Future Facing Disputes

Risk, Resilience and Reputation

Why businesses need to get digital accessibility right

In 2020, businesses had to switch overnight to online delivery of goods, services and other activities. Having gone online in haste, there is a significant risk that digital accessibility has not been 'baked in' to new solutions. Since the outbreak of COVID-19, there has been an increase in claims against corporates and governments for failing to make websites, apps and other digital technologies (e.g. payment terminals) accessible to people with disabilities.

This trend is set to continue as developments in AI are making it more efficient and affordable to "audit" websites and apps for compliance with accessibility standards. It is becoming easier for claimant law firms to discover potential claims (although also for organisations to investigate and therefore prevent and remedy digital accessibility problems). As many aspects of our lives continue in virtual or hybrid formats, a raft of claims, including class actions, could be on the horizon.

In this paper we look at the risk of digital accessibility claims being brought and what actions businesses should be taking in anticipation.

While the focus of this article is on the law and risks of non-compliance, it goes without saying that digital accessibility is an issue of human rights (Article 9 of the Convention on the Rights of Persons with Disabilities, which the UK has ratified). It also just makes good business sense.

What is the law in the UK?

The law prohibits discrimination on the basis of disability in the context of providing goods, services and facilities (whether or not for payment), including websites, apps and other digital goods and services. The same prohibition applies where businesses provide digital technologies internally, for example an intranet for employees.

This prohibition is contained in the Equality Act 2010. A person who cannot access a website or app, or cannot access it to the same extent as other users, may have a claim for discrimination on the basis that they have not been provided with a good, service or facility, or on the basis that there has been a breach of the duty to make reasonable adjustments.

There is no clear guidance for the private sector on what level of digital accessibility they need to meet. It is likely, however, that courts would use the *W3C Web Content Accessibility Guidelines 2.1 AA* (**WCAG**) as an influential guide. WCAG is a globally accepted industry standard, although compliance with WCAG is not always enough in practice to make a technology accessible.

Since September 2018, public bodies have been under an obligation to ensure that new websites are accessible, previously published websites were accessible by September 2020 and all mobile applications are accessible from June 2021. This means making those technologies "perceivable, operable, understandable and robust" – a standard that the relevant regulations assume is met if the Harmonised European Standard on accessibility is met (this is currently EN 301 549 v2.1.2, which mirrors WCAG). These requirements are likely to impact on businesses from which government procures, for example, IT services.

Risks of non-compliance

Failures to ensure digital accessibility poses some legal risks to businesses, as well as reputational ones.

a) Complaints and investigations
First, a contravention of the Equality Act may be the subject of a complaint to the Equality and Human Rights Commission. The Commission has enforcement powers, including to investigate alleged or suspected breaches of the law, issue a compliance notice which may then be enforced in a court or tribunal, and/or enter into binding agreements with organisations as to remedial steps compliance with which is then monitored by the Commission. The Commission may also bring, or intervene in, legal proceedings in relation to a breach.

b) Litigation, including class actions
Second, individuals may sue for compensation for breaches of the Equality Act. Where the Court finds that there has been a contravention, it has wide discretion as to the order that it can make including an award of damages (including for distress), an injunction and/or a declaration.

In the US, as at 9 September 2020, there were at least 10 separate class actions for alleged failure by corporates to make their websites or applications accessible to people who are visually or hearing impaired. These actions covered 53 defendants, many of them household names, ranging from online retailers of consumer goods, medical supplies and motor vehicles to colleges and universities. Similar claims have been threatened in the UK by two specialist claimant class action firms.

Although England & Wales is not a jurisdiction with a tradition of US-style class actions, such an action is not untenable. For example, a claim such as this could be brought as an opt-in group litigation where there are multiple claims that give rise to "common or related issues of fact and law", or as an opt-out representative action provided the claimants can show that "more than one person has the same interest in a claim". The "same interest" test has to date been interpreted narrowly by the courts, although the Supreme Court is likely to clarify this in 2021 in the appeal from *Lloyd v Google* [2019] EWCA Civ 1599.

Although no court proceedings for failures in digital accessibility have been pursued through to judgment – the few that have been brought have been settled – utilising a class action mechanism would allow multiple claims to be aggregated such that they may not only pose the risk of reputational harm and setting a precedent, but also pose a risk financially.

What should organisations be doing now?

With our home and work lives more dependent than ever before on digital technologies, it is only a matter of time before greater financial consequences and reputational damage are felt by those who fail to take steps now to ensure that their digital goods, services and workplaces are accessible.

As with most areas of compliance, taking some simple, proactive measures now has the potential to save significant difficulties later. This is all the more important when it comes to digital accessibility because experience shows that building accessibility into the design of digital technologies from the outset is significantly easier and more cost-effective than it is to retrofit for accessibility.

With this in mind organisations should:

1. **Develop policies and procedures, including in respect of design and development agreements with their suppliers.** They should ensure that, in circumstances of urgency, digital accessibility is still considered methodically and robustly from the outset to avoid contravening the Equality Act.
2. **Audit their websites, apps and other digital technologies to ensure that they are accessible at least to the WCAG standard.** We recommend that, whenever possible, businesses engage specialist human accessibility testers to conduct this audit in addition to software detection products, as it is widely recognised that the latter still has significant limitations.
3. **Consider and respond to complaints about digital accessibility promptly and carefully to avoid ending up subject to enforcement action or legal proceedings.**

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