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Disability Discrimination and Substantive Equality: What Lessons Could Be Learned from the British Public Sector Equality Duty?

Sylvanus B. Effiom *

Introduction

The Equality Act (EqA) 2010¹ came in to force on 1 October 2010 and introduced a new public sector equality duty which not only harmonise the previous patchwork of positive duties on public authorities to promote equality in respect of race, gender and disability but also extend its coverage to include all the protected characteristics, except marriage and civil partnership.² As one of the key ways by which the legislation intends to strengthen the law on discrimination to support progress on equality, the PSED is intended to have a transformative effect.³ However, the current situation with regard to disability equality is clearly unsatisfactory.

At present, Around a third of persons with disabilities in Britain experience discrimination in accessing goods or services, including health services while The employment rate of this group of persons is 48.9 % compared to 78% for the overall working-age population.⁴ The Equality Review estimated that, at the present rate of progress it is likely to take decades to achieve equality of opportunity for persons with disabilities in

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¹ The Equality Act 2010 is the main Legislation outlawing discrimination in the UK. Section 4 of Chapter 1, Part 2 of the Act lists disability as one of the protected characteristics.

² The Public Sector Equality Duty is contained in Section 149 EqA 2010.

³ Explanatory Notes, EqA 2010, (12).

⁴ Office for Disability Issues at <http://odi.dwp.gov.uk/disability-statistics-and-research/disability-equality-indicators.php>.

fields such as education and health services while the employment gap for this group of persons will probably never be closed.⁵

This article aims at assessing the extent to which the PSED can improve the situation and thereby contribute to the attainment of substantive equality for persons with disabilities in our society. A main contention of this article is that, even though the PSED may have been intended to represent an important shift of regulatory philosophy in the area of equality legislation in Britain, its application in the field of disability could be seriously undermined by the pervading influence of the tenets of formal equality in the legislation and this may end up posing new challenges with regard to the attainment of substantive equality for persons with disabilities. Section One provides a theoretical framework for understanding the distinction between formal and substantive equality within the context of the limitations of the conventional anti-discrimination laws. Section two explores the challenges of the asymmetrical nature of disability discrimination as reflected by the role of the definition of disability as gatekeeper. The Section also highlight the difference between the medical and social models of disability and argue that, at least for the purpose of the PSED, the definition of disability should move towards a more social model. Section three examines the structure and content of the statutory duty and asks whether they can be said to reflect a substantive conception of equality. In particular, the Section highlight the synergy that must exist between the advancement of equality of opportunity and the provisions on positive measures in the EqA 2010 as an exception to the non-discrimination principle. Section four considers the connections between the equality duty and the other disability-related discrimination measures contained in the EqA 2010 such as the duty to make reasonable adjustment. Prominent in this connection is the presence in the EqA 2010 of indirect discrimination which is applicable to the protected characteristic of disability. A key element of the inquiry here will be the extent to which the PSED could operate to reinforce these measures in order to attain substantive equality for persons with disabilities.

⁵ *Fairness and Freedom: The Final Report of the Equalities Review* (Communities and Local Government Publications, 1 June 2007, Product Code 06DL0440/a, www.theequalitiesreview.org.uk). p. 24.

1. Formal and Substantive Equality

British anti-discrimination Laws have traditionally been founded on two important and interrelated conceptual frameworks. The first is a formal conception of equality based on the Aristotelian notion of equal treatment that likes should be treated alike and unlike treated unlike.⁶ This is reflected in the established concept of direct discrimination which requires proof that a person has been less favourably treated than a comparator.⁷ The second is a dependency on an individualised, complaints-led model of enforcement which is framed conceptually to ensure that victims of discrimination enforce their rights through individual complaints, based on proof of breach.⁸

However, after almost three decades of relevant anti-discrimination legislation, it had become increasingly apparent that the formal, individualised and complaint-based model of equality not only has significant limitations in terms of the ability to tackle the structural causes of discrimination but that these limitations have particular force in the context of disability. Formal equality which Fredman⁹ has characterised as “equality as sameness” advocates consistency in all cases and is framed around achieving equal treatment for the individual. The focus of formal equality on the individual means that the specific characteristics of groups are ignored in the equality equation. The significance of this on disability equality becomes evident once it is acknowledged that structural patterns of exclusion are often responsible for making particular impairments a source of disadvantage and that positive action may be required to challenge these patterns.¹⁰

⁶ S. Fredman, *Disability: A Challenge to the Existing Anti-Discrimination Paradigm?*. In A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. Oregon, Hart Publishing 2005. pp. 219-248.

⁷ Although the DDA 1995 and now, the EqA 2010 appear to have a similar comparator requirement for direct disability discrimination, tribunals and courts have found it difficult to identify an appropriate non-disabled norm to function as the comparator; see *Clark v Novacold* [1999] IRLR 318(CA); *Lewisham v Malcolm* [2008] UKHL 43, [2008] 3 WLR 194; *Aylott v Stockton on Tees Borough* [2010] EWCA Civ 910.

⁸ S. Fredman, *Discrimination Law*. (Oxford, OUP 2002).

⁹ *Ibid.*

¹⁰ C. O’Cinneide, *A New Generation of Equality Legislation? Positive Duties and Disability Rights*. In A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. Oregon, Hart Publishing, 2005. pp. 219-248.

An important reason why the conventional anti-discrimination laws do not adequately tackle the structural causes of inequality is its dependence on an individualised, complaints-led model of enforcement. The implication here is that, where an individual with a disability has been discriminated against in employment, the only avenue available to pursue justice is for him or her to bring a disability discrimination claim before an employment tribunal. As a result, the burdens of frequently 'lengthy and costly' litigation often fall on the most vulnerable members of society. Many individuals with a disability are unable to bring claims and justice is pursued in an ad hoc manner. Even if a claim does succeed, the remedy is still limited to compensating the individual complainant. The complaints-led model presents no obligation on employers to correct the institutional structure which gave rise to the discrimination'. Individual compensation does not necessarily guarantee change and the experience has been that patterns of structural inequalities and institutional discrimination are left unchanged.¹¹

Consequently, there have been calls recently for a shift to a more effective equality strategy that not only combine the conventional anti-discrimination measures with a more 'proactive and collective' approach but is also underpinned by a substantive conception of equality. In this respect, the Discrimination Law Review (DLR), which was launched in February 2005 "to consider the opportunities for creating a clearer and more streamlined discrimination legislative framework which produces better outcomes for those who currently experience disadvantage"¹², recommended the adoption of the four 'dimensions of equality' as identified by Fredman and Spencer¹³:

- Addressing disadvantage--taking steps to counter the effects of disadvantage experienced by groups protected by discrimination law, so as to place people on an equal footing with others;

¹¹ S. Fredman. *The Public Sector Equality*. *Duty Industrial Law Journal*, 1 December 2011, 40 (4): p. 405. Also, see B. Hedbo. *Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation*. *Industrial Law Journal*, 2011, 40 (4): p. 315.

¹² Department of Communities and Local Government, *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (2007) [<http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation>][5.28]-[5.29].

¹³ S. Fredman and S. Spencer. *Equality: Towards an Outcome-Focused Duty*. 2006, 156 *Equal Opportunities Review* 14. Also, S. Fredman and S. Spencer, *Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes*. 2006, *EHRLR* 598.

- Promoting respect for the equal worth of different groups, and fostering good relations within and between groups--taking steps to treat people with dignity and respect and to promote understanding of diversity and mutual respect between groups, which is a pre-requisite for strong, cohesive communities;
- Meeting different needs while promoting shared values--taking steps to meet the particular needs of different groups, while at the same time delivering functions in ways which emphasise shared values rather than difference and which provide opportunities for sustained interactions within and between groups;
- Promoting equal participation--taking steps to involve excluded or under-represented groups in employment and decision-making structures and processes and to promote equal citizenship.

The inception of the Equality Act 2010 supposedly embraced this shift' through the single public sector equality duty and thereby heralded the realisation of substantive equality for persons with disabilities. The notion of substantive equality was first introduced in to the case law of the United States Supreme Court in the case of *Brown v Board of Education*¹⁴ and its focus is on the characteristics of group membership. The concepts of positive action and equal opportunity are central to the notion of substantive equality. Positive or affirmative action encompasses a range of policies that 'do not require evidence of discrimination on an individual basis but rest on the identification of past group-based discrimination. On its part, equal opportunity provide a vehicle for taking in to account the position of the individual in society in relation to his or her group membership and the impact that any policy or measure is likely to have on him or her.

The significance of the concept of substantive equality becomes evident when the notion of equal opportunities is distinguished from the alternative conceptions of formal equality and equality of results or outcome. As pointed out above, formal equality is based on the premise that 'likes should be treated alike' and advocates consistent treatment in all cases. Equality of results goes beyond equal treatment and aims at achieving a fairer distribution of benefits. To the extent that its aim is diagnostic, demonstrating the existence of obstacles to entry, equality of result could be said to be concerned with substantive equality rather than

¹⁴ 347 US 483, 495 (1953).

just formally equal treatment. If equality is perceived as a spectrum, with formal equality at one end and equality of results at the other, equality of opportunity falls somewhere in the middle.

The centrality of substantive equality to the notion of equal opportunity is illustrated by Fredman using the metaphor of a race. Each competitor should have the chance to start from the same position but, once the race has begun, the outcome must depend on merit. However, while Fredman's¹⁵ analysis of equal opportunity in terms of equality of results or output may afford opportunities to those who have been disproportionately excluded in the past, its insistence on equalizing the starting point might perpetuate disadvantage by failing to address existing discrimination and disadvantage.

The Definition of Disability

Disability discrimination under the EqA 2010 is expressly asymmetrical and the role of the definition of disability is that of gatekeeper as it grants access to the full protection of disability discrimination law only to those persons who could be regarded as being or having been disabled. Thus, Section 6 of the EqA 2010 provides:

- i. A person (P) has a disability if:
 - (a) 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.
- ii. A reference to a disabled person is a reference to a person who has a disability.

This definition is subject to the provisions in Schedule 1 of the Act.¹⁶ Furthermore, certain persons are deemed disabled by virtue of regulations made under the Act. Thus, persons certified as blind, partially sighted, severely visually impaired or visually impaired are deemed to be

¹⁵ S. Fredman, *supra* no. 8, 15-16.

¹⁶ Schedule 1 provides similar clarification to that in the Disability Discrimination Act 1995 but removes the categories of day-to-day activities.

disabled.¹⁷ Furthermore, the scope of the protectorate is expanded in the context of direct discrimination to include associative discrimination and discrimination by perception¹⁸ while a person who has had a past disability is to be treated as having a disability¹⁹. This preserves the position with regard to those who were registered as disabled under the Disabled Persons (Employment) Act 1944 to the effect that they are treated as having had a past disability. However, the provisions on past disability are limited in their scope as they do not apply in the context of transport²⁰ and improvements to let dwelling and housing.²¹

The asymmetrical nature of disability discrimination under the EqA 2010 replicates the position under the DDA 1995, confirming that the legislation aims, not at neutrality, but at redressing the disadvantage experienced by a specific group.²² While the asymmetrical nature of disability discrimination law may have the advantage of facilitating more favourable treatment of persons with disabilities, the inclusion of a definition of disability or a disabled person in the Act may present significant difficulties with regard to the restrictions it places on the scope of the protectorate. The presence of a definition of disability in the Act may imply that public authorities are not afforded any latitude in how they define disability for the purposes of implementing the equality duty and this may have the undesired effect of weakening the interpretation and enforcement of the duty.

Also, the asymmetrical nature of disability discrimination as demonstrated in the definition of the potential scope of the protectorate may give the impression that the focus is on protecting the needs of a particular group of persons with disabilities. This position is reinforced by the fact that the EqA 2010 uses the phrase 'protected characteristic' with all the connotations of protecting and providing for the welfare of a particular group of individuals with a disability. There is a possibility that policy makers and enforcement bodies may come to perceive equality for persons with disabilities as a form of welfare benefit or hand out reserved

¹⁷ This was the position under the Disability Discrimination (Blind and Partially Sighted) Regulations 2003 SI 2003/712,

¹⁸ Section 13 Equality Act 2010.

¹⁹ Section 6(4) and Sched 1, para 9).

²⁰ Note that Part 12 of the Equality Act 2010 deals with transport.

²¹ Section 6(4), Equality Act 2010. Also, see section 190 of the Act.

²² The Sex and race legislations deliberately do not target the disadvantaged group, but instead view any sex or race-based criterion as unlawful. This is the case even where the goal is to benefit the disadvantaged group. The implicit aim of the legislations is to achieve a gender neutral, colour blind society.

for a particular group or class of persons who fall within the legal definition of disability. However, it could be said that to limit the benefits of a legislation that is intended to prevent discrimination and advance equality of opportunity to certain kinds of disability or to disabilities reaching a certain degree would not appear to be consistent with the underlying goal of substantive equality. Disability discrimination law must move away from protecting a group of 'disabled' people and instead protect anyone who experiences discrimination on the grounds of impairment.

The position of the EqA 2010 with regard to the definition of disability may be contrasted with that of the EU Framework Directive on Equal Treatment in Employment and Occupation (Framework Directive).²³ The Framework Directive aims at putting into effect in the member states the principle of equal treatment in the field of employment and occupation.²⁴ Though the principle of equal treatment is stated in Article 2(1) of the Directive to mean that there shall be no direct or indirect discrimination on the ground, inter alia, of disability, the Directive itself does not contain any definition of disability and this may give the impression that member states are afforded considerable latitude in how, or whether, they define disability for the purposes of transposing the Directive.

However, the European Court of Justice has stated in C-13/05 *Chacon Navas v Eurest Colectividades SA*²⁵ that, for the purpose of the Directive, the concept of 'disability' must be given an autonomous and uniform interpretation and that the concept of "disability" as used in the Directive 'must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person in professional life. The *Chacon Navas Case* was the first case on the ground of disability under the Framework Employment Directive to reach the European Court of Justice and the net questions posed were whether sickness counts as a disability and, if not, could sickness (or health status) be considered covered by analogy. The Court adopted a strongly medical approach in defining disability, holding that sickness did not amount to a disability for the purpose of the directive.

The decision in the *Chacon Navas* case may be compared to the recent ECJ decision in C-354/13 FOA (Karsten Kaltoft) v Billund where the court raised the possibility that a worker with long-term obesity might be

²³ Council Directive 2000/78/EC of November 2000.

²⁴ Ibid Article 1

²⁵ [2006] ECR I-6467.

regarded as disabled. In this case, the ECJ was requested to decide amongst others, whether obesity could be deemed to be a disability under EU Directive 2000/78/EC, and if so, how to determine if an obese person is protected against disability discrimination. The court held that while obesity itself cannot be regarded as a ground for protection against discrimination under EU law, nevertheless it could be a disability where it “entails a limitation which results in particular from physical, mental or psychological impairments that interactions with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one”. The ECJ stated that it was a matter for national courts to determine whether the conditions required for obesity to be a disability are met. However, the ECJ decision lends credence to the view that current medical conditions that might presage future disabilities may bring the individual within the protective scope of the Directive.

The Medical versus the Social Model

Section 6 of the EqA 2010 evinces a predominantly medical definition of disability which focuses on impairment as being the cause of limited opportunities and life chances.²⁶ The definition requires that the interested disabled person must have a physical or mental impairment which has an adverse effect on his or her ability to carry out day-to-day activities. The Act preserves the definition of disability under the repealed DDA 1995 which was highly criticized for leaving out of its scope many types of disabilities simply because they do not meet the medical definition of impairment or because the impairment did not have any effect on normal day-to-day activities (let alone an effect which is substantial and long term). Concerns about the restrictive potentials of the definition of disability were raised by the defunct Disability Rights Commission (DRC)²⁷ and the DDA 1995 was amended by the DDA 2005 to ensure that those suffering from a progressive condition, specifically cancer, HIV infection or multiple sclerosis, are deemed to have a disability. This

²⁶ For the literature on the medical and social models of disability, see generally C. Barnes and G. Mercer (eds). *Implementing the Social Model of Disability: Theory and Research* (Disability Press 2004).

²⁷ The DRC was merged with the Equal Opportunity Commission (EOC) and the Commission for Racial Equality (CRE) to form the Commission for Equality and Human Rights (CEHR) in 2007.

position has been maintained under the EqA 2010 and those suffering any of these conditions will be treated as disabled under the Act.

Although the EqA 2010 has removed the eight capacities of 'normal day-to-day activities',²⁸ it has retained the requirement under the DDA 1995 for an impairment not only to be substantial but that it must have a long-term adverse effect on the individual's ability to carry out normal day-to-day activities. This position is regrettable as the focus of disability legislation should be on the extent and nature of discrimination, not on the extent and nature of impairment. A substantive equality approach is more likely to focus attention on the realities of disability discrimination and to take an active attitude to dismantling the obstacles which stand in the way of equality for this group of persons.²⁹ Perhaps, inspiration may be gained from the Irish and Australian legislations where the definition of disability does not contain any requirement that the impairment be substantial or long-term.³⁰

The fact that the medical orientation of the definition of disability under the EqA 2010 could prove a hindrance rather than a help to the attainment of substantive equality for persons with disabilities may provide the necessary justification for the move toward a more social definition of disability. The social model of disability identifies "disabling barriers" rather than "impairment" as the problem to be tackled. Disabling barriers are the attitudinal, economic, and/or environmental factors preventing certain people from experiencing equality of opportunity because of an impairment or perceived impairment. The term 'disability' is used to describe a social experience. In this respect, public authorities implementing the equality duty may gain inspiration from the United Nation (UN) Convention on the Rights of Persons with Disabilities (CRPD)³¹ and adopt an expansive approach by extending the outer limits

²⁸ See "Guidance on matters to be taken into account in determining questions relating to the definition of disability" (see www.odi.gov.uk). an impairment under the DDA 1995 was generally considered as having an effect upon a person's ability to carry out normal day to day activities only if it affects one or all of the following "capacities": mobility; manual dexterity; physical co-ordination; continence; the ability to lift or move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand and perception of the risk of physical danger; see Schedule 1 paragraph 4 DDA 1995.

²⁹ E Ellis, *EU Anti Discrimination Law* (Oxford University Press, 2005).

³⁰ Irish Employment Equality Act 1998, s 2(1); Australian Disability Discrimination Act 1992, s 4.

³¹ The CRPD was adopted on 13 December 2006 and was opened for signature on 30 March 2007. The Convention and the Optional Protocol entered into force on 3 May

of the legal definition of disability to include individuals who would not generally qualify as disabled under the Equality Act 2010.

The CRPD was intended as a clear reaffirmation of the rights of persons with disabilities and contains no definition of disability³². However, Article 1 of the Convention evinces a predominantly social model of disability, only partially circumscribed by a medical perspective and provides that Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The provisions of Article 1 is reinforced by the provisions of preamble e which Recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The CRPD fundamentally challenges our conceptualisation of disability and the current understanding of disability discrimination in the UK as manifested in the EqA 2010. It can at least be said of the definition in the UN Convention that it makes an effort to understand and express the basic point that it is the interaction of disability with social processes (i.e. the absence of sensitivity in such processes to disability) that is at the root of disability discrimination. Regrettably, the formula used by the EqA 2010 and the ECJ to the effect that it is the impairment that itself hinders the participation of persons with disabilities does not demonstrate any similar depth of understanding.

2. The Structure of the Duty

The “Due Regard” Standard

At the heart of the Public sector equality duty is the core requirement that a public body must pay due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations.

2008. The UK ratified the CRPD on 8 June 2009 and ratified the Optional Protocol on 7 August 2009. The European Union (EU) ratified the convention on 26 November 2009.

³² For the relationship between the Equality Act 2010 and the CRPD, see generally S. Fraser Butlin, *The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?*, 2011, 40 ILJ 428-438.

The 'due regard' standard was applied under the preceding race, disability and gender duties. Thus, Section 71 of the Race Relations Amendment Act 2000, passed in the wake of the Macpherson report³³ which accused the Metropolitan Police Force of 'institutional racism' provided that, in carrying out their functions, defined public bodies shall have due regard to the need not only to eliminate unlawful racial discrimination but also to promote equality of opportunity and good relations between persons of different racial groups.

Both the disability and gender duties introduced in 2005 and 2006 respectively followed the blueprint of the race duty with regard to the due regard requirement. In fact, the gender duty was framed in almost identical terms to that of the race duty, except that it did not include the requirement to promote good relations but rather extended the duty to cover the elimination of harassment and victimisation.³⁴

While maintaining the due regard standard, the disability equality duty contained significant elements which had the potential of delivering substantive equality to this group of persons. Of particular significance here is Section 49(A) of the Disability Discrimination Act) 2005 amendment) which required almost all public bodies to have, whilst carrying out their functions, due regard to the need to promote positive images of, and participation in public life of persons with a disability, and to recognise that achieving equality for this group of persons will at times require adjustments that will mean treating a person with a disability more favourably.³⁵

However, there were several difficulties with the "due regard" standard under the preceding race, disability and gender equality duties. Firstly, the standard was simply to 'have due regard' and this led to some uncertainty whether the 'due regard' requirement was a mere procedural requirement or a substantive, action-based stipulation requiring a public body to take positive actions to achieve results.. This point was influential on both the Equalities Review³⁶ and the Discrimination Law Review³⁷ both of whom were concerned that the implementation of the duty may

³³ Home Office, the Stephen Lawrence Inquiry. Report of an inquiry by Sir William Macpherson of Cluny. CM4262-I1998.

³⁴ Sex Discrimination Act (SDA) 1975, Section 76 A (1).

³⁵ DDA 1995, Section 49A.

³⁶ *Fairness and Freedom: The Final Report of the Equalities Review*. Op cit.

³⁷ *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*. Op cit.

become a mere bureaucratic process of compliance rather than one focused on achieving tangible outcomes.

The permissive nature of the “due regard” standard could be particularly problematic with regard to eliminating unlawful discrimination. The fact that discrimination is unlawful implies that the public authority is under a mandatory duty to eliminate it, rather than simply paying due regard to the need to eliminate it.³⁸ In fact, even where the provisions of the relevant anti-discrimination statutes provide a necessary benchmark for the elimination of unlawful discrimination, there remained a real risk that such a formulation could simply perpetuate a culture of ‘negative compliance’ which may sit uncomfortably with the aims of the equality duty.³⁹

In other words, given its permissive rather than mandatory nature, it will be difficult for the public sector equality duty to oblige organizations to discard easily the entrenched culture of negative compliance for a proactive approach without some element of coercion. If the duty is to be able to bring about enduring social change, then a more mandatory rather than permissive duty is required. It does not make sense to require public authorities to do no more than pay due regard to the need to eliminate discrimination just as it will be incorrect to assume that simply requiring organizations to pay due regard will push them to take the necessary actions to eliminate discrimination. A law which contains a much stronger formulation would signal an unequivocal endorsement of the principle of substantive equality as well as provide clear guidelines for compliance.

Second, the open-textured nature of the statutory aims to advance equality of opportunity and foster good relations could be problematic to public bodies implementing the duty. The statutory aims of ‘equality of opportunity’ and ‘good relations’ are extremely vague and if public authorities do not understand, for example, what promoting equality of opportunity actually means in practice, there is a likelihood that the implementation of the duty will become an exercise in procedure rather than one aimed at achieving real and substantive outcome. This reduces the effectiveness of the equality duty in achieving meaningful outcomes for disadvantaged groups.

³⁸ S. Fredman, *supra* No. 11.

³⁹ For further details on the issue of negative compliance, see generally: S. Bisong Effiom. *The Implementation of the Public Sector Equality Duty by Local Authorities in the UK: A Case Study of the London Borough of Southwark*. Dissertation presented for the award of PhD degree, Middlesex University January 2012 (unpublished).

The new Public Sector Equality duty has maintained the foundational commitment of the previous race, disability and sex duties, requiring public authorities to 'have due regard' to the need to advance equality of opportunity, rather than to take steps to achieve results or outcomes. Furthermore, the traditional negative duty not to discriminate is now combined with the two positive duties, namely, to advance equality of opportunity and to foster good relations between persons in the community. Thus, section 149 of the Equality Act 2010 provides that:

(1) A public authority must, in the exercise of its functions, have due regard to the need to:

- (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Though the new Public sector equality duty has maintained the foundational commitment of the duty to pay 'due regard', it has however, made some significant changes towards substantive equality. First, the due regard standard has now been complimented with clearer objectives which creates a synergy with the provisions of Section 159 of the Act permitting positive action. Thus section 149(3) of the Act provides as follows:

Having due regard to the need to advance equality of opportunity ... involves having due regard, in particular, to the need to-

- (a) Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.¹⁹

Second, the new public sector equality duty require public authorities to have due regard to the need to 'advance' equality of opportunity, rather than simply to 'promote' equality of opportunity as was the case in the preceding race, disability and gender duties. The use of the word 'advance'

in the statute is significant as it indicates a more proactive approach to equality, requiring public authorities to focus on making progress in achieving outcomes. This has a particular resonance with the notion of substantive equality encapsulated in Ronald Dworkin's distinction between the equal treatment of people and the treatment of people as equals.⁴⁰

The notion of treatment of people as equals is based on the understanding that people are entitled to equal concern and respect from the State. It marks a fundamental departure from the notion of formal equality or equal treatment by requiring treatment which is not identical in situations where treating everybody in the same way would demonstrate a lesser degree of concern and respect for certain individuals because of their particular circumstances. This point is described by Bamforth who asserts that a crucial difference between equal treatment and treatment as equals lies in the comparison which each involves. Equal treatment requires only a crude evaluation of whether two persons or actions are sufficiently 'the same' that they merit similar treatment. On the other hand, treatment as equals involves a substantive and more flexible conception of equality which focuses not on the question whether any deviation from equal treatment is permitted but on whether any such deviation is consistent with equal concern and respect.⁴¹

Advancing Equality of Opportunity

A central concept engaged in the public sector equality duty is that of "advancing equality of opportunity." However, while the legislation provides some details of what advancing equality of opportunity means, the question that remains is what is the end being pursued by the duty to advance equality of opportunity? In this respect, it is significant to note the Equalities Review's definition of an equal society:⁴²

An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish.

An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.

⁴⁰ R. Dworkin, *A Matter of Principle*. Oxford, OUP, 1986, pp 190-98 and 205-13.

⁴¹ N. Bamforth. *Conceptions of Anti-Discrimination Law*. 2004, Vol. 24 *OJLS* pgs 693-4.

⁴² The Equalities Review, op cit. p19.

Section 149(3) (a) emphasizes the importance of public authorities responding to the disadvantaged circumstances of certain groups in the community as a pre-condition of the effective advancement of equality of opportunity for these groups of persons. This is a particularly significant provision for persons with a disability, not only because of the profound social disadvantage currently experienced by this group of persons but also because most of them live in conditions of poverty.⁴³

A key feature of substantive equality is its commitment to bettering the socio-economic position of worse-off sectors of society. In the context of disability, the relevance of the provisions of Section 149(3) (a) lies in the recognition that positive action may be needed to compensate for the accumulation of inequality resulting from the circle of disadvantage that persons with a disability have experienced across different areas of social life. The decision of the Coalition Government not to bring into effect the socioeconomic disadvantage duty in Section 1 of the Equality Act 2010 represents a setback for the attainment of substantive equality for this group of persons.

The socio-economic disadvantage duty requires certain listed public bodies such as Government departments, local authorities and NHS bodies which have strategic functions, when making strategic decisions such as deciding priorities and setting objectives, to consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage. Such inequalities could include inequalities in education, health, housing, crime rates, or other matters associated with socio-economic disadvantage. In addition, the duty applies to other public bodies which work in partnership with a local authority to draw up the sustainable community strategy for an area, when they are drawing up that strategy. These partner public bodies are specified in the Local Government and Public Involvement in Health Act 2007.

The principle of advancement of equality of opportunity for persons with a disability also involves taking positive measures to meet their needs which are different from the needs of persons who are not disabled. Christopher McCrudden has pointed out that "A vital way in which equality guarantees are underpinned is by ensuring that basic social

⁴³ DRC, *The Role of Independent Advocacy in Reducing Inequality and Improving the Life Chances of Disabled People: The Disability Agenda-Creating an Alternative Future*. Accessed April 2007 www.drc.gov.uk. The Disability Rights Commission was merged with the Equal Opportunity Commission and the Commission for Racial Equality to form the Equality and Human Rights Commission in 2007.

protections for the most vulnerable are secured, such as housing, food, and education. To the extent that such protections are provided to all, substantive equality will be furthered."⁴⁴ The Public Sector Equality Duty should therefore provide a framework for public authorities to reflect on how positive measures might be better directed to achieve social welfare for persons with a disability.

However, persons with a disability are not a homogenous group with the same or similar needs and there is a concern to recognise heterogeneity within disability categories in the context of the provision of welfare services. An innovative feature of the new streamlined single public sector equality duty is its wide coverage which provides public authorities with the opportunity to tackle intersectional or cumulative discrimination. The DDA 1995 assumed a single identity ascription, overlooking the fact that some of the most egregious discrimination experienced by, for example, persons with a disability from the black and ethnic minority community happens at the intersection of their two different identities⁴⁵. Thus, understanding the different needs of persons with disabilities and designing policies and practices to meet these needs in order to achieve equality of outcome is at the heart of the new public sector equality duty.⁴⁶

Sandra Fredman has recently speculated that social rights might provide "a better route to substantive equality."⁴⁷ In this respect, the provision of Section 149(3)(b) could be linked to the requirement of a "minimum core" approach enunciated by the UN Committee on Economic, Social and Cultural rights which appears to dictate that public authorities should initially concentrate on the needs of those who are worst-off before moving on to other, less pressing, needs.⁴⁸ This would mean that, in its

⁴⁴ C. McCrudden. *Equality and Non-Discrimination*. in D. Feldman, (ed), English Public Law, Oxford University Press, 2004, p. 588. Ch.11

⁴⁵ For an illustration of the issue of multiple discrimination and intersectionality in the disability context, see generally T. Degener. *Intersections between Disability, Race and Gender in Discrimination Law*. in D. Schiek and A. Lawson (eds). *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*. London, Ashgate, 2011. For race and gender, see K. Crenshaw. *Demarginalising the Intersection of Race and Sex*. 1989, University of Chicago Legal Forum, 139, 151.

⁴⁶ C. Gooding. *Will the New Equality Duty Deliver Progress for Disabled People?*. Keynote presentation delivered at the Lancaster Disability Studies Conference, September 2010.

⁴⁷ S. Fredman. *Providing Equality: Substantive Equality and the Positive Duty to Provide*. 2005, 21 South African Journal on Human Rights, 164, p.180.

⁴⁸ General Comment No 5 'Persons with Disabilities' adopted by the Committee on Economic, Social and Cultural Rights at its 11th session in 1994 (UN Doc E/1995/22).

budgetary and resource allocations, the public authority must give top priority to meeting the needs of persons with disabilities since, by whatever indicator, be it in housing, transportation, employment or education they are the worse off than other members of the community. The public sector equality duty goes further down the substantive equality route by making it necessary for public authorities to engage with their employees and other interest groups. In fact, the requirement under Section 149(3) (c) EqA 2010 has a special significance to persons with a disability who have been particularly affected by exclusion from decision making processes, resulting in the neglect and or lack of understanding of their specific needs.⁴⁹ Both the DDA 1995 and the Equality Act 2010 contain provisions for specific duties which are designed to assist the public body by providing a structure for delivering on the general duty.⁵⁰ The DDA's specific duties did not only require public authorities to draw up and publish disability equality schemes but also that the schemes should be drawn up with the involvement of persons with a disability who had an interest in the organisation's performance of its functions.⁵¹ This requirement of consultation and involvement was widely recognised not only to be an important step in the promotion of substantive equality for persons with a disability⁵² but also as one of 'the key principles which underpin the effective performance of public sector equality duties'.⁵³ However, the specific duties under the Equality Act 2010 does not contain any requirement on public authorities to engage with persons with a disabilities and their representatives in framing their equality objectives and in achieving those objectives.⁵⁴ This leaves open the possibility that the potential of the new duty to deliver substantive equality would be undermined by its deference to the decision-making processes of public authorities, with their inherent tendency to reconfigure or even legitimise existing inequalities. This point assumes added significance when it is

⁴⁹ C. O' Cinneide, op cit. pp. 219-248.

⁵⁰ Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966; in relation to the EqA2010, see The Equality Act 2010 (Specific Duties) Regulations 2011SI No. 2260.

⁵¹ Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) Reg. 2.

⁵² C. Pearson et al. *Don't Get Involved: An Examination of How Public Sector Organisations in England are Involving Disabled People in the Disability Equality Duty*. (2011) 26 Disability and Society 255, 266.

⁵³ Department for Communities and Local Government. *Discrimination Law Review*. Op. cit. p. 92, para 5.

⁵⁴ The Equality Act 2010 (Specific Duties) Regulations 2011SI No. 2260.

considered that public authorities are under no obligation to involve or even consult with persons with a disability when discharging the duty to identify equality objectives.

The decision of the Coalition government to remove the requirement to involve or consult persons with a disability does not only demonstrate a lack of sufficient understanding of the importance of process in achieving substantive equality but most importantly, carry the real risk that public bodies may begin dismantling those processes and structures which had been developed to promote the involvement of persons with disabilities in the decision-making process. The decision represents a step backwards by the government in meeting its obligations under Article 4(3) of the UNCRPD which enshrines the importance of process and involvement. The Article requires that: *in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.*

The Duty to Foster Good Relations

The facilitation of social inclusion and of participation in society may be regarded as important values which not only underlie the concept of substantive equality but also shape the content of the public sector equality duty. This is demonstrated in the duty contained in Section 149(1)(c) EqA 2010 to foster good relations. The Act provides in section 149(5) that fostering good relations involves, in particular, the need to tackle prejudice and promote understanding. In the disability context, it is important to situate the relevance of the duty to foster good relations within the context of the varied ways by which persons with disabilities could be discriminated against. Historically, persons with disabilities have been treated negatively in part because of their low status in society which has given rise to a feeling of superiority on the part of public officials and professionals. An important feature of discrimination against persons with disabilities in the community is the prevalence of proxies or stereotypes concerning the assumed characteristics of this group of persons. This

situation persists despite the assertion that “These proxies are usually highly inaccurate and diminish the individuality of the individual.”⁵⁵ This implies that the development and implementation of equality awareness strategies is a key element in the implementation of the duty on public authorities to foster good relations. There is evidence to support the assertion that the emphasis so far has been on staff training as a way of developing organizational capacity to deal with the challenges of mainstreaming.⁵⁶ However, if the duty is ultimately to change societal attitudes by eliminating prejudice and promoting understanding in the context of disability, there is a Need to extend Disability Awareness Programs to Outside the Organisation. Public bodies, especially local authorities would have to develop and implement sound and effective public awareness campaigns and strategies on disability discrimination and equality. This clearly seems essential in the light of the recent increases in the level of harassment and violence against persons with disabilities in the community and could lead to more general gains.⁵⁷

In addition to encouraging a more proactive approach to tackling disabling barriers by other organisations outside the public body, such a public awareness campaign would support a general change in discriminatory attitudes amongst the public. The campaign would need to highlight some of the inaccurate proxies and stereotypes of persons with disabilities and the changes to the policies and practices of the public body would complement this message. There would also need to be a sustained publicity campaign particularly to highlight the difference between discrimination and hate crime in order to make sure that the broader public understood the difference and did not misinterpret it. This shift in public attitudes required by the legislation is one of its positive attractions. However, there is a need to guard against what Professor Quinn refers to as the ‘temptation of elegance’ or the idea that the inner beauty of a statutory provision is itself enough to bring about the desired shift in public attitude towards persons with disabilities. As the renowned American jurist Oliver Wendell Holmes has pointed out, the life of the

⁵⁵ G. Quinn. *Disability Discrimination Law in the European Union*. In H. Meenan (ed) *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, Cambridge, Cambridge University Press, 2010, p 277.

⁵⁶ S. Witcher. *Mainstreaming Equality: The Implication for Disabled People*. *Social Policy and Society*, Vol. 4 1, 2005, pp. 55 – 64.

⁵⁷ Equality and Human Rights Commission. *Our Inquiry into the Harassment of Disabled People*. (2011) available at http://www.equalityhumanrights.com/uploaded_files/disabilityfi/dhfi_easy_read.pdf.

law is not logic but experience and experience has taught us that the formal language of the law often finds infertile ground with regard to the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. Ultimately, the shift in public attitude with regard to persons with disabilities will depend largely on the ability of public authorities to draw a connection between the law and our collective commitment to uphold those values that underpin the notion of “citizenship”-inclusion, autonomy, mutuality of obligation, civic virtue and commitment.⁵⁸

The PSED and Positive Action

What converts the public sector equality duty from mere aspiration into a powerful lever for change is the realization that, in order to be effective, the advancement of equality of opportunity must be complemented by positive measures. This point is reinforced by the fact that the provisions dealing with positive actions were put into the Part 11 of the EqA 2010 alongside the public sector equality duty, indicating to a large extent that the legislation does not contemplate positive action measures and policy as an obstacle to the advancement of equality of opportunity.

Rather, it sees the advancement of equal opportunity as being complemented by positive action measures and policies and especially by the latter's focus on providing the material underpinning to equality. In fact, given the potential synergy between both sets of measures (measures to advance equality of opportunity on the one hand and positive action measures on the other), it is possible to conclude that any negative invocation of positive action measures such as practices that reserve certain categories of low status jobs for certain groups of persons with disabilities should be strictly scrutinised as undermining the duty to advance equality for this group of persons. Such an approach is of particular significance in the context of disability since it is obvious that profound structural change will be required to puncture the complex and deep-rooted patterns of inequality experienced by this group of persons who, historically, have not had access to equal opportunities.

⁵⁸ L. Davis. *Riding with the Man on the Escalator: Citizenship and Disability*. In M. Jones and L.A. Basser Marks (eds), *Disability, Diversity and Legal Change*. Cambridge, Kluwer Publishing, 1999, pp. 65-74.

The EqA 2010 provide for positive action with regard to all the protected characteristics at two levels; the first, contained in Section 158 deals with positive actions outside the employment field and provides that the Act does not prohibit a public authority from taking any action which is a proportionate means of achieving any one of three aims:

- a) Enabling or encouraging persons who share a protected characteristic to overcome or minimise a disadvantage connected to the characteristic;
- b) Meeting those needs of persons who share a protected characteristic that are different from the needs of persons who do not share it; or
- c) Enabling or encouraging participation in an activity where participation by persons who share that characteristic is disproportionately low.

The second is contained in Section 159 which permits an employer to take a protected characteristic into account when deciding who to recruit or promote, where people having that characteristic suffer a disadvantage or are underrepresented in the employer's workforce.⁵⁹ However, the ambit of the permissible positive actions in recruitment and promotion under the EqA 2010 is subject to certain specified conditions which may, in practice operate to curtail the ability of employers to achieve substantive equality for persons with disabilities who wish to enter in to or remain in their employment.

First, the Act provide that 'The employer must not have a 'policy' of automatically treating those who share a protected characteristic more favourably than those who do not have it with regard to recruitment and promotion.⁶⁰ Positive action in recruitment and promotion is permitted only if it is a proportionate means of achieving the aim of overcoming or minimising the disadvantage or under-representation in the workforce.⁶¹ This provision creates some ambiguity, especially in the context of disability where, according to Section 159 (3), it is possible to treat

⁵⁹ Section 159(5) EqA 2010 provides a broad definition of recruitment and includes offering a person a partnership, or a pupillage or tenancy in barristers' chambers, and public appointments.

⁶⁰ Section 159 (4) (b) Equality Act 2010.

⁶¹ It is for the Courts and Tribunals to decide what is proportionate. The Explanatory Notes provide that factors such as the seriousness of the disadvantage, the extremity of need or under-representation and the availability of other means of countering them may be relevant in establishing proportionality.

persons with disabilities more favourably than persons who are not disabled.

The provision of Section 159 (3) could be related to the position under the DDA 1995 where the extent to which positive discrimination was permitted was related, in part to the fact that the protection afforded by the statute was asymmetrical. The legislation did not explicitly specify that a person with a disability must be qualified for a job in order to be treated more favourably than a non-disabled person. In *Archibald v Fife Council*,⁶² the House of Lords held that the DDA 1995, to the extent that the provisions of the Act required it, permitted and sometimes obliged employers to treat persons with disabilities more favourably than others. In any case, it is plausible to conclude that the provisions of Section 159(3) will operate to ensure that employers continue to develop and maintain positive measures to support and encourage persons with disabilities with regard to areas such as training opportunities and work placements.

Second, the provision on positive action can be used only where the candidates are 'as qualified as' each other.⁶³ The Act allows for more favourable treatment only within the context of a tie-break situation; that is, where both the disabled and non-disabled candidate are regarded as equally well qualified but the fact that one of them has a disability is taken into account as a tie-breaking factor in their favour. Although the tie-break approach marks a step towards equality of results, this must take place on a case-by-case basis so that proactive policies such as quotas and targets are still prohibited. Further, as the candidates in question must be 'as qualified as' each other, the emphasis on merit that is central to the concept of formal equality remains. This would ensure that recruitments and promotions in employment will continue to be based on merit and that only the most qualified person is given the job.

The provision of Section 159(4) EqA 2010 could be compared to the provisions of Section 7 of the Local Government and Housing Act 1989, which makes it mandatory that all appointments by local authorities be made on merit. It also has a particular resonance with the provisions of Recital 17 of the Framework Directive which states that the Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the

⁶² *Archibald v Fife Council* (2004) UKHL 32, (2004) IRLR.

⁶³ Section 159 (4) (a) Equality Act 2010.

relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.⁶⁴

The limitations on positive action illustrates the pervasive influence of the tenets of formal equality on the EqA. The notion of meritocracy on which the provisions of Section 159 of the Act is based is an extremely narrow one, framed around formal qualifications and which may in fact operate to perpetuate discrimination and inequality by failing to take into account the fact that an individual's lack of the relevant formal qualification may be due to entrenched social disadvantage or physical attributes such as impairments. However, The Explanatory Notes accompanying the EqA 2010 is clear that formal qualifications are only one way in which a candidate's overall suitability may be assessed and that any such assessment will depend on a number of factors relevant to the job in question, such as experience, aptitude, physical ability, or performance during an interview or assessment. In other words, candidates must be assessed on their merits up to the point where they were found to have substantially equivalent merits. Such an interpretation would be in line with the European Court of Justice case law.⁶⁵

The positive action provisions of the Equality Act 2010 bring UK anti-discrimination law in line with that of the EU where positive action measures have traditionally proliferated, especially in the field of employment. Of particular significance in this regard is Article 7 of the Framework Directive which permits, in certain circumstances, positive actions in favour of an employee or applicant with a disability. Article 7 (1) stress that, in order to ensure the practical realisation of the principle of equal treatment, Member States are not prevented from 'maintaining or adopting specific measures to prevent or to compensate for disadvantages' linked to the relevant grounds of discrimination, including disability.

On its part, Article 7(2) provide that the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment. The reference to Health and Safety in this context is significant as there is a possibility that employers might use health and safety concerns in order to exclude persons with disabilities from the workplace. In other words,

⁶⁴ Council Directive 2000/78/EC of 27 November 2000.

⁶⁵ Case C-407/98, *Abrahamsson u Fogelquist* [2000] ECR I-5539.

health and safety concerns may become an obstacle to the achievement of a non-discriminatory and integrated workplace.⁶⁶

Positive Action and the Duty to Make Reasonable Adjustment

There is a link between the positive action provisions of the EqA2010 and the duty to make reasonable adjustment. Section 20 of the Equality Act 2010 contains a free-standing duty to make reasonable adjustment for persons with disabilities.⁶⁷ The duty applies to both employers, providers of services and Public authorities in the discharge of their functions and contains three main elements with regards to adjustments which may be required of the duty bearer; first, it requires the duty bearers to take reasonable steps to change their provision, criterion or practice which puts persons with disabilities at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Second, it requires them to take reasonable steps to overcome obstacles created by their physical features where these obstacles puts persons with disabilities at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Third, it requires them to provide assistive auxiliary aids and services such as information on tape or brail or even the provision of a sign language interpreter where a person with a disability would, but for the provision of such an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.⁶⁸

The provisions on positive action and the duty to make reasonable adjustment are both forms of substantive equality that not only require due regard to be given to the disadvantaged position of persons with a disability but are also concerned with the active removal of disadvantages to which persons with a disability would otherwise be subjected to. The question that may be asked is if the duty to make reasonable adjustment is co-extensive with the provisions on positive actions, what then is the "added value" of the provisions on positive action in an equality statute that already includes a duty to make reasonable adjustment?

⁶⁶ J. Davies & W. Davies. *Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State*. Vol. 29, No. 4, ILJ December 2000, pp. 347-377.

⁶⁷ A similar duty was imposed on employers by Section (4) DDA 1995 and on service providers by Section 21 DDA 1995.

⁶⁸ Section 20 (5) EqA 2010.

The positive action measures in the EqA are crafted in general terms and not tailored to individual circumstances, albeit with proxies for individual need in mind. On its part, the duty to make reasonable adjustment, at least in the employment context, is quintessentially individualised; it relates not to the needs of persons with disabilities in general, but to the requirements of a particular person with a disability so that his or her particular characteristics or circumstances are taken into account.

The duty to make reasonable adjustment in the employment field is reactive in nature, simply requiring duty-bearers to take reasonable steps to accommodate the needs of a particular person with a disability with whom they are confronted. The duty is only triggered when the ‘interested disabled person’ is put at a substantial disadvantage by some aspects of the employer’s operations.⁶⁹ The duty to make reasonable adjustment therefore provides a platform for the “interested disabled person” to subjectivize some of the entitlements provided by the provisions on positive action.

A major drawback of the positive action provisions of the EqA is, therefore, its lack of direct accountability to the individual with a disability. A consequence of this lack of direct accountability is the fact that there may not be a close correlation between the positive measures provided by public authorities and individual needs. This accountability deficiency inherent in the positive action measures is compensated for by the duty to make reasonable adjustment which is enforced as part of a discrimination claim brought by an individual claimant and is intimately tied to the non-discrimination idea.⁷⁰ The duty creates clear legal standing for the interested disabled person to challenge the manner by which he or she is being accommodated and to ensure that any measures taken are adjusted to his or her realities. This underscores the point that, unlike the permissive nature of the positive action provisions, the duty to make reasonable adjustment is not a positive action left to the discretion of public or private bodies.

⁶⁹ See Schedule 8 Part 2 EqA 2010 for definition of the “interested disabled person”. A similar provision was contained in Section 4A (1), DDA 1995 which referred to “the disabled person concerned”.⁷ Lawson contend that it is because the duty is not triggered until this point that it is considered as reactive rather than anticipatory. See A. Lawson. *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*. Oregon, Hart Publishing, 2008, p. 67.

⁷⁰ By section 21(2) EqA 2010, a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustment imposed on him in relation to the disabled person. Note that a failure to take a positive measure does not amount to discrimination.

It is regrettable that the Specific Duties under the EqA does not contemplate the active involvement of persons with disabilities and their representative organisations in the design and ongoing review of any positive action measures. This leaves open the possibility that public bodies will continue to design and implement positive action measures in 'the best interests' of persons with disabilities and yet in complete ignorance of their expressed wishes. The real risk here is that these measures may become very detached from what individuals actually need. This probably explain why it is so important that The duty to make reasonable adjustment continue to operate as a corrective or reality-check, enabling individuals to challenge how public authorities design and deliver relevant positive measures.

3. The PSED, Indirect Discrimination and the Duty to Make Reasonable Adjustment

Section 19 of the Equality Act 2010 introduce indirect discrimination, for the first time, in to the corpus of UK disability discrimination law. According to the Section, indirect discrimination occurs when an employer or a provider of services applies an apparently neutral provision, criterion or practice which puts, or would put persons of a protected characteristics, and which actually disadvantages a person with the said characteristics, at a particular disadvantage compared with other persons who do not share the said characteristics, unless that provision, criterion or practice can be objectively justified as being a proportionate means of achieving a legitimate aim.

Unlike the Sex Discrimination Act (SDA) 1975 and the Race Relations Act (RRA) 1976, the Disability Discrimination Act (DDA) 1995 did not make any provision for indirect discrimination. However, the concept of indirect discrimination occupies a prominent place in the Employment Equality Directive.⁷¹ An explanation often provided for its absence from the DDA was that much of its function was performed by the concept of reasonable adjustment. The UK government therefore relied on the proviso in Article 2(2) (b) (ii) of the Employment Equality Directive to

⁷¹ Article 2(2) (b): Council Directive 2000/78/EC of November 2000 (The Framework Directive). The DDA 1995 was amended in 2003 to give effect to the EC Directive and introduced the concept of indirect discrimination. See DDA 1995 (Amendment) Regulations 2003; SI 2003/1673.

justify the absence in the context of disability of indirect discrimination from the DDA 1995.

The Framework Directive allows for two types of defences against a charge of indirect discrimination.⁷² The first defence is of general application to all the grounds (including disability) and it allows for an objective justification with a legitimate aim and pursued by necessary and appropriate means.⁷³ The second defence is contained in Article 2(2) (b) (ii) and deals more specifically with the concept of indirect discrimination as applied to disability. Moreover, the defence is directly linked to the obligation to make reasonable accommodation under Article 5 of the Directive.

Professor Quinn has postulated that the provision of Article 2(2) (b) (ii) is framed on an implicit assumption that not only will 'indirect discrimination' arise unless effectively responded to with 'reasonable accommodation' but also that the only available response or cure to 'indirect discrimination' where it is proven to occur in the context of disability is the provision of 'reasonable accommodation'.⁷⁴ The understanding here appears to be that, since many if not all of the barriers that arise in the context of indirect discrimination can be removed or avoided by invoking the duty to make reasonable adjustment, then 'indirect discrimination' will arise unless 'reasonable adjustment' is able effectively to remove the substantial disadvantage to persons with disabilities caused by the relevant provision, criteria or practice. However, there is the theoretical possibility of indirect discrimination arising on the ground of disability for which the provision of 'reasonable accommodation' is no answer or solution. In such cases, the only defence that could be relied upon to defend an allegation of indirect discrimination on the ground of disability will be the general defence contained in Article 2(2) (b) (i). In other words, the notion of 'reasonable accommodation' can be both a 'cure' to indirect discrimination and a defence against a charge of indirect discrimination when it is shown not to be possible in practice due to the defence of 'disproportionate burden' provided for by Article 5 of the Directive.

⁷² L. Waddington and A. Hendricks. *The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*. 18, 2002, *International Journal of Comparative Labour Law and Industrial Relations*, p. 403. See also, G. Quinn *supra* no. 38, p. 261-2.

⁷³ Article 2(2) (b) (i), Council Directive 2000/78/EC of November 2000 (The Framework Directive).

⁷⁴ G. Quinn. *Disability Discrimination Law in the European Union*. *Op cit*, p. 261-2.

The importance of the concept of indirect discrimination in achieving substantive equality for persons with disabilities may lie, partly, in its group dimension. The introduction by the EqA 2010 of the concept in to the corpus of disability employment law underscores the point that disability discrimination is not just about individual acts of discrimination but involves careful scrutiny of an organisation's policies, practices and structures. The duty to make reasonable adjustment in the employment provisions of the Equality Act 2010 does not recognise the group dimension of disability discrimination. The duty to make reasonable adjustment is not only highly individualised and reactive but also does not contain the closely related anticipatory element found in the non-employment area.

The implication here is that, without the concept of indirect discrimination, the only mechanism that could be used to oblige employers to identify and deal with institutional discrimination against persons with a disability is the public sector equality duty.⁷⁵ However, the duty is limited by the fact that it does not generally create subjective rights. The failure to comply with the Public sector equality duty does not amount to unlawful discrimination and its enforcement lies either in the hands of individuals or organisations willing to bring actions for judicial review, or in the hands of the Equality and Human Rights Commission. Also, the duty applies only to the public sector. Therefore, given its group dimension, indirect discrimination is better placed than reactive reasonable adjustment to challenge and break down systemic barriers in the field of employment. The group dimension ensures that the focus is on the structures of an organisation that are likely to perpetuate group disadvantage rather than on individual acts of discrimination.

In this respect, indirect discrimination has a particular resonance with the section 20 EqA 2010 anticipatory reasonable adjustment duty in the non-employment sphere. A salient element of the anticipatory nature of the duty to make reasonable adjustment is the fact that it requires service providers to scrutinize their physical features, provision, criteria and practices in order to identify the disproportionate disadvantage they may cause to persons with a disability in general. Scrutiny will require that consideration be given to how potential 'barriers' arising from problematic physical features, provisions, criteria or practices might be removed,

⁷⁵ A. Lawson. *Disability Discrimination In Employment And The Equality Act 2010*. 2011, 40 IIJ.

altered or avoided. It would involve carrying out a thorough impact assessment, of an organization's policy procedures and practices.⁷⁶

This requirement that public bodies and other service providers scrutinize their policies, practices and functions contained in the prohibition against indirect discrimination and the section 20 anticipatory duty to make reasonable adjustment and conceptualize by the PSED as the duty to pay due regard is immensely significant to equality for persons with disabilities. Most of the discrimination by public bodies and service providers against persons with disabilities are "motiveless" and "indirect", arising from 'thoughtlessness or the unquestioning acceptance of long established practices' that has left a legacy of practices that effectively exclude persons with disabilities from the mainstream of society.⁷⁷

Both the concept of indirect discrimination and anticipatory reasonable adjustment have the potentials of driving and encouraging service providers to think in advance about removing barriers experienced by persons with a disability. They operate to deny service providers of an excuse to treat persons with disabilities 'less favourably' on the basis that, because they did not know that their policies and practice were discriminatory against persons with a disability, it was not necessary to review or change such policies or practice.

There is a real possibility that a successful implementation of the PSED would not only overlap with the anticipatory element of the reasonable adjustment duties and the prohibition of indirect discrimination but the overlap is likely to encourage public bodies to discharge them together. This may ultimately result in a process whereby the three obligations not only reinforce each other but lead to an increased awareness on the part of public authorities that their obligation is not simply to have 'due regard' to the need to eliminate disability discrimination but also to take positive measures to facilitate access and inclusion for this group of persons.

⁷⁶ R (Kaur & Shah) v London Borough of Ealing & Anor [2008] EWHC 2062 (Admin). Also, R v Birmingham City Council and M, G and H v Birmingham City Council (co-joint appeals) [2011] EWHC 1147 (Admin).

⁷⁷ G. Quinn, *op cit.* p 231-277.

4. Conclusion

The Equality Act 2010 has fundamentally reconfigured the equality landscape in Britain and the public sector equality duty provides an important platform for public authorities to tackle institutional discrimination and inequality against persons with disabilities. If combined with other changes contained in the EqA 2010 such as the introduction of indirect discrimination and positive action, the public sector equality duty has the potential to move UK disability discrimination law more towards a profound conception of substantive equality for persons with disabilities.

However, the new duty has maintained the foundational commitment of the previous race, disability and sex duties, requiring public authorities simply to 'have due regard' to the need to promote equality, rather than to take steps to achieve results or outcomes. The 'due regard' standard may have been intentionally formulated so as to promote mainstreaming which has been recognised as a powerful tool for achieving substantive equality for persons with a disability. Nevertheless, its permissive nature may not only reflect a fundamental ambivalence as to the real importance of equality but most importantly, account for the fact that the impact of the previous Race, Disability and Sex duties has been mixed. In some instances, the duty had been reduced to some form of bureaucratic 'form-filling', especially in relation to impact assessment, rather than providing a framework to the authorities for improving the way they make decisions or allocate resources.⁷⁸ It is suggested that a stronger formulation of the duty alongside the standard of Article 2 of the International Covenant on Social, Economic and Cultural Rights, which imposes a duty on the State to '*take steps, ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights*' would ensure a conscientious implementation of the public sector equality duty by relevant public authorities.

Finally, the equality duties remain confined to the public sector, even though in recognition of the fact that a large number of public functions are now contracted to private bodies, the legislation is extended to cover

⁷⁸ See generally: EHRC. *The Equality Duties and Schools: Lessons for the Future*. 2011; and EHRC and Focus Consultancy. *The Performance of the Health Sector in Meeting the Public Sector Equality Duties: Moving Towards Effective Equality Outcomes*. 2011. Available at <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/research-and-policy-papers-on-the-duty/>, accessed 26 October 2011.

private bodies with public functions.⁷⁹ Even more regrettable is the fact that the duty does not apply to private bodies exercising purely private functions. Such a position ignores the fact that the ideal of substantive equality will only be achieved if concerted efforts are made across the public and private sectors. Perhaps there are lessons that could be learnt from Northern Ireland where the fair employment legislation applies to public and private employers and the Ontario pay equity legislation which covers all private employers who employ more than ten employees as well as all public employers.

⁷⁹ Section 150(5) and 149(2), EqA 2010. Also, *YL v Birmingham City Council* [2007] UKHL 27 [2007] 3 WLR 112, HL.

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