Committee *for*
Employment & Social Security

FAQs - Accessibility and the discrimination legislation proposals

[Last updated 25th March 2020]

Q1: What does accessibility mean?

A1: Accessibility is about designing things inclusively so that disabled people can use spaces and services in the same way as everyone else without needing adjustments. It is not focused on the needs of any specific individual, but is to do with thinking about relatively common impairments and designing with those in mind to improve access for everyone.

For example, step-free access could help people with mobility impairments; having well designed signage can make it easier for people with visual impairments to find their way around; or using a microphone and hearing loop might make speaking events more accessible to people with hearing impairments. Sometimes these changes can be good for everyone – for example, having level access might make it easier for people carrying heavy things or caring for small children as well as for people with mobility impairments.

Q2: What is a reasonable adjustment?

A2: A reasonable adjustment is a necessary and appropriate modification or adjustment which a disabled person requires in order to have equal opportunity or equal access to participate. There is no obligation to provide an adjustment if doing so would be a disproportionate burden on the provider.

Reasonable adjustments might be anticipatory, in that an organisation might be expected to be able to include a disabled person because they have thought about accessibility in advance of someone with an access need trying to use their service (like having an accessible webpage). This only applies in certain contexts (see below).

Organisations might also need to make reasonable adjustments specifically to include an individual disabled person. This might be focused on their particular needs , which might be unique to them(for example, printing something on coloured paper for someone with dyslexia when they request it), but sometimes making adjustments for individuals can benefit other people too.

Denial of a reasonable adjustment is a form of discrimination. This means that individuals can make discrimination complaints if they feel that adjustments have not been made for them, where it would be proportionate for an organisation to have made that adjustment.

Q3: What does the Committee *for* Employment & Social Security's Policy Letter say about accessibility?

A3: All education providers and providers of goods or services should think about accessibility. This includes public, private and third sector education providers and providers of goods or services. This is because when the proposed new legislation comes into force (if approved) disabled people will be able to make complaints (including indirect discrimination complaints[1] and complaints about denial of a reasonable adjustment) if they feel that they have been discriminated against. In the event of a complaint, it would be likely to stand against an education provider or provider of goods or services if they had not thought about common access needs in advance of a customer, service user or student needing something. This is because the reasonable adjustment duty is, in effect, anticipatory for education providers and providers of goods or services (as in the UK).

However, it is proposed that certain kinds of complaint won't be able to be made right away:

- People won't be able to register a disability discrimination complaint relating to a 'physical feature' of a building (for example, a narrow doorway or a step – see A9 below) until five years after the legislation comes in.
- Education complaints won't be able to be made immediately. This is so that the States can make sure that the way for deciding certain kinds of complaint under the new Education Law about which school students could go to and how best to meet their needs align properly.

ESS is proposing that the public sector has a particular duty to produce accessibility action plans. Other organisations may wish to do this too, but they are not legally required to have any particular form of documentation. The public sector plans should be in place by five years after the law is introduced. If a public sector organisation does not have a plan in place by this date they could be issued with a compliance notice telling them to develop a plan.

Q4: What do employers, clubs and associations and landlords need to do about accessibility?

A4: Employers, clubs and associations and residential landlords should respond to the needs of their disabled employees, members and tenants (wherever they are aware there is a need) – including making reasonable adjustments where this is not a disproportionate burden on them to do so. However, it would not stand against them if they did not think about disabled people in general in advance when designing things that affect their employees, members or tenants.

Commercial landlords who let properties (particularly to education providers or providers of goods or services) should not unreasonably refuse requests to make their properties more accessible if the organisation letting from them wants to do this work. So, for example, if a

[1] Whereas direct discrimination is where a person is treated differently on the basis of a protected ground (such as disability or race), indirect discrimination is where an apparently neutral provision has an adverse effect on a particular group. For example, if a website has text embedded in images that can't be used by a screen reader this might indirectly discriminate against visually impaired people. If the organisation wanted to defend their use of a particular provision they would have to objectively justify this by showing that it was both proportionate and necessary.

small business rented a shop and wanted to put a ramp up to the door (paying for it themselves), the owner of the building shouldn't refuse unless there is a good reason to do so. If the owner of the building did refuse with no good reason that owner might have to pay compensation to an individual if they made a disability discrimination complaint against the small business in relation to what the request had been about and that complaint was upheld.

Q5: What about organisations that are employers AND providers of goods or services?

A5: Organisations that are both employers AND providers of goods or services need to think about what areas, services or facilities employees use and what areas, services or facilities customers use. These organisations should focus their thinking about accessibility of areas, services or facilities their customers use.

Q6: In the consultation last summer the Committee proposed an anticipatory accessibility duty for everyone, including the private sector. Now a duty to prepare an action plan only applies to the public sector. Does this mean that businesses don't need to think about accessibility?

A6: When the new legislation comes into force (providing the Committee's proposals are approved), individuals will be able to make disability discrimination complaints against public, private and third sector organisations. Because the reasonable adjustment duty is anticipatory for education providers and providers of goods or services, it would be likely to stand against an education provider or provider of goods or services if they had not thought about accessibility in advance of an individual needing to make a request for an adjustment (no matter which sector).

In addition, a public sector organisation could be issued with a compliance notice if, after five years, they don't have a plan in place about how to improve the accessibility of their services. Private and third sector organisations do not need a plan and cannot be issued with a compliance notice for not having a plan. However, it would be good practice for them to have a plan in place.

The Committee's proposals have changed following the public consultation carried out last summer. The draft proposals published by the Committee in the summer of 2019 contained two distinct duties – a responsive reasonable adjustment duty and an anticipatory accessibility duty (which included a duty to draft an accessibility action plan). This has been reframed in the Committee's Policy Letter (the final proposals) to align with the UK position where there is a single reasonable adjustment duty, which is anticipatory in certain contexts. While the way it is framed in law is a bit different to what was proposed in the Committee's draft policy proposals published last summer, the practical implications are very similar. The main change for employers and service providers is that private and third sector organisations do not have to have an accessibility action plan in place, and cannot be issued with a compliance notice if they do not have a plan. They may still wish to plan, though, as the responsibility to anticipate needs is still there for education and goods or services providers as set out in A3.

Q7: Does the proposed five year delay in the ability of people to register complaints relating to the physical features of a building mean that employers and service providers don't need to worry about disability discrimination until about 2027 (if the new law is introduced in 2022)?

A7: No. If the law is introduced in 2022, people will be able to register disability discrimination complaints on anything that's not related to a physical feature of a building (or an education related complaint until the tribunal mechanism for hearing education complaints is established). Complaints relating to reasonable adjustments or indirect discrimination could cover, for example, the way that staff interact with customers with dementia or autism, whether there is a hearing loop, if a document is available in large print or whether or not an organisation's website is accessible – none of these are related to the physical features of a building. (See A9 below for further information about what is and is not a 'physical feature').

It is proposed that people will be able to register discrimination complaints relating to a physical feature of a building from 5 years after the legislation comes into force (estimated to be in 2027). We would anticipate that businesses and organisations will use the five year lead-in period to think about the physical accessibility of their service and, potentially, start making changes in advance – reducing the chances that a complaint will be made against them when the five years have passed.

Q8: Does this mean that employers and service providers need to make their services fully accessible by 2027 (if the new law is introduced in 2022)?

A8: By 2027 people will be able to make complaints which relate to the accessibility of physical features. Meeting best practice standards for accessibility might reduce the chance of a complaint being made and/or increase the chance of successfully defending a complaint if one was made. However, the duty to make reasonable adjustments is proportionate and recognises that organisations might not be able to make all of the changes required to meet best practice standards within a short space of time (or at all, for example, if incompatible with a historic building – though this would need to be discussed with the Development & Planning Authority). It is also true that best practice standards are evolving, so what complies now may not comply in future. What it is important to show is that accessibility is being considered and reasonable steps are being taken. We would not anticipate that the whole island will comply with best practice standards by 2027.

For the public sector, we would expect services to have plans in place about how to work towards better accessibility for disabled people after five years. This does not mean the plan must be fully implemented in five years. It is envisaged this will be an ongoing, rolling process where the plan is refreshed every five years and actions to address accessibility issues are prioritised. It may take many years for some services or sites to meet best practice guidelines; however, they will need to show that they are progressing in a prioritised and strategic way within available resources.

Q9: The Policy Letter says complaints related to disability discrimination can't be made about a physical feature of a building in the first five years. What's a 'physical feature'?

A9: The Committee is proposing that it can make Regulations specifying what a physical feature is and is not, so that this can be amended easily if clarity or change is needed. As an initial starting point, it is suggested that a physical feature includes:

- a feature arising from the design or construction of a building;
- a feature of an approach to, exit from or access to a building;
- a fixture or fitting.

It does not include:

- the replacement of a sign or notice;
- the replacement of a tap or door handle;
- the replacement, provision or adaptation of a door bell or door entry system;
- changes to the colour of a wall, door or any other surface.

While it is proposed that complaints about physical features cannot be registered in the first five years, it would still be good practice to consider making changes, where these are not a disproportionate burden to make. It is also important to understand that it would be necessary to consider other 'work arounds' from day 1 of the legislation coming into force if a physical feature was the cause of a disabled person not being able to access employment, goods or services, etc. For example, if a wheelchair user requested a reasonable adjustment to allow them to access a building with steps up to its main entrance, but there was an alternative entrance that the person could use, then use of this alternative entrance should be considered.

Q10: Will there be anyone working to promote access for disabled people?

A10: The Disability Officer already undertakes some work to promote access for disabled people - this will continue. There will also be someone who will be working on promoting equality and raising awareness in the Employment and Equal Opportunities Service. This person will look at a wide range of issues and identify some priorities to work on to promote equal opportunities. The priorities could (but would not necessarily) include work on accessibility and disability inclusion.

All education providers and providers of goods or services will be advised to think about accessibility.

Q11: Will there be anyone to give advice about access for disabled people?

A11: Yes, if the States agree the Committee's proposals then in plenty of time before the new legislation comes in there will be advice and guidance developed for service providers that will cover accessibility. The Employment and Equal Opportunities Service will have some basic tools to help people to think through the accessibility of their services – like, for example, checklists to support people to do a self-audit so that they can identify if there are any access issues for their service. Larger organisations may wish to use the services of a professional access auditor or consultant, or to train one of their staff in accessibility.

For very small organisations, the Committee *for* Employment & Social Security has proposed commissioning some specialist access consultancy. It is intended that small organisations would use self-assessment tools to identify any access issues and could then use the consultant to discuss what their priorities should be and how best to address any issues identified.