make reasonable adjustments is anticipatory:

The duty is an anticipatory duty. Service providers should therefore not wait until a disabled person wants to use their service before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. Service providers are not expected to anticipate the needs of every individual who may use their service, but they are required to think about and take reasonable steps to overcome barriers that may impede people with different kinds of disability, e.g. given that people with dementia, mental health conditions or mobility impairments may face different types of barriers. Furthermore, once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services then it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that they face in accessing services, or has suggested a reasonable solution to that difficulty.

h) The duty to make reasonable adjustments is a continuing duty:

The duty to make reasonable adjustments is a continuing, evolving duty. Service providers should keep the duty and any existing adjustments under regular review in light of their ongoing experiences with disabled customers: it is not something that needs simply to be considered once only, and then forgotten. What was originally a reasonable step to take might no longer be sufficient, and the provision of further or different adjustments might then have to be considered. In addition, a step that might previously have been an unreasonable one for a service provider to take could subsequently become reasonable in light of changed circumstances or technological developments which may provide new or better solutions.

i) When is an adjustment 'reasonable'?

The duty to make reasonable adjustments places service providers under a responsibility to take such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments. The Act does not specify that any particular factors should be taken into account but the Code of Practice explains that:

i) What is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case and will vary according to:

- the type of service being provided;
- the nature of the service provider and its size and resources; and
- the effect of the disability on the individual disabled person.

ii) The following is a non-exhaustive list of some of the factors which might be taken into account when considering what is reasonable:

- The **effectiveness** of the proposed adjustment in preventing the substantial disadvantage experienced by a disabled customer in accessing the services in question;
- the **practicability** of the adjustment;
- the extent of any **disruption** caused in making the adjustment;
- the **financial and other costs** of making the adjustment;
- **the extent of the service provider's financial or other resources**;
- the amount of any **resources already spent** on making adjustments; and
- the **availability of financial or other assistance**.

iii) The question of the reasonableness of an adjustment is an objective one for the courts to determine and service providers may have to implement a variety of adjustments. In all cases, it is important to use, as far as is reasonable, a means of communicating about the existence of any adjustments which is itself accessible to disabled people.

j) The cost of making reasonable adjustments:

i) The Equality Act prohibits service providers who are under a duty to make reasonable adjustments for disabled customers from requiring those customers to pay to any extent for the costs of making those adjustments.

ii) It is more likely to be reasonable for a service provider with substantial financial resources to have to make an adjustment with a significant cost than for a service provider with fewer resources. The resources available to the service provider as a whole are likely to be taken into account when assessing the reasonableness of the cost of making a particular adjustment, as well as the other demands on those resources. Where the resources of the service provider are spread across more than one business unit or profit centre then the demands on them all are likely to be taken into account in assessing reasonableness.

k) Reasonable adjustments in practice:

The Code of Practice recommends the following practical measures when a service provider is considering making reasonable adjustments, explaining that in some circumstances they may either be a means to identify reasonable adjustments or actually constitute reasonable adjustments themselves:

- Plan in advance for the requirements of disabled people and regularly review the reasonable adjustments already in place;
- Conduct access audits on premises;
- Ask disabled customers for their views on reasonable adjustments;
- Consult local and national disability groups;
- Draw disabled people's attention to relevant reasonable adjustments so that they know that they can use the service;
- Properly maintain auxiliary aids and have contingency plans in place in case of the failure of the auxiliary aid;
- Train employees to appreciate how to respond to requests for reasonable adjustments;
- Encourage employees to develop additional serving skills for disabled people (for example, communicating with hearing impaired people); and
- Ensure that employees are aware of the duty to make reasonable adjustments and understand how to communicate with disabled customers so that reasonable adjustments can be identified and made.

4) Service provider's duties towards disabled customers under The Equality Act 2010

4.1) Introduction:

a) Part 3 of the Equality Act provides disabled customers with protection against disability-related discrimination by service providers and those providing public functions. (A person or organisation may of course have duties under more than one part of the Act, e.g. where they both employ people and provide services to customers. However, this guidance note focuses on the legal obligations owed by service providers to disabled customers). Part 3 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against when using any service, whether it's provided publicly or privately and whether that service is paid for or free of charge.

b) What are 'services'?

i) A wide range of services are covered by the Equality Act, including services which are provided to the public, or a section of the public, by local authorities, government departments and their agencies; some charities; voluntary organisations; hotels; restaurants; pubs; post offices; banks; building societies; solicitors; accountants; telecommunications organisations; public utilities (such as gas, electricity and water suppliers); services provided by bus and train operators, railway stations, airports; public parks; sports stadia; leisure centres; advice agencies; theatres; cinemas; hairdressers; shops; market stalls; petrol stations; telesales businesses; hospitals, and clinics.

ii) Services are covered regardless of whether they are provided by a private, voluntary or public body. It is the provision of the service that is affected by the Act, and not the nature of the service or business or the type of establishment from which it is provided.

c) Who are 'service providers'?

The Equality Act imposes obligations on everyone concerned with the provision of services to the public, or to a section of the public, whether in the private, public or voluntary sectors. It does not matter if services are provided free of charge, such as access to a shopping mall, or in return for payment, for example, a meal in a restaurant. Under the Equality Act, the provision of services to the public includes the provision of goods or facilities.

d) Who are 'service users'?

Service users are customers of services, users of facilities, consumers or purchasers of goods, people who benefit from or are subject to public functions, and people who are members, associates and guests of associations.

e) Services provided to the public by more than one provider:

A service to the public might appear to be provided by more than one service provider. In such a case, it may be important to identify who is actually responsible for providing the service which has given rise to the alleged discrimination. In some cases, liability under the Act may be shared among a number of service providers. It is possible, for example, for two service providers to have full liability, and any obligations must be met by them both. For example:

- A bank has a cash machine inside a supermarket. Although the cash machine is located on the supermarket's premises, the service is being provided by the bank. The bank is likely to be responsible for any duties that may arise under the Act in respect of the cash machine. However, the supermarket is likely to be responsible for ensuring that the cash machine is physically accessible to disabled customers using its premises.

f) Public functions:

i) The Equality Act also imposes obligations on any person who exercises public functions as defined in the Act. The public function provisions apply in relation to a function of a public nature, exercised by a public authority or by another person (including a private organisation*), where the function is not covered by the services, premises, work or education provisions of the Act.

*(Public functions are not only carried out by public authorities: they may also be carried out by private or voluntary organisations, e.g. when a private company manages a prison or when a voluntary organisation takes on responsibilities for child protection).

ii) The term 'public function' may cover a wide variety of activities, including:

- determining frameworks for entitlement to benefits or services;
- law enforcement;
- receiving someone into a prison or immigration detention facility;

- planning control;
- licensing;
- enforcement of parking controls, trading standards, environmental health;
- exercising statutory powers under mental health and children legislation;
- regulatory functions; and
- investigation of complaints.

4.2) The Duty not to discriminate when providing services and exercising public functions:

The duty not to discriminate against disabled customers or service users, when providing services or exercising public functions, are set out in Part 3 of the Equality Act and comprise the following:

a) The Equality Act explains that a service provider who is concerned with the provision of a service to the public or to a section of the public (and whether for payment or not) must not discriminate against a disabled customer by failing to provide him or her with the particular service. The Equality Act explains that failing to provide a service includes not providing a disabled customer with:

- a service of the usual quality;
- a service in the usual manner; or
- a service on the usual terms,

as compared with the service normally provided to the public or to a section of the public which includes the disabled customer. (A service includes the provision of goods or facilities, and also the provision of a service in the exercise of a public function).

b) Secondly, the Equality Act explains that a service-provider must not, in providing the service, discriminate against a disabled customer:

- as to the terms upon which it provides the service;
- by ceasing to provide the service; or
- by subjecting the customer to any other detriment.

The Code of Practice provides the following guidance about these first two types of discrimination:

- These provisions may overlap so that, for example, rude or offensive behaviour towards a customer or potential customer will constitute a lower standard of service or a detriment. A lower standard of service might in turn constitute not providing the service in the manner and the terms on which the service is normally provided;
- Discrimination in the terms of service could include charging more for goods or services, or imposing extra conditions for using a facility or service;
- Even if a service provider thinks that they are acting in the best interests of a service user, their action may still create a detriment for that person. For example: an assistant in a small shop refuses to serve a disabled person with a mobility impairment, arguing that a

nearby larger shop can offer better access. This is a refusal of service and is likely to be against the law, even if the shopkeeper had the best interests of the person in mind; and

- A service provider does not have to stock special products for all groups or particular groups of people to comply with the Act. However, if the provider would take orders from other customers for products that it does not normally stock, it would be likely to be unlawful to refuse to take such an order.

c) Thirdly, the Equality Act explains that a service-provider must not, in relation to the provision of the service, harass either a person requiring the service or a person to whom the service is being provided.

d) Fourthly, the Equality Act explains that a service-provider must not:

- victimise a person requiring the service by not providing the service to them; nor
- victimise a disabled customer as to the terms on which the service is being provided, by terminating the provision of the service, or by subjecting the customer to any other detriment.

e) Fifthly, the Equality Act explains that a person who is exercising a public function must not do anything that constitutes discrimination, harassment or victimisation. The Code of Practice explains that this is a broad provision which would cover, for example, refusing to allow someone to benefit from the exercise of a function, or treating someone in a worse manner in the exercise of a function. Examples could include being refused a discretionary welfare benefit or dismissing an application to adopt because of a protected characteristic.

f) Finally, the Equality Act explains that service providers and those who are exercising a public function are under a duty to make reasonable adjustments in favour of disabled customers.

g) Relationships which have ended:

The Equality Act explains that it is unlawful to discriminate against, harass or victimise someone after a relationship covered by the Act has come to an end, where the treatment arises out of and is closely connected to a relationship which used to exist between them; and which would have been prohibited if the relationship was still continuing. A person will be able to enforce protection against discrimination or harassment as if they were still in the relationship which has ended.

4.3) Service providers cannot contract out of their obligations under the Equality Act:

The Equality Act prevents service providers from avoiding their responsibilities under the Act by seeking to enter into agreements which permit them to discriminate or commit other unlawful acts. Any such term is unenforceable, although this will not prevent a person who is or would be disadvantaged by an unenforceable term from relying on it to derive any benefit to which they are entitled. A person who has an interest in or is affected by a contract containing an unenforceable term may apply to a county (or sheriff court in Scotland) to have that term removed or modified.

4.4) Liability of employers and principals:

a) The Equality Act makes employers legally responsible for acts of discrimination, harassment or victimisation committed by their employees in the course of employment. Principals (including employers) are also liable for such acts committed by their agents while acting under the principal's authority. It does not matter whether the employer or principal knows about or approves of the acts of their employee or agents. The practical consequence of this is that employers / principals are likely to be liable where any employee / agent discriminates against a disabled customer.

b) However, an employer will not be liable for unlawful acts committed by their employees in the course of employment where the employer has taken all reasonable steps to prevent such acts (i.e. if there were no further steps that they could have been expected to take). Furthermore, a principal will not be liable for unlawful discrimination carried out by its agents where the agent acted in contravention of the principal's express instructions not to discriminate, as the agent will not have acted 'with the authority of the principal'.

c) The Code of Practice explains that service providers are more likely to be able to comply with their duties under the Act and prevent their employees from discriminating against service users or customers (whether on the ground of disability or otherwise) if they take the following steps:

- Establish a policy to ensure equality of access to and enjoyment of their services by potential service users or customers from all groups in society;
- Communicate the policy to all staff, ensuring that they know that it is unlawful to discriminate when they are providing services;
- Train all staff, including those not providing a direct service to the public, to understand the policy, the meaning of equality in this context and their legal obligations;
- Monitor the implementation and effectiveness of the policy;
- Address acts of discrimination by staff as part of disciplinary rules and procedures;
- Ensure that performance management systems address equality and non-discrimination;
- Maintain an easy to use, well-publicised complaints procedure;
- Review practices to ensure that they do not unjustifiably disadvantage particular groups; and
- Consult customers, staff and organisations representing groups who share protected characteristics about the quality and equality of their services and how they could be made more inclusive.

e) The Code of Practice also explains that in relation to the duty to make reasonable adjustments for disabled people, the following actions will help service providers to meet their obligations under the Act:

- Review regularly whether services are accessible to disabled people;
- Carry out and act on the results of an access audit carried out by a suitably qualified person;
- Provide regular training to staff which is relevant to the adjustments to be made; and
- Review regularly the effectiveness of reasonable adjustments and act on the findings of those reviews.

f) The Code of Practice explains that small businesses and organisations who provide services may find a less formal approach sufficient, e.g. talking to staff and service users or customers and thinking about whether their services are being used by all sections of the community. However, the guidance above regarding communications with staff on the unacceptability of discrimination will still be essential.

4.5) Liability of employees and agents:

Individual employees may be held personally liable for unlawful acts which they commit in the course of employment, whether or not the employer has a defence against liability. Likewise, agents may also be held personally liable for unlawful acts which they commit under their principal's authority, whether or not the principal condoned the acts.

4.6) Enforcement:

a) Claims for discrimination by service providers and those performing public functions are normally brought in the county courts of England and Wales and in the sheriff court in Scotland. As always, there is merit in any potential claimant seeking to resolve his/her complaint without recourse to the civil courts, e.g. via conciliation. Any claim must be started within six months (minus a day) of the alleged unlawful act. (Where an unlawful act extends over a period of time then it will be treated for these purposes as occurring at the end of that period). If the proceedings are not brought within the period of six months then the court still has discretion to hear the proceedings, if it thinks it is just and equitable to do so.

b) Remedies:

i) In England and Wales the county court has the power to award various remedies which include:

- a declaration of the rights and responsibilities of the parties to the claim;
- an injunction to prevent the person defending the claim from repeating any unlawful act in the future; and
- damages to compensate for any loss suffered by the person bringing the claim.

ii) An award of damages can include any loss which the claimant has suffered and may include compensation for injured feelings (whether or not it includes compensation on any other basis)..

iii) Where the court makes a finding of indirect discrimination but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant, it must not award damages unless it first considers whether to dispose of the case by providing another remedy, such as a declaration or injunction.

4.7) Exceptions and exemptions from the duties with regard to services and public functions:

The Equality Act contains a number of exceptions which permit discrimination in the provision of services, the exercise of public functions or the activities of associations, which the Act otherwise prohibits. These include the following:

a) Statutory authority:

The non discrimination disability provisions of the Equality Act may be overridden where a service provider or those exercising a public function has no discretion or choice but to comply with another law. :

b) National security:

A service provider or person carrying out public functions will not breach the Act if they do anything that it is a proportionate means of safeguarding national security.

c) Charities:

A charity will not breach the Act by providing benefits only to people who share a particular protected characteristic if this is in accordance with the charity's governing document and is either:

- a proportionate means of achieving a legitimate aim; or
- for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic.

d) Insurance:

i) In some circumstances, the fact that a person is disabled may be used as a factor in deciding whether to provide insurance services to that person and, if so, on what terms. The Act specifies the circumstances and prescribes the conditions that must be met if differential treatment in providing insurance services is permitted. The prohibition against disability discrimination in the provision of services does not apply to anything which is done in connection with insurance business (as defined) if:

- it is done by reference to information which is both relevant to the assessment of the risk to be insured and from a source on which it is reasonable to rely; and
- it is reasonable to do.

ii) This exception permits anyone involved in 'insurance business' to discriminate against a disabled person in any aspect of selling insurance or writing the terms on which a disabled person can be insured against certain risks, provided such treatment is reasonable and based on relevant, current information from a reliable source. Information which might be relevant to the assessment of the risk to be insured includes actuarial or statistical data or a medical report. An insurer

cannot rely on untested assumptions or stereotypes or generalisations in respect of a disabled person.

iii) However, an insurer is prohibited from adopting a general policy or practice of refusing to insure disabled people or people with particular disabilities. It is also unlawful to have a policy or practice of only offering insurance to disabled people or people with particular disabilities on additional or adverse terms or conditions.

iv) The Equality Act explains that it will not be unlawful discrimination under the Act to do anything in connection with insurance business in relation to an insurance policy which was already in existence when the Act came into force (in October 2010). Such insurance policies may continue without need for change until they are renewed or have their terms reviewed, at which point this exception will cease to apply, and any discrimination will only be lawful if the relevant conditions set out in paragraphs i) to iii) above are met.

e) Exceptions relating to the scope of public functions:

The Equality Act excludes certain types of functions and certain public authorities from the prohibition of discrimination, harassment and victimisation in the exercise of public functions:

i) A function of Parliament or a function exercisable in connection with official business of Parliament;

ii) A judicial function, including functions exercised by a person other than a court or tribunal, e.g. certain functions of the Parole Board;

iii) Armed forces: in relation to disability (gender reassignment and sex discrimination), the Act excludes anything done for the purpose of ensuring the combat effectiveness of the armed forces;

iv) The Act excludes the security services from the prohibition of discrimination, harassment and victimisation.

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