

## Challenging the impact of digital exclusion

The DLA is seeking to enhance practitioners' ability to find test cases on aspects of discrimination law and to tie into the campaigning work of organisations working for equality in the UK. In this article Sally West, policy manager, and Christopher Brooks, head of policy, at Age UK respectively, and Declan O'Dempsey, barrister, Cloisters Chambers, explore Age UK's experience of non-digital access to services and the impact of digital exclusion on older people. They highlight the inequalities this creates and outline the legal context for aspects of digital exclusion, providing guidance on how such exclusion could breach equality and human rights law.

For many people the internet and digital technology are essential to the way they work, communicate, shop, manage their finances, access services, and enjoy entertainment. However, not everyone is online and some people who use the internet only do so for limited tasks such as emails or video calls. For some people being offline is a lifestyle choice, but many are excluded for reasons such as limited digital skills, lack of access, or cost.

Older people and those with disabilities, in particular, may be excluded. This often leads to people feeling cut off or finding daily life increasingly difficult. This could, to some extent, be addressed by helping people gain and increase their digital skills and by ensuring digital services and websites are easy to access. However, as technology is always advancing, it is likely there will always be some people who will not be able to fully engage in the digital world.

Age UK is urging the government to end the discrimination against people for not being online. Its campaign on digital exclusion – *Offline and Overlooked*<sup>1</sup> – raises the question of whether service providers, including the state, are fulfilling their legal obligations under the Equality Act 2010 (EA) in terms of provision for those who are digitally excluded.

### What is digital inclusion and digital exclusion?

Digital inclusion means having access to and being able to use the internet. A research project developing a UK benchmark for digital inclusion at a household level sets out this definition:

*A minimum digital standard of living includes, but is more than, having accessible internet, adequate equipment, and the skills, knowledge and support people need. It is about being able to communicate, connect and engage with opportunities safely and with confidence.*<sup>2</sup>

In this article when the authors refer to people who are digital excluded, they are referring to those who do not use the internet or who do not have the skills or confidence to carry out activities online.

### Who is digitally excluded?

Although the concept of digital inclusion is much broader than whether someone has access to the internet, national survey data on whether or not people use the internet provides a useful way of looking at factors associated with a higher risk of digital exclusion. The protected characteristics of age and disability under the EA are

<sup>1</sup> [www.ageuk.org.uk/our-impact/campaigning/offline-overlooked/](http://www.ageuk.org.uk/our-impact/campaigning/offline-overlooked/)

<sup>2</sup> [www.goodthingsfoundation.org/insights/developing-a-new-benchmark-a-minimum-digital-living-standard/#:~:text=A%20minimum%20digital%20standard%20of,opportunities%20safely%20and%20with%20confidence](http://www.goodthingsfoundation.org/insights/developing-a-new-benchmark-a-minimum-digital-living-standard/#:~:text=A%20minimum%20digital%20standard%20of,opportunities%20safely%20and%20with%20confidence)

**5.8 million people aged 65 or over... could not achieve the 'Foundation Level' of digital skills.**

particularly relevant when considering barriers to internet use. So, while nearly all younger people in the UK have used the internet in the last three months, this is not the case for 10% of people aged 65 to 74 years (around 700,000 people in the UK) and 34% of those aged 75 years or older (around two million people). Overall, in 2022, an estimated 2.7 million people aged 65 years or older in the UK had not recently used the internet, the majority of whom had never used it.<sup>3</sup> In any indirect discrimination claim such statistics will be of use in establishing the particular disadvantage at a group level.

Digital exclusion is also linked to disability. For all age groups, people who are disabled as defined by the EA, are less likely to be internet users than non-disabled people. The most recent publication of the ONS UK internet users statistics covers 2020.<sup>4</sup> These show that at that time 22% of people aged 16 and over were disabled as defined by the EA.

Among those aged 65 to 74, 34% were defined as disabled. In this age group, 79% of disabled people had recently used the internet compared to 89% of non-disabled people. Among those aged 75 and over, 47% were disabled people and 47% of these had recently used the internet compared to 62% of those aged 75 or over who were not disabled.

Access to computer equipment and the internet at home is also linked to age. In 2021, 94% of all adults aged 18 and over in the UK had access to the internet at home, including two per cent who had access but did not go online. Among those aged 65 and over, 80% had access including 7% who did not go online.<sup>5</sup>

Smartphone use is also less common among older people. In 2022, 58% of people aged 65 and over had a smartphone; in contrast, 95% or more of people aged between 16 and 54 had a smartphone.<sup>6</sup>

However, it is also important to look beyond access to and use of the internet. The annual Lloyds UK Essential Digital Skills benchmark provides a measure of the fundamental tasks needed to access the online world, and the essential digital skills needed for life and work. The most recent survey (2022) found that 30% of people aged 65 to 74, and 69% of those aged 75 or over could not achieve the 'Foundation Level' of digital skills meaning that they could not complete all eight of the most fundamental tasks considered to be required to use the internet safely and successfully. This amounts to 5.8 million people aged 65 or over.<sup>7</sup>

Those classified as having an impairment were less likely to reach the Foundation Level than those with no impairment and there were differences depending on the type of impairment. For example, the proportion who had Foundation Level skills was:

- 87% among those with no impairment
- 77% among those with mental health impairment
- 60% among those with physical impairment, and
- 55% among those with sensory impairment.

<sup>3</sup> Source: Age UK analysis of ONS analysis of quarterly Labour Force Survey, January - March 2021 projected to 2022. [www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/policy-briefing---facts-and-figures-about-digital-inclusion-and-older-people.pdf](http://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/policy-briefing---facts-and-figures-about-digital-inclusion-and-older-people.pdf)

<sup>4</sup> ONS Internet Users, 2020, released April 6, 2021, [www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/datasets/internetusers](http://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/datasets/internetusers). Accessed October 9, 2023.

<sup>5</sup> Ofcom, Online Nation, 2022 Report; [www.ofcom.org.uk/\\_data/assets/pdf\\_file/0023/238361/online-nation-2022-report.pdf](http://www.ofcom.org.uk/_data/assets/pdf_file/0023/238361/online-nation-2022-report.pdf)

<sup>6</sup> Ofcom. March 2023. Adult's Media Literacy Core Survey 2022 Data Tables. Table 20. [online] Available at [www.ofcom.org.uk/research-and-data/data/statistics/stats23#adultmediatracker](http://www.ofcom.org.uk/research-and-data/data/statistics/stats23#adultmediatracker). Accessed October 9, 2023.

<sup>7</sup> Age UK analysis of data from Lloyds Bank. November 2022. 2022 Consumer Digital Index. The UK's largest study of digital and financial lives. Essential Digital Skills Interactive Data Tables [online]; available at <https://www.lloydsbank.com/banking-with-us/whats-happening/consumer-digital-index.html>. Accessed April 12, 2023.

## Digital exclusion and access to local public services

Public authorities are prohibited from discriminating in the provision of their public functions and service provision under s29 EA, including in the terms on which the authority provides the service to the service user. S149 EA also requires authorities to have due regard to the need to eliminate unlawful discrimination and advance equality of opportunity between different groups. This public sector equality duty (PSED) will in particular impact on certain policy measures of local authorities.

Local authorities are increasingly adopting a 'digital first' approach where people are encouraged to access services and information online through their website. This is efficient for the provider and works well for the many people who are confident using digital systems. However, Age UK regularly hears from people who are finding it difficult to access local services if they are not online. Some examples include:

- applying for blue badges (which provide disabled parking)
- applying for housing benefit and council tax reduction (means-tested benefits to reduce rent and council tax)
- applying for social housing and bidding for properties
- paying at a parking meter – for example, in some areas people are expected to use an app, excluding those who do not use a smartphone
- buying visitors' parking permits.
- finding information about council services.

Some individuals and local organisations have told Age UK that in their area, some services which can only be accessed online. Those who cannot access them are told to ask for help with the online application from family, friends, or local organisations.

More commonly, there are alternative ways to contact the local authority or access services, but these may be hard to find out about or are difficult for people to use. For example, one local Age UK organisation explained that although its council provides a telephone service for blue badge applications, some people are told they need to claim online. Another said applicants have to '*argue with council staff*' to get a paper form. In some areas the offline alternative involves going to a council office to complete the application face-to-face which may be difficult for those with mobility problems or who do not have good public transport. Others face long waits to speak to someone on the telephone.

In June 2023 Age UK produced a report about applying for blue badges and other council services based on feedback from local Age UK organisations.<sup>8</sup> This survey of 61 Age UK partner organisations across England and Wales reported the difficulties people faced when applying for a blue badge and other support from their local authority due to pressure to apply online. It concludes that in most areas there is strong encouragement to access council services digitally which risks excluding people who do not use the internet. Age UK is encouraging councils to review their systems to ensure that those who are not online can easily find out about, and access, services.

## Using the Equality Act 2010 & the Human Rights Act 1998

These difficulties in accessing services raise questions as to whether local authorities are always fulfilling their obligations under the EA, and whether there are potential breaches of human rights under the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR).

Those advising or supporting disadvantaged groups should consider whether indirect discrimination in the provision of services/functions (ss19 and 29 EA) is occurring.

<sup>8</sup> *Applying for a Blue Badge and other council services if people are not online*, Age UK, 2023

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They should also consider whether there is discrimination in relation to the rights of these groups to respect for family and private life (Article 8) and the right to receive information (Article 10) under the ECHR, read with Article 14. In relation to disabled persons, consideration should also be given to the duty to make, in an individual case, reasonable adjustments. This is dealt with below.

When an authority is devising or reviewing its digital strategy, the PSED requires the minds of the decision-makers to be focused on the needs of the age and/or disability groups which are different to the needs of other age groups or non-disabled persons groups. Local activists can bring to the attention of the local authority decision-makers information which will need to be weighed by the decision-maker.

The PSED represents a pre-litigation campaigning tool in the hands of such activists. The guidance in *Hotak v Southwark LBC* [2015] UKSC 30; [2016] AC 811 [para 75] on the requirements to exercise the 'due regard duty' in substance and with rigour and an open mind can be emphasised. As can the factors mentioned in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [para 91] in relation to the timing of the consideration of the duty and the requirement for the authority to have a 'conscious approach and state of mind'.

In the context of digital exclusion, practitioners are likely to want to ask the authority whether it has taken into account the way in which those of the disadvantaged age or disability group are affected by online service provision and what consideration has been given to how such disadvantage could be mitigated. If there is a tendency for the provision by the local authority to result in indirect discrimination, it should be asked how it has had due regard to the need to eliminate unlawful discrimination in this area.

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As noted in *Cengiz and Others v Turkey* 48226/10 and 14027/11 European Court of Human Rights (Second Section) December 1, 2015, the right under Article 10 ECHR applies to the means of dissemination of information; any restriction imposed on such means necessarily interferes with the right to receive information. Even if no breach of Article 10 can be shown in a case, the discriminatory dissemination of information will need to be justified under Article 14 to avoid a breach of the disadvantaged group members' human rights.

Similarly, due to the way in which many services impact on the ability of individuals to establish and develop relationships with other people and the outside world, discrimination in respect of provision of access to services may have a similar effect in relation to Article 8 rights, which are likely to be engaged even if not breached. An interesting analysis of human rights arguments in relation to age can be found in [2013] UKFTT 522 (TC) (*LH Bishop Electrical Co Ltd v Revenue & Customs Commissioners*); Briefing 706 [2014] which appears to be the only case to have considered age-related human rights arguments in relation to online function provision.

In relation to disabled persons it is important to recall, first that the duty to make reasonable adjustments (ss20 and 21 EA) is owed to 'disabled people generally' in the context of provision of functions and goods and services (para 2(2) Schedule 2 EA). In addition, the service provider must also fail to comply with the duty in respect of an individual for an unlawful act to take place. When considering this aspect of the duty in the context of access to services and functions provided by a public authority, practitioners should consider asking how this aspect of the duty has been considered under s149 EA. The authority should have due regard to the need to eliminate unlawful discrimination by considering whether the provision, criterion or practice, physical feature or lack of auxiliary aid impedes persons with one or more kinds of disability (see *Roads v Central Trains Ltd* [2004] EWCA Civ 1919, and *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191).

Under s15 EA one or more disabled persons may be able to bring a claim against a service or function provider that, because of something (inability to use online services) arising from their disability, they are treated unfavourably.

With this, and with s19 EA, the defendant authority has the option to show, and the burden of proving, that the treatment or provision, criterion or practice was justified as an appropriate and reasonably necessary means of achieving a legitimate aim. Care should be taken to make any such defendant define the legitimate aims on which reliance is placed.

In the context of reasonable adjustment claims, in particular, it is important to define the service which is being provided properly (and realistically) in all cases. Online provision of information/services is simply the provision of information/services by some other means and no argument is likely to be accepted to the effect that moving access to services online renders them a completely different service to traditional services or functions. The provider is not obliged to change the nature of the service being provided (see *Edwards v Flamingo Land Ltd* [2013] EWCA Civ 801) but provision of offline services is similar to the request for an alternative means of interpretation (such as British Sign Language).

The question of how expensive the alternative means of service provision is will be important in different contexts, but in principally the same way:

- a) A putative adjustment may be seen as unreasonable if it is too expensive (but the service provider cannot pass on the cost of any reasonable adjustment to the disabled person).
- b) When seeking to justify the provision, criterion or practice which excludes the (age or disability based) disadvantaged groups (or when seeking to justify unfavourable treatment of disabled persons under s15) the provider can seek to invoke the expense of the alternative means provided that this does not amount to an argument that it is cheaper to discriminate.

When dealing with a claim for s19 EA discrimination against a public authority service or function provider, consideration should always be given to asking for details of whether and how the authority has had due regard under s149 EA. Arguably an authority must select its aims as well as its means having due regard to the aims in s149. If it does not do so, it may not be able to prove that the aims it has are lawful ones and/or that the means adopted are lawful. It will have much more difficulty justifying what appears to be unlawful indirect discrimination if due regard has not been had.

Finally, practitioners seeking to bring discrimination complaints arising from disability cases or failure to make reasonable adjustments should ensure that the provider is fully aware of the person's disability. Many cases will involve seeking injunctive relief in this area, so it is important to have pointed out the claimant's disability when requesting the adjustment or that the unfavourable treatment should stop, so that there cannot be any real question under s15(2) (knowledge of disability status) or in relation to the duty to make reasonable adjustments (where it is necessary to have knowledge of both the disability and that the claimant is likely to be disadvantaged).

### Access to health services

Digital transformation is seen as important in the modernisation of the health service and NHS England refers to '*websites and apps that make care and advice easy to access wherever you are*'.<sup>9</sup> For those online this has clear benefits, but it risks disadvantaging people who are digitally excluded. Age UK hears from people who are finding it harder

<sup>9</sup> [www.england.nhs.uk/digitaltechnology/](http://www.england.nhs.uk/digitaltechnology/)

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to access the health services they need because they are digitally excluded. Some examples are:

- Many GP surgeries are strongly encouraging patients to book appointments online. While telephoning for an appointment may be an option, it can be very difficult to get through – people may have to hold on for a long time to only find all appointments have gone.
- Age UK has been told that some surgeries are no longer allowing people to request repeat prescriptions over the telephone. One enquirer said her mother was very upset as she had been told she would have to go to the surgery in person which was very difficult for her to do. Her only option was to depend on others to order her prescriptions online.
- People are directed to online services to book hospital appointments. A woman in her 80s told Age UK she was only given the option to book a clinic appointment online.
- People are being encouraged to access services through the NHS app.<sup>10</sup> This gives access to GP services and other health services and enables people to, for example: book and manage hospital appointments, ‘shop around’ for where to go for treatment, and search for information and advice on conditions and treatments. People offline do not have the same options.

Patients waiting for treatment are told that they can look at [www.myplannedcare.nhs.uk](http://www.myplannedcare.nhs.uk) to find waiting times, support information and guidance on what to do while they are waiting. The authors are not aware of an offline alternative unless people are given a leaflet with their letter or at their referral appointment.

In examples such as these, it is not necessarily the case that people are denied access to health care and services altogether. However, because they cannot use the online systems, they may find it harder to do so, may have to depend on other people or, as in the case of finding information, may get more limited support. In some situations, these barriers may make people more reluctant to seek help. For example, one person told Age UK *‘Making an appointment with my GP surgery seems so complicated now, I don’t like to try.’*<sup>11</sup>

As with local authority services, there are questions about whether health services are fully considering the needs of digitally excluded people. Practitioners should be astute to consider how the behaviour of health providers can be altered in this respect. For NHS providers early intervention relating to the PSED may be sufficient to change behaviour to make it more inclusive. However the full array of ss15, 19, 20, 21 and 29 EA should also be considered.

### **Private sector products and services**

The increased use of digital technology is also transforming the way the private sector provides services and products. Plainly the range of legal challenges available in relation to private sector providers does not include the PSED or HRA challenges directly, although the interpretive effect of ECHR rights will influence the interpretation of the duties owed by private providers (s3 HRA).

Closure of local bank branches driven by the move to online banking is an issue which Age UK hears about regularly with some people now expected to travel many miles to the nearest branch. Even among older people who use the internet for some activities, not everyone wants to, or feels able to bank online with security concerns being a

<sup>10</sup> [www.nhs.uk/nhs-app/about-the-nhs-app/](http://www.nhs.uk/nhs-app/about-the-nhs-app/)

<sup>11</sup> Age UK Older People’s Health and Care online survey, promoted through Age UK networks and on social media, October 4 – 27, 2022

major issue. Among internet users, 51% of people aged 75 or over and 41% of those aged 65 to 74 do not bank online or do so less than once a month.<sup>12</sup>

Those who are digitally excluded can also face higher costs for a range of products and services. For example, online-only savings accounts may offer higher rates of interest; supermarkets can provide reductions for those who download their app (so only for those with a smartphone); and, a specific example, Royal Mail provides a discounted rate for some parcel services arranged online in comparison to the price of services purchased at the post office.<sup>13</sup>

Accessing customer services can also be more difficult if people are not able to go online to contact companies. Age UK regularly hears of the difficulties people face in accessing customer services such as contacting energy companies. It can often be hard to find the number in the first place; people may face a range of push button options (hard for people with certain conditions e.g. hearing impairments, arthritis), and then may face a long wait to get through.

### Challenging digital exclusion

In order to highlight the extent and impact of digital exclusion, and to encourage public and private sector organisations to ensure that their services are accessible to everyone, Age UK's *Offline and Overlooked* campaign is calling for:

- All public services, including the NHS, council services and other nationally-provided public services, to offer and promote an affordable, easy to access, offline way of reaching and using them.
- The government must make sure local governments receive enough funding to provide offline services.
- Much more funding and support to enable people who are not computer users, but who would like to be, to get online.
- The government should lead on the development of a long-term, fully-funded national Digital Inclusion Strategy to support people of all ages who want to go online to do so (the last such strategy was produced in 2014).
- Banks must accelerate the roll-out of Shared Banking.

One of the most effective levers for change or accommodation is changing the mindset of the public sector providers of services and functions. Practitioners should consider working with local or national groups to engage with these authorities in their decision-making processes, encouraging them to have due regard to the needs of the members of these age and disability groups, and supporting them to consider the need to provide alternative means of service provision.

Practitioners should consider (a) whether there are individual test cases which can probe the lawfulness of some of these practices outlined above and (b) whether there are group litigation cases which would more effectively change the practice of businesses and authorities in respect of these matters.

Although Age UK is unable to provide funding to support legal cases, it is interested to learn about any relevant examples of cases which readers are currently working on, or have undertaken in the recent past, in order to assist its campaigning work. If you would like to get in contact, please email [policy@ageuk.org.uk](mailto:policy@ageuk.org.uk).

<sup>12</sup> Age UK analysis of Understanding Society: Wave 12, 2020-2021 [data collection]. 17th Edition. UK Data Service. SN: 6614, DOI: 10.5255/UKDA-SN-6614-18. Downloaded February 21, 2023. Available at <https://beta.ukdataservice.ac.uk/datacatalogue/studies/study?id=8806>

<sup>13</sup> [www.royalmail.com/current-postage-prices](http://www.royalmail.com/current-postage-prices)

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