

Reasonable Adjustments and Service Providers: What do I need to do?

What does the law say service providers who provide services to the public need to do in relation to disabled service users? This Note summarises the law and some key practical pointers.

The law

The law in connection with providing services to the public is found in Part 3 of the Equality Act 2010. In addition, the Equality and Human Rights Commission has produced very useful Code of Practice, something Tribunals and Courts are required to consider when issues arise in this area.

Definitions

A service provider is defined widely as a body which provides a service to the public or part thereof. That can include a public, voluntary or private body provided the service is to the public. The nature of the body is not therefore relevant. Rather the question is to whom the service is provided.

Moreover the duties which apply to service providers are the same irrespective of the nature of the service provider (although the way in which the service is provided may differ). The way in which the service is provided does not matter. Thus the obligations can extend, for example, to the provision of the service via a website as much as to the “real” world.

The duties arising under the legislation apply in relation to service users (or former service users) who are “disabled” i.e. those who satisfy the Equality Act’s definition of disability. This extends to individuals with a physical or mental impairment which has a substantial or long term adverse effect on their ability to carry out normal day to day activities. There is a considerable body of law and complexity in relation to this definition. However, as the obligations extend to disabled service users generally and not just in relation to a specific disabled person, the definition is not ordinarily something that would be considered on a day to day basis. Service providers require to ensure adjustments have been made ideally before a disabled service user requires access to the services.

In passing, it may be relevant to note that there are some areas of disability discrimination law whereby individuals are protected even although they themselves are not disabled, including in relation to direct discrimination where an individual is perceived to be disabled, where a person associates with a disabled person and where a person suffers harassment because of disability.

What rights arise?

The obligation is to avoid discriminating in relation to the decision to provide the service (or not) and with regard to the quality of the service itself. The obligations are extremely wide ranging and service providers need to be very careful to ensure disabled service users are given equality of access to the service. It is unlawful to subject disabled service users to any detriment.

Reasonable adjustments

The main obligation that arises in this area is in connection with the duty to make reasonable adjustments. There are three types of adjustments that need to be considered:

The first duty is that where a provision criteria practice (i.e. any formal or informal policy, rule, practice criteria, condition, qualification or discretionary decision) puts a disabled person at a substantial disadvantage compared to persons who are not disabled, the service provider must take such steps as is reasonable to avoid that disadvantage. Thus if a service user was required to queue in order to obtain a service, and a disabled service user with mobility issues would encounter pain whilst

queuing, a reasonable adjustment to remove the substantial disadvantage suffered by that disabled person would be to allow a chair or to service that person via separate service desk (so they did not suffer pain when queuing).

Another example would be where a service provider has a policy requiring complaints to be made in writing. The visually impaired service user or service user with a learning disability may find it difficult to comply with that provision and so a reasonable adjustment to remove the disadvantage may be to allow complaints by disabled service users to be made in different ways (whether by telephone or during a face to face meeting).

The second type of adjustment that needs to be made arises where a physical feature puts a disabled person at a substantial disadvantage compared with persons who are not disabled. In that situation the duty is to take such steps as are reasonable to remove that disadvantage. In this regard any physical feature which puts a barrier to the provision of the service on equal terms needs to be adjusted. Thus if complaints require to be lodged in person and there was limited access for those with mobility issues, the service provider should identify ways of allowing access.

The third type of adjustment is where but for the provision of an auxiliary aid or service the disabled service user would be put at a substantial disadvantage in comparison to those who are not disabled, the service provider should take such steps as are reasonable to provide the auxiliary aid. So if some form of equipment or interpreter or other assistance would remove the substantial disadvantage, that service or aid should be provided.

How does the duty work in practice?

The obligation to make reasonable adjustments is owed to disabled people generally and is anticipatory in nature. This means that service providers should consider *in advance* what barriers may impede disabled service users in relation to the service and how can these be overcome. Whilst adjustments could be considered on a case by case basis, failing to consider matters in advance could be problematic. Service providers should carefully audit their service and ensure that all barriers are fully considered such that disabled service users have equality of access and any adjustments required whether in terms of provisions, criteria or practice, auxiliary aids or adjustments to physical features are implemented.

The duty to make reasonable adjustments is a continuing duty that evolves and should be kept under constant review. Just because an adjustment was unreasonable in the past does not mean it would not be reasonable now. An example given in the Code of Practice is a library which introduced computers. Software that would be useful for visually impaired people was, when the computers were introduced, too expensive and not fit for purpose. However, when the computers were being upgraded, the software had become more advanced and it would be a reasonable adjustment at that stage to include such software.

A service provider cannot justify a failure to make reasonable adjustments. Therefore the main question in this area is whether or not the adjustment is reasonable or not. What steps are reasonably required to remove the substantial disadvantage suffered by the disabled service user?

There is no obligation to make an adjustment if it would be outwith the public body's powers or where making the adjustment would fundamentally change the nature of the service but ultimately the question is whether or not the step would be reasonable. Just because the adjustment would not necessarily remove the advantage does not mean it is not reasonable to make it.

What is reasonable?

The Code provides some guidance as to the issues to be considered in determining whether an adjustment would be reasonable or not, including:

- The type of service being provided
- The nature, size and resources of the service provider

- The effect upon the individual (and their disability) of the adjustment
- Whether the step would be effective in preventing the disadvantage
- Whether the step is practicable
- Any disruption that could be caused
- The availability of any other financial resources

The question as to whether an adjustment is reasonable is a matter ultimately for a court to determine objectively. The only question is whether the step was reasonable. There is no limit as to what steps might need to be taken.

Other obligations

Other relevant obligations in terms of the Equality Act include:

- the obligation not to directly discriminate on grounds of disability (which can never be justified),
- the obligation not to indirectly discriminate against a disabled service user,
- the obligation not to discriminate against a service user because of something arising from their disability,
- victimisation and
- harassment.

These are wide ranging duties which often need to be considered.

But who is liable?

Whilst the service provider is principally liable for any failure to comply with the law by the service provider (or staff, for whom the service provider is responsible), an employee who carries out an unlawful act could also be *personally* liable. This can be a powerful way in which organisations can encourage staff to consider the issues arising under this subject carefully.

A service provider is liable for unlawful acts that staff commit, subject to a statutory defence. The defence is that where the service provider takes *all reasonable steps* to prevent the unlawful act from occurring, the service provider may not be liable (with the individual being solely liable). Guidance in the Code suggests that to benefit from the defence service providers need to consider:

1. Is there a comprehensive policy that ensures the equality of access and enjoyment of the service by all groups of society?
2. Is the policy is publicised, monitored and policed fairly and robustly?
3. Has suitable training for all staff been introduced to ensure that they know of their obligations?
4. Are disability related groups involved in the process?
5. Are discrimination issues properly dealt with via disciplinary and performance management processes?
6. Has the service been audited regularly to deal with issues in this area?

Service providers want to be proactive to ensure equality of access is achieved at the earliest opportunity.

Getting it wrong...

The risk of failure is considerable. Leaving aside the reputational costs of failure to ensure equality of access, breaches of the Act in this area can be costly. Court action is a possibility. A court can order

compensation (which could include compensation for injury to feelings). It is also possible for the Scottish Public Service Ombudsman to be involved in this area (in respect of the organisations subject to the Ombudsman).

Practical pointers

1. Consult with service users and representative groups to ensure all possible adjustments are considered at an early stage and at regular intervals.
2. Draw disabled service users' attention to adjustments that are made to ensure all users know how they can access the service and what adjustments will be made going forward.
3. Ensure access to services is kept under review and suitably qualified experts audit the service and adjustments on a regular basis to ensure up to date adjustments are being made and considered.
4. Ensure any adjustments are not paid for by the disabled service user. These must be the responsibility of the service provider.
5. Introduce a programme of training for all staff to ensure that they are confident in asking questions about disability and that they understand the obligations within the legislation.
6. Have properly maintained auxiliary aids with appropriate contingency plans in the event of failure.
7. Develop and foster an open culture whereby staff are encouraged to develop their skills in this area.

The law with regard to making reasonable adjustments when providing a service to the public can be complicated but advanced consideration and careful planning can avoid problems and achieve equality for all.

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3 October 2016