



THE LAW SOCIETY
of SCOTLAND

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Ensuring fairness,
creating more
accessible services

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Foreword

Solicitors in Scotland play a vital role in the lives of individuals, in businesses, communities, government and other institutions. They interact with a wide cross-section of society whether to protect the rights of the vulnerable or support business and economic growth.

To maintain that position, it is essential that the profession is recognised for its high standards, is open and accessible and is regulated in the public interest.

At the heart of our profession is a shared set of standards to which every solicitor subscribes. All the standards are based on principles of trust, respect and integrity and include a specific statement on diversity.

Feedback from organisations representing disabled people, as well as research commissioned by the Society and other justice sector organisations, has highlighted challenges for individuals accessing legal services. The Society is committed to ensuring that such challenges do not arise as the result of a potential shortfall in professional standards, whether as part of the way we support development in this area or due to the manner in which legal teams or individual solicitors provide services.

Many of the organisations that gave us feedback expressed a desire for the Society positively to support and encourage improved practice across the sector, rather than allowing these issues to escalate, potentially ending up as complaints. The Society also believes this is the most constructive way to help improve the experience and perception of clients.

This guide supplements information published by the Society over the past few years on disability and all the protected characteristics later enshrined in the Equality Act 2010. It will provide greater detail and understanding for solicitors, which we hope will then benefit disabled clients, other potentially marginalised groups and the more vulnerable, across Scotland.

I encourage all solicitors to read this guidance and discuss it as a firm or in-house legal team – considering what actions you may need to take to ensure your legal team is accessible to all. A checklist is provided to help organisations gradually improve their performance and further sources of information as referred to in Appendix A should also assist.

I am grateful to Capability Scotland - in particular Richard Hamer and former colleague Elspeth Molony - for the huge effort put into developing this guide and I look forward to receiving feedback on its use.



Bruce Beveridge
President

Introduction

The aim of this document is to provide advice and information to the legal profession to assist with complying with the Equality Act 2010 when providing services to disabled people.

Advice is also provided for solicitors and firms who wish to operate best practice and thereby exceed the requirements of the law. This advice can be found in the yellow boxes throughout the guide.

The Law Society of Scotland asked Capability Scotland to develop this guide. Capability Scotland campaigns with, and provides education, employment and care services for, disabled people across Scotland. The organisation aims to be a major ally in supporting disabled people to achieve full equality and to have choice and control of their lives by 2020. Two members of the team who developed this guide are members of Law Society committees – the Equality and Diversity Committee and the Law Reform Equalities Sub-Committee.

In 2009, the Justice Disability Steering Group, a coalition of justice organisations including the Law Society of Scotland, asked Capability Scotland to explore disabled peoples' experiences of the justice system in Scotland. This involved conducting a survey that found that 42% of disabled people and their carers did not believe they had equal access to the justice system. Capability Scotland also conducted seven involvement events with disabled people, the results of which included a call on the legal profession to do more to ensure equal access for disabled people to their services.

In December 2012, Capability Scotland contacted over 100 disabled people to follow up on this research and discover if disabled peoples' experience of accessing legal services had improved. Experiences shared by disabled people in both pieces of research are used as the basis of examples in this guide. However all names have been changed in the examples, which can be found in pink boxes throughout the guide.

The Equality Act covers employment as well as service provision. For guidance in this area, see the Equality and Human Rights Commission website (www.equalityhumanrights.com) and the Society's own advice in this area 'Ensuring Fairness, Creating Opportunities'. <http://www.lawscot.org.uk/members/member-services/publications/ensuring-fairness,-creating-opportunities-a-practical-guide-to-equality-and-diversity-for-scottish-solicitors>

Purpose of the Equality Act 2010

The stated purpose of the Equality Act 2010 is to 'harmonise discrimination law, and to strengthen the law to support progress on equality'.

The stated purpose of the Equality Act 2010 is to 'harmonise discrimination law, and to strengthen the law to support progress on equality'.

The Act consolidates the previous complex matrix of discrimination legislation, including the Disability Discrimination Act 1995, and harmonises UK legislation with the four key European Union Equal Treatment Directives. It aims to make Britain a fairer place to live and work by tackling inequality and rooting out discrimination.

The Act received royal assent in April 2010 and the main provisions came into force in October 2010.

It should be noted that the decision was made not to bring into force provisions relating to a socio-economic duty and protection from dual discrimination. In addition, following consultation in autumn 2012, the UK Government is repealing the third party harassment provisions, along with enforcement provisions relating to employment tribunals' power to make wider recommendations in discrimination cases and the procedure for obtaining information. This is part of the Government's 'Red Tape Challenge' and the amendments will be made by the Enterprise and Regulatory Reform Bill in 2013.

Who is covered by the Equality Act?

Everyone is covered by the Equality Act. It is not about minority groups, it gives every one of us rights not to be discriminated against on grounds of any of the following personal features:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

These personal features are referred to as 'protected characteristics' (s.4).

This guide focuses on the protected characteristic of 'disability', the meaning of which is explored further in the following section.

Definition of Disability

In order to be protected by the Act, a person must meet the Act's definition of disability, which is:

s. 6. Disability

(1) A person (P) has a disability if—

- (a) P has a physical or mental impairment, and;
- (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day-to-day activities.

In order to meet the Act's definition of disability a person must have an impairment which is:

- Either physical or mental, which includes sensory impairments and learning disabilities as well as physical impairments and mental ill health.

Example

Lionel Jenkins has a brain injury as a result of a car accident. Lionel, who is 19, has acquired learning disabilities as a result of his injury and requires full time support and care. He lives in Dumfries with his parents and his younger sister. Lionel is likely to meet the Act's definition.

Example

Ava Spinelli is 41 years old and lives in Fortrose on the Black Isle with her husband and two teenage sons. Ava, who has been deaf since birth, communicates using British Sign Language (BSL). English is her second language and whilst she has learnt to lip read to a certain extent, she does not have good written English. Ava is likely to meet the Act's definition.

- The impairment must have adverse effects which are substantial, which means that the impairment must have an effect on the person that is more than trivial or minor.

Example

Michael Hawthorn is 28 years old and lives in North Lanarkshire with his partner John. Michael has cerebral palsy and while he is able to do most things for himself, he gets tired easily and it is harder for him to accomplish everyday tasks than other people and it takes him much longer. Michael is likely to meet the Act's definition.

- The substantial adverse effects must be long term, which means that the impairment must have lasted for 12 months, be expected to last for 12 months or be likely to last for the rest of the person's life.

Definition of Disability

Example

Ping Li is 72 years old and lives in a nursing home in St Andrews. Ping lived in her own home until she had a stroke last year which resulted in paralysis down her left side, a speech impairment, chronic fatigue and aphasia. Ping is likely to meet the Act's definition of a disabled person.

- The Act does not define what is to be regarded as a '**normal day-to-day activity**' but in general, day-to-day activities are things people do on a regular basis such as shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.

Example

Misbah Iram is 21 years old and lives in Edinburgh in a student flat. She is in her second year of studying bioengineering, which she does on a part time basis as she has had Myalgic Encephalomyelitis (ME) since she was 16 resulting in debilitating fatigue, painful muscles and joints and poor concentration. Misbah is likely to meet the Act's definition of a disabled person.

Best practice tip

If a customer or potential customer tells you that they are disabled, take them at their word and do not ask for "proof". Since the abolition of the register of disabled people in 1996, disabled people do not have a standard piece of identification they can show you to verify that they are disabled. It is best practice to accept a person is disabled and make any adjustments to your service that they require.

There are a couple of exceptions to the rule that a person must meet the Act's definition of disability to be protected as a disabled person. These are:

- People with cancer, HIV infection or multiple sclerosis (MS) are protected by the Act from the point of diagnosis.
- People who are certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist are deemed to meet the Act's definition.

Definition of Disability

Example

Charlie Mitchell is 41 years old and lives in Portree. Charlie has bipolar disorder and therefore fluctuates between periods of feeling relatively 'normal' to periods of mania and periods of depression. When in a period of depression Charlie feels hopeless, lacks energy and has difficulty concentrating and remembering things. When in a period of mania Charlie feels full of energy, is easily distracted and has hallucinations. Although his condition fluctuates, the effects of the mania and depression are such that Charlie is likely to meet the Act's definition.

- Someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered by the Act.

Example

Samuel Pickford had a severe stammer when he was a teenager. His stammer was always worse when he was stressed or in new environments. This meant that Samuel did not use the telephone and avoided conversations with people he didn't know well. Samuel received speech therapy for a prolonged period to try to improve his stammer so that he could go to university. Although he had to defer for a year, he did eventually improve to the extent that his stammer no longer had an adverse effect on his ability to carry out day-to-day activities. Although Samuel, who is now 28, no longer meets the Act's definition, he is still covered by the Act as someone who was a disabled person in the past.

Best practice tip

Do not focus on whether you think a potential client would meet the Act's definition of disability when considering the way you provide your services. Good customer service for disabled people is to make any adjustments the client may need regardless of whether or not they meet the Act's strict definition.

Who has responsibilities under the Equality Act?

The Act applies to businesses and organisations across all sectors – private, public and voluntary – and applies to all those providing goods, facilities and services in Great Britain, whether they are provided for a fee (including where funded by legal aid) or free of charge.

The Act therefore applies to all solicitors providing legal services, including in-house solicitors, sole practitioners and large firms.

Definition of Disability

Best practice tip

It is important to recognise the business benefits of accessibility and good customer service for disabled people. Disabled consumers are a significant but poorly addressed market worth an estimated £80 billion per annum in the UK.

Up to one in five customers are currently likely to be a disabled person. Therefore for an average business disabled customers may account for up to 20% of the customer base.

A survey of disabled consumers' buying patterns revealed that a staggering proportion, 83%, had to take their custom elsewhere, to a more accessible competitor. The risk of losing business to a more accessible competitor is high because consumer experiences of disabled people affect the choices of family and friends.

Therefore business benefits associated with better accessibility include a rapidly expanding customer base, increases in revenues and profits and a distinct competitive advantage.

There is a strong link between age and the prevalence of disability and, as the population grows older, there is likely to be an even greater prevalence of disability in the future. If the impact of the ageing population is considered, businesses may be losing over a quarter of their potential customers by failing to respond to disabled customers' requirements. Businesses with a better focus on disabled customers have seen a rapidly expanding customer base, increases in sales and profitability, have gained a substantial 'foothold' in their market and a distinct advantage to their competitors.

Disabled customers spend a lot longer choosing where to buy than the average consumer and tend to make more 'informed choices'. The main decision factors underpinning customer choice are 'past experience of good service' and 'reputation for good service'. The main reasons for disabled customers switching to a more accessible competitor include:

- Inaccessible premises
- Inaccessible websites
- Poor customer service: lack of awareness, poor communications, lack of flexibility
- Inaccessible telephone systems
- Inaccessible printed information

A survey of disabled consumers' buying behaviour revealed that 66% choose businesses where they have received good service. Two thirds seek businesses with a good reputation for customer service. For over 37% good, 'disability aware' service is the primary reason for choosing a business. Over one third of disabled customers do not complain about the poor service they have received – the business therefore may never know why they have lost that customer.

Provision of Services

A wide range of services are covered by the Act, including:

- Buildings that members of the public, or sections of the public, are permitted to enter
- Advice provided in person, over the telephone or by email or letter
- Websites
- Home visits
- Conferences and training

Section 29 of the Act details the responsibilities of service providers:

s. 29. Provision of services, etc.

(1) A person (a “service provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service provider (A) must not, in providing the service, discriminate against a person (B)—

- (a) as to the terms on which A provides the service to B;
- (b) by terminating the provision of the service to B;
- (c) by subjecting B to any other detriment.

‘Not providing the person with a service’ (point 1 above) includes the service provider:

- Refusing to provide the person with the service
- Not providing the person with a service of the quality that they usually provide to the public

Example

Ava Spinelli, who we met earlier, makes an appointment with her local solicitor because she is considering divorcing her husband. Ava requests a BSL interpreter for the appointment so that she can communicate effectively with the solicitor. The solicitor, who lives in Ava’s village, knows the Spinelli family and asks that one of Ava’s sons provides the interpretation because he does not want to incur the cost of paying a BSL interpreter. Ava makes it clear that this is not possible owing to the nature of the issue she wishes to discuss. The solicitor says that in that case he cannot help her.

Requiring a family member to act as an interpreter is likely to amount to not providing the person with a service of the quality that they usually provide because meetings should be confidential between solicitor and client (BSL interpreters are bound by a code of confidentiality). Refusing to provide a BSL interpreter is likely to amount to refusal of service.

Provision of Services

- Not providing the person with the service in the manner in which, or on the terms on which, the service provider usually provides the service to the public

Example

Ping Li, who we met earlier, phones her family lawyer to set up a Power of Attorney. The receptionist struggles to understand what Mrs Li is saying as a result of her speech impairment. But rather than asking Mrs Li to repeat herself until he understands, the receptionist tells her to phone back later when he knows he won't be on shift. This is not the quality of service that the receptionist usually provides and could therefore be disability discrimination.

With regards point 2 above:

- Discrimination in the terms of service could include charging more for the service or imposing extra conditions for using a service.
- 'Detriment' is not defined by the Act and is a very broad term. Generally, a detriment is anything which the service user might reasonably consider put them at a disadvantage. This is regardless of whether the service provider thinks they are operating in the best interest of the person.

Example

Lionel Jenkins, who we met earlier, decides to write a will, having come close to death as a result of his car accident. He makes an appointment with a high street solicitor and his mother drops him off for the appointment and then goes shopping. The solicitor treats Lionel in a very patronising manner and refuses to draft the will for him without one of Lionel's parents present, despite the fact that Lionel has the ability to make important decisions for himself. This is likely to be disability discrimination.

Prohibited Conduct

The Equality Act refers to different types of discrimination as “prohibited conduct”. Prohibited conduct relevant to disability discrimination is:

- Direct discrimination (s.13)
- Discrimination arising from disability (s.15)
- Indirect discrimination (s.19)
- Harassment (s.28)
- Victimisation (s. 27)

Direct discrimination is less favourable treatment because of a protected characteristic, so because a person is disabled. It can also be referred to as discrimination on grounds of the person’s impairment or condition.

s. 13. Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

Best practice tip

Make sure your staff know that they must not treat a disabled customer in such a way that they experience a detriment if the reason for the treatment is connected to disability. However there is nothing to stop you treating a disabled customer more favourably than you treat non-disabled people.

Direct Discrimination

Example

Anka is having problems with her landlord so she goes to her local solicitors' office to see if they can help. When she enters the office she finds that there is a member of the public at the reception desk already so she waits in line. When the member of staff cheerily says goodbye to the first person and wishes him a good day, Anka starts to move forward. The receptionist's smile vanishes and she stares at Anka's facial scarring as she walks towards the desk and then refuses to look at her when Anka is speaking or when she replies. She places an information leaflet on the counter and shoves it towards Anka, curtly telling her to look at it and phone if she wants an appointment. As Anka walks off she hears the receptionist cheerfully asking the next person in the queue to move forward. This is likely to be direct discrimination.

Direct discrimination can occur even if the person affected does not actually have the impairment or condition which is the cause of the less favourable treatment. This is referred to as '**discrimination by perception**'. This occurs when a service provider treats a person less favourably because they perceive or think that the person has an impairment or condition, even if they do not. This therefore protects non-disabled people and also disabled people who are treated less favourably on grounds of a condition they do not have.

Example

Giles Nelson is a non-disabled businessman who uses a Bluetooth headset with his mobile phone. He goes to a legal trade event and takes several phone calls while he walks between the stalls, one of which makes him quite annoyed. Two members of staff on a stall promoting a large city law firm report him to security saying there is "a madman wandering about talking to himself and wildly gesticulating". Giles is asked to leave and he hears the security staff arguing about "who let the psycho in". This could be disability discrimination by perception.

Direct discrimination can also occur if a person is treated less favourably as a result of their connection to a disabled person. This is referred to as '**discrimination by association**'. It incorporates the European Court of Justice's July 2008 decision in the Coleman v Attridge Law case into law. This means that friends, colleagues, family members and carers of disabled people are protected from discrimination that might occur as a result of their connection with a disabled person.

Direct Discrimination

Example

Michael Hawthorn and his partner John have been using the same solicitor for years. However the law firm decides to convert the accessible toilet in their Airdrie office into a meeting room. Michael is very angry about this when he finds out and writes and telephones to highlight the importance of providing accessible toilet facilities and their responsibilities under the Equality Act. Michael is very angry and severs the relationship with his solicitor. John wants to keep using the same firm as he is half way through a civil case. However, shortly after Michael's dispute with the firm, John receives a letter from the firm stating that they no longer wish to represent him. This could be discrimination by association.

Comparator

Direct discrimination is less favourable treatment. This means that the person's treatment must be compared to the way the service provider treats, has treated or would treat another service user. This other person is referred to as the 'comparator'.

In disability discrimination, the comparator is someone who does not have the relevant impairment or condition but is in the same or nearly the same circumstances as the person who has been discriminated against. In many cases it is not possible to find a comparator who fits this description and instead a hypothetical comparator must be used. However, in Anka's case detailed earlier, her comparator could be either the person who was in the queue in front of her or the person in the queue behind her because both customers received a far higher standard of service.

Can Direct Discrimination be Legal?

Direct discrimination is always unlawful and cannot be justified no matter what the service provider's motive or intention. Therefore if the treatment stems from prejudices or stereotypes, such as patronising or condescending attitudes, it would still be unlawful discrimination.

Example

Misbah is fired from her part time job due to the number of sick days she has taken when her fatigue has been too severe to go into work. Misbah goes to the university legal clinic to seek advice about whether this is disability discrimination. The lawyer dismisses her concerns about discrimination and tells her that she should take this as a wake-up call and stop being so lazy and pretending that there's something wrong with her.

Discrimination Arising from Disability

Best practice tip

All staff should be given disability equality training to ensure that they have positive attitudes towards disabled people, are confident in interacting with disabled customers and understand their company's responsibilities towards disabled people. The training should be based on the social model of disability and delivered by disabled trainers with first-hand experience of the disabling barriers in society.

Discrimination Arising from Disability

Discrimination arising from disability is a category of discrimination that had not previously been covered by the Disability Discrimination Act. It is unfavourable treatment because of something arising in consequence of disability. This means that there must be a connection between whatever led to the unfavourable treatment and the person's impairment or condition.

s. 15. Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

The consequences of an impairment or condition include anything which is the result, effect or outcome of disability such as a speech impairment (as in Mrs Li's case earlier), comprehension difficulties, impaired mobility or the use of a wheelchair.

Example

Charlie is arrested for breach of the peace during a period of mania. He has used the same firm of solicitors for years but his business was taken on by a different partner when his family solicitor died. Charlie finds the new partner far less understanding of his issues. Charlie cannot concentrate for any length of time and is easily distracted. His solicitor loses his patience with him at their second meeting and drops him as a client. This could be discrimination arising from disability.

Discrimination Arising from Disability

Comparator

Discrimination arising from disability is unfavourable treatment. This means that a disabled person does not have to compare their treatment with that of another person to show they have been discriminated against. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of their impairment or condition.

Can Discrimination Arising from Disability be Legal?

There are two circumstances under which discrimination arising from disability may be justifiable:

1. If the treatment was a 'proportionate means of achieving a legitimate aim', or
2. If the service provider can show that they did not know, and could not reasonably have been expected to know, that the person had the relevant impairment or condition.

The concept of 'legitimate aim' is not defined in the Equality Act. It is taken from European Union Directives and decisions of the Court of Justice of the European Union (CJEU). For an aim to be legitimate it must be legal, non-discriminatory and it must represent a real, objective consideration. However, the consideration cannot simply be monetary – it is not justifiable to argue that it is cheaper to discriminate.

Examples of legitimate aims include:

- Ensuring the health and safety of your staff and customers
- Compliance with Law Society rules and governance
- Upholding the dignity of staff and customers

Unfavourable treatment will also not amount to discrimination arising from disability if the service provider can show that they did not know that the person had the impairment or condition on which the treatment was based. This is known as the 'lack of knowledge defence'. This only applies if the service provider has done all that they can reasonably be expected to do to find out if a person is disabled. What is reasonable depends on the circumstances. A law firm may be expected to have this knowledge about existing clients, whereas a receptionist may not be expected to have this information about members of the public making first time enquiries, especially if the impairment or condition is not visible.

In Charlie's case referred to earlier, the new partner refuses to provide Charlie with legal services for a reason arising from his manic depression. Any claims to the effect that the new partner did not know that Charlie's problems with concentration are a result of manic depression are unlikely to be successful since Charlie has been using that firm of solicitors for years.

Indirect Discrimination

Indirect discrimination is discrimination which arises as a result of a policy or practice which applies equally and neutrally to all customers but puts people sharing a protected characteristic at a particular disadvantage.

s. 19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the Characteristic;

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) it puts, or would put, B at that disadvantage, and;

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

The phrase 'provision, criterion or practice' is not defined by the Act but it includes:

- A firm's policies (formal and informal)
- Practices and procedures
- Arrangements made for customers
- Prerequisites for service provision

Example

Marie Taylor has an accident in a supermarket in Inverness. This shakes her confidence and she decides to get a guide dog. Marie wants to explore taking a personal injury case against the supermarket so searches the internet for a reliable solicitor specialising in personal injury. She phones and makes an appointment but when she goes for her first meeting, she is told that she can't take her guide dog onto the premises. The security guard says "It ain't me that makes the rules Miss – no dogs allowed". Marie has to leave and miss her appointment. The 'no dogs' rule applies equally to all customers but puts disabled people with assistance dogs at a particular disadvantage.

Indirect Discrimination

Comparator

With indirect discrimination the comparison to be drawn is between the group which is put at particular disadvantage and a group who do not have the impairment or condition in question. In Marie's case the comparison is between visually impaired people with guide dogs and sighted people with dogs as pets. Visually impaired people with guide dogs rely on their dogs for mobility and independence, whereas sighted people with dogs have dogs for reasons including pleasure and company – they do not rely on their dogs to the extent that a visually impaired person would rely on their guide dog. Therefore visually impaired people with guide dogs would experience a particular disadvantage as a result of the 'no dogs' rule, which others do not.

Can Indirect Discrimination be Legal?

The objective justification test referred to above applies to indirect discrimination. Therefore if the service provider can show that it is 'a proportionate means of achieving a legitimate aim', then it will not amount to indirect discrimination. However, in order to show that treatment was proportionate service providers must consider whether a reasonable adjustment could be made to the provision, criteria or practice to avoid the discriminatory effect on disabled people (such as the simple exception to the 'no dogs' rule to exclude all dogs except assistance dogs).

Example

Mrs Li has found a different firm of solicitors to set up Power of Attorney for her. The firm follows their standard procedure and sends her a form to complete but Mrs Li can no longer write as a result of her stroke. She phones the firm and explains this. The receptionist offers to send her an electronic copy to complete online, but Mrs Li does not have a computer or know how to use one. The receptionist asks if "someone at home" could help her and Mrs Li explains she lives in a nursing home and does not want to share the private information required by the form with the staff. The receptionist tells Mrs Li that she will check what can be done for her and get back to her. A partner phones back that afternoon and asks Mrs Li if it would assist her to come back into the office so that a member of staff could help her complete the form. Mrs Li gladly accepts. This is a reasonable adjustment which avoids indirect discrimination against people who cannot write.

Best practice tip

Make sure that all of your staff understand that disabled people can ask for things to be done differently and that sometimes they will have to think creatively about how their standard practice can be adjusted to meet the needs of disabled clients.

Harassment

Harassment on grounds of a protected characteristic is prohibited conduct under the Equality Act.

s. 26. Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

'Unwanted conduct' is not defined in the Act but covers a wide variety of behaviour including:

- Jokes, impressions and facial expressions
- Spoken words
- Written words including graffiti and emails
- Mimicry and physical gestures
- Pranks and other physical actions

Example

Michael has found a new firm of solicitors and meets with them to discuss issues around civil partnership. As he leaves the meeting room he walks past a group of interns who are heading out for their lunch. One of the interns walks behind Michael mimicking the way he walks, which is affected by his cerebral palsy, and the other interns all laugh. Michael sees this in the reflection on the meeting room glass walls and feels humiliated. This is likely to amount to harassment.

A person does not have to say that the behaviour is unwanted for it to be deemed so. It is enough that it is unwelcome or uninvited.

The behaviour does not have to be directed specifically at the customer for the customer to feel harassed by it. Nor must the motivation or intent be to harass the person. It is sufficient that the behaviour has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Conversely, even if the behaviour does not have this effect on the person, if the motivation was to create an intimidating, hostile, degrading, humiliating or offensive environment for the person then this will be sufficient to establish unlawful harassment.

Harassment

Comparator

A comparator is not required with harassment. The defining principles are the effect on the person and the purpose of the behaviour.

Can Indirect Discrimination be Legal?

Harassment is never legal, but service providers can avoid liability for harassment carried out by their employees if they take all reasonable steps to prevent harassment occurring. A firm would be considered to have taken 'all reasonable steps' if there were nothing further that they could be expected to do. Reasonable steps are likely to include:

- Having in place a robust Dignity at Work policy
- Training staff on the Dignity at Work policy
- Ensure that your Dignity at Work policy references the Equality Act provision on harassment
- Ensuring that all staff understand the broad scope of harassment and that it includes jokes, pranks and other 'office banter' that may take place without any intention to harass

Victimisation

s. 27. Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because —
(a) B does a protected act, or;
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Comparator

A comparator is not required with victimisation.

Can Victimisation be Legal?

Victimisation is never legal.

The Duty to Make Reasonable Adjustments

The duty to make reasonable adjustments is arguably the most important aspect of the Equality Act. It requires service providers to make changes to the way services are provided in order to overcome any barriers for disabled people. Therefore this goes beyond simply avoiding disability discrimination and requires service providers to make positive changes to the way services are provided.

s. 20. Duty to make adjustments

(2)The duty comprises the following three requirements

(1)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(2)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(3)The third requirement is a requirement, where a 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, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

The aim of the duty to make reasonable adjustments is to bring the standard of service received by disabled people as close as possible to the standard of service received by non-disabled people.

Where it is impossible or unreasonably difficult for a disabled person to make use of the services that you offer to the public, you have the duty to make a reasonable adjustment to enable the disabled person to access your services. Failure to make a reasonable adjustment will amount to unlawful disability discrimination.

Best practice tip

The Act says that you are only required to make reasonable adjustments if your service is impossible or unreasonably difficult for disabled people to use. However it is best practice to make adjustments if a disabled person is at any kind of disadvantage, and not only if your service is unreasonably difficult to access.

The Duty to Make Reasonable Adjustments

Service providers are required to cover any costs involved in making reasonable adjustments. It is unlawful to pass on the cost of reasonable adjustments to disabled people.

The duty to make reasonable adjustments is an anticipatory duty, which requires you to consider whether the way you provide your services presents any barriers to disabled people. Therefore you should not wait until a disabled person wants to access your services before you take any action. If you do wait, it may be too late to avoid the disadvantage, potentially leading to a disability discrimination claim.

The duty to make reasonable adjustments is a continuing duty. You should keep the way you provide services under regular review and take into account your experience with disabled people trying to access your services.

Best practice tip

Keep a written record of all considerations around reasonable adjustments – all the discussions you have, actions you take and decisions you make with regard to reasonable adjustments. This shows that you are keeping your responsibilities under continual review, demonstrates the action you have taken and the reasons for perhaps not taking action, and if a dispute arises with a disabled person you will be able to demonstrate your rationale behind action or lack of action.

The duty to make reasonable adjustments is comprised of three elements:

1. Where a provision, criterion or practice puts disabled people at a substantial disadvantage compared with those who are not disabled, to take reasonable steps to avoid that disadvantage.

To comply with this duty you should examine the way you provide your services and make sure that there is nothing that could detrimentally affect a disabled person. This includes any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

A practice may have the effect of excluding or screening out disabled people from accessing your services. Or it might create a barrier that makes it more difficult for disabled people to access your service. In such cases, the reasonable adjustment duty requires you to change the policy so that it no longer has that negative effect.

The Duty to Make Reasonable Adjustments

Example

Marie Taylor makes a complaint against the law firm where she was refused entry on grounds of a 'no dogs' rule. The law firm adjusts the rule to allow assistance dogs to enter the premises and communicates this to all staff. This is a reasonable adjustment.

The Act states that where a provision, criterion or practice relates to the provision of information, it is a reasonable adjustment to provide the information in an accessible format such as large print, audio and electronically. You do not have to keep a stock of all your publications in alternative formats, but it is important that you and your staff know that you have a legal duty to provide accessible information and that you know what to do if you get a request for an alternative format.

Best practice tip

As well as providing information in accessible formats, try to make sure that all the information you produce is clear and in plain English. Plain English is clear and concise and avoids difficult words, legalese and jargon. This will be beneficial for all clients, not just people with learning disabilities and difficulties.

2. Where a physical feature puts disabled people at a substantial disadvantage compared with people who are not disabled to avoid that disadvantage or adopt a reasonable alternative method of providing the service or exercising the function.

Physical features might be temporary or permanent, fixed or movable. For example your premises might have steps leading up to the front entrance, which would be a barrier for wheelchair users and people with reduced mobility, or your signs might be too small, or have a shiny surface that produces glare, which would be a barrier for people with visual impairments.

The Act states that avoiding a substantial disadvantage caused by a physical feature includes:

- Removing the physical feature in question
- Altering it so it is no longer an issue
- Providing a reasonable means of avoiding it

The best course of action is to remove the physical feature as this is most likely to afford disabled people the same level and quality of access as other people. Service providers who only chose to provide a reasonable means of avoiding the physical feature when it was reasonable for them to remove it altogether will not be looked upon favourably by the courts.

The Act requires that any means of avoiding the physical feature must be a 'reasonable' one. This means that the provision of the service in this way must not significantly offend the dignity of disabled people and should not cause disabled people undue inconvenience or anxiety.

The Duty to Make Reasonable Adjustments

Example

Andrew MacIntosh lives in Peebles in a two storey townhouse. His Chronic Obstructive Pulmonary Disease is getting increasingly worse and he is using his wheelchair more and more in the house. He rarely goes upstairs, which is where his bathroom is located. He wants his downstairs shower room to be converted into a wetroom but is having issues with his local social work department. He wants to seek legal advice so searches online for an accessible solicitor's office with accessible parking and toilet facilities. He is unable to find any suitable firms in the Borders area so phones a large company to request a home visit. The firm agrees to meet Mr MacIntosh in his own home in recognition of the inaccessibility of their office.

Best practice tip

You may be able to identify some physical features which present access barriers. However to ensure that you are aware of all possible barriers it is recommended to have an access audit carried out. It is best practice to involve disabled people, especially wheelchair users, visually impaired people and hearing impaired people, in the audit because disabled people with first-hand experience of the disabling barriers are best placed to identify issues and suggest solutions.

3. Where not providing an auxiliary aid or service puts disabled people at a substantial disadvantage compared with people who are not disabled, to provide that auxiliary aid or service.

An auxiliary aid or service is anything which provides additional support or assistance to a disabled person such as the provision of a special piece of equipment, extra assistance from staff, the provision of a sign language interpreter or the provision of an induction loop for hearing aid users.

Best practice tip

If you put in place an auxiliary aid or service, it is important that you make sure that staff are aware of it and they know what to do in situations where a disabled person might benefit from using it. It is very common for service providers to purchase equipment, such as induction loops, and not provide any staff training. This results in the equipment not being made available to customers, which means that the adjustment has failed.

The Duty to Make Reasonable Adjustments

What is 'Reasonable'?

One of the most frequently asked questions about this duty is 'what is reasonable?' Neither the Act nor the Code of Practice defines what is meant by 'reasonable'. This is because what is reasonable depends on a number of factors. The nature of the service provider is a key consideration here – what is reasonable for a large law firm to do is different to what is reasonable for a sole practitioner to do.

However the Code of Practice does list a number of factors that may have a bearing on whether or not an adjustment is reasonable. These are:

- Whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question: to be reasonable, the adjustment must be effective in tackling the problem facing the disabled person.
- The extent to which it is practicable for the service provider to take the steps: it is more likely to be reasonable for a service provider to have to take a step that is easy to take than one that is difficult. If the adjustment is not feasible or would be impossible to put into place, it would not be reasonable.
- The financial and other costs of making the adjustment: if an adjustment costs little or nothing it is likely to be reasonable unless some other factor (such as practicability or effectiveness) made it unreasonable.
- The extent of any disruption which taking the steps would cause: if an adjustment is not disruptive, it is likely to be reasonable unless some other factor made it unreasonable.
- The extent of the service provider's financial and other resources: if you have substantial financial and human resources it is more likely to be reasonable for you to make a complex adjustment than if you have fewer resources.
- The amount of any resources already spent on making adjustments: it is more likely to be reasonable for a service provider who has not spent any money on making adjustments to make an adjustment than it is for a service provider who has already spent a lot of money in this area.
- The availability of financial or other assistance: if you can get outside help to make an adjustment that is likely to make it more reasonable.

The question of the reasonableness of an adjustment is an objective one for the courts to determine.

The Duty to Make Reasonable Adjustments

Best practice tip

Your duty under the Act is to take reasonable steps. However it is best practice to consider all the steps you could take to improve access for disabled people, whether or not they would be required by the duty. There are lots of low cost, minimum hassle things that you can do to increase access for disabled people such as rearranging furniture to increase space for manoeuvring in public areas, providing seating with arm rests in your waiting area, training staff to provide assistance to disabled people and improving signage.

Comparator

There is no need for a comparator with the duty to make reasonable adjustments.

Can Failure to Make a Reasonable Adjustment be Legal?

There can be no justification for failing to make an adjustment that is reasonable. However, if an adjustment is not reasonable, then the service provider is not required to take the action.

A disabled person who believes that a service provider has committed an unlawful act against them – discrimination, harassment or victimisation or failure to make a reasonable adjustment – may bring civil proceedings in the sheriff court.

However, it is recommended that before taking formal action, the disabled person attempts to resolve the issue informally with the service provider by using their complaints process.

After that, the client may be able to make a complaint to the independent Scottish Legal Complaints Commission (www.scottishlegalcomplaints.com). The standards for Scottish solicitors set out, in section 15, a reminder that:

15. Diversity

It is against the law for anyone, including solicitors, to discriminate because of race, sex, marital status, disability, sexuality, religion and belief or age. This applies to all their professional dealings with clients, employees or other lawyers.

Other sections of those standards are also relevant. For example ensuring the client understands the information and advice being provided is a required standard, and this relates to all forms of communication and the linked equality issues. For example, issuing 'Terms of Business' (as required under Practice Rules) to a client in written English when the client cannot read English, perhaps because BSL is their first language, could be deemed a breach of the professional code.

If this does not solve the problem then the next stage is to use conciliation services. The Equality and Human Rights Commission (EHRC) provides conciliation services for this purpose.

Court action must be started within six months (minus a day) of the alleged unlawful act unless the EHRC conciliation service is being used in which case the period within which the claim may be brought is generally nine months.

The disabled person alleging discrimination must build a case to take to court to prove that they have been discriminated against. This is likely to involve obtaining information from the service provider in a process known as 'procedure for obtaining information'. Service providers do not have to respond to this request for information but courts do not look favourably on service providers who fail to respond.

The burden of proof lies first with the disabled person to prove facts about the alleged discrimination. If the court feels that sufficient information has been provided then the burden of proof shifts to the defendant. To successfully defend a claim, the service provider must prove that they did not act unlawfully.

Enforcement and Conciliation

The Code of Practice lists the following as potential remedies the sheriff court may order:

- A declaration of the rights and responsibilities of the parties to the claim
- An interdict to prevent the person defending the claim from repeating any unlawful act in the future
- Quashing orders by which the court can set aside an administrative decision or action of a public authority
- Damages to compensate for any loss suffered by the person bringing the claim
- Interest on damages
- Costs

Appendix A: Further Information

The Law Society of Scotland

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Telephone: 0131 226 7411
Email: diversity@lawscot.org.uk
www.lawscot.org.uk

Capability Scotland

Head Office
11 Ellersly Road
Edinburgh
EH12 6HY

Telephone: 0131 313 5510
Email: advice@capability-scotland.org.uk
www.capability-scotland.org.uk

The Equality and Human Rights Commission

151 West George Street
Glasgow
G2 2JJ

Telephone: 0141 228 5910
Email: scotland@equalityhumanrights.com
www.equalityhumanrights.com

Equality Advisory Support Service

FREEPOST
Equality Advisory Support Service
FPN4431

Telephone: 0808 800 0082
Email: Complete the form online.
www.equalityadvisoryservice.com

Appendix B: Access Checklist

It is good practice for firms to conduct a disability audit to ensure that you are complying with the legislation and, where possible, operating best practice.

Customer Service

1. Do your staff receive disability equality training?	
2. Do you request feedback from the public about their customer experience and use this to inform developments in your service?	
3. Are your staff confident in providing services to disabled people and interacting with disabled people?	

Access to Information

1. Do your staff receive disability equality training?	
2. Do you request feedback from the public about their customer experience and use this to inform developments in your service?	
3. Are your staff confident in providing services to disabled people and interacting with disabled people?	
4. Do your staff know what to do if they are asked for a publication or a form in an alternative format?	
5. Do you monitor requests for alternative formats?	
6. Do you use a minimum font of size 12 for all documentation?	
7. Do you encourage staff to avoid jargon and use plain English?	
8. Have you tested your website to ensure it is accessible?	
9. Do you provide information on your website about the accessibility of your premises, including induction loop provision, parking and accessible toilets?	

Appendix B: Access Checklist

Communication

1. Are any of your staff trained in British Sign Language (BSL)?	
2. Do you provide BSL interpretation to new and existing clients who use BSL?	
3. Do your staff know what to do if a request for BSL interpretation is received?	
4. Do you have a policy on the use of family members as BSL interpreters?	
5. Are your public counters and meeting rooms equipped with induction loops and the appropriate signage?	
6. Are staff trained in the use and upkeep (including charging) of induction loops?	
7. Do you provide longer appointments for people with communication support needs?	
8. Are your staff trained in communicating with people who use high and low tech communication supports?	

Appendix B: Access Checklist

Physical Access

1. Do you provide parking for clients?	
2. Do you have designated parking spaces for Blue Badge holders close to your front entrance?	
3. Is the route from the car park to your front entrance flat and smooth?	
4. Is your main entrance accessible?	
5. Is there a permanent or portable ramp if necessary?	
6. Are there handrails on both sides of any steps?	
7. Is there a bell to press for assistance at the bottom of the ramp/stairs?	
8. Is the main door fitted with a semi or fully automated door-opening mechanism?	
9. Do you have a lowered section of counter at reception for wheelchair users?	
10. Do you provide seats with arm rests in the waiting area?	
11. Do you provide accessible toilet facilities?	
12. Do you have an accessible meeting room?	
13. Do you have a lift to access upper levels?	
14. Are door widths throughout at least 800mm to allow wheelchair access?	
15. Are floor surfaces slip resistant?	
16. Is there sufficient space throughout for a wheelchair user to manoeuvre?	

Appendix B: Access Checklist

Emergency Evacuation

1. Is your audible fire alarm supplemented with a flashing alarm?	
2. Do you provide evacuation chairs on all upper levels and train staff in their use?	
3. Is there signage to accessible escape routes?	

Appendix C: Language and Disability

This is an excerpt from Capability Scotland's *Plain Talking* leaflet, copies of which can be obtained by contacting the organisation.

It is a result of research carried out with disabled people and the words and phrases disabled people prefer.

We don't like	We prefer
The disabled	<ul style="list-style-type: none"> • Disabled people • People with physical / sensory / visual / hearing impairment • People with disabilities impairments
Handicapped person	<ul style="list-style-type: none"> • Disabled person • Person with a physical / sensory / visual / hearing impairment • Person with a disability
Able-bodied person	<ul style="list-style-type: none"> • Non-disabled person
Victim of / suffering from	<ul style="list-style-type: none"> • Person who has asthma / cerebral palsy / cancer etc • Person with a mental health issue / facial disfigurement / HIV etc
Wheelchair bound / confined to a wheelchair / person in a wheelchair	<ul style="list-style-type: none"> • Wheelchair user • Person who uses a wheelchair
Spastic	<ul style="list-style-type: none"> • Person with cerebral palsy
Mongol	<ul style="list-style-type: none"> • Person with Down's Syndrome
Cripple / invalid	<ul style="list-style-type: none"> • Disabled person
Mentally handicapped / retarded	<ul style="list-style-type: none"> • Person with a learning difficulty
Physco / nutter / madman / madwoman	<ul style="list-style-type: none"> • Person experiencing mental ill health
The blind	<ul style="list-style-type: none"> • Blind person
The deaf	<ul style="list-style-type: none"> • Deaf person
Dumb / mute	<ul style="list-style-type: none"> • Person without speech



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