PERCEIVED DISABILITY DISCRIMINATION AND THE DEFICIENT EQUALITY ACT: INTERPRETIVE AND LEGISLATIVE REMEDIES

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ABSTRACT

The Equality Act 2010 was intended to extend to cover perceived discrimination, such as dismissing a turbaned Sikh barista under pressure from customers mistaking him for a Muslim. Such mistakes are rooted in stereotyping, fear, and prejudice. *Disability* discrimination is particularly prone to these attitudes, but the Act's inadequate drafting renders perceived disability discrimination claims exceptionally difficult. This paper suggests some innovative interpretive solutions, but ultimately recommends statutory reform.

1. INTRODUCTION

When Elizabeth McDougall's job offer was withdrawn upon the disclosure of a previous mental illness, her claim for disability discrimination failed because she did not have a legally recognised 'actual' disability (it was short-term and unlikely to recur).[1] The case predated the possibility of claiming *perceived* disability discrimination, which *should* resolve such acts of stereotyping, fear, and prejudice.[2] However, even under the statutory reforms intended to cover perceived discrimination, it remains unlikely that her claim would succeed.

The cause is inadequate drafting. It fails to implement policy, expressed most recently in the Explanatory Notes to the Equality Act 2010, providing an example of an employer rejecting a job application from a white man, wrongly thinking he is black because of his African-sounding name.[3] Similarly, an employer may dismiss a turbaned Sikh barista under pressure from customers mistaking him for a Muslim (notably in the wake of the 9/11 attacks, or anniversaries).[4] The mistakes are rooted in stereotyping, fear, and prejudice. These attitudes also underpin perceived *disability* discrimination, which is particularly prone to 'society's accumulated myths and fears'[5] and 'neglect, ignorance, prejudice and false assumptions'.[6] Thus, applicants reluctant to lift heavy objects, or frequently asking for questions to be repeated, or with a record of a physical or mental impairment (*McDougall*), may be rejected on the misperception that each has a disability.

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[1] *Richmond Adult Community College v McDougall* [2008] ICR 431 (CA).

[2] The reform was as a result of EU law: Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, reported several months after *McDougall*. See text to n 17.

[3] Equality Act 2010 (EA 2010), Explanatory Note 63.

[4] Human Rights Watch, '"We are Not the Enemy" Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arabs or Muslims after September 11', Vol 14 No 6 (G) November 2002, p 15 < https://www.hrw.org/reports/2002/usahate/ >; EEOC Guidance, Example 3 < https://www.eeoc.gov/laws/guidance/religious-garb-and-grooming-workplace-rights-and-responsibilities#_ftn5 > both accessed 12 August 2022.

[5] *School Board of Nassau County v Arline* 480 US 273, 284 (US Supreme Court, 1987).

[6] UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No.5: Persons with Disabilities, E/1995/22, 9 December 1994, para 15 < https://www.refworld.org/docid/4538838f0.html >. Cited, *Guberina v Croatia* (2018) 66 E.H.R.R. 11, [29]. Accessed 12 August 2022.

The inadequate drafting is a result of a desire to compress perceived discrimination into the standard formula for direct discrimination, requiring *less favourable* treatment *because of* a protected characteristic, such as race, sex, or disability.[7] This was intended to cover a number of nuanced scenarios beyond a rudimentary act of prejudice ('no women need apply'), but fails fully to capture perceived discrimination, which differs in principle and structure. The problem stems from two issues with the drafting.

First, it is unlikely that a defendant would perceive all the elements of the uniquely complex definition of disability (requiring an impairment to have a long-term substantial effect on day-to-day activities). Second, (a problem shared with other protected characteristics), proving the 'less favourable' element suggests a comparison of how the defendant would have treated another without the disability. Given that the claimant has no actual disability, such a comparison is futile.

This paper identifies the technical shortcomings and offers some interpretive solutions, but ultimately recommends statutory reform. On the first problem, the interpretive solution is that rather than requiring the perception to coincide with the complex definition of 'a person with a disability', it should relate to a 'generalised concept of disability', which can be squared with provisions elsewhere. On the second, the comparative scenario is envisaged without the *attribute* that prompted the misperception, such as the turban, or reluctance to lift heavy objects, or frequent requests for questions to be repeated, or record of impairment.

These rather innovative solutions are not wholly adequate though, and statutory reforms are recommended. As well as defining 'a person with a disability', there should be an additional definition of somebody 'perceived to have an impairment'. There are three possibilities for reforming the comparison. The first is that attributes prompting the perception should not form part of the comparative scenario. The second is to envisage how a different employer would have treated the claimant. The third is to drop the comparison altogether for perceived disability discrimination. The recommendations need not lead to unmeritorious litigation. These solutions and recommendations follow a brief account of the origins and underlying policy considerations of perceived discrimination.

2. ORIGINS OF PERCEIVED DISCRIMINATION

The first hint in Britain came in 1983. On the Race Relations Act 1976, Lord Fraser wrote,

> A person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous.[8]

This observation was cited in 2003 when endorsing perceived discrimination in the Explanatory Notes to British legislation introducing sexual orientation and religion/belief discrimination laws. The Note also stated that individuals could sue without disclosing their sexual orientation, or religion/belief.[9] Likewise, a worker being abused with mental-health epithets should be able to complain without disclosing any actual mental health impairments. The principal aim of this policy is to protect those with an actual protected characteristic, but by doing so, it throws a protective blanket over anyone suffering discriminatory treatment, irrespective of whether they possess a relevant protected characteristic.

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[7] EA 2010 s 13, which is set out below, with its EU counterpart, text to n 66. The principal protected characteristics under EU and UK law are sex, race, gender reassignment, disability, sexual orientation, religion or belief, and age (EA 2010, s 4).

[8] *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) 563.

[9] Explanatory Notes to the Employment Equality (Religion or Belief) Regulations 2003, 2003/1660 and Employment Equality (Sexual Orientation) Regulations 2003, 2003/1661, paras 24-25. This Note cited in support Lord Fraser's dictum cited above, from *Mandla* (ibid).
< https://webarchive.nationalarchives.gov.uk/20050303225921/http://www2.dti.gov.uk/er/equality/so_rb_longexplan.pdf > accessed 12 August 2022. For harassment see *English v Sanderson Blinds* [2008] EWCA 1421 [39] (Sedley LJ). See text to n 73.

The wrongs underpinning the dedicated legislation for perceived *disability* discrimination in the United States[10] can be found in the Congressional history. 'Discrimination against people with disabilities . . .often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies'[11] as well as 'stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals'.[12] The result is, 'that unfounded concerns, mistaken beliefs, fear, myths, or prejudice about disabilities are often just as disabling as actual impairments, and its corresponding desire to prohibit discrimination founded on such perceptions'.[13]

Parliament continued its policy, recognising perceived discrimination in the main body of legislation for the first time in the 2006 Equality Act (outlawing religious discrimination in the supply of goods, services, and premises); this recognised a religion or belief 'to which he is thought to belong or subscribe'.[14] Meanwhile, for sex, gender reassignment, age, and disability, liability was confined to treatment because of the *victim's* protected characteristic.[15] These anomalies were swept away by the Equality Act 2010, providing a harmonising 'open' definition of direct discrimination, intended to cover perceived discrimination for all but two specified protected characteristics.[16]

This harmonisation was in response to *Coleman v Attridge Law*,[17] where the European Court of Justice (ECJ) stated, 'The principle of equal treatment… applies not to a particular category of person but by reference to the grounds mentioned in Art.1'.[18] This edict, albeit from a case on associative disability discrimination,[19] was broad enough to encompass perceived discrimination. What was not expressed in these developments was the inherent shift of focus away from the status of the victim (or an associated third party), and with it the comparison, something seemingly indispensable in the EU and UK form-based regimes. The focus shifts to the defendant's perception and nature of the conduct.

Irrespective of any doctrinal shifts, as this brief history shows, Parliament expressed repeatedly a clear intention that perceived discrimination, including perceived disability discrimination, should be covered by the Equality Act 2010. However, the Act fell short of specifying 'perceived discrimination' in the main text. This was from a fear of inadvertently narrowing the scope of the open definition of direct discrimination.[20] This well-intended omission failed to anticipate the inadequacy of the Act's provisions.

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[10] Americans with Disabilities Act (ADA) 1990. See (n 95) and accompanying text.

[11] Sen Tom Harkin, chief sponsor and principal author of the ADA. Committee for Education and Labor, HR Rep No 101-485(II) (1989-1990) at 30. More of the report can be found here <. https://www.congress.gov/congressional-report/101st-congress/house-report/485/2 > accessed 12 August 2022.

[12] ibid, at 40.

[13] Committee for Education and Labor, HR Rep No 110-730 (I) (2007-2008) at 13. < https://www.congress.gov/congressional-report/110th-congress/house-report/730/1 > accessed 12 August 2022.

[14] EA 2006, s 45(2), in force 30 April 2007, repealed 30 September 2010 by the EA 2010 (sch 27(1) para 1) which absorbed religious discrimination in goods, services, and premises (s 29).

[15] Respectively, SDA 1975, s 1(1)(a), 2A(1)(c); Employment Equality (Age) Regulations 2003, 2006/1031, reg 3; DDA 1995, s 3A(1). Also not covered was sexual orientation discrimination in goods, services, and premises: The Equality Act (Sexual Orientation) Regulations 2007 SI2007/1263, reg 3(1).

[16] EA 2010, Explanatory Notes 63 and 94. Excluded from this are Marriage and Civil Partnership (s 13(4)), and Pregnancy or Maternity (ss 17, 18).

[17] Case C-303/06, [2008] 3 CMLR 27. See Written Statement by Leader of the House of Commons (Harriot Harman), HC Deb 2 Apr 2009, Col 88W
< https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090402/wmstext/90402m0003.htm > accessed 12 August 2022.

[18] ibid, paras 38 (and 50). The 'grounds' here were sexual orientation, religion or belief, disability, and age ('Framework' Directive 2000/78/EC, art 1).

[19] Less favourable treatment of a person without a relevant protected characteristic because of their association with somebody with the relevant protected characteristic. In *Coleman* (ibid) the employer discriminated against a mother because her baby had a disability.

[20] Equality Bill Deb 17 June 2009, cols 253-254 (Solicitor-General).

Each drafting problem, with its proposed interpretive solution, is taken in turn below: first, perceiving the 'features' of disability, and second, the comparison. Following this, the order is repeated for the recommended statutory reforms.

3. PERCEIVING THE 'LEGAL FEATURES' OF DISABILITY

A. The Functional Requirements

There are three broad models to define disability: medical, functional, or 'social barrier'.[21] The medical model is centred on the 'health status' of the individual. Its response is cure, rehabilitation, or prevention. This excludes notions of societal inequality and inaccessibility. Legal definitions tend towards the functional model, recognising disability as an impairment that substantially affects normal day-to-day activities. The requirement for an impairment gives this a medical dimension, although it does not require a medically recognised illness.[22] Otherwise, it focuses on what the individual can and cannot do, and the obligation on society to enable the individual's participation in civil life. Exceptionally, the Equality Act 2010 identifies some impairments under the 'social barrier' model, such as severe disfigurements and HIV status.[23] It does this by deeming such impairments to have the requisite functional effects. This is recognition that the 'obstacle' to participation in civil life is the reaction to a person's impairment, rather than the person's ability to participate.

The functional requirements are included in the principal definition of disability provided by the Equality Act 2010, section 6(1):

> 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.

This comprises four elements, or 'features'. The first is an impairment, followed by three functional elements: a long-term, substantial, adverse effect on normal day-to-day activities. However, these are loaded with nuances and exceptions. For example, although the impairment need not be a recognised medical condition,[24] hay fever is excluded, as are addictions (unless from medical treatment), exhibitionism, voyeurism, and tendencies to set fires, steal, or physical or sexual abuse of others.[25] 'Day-to-day' includes work activities, although there is some 'post-Brexit doubt' as to whether this includes *specialist* work activities.[26] 'Long-term' means *either*: (a) it has lasted at least 12 months; (b) is likely to last at least 12 months; or (c) it is likely to last for the rest of the life of the person affected.[27] 'Likely' here means 'could well happen' rather than 'more likely than not'.[28] 'Substantial' means simply

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[21] For a summary, see, A Broderick and D Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge: CUP, 2019) chapter 1, pp 18-27.

[22] See e.g. *J v DLA Piper* [2010] IRLR 936 (EAT) (employment tribunal erroneously distinguished depression from *clinical* depression when rejecting as claim); *College of Ripon & York St John v Hobbs* [2002] IRLR 185 (EAT).

[23] EA 2010, sch 1, Part 1, para 3 (disfigurements) and para 6(1).

[24] (n 22).

[25] SI 2010/2128, respectively, reg 3; reg 4(2) & (3); reg 4(1).

[26] See text et al to n 39.

[27] EA 2010, sch.1, para.2(1).

[28] *SCA Packaging v Boyle* [2009] UKHL 37. The case centred on the effect of medical treatment (now EA 2010 Sch.1 para.5), but the House included long term effects in its reasoning: ibid [52], [78], (Lady Hale), [81] (Lord Neuberger), [78] (Lord Brown). See also, Guidance on matters to be taken into account in determining questions relating to the definition of disability, para C3. Made under EA 2010, s 6(5).

'more than trivial'.[29] As noted above, exceptions to the functional requirements include severe disfigurements, Cancer, HIV infection and multiple sclerosis, which are deemed to be disabilities without more.[30] Other 'progressive' impairments are recognised when there are *insubstantial* effects which are likely to become substantial.[31]

It can be appreciated from this, that the possibility that an employer *misperceived* a disability is quite remote. The difficulty was voiced in 2010 by Underhill J:

> If a manager discriminates against an employee because he believes her to have a broken leg, or because he believes her to be 'depressed', the question whether the effects of the perceived injury, or of the perceived depression, are likely to last more or less than 12 months may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived 'depression', may it be clear what he understands by the term).[32]

This assumes that an employer's mistake of fact that a victim has a disability must be consciously aligned with the complex legal definition(s) of disability. Bear in mind that the nuances and exceptions highlighted above are drawn from a vast range of sources. Section 6 is accompanied by a Schedule, dedicated secondary regulations, *and* statutory Guidance.[33] To give an idea of the difficulties here, the Industrial Relations Law Reports contain 19 cases on the meaning of direct disability discrimination, 13 on the meaning of discrimination arising from disability, 48 on reasonable adjustments,[34] and 338 on the definition of disability. Meanwhile, there were 49 cases on the definition of race, and 19 on religion or belief.[35]

In an apparent, but unacknowledged, revision of his dictum, Underhill LJ approved a statement that the perception will not depend on the defendant's knowledge of disability law, but whether they perceived the victim 'to have an impairment with the features which are set out in the legislation'.[36] This suggests that perceived disability discrimination depends on a mistake of fact, and not a mistake of law. But this is too simplistic. It must mean that the perception of fact coincides with the legal definition. To adapt Underhill's J example, the manager wrongly thinks that the employee with a broken leg will be on crutches for at least a year, and thus unable to perform the job. This perception coincides with the long-term requirement. From this, it is reasonable to suppose that an employer's job description incidentally would reference the legal definition. Thus, for an envisaged long-term appointment, an employer perceiving that an applicant could not meet the job description might have thought also that this inability 'could well' last beyond 12 months.

As it happened, such a scenario arose in the first reported UK case on perceived discrimination, *Chief Constable of Norfolk v Coffey*.[37] Here, an employer, aware that a candidate's declared hearing problem did not amount to a disability, wrongly assumed that it would deteriorate to the point where she would become incapable to do the job. The perception neatly coincided with the *likely* long-term element, completing the legal definition of disability. Nevertheless, beyond such fortuitous circumstances, problems remain.

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[29] EA 2010, s 212(1) codifying *Goodwin v The Patent Office* [1999] ICR 302 (EAT) 310 (Morison J). See also Guidance (ibid) para A1.

[30] EA 2010, sch 1, Part 1, para 3 (disfigurements); para 6(1).

[31] ibid, sch 1, para 8; Guidance (n 28) B18-B20. Conditions include systemic lupus erythematosis, various types of dementia, rheumatoid arthritis, and motor neurone disease, but this is not an exhaustive list.

[32] *J v DLA Piper* [2010] ICR 1052 (EAT) [62].

[33] Respectively, EA 2010, sch 1, Part 1; Equality Act (Disability) Regulations 2010, SI 2010/2128; 'Guidance (n 28).

[34] EA 2010, ss 13, 15, 20-21, respectively.

[35] IRLR 'Index-Casemarks', as at 1 May 2022.

[36] *Chief Constable of Norfolk Constabulary v Coffey* [2019] UKCA 1061 [35] citing [2018] ICR 812 (EAT) [51] (Judge Richardson).

[37] [2019] EWCA Civ 1061. In *Chief Constable of Lothian and the Borders Police v Cumming* (EAT, 29 July 2009) UKEATS/0077/08/BI, perceived discrimination was not pleaded upon very similar facts. In *J v DLA Piper UK LLP* [2010] IRLR 936 (EAT) perceived disability discrimination was alleged, but the case was resolved on an issue of actual disability.

First, whereas a job description may prompt an employer to consider an applicant's abilities from the point of recruitment, it is unlikely to prompt a similar consideration solely in the past, to coincide with the usual already-fulfilled 12 month requirement, for example. Nor would it arise if the job is short-term. Moreover, this does not account for those employers acting upon the impairment alone. As Underhill's J caution acknowledges, this is a more likely scenario, and includes the policy-driven mischiefs of stereotyping, fear, and prejudice, or perhaps, a resistance to making reasonable adjustments.[38] The employer in McDougall's case may have acted out of prejudice towards mental illness, rather than a misperception that its effects could impair her job performance. Indeed, the 'legal features' requirement provides a perverse incentive for defendants to ignore the effects of any impairment, and instead act upon stereotyping, fear, or prejudice. If McDougall's case arose today, the employer would be advised to admit only that it acted out of prejudice towards mental illness, and gave no thought to its effects.

Second, there are some uncertainties regarding the legal definition of disability. There is post-Brexit doubt regarding specialist occupations. While 'day-to-day activities' under the Equality Act 2010 was not intended to extend to 'highly specialised activities', such as playing the piano to a concert standard,[39] the ECJ defined disability as an impairment that hinders the person's participation in *professional life*,[40] suggesting that all occupations are covered, no matter how infrequent or specialist are the skills required.[41] There is also conflicting authority as to whether 'excluded conditions'[42] include those resulting from a recognised impairment.[43]

Third, the 'legal features' requirement raises an anomaly. It might surprise readers of Underhill's LJ edict that no such requirements apply to actual discrimination. Take this example, suggested by the Government when introducing a conventional model of direct discrimination into disability law:

> [A]n employer, on learning that a job applicant has diabetes, summarily rejects the application without giving any consideration of the applicant's circumstances or whether the person concerned would be competent to do the job (with or without a reasonable adjustment).[44]

This employer cares not about job performance nor the effects of diabetes, but has acted upon stereotyping, fear, and prejudice. Suppose now that the employer was mistaken and the applicant did not have diabetes. While it could be said that a perception of diabetes is sufficient to fulfil the functional features (given that diabetes almost certainly has the requisite long-term effects[45]), this employer has not perceived those functional effects in order to coincide with the legal requirements. In any case, no such argument could stand for most impairments. Exchange 'diabetes' for 'depression', and the point is made. But the fundamental point is that for no apparent reason, the 'legal features' requirement makes proving perceived discrimination more demanding than proving actual discrimination, which undermines the policy goal of the Act.

These three problems demonstrate that the 'legal features' requirement can produce, anti-purpose perversity, uncertainty, and anomalies. This provokes a reconsideration of Underhill's LJ interpretation. What follows is an interpretation that aligns the statutory scheme with its purpose.

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[38] A conclusion of the ET in *Coffey*, cited with approval [2019] UKCA 1061 [78] and [76].

[39] Guidance (n 28), paras D5, D8-D9.

[40] Case C-13/05 *Chacon Navas v Eurest Colectividades SA* [2006] 3 CMLR 1123, para 38; Case C-335/11 *HK Danmark v Dansk almennyttigt Boligselskab ('Ring')* [2013] 3 CMLR 21, paras 38-39.

[41] See *Patterson v Commissioner of Police for the Metropolis* [2007] ICR 1522 (EAT) [66]-[67], approved, *Coffey* [2019] UKCA 1061 [53]; *Chief Constable of Dumfries and Galloway v Adams* [2009] ICR 1034 (EAT, Sc) [17]-[19]; *Sobhi v Commissioner of Police of the Metropolis* [2013] Eq LR 785 (EAT); *Cumming* (n 37) [20].

[42] Text to n 25.

[43] *Nuttall v Butterfield* [2006] ICR 77 (EAT), cf *Murray v Newham Citizens Advice Bureau* [2003] ICR 643 (EAT).

[44] Explanatory Notes to the *pre-consultation draft* DDA 1995 (Amendment) Regulations (SI 2003/1673), para.32; See also the previous Code of Practice Employment and Occupation (2004) London: TSO (ISBN 0 11 703419 3), para 6.7.

[45] Even in remission, it could well recur: < https://www.diabetes.org.uk/guide-to-diabetes/managing-your-diabetes/treating-your-diabetes/type2-diabetes-remission > accessed 12 August 2022.

B. **An interpretive solution: a generalised concept of disability - the 'section 4 approach'**

The suggestion here is to leave behind the section 6 requirements and suppose a 'generalised concept of disability'.[46] The phrase was deployed by an employment tribunal in a case where the claimant, having a history of anxiety insufficient to amount to a disability, was refused a transfer because of that history. The tribunal held that the employer was liable for acting on a generalised concept of disability. If claimants had to prove that a defendant perceived all four legal elements, the tribunal reasoned, their ability to claim perceived discrimination would be rendered 'virtually useless'.[47] The concept recognises when a defendant acts upon a stereotypical view of disability. However, rather than reading down section 6 to fulfil a policy goal, the concept can be aligned fully with the statutory language. The starting point is to appreciate that reliance on the 'four features' of section 6 is misplaced. Section 6 merely defines a *person* with an actual disability. Consider again the dismissal of the turbaned Sikh barista, mistaken for a Muslim.[48] For perceived discrimination, no proof would be required to show that the employer (or the customers) had in mind a working knowledge of religions to have made the mistake. They would not be asked to recite the five pillars of Islam, for example. Nonetheless, the perception falls within the legal protected characteristic of 'religion'. Much the same could be said about the 'African-sounding name' example.[49] The bigoted employer is liable despite not knowing if the name had origins and usage in Africa.

Now suppose an employer rejecting an applicant with a record of schizo-affective disorder, misperceiving her to have a disability (see *McDougall*). This employer knew nothing of the condition, nor its effects. The difference is that generalised concepts of Islam, and African names, readily fall under the respective legal terms religion (s 10) and race (s 9), while a generalised concept of disability can fail to satisfy the requirements of section 6. This is because only section 6 defines a *person* with a protected characteristic.[50] By contrast, the legislation makes no demand that a 'religious person' practices their faith, nor that a homosexual person has had a same-sex relationship, nor (more absurdly) that a woman wears feminine clothing or an older person exhibits stereotypical geriatric behaviour.

For perceived discrimination though, this distinction between disability and these other protected characteristics is illusory. The Equality Act 2010 provides, by section 4, that 'disability' is a protected characteristic, and that by section 6, 'a person has a disability' if fulfilling the 'four features'. Meanwhile, the definition of direct discrimination (section 13) requires less favourable treatment *because of* a protected characteristic (the 'reason' for the treatment). As is well known, the absence of a possessive adjective (*his* or *her* protected characteristic) was a deliberate piece of drafting. It is not confined to the victim's, or indeed anyone else's,[51] protected characteristic, but has a more generalised meaning. This was apparent in the *Coleman* dictum that influenced this drafting.[52] Thus, the word 'disability' when attached to section 13 does not necessarily allude to section 6, which, by defining *a person* with a disability, is relevant for other purposes, such as making reasonable adjustments, indirect discrimination, and discrimination because of something arising in consequence of the disability, all of which require that the claimant has an actual disability.[53]

Thus, if section 6 does not control section 13, it cannot be said to control a section 13 subspecies, *perceived* discrimination. Perceived discrimination is concerned with the *defendant's* mistake, and not the protected status of the claimant. It is thus more appropriate to relate the 'protected

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[46] *Fortt v Chief Constable of South Wales Police* (ET, 18 May 2015) Case No: 1601986/2014, [54] (Judge S Davies).

[47] ibid.

[48] Human Rights Watch, (n 4).

[49] EA 2010, Explanatory Note 63. See text to n 3.

[50] Along with disability, the Act defines a person by gender reassignment (EA 2010, s 7), marriage (s 8), and pregnancy (ss 17 and 18).

[51] *Showboat Entertainment Centre v Owens* [1984] ICR 65 (EAT) 73 (text to n 87).

[52] See above, text to n 18.

[53] EA 2010, ss 20-21, 19, and 15 respectively.

characteristic' in section 13 to section 4. Before developing this proposition, it is helpful to rehearse a rule of statutory interpretation.

English law is able to afford the same word or phrase, in the same statute, or across associated statutes, different meanings.[54] Moreover, House of Lords authority has for a long time considered context in a broad sense:

> [W]ords, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. ... I use 'context' in its widest sense, ... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia* [in the same matter], and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.[55]

The Explanatory Notes and legislative history are explicit that the legislation is intended to address perceived discrimination. There is nothing to exclude or limit perceived disability discrimination. As such, it is legitimate to allocate a different meaning to the word 'disability' in section 4 than in section 6. Indeed, it is the only sensible interpretation. Four arguments support this.

First, given that the perception of other protected characteristics can be generalised (as the above examples demonstrate), the same approach should be taken to disability. This interpretation, resting on an (albeit subtle) distinction between a generalised concept of disability and a person with a disability, is reconcilable with legislative framework, given that sections 4 and 6 can be afforded different meanings.

This leads to the second argument. If the legal features of disability were required as the *reason* for the treatment (under s 13), some blatant examples of actual disability discrimination would be immune, and with this a central purpose wrecked. In addition to the Government's 'diabetes' illustration (above),[56] more grievous examples can be envisaged. Suppose an employer includes in a job advertisement, 'no disabled need apply'.[57] As it appears, this exclusion does not meet the section 6 requirements. While it is arguable that the term 'disabled' equates to an 'impairment', the advertisement does not express the other features (substantial, long-term, day-to-day activities), or anything resembling them. As such, this advertisement could be distinguished from one expressed to exclude women, Muslims, Asians, Homosexuals, and so on. Yet, they would all contravene an expressed purpose of the legislation, that direct discrimination includes deterrents.[58] If section 6 controlled section 13 here, there would be no liability. The logical interpretation is that for disability, section 13 relates to section 4. This is not to argue that the person without an actual protected characteristic could claim to have been deterred in the circumstances.[59] The point is that section 6 does not necessarily control section 13. As such, there is no reason it should do for perceived discrimination.

This can be appreciated from the legislative history on discriminatory advertising, the third argument. As the above suggests, discriminatory advertising can be challenged by deterred individuals as direct discrimination within section 13. Prior to the Equality Act 2010, although equality legislation *expressly* outlawed discriminatory advertising, enforcement was reserved to the relevant enforcement body.[60] The Disability Discrimination Act 1995 outlawed advertisements that 'might reasonably be

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[54] e.g. in *Bracey v Read* [1963] Ch 88 (Ch), the word 'premises' in the Landlord and Tenant Act 1954 was given different meanings, including land upon which there were no buildings. See also *R v Allen* (1872) LR 1 CCR 367, ('marry' and 'married' given distinctive meanings). The phrase 'in a course of a business' was given different meanings for the SGA 1979 and its 'associated' statute, the UCTA 1977 (*Feldarol Foundry Plc v Hermes Leasing* [2004] EWCA Civ 747; *Stevenson v Rogers* [1999] 2 QB 1028 (CA), 1040E). Before then, the same phrase was ascribed a narrow meaning for the (penal) Trade Descriptions Act 1968, s 1 (*Davies v Sumner* [1984] 3 All ER 831 (HL)).

[55] *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436 (HL) 461 (Viscount Simonds).

[56] Text to n 44.

[57] See the previous Code: 'An employer may advertise internally for a promotion, stating that the post is not suitable for anyone with a history of mental illness, and exclude, unknowingly, a member of staff with a history of schizophrenia'. ('Disability Discrimination Act 1995 Code of Practice on Employment and Occupation' TSO (ISBN 0 11 703419 3.)

[58] EA 2010, Explanatory Note 63.

[59] Although, see *Rete Lenford*, below (n 62).

[60] For sex and race, see respectively, SDA 1975, s 38; RRA 1976, s 29.

understood to have indicated' that a job was open only to persons not having a disability.[61] This wording does not require that the advertisement should fulfil the 'four features' to be unlawful, just as there was not one requiring a specific racial description in parallel provisions at the time. These specific provisions were consolidated into the Equality Act's general edict against direct discrimination under section 13, which, in response to EU law, was intended to cover advertisements.[62] Given EU law, the Long Title of the Act, declaring that it was to 'reform and harmonise equality law' and 'increase equality of opportunity', the most logical interpretation of section 13 is that it must be levelled up. In this context it means that some references to disability must be as it 'might be reasonably understood', and not to the legal features of section 6.

The fourth argument is that it is not unreasonable for a generalised concept of disability to fall short of the section 6 requirements. It is not an affront to the notion of disability, for example, to suppose that somebody has a disability whether or not its effects are perceived to be long-term. Notable here are the Australian and Irish models, which do not demand any effects to be long-term.[63]

Before concluding, consideration is required of the situation where the general concept of disability is perceived via an attribute, say, an impairment, or a manifestation of the impairment. Ordinarily, there is an important distinction between treatment because of a protected characteristic and treatment because of an attribute per se. For example, a restaurateur's refusal to admit a person accompanied by a service dog need not necessarily amount to direct disability discrimination, but readily be analysed as 'discrimination arising from disability', or indirect discrimination, both of which require the claimant to have an actual disability, and in any case carry a general justification defence. For perceived direct discrimination, the reason for the treatment is the protected characteristic itself, albeit something existing only in the mind of the discriminator. However, it is well-established for actual direct discrimination, that the impairment can be identified via its effects,[64] and there seems to be no reason why this should not apply to perceived discrimination more generally, just as it is via the attribute of a turban, or African sounding name. Thus, a restaurateur prompted by a dog to (mis)perceive that its handler had, say, epilepsy, could be liable for direct discrimination for rejecting the person because of epilepsy, rather than because of the dog. Such cases should not be wrongly categorised into causes of action that will inevitably fail for the want of an actual disability.[65]

Although not perhaps envisaged by the drafters, section 4 provides a convenient home for section 13's 'because' question. Context and purpose point to this being the sensible *and* legitimate interpretation. Nonetheless, section 13's requirement for less favourable treatment, requiring a comparison, presents another, more general, obstacle to perceived discrimination claims.

4. THE COMPARISON

[61] DDA 1995, s 11; see also, s 10, and for sex and race, ibid.

[62] Explanatory Notes to the EA 2010, para 63. See Joint Committee on Human Rights, Legislative Scrutiny: Equality Bill; (26th Report, 12 November 2009) (2008-9, HL 169, HC 736) Part 8, para 56. See Case C-54/07 *Feryn* [2008] ECR I-05187 (ECJ) ('We will not hire Moroccans); C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (employer stating he would never hire homosexuals could be sued for direct discrimination by support group, even though no vacancy). For a similar case in the US, where the practice was held to be unlawful direct discrimination, see *Abrams v Baylor College of Medicine* 805 F.2d 528 (5th Cir. 1986). The ECJ has held that a person with *no* interest in a post cannot sue, C-423/15 *Kratzer v R+V Allgemeine Versicherung AG* [2016] ICR 967, as has the EAT: *Keane v Invstigo* (11 December 2009); *Berry v Recruitment Revolution* (EAT, 6 October 2010).

[63] Respectively, DDA 1992, s 4 'disability'; Employment Equality Act 1998, s 2 (under "Disability"). Both accessed 12 August 2022.

[64] See *College of Ripon & York St John v Hobbs* [2002] IRLR 185 (EAT) [32] (Lindsay J), approved *Millar v Inland Revenue* [2005] IRLR 112 (CSIH) [18]; *McNicol v Balfour Beatty* [2002] EWCA Civ 1074 [21]; Guidance (n 28) paras A1-A8.

[65] See generally, < https://epilepsysociety.org.uk/living-epilepsy/wellbeing/safety-and-risk/seizure-alert-dogs > accessed 12 August, 2022. A few 'proxies' have been recognised as indissociable from a protected characteristic: e.g. 'pensionable age' for sex (*James v Eastleigh BC* [1990] 2 AC 751 (HL)); 'marriage' for sexual orientation (*Bull v Hall* [2013] UKSC 73). These cases predated respectively the incremental harmonising of pensionable ages and the introduction of same-sex marriage.

The problem here applies to perceived discrimination on any ground, not just disability. It is implicit in the Equality Act 2010, and explicit in the EU equality directives, that a comparison is required to establish whether the treatment was 'less favourable'. The principal equality directives require that a person is treated less favourably than another 'would be treated in a comparable situation…'.[66]

In Britain, the Equality Act 2010 defines direct discrimination thus:

> 13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The 'less favourably' element of section 13 is supplemented with section 23(1):

> On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case.

Although section 23 suggests that the 'circumstances' in each case should be the same, one difference, the protected characteristic in question, is essential. Otherwise, the comparison, exactly replicating all the circumstances, would test nothing. This can be squared with the statutory language by assuming that the protected characteristic is not 'material' to the comparison. The most common comparison then, is between the claimant and a person in exactly the same circumstances *except* that the person does not possess the claimant's protected characteristic. For example, in recruitment, the claimant's comparator would be an equally qualified applicant (real or hypothetical) without the disability, or of a different sex, or race, etc, as the case may be.

For perceived discrimination, the comparison is less concrete, if not fictitious. If the claimant has no relevant *actual* protected characteristic, then what of the comparator? It would seem that the legislation was drafted without anticipation of this, yet tribunals must reconcile the policy commitment with this drafting. Three possible comparison devices to aid a perception claim are discussed next. These are: a *Coffey* comparator; a 'bypass'; and a comparison of attributes.

A. The '*Coffey* Comparator'

In *Coffey* (above),[67] the EAT identified the comparator as 'a person who was not perceived to be disabled'.[68] Although linguistically neat, in substance it compares how a *different* employer (or the same employer with a different perception) would have treated the *same* person. The EAT formula is worded in a way to suggest that the comparator, someone not so perceived, is a different claimant. But this is deceptive. There is in fact nothing in this approach to suppose that the claimant's counterpart comparator is any different. The only difference in this comparison is the perception, which lies entirely with the employer.

This does not square with the equality directives, nor section 13, which asks how the same defendant treated (or would have treated) *others.*[69] This is not just about fidelity to the legislative language. There is a degree of policy behind this drafting. It prevents a defence based on changing the defendant's circumstances. In *Grieg v Community Industry*,[70] for example, the EAT rejected an argument that a woman refused work on an all-male team should be compared with a man rejected from an all-female team.

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[66] Framework Directive 2000/78/EC (sexual orientation, religion or belief, disability, age), art 2(2)(a); Recast Directive 2006/54/EC (sex), art 2(1)(a); Race Directive 2000/43/EC, art 2(2)(a).

[67] [2018] ICR 812 (EAT); [2019] EWCA Civ 1061. See text to n 37.

[68] ibid [66] (Judge Richardson).

[69] EA 2010, s 13 (see above). The equality directives refer to treatment of 'another' (n 66).

[70] [1979] ICR 356 (EAT).

As a matter of principle, those without a relevant protected characteristic should not be able to sue for discrimination based on the *defendant's* protected characteristic. In *Lee v Ashers*,[71] for example, the Supreme Court rejected an argument that a defendant baker, refusing *anyone*, for religious reasons, to ice a cake with 'Support Gay Marriage', should be compared with a non-religious baker. That would transform a failed claim for sexual orientation discrimination into one for religious discrimination. Giving judgment for a unanimous Court, Lady Hale wrote, 'The [statutory] purpose is not to protect people without such a characteristic from being treated less favourably because of the protected characteristic of the alleged discriminator'.[72] Thus, it should not be possible, for example, a to sue a Muslim shopkeeper for refusing to sell alcohol, or a Christian newsagent for refusing to sell pornography.

A case *not* followed in *Lee v Ashers* adds definition to this principle. In *English v Sanderson Blinds*,[73] the Court of Appeal held that it could be unlawful *harassment*[74] to subject a man to homophobic abuse, even though the abuser (a colleague) knew that he was heterosexual. Although there was no misperception, this resembled perceived discrimination in the sense that the victim had no actual protected characteristic, leaving the focus on the nature of the defendant's conduct. *Sanderson* was cited but not followed in *Lee v Ashers*. No reason was given, although the obvious implication is that its ratio is confined to harassment, where no comparison is required. If claiming *discrimination,* given that his comparator would also be heterosexual, Mr English's only argument would have been that the comparator should be a non-homophobic colleague, an argument roundly rejected in *Lee v Ashers*.

Thus, statutory language, policy, and principle[75] indicate that liability for actual direct discrimination cannot be based on the protected characteristic, or even the circumstances, of the defendant. The consequent, and inevitable, comparison requires a test of how the *same* defendant would have treated another.

And so, while the *Coffey* comparator pursues a legitimate policy goal of implementing perceived discrimination, it jars with the broader policy concerns regarding direct discrimination, and is at odds with language and principle. Although it does not change the defendant's protected characteristic, it does change *a* characteristic (their perception). It is of course arguable that this remains the same defendant, albeit with a different perception. But this is no different from supposing the same baker with a different religion, or the same employer with a different job description. It also produces some absurd imagery. It is one thing to suppose a non-Christian baker, but quite another, say, to hypothesise the same employer in a different mood, or having been enlightened after attending an equality awareness programme.

While the *Coffey* comparator is an attempt to implement policy, it carries enough problems to render it vulnerable to challenge for (at least) its incompatibility with principle, the statutory language, and potential to broaden direct discrimination beyond any policy boundaries; it carries the potential to undermine the established notion of a comparison and with it the possibility of importing the *Sanderson* doctrine into direct discrimination. It is less than ideal, especially if a better solution exists.

The subsequent Court of Appeal judgment in *Coffey* approved the EAT's comparison, although it preferred to bypass the comparison altogether,[76] an alternative device discussed next.

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[71] [2018] UKSC 49.

[72] ibid [44].

[73] [2008] EWCA 1421.

[74] See EA 2010, s 26(1). Harassment was not claimed in *Lee v Ashers*, as it was not actionable in relation to sexual orientation or religion. See e.g. EA 2010, s 29(8), or for premises (34(4)); exercise of public functions (28(8), 33(6), 34(4), 35(4)); associations (members or guests-103(2)); school education (85(1), which also excludes harassment related to gender reassignment).

[75] A paraphrase of Lady Hale's summary on the matter, *Lee v Ashers* [2018] UKSC 49 [45].

[76] [2019] UKCA 1061 [77] and [76] respectively.

B. **'Bypassing' the Comparison**

One ground of appeal in *Coffey* was that the employment tribunal failed to make a comparison. The Court of Appeal rejected the point. In his leading judgment, Underhill LJ held that if the 'because' question is answered, 'there can be no error of law in it not having explicitly addressed the less favourable treatment question'.[77] This thinking has roots in a suggestion by Lord Nicholls, that where a prohibited reason for the treatment is identifiable, a tribunal can 'avoid arid and confusing disputes about the identification of the appropriate comparator'.[78] Upon this, Underhill LJ wrote,

> [I]t is now very well established that the comparison exercise under section 13(1) (the so-called 'less favourable treatment' question) does essentially the same job as asking whether the treatment complained of was 'because of' the protected characteristic (the so-called 'reason why' question), and that if the latter question is answered the answer to the former will normally follow.[79]

However, there are strong reasons suggesting that a comparison must be made in every case. As noted above, it is explicit in the EU definition of direct discrimination.[80] For the Equality Act 2010, section 13 demands '*less* favourable' treatment. Although this does not in terms demand a comparison, it is implicit. Statutory context also supports this. Elsewhere, the Act signals where a comparison is unnecessary when using the phrase '*un*favourably'.[81] To address a 'less favourably' element, one must ask, *less favourably than what?* This inevitably involves a comparison. As such, Explanatory Note (91) to section 23 states that 'The treatment of the claimant *must* be compared with that of an actual or a hypothetical person – the comparator...'. (Emphasis supplied.) There is ample House of Lords authority to the same effect,[82] and notably, a few months after Lord Nicholls' suggestion, Lord Hobhouse observed, 'The comparison test must be satisfied and dicta which state or suggest the contrary are wrong'.[83]

In order to accord with this weight of authority, a more benign interpretation of Lord Nicholls' statement is needed. This could be that in *some* cases it would be efficacious to reverse the customary order of analysis, with the comparison following the answer to the 'because' question. An example is *Stockton on Tees BC v Aylott.*[84] Here, Mr Aylott had a number of sickness absences from work in relation to his bipolar affective disorder. Following one period of absence, and concerns about his behaviour and performance, he was moved to another post, where deadlines were set and his performance was closely monitored. Eventually he was dismissed on grounds of capability (ill-health). The evidence was that the employer placed onerous conditions on Mr Aylott because of its 'stereotypical view of mental illness'. A dispute arose over the precise circumstances of the hypothetical comparison. Should it include previous behaviour and the move to another post? Invoking Lord Nicholls' suggestion, the Court of Appeal held that as the evidence showed that the employer had treated Mr Aylott so because of disability, there was no need to quibble over the precise identity of the comparator, although it should not entirely be disregarded.[85] Thus, one followed. Given the reason for the treatment, there was no need to generate a comparison any more detailed than somebody returning to work with a 'complicated broken bone'.[86]

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[77] ibid [76].

[78] *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (HL) [11]. See also *Islington LBC v Ladele* [2009] ICR 387 (EAT) [37]-[39] (Elias J); *JP Morgan Europe Ltd v Chweidan* [2011] EWCA Civ 648 [5] (Elias LJ).

[79] [2019] UKCA 1061 [76].

[80] Text to n 66.

[81] EA 2010, ss 15 (discrimination arising from disability), 17 (pregnancy), 18 (maternity).

[82] *Glasgow CC v Zafar* [1998] ICR 120 (HL) 124 (Lord Browne-Wilkinson for a unanimous House); *Macdonald v Advocate General for Scotland* [2003] UKHL 34 [106], [109], [110] (Lord Hobhouse), [153] (Lord Roger); *Carter v Ahsan* [2008] 1 AC 696 [36] (Lord Hoffman for a unanimous House).

[83] *Macdonald v Advocate General for Scotland* [2003] UKHL 34 [110].

[84] [2010] ICR 1278 (CA).

[85] ibid [49].

[86] ibid [41], [46]-[50].

However, such an approach is not possible in perception cases, such as *Coffey*. An established reason for the treatment does not inform the identity of the claimant's comparator. It is one thing to avoid quibbling over the precise identity of the claimant's comparator, and quite another not to have one at all. Even a benign interpretation of Lord Nicholls' suggestion cannot be squared with perceived discrimination nor the weight of authority, and any suggestion to the contrary, in Lord Hobhouse's words 'is wrong'.

This conclusion will again jar with the statutory purpose. It also means that either on the EAT's comparison, or any bypassing of it, *Coffey* was wrongly reasoned. However, a solution to a comparison in cases like *Coffey* may be found in the next device, concerning attributes.

C. **An interpretive solution: section 4 and a comparison of attributes**

This assumes a section 4 approach (above), and suggests that the comparator is somebody without the attribute prompting the perception, say, an impairment, or manifestation or effect. Just as the turbaned Sikh barista could be compared with somebody without a turban, and the job applicant with the 'African-sounding name' could be compared with somebody with a different name, the comparator for disability could be somebody without the medical record (*McDougal*), or declared hearing impairment (*Coffey*).

This is the most logical interpretation of the legislation in the context of its language, principles, and purpose. Unlike the deceptive *Coffey* comparator, it tests how the *same* defendant would have treated *another*. It enables a meaningful comparison where neither the claimant nor their comparator has an actual protected characteristic. There is also some support in precedent. In *Showboat Entertainment Centre v Owens*,[87] a white manager refusing to obey a racist order (to ban black youths) was compared to a white manager with a different *attitude* to race. Browne-Wilkinson J reasoned, 'Only by excluding matters of race can you discover whether the differential treatment was on racial grounds'.[88] Despite having no relevant actual protected characteristic, the manager's attribute (his attitude to race) provided a meaningful reference for the comparison. It is thus feasible to classify attributes that prompted the treatment as 'matters of disability', to adapt Browne-Wilkinson's LJ rubric. In line with the section 4 approach, these matters could include prompts, via which, the general concept of disability was perceived. In the same way that a person perceives a religion via headgear, or race via a name, the defendant could perceive a disability via a service dog (epilepsy), or a reluctance to lift heavy objects (back injury), or an interviewee's frequent requests for questions to be repeated (hearing impairment).

This approach can be squared with the specific rider in section 23(2). It will be recalled that for the comparison, section 23(1) requires that 'there must be no material difference between the circumstances relating to each case'. Section 23*(2)* adds, that for disability, 'The circumstances relating to a case include a person's abilities…'.[89] In other words, the comparator must have all the abilities (or more likely inabilities) of the claimant. It helps distinguish direct disability from discrimination arising from disability. For example, a surgeon rejected for having a communicable disease (e.g. hepatitis) would be compared with an applicant carrying an equally communicable disease which is not a disability.[90] This would appear to reduce the range of attributes that could be excluded from the comparator and thus frustrate cases where the disability was perceived via an attribute, or at least, via an inability. If the comparator would also be endowed with a reluctance to lift heavy objects, or an apparent inability to hear questions; the conclusion would be that the claimant was treated no less

[87] [1984] ICR 65 (EAT).

[88] ibid 73.

[89] The counterpart EU Framework Directive 2000/78/EC carries no such rider, although it is implicit in the 'comparable situation' aspect, and could even be accommodated in the Occupational Requirement 'defence' (art 4(1)).

[90] See e.g. *High Quality Lifestyles v Watts* [2006] IRLR 850 (EAT) [46]-[49].

favourably than this comparator. But this need not be so. As the Court of Appeal held in *Aylott*, 'The relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision of which complaint is made'.[91] Thus, if the real reason for the treatment is disability, any attributes that may have prompted it are not ascribed to the comparator. Hence, for actual discrimination, where the established reason for the treatment was the applicant's disability (back injury), assumed via the reluctance to lift heavy objects, then the comparator is someone without that reluctance. For perceived discrimination, the logic is much the same: if the employer (mis)perceived a disability via the reluctance to lift heavy objects, then the comparator is somebody without that reluctance. The same could apply to the inability to hear questions, possession of a service dog, or any attribute that triggers the misperception of a disability.

This approach would not facilitate unmeritorious claims. Where it is established that the treatment was 'because of', say, a ban on *all* dogs, or the claimant's laziness, or inattention and insolence, the comparison that 'follows' includes, respectively, a dog, or a lazy applicant, or an inattentive and insolent interviewee. This will show that the defendant treated the claimant no less favourably than it would have treated a comparator.

5. RELAXING THE BURDEN - LEGISLATIVE REFORM

The interpretive solutions offer a way out of many of the problems. But they rely on a subtle distinction (between a generalised concept of disability and a person with a disability) and a consequential comparison. This presents an overly technical scheme that can undermine public confidence in the law,[92] especially one to challenge the same public's 'accumulated myths and fears'.[93] It also relies upon an innovative and progressive judiciary, something that cannot be guaranteed. All of this suggests that legislative reform would be preferable, if not necessary.

The proposal here is to require a perception of only an impairment, with either the comparative scenario without the impairment, a codification of *Coffey*, or the revocation of the comparative element in favour of *unfavourable* treatment.

A. Statutory reform – 'Perceived Impairment'

This would require an additional provision to section 6 stating that a person also has a disability if they are perceived to have an impairment. This is something long established in the United States.[94] The Americans with Disabilities Act 1990 provides for perceived discrimination where the claimant was 'regarded as having… an impairment… whether or not the impairment limits or is perceived to limit a major life activity'. This does not apply to 'minor and transitory' impairments, with transitory being

[91] (n 84) [40].

[92] Perhaps infracting the rule of law. See *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 (HL) 638, where Lord Diplock considered it a constitutional principle that citizens should be able to rely on what a statute says.

[93] Text to nn 5, 11-13.

[94] Rehabilitation Act 1973: s 505 (29 USC § 706(7)(B)(iii)): This 'Perceived disability' provision was introduced in 1974. See now, EEOC 29 CFR appendix, para 1630.2(l) (2008) at 'Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity'. < https://www.govinfo.gov/content/pkg/CFR-2018-title29-vol4/xml/CFR-2018-title29-vol4-part1630.xml >. The Australian DDA 1992 (s 4), and Irish Employment Equality Act 1998 (s 2) both similarly provide that a disability can be 'imputed' to a person ('disability' under these Acts has no long-term functional requirements). Both accessed 12 August 2022.

with an actual or expected duration of 6 months or less.[95] This rider, excluding 'common ailments like the cold or flu',[96] is to avoid abuse by workers with short-term minor ailments.[97]

Aside from 'minor or transitory' conditions, this would mean that many actual disability claims that failed for want of sufficient effects, would now succeed. For example, if at the time of the alleged discriminatory act the effects of a mental illness were unlikely to recur (*McDougal*), or where a progressive condition has yet to have *any* effects (as usually required).[98] However, if the underlying policy regarding stereotyping, fear, and prejudice, is to be respected, such claims ought not to be labelled unmeritorious. The employer escaping liability merely because of an absent functional element, has acted on fear or prejudice with all the more force *because* the impairment had no functional effects which would actually affect job performance. Bear in mind also, this does not facilitate other causes of action, such as indirect discrimination, discrimination arising from disability, and reasonable adjustments.[99]

A concern at the other end of the spectrum is that a requirement for a perceived *impairment* is more restrictive than the section 4-based generalised concept of disability. However, the section 6 notion of impairment is not as rigid as it may first appear. It will be recalled that an impairment itself does not need to be a medically recognised condition,[100] and an impairment may be identified via its effects.[101] In any case, the drafting should be along these lines:

> *6(1A) For the purposes of section 13 a person also has a disability if anyone (bar B) perceives the person to have an impairment (that is more than trivial and has an actual or expected duration of at least 6 months).*

The drafting is intended to be consistent with both the potential and the limits of section 13. There are four aspects to this. The first, for the avoidance of doubt, expressly confines the notion of perceived discrimination to direct discrimination within section 13. The second, ('bar B') excludes the claimant from 'self-defining' (or 'self-perceiving') as a person with an impairment; this can exclude unmeritorious claims.[102] The third is to encompass the situation where the defendant acts upon another's perception, typically a 'customer preference'.[103] The fourth encompasses perceived 'associative' discrimination. For example, where an employer discriminates against a worker on the misperception that the worker's child has a disability.[104]

B. **Statutory reform - the Comparison**

[95] 42 USC s 12102(3)(B). The Act was amended in 2008. ADA 1990, s 3(1), 42 USCA s 12102: '(1)… The term "disability" means, with respect to an individual-…(C) being regarded as having such an impairment… (3)(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity'. See, e.g. *Mercado v Puerto Rico* 814 F.3d 581, 588 (1st Cir, 2016).

[96] ibid, HR Rep No. 110-730, pt. 1, (2008) at 14.

[97] ibid.

[98] *Mowat-Brown v University of Surrey* [2002] IRLR 235 (EAT). For progressive conditions, see text to nn 30-31.

[99] EA 2010, ss 19, 15, and 20-21 respectively.

[100] (n 22).

[101] (n 64).

[102] For fears that the US more openly drafted 'Regards as' definition will cause a flood of claims, see e.g. Samantha Katie Bernstein, 'The Americans with disabilities act of 1990 - as amended: Remedying the boundary that congress overstepped' (2014) 25 *George Mason Civil Rights Law Journal* 123.

[103] Text to nn 4, 115.

[104] A variation on *Coleman*, Case C-303/06, [2008] 3 CMLR 27. See n 19.

The following three legislative suggestions in relation to the comparison assume the new provision defining a perceived impairment (*s 6(1A)*, set out above).

The first suggestion adapts the comparison suggested for the section 4 approach.[105] This time the perception is of an impairment, rather than a generalised concept of disability. Nonetheless, the principles are much the same. Even where the perception is via an inability, the approach taken in *Aylott* will suffice. But rather than relying on an innovative judiciary, and for the avoidance of doubt, an additional provision is needed:

> *23(2A) But, on a comparison for the purposes of section 13 in combination with section 6(1A), attributes relevant to the perception are not relevant circumstances.*

The word 'but' indicates primacy over the prior instruction (s 23(2)). The question becomes, how the defendant treated a claimant perceived to have an impairment because of their *attributes*, compared with how it would have treated somebody without those attributes. This enables a comparison to operate in much the same way as proposed for the section 4 approach. It would not change the outcome in the 'surgeon' example,[106] as any perception was of transmissibility, and not of the impairment. Note also, the reference to section 13 confines this to direct discrimination. This comparison is fidelious to the 'perceived impairment' (*s 6(1A)*) approach, as well as the statutory scheme and purpose. Nonetheless, this dual model is somewhat technical and complex. This invites other suggestions.

The second is to codify the *Coffey* comparator. Although problematic in many ways, it could work practically, if having statutory status and confined to perceived disability discrimination. This would defeat any objections in litigation. It would require an addition to section 13:

> *13(1A) A person (A) discriminates against another (B) if, because of an impairment (of anyone bar A) perceived by A, A treats B less favourably than A treats or would treat others if A had not perceived that impairment.*

The reference to a perceived impairment connects this to the new section 6(1A). In line with *Coffey*, this asks how a different defendant would have treated the same claimant. The formula includes treatment based on the perceived impairment of a third party, and excludes treatment based on any impairment of the defendant.[107]

The third suggestion is to revoke the comparison altogether for perceived disability discrimination, requiring *un*favourable, rather than *less* favourable, treatment. Although this deviates from the conventional 'equal treatment' model of direct discrimination, it is aligned with pregnancy/maternity discrimination, and the Act's concepts of harassment and victimisation. Moreover, it aligns with the asymmetrical nature of disability discrimination law, which in so many ways is intended to provide *different*, rather than *equal*, treatment; while section 13(3) permits *more* favourable treatment for persons with a disability, the reasonable adjustments duty *mandates* it.[108] Again, an addition to section 13 would be required:

> *13(1A) A person (A) discriminates against another (B) if, because of an impairment (of anyone bar A) perceived by A, A treats B unfavourably.*

While the first suggested comparison (*attributes*) is intrinsically one for disability, the second two ('*Coffey*' and 'unfavourable') create a more obvious disparity with perceived discrimination for other protected characteristics, which share the same problem with the comparison. While it is not the purpose of this paper to resolve the comparator problem for other protected characteristics, it may be necessary to do so in order to justify such amendments. This could be achieved simply by adding the

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[105] 'Section 4 and a comparison of attributes', above, p 0-0000.

[106] Text to n 90.

[107] See the discussion above, text et al to n 67.

[108] See e.g. *Archibald v Fife Council* [2004] ICR 954 (HL) [19] (Lord Hope), [30] (Lord Roger), [47] (Lady Hale).

phrase 'protected characteristic' in either of the formulas. This broader approach does not lose sight of the principal purpose of the amendment as a 'perceived impairment' remains a protected characteristic under the proposed section 6(1A).

6. WOULD A REFORMED TEST BE INEQUITABLE?

An attempt to introduce a dedicated provision for perceived disability discrimination (similar to the American model) was rejected during the passage of the Equality Bill on the basis that, 'It would be most inequitable for somebody who did not have a disability to have a lighter test to gain protection than somebody who did, and that is the logical fault in the proposal'.[109] The same criticism could be made of the solutions suggested in this paper. This can be met with a number of arguments.

1. Such reform would address the particular policy concerns underlying the legislation, as explained by the US Congress[110] and neglected by Parliament.

2. The 'lighter test' criticism could be made against perceived discrimination on any protected characteristic. Perceived discrimination inevitably shifts the emphasis onto the nature of the defendant's conduct and away from the identity of the victim. As Underhill LJ highlighted, at present, compared to other protected characteristics, it is *more* difficult to establish perceived disability discrimination. Easing the burden merely puts disability on a par with other protected characteristics.

3. In many cases, the evidential burden for perceived and actual disability discrimination will be comparable. Lord Browne-Wilkinson once observed, 'those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed, they may not even be aware of them'.[111] Subsequent Supreme Court pronouncements have acknowledged that most cases of direct actual discrimination are 'not obvious' and necessitate an enquiry into the defendant's 'mental processes'.[112] Such enquiries would not expect to discover articulate and detailed definitions of the religion, race, ethnicity, or sexual orientation, as the case may be. Instead, inferences that produced a generalised concept of any of these protected characteristics are likely to suffice. An enquiry into the defendant's perception is on a par with this.

4. The present (demanding) burden provides a perverse incentive for those bound by the legislation *not* to acquire knowledge of disabilities and the related legal obligations. Employers would be better off turning a blind eye to the law, guidance, and Codes of Practice.

5. Although some failed actual disability claims would succeed under the reform, if the underlying policy regarding stereotyping, fear, and prejudice, is to be respected, such claims ought not to be labelled unmeritorious. The employer escaping liability merely because of an absent

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[109] Equality Bill Deb 16 June 2009 Cols 195-197 (Solicitor-General) < https://publications.parliament.uk/pa/cm200809/cmpublic/equality/090616/am/90616s02.htm > accessed 12 August 2021. This reason was given in two ET judgments when rejecting a lower standard: *Estlin v Central Manchester University Hospitals NHS Foundation Trust* 2412374/2011 (ET, 20 November 2014); *Balakumar v Imperial College of Health Care NHS Trust* 2201372/15 (ET (London Central) 22 January 2016). Both reported R Crasow, '"Perceived disability discrimination": achieving a fair outcome for the non-disabled' (2016) 133 *Employment Law Bulletin* 2-4.

[110] See above, text to nn 11-13.

[111] *Glasgow CC v Zafar* [1998] ICR 120 (HL) at 126. For an example, see *King v China Centre-Great Britain* [1992] ICR 513 (CA).

[112] *Nagarajan v LRT* [2000] 1 AC 501 (HL) at 511 (Lord Nicholls). *R (E) v Governing Body of JFS* [2009] UKSC 15, [21]-[23] (Lord Phillips), [62]-[64] (Lady Hale), [78] (Lord Mance), [114]-[117] (Lord Kerr), [132] (Lord Clarke).

functional element has acted on fear or prejudice as the impairment had no functional effects that would actually affect job performance.

6. Anyone with an actual disability tempted by an easier burden to claim perceived discrimination will forego other rights, including indirect discrimination, discrimination arising from disability, and the reasonable adjustments duty.[113] They might also be disadvantaged in the award. For example, a person with an actual disability may find it harder to find work, and so be due greater compensation. It may also be that any injury to feelings would be greater for somebody with an actual disability.[114]

7. FROM FORM TO MOTIVE

Before concluding, it is necessary to address a corollary of any of the suggested solutions for the comparison. Being rooted in stereotyping, fear, and prejudice, perceived disability discrimination can depend more on the defendant's 'guilty' mind than ordinarily required. Compromising, or revoking, the comparison can exaggerate this as the *reason why* question increases in importance. This represents a structural shift from form to motive, or in the (UK) statutory language, from the 'less favourably' to the 'because' question. For conventional direct discrimination, a 'guilty mind' notion has been strongly rejected by the UK judiciary in favour of something akin to strict liability, a policy-driven attempt to prevent 'benign motive defences'. The argument runs that if a guilty mind is required for liability, those acting with an 'innocent' motive cannot be liable. Those who discriminate because of customer preferences,[115] or to protect women or particular nationals, from harassment or even endangerment,[116] can claim they have no personal discriminatory animosity and therefore no liability. However, these two extremes of strict liability and a guilty mind may not be as polarised as first appears. As Lord Nicholls once said, there is a sharp distinction between the reason for the treatment in the defendant's 'mental processes', and the motive behind the reason.[117] Accordingly, American jurisprudence, which *requires* a discriminatory motive for direct discrimination, simultaneously recognises, distinguishes, and rejects, attempted benign motive defences.[118] As such, the two approaches are not wholly irreconcilable. Recognition of perceived discrimination may disrespect the UK's form-based approach, but it need not necessarily import benign motive defences.

8. CONCLUSION

[113] EA 2010, ss 19, 15, and 20-21 respectively. This point was made in *Fortt v Chief Constable of South Wales Police* (n 46) [50] (Judge S Davies).

[114] EA 2010, s 124 (ETs) and 119. For guidance on awards for injury to feelings see, *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318; updated, *Da'Bell v NSPCC* [2010] IRLR 19 (EAT). Although see the harms suggested for perceived discrimination in the US Congressional history, text to nn 11-13.

[115] *R v Birmingham City Council, ex parte EOC* [1989] AC 1155 (HL) 1193-1194 (Lord Goff). See *Segor v Goodrich Actuation Systems Ltd* (EAT, 2012) UKEAT/0145/11/DM (US arms contract stipulated 'no French nationals'); *Hafeez v Richmond School* (IT, 27 February 1981) parents' preference for pupils to be taught by 'English teachers'; C-188/15 *Bougnaoui v Micropole SA* [2017] 3 CMLR 22 [40] (customer preference not to be served by a Muslim).

[116] Respectively, *Grieg v Community Industry* [1979] ICR 356 (EAT) (text to n 70); *Amnesty International v Ahmed* [2009] IRLR 884 (EAT).

[117] *Nagarajan v LRT* [2000] 1 AC 501 (HL) 511.

[118] e.g. *Diaz v Pan Am* 442 F 2d 385 (5th Cir 1971), certiorari denied, 404 US 950 (1971) (preference for female cabin crews). See also, *Chaney v Plainfield Healthcare* 612 F.3d 908 (7th Cir 2010) (care home acceded to patient's preference for a white nurse). See also the barista example, text to n 4.

Legislative history and expressed purpose support the notion of perceived disability discrimination. Yet, it is not readily realised in the equality legislation. The two obstacles are the exceptional complex definition of disability and the impossibility of a comparison wholly fidelious to policy, principle, and the statutory language. The somewhat innovative interpretive solutions could be implemented immediately. But there are drawbacks, notably the subtlety of the distinction between the *generalised concept* of disability and a *person* with a disability, and dependence upon an imaginative and progressive judiciary. The proposed statutory solution circumvents the obstacles in the current drafting simply by adding that the definition of disability includes a person perceived to have an impairment. This is combined with a corresponding comparison, or a codified *Coffey* comparator, or the revocation of the comparative element. A statutory solution recognises that perceived discrimination is different in principle and structure, requiring dedicated provisions bringing clarity, certainty, and consistency.

As well as falling short of its policy goals, the current drafting perversely provides an incentive for employers *not* to acquire knowledge about disabilities nor their corresponding legal obligations. While the suggested solutions will permit some failed actual disability claims to succeed, they will not be unmeritorious. In any case, those with an actual disability tempted to claim for perceived discrimination will forego other rights and risk reduced compensation. A 'lighter test' simply brings perceived disability discrimination into line with perceived discrimination generally, and indeed, is comparable with many cases of actual discrimination.