

The invisible law of visible difference: Disfigurement in the workplace

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Abstract: The Equality Act 2010 provides that people with severe disfigurements are deemed to be disabled. Through the lens of the Convention on the Rights of Persons with Disabilities and models of disability, this article highlights a number of difficulties with the Act's approach, including the problematic 'severity' threshold, the issue of complex conditions which include both disfigurement and functional impairment, and a lack of provision for progressively disfiguring conditions. Analysis is then provided of opportunities to mitigate these difficulties, specifically the concept of perceptive discrimination, and the application of the duty to make reasonable adjustments to disfiguring conditions. It is argued that the law needs to be reformed and options for change are presented.

Introduction

The Equality Act 2010 ('the Act') has been criticised for following the 'medical model', rather than the 'social model', in defining what counts as a disability¹. The medical model 'locates the "problem of disability" in the person', whereas the social model 'views disability as part of the diversity of the human experience, placing responsibility on society to remove the physical, environmental, attitudinal, and legal barriers that prevent people with disabilities from exercising their rights to inclusion and participation in society'². Although the Act locates itself primarily within the medical model of disability, the social model has proved internationally

¹ See, for example, Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 Industrial Law Journal 359, 364.

² Arlene Kanter, *Development of Disability Rights under International Law* (Routledge 2015) 46.

influential³ and the UN Convention on the Rights of Persons with Disabilities⁴ ('CRPD'), in particular, is founded on a set of rights-based principles aligned to the social model of disability.

One apparent exception to the medical model approach in the Act may be found in the inclusion of people with disfigurements within the meaning of disability. Disfigurement does not fit the traditional 'medical' model mould because it often lacks the functional limits on which the Act's usual concept of disability is based; the 'problem' is not usually one of effects on the individual's activities, but the perceptions and attitudes of other people. Its inclusion is, therefore, arguably a recognition of societal, rather than biological, barriers. However, incorporating this social 'square peg' into a legislative 'round hole' is not without its difficulties, and it is submitted that the law designed to secure equality for people with a visible difference remains under-developed.

Part 1 of this article will consider the understanding of disability offered by the social model, the principles of disability policy provided by international law, and how these connect with the lived experience of visible difference as reported in existing research. Part 2 will evaluate the Act's provisions on disfigurement in the workplace, assessing the extent to which they achieve the aims of this overarching framework. Finally, Part 3 will consider

³ Colin Barnes, 'Understanding the social model of disability: past, present and future' in Nick Watson, Alan Roulstone and Carol Thomas, *Routledge handbook of disability studies* (Handbook of disability studies, London ; New York : Routledge 2012), 49.

⁴ UN Convention on the Rights of Persons with Disabilities A/RES/61/106, 24 January 2007 (CRPD).

options for reform, including both pragmatic, discrete amendments to the existing law, and a reconceptualization of the link between disfigurement and disability.

At the outset, a brief word on terminology. It is perhaps no surprise that the language used to describe disability and its relation to the identity of the person has proved contentious, and the same goes for disfigurement. For some, a description of a person *with a disability*, or a *disabled person*, goes to the root of the concept, locating the disability either within the individual or in society's treatment of her. For others, the term *disfigurement* is regarded by some as a negative and emotive word, but *visible difference* is not universally preferred. The issue has, for some, become one of felt categorisation, not just language, but the legislation is arguably too blunt to do justice to such human concerns. So, while it would not be realistic to produce a legal argument without reference to the words used in the statute, where appropriate this article will use the terminology of disfigurement and visible difference interchangeably.

Part 1: An evaluative framework

It was Mike Oliver, writing in 1983, who first coined the use of the phrase 'the social model'⁵. He describes this as 'nothing more or less fundamental than a switch away from focusing on the physical or mental limitations of particular individuals to the way the physical structures, societal systems, culture and social environments impose limitations on

⁵ The origins of the social model can be traced to the work of the Union of the Physically Impaired Against Segregation (UPIAS).

certain groups or categories of people'⁶. The traditional UK conception of the social model is noted for its rigid distinction between impairment and disability; impairment could be 'lacking all or part of a limb ... or mechanism of the body'⁷ whereas disability is 'the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities'⁸. Pursuant to this analysis, a disfigurement may be an impairment, but disablement arises from the expectations and reactions of society which oppress people who are visibly different. This social model analysis explains the siting of disfigurement within disability law; the individual's participation in society can be disabled even when the functions of his body are not.

While the social model remains influential today, it is not without its critics. One of the most common criticisms is that the social model's focus on external barriers denies the reality of living with an impairment. The argument is that, in focusing on the societal construction of disability, the social model denies biological reality⁹. Pain, for example, can be a disabling effect of impairment which cannot be adequately explained by reference to external barriers. Similarly, just as socially constructed disability can curtail a person's

⁶ Mike Oliver, Bob Sapey and Pam Thomas 'Social Work with Disabled People' (4th edition, Basingstoke: Macmillan 2012) 15.

⁷UPIAS and the Disability Alliance, 'Fundamental Principles of Disability' (1975), 14, <<https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf>> accessed 9 April 2018.

⁸ *ibid.*

⁹ See for example Dimitris Anastasiou and James M. Kauffman, 'The Social Model of Disability: Dichotomy between Impairment and Disability' (2013) 38 *Journal of Medicine and Philosophy* 4419.

activities, sometimes so can the effects of impairment itself¹⁰. By way of example, Shakespeare and Watson memorably argued that 'Most activists concede that behind closed doors they talk about aches and pains and urinary tract infections, even while they deny any relevance of the body while they are out campaigning'¹¹. In contrast, Colin Barnes stresses the pragmatism of the 'social model impairment, disability dichotomy'¹² and highlights the danger of an academic debate which threatens to undermine the change in perception generated by the social model. To add further complexity, different conceptions of the social model have developed in different countries¹³, each with a varied emphasis.

Without doubting the benefits of this debate, this article will not attempt to take a position within it. The focus here is on how the understanding of disfigurement offered by a broadly defined social model contrasts with the Act's medical model ideology; a distinction between the two is evident however the social model is nuanced. References to the social model in this article are therefore to be understood simply as the idea that disability arises at least partly from the interaction between impairment and external environments and attitudes.

Given the importance of social model ideology to understanding the link between disfigurement (which often lacks functional impairment) and disability, I will now consider

¹⁰ Liz Crow, 'Renewing the Social Model of Disability' Coalition News <<http://www.roaring-girl.com/work/renewing-the-social-model-of-disability/>>accessed 23/4/18.

¹¹ Tom Shakespeare and Nicholas Watson, *The social model of disability: An outdated ideology?*, vol 2 (Emerald Group Publishing Limited 2001), 12.

¹² Barnes (n3) 53.

¹³ Janine Owens, 'Exploring the critiques of the social model of disability: the transformative possibility of Arendt's notion of power' (2015) 37 *Sociology of Health & Illness* 385, 386.

briefly how this ideology has been reflected in conceptions of disability at the international level and the implications for people with a visible difference. The three instruments to be considered are the CRPD, the EU Employment Equality Framework Directive (Directive 2000/78), and the European Convention on Human Rights ('ECHR'), together with relevant case law.

When the UK ratified the CRPD and its Optional Protocol in 2009, it affirmed a set of broad principles aligned to the social model which applies principles of human rights in the context of disability. The breadth of its drafting has been interpreted, both domestically¹⁴ and by the CRPD Committee itself¹⁵, as offering states a margin of appreciation.

Article 1 offers a description (note, not a definition) of disability wide enough to encompass both disfigurement and other types of disability:

[...]

'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'¹⁶.

¹⁴ House of Lords Select Committee, *The Equality Act 2010: the impact on disabled people*, 2016) (HL Paper 117) para 75 and 79.

¹⁵ See e.g. *Marie-Louise Jungelin v Sweden* (2014) Communication No. 5/2011 Committee on the Rights of Persons with Disabilities CRPD/C/12/D/5/2011, para 10.5: a margin of appreciation to decide "the reasonableness and proportionality of accommodation measures".

¹⁶ CRPD (n4) art 1.

This description makes no mention of functional limitation (and the Committee has expressly confirmed that the definition applies to disabilities ‘that may or may not come with functional limitations’¹⁷). It also imposes no substantiality or severity requirement; it is the potential consequence, not the level, of the impairments and their interaction which matters. The drafting of Article 1 (in particular the word ‘include’ and the description in the Preamble of disability as an ‘evolving concept’¹⁸) is also not fixed or exhaustive, enabling it to sidestep the accusations of rigidity sometimes levelled at the social model.

The CRPD sets out a number of general principles which are intended to inform its interpretation¹⁹, among them:

- ‘(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity; (...)’²⁰

¹⁷ CRPD ‘General Comment No. 3 on Article 6’ (2016) CRPD/C/GC/3, para 5.

¹⁸ Wiebke Ringel, ‘Non-discrimination, Accommodation, and Intersectionality under the CRPD: New Trends and Challenges for the UN Human Rights System’ (2017) 20 Max Planck Yearbook of United Nations Law Online 98, 106.

¹⁹ Anna Lawson, *The United Nations convention on the rights of persons with disabilities : new era or false dawn?* (Syracuse, N.Y. : Syracuse University, College of Law. 2007) 591.

²⁰ CRPD (n4) art 3.

There are accompanying general obligations²¹ on state parties (including an obligation to take measures to eliminate discrimination²²), and a series of specific obligations, the most relevant for present purposes being Equality and Non-Discrimination²³, Awareness-Raising²⁴, Access to Justice²⁵, Respect for Privacy²⁶ and Work and Employment²⁷. The main practical limitation of the CRPD is that, although individuals in the UK can complain to the CRPD Committee over alleged breaches, they cannot (currently, at least²⁸) directly enforce it, but the CRPD is binding in international law and provides a strong framework of good disability policy.

A similar approach to non-functional disability is emerging in the decisions of the European Court of Human Rights ('ECtHR')²⁹. Article 14 of the ECHR provides a right to non-discrimination related to other Convention rights. The ECtHR has held that this right not only encompasses disability but also 'health status', which it seems willing to apply even where there is no resulting functional limitation. In the case of *I.B. v Greece*, for example, an HIV positive claimant was found to fall within Article 14 despite the fact that 'the nature of the applicant's job, which did not demand excessive effort, precluded the risk of a reduction

²¹ *ibid* art 4.

²² *ibid* art 4(e).

²³ *ibid* art 5.

²⁴ *ibid* art 8.

²⁵ *ibid* art 13.

²⁶ *Ibid* art 22.

²⁷ *ibid* art 27.

²⁸ The 2017 Labour Party manifesto includes a commitment to enact the CRPD into UK law if they win power.

²⁹ For a more detailed discussion, see Andrea Broderick, 'A reflection on substantive equality jurisprudence: The standard of scrutiny at the ECtHR for differential treatment of Roma and persons with disabilities' (2015) 15 *International Journal of Discrimination and the Law* 101.

in his capacity for work since, during the many years in which a person was merely HIV-positive, his or her working capacity was not substantially reduced'³⁰. In the case of *Kiyutin v Russia*³¹, the court placed particular weight on the historic stigma against and exclusion of people with HIV and afforded states a narrow margin of appreciation as a result. Consistent with the social model of disability, the court recognised the disabling impact of attitudinal barriers. It is submitted that a parallel argument could be made in relation to people with disfigurements who often face stigmatisation and exclusion. Where engaged³², the wider reach of Article 14 may prove to be a useful interpretive tool in respect of shortcomings in domestic disfigurement law.

As the EU is a party to the CRPD, the EU Employment Equality Framework Directive (Directive 2000/78) ('the Directive') 'must, as far as possible, be interpreted in a manner consistent with the Convention'³³. Relevant domestic legislation, including the Act, in turn needs to comply with the Directive, the ECHR and the CRPD, which would seem to offer a good opportunity for a common approach. However, that opportunity has not been seized, and case law on the Directive from the Court of Justice ("ECJ") has not consistently reflected CRPD principles³⁴ in this respect.

³⁰ Application no. 552/10, judgment 3 October 2013, para 86.

³¹ Application no. 2700/10, judgment 10 March 2011, para 64.

³² See e.g. Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review 273, for a discussion of the 'parasitic' nature of article 14.

³³ Joined cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, EU: C:2013:222, para 32.

³⁴ Lisa Waddington, 'Saying All the Right Things and Still Getting it Wrong' (2015) 22 Maastricht Journal of European and Comparative Law 576, 583. See also Gauthier de Beco, 'Is obesity a disability? The definition of disability by the Court of Justice of the European

In the case of *Ring*³⁵, the ECJ provided a definition of disability which appeared to embrace the social model. It defined disability for the purposes of the Directive as:

‘a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’³⁶.

But subsequent applications of this definition have been restrictive and have implications for disfigurement³⁷. In the case of *Kaltoft*³⁸, the court adopted the *Ring* definition but elaborated on the need for a limitation resulting from impairment. In *Kaltoft*, in the context of obesity, the court suggested that ‘reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity’³⁹ could suffice. So, the limitation is being interpreted as something the individual is physically unable, or less able, to do in professional life as a result of the impairment. As Lisa Waddington argues, ‘this seems to render it difficult to interpret the Court’s definition of disability as embracing individuals who experience no physical limitation, but who are only hampered by the discriminatory attitudes of others,

Union and its consequences for the application of EU anti-discrimination law’ (2016) 22 Columbia Journal of European Law 381, 383.

³⁵ *Ring* (n33).

³⁶ *ibid* para 34.

³⁷ Waddington (n34), 588.

³⁸ *Case C-354/13 FOA v Kommunernes Landsforening (Kaltoft)* (Court of Justice).

³⁹ *ibid* para 60.

discriminatory rules or provisions'⁴⁰. This interpretation is strengthened by the reference in the subsequent case of *Daouidi* to a limitation of 'capacity'⁴¹. It is clear that the required limitation can be a partial hindrance rather than an absolute prevention, but someone who has no physical limitation at all, and is disabled purely by external attitudinal barriers (someone with a pure disfigurement, or someone who is HIV positive⁴² but asymptomatic, perhaps), may not be disabled under the Directive.

This interpretation appears to create significant distance between the Directive's concept of disability, and that espoused by Article 1 of the CRPD, despite the latter purportedly being used to interpret the former. What does this mean for someone with a visible difference? It means that a claimant who is left without a domestic remedy because of a shortcoming in the way that the Act deals with disfigurement is unlikely to be able to rely on the Directive. It also means that Parliament and the British courts are receiving conflicting messages from the wider disability law framework about the scope of disability relating to impairments without functional limitation. This lack of functional consistency risks diluting the strong agenda for reform provided by the social model and CRPD.

This article will use social model principles (and their embodiment in the CRPD) to evaluate the Act's treatment of people who are visibly different. However, a simple comparison of how the Act's approach is different from the social model and CRPD falls

⁴⁰ Waddington (n34) 587.

⁴¹ Case C-395/15 *Daouidi v Bootes Plus SL*, para 48. See also Case C-270/16 *Ruiz Conejero v Ferroser Servicios Auxiliares and Ministerio Fiscal*, para 28.

⁴² See Peter McTigue, 'From Navas to Kaltoft' (2015) 15 *International Journal of Discrimination and the Law* 241 for a fuller discussion of ECJ case law in relation to HIV as a disability.

short of being truly useful. This is because, by the time the Act came into force in 2010, the UK had already ratified the CRPD, but still chose to retain its existing legislative roots in the medical model of disability. The contrasts between the Act and its overarching framework are therefore intentional; highlighting them is unlikely, without more, to stimulate a change of approach in the medium term. On that basis, the CRPD and social model principles will also be drawn on to explore how solutions can be found within the Act's existing ideology.

The lived experience of visible difference

An estimated 1.3 million people in the UK have a significant disfigurement (569,000 of which are facial)⁴³ and a large amount of research has been undertaken into the lived experience of visible difference. While recognising the impossibility of accurately representing the nuances of a rich body of scholarship in a few paragraphs, three general themes are worthy of comment. Visible difference: (i) often has a negative impact on social interaction, ii) can lead to distressing psychological consequences for those affected, and iii) is the subject of subconscious bias which causes some people to associate visible difference with negative personality traits. These three themes will be discussed in turn.

First, the social consequences. Studies have shown that people living with disfigurements often have heightened concern over social interaction, particularly with strangers, expecting negative reactions from others⁴⁴ and avoiding social situations as a

⁴³ Changing Faces, '*Disfigurement in the UK*' May 2017.

⁴⁴ Emma Robinson, 'Psychological research on visible differences in adults' in Richard Lansdown and others (eds), *Visibly Different* (Butterworth-Heinemann 1997) 103.

result⁴⁵. Negative reactions are sometimes explicit, but many people with a visible difference also report implicit awkwardness such as 'the guarded references, the common everyday words suddenly made taboo, the fixed stare elsewhere, the artificial levity, the compulsive loquaciousness, the awkward solemnity'⁴⁶. A recent survey by the charity Changing Faces⁴⁷, which supports people with disfigurements to face or body, found that 81% of visibly different participants had experienced staring, comments or unpleasantness from a stranger, and 33% believed they had been the victim of a disfigurement hate crime (though only 30% of those had reported it).

While some scholarship has mooted that negative expectations of others may lead to self-fulfilling prophecies⁴⁸, studies have also demonstrated that such concerns about the reactions of others are frequently well-founded, with the general public tending to avoid interaction with people with disfigurements where possible, choosing to stand further away on the street⁴⁹, not to sit next to them on a train,⁵⁰ and to be less likely to donate to a charity collection if the collector has a visible difference.⁵¹ One study of people with

⁴⁵ Andrew Thompson and Gerry Kent, 'Adjusting to disfigurement: processes involved in dealing with being visibly different' (2001) 21 *Clinical Psychology Review* 663, 666.

⁴⁶ Fred Davis, 'Deviance Disavowal: The Management of Strained Interaction by the Visibly Handicapped' (1961) 9 *Social Problems* 120, 123.

⁴⁷ Changing Faces (n43).

⁴⁸ Alan Feingold, 'Good- Looking People Are Not What We Think' (1992) 111 *Psychological Bulletin* 304; Robinson (n44) 103.

⁴⁹ Nicola Ramsey, Ray Bull and D Gahagan, 'The Effects of Facial Disfigurement on the Proxemic Behaviour of the General Public' (1982) 12 *Journal of Applied Social Psychology* 137. Interestingly, the study found that people stood further away from a person with a permanent congenital disfigurement than from someone with a temporary facial injury, illustrating the difficulty in making cross-condition comparisons.

⁵⁰ Vicky Houston and Ray Bull, 'Do people avoid sitting next to someone who is facially disfigured?' (1994) 24 *European Journal of Social Psychology* 279.

⁵¹ Ray Bull and Julia Stevens, 'The effects of facial disfigurement on helping behaviour' (1981) 8 *Italian Journal of Psychology* 25.

psoriasis reported that 20% of participants had been asked to leave a restaurant, swimming pool or other public place because of their appearance.⁵² Research also demonstrates this pattern affecting the workplace, with people who disclosed a visible difference less likely to be interviewed⁵³ and more likely to be paid less⁵⁴ and significant numbers believing that they have been discriminated against by colleagues and managers⁵⁵. It is worth noting, though, that the aetiology of the visible difference may affect the individual's experience, with some conditions being better received or understood than others⁵⁶.

The relevance of the social model of disability here is immediately apparent; the attitudes of other people towards visible difference have the power not just to isolate socially, but to prevent participation in certain activities, to compromise personal security and privacy, and reduce the ability to support oneself financially necessitating dependence on others. The perceptions of other people can create disability even though the physical impairment of disfigurement often produces few, if any, limits on what the individual can do. Visible difference without other impairment effects embodies the strong social model impairment-disability dichotomy.

⁵² I Ginsburg and B Link, 'Feelings of stigmatization in patients with psoriasis' (1989) cited in Gerry Kent and Steve Keohane, 'Social anxiety and disfigurement: The moderating effects of fear of negative evaluation and past experience' (2001) 40 *British Journal of Clinical Psychology* 23, 24.

⁵³ Anna Stone and Toby Wright, 'When your face doesn't fit: employment discrimination against people with facial disfigurements' (2013) 43 *Journal of Applied Social Psychology* 515.

⁵⁴ Daniel S Hamermesh, *Beauty Pays* (Princeton University Press 2011).

⁵⁵ *Changing Faces* (n43).

⁵⁶ Frances Cooke Macgregor, 'Facial disfigurement: Problems and management of social interaction and implications for mental health' (1990) 14 *Official Journal of the International Society of Plastic Surgery* 249, 251.

Second, and perhaps unsurprisingly, psychological effects within this group, such as low self-confidence⁵⁷, negative self-image, anxiety and depression⁵⁸ are often reported. One study⁵⁹ found that people with facial disfigurements had fear questionnaire scores equivalent to people with social phobia. The strength of the connection between social stigma and psychological distress suggests that attitudinal barriers can be internalised by those affected, creating lowered expectations and intensifying disability; external barriers can create internal barriers.

Third, implicit bias. Studies demonstrate character assumptions and a learned bias against visibly different faces, with photographs being judged as less honest, less employable, less trustworthy, less optimistic, less effective, less capable, less intelligent, less popular, and less attractive than photographs of a control group⁶⁰. The pernicious problem of implicit bias makes challenging discrimination harder; it can be difficult to ascertain the true motivation for a decision where even the decision-maker may not appreciate what underlies it. The perceived link between visible difference and negative character traits means that people can be disabled not just by erroneous assumptions about 'what they can't do' but also by insidious suppositions about 'what sort of person they are'.

⁵⁷ Robinson (n44) 103.

⁵⁸ S Jowett and T Ryan, '*Skin disease and handicap: an analysis of the impact of skin conditions*' (1985) 20 Soc. Sci. Med. 425, 427.

⁵⁹ R. Newell and I. Marks, 'Phobic nature of social difficulty in facially disfigured people' (2000) 176 The British journal of psychiatry : the journal of mental science 177.

⁶⁰ Marlene Rankin and Gregory Borah, 'Perceived Functional Impact of Abnormal Facial Appearance' (2002) 111 Plastic & Reconstructive Surgery 2140.

Underlying all three ‘themes’ of the lived experience is the problem of stigma and (conscious and unconscious) bias. The CRPD imposes an obligation on states to address such underlying prejudice proactively, including awareness-raising campaigns⁶¹, measures to foster respect for the rights and dignity of disabled people⁶², and the promotion of employment of disabled people in the private sector⁶³. But considerable flexibility is left to state parties in deciding how best to achieve this. Some valuable measures (public awareness campaigns, for example) may not require the force of law⁶⁴. But proactivity in a *legal* context tends to suggest the creation of positive duties. Positive duties can impose specific equality obligations on particular groups (public bodies, or all employers for example) rather than relying on individuals to respond to discrimination reactively with a legal claim.

Positive duties play only a small part in employment equality law in the UK, which focuses instead on an individual complaints-led model⁶⁵. One exception to this statement is the inclusion, in s.149 of the Act, of a positive duty on public authorities to have ‘due regard’ to specific equality objectives. A detailed discussion of the s.149 duty is outside the scope of this article, but the duty has been widely criticised for not going far enough (its scope is procedural rather than requiring public authorities to take steps to achieve the equality

⁶¹ CRPD art 8 (2)(a).

⁶² CRPD art 8 (a).

⁶³ CRPD art 27 (1)(h).

⁶⁴ ‘Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland’ CRPD/C/GBR/CO/1 (3 October 2017) recommends the UK take awareness-raising measures to “include mass media strategies and campaigns, with different target audience groups”; See also House of Lords Select Committee (n14) para 191 and 192.

⁶⁵ Sandra Fredman, ‘The Public Sector Equality Duty’ (2011) 40 Industrial Law Journal 405, 407; House of Lords Select Committee (n14) para 345 and 346.

objectives⁶⁶, and some scholarship has highlighted inconsistent levels of meaningful compliance⁶⁷). The potential for positive duties to combat disfigurement prejudice is an area for future research.

Notwithstanding a scarcity of positive duties, and a limited ability of the complaints-led model to counter the structural causes of discrimination⁶⁸, it will be argued in the following section that the Act's disfigurement provisions are counter-productive and fail effectively to challenge prejudice, serving to reinforce stigma and marginalization and restrict awareness of the rights and dignity of people who are visibly different.

Part 2: The statutory provisions

Discrimination against people with visible differences is, at least to some extent, prohibited by disability provisions in the Act. The definition of disability is contained within Section 6 of the Act:

'A person (P) has a disability if—

(a) P has a physical or mental impairment, and

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

⁶⁶Fredman *ibid* 410.

⁶⁷ See, for example, Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathaway, 'The Public Sector Equality Duty: Enforcing Equality Rights Through Second-Generation Regulation' (2017) October 2017 *Industrial Law Journal*.

⁶⁸ Fredman (n65) 408.

While someone with a visible difference, without other functional limitations, would be unlikely to satisfy the standard definition of disability contained within section 6, Schedule 1⁶⁹ deems that an impairment which consists of a severe disfigurement is to be *treated as* having a substantial adverse effect on the ability to carry out normal day-to-day activities. This removes the need for the individual to have to demonstrate the functional disadvantage required by the standard definition, albeit that he still has to demonstrate that the impairment is long-term (meaning that it has lasted, or is likely to last, for at least 12 months, or for the rest of the life of the person affected⁷⁰).

How severe is ‘severe’?

There is no further definition within the Act on what constitutes a severe disfigurement, but the Guidance provides:

‘Examples of disfigurements include scars, birthmarks, limb or postural deformation (including restricted bodily development), or diseases of the skin. Assessing severity will be mainly a matter of the degree of the disfigurement which may involve taking into account factors such as the nature, size, and prominence of the disfigurement. However, it may be necessary to take account of where the disfigurement in question is (e.g. on the back as opposed to the face).’⁷¹

⁶⁹ EA 2010, sched 1, pt 1, s 3.

⁷⁰ EA 2010, sched 1, pt 1, s 2.

⁷¹ Office for Disability Issues, ‘*Guidance on matters to be taken into account in determining questions relating the issue of disability*’, Para B25,

The Act makes no distinction between congenital or acquired conditions, though tattoos which have not been removed, and piercings, are expressly excluded.⁷²

The open scope of this concept has, to some extent, been addressed in case law, but with little resultant clarity. In *Hutchinson 3G UK Ltd -v- Edwards*⁷³, the claimant worked in a mobile 'phone shop, and was asked to wear a company polo shirt. He suffered from Poland syndrome which caused a significant asymmetry of his chest cavity which, he felt, would have been obvious when wearing a polo shirt. His condition also made some movements (e.g. pushing / pulling) more difficult. The first instance Tribunal decided that Mr Edwards had a severe disfigurement, but this was appealed, with the respondent arguing that the Tribunal did not have enough evidence in front of it on which to reach this conclusion. The Employment Appeal Tribunal ('EAT') expressed discomfort about being asked to make visual judgments on the extent of a disfigurement evidenced photographically or in person, recognising that 'the protection is afforded to those for whom issues of appearance are likely to be particularly sensitive'⁷⁴. The EAT concluded instead that it was entitled to take into account 'the impact of the disfigurement on the claimant'⁷⁵ in assessing the severity of a disfigurement – in other words, the claimant's perception of, and behavioural response to it. By promoting 'a degree of sensitivity'⁷⁶ in the evidential requirements for establishing severe disfigurement, the EAT introduced both flexibility for claimants and uncertainty for respondents, accepting that different forms of evidence may suffice in different cases. The

<https://www.equalityhumanrights.com/sites/default/files/odi_definition_of_disability_equality_act_guidance_may.pdf> accessed 9 April 2018.

⁷² The Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128, reg 5.

⁷³ [2014] UKEAT/0467/13/DM.

⁷⁴ *ibid* para 56.

⁷⁵ *ibid* para 55.

⁷⁶ *ibid* para 57.

EAT did, however, conclude that the test for severe disfigurement could not be wholly subjective; ‘not simply what the claimant believed to be the case’⁷⁷.

Prima facie, this decision is favourable to claimants, allowing more people to meet the evidential threshold and balancing the Act’s requirements of process with ‘respect for inherent dignity’⁷⁸ of the claimant. However, it could conceivably disadvantage claimants whose disfigurements are borderline in their severity, but who have not allowed their life choices to be inhibited. Tribunals must guard against this, as it threatens to remove access to justice for those who have exercised a ‘full and effective participation in society’⁷⁹; the antithesis of what disability law policy, enshrined in the principles of the CRPD, seeks to achieve.

The bodily location of disfigurement

Returning to the Guidance⁸⁰, it is clear that the bodily location of the disfigurement is one factor to be taken into account in deciding whether the severe disfigurement threshold test is met. In *Blyth v Historic Scotland*⁸¹, for example, the Tribunal noted that the claimant’s psoriasis was mainly on her torso and legs; parts of her body which she covered up. The Tribunal found her not to have a severe disfigurement. In *Whyte v First Capital East Ltd*⁸², again the EAT found that the claimant’s folliculitis on his back was not a severe

⁷⁷ *ibid* para 60.

⁷⁸ CRPD article 3(a).

⁷⁹ CRPD article 1.

⁸⁰ Office for Disability Issues (n71).

⁸¹ [2001] ET/S/400514/00.

⁸² [2005] UKEAT/0686/04/DM.

disfigurement, commenting that ‘location is important as it affects ordinary people’s judgment about its severity...protection against discrimination ... is more necessary when it is visible on the face than when it is invisible on the backside’⁸³ [sic].

This focus on invisibility suggests that the rationale for the guidance lies at least partly in how likely the disfigurement is, given its location, to be seen by others. On one level, this seems both logical and in line with the social model of disability, reflecting the frequency with which attitudinal barriers would be expected to be encountered. But, while recognising that facial disfigurements can be particularly challenging for those affected, on closer analysis the possibility that this guidance will be used to exclude non-facial disfigurements from equality protection is troubling in two respects.

First, it creates an expectation that a disfigurement which *can be covered, should be covered*; or, at least, that legal redress may be limited where it *could have been covered*.

While the Guidance which accompanies the Act provides that:

‘[a]ccount should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities’⁸⁴,

the emphasis of these coping mechanisms is on small, practical activity choices, such as avoiding skiing, but not shopping, to alleviate back pain. The issue of coping mechanisms is

⁸³ *ibid* para 34.

⁸⁴ Office for Disability Issues (n71) para B7.

not directly relevant to severe disfigurements which, as discussed above, do not need to satisfy the substantial adverse effect test. But linking the bodily location of a disfigurement with its severity imports a similar expectation; that a person will cope by hiding their difference. Far from being a small, practical activity choice, this goes to the root of the individual's self-identity and body image. The respect for difference and human diversity⁸⁵ emphasised in the CRPD reflects a move away from the 'care or cure' approach to disability, embodied in the medical model, towards an approach which values disability not as 'a "mistake" of society but an element of its diversity'⁸⁶. Restricting access to justice in situations where diversity can be covered up is a retrograde step which shifts the focus away from the employer's alleged discriminatory behaviour back to the specifics of individual impairment.

The second concern with the focus on the visibility of the bodily location stems from the risk of conflating visibility and knowledge. While a disfigurement in a visible place, such as the face, is very likely to become known to others, the converse is not necessarily true; disfigurements in places of the body often covered by clothes can also become 'known'. They could, for example, be disclosed voluntarily, gleaned from a sick note, or visible in hot weather. So, while facial disfigurements are likely to be noticed and at risk of stigmatisation, thus meriting legal redress, it isn't the case that disfigurements on the torso are immune from such stigma or undeserving of legal remedy if they do give rise to discrimination.

⁸⁵ CRPD art 3(d).

⁸⁶ United Nations, *The Convention on the Rights of Persons with Disabilities Training Guide* (2014), Module 1, B.

It is submitted that, instead of using the likelihood of a disfigurement being noticed to exclude some people from the definition of disability, the better approach (and one which reinforces the CRPD's focus on hindered participation) is for the employer's actual knowledge and conduct to be assessed on the facts of each case in determining whether discrimination has taken place.

Progressive conditions

Although the Act makes provision for progressive conditions generally⁸⁷, (the Act provides that a person with a progressive condition is protected as a disabled person from the first time when his impairment has some adverse effect, provided that the adverse effect is likely to become substantial in the future) similar protection has not been afforded to people with progressively disfiguring conditions, such as neurofibromatosis type 1⁸⁸ or vitiligo⁸⁹, which are likely to lead to severe disfigurement.

The progressive condition provision under the Act was introduced to combat stigma before the condition reached a stage where the substantial adverse effects test was satisfied; a recognition of social barriers pre-empting functional barriers. HIV, multiple sclerosis and cancer are expressly included as disabilities⁹⁰, rather than being left to fall under the progressive conditions provision, because they were identified as conditions which could be diagnosed and lead to stigmatisation while the affected person was

⁸⁷ EA 2010 Sched 1, Pt 1, s 8.

⁸⁸ Neurofibromatosis Type 1 is a genetic condition which can cause (usually benign) tumours to grow over time along the nerves, both inside the body and on the skin. In some people, it also causes other symptoms such as scoliosis, high blood pressure and learning difficulties.

⁸⁹ Vitiligo causes patches of skin to lose pigmentation, often progressively.

⁹⁰ EA 2010 Sched 1, Pt 1, s 6(1).

asymptomatic, thereby also failing the progressive condition test. There is an obvious parallel here with progressively disfiguring conditions, which may *never* produce an adverse effect on day-to-day activities, but which can lead to stigmatization from an early stage.

The CRPD does not discuss progressive conditions, because it does not need to; its concept of disability is not limited by reference to a given level of impairment. Someone with a progressively disfiguring condition would be covered by the CRPD from the moment that the condition, in interaction with various barriers, has the potential to hinder full participation in society. The failure to extend the progressive condition protection to disfigurement is therefore out of step with the CRPD. It is arguable that, if this point were tested in court, this gap could be easily filled without sacrificing the integrity of the Act's existing provisions. However, the lack of clarity may discourage such claims being brought in the first place.

The discussion so far has raised several concerns which are, directly or indirectly, related to one thing: the threshold test of severity. The real question is therefore not how severity should be determined, but whether the severity threshold should exist at all.

Why have a severity threshold?

When the severity threshold for disfigurement was first introduced (in the Disability Discrimination Act 1995 ('DDA'), which preceded the Act), Parliamentary records show that the rationale was a presumed assumption that more serious disfigurements will always elicit worse discrimination. This was questioned during the passage of the Bill through the Lords, as follows:

‘The Government protect those with severe disfigurement; but, as the charity Changing Faces makes clear, discrimination is not related to the severity of disfigurement or to the severity of disability. Small wounds can be very disfiguring, whereas a large burn carried by an airman may be worn with pride as a sign of war. Alternatively, mild facial palsy is, for example, very isolating. Therefore, it is not size, it is not seriousness and it is not the conspicuousness of disfigurement which affects the person's ability to cope: it is another person's perception of it. Yet, such a person would not be protected under the provisions of the Bill.⁹¹’

However, the amendment proposed to resolve the issue was one of perceived disability rather than one directed specifically at disfigurement. At the time, perceived discrimination was not provided for within the DDA (although it has subsequently been incorporated into the Act) and the amendment was not passed. Arguments that ‘if the definition of disability is too narrowly drawn, there may well be people who are disabled but who are not protected’⁹², were overridden to prevent the net being drawn so widely that ‘the issue falls into some form of disrespect; or ... the provisions cannot be operated and the very people whom we wish to help are not helped’⁹³. However, with the benefit of twenty years of hindsight, the binary distinction in the Act between severe and non-severe disfigurements still appears hard to justify for the following reasons:

1. Studies in the field of psychology continue to confirm that this assumption of clinical severity leading to worse consequences is wholly unreliable: reactions to minor or

⁹¹ HL Deb, 1995, v564, c1642 Baroness Hollis of Heigham.

⁹² *ibid*, v564, c1650.

⁹³ *ibid*, v564, c1650, Lord Mackay of Ardbrecknish.

moderate disfigurements, in terms of the psychosocial impact on the individual, can often be as damaging as those experienced by people with severe disfigurements⁹⁴ and, despite variability, there is evidence that some people with relatively minor disfiguring conditions experience higher levels of both depression and social anxiety than their more severely disfigured counterparts⁹⁵.

2. The severity threshold for disfigurement is inconsistent with the threshold test for disability in the Act, that of 'substantial adverse effect'. 'Substantial' is defined in the Act as 'more than minor or trivial'⁹⁶ which has, in turn, been interpreted as a relatively low standard. An ordinary reading of the word 'severe' denotes a higher threshold than 'substantial' (as evidenced, for example, by national security threat levels where severe is a more serious level than substantial). This suggests that functional impairments are treated by the Act as more disabling than the social barriers of disfigurement, necessitating staggered thresholds for the law to engage. Once again, this sits uncomfortably with a body of evidence which demonstrates that people with a disfigurement are as likely to suffer discrimination in the workplace as people with other types of disability. As mentioned above, studies have found that a person with a disfigurement is at least as likely to be discriminated against in the job application process as someone in a wheelchair⁹⁷, although

⁹⁴ See e.g. Frances Cooke Macgregor, 'Social and Psychological Implications of Dentofacial Disfigurement' (1970) 40 *The Angle Orthodontist* 231, 232.

⁹⁵ Nichola Rumsey and others, 'Altered body image: appearance- related concerns of people with visible disfigurement' (2004) 48 *Journal of Advanced Nursing* 443.

⁹⁶ EA 2010 s 212(1).

⁹⁷ Sarah V. Stevenage and Yolanda McKay, 'Model applicants: The effect of facial appearance on recruitment decisions' (1999) 90 *British Journal of Psychology* 221; Anna

interestingly one of the studies found this was only prevalent in sectors involving a high degree of customer contact⁹⁸, perhaps indicating that employers are fearful of the reactions of customers. Similarly, an American study asked workers about their levels of discomfort in working with people with different disabilities, and a facial disfigurement featured highly in the rankings of reported discomfort⁹⁹. There appears, therefore, to be little justification for imposing a higher threshold for equality rights based on disfigurement than on other types of disability.

Accordingly, it is submitted that the 'severity' threshold for disfigurement is unjustified and inconsistent. In contrast to the CRPD, in which 'the challenge facing a person with a disability is measured in terms of the existing barriers and not on the category or percentage of the impairment'¹⁰⁰, the severity threshold represents a familiar retreat to the ideology of the medical model, pushing the focus back onto the level of impairment. Given the sensitivity of issues of appearance (as recognised by the EAT in *Edwards*), requiring a person to prove that he is 'severely disfigured' as a precondition to challenging discrimination runs counter to the principles of respect for difference¹⁰¹ and the inherent dignity of the person¹⁰², and inhibits effective access to justice¹⁰³ as required by the CRPD.

Stone and Toby Wright, 'When your face doesn't fit: employment discrimination against people with facial disfigurements' (2013) 43 *Journal of Applied Social Psychology* 515

⁹⁸ Stone and Wright, *ibid*.

⁹⁹ Gwen Jones and Dianna Stone, 'Perceived discomfort associated with working with persons with varying disabilities' (1995) 81 *Perceptual and Motor Skills* 911, 915.

¹⁰⁰ Nations, *The Convention on the Rights of Persons with Disabilities Training Guide*(n86) Module 1, D (d).

¹⁰¹ CRPD art 3(d).

¹⁰² CRPD art 3(a).

¹⁰³ CRPD art 13.

For these reasons, it is submitted that the severity requirement should be completely removed.

A matter of pure aesthetics

A further hurdle arises in the interpretation of a disability which ‘*consists of*’ severe disfigurement. In *Cosgrove –v- Northern Ireland Ambulance Service*¹⁰⁴, the claimant had psoriasis which amounted to a severe disfigurement but which the parties agreed would not, but for the ‘deemed disability’ provision of severe disfigurement which existed under the DDA 1995 at the time (and which was similar for this purpose to the current provisions under the Act), have satisfied the definition of disability. He was denied a job as an ambulance person due to the risk of irritants aggravating his condition at work, an increased risk of infection for him through broken skin, and an increased risk of cross-infection for his patients. Mr Cosgrove argued that this amounted to disability-related discrimination but his argument hinged on whether the impairment was the psoriasis as a whole (argued by Mr Cosgrove) or merely the disfiguring aspect of the psoriasis. This interpretation was crucial because, while the refusal of the job was causally connected to the symptoms of psoriasis, particularly broken skin, it was not connected to the disfiguring appearance of the psoriasis.

The Court of Appeal (NI) decided that ‘[a]n impairment ‘consisting of’ disfigurement means, in common parlance, that the impairment relates solely to the cosmetic aspect of the condition’¹⁰⁵. Although the claim was decided in relation to disability-related

¹⁰⁴ [2007] IRLR 397.

¹⁰⁵ *ibid* para 16.

discrimination, it appears likely that it would also apply in relation to other forms, such as discrimination arising from a disability.

It is questionable whether this narrow interpretation of a disability consisting of a severe disfigurement made much practical difference to a claimant in Mr Cosgrove's medical context, as the treatment could perhaps have been objectively justified, subject to a meaningful risk assessment process being carried out. However, the narrow interpretation could make a greater impact in other contexts. Had Mr Cosgrove applied for an office job, for example, the identified risks would presumably have been much reduced and, as a consequence, the withdrawal of the offer much less likely to be objectively justifiable. But his claim would still have failed as the withdrawal of the job offer would not arise from the disfiguring aspect of his condition.

The real problem with Cosgrove stems from the statutory wording ('a disability which *consists of* a severe disfigurement'), but the court's literal interpretation missed an opportunity to tackle this; they commented that if someone in Mr Cosgrove's situation was intended to be included within the embrace of the relevant section, 'a phrase such as "includes severe disfigurement" could have been used'¹⁰⁶. The decision leaves many people who have a complex disfiguring condition (by which I mean one which includes an element of disfigurement and some other symptoms or effects) in an 'either/or' position; if aiming to prove disability under the standard test in s.6 of the Act, the aesthetic aspect of the condition is irrelevant, but if applying the deeming provision for severe disfigurements, the

¹⁰⁶ *Cosgrove* (n104) para 16.

non-aesthetic aspects of the condition are not protected against discrimination. This runs contrary to the way in which other disabilities under the Act are dealt with, where a cumulative approach to minor functional impairments is taken¹⁰⁷.

Cosgrove encapsulates the conflict between the social and medical models; its graceless approach implies that someone can be disabled either by attitudes towards people who look different or by functional effects of their impairment – but not both. By implication, the law declares that Mr Cosgrove encountered ‘the wrong type of barrier’, which is a far cry from the more complex ‘interaction with various barriers’¹⁰⁸ envisaged in the CRPD. As a Northern Irish decision, *Cosgrove* is persuasive but not binding in England and Wales or Scotland, which may allow an opportunity for the limitations of the decision to be departed from.

Having set out the limitations of the Act’s approach to disfigurement, there are two avenues which, though not featuring significantly in the reported case law on disfigurement discrimination, may contribute to mitigating these limitations: perceptive discrimination, and reasonable adjustments.

Perceptive discrimination

Someone with, say, a moderate disfigurement, who does not satisfy the ‘severe’ threshold test, may be able to base a claim of direct discrimination or harassment on the

¹⁰⁷ Office for Disability Issues (n71) para B4-B6.

¹⁰⁸ CRPD art 1.

respondent's *perception* that he has a severe disfigurement. Perceptive discrimination claims recognise that discrimination can occur on the basis of a protected characteristic which the victim does not have. By way of example, in *English v Thomas Sanderson Ltd*¹⁰⁹, Mr English brought a successful harassment claim when he was subjected to a campaign of homophobic verbal harassment, despite the fact that he was heterosexual. Perceptive discrimination embodies the social model of disability, in that it recognises that disability can be externally created, not inherent within the individual.

Claims based on perception are permitted under the Act because the wording of both s. 13 (direct discrimination) and s.26 (harassment) is wide enough to allow a claim to be brought where the claimant does not actually have the protected characteristic (in this case, disability). Assume the example of an employee with a small facial haemangioma who is called an offensive nickname at work and told that he cannot be promoted to a client-facing role because of his face. The law's perception of his level of disfigurement may be different from those of his employer and colleagues, in that a Tribunal may find his disfigurement to be only moderate, so not disabling. But a claim that he has been discriminated against and / or harassed because of his employer's perception may enable this gap to be bridged.

However, discrimination because of perceived disability claims are not straightforward because disability (unlike, say race or sex) has a threshold test (set out in s.6 of the Act) which a claimant has to meet. To what extent does the decision-maker have to

¹⁰⁹ (2009) I.C.R. 543.

know of, or put his mind to, the elements of that specific legal test before he can be said to perceive disability? In the recent case of *Coffey*, the EAT confirmed that:

‘[T]he answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.’¹¹⁰

Although the EAT's confirmation of the application of perceptive discrimination to disability is welcome, *Coffey* is in other ways disappointing; it is likely to lead to a series of denials by decision-makers about the scope of their perception. However, this hurdle may be easier for people with disfigurements to overcome than for people with some other types of disability. This is because a moderate disfigurement, which is perceived by the employer to be severe, should be able to bypass the ‘substantial adverse effect’ test contained in s.6; severe disfigurements (presumably including *perceived* severe disfigurements) are *treated as* satisfying that definition. Does this make a difference? Seemingly, yes. It means there is nothing for the respondent to put his mind to save for whether the claimant has a severe disfigurement. Comments like those envisaged in our fictional scenario would seem to make it difficult for the respondent to deny this perception. A perceived disability claim may prove a useful alternative where the severity of the disfigurement is contested.

¹¹⁰ *The Chief Constable of Norfolk v Coffey* UKEAT/0260/16/BA, para 51.

Perceptive discrimination claims can also apply where the perpetrator knew the victim not to have the characteristic which formed the basis of the harassment¹¹¹; in *English*, for example, the people harassing Mr English knew him not to be gay but harassed him with homophobic abuse anyway. One of the judges in that case noted as ‘barely perceptible’¹¹² the distinction between someone harassed because he is believed to be gay and someone harassed *as if he were* believed to be gay. Although the facts of the case are perhaps unusual – claims where people are harassed as if they had a severe disfigurement even when they are known not to have one will be few and far between – the court’s approach has important implications for disability law in two respects. First, the court placed the focal point of its analysis firmly on the discriminatory conduct, not on the characteristic of the victim. This affirms the social model’s external focus and contrasts with the Act’s approach to severe disfigurement, where the threshold test excludes many claims at the hurdle of proving disability. Second, in *English*, Sedley LJ recognised that sexual orientation is a matter which many people may prefer to keep private¹¹³, so the law should not require its disclosure in order to challenge discrimination. Given the ‘gruelling and personally invasive’¹¹⁴ process of having one’s impairment publicly scrutinised in a disability claim, this recognition of needing to balance privacy with principles of legal process is welcome; requiring someone to undergo a public analysis about whether they are both severely disfigured and disabled is a doubly unreasonable impediment to accessing justice.

¹¹¹ Equality and Human Rights Commission, *Equality Act 2010 Code of Practice, Employment* (The Stationery office Limited 2011) para 7.10.

¹¹² *English* (n109) para 38, per Sedley LJ.

¹¹³ *ibid* para 39.

¹¹⁴ Lawson (n1) 361.

Where the claim relates to discrimination on the basis of actual, rather than perceived, disability, it is hard to conceive how to prove disability (as it is currently defined in the Act, at least) without the intrusion of some enquiry. But the CRPD requires procedural accommodations to ensure that justice is accessible¹¹⁵. The Employment Tribunals have the power to make anonymity orders and restricted reporting orders but the requirements for these orders to be made are stringent. This is an area which could be further developed to prevent worthwhile claims being deterred.

Reasonable adjustments

The second area worthy of specific mention, but perhaps overlooked in its potential to assist people with disfigurements, is the duty to make reasonable adjustments. Unlike the issues discussed already, the duty does not affect whether someone with a disfigurement is deemed to be disabled, but how they should be treated once that threshold is assumed to have been met. The concept of reasonable accommodation is also provided in the CRPD¹¹⁶.

The duty to make reasonable adjustments under the Act applies to the following scenarios:

¹¹⁵ The UN's 2017 recommendations to the UK included a variety of measures to make justice more accessible for disabled people, including increased availability of legal aid and reasonable adjustments in the justice system. See Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland, 3 October 2017, CRPD/C/GBR/CO/1.

¹¹⁶ CRPD art 5(3). For a discussion on the CRPD duty generally and how it compares to the duty under the Act, see for example, Sarah 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 Industrial Law Journal 428, 435.

1. where a provision criterion or practice (“PCP”) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled;
2. where a physical feature (of premises) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; and
3. 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.

The requirement is to take such steps as are reasonable to avoid the disadvantage (in the case of the first and second requirements) or provide the auxiliary aid (for the third requirement).

The application of the duty to disfigurements is not initially obvious in the way that it would be for a disability with a clear functional consequence. While a ramp may provide a neat solution to the disadvantage of an office entrance step for someone in a wheelchair, the mechanics of adjustment are perhaps more obscure where the impairment is a disfigurement. I would argue, however, that the duty can be applied practically for the benefit of many people with a visible difference, and a number of potential applications will now be put forward.

Auxiliary aids are unlikely to be relevant for someone with a ‘pure’ disfigurement without functional limitation. Physical features of premises, too, often represent no problem for people with a disfigurement, though there are some exceptions; for example, both cold and dry air can exacerbate psoriasis symptoms, and artificial and natural light can aggravate photo-dermatological skin conditions, potentially requiring adaptations to air conditioning settings, workplace lighting, or seating arrangements. Such issues need to be assessed on a case by case basis.

PCPs, though, have broader relevance. One example of a formal PCP is company ‘look policies’ and dress codes. Although prescriptive policies setting out how members of staff should present themselves are unusual, many employers have some kind of uniform requirement; the company polo shirt is, after all, what led to Mr Edwards’ claim. Rigid enforcement of such a dress code may place employees with a severe disfigurement at a substantial disadvantage. In *Riam Dean v Abercrombie and Fitch*¹¹⁷, for example, the employee had been allowed to wear a cardigan on the shop floor to hide the join of her prosthetic arm. When a manager asked her to remove the cardigan and she refused, she was told to work in the stock room as she didn’t comply with the company’s look policy. The Tribunal upheld her claim of harassment and found that there had been a withdrawal of a reasonable adjustment relating to the cardigan, as well as a wrongful dismissal. Although the claimant on this occasion preferred to cover up, it is submitted that the opposite situation – had she been *asked* to cover up by wearing a cardigan, for example - would also have been unlawful.

¹¹⁷ Unreported August 2009.

PCPs relating to performance evaluation may prove problematic given the subconscious tendency to associate negative character traits with visibly different people (which was discussed in Part 1). Policies which involve making judgments about staff may need to be adjusted to remove the possibility of any hidden discriminatory bias. A particular area of concern is soft skills such as 'teamworking ability', 'attitude' or 'ambition' which are almost invariably subjective and could easily be influenced by unfounded assumptions of how popular, employable or capable someone is likely to be. Ongoing training for managers about implicit bias and its effects seems to offer potential for improvements¹¹⁸ by making subconscious bias and its effects conscious, but evaluation scoring systems can also be made clearer and linked to objectively verifiable criteria.

PCPs sometimes relate to the nature of the role itself. Returning to the psychological consequences identified earlier, some people with a visible difference report feeling particularly uncomfortable meeting new people¹¹⁹. A role requirement to give external presentations or attend networking events, for example, could therefore put an employee at a substantial disadvantage compared with someone who is not disabled. Even where the employer is aware of the disfigurement, though, the employee may need to expressly explain the nature of this substantial disadvantage in order to trigger the duty to make reasonable adjustments¹²⁰ as, unlike the 'wheelchair and office step' scenario envisaged

¹¹⁸ See, in the context of implicit racial bias: Patricia G. Devine and others, 'Long-term reduction in implicit race bias: A prejudice habit-breaking intervention' (2012) 48 *Journal of Experimental Social Psychology* 1267.

¹¹⁹ Robinson (n44) 103.

¹²⁰ Mark Bell, 'Mental Health at Work and the Duty to Make Reasonable Adjustments' (2015) 44 *Industrial Law Journal* 194, 208.

earlier, it may not be reasonable for an employer to investigate such an adjustment without knowledge of this impact on the employee.

Once aware of the disadvantage relative to people who are not disabled, the employer is under a duty to take reasonable steps to prevent the PCP creating that disadvantage. Possible reasonable adjustments could include role support, such as mentoring and social skills training, or a variation of role duties. Open communication is important, to prevent requests for alterations to the work itself being 'interpreted ... as an employee "being awkward"'¹²¹ and to prevent unjustified assumptions.

A final category of PCP worth particular mention in this context, given the social difficulties complained of by some, relates to employee relations. In *Smith v HM Prison Service*¹²², the employer was found to have failed to make reasonable adjustments for an employee with a severe facial disfigurement by failing to prevent continued bullying. It is pertinent here that the bullying was directed not just at the Claimant but also some of her colleagues; there was negative equality of treatment. But the Tribunal recognised the claimant's heightened sensitivity to bullying in the light of her condition (which the employer should also have been aware of) which placed her at a substantial disadvantage in comparison with people who were not disabled.

¹²¹ Deborah Foster, 'Legal obligation or personal lottery?' (2007) 21 Work, Employment & Society 67, 77.

¹²² Unreported, August 10, 2004. See IDS Diversity at Work 9 (March 2005) 22.

The need for the employer to become aware of the employee's relative substantial disadvantage means that the duty to make reasonable adjustments is reactive, rather than anticipatory¹²³. In other words, it 'looks back' at the barriers created, instead of requiring employers to take steps to *prevent* the barriers which can create disability, such as embedding disability and disfigurement equality into policies and staff training. With recent research by the Equality and Human Rights Commission¹²⁴ highlighting that attitudinal change is a long process, not a quick fix, the reactive duty misses an opportunity to begin tackling that process as early as possible.

Despite this lack of an anticipatory legal obligation, however, it is encouraging to note that a number of large employers, from both the private and public sectors, have signed up as members of the 'Face Equality at Work'¹²⁵ campaign run by the charity, Changing Faces, committing to strive to create a workplace where people are judged on ability and potential rather than appearance. As well as the moral and legal advantages in creating an inclusive workplace irrespective of appearance, the charity highlights the financial incentives of inclusion too; the potential reputational gains to the company, increased staff skill retention, and the benefits of customer loyalty.

¹²³ Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (n1) 368.

¹²⁴ Equality and Human Rights Commission, 'Summary report: Tackling Prejudice and discrimination' (2017) 5 <<https://www.equalityhumanrights.com/en/publication-download/tackling-prejudice-and-discrimination-summary-report>> accessed 9 April 2018.

¹²⁵ Changing Faces, Face Equality at Work, <<https://www.changingfaces.org.uk/resources/work/members-of-face-equality>> accessed 9 April 2018.

Although the duty to make reasonable adjustments has an important role to play in visible difference, awareness may be a significant block on its application; a recent survey by the charity Changing Faces found that nearly half of those people with a visible difference who responded were unaware that severe disfigurement was included as a disability in the Act¹²⁶. Research on the extent to which reasonable adjustments are being applied in practice to employees with a visible difference is ongoing.

Part 3 Options for reform

From the above analysis, two key legal themes emerge: i) there are important limitations in the way the Act defines disability which consists of severe disfigurement, and ii) a lack of awareness of the law inhibits enforcement of rights and misses an opportunity to embed equality for those with a visible difference. Options for reform will now be considered in the light of these twin themes.

One answer is to bring the Act's disability definition more in line with the approach taken in the CRPD and the social model. A definition which focused at least partly on external barriers could include people who are visibly different without the friction caused by trying to bolt on a separate disfigurement provision. However, as noted earlier, that suggestion is perhaps a little idealistic given the deliberate choice taken by Parliament to situate the definition of disability in the Act within the medical model. Similarly, while the

¹²⁶ Changing Faces (n43).

creation or extension of positive equality duties could offer proactive potential, optimism on this front is muted given that the s.149 duty on public bodies was recently pared back¹²⁷.

A pragmatic solution in the short term would be to advance some discrete changes to the Act to remove or mitigate the 'severity' requirement for disfigurements and expressly include progressively disfiguring and 'complex' conditions. These discrete changes have the potential to remove many of the legal inconsistencies and limitations noted earlier. But what they lack is the potential to increase awareness, either among the general public or people who are visibly different. In this respect, it is submitted that a charter mark approach may offer the potential both to raise awareness of disfigurement prejudice and spread good practice. The Athena SWAN charter on gender equality¹²⁸, though voluntary, has been widely adopted in the Higher Education community and, in some cases, is being externally reinforced through criteria for research grants. A similar initiative based on appearance has potential, especially as the Face Equality at Work campaign by Changing Faces already demonstrates the willingness of some household name employers to engage with these issues.

An alternative approach is to reconceptualise the link between disfigurement and disability so that the rights of visibly different people are recognised independent of disability. Two possibilities will be considered: the creation of a separate protected

¹²⁷ See, for example, Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40 Industrial Law Journal 315, 319; Manfredi, Vickers and Clayton-Hathaway (n67) 4.

¹²⁸ Equality Challenge Unit, Athena SWAN charter, <www.ecu.ac.uk/equality-charters/athena-swan/> accessed 9 April 2018.

characteristic of disfigurement¹²⁹ and the prohibition of general appearance discrimination, which already exists in France, Belgium¹³⁰ and some local laws (to varying degrees) in America¹³¹.

In addition to its awareness-raising potential, the partial separation of disfigurement into its own protected characteristic could provide an opportunity to resolve the uneasy relationship between the 'social model' disfigurement concept and the 'medical model' disability provisions, which lies at the root of much of the legislative friction identified earlier. The reference to 'partial' separation reflects the fact that the inclusive concept of disability in the CRPD would still encompass disfigurement, enabling the two concepts to retain a degree of unity over the disabling barriers they encounter.

However, separation would also bring difficulty. First, the law needs to ensure sufficient permeability to provide for 'complex' disfiguring conditions involving both visible difference and functional impairment. Given the failure of the Act to achieve this combination under the single characteristic of disability, it may prove even harder across characteristics. Second, the definition of disfigurement is likely to lead to problems similar to those already encountered, including the deterrent effect of the terminology of disfigurement, and a lack of clarity of scope; in the words of one American author:

¹²⁹ Changing Faces, *Evidence (EQD0131)* (of Lords Select Committee on the Equality Act 2010 and Disability 2015). This document proposes a separate characteristic of *facial* disfigurement.

¹³⁰ Belgium prohibits discrimination due to physical or genetic characteristics.

¹³¹ Deborah Rhodes, *The Beauty Bias* (Oxford University Press 2010), 126.

‘It (...) seems an arbitrary distinction to say that an employer cannot refuse to hire a person who has a disfiguring scar on his chin, for example, but can refuse to hire someone whose chin is jutting or unusually shaped’¹³².

General appearance discrimination, on the other hand, avoids this difficult distinction; appearance is a spectrum which applies to everyone, there are no threshold tests of severity, or even disfigurement, to meet in order to qualify for protection. ‘Appearance’ also enables the blunt terminology of disfigurement to be removed.

However, general appearance laws bring their own complications. Some employers argue that hiring good-looking staff is a valid commercial consideration¹³³ and morally no different from hiring based on intelligence, which is outside of the individual’s control¹³⁴ in the same way as immutable appearance characteristics like hair colour and the size of one’s ears.

Much of the academic discussion about appearance discrimination addresses the concept not from a disfigurement perspective, but in terms of its ability to counter the ‘beauty is good’¹³⁵ stereotype (under which people subconsciously associate beauty with

¹³² Anonymous, 'Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance' (1987) 100 Harvard Law Review 2035, 2045.

¹³³ Robert J Barro, 'So you want to hire the beautiful. Well why not?' *Business Week* (USA <https://scholar.harvard.edu/files/barro/files/98_0316_hire_bw.pdf> accessed 1 March 2018; Samuel V. Bruton, 'Looks-Based Hiring and Wrongful Discrimination' (2015) 120 Business and Society Review 607.

¹³⁴ Barro, *ibid*.

¹³⁵ Karen Dion, Ellen Berscheid and Elaine Walster, 'What is beautiful is good' (1972) 24 Journal of Personality and Social Psychology 285.

positive character traits, and vice versa, as discussed in Part 1). While bringing this implicit bias into the public consciousness may benefit people who are visibly different, aligning disfigurement with the debate about how to determine nuances of appearance¹³⁶ may result in a diluted recognition of the reality of living with visible difference. One commentator opined that:

‘while early cases may involve plaintiffs with severe facial disfigurement, the concept of “mindless incrementalism” so familiar to employment law will likely soon take over ... those seeking to take advantage of a cause of action for appearance discrimination are soon likely to expand beyond the severely disfigured to the merely homely or unkempt’.¹³⁷

In the US, a few local appearance discrimination laws sit alongside equality law applicable to people with disfigurements in the Americans with Disabilities Act. Evidence suggests that most of the appearance laws are little enforced¹³⁸; but enforcement is only part of the issue and the potential of such laws to raise the public consciousness and change behaviours remains¹³⁹.

¹³⁶ Heather R. James, 'If you are attractive and you know it, please apply: appearance based discrimination and employers' discretion' (2008) 42 Valparaiso University Law Review 629, 660.

¹³⁷ James J. McDonald, Jr., 'Civil rights for the aesthetically- challenged.(physical appearance discrimination)' (2003) 29 Employee Relations Law Journal 118, 127.

¹³⁸ Rhodes, *The Beauty Bias* (n131) 127.

¹³⁹ *ibid* 139.

In summary, a range of steps could be taken to address the twin themes of legal scope and raised awareness. But choosing a path for reform is not straightforward. Underlying the different options for change, there are issues of self and group identity, in particular as regards the relationship between visible difference and disability. Low levels of reported disfigurement discrimination claims mean that the application of the legislation has not regularly received judicial scrutiny and, perhaps as a consequence, little public debate has taken place. Consultation may therefore prove a fruitful next step both in raising awareness and shaping changes to the law.

Conclusion

This article has argued that the Act fails to reflect the principles and standards of equality required by the CRPD and the social model of disability. The terminology, test and procedure of proving severe disfigurement themselves inhibit access to justice and fail to respect the dignity of people who are visibly different. The inclusion of a 'severity' threshold is inconsistent with both reports of the lived experience, which show the potential for more minor disfigurements to have profound social and psychological effects, and the lower 'substantial' threshold which applies to other types of impairment. It is conceivable that this has contributed to low levels of enforcement and awareness.

A failure to include progressively disfiguring conditions within the Act's remit not only fails to mitigate the unfairness of the severity threshold, but also creates inequality between people with a visible difference and people with other types of impairment.

Similarly, the Court's restrictive 'aesthetic' interpretation of the severe disfigurement provision creates an additional hurdle for claimants with complex disfiguring conditions.

Although the duty to make reasonable adjustments and the concept of perceptive discrimination may prove useful in some cases, there is still a need for increased awareness and guidance on these issues specific to disfigurement.

In conclusion, the current law on disfigurement in the workplace is not fit for purpose. It is a superficial nod to an issue which demands a more considered response.

With thanks to Professor Aaron Baker and Professor Jane Macnaughton, both of Durham University, for their comments.

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