

How does, and should, the law ensure accessible spaces for learning in universities?

“Sometimes access comes up as a question, at other times as an answer, and at still other times it doesn’t come up at all”

Tanya Titchkosky, *Questions of Access: Disability, Space, Meaning*

The answer to this question begins with and depends upon a clarification of the exact meaning of “accessible spaces for learning”. The inexact treatment of this term has contributed to confusion surrounding the legal framework that ensures accessibility. Therefore, this essay begins by providing a precise yet nuanced definition of “accessible spaces in learning”. Relying upon this definition, this essay will then simultaneously discuss and critique three key aspects of the UK legal framework that attempt to ensure such spaces: the UN Convention on the Rights of Persons with Disabilities 2006 (“UNCRPD”), the Equality Act 2010 (“EqA”) and the Higher Education Act 2004 (“HeA”).

Definitional Challenges

Is the notion of “accessible spaces in learning” limited to the physical environment of the classroom or does it extend to lecture resources? To determine what constitutes an “accessible space for learning”, this essay begins with defining “accessibility”.

Accessibility can be superficially defined as “the practice of making information, activities, and/or environments sensible, meaningful, and usable for as many people as possible”¹. Thus, accessibility is an important consideration in designing inclusive environments for disabled persons. However, accessibility is a matter of degree: “[a]ccessibility is not something that is either true or false”². Accessibility also does not look the same in every circumstance. For instance, two individuals with dyslexia may have different access requirements; one may benefit from text-to-speech accommodations, and the other not. For these reasons, ‘accessibility’ is a difficult term to understand; by its nature, it is incapable of a static definition. The mere appreciation that accessibility “can only be measured in relation to a specific ability or scenario”³ aids in providing nuanced understanding of the term.

Through this dynamic conceptualisation of ‘accessibility’, this essay proposes the following definition of “accessible spaces for learning”: physical, mental and social spaces, where learning takes place, that have been designed to ensure meaningful participation and engagement from both disabled and non-disabled students, equally. “Accessible spaces for learning” in university would extend to labs, tutorials and online bulletins, while excluding other broader educational barriers like poor transportation links to campuses. It is in light of this definition that the essay will now consider how the law ensures such spaces, and makes recommendations on how the law should ensure these spaces.

¹ ‘What Is Accessibility: An Introduction’ (SeeWriteHear, 15 October 2020)

<lt;<https://www.seewritehear.com/learn/what-is-accessibility/>> accessed 8 September 2023

² Duggin A, ‘What We Mean When We Talk about Accessibility’ (Accessibility in government, 16 May 2016) <<https://accessibility.blog.gov.uk/2016/05/16/what-we-mean-when-we-talk-about-accessibility-2/>> accessed 3 September 2023

³ Duggin A, ‘What We Mean When We Talk about Accessibility’ (Accessibility in government, 16 May 2016) <<https://accessibility.blog.gov.uk/2016/05/16/what-we-mean-when-we-talk-about-accessibility-2/>> accessed 3 September 2023

The Current Legal Framework & Suggestions

This section provides a three-part detailed discussion of the UNCRPD, EqA and HeA, focusing on how these provisions currently form a legal framework that imposes duties upon Higher Education Institutes (“HEIs”) to provide accessible spaces for learning (as defined above) and suggests how these provisions should prospectively operate.

(i) *The UN Convention on the Rights of Persons with Disabilities (2006)*

The UNCRPD acts as a near universal consensus on the affirmation of the rights of disabled persons, while the accompanying Optional Protocol provides two implementation and monitoring procedures⁴ for the CRPD. It provides a procedure that enables an individual to bring complaints of breach of their rights to the UN Committee on the Rights of Persons with Disabilities and empowers this committee to undertake inquiries into systemic violations of the CRPD. The UK has ratified both the CRPD and the Optional Protocol⁵.

The UNCRPD ensures accessible spaces for learning in university by both generally insisting upon accessible design, and specifically calling for accessibility in education via Article 24. The general emphasis on “accessibility” can be found in Article 3, where accessibility is stated as one of the principles underlying the Convention. Moreover, the UNCRPD imposes a general duty on state parties “to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”⁶, and subsequently proscribes multiple undertakings for states to ensure the accessibility of the physical environment, transportation, information and communications technology, and other amenities open or provided to the public. This general duty under Article 9 encompasses a narrower duty on state parties to ensure HEIs provide accessible spaces for learning.

The Convention also imposes a specific duty on state parties to ensure that HEIs and universities ensure accessible spaces for learning, via Article 24, by reaffirming the right of disabled persons to education. In providing that state parties “shall ensure an inclusive education system at all levels and life-long learning”⁷, the Convention extends the obligation of ensuring inclusivity to universities. Although there have been previous international statements on the right to inclusive education⁸, “Article 24 of the CRPD is the first-time reference has been explicitly made to inclusive education in a treaty text.”⁹ Although the Convention does not explore what steps must be taken to ensure that universities are inclusive, it can be inferred from Article 3, that the notion of inclusive education is underpinned by “accessibility”. Moreover, the UN Committee’s General Comment on the scope of Article 24¹⁰, clarifies that fulfilment of the obligation to ensure inclusive education,

⁴ Fraser Butlin S, ‘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, 429

⁵ *Ibid* 429

⁶ UNCRPD, Article 9.1

⁷ UNCRPD, Article 24.1

⁸ See: The UNESCO Salamanca Statement and Framework for Action on Special Needs Education (1994)

⁹ Byrne B, ‘How Inclusive Is the Right to Inclusive Education? An Assessment of the UN Convention on the Rights of Persons with Disabilities’ Concluding Observations’ (2019) 26 *International Journal of Inclusive Education* 301, 302

¹⁰ Committee on the Rights of Persons with Disabilities, “General comment No. 4 on the right to inclusive education” 12th session, adopted 25 November 2016, CRPD/C/GC/4

requires the education system to be comprised of four interrelated features, one of which is accessibility (as expounded upon in Article 9).

Although the Convention attempts to ensure accessible spaces for learning in universities by imposing positive obligations on state parties and monitoring the fulfilment of these obligations, it is important to highlight that the UNCRPD and Optional Protocol has never been incorporated into domestic legislation. Instead, compliance with the UNCRPD is sought through various domestic legislation, such as the EqA¹¹, in spite of calls to incorporate the Convention to preserve disability rights following Brexit¹².

Therefore, the UNCRPD unfortunately does little in directly ensuring accessible spaces of learning in universities. However, it will be recommended that the EqA should be brought in line with the UNCRPD, to encourage a more progressive approach to understanding disability and accessibility.

(ii) *Equality Act 2010*

There are four ways in which the EqA aims to ensure accessible spaces for learning in universities.

First, the EqA protects disabled persons against indirect discrimination. Disability, as defined in S.6, is one of 9 “protected characteristics”¹³. S.19 prohibits indirect discrimination against persons possessing one of the “protected characteristics”. S.19 defines indirect discrimination as “a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic.”¹⁴ The prohibition of indirect discrimination ensures accessible spaces for learning in university, by imposing a duty on universities to ensure that features of the usual learning and teaching environment do not inadvertently disadvantage disabled persons.

However, the definition of disability under the EqA embodies a retrogressive attitude that inhibits the provision of accessible spaces for learning. The framing of S.6 is based on a “medical perception that the disabled persons experience is due to their impairments or health conditions.”¹⁵ In practice, this medical model of disability excludes a portion of disabled persons from falling within the protection offered by the act, especially those with unseen disabilities. The exclusionary nature of the S.6 definition is antithetical to ensuring accessible spaces for learning in universities. This essay suggests that the S.6 definition be reformulated to be brought in line with Article 1 UNCRPD, which focuses on the way society is ill-designed to accommodate disabled individuals. The value of this change in ensuring accessible spaces for learning in universities, is that it promotes an attitudinal shift away from the individuals’ impairments, towards identifying barriers the exist in educational environments.

Second, s.20 EqA ensures accessible spaces for learning by placing a positive duty upon institutions to make reasonable adjustments for disabled persons. There are three

¹¹ Laura Abreu, ‘The UN Convention on the Rights of Persons with Disabilities: UK implementation’ (2022) <<https://researchbriefings.files.parliament.uk/documents/CBP-7367/CBP-7367.pdf>> 08 September 2023, 8

¹² Ibid.

¹³ Equalities Act 2010, S.4

¹⁴ Ibid. S.19

¹⁵ Geffen R, ‘The Equality Act 2010 and the Social Model of Disability ’ (dissertation, Chartered Society of Physiotherapy London 2013)

requirements to the S.20 duty: a provision, criterion or practice must put a disabled person at a substantial disadvantage in comparison with persons who are not disabled¹⁶, the institution must take reasonable steps to avoid the disadvantage¹⁷ and provide auxiliary aids¹⁸. S.20 ensures accessible spaces for learning in university by imposing an anticipatory and reactive duty. The anticipatory duty requires reasonable adjustments to be made for all disabled person¹⁹, regardless of whether or not the university knows that a student has a disability. The reactive component of S.20 means universities may be required “to react to the needs of the individual student whose impairment is known to them”²⁰. Therefore, S.20 ensures accessible spaces for learning in university by requiring universities to both anticipate how their learning environments impact disabled students and address the access needs of individual students.

Thirdly, S.91 EqA places specific anti-discrimination duties upon HEIs. S.91(2) prohibits HEIs from discriminating against students in multiple ways, such as the manner in which it “affords the student access to a benefit, facility or service”²¹. S.91(3) explicitly prohibits universities from discriminating against disabled persons, including the way in which the HEI decides the terms on which it confers qualifications²². S.91(9) also reiterates the imposition of the duty to make reasonable adjustments for disabled persons. S.91 ensures accessible spaces for learning in universities by spelling out the duties of HEIs.

Fourth, S.149 EqA places universities under a public sector equality duty (PSED). S.149(1) outlines three duties under the PSED: eliminating conduct prohibited by the EqA, advancing equality of opportunity and fostering good relations between people from different groups. Although S.149 does not afford disabled students with a private remedy for a university’s failure to fulfil their PSED, S.149 ensures accessible spaces for learning in universities through its relationship with S.20: often the “discharge of the reasonable adjustment duty will provide evidence of compliance with the PSED”²³.

(iii) *Higher Education Act 2004*

The importance of the HeA in ensuring accessible spaces for learning rests in the establishment of the Office of the Independent Adjudicator (OIA) under Article 13. The OIA administers the independent student complaints scheme and is often tasked with addressing disability discrimination disputes between students and universities. Thus, the OIA ensures accessible spaces for learning in university in two ways.

First, the OIA can provide recommendations on how to meet a disabled student’s access requirements. Although the OIA does not have a regulatory function and has no powers over universities, “universities always implement the recommendations made and so conduct

¹⁶ Equalities Act 2010, S.20(3)

¹⁷ Ibid S.20(4)

¹⁸ Ibid S.20(5)

¹⁹ “Equality Act 2010 Technical Guidance on Further and Higher Education” (2014) <<https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf>> accessed on 8 September 2023, para. 7.19-21

²⁰ *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191

²¹ Equality Act 2010, S.91(2)(b)

²² Ibid. S.91(3)(b)

²³ Pauline Roberts P and Erich Hou, ‘The Best Education Money Can Buy? Disabled University Students and the Equality Act 2010’ (2016) 16 *International Journal of Discrimination and the Law* 143, 151

themselves as bound”²⁴. Second, the OIA provides a free mechanism for raising disability discrimination disputes. This ensures accessible spaces for learning in university by enabling disabled students to assert their rights to inclusive education, without financial constraints.

However, the capacity of the OIA has been drastically reduced by the ruling in *Maxwell*²⁵. The court held that it does not fall to the OIA to determine whether there has been a discriminatory breach of the EqA S.20 duty. Mummery LJ infamously stated that so long as the OIA decisions are reasonable, the courts “will be slow to interfere with”²⁶ OIA decisions and recommendations.

However, it is counter-intuitive to find that the OIA cannot make such declarations, for the question of whether the university acted reasonably in disability discrimination disputes will implicitly require an assessment of whether the alleged conduct was, in fact, discriminatory. Moreover, the reduction in the jurisdiction of the OIA serves to make the process of resolving disability discrimination disputes more onerous on students, financially and timewise. As highlighted by Christopher MacFarland

“The OIA will usually only consider a complaint after all of the University’s internal complaints procedures have been exhausted and these internal procedures are likely to take several months or longer to complete.”²⁷

As alluded to by MacFarland, even with the s.118(3) EqA 3-month extension on the time limit to bring discrimination claims from the OIA to the Court, there is a possibility that disabled students will run out of time to initiate court proceedings. This creates an unduly stressful situation for disabled students. Even if a student is within the time limits, resorting to the courts is a financial privilege only a few can afford, in light of reductions in legal aid. It is apparent that *Maxwell* has damaged the capacity of the legal framework to ensure accessible spaces for learning in universities, by unjustifiably reducing the jurisdiction of the OIA. This essay contends that *Maxwell* should be overturned and the OIA be statutorily empowered to make declarations as to whether a university’s actions are contrary to the EqA.

Conclusion

Upon reviewing the UNCRPD, the EqA and HeA, this essay concludes that the law ensuring “accessible spaces for learning” in universities should undergo two key changes. First, the EqA should be brought in line with the UNCRPD to promote a more progressive definition of disability. Second, *Maxwell*²⁸ should be statutorily overruled to empower the OIA to make declarations as to whether a university’s actions are contrary to the EqA, thereby providing a cost-effective and efficient source of redress for disabled students.

²⁴ Sue Ashtiany “Disability advice note for the office of the independent adjudicator.” (2011) <http://www.oiahe.org.uk/media/41286/ashtiany_report.pdf> accessed 7 September 2023

²⁵ *R (Maxwell) v OIA* [2011] EWCA Civ 1236

²⁶ *Ibid.* 23

²⁷ MacFarland C, ‘Not All Equality Claims Are Equal: Weaknesses in the Office of the Independent Adjudicator’s (OIA) Approach to Equality Act 2010 Claims’ (*Sinclair’s Law*, 27 January 2016) <<https://www.sinclairslaw.co.uk/news/not-all-equality-claims-are-equal-weaknesses-in-the-office-of-the-independent-adjudicators-oia-approach-to-equality-act-2010-claims/>> accessed 8 September 2023

²⁸ *R (Maxwell) v OIA* [2011] EWCA Civ 1236