

Exemption issues

The DCLG has clarified the relationship between the Building Regulations and the Equality Act 2010. Martin McConaghy discusses the potentially complex application of the Regulation 9 Exemption

The Equality Act, as with the Disability Discrimination Act before it, contains an exemption from the duty to make reasonable adjustments to physical features for Part 3 duty holders (service providers, entities exercising public functions and associations) in certain circumstances.

The DCLG letter, issued 9 December 2011¹, clarified the relationship between Regulation 9 of the Equality Act 2010 (Disability) Regulations 2010 – secondary legislation to the Equality Act – and Approved Document M of the Building Regulations. Perhaps what's more important is how applicable and robust the exemption would be for Part 3 duty holders in practice.

So what does this mean?

On first review of the Regulation 9 exemption, it is understandable that many people will take comfort from it. However, the exemption's applicability and usefulness in real world scenarios is more complex than this and perhaps not as robust as it would first seem, as illustrated in the following scenarios.

Scenario 1 – It is not a blanket exemption from the duty to make reasonable adjustments

Consider a duty holder who has a lift which is in full accordance with Approved Document M: Access to and Use of Buildings. A member of the public finds that the lift is not large enough for their wheelchair.

If the user requests that the lift be replaced with a larger lift, it would not be reasonable because the existing lift is in full accordance with Approved Document M and therefore the Regulation 9 exemption would be applicable, for a period of 10 years. However, the duty holder would still need to consider other non-physical reasonable adjustments such as using a ground-floor accommodation to replicate the service on upper floors.

The exemption only relates to the duty to make adjustments to physical features (item 2 in the panel below) and is not a blanket exemption from the overall duty to make reasonable adjustments. Therefore other requirements to make reasonable adjustments in relation to provisions, criterion, practices and provision of auxiliary aids are not covered.

Overview

In relation to the duty to make reasonable adjustments for disabled people, Section 20 Chapter 2 of the Equality Act 2010 provides three duties:

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.*

Part 4 of the Equality Act 2010 (Disability) Regulations 2010 states (author's emphasis in bold):

9. (1) *This regulation prescribes **particular circumstances**, for the purposes of paragraph 2 of Schedule 2 and paragraph 2 of Schedule 15 to the Act, **in which it is not reasonable for a provider of services, a public authority carrying out its functions or an association to have to take the steps specified in this regulation.***
9. (2) **It is not reasonable for a provider of services, a public authority carrying out its functions or an association to have to remove or alter a physical feature where the feature concerned:**
 - (a) *was provided in or in connection with a building for the purpose of assisting people to have access to the building or to use facilities provided in the building; and*
 - (b) **satisfies the relevant design standard.**
9. (3) *Whether a physical feature satisfies the relevant design standard shall be determined in accordance with the Schedule.*

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In some instances, alternative management process may be so onerous that it may be more cost effective for the duty holder to actually undertake adjustments rather than incurring ongoing management costs. For example, a large shop with an inclined platform lift which accords with the Approved Document, but finds that wheelchairs are too large to be accommodated on the device, may need to consider providing a separate stair climbing device which would need to be deployed and managed by staff (an auxiliary aid). The cost of the auxiliary aid plus the staff time could outweigh the cost of a larger platform lift.

Scenario 2 – The applicability if the exemption relies on compliance with the Approved Document, not sign-off by a building control professional
A recently constructed entrance ramp is steeper than the Approved Document M would require. However, the building control professional accepted the construction in recognition of the site constraints and following submission of an Access Statement. There are many occasions where legitimately and for good

reason works that do not actually accord with Approved Document M are constructed and approved by building control professionals. The exemption would not be applicable because it only applies to features which accord with the relevant design considerations, objectives and provisions of the Approved Document. Hence, building control approval is not relevant when considering the applicability of the Regulation 9 exemption.

Scenario 3 – The exemption will only apply to a request to alter an existing physical feature

The premises of a duty holder include a left-hand transfer accessible WC, which fully complies with the Approved Document. However, a request is received to provide a right-hand transfer accessible WC. Since the request does not involve making reasonable adjustments to the existing WC and instead requests the provision of a different variation, the exemption is not applicable. This is because the exemption only relates to existing features, and is not a blanket exemption applying to the overall building.

Another factor to consider is which design standards to apply where there are conflicts between BS8300 and Approved Document M...

Whether a physical feature satisfies the relevant design standard shall be determined in accordance with the Schedule

The Schedule (Regulation 9 (3), Removal or Alteration of Physical Features: Design Standards) from the Equality Act 2010 (Disability) Regulations 2010 goes on to state (author's emphasis in bold):

Definition of "relevant design standard"

1. (1) Subject to sub-paragraph (3), a physical feature, in relation to a building situated in England or Wales, satisfies the relevant design standard for the purpose of regulation 9(2) where **it accords with the relevant objectives, design considerations and provisions in Approved Document M.**
- (2) Subject to sub-paragraph (3), a physical feature, in relation to a building situated in Scotland, satisfies the relevant design standard for the purposes of regulation 9(2) where:
 - (a) it was provided in or in connection with the building on or after 30th June 1994 and before 1st May 2005 **in accordance with the Technical Standards relevant** in relation to that feature; or
 - (b) it was provided in or in connection with the building on or after 1st May 2005 in accordance with the relevant functional standards and guidance in the Technical Handbook.
- (3) **A physical feature does not satisfy the relevant design standard where more than 10 years have elapsed since:**
 - (a) the day on which construction or installation of the feature was completed; or
 - (b) in the case of a physical feature provided as part of a larger building project, the day on which the works in relation to that project were completed.



» So, in practice it can be seen that using the exemption as a defence could be fraught with complexities in terms of its actual applicability and how beneficial the exemption would be when considering the wider duties. However, there are other questions which need to be considered.

The schedule pertaining to 'relevant design standards' only includes Approved Document M (England & Wales) and the Technical Standards (Scotland). What is interesting is that BS8300: 2009+AD1:2010, *Design of buildings and their approaches to meet the needs of disabled people – Code of practice* and amendments has no specific legal status in relation to the exemption.

This is a particularly concerning issue, since BS8300 is generally accepted as being the best practice document for accessibility. Consider a scenario where a feature, such as a peninsular WC, has been constructed to meet BS8300 in full. In the event of a complaint, the exemption is irrelevant because it relies solely on accordance with the Approved Document which does not provide guidance on the design of such facilities.

Another factor to consider is which design standards to apply where there are conflicts between BS8300 and Approved Document M – should designers follow the Approved Document to ensure that the duty holder's exemption is applicable?

To conclude, while the exemption may prove useful in very specific circumstances, it is clear that simply

adopting a policy of compliance with Approved Document M may not be sufficient to meet Part 3 duty holders' responsibilities and indeed, as a strategy for premises, it clearly has its limitations. For example, when specifying new premises or undertaking periodic access audits, adoption of Approved Document M as the baseline requirement may not be sufficient. All duty holders would be prudent to adopt a more holistic best-practice approach to securing inclusive environments.

Further information

¹ *Circular letter: Building Regulations 2010 - Equality Act clarification* can be found at ow.ly/9Bxwq

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