Test of time

Ten years after the duty to ensure access under the Disability Discrimination Act 1995 came into force, **Martin McConaghy** reflects on progress

Practitioners working in 2004 will remember the implementation of the final stage of the Disability Discrimination Act 1995 (DDA), and the challenges faced by service providers relating to 'reasonable adjustments' to physical features and their premises. While the DDA was subsumed into the Equality Act 2010, many of the duties to overcome access barriers remain the same.

However, measuring progress is difficult, and a number of recent studies demonstrate that meeting disabled people's needs has been slow. For example the *Missing out* study by Really Useful Stuff in 2013 (*http://bit.ly/1isLRYU*) revealed that: "65% of respondents feel that retailers have made no improvement in recent years and as many as a quarter (26%) believe that access has got worse.

Other studies tell a similar tale, including a report by Trailblazers (*http://bit.ly/1n2gdUT*) which found that: "75% of respondents felt limited or forced to shop online due to high street inaccessibility."

The question this poses is that if satisfaction is so low where are the claims for discrimination?

Reasonable adjustments

In fact, since the 2004 duties came into effect, only a relatively small number of claims have actually reached the courts relating to service provision, perhaps the most well known being Roads v Central Trains [2004] and Allen v RBS [2009]. There are a number of explanations for this, including the lack of appetite among disabled people for pursuing a claim and more recently, perhaps the cuts to legal aid. Even less is known about the number of claims settled before reaching the courts.

It appears that most organisations began responding to their duties when the DDA was first introduced in 1995. The schedule allowed for planning and implementing a strategy on reasonable adjustments before the 2004 duties came into effect. During the early 2000s a lot of effort and money was expended to ensure access measures were in place, but it seems that since 2004 most organisations' efforts appear to have reduced or at least been given less priority.

In hindsight, this 'peak in effort' is rather strange when considering the fundamental nature of legislation and the associated risk. There are a number of factors that have changed, and continue to change over time, including what may be considered 'reasonable', the wider social context, legislation and relevant technical standards. And of course, many organisations' property portfolios will have altered considerably over the past 10 years.

For most organisations, the steps to be taken have become more onerous, for example, some of the key factors of 'reasonableness' from the Equality Act Statutory Code of Practice *Services, public functions and associations*.

The extent of disruption

Some organisations will have identified barriers to disabled people that required disruptive works to remedy them. On this basis, they may have deemed that it was not reasonable to undertake the works at that point in time. However, 10 years on, most commercial property will have been subject to a refurbishment and therefore the original argument about disruption may no longer be sufficient.

> "If satisfaction is so low where are the claims for discrimination?

Financial and other costs

For some, the costs of making adjustments are the most contentious issue. Many organisations undertaking access audits in the early 2000s would have had a view on what was a reasonable amount of money to spend, but more money may have become available since then.

In essence, an organisation's argument about what is reasonable, or perhaps more importantly what is not reasonable, can be weakened over time, making it more difficult to defend a claim should one arise.

Also directly related to time are the numbers of disabled people attempting to access services. For example, if you had a less-than-accessible service in October 2004, with a low footfall, you would have been unlucky to have had a serious complaint. Ten years on, the cumulative footfall means that an organisations' exposure and the likelihood of a disabled person needing access to services has increased significantly.

Risk factors

Evaluating the likelihood of a claim is difficult. However, there are some wider

changes within society that signal an increase due to a number of factors.

Changing attitudes

Historically, disability was viewed largely from the perspective of the medical or charitable models, leading to individuals seeing their impairment as the source of disability rather than the design or construction of the built environment. Coupled with this, many older people who meet the definition of 'disability' under the legislation would not see themselves as being disabled. However, this is changing as new generations of disabled people come through the education system where their needs have been met through adaptation and support. They see disability in the context of the social model; something that is imposed on individuals by society's failure to take account of people with impairments.

Rise in number of disabled people

The government's Office for Disability Issues uses statistics from the Family Resources Survey 2010/11, which suggest there are more than 11 million people with disabilities in the UK. What is interesting is that the prevalence of disability rises with age. The same study suggests that around 6% of children are disabled, compared to 16% of working age adults and 45% of adults over the state pension age. An ageing society in Britain is bringing an increased prevalence of disability, and with it a greater potential number of complaints.

Equality Act 2010

While the DDA's replacement, the Equality Act 2010, shares a lot of common ground, its introduction included a significant change to the threshold required to prove that discrimination has occurred. The DDA required disabled people to demonstrate that it was 'impossible or unreasonably difficult' to use a service but under the Equality Act the complainant only needs to prove 'substantial disadvantage' when compared to a non-disabled person.

Although the meaning of the phrases will likely be the subject of legal argument, in my opinion it is a lower threshold to prove. This is particularly important for properties where access is less than ideal, but where it is likely to be possible. Properties where access has been provided via portable ramps or secondary entrances are all potential areas where this change in the threshold could become pertinent.

> "The risk of a claim for discrimination has actually increased since 2004

In addition to the changes to the legislation, the technical standards used to 'anticipate barriers to disabled people' have also changed since the DDA. The latest version of BS 8300, *Design of buildings and their approaches to meet the needs of disabled people*, was published in 2009 and amended again in 2010. This has introduced much more detail for certain areas and guidance for some new features, all of which can now be 'anticipated' by virtue of it being included in a British Standard.

Many service providers will also have acquired new properties, refurbished existing and potentially even designed and built new accommodation. If a conscious effort is not made to ensure that the new and refurbished properties are accessible, organisations may face an increased risk of receiving a serious complaint. Also worth noting is that service providers will still need to consider undertaking access audits of these premises to demonstrate they have discharged their obligations.

When considering all these factors collectively, it is clear that the risk and likelihood of a claim for discrimination arising has actually increased since 2004, and moving forward it appears it will continue to grow. For those organisations that want to avoid the consequences of a claim, or even capitalise on the business case for accessibility (a subject for a different day), it is clear that a continual improvement approach must be adopted to all aspects of accessibility.

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