Making equality law work for Deaf people

by

Robert Brian Wilks
BA (Swansea) PGDipL (UWE)
PGDipLP (Cardiff) LLM (Leicester)
PGCDPPHE (South Wales) Solicitor

A thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy

School of Law
University of Leicester

September 2019
# TABLE OF CONTENTS

ABSTRACT ................................................................................................................................. VI

ACKNOWLEDGMENTS ........................................................................................................... VIII

TABLE OF AUTHORITIES ........................................................................................................ XI

CHAPTER 1 – INTRODUCTION .................................................................................................. 1

1 Aims and objectives ............................................................................................................... 1

2 Deaf people in the UK ............................................................................................................ 1

3 Motivation for the thesis ....................................................................................................... 6

3.1 Inequality in education ...................................................................................................... 6

3.2 Inequality in employment ................................................................................................. 9

3.3 Inequality in the criminal justice system ......................................................................... 10

3.4 Inequality in accessing legal advice ................................................................................. 12

3.5 Inequality in prisons ....................................................................................................... 13

3.6 Inequality in health ......................................................................................................... 14

4 Scope of the thesis ................................................................................................................ 14

5 Structure of the thesis ......................................................................................................... 15

6 Methodology ....................................................................................................................... 18

6.1 The doctrinal approach ................................................................................................... 19
6.2 The socio-legal approach .......................................................... 20
6.3 The comparative approach ....................................................... 21

CHAPTER 2 – THE DEAF LEGAL DILEMMA ...................................... 24

1 Introduction ..................................................................................... 24
2 The Hearing-World ......................................................................... 26
3 The Disabled-World ......................................................................... 28
  3.1 The medical or individual model ................................................ 34
  3.2 The social model of disability ..................................................... 39
  3.3 The minority group model ......................................................... 46
  3.4 The cultural model ...................................................................... 50
4 The Deaf-World ............................................................................... 51
  4.1 A culturo-linguistic group .......................................................... 55
  4.2 Sign Language Peoples ............................................................... 58
  4.3 An ethnic group .......................................................................... 59
5 The concept of DEAF-GAIN ............................................................ 67
6 Conclusion ......................................................................................... 69

CHAPTER 3 – THE DEAF EQUALITY CONCEPTS ................................. 75

1 Introduction ..................................................................................... 75
2 What is equality? ............................................................................. 79
3 The precepts of equality ................................................................. 81
3.1 Formal equality ................................................................. 84
   3.1.1 Equal treatment ..................................................... 88
   3.1.2 Equality of opportunity ......................................... 90
3.2 Substantive equality ..................................................... 96
   3.2.1 Respect for equal worth, dignity and identity ............. 100
   3.2.2 Equality of results and equality of outcomes .......... 106
3.3 Transformative equality ................................................. 110
   3.3.1 Social inclusion ..................................................... 116
   3.3.2 Challenging oppression .......................................... 119
   3.3.3 Full participation ................................................... 122

4 Conclusion ........................................................................ 125

CHAPTER 4 – HOW EQUALITY LAW WORKS FOR DEAF PEOPLE ...... 132

1 Introduction ...................................................................... 132

2 Equality of opportunity: the Equality Act 2010 ..................... 134
   2.1 The definition of disability ............................................. 136
   2.2 The duty to make reasonable adjustments ....................... 137
   2.3 The triggering of the duty to make reasonable adjustments .. 138
      2.3.1 Single, one-off adjustments ....................................... 141
      2.3.2 Recurrent adjustments ............................................... 144
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Subchapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4</td>
<td>Enforcement</td>
<td></td>
<td>148</td>
</tr>
<tr>
<td>3</td>
<td>Equal worth, dignity and identity</td>
<td></td>
<td>150</td>
</tr>
<tr>
<td>3.1</td>
<td>Universal Declaration of Human Rights</td>
<td></td>
<td>152</td>
</tr>
<tr>
<td>3.1.1</td>
<td>Enforcement</td>
<td></td>
<td>154</td>
</tr>
<tr>
<td>3.2</td>
<td>Convention of the Rights of Persons with Disabilities</td>
<td></td>
<td>157</td>
</tr>
<tr>
<td>3.2.1</td>
<td>The definition of disability</td>
<td></td>
<td>157</td>
</tr>
<tr>
<td>3.2.2</td>
<td>Implementation</td>
<td></td>
<td>158</td>
</tr>
<tr>
<td>3.2.3</td>
<td>Enforcement</td>
<td></td>
<td>162</td>
</tr>
<tr>
<td>3.3</td>
<td>European Convention on Human Rights</td>
<td></td>
<td>166</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Enforcement</td>
<td></td>
<td>168</td>
</tr>
<tr>
<td>4</td>
<td>Social inclusion: the public sector equality duty</td>
<td></td>
<td>172</td>
</tr>
<tr>
<td>4.1</td>
<td>Enforcement</td>
<td></td>
<td>175</td>
</tr>
<tr>
<td>5</td>
<td>Conclusion</td>
<td></td>
<td>179</td>
</tr>
</tbody>
</table>

CHAPTER 5 – SIGN LANGUAGE RECOGNITION: A SOLUTION TO THE DEAF LEGAL DILEMMA? | 183 |

1 | Introduction | 183 |

2 | A right to language | 187 |

2.1 | The European Union’s approach | 191 |

2.2 | The Council of Europe’s approach | 194 |

2.3 | The United Nations’ approach | 199 |
# Legislative measures

3 Legislative measures........................................................................................................... 201

## 3.1 The status of BSL in the UK

3.1 The status of BSL in the UK.......................................................................................... 203

## 3.2 BSL (Scotland) Act 2015

3.2 BSL (Scotland) Act 2015.......................................................................................... 210

## 3.3 New Zealand Sign Language Act 2006

3.3 New Zealand Sign Language Act 2006 ................................................................. 215

## 3.4 Finnish Sign Language Act 2006

3.4 Finnish Sign Language Act 2006 ............................................................................... 219

## 3.5 Irish Sign Language Act 2017

3.5 Irish Sign Language Act 2017 ..................................................................................... 221

# Criticisms of sign language recognition

4 Criticisms of sign language recognition ........................................................................ 221

# Conclusion

5 Conclusion .......................................................................................................................... 225

## CHAPTER 6 - CONCLUSION

1 Introduction ....................................................................................................................... 230

2 Key findings ...................................................................................................................... 232

## 2.1 The Deaf Legal Dilemma

2.1 The Deaf Legal Dilemma .............................................................................................. 232

## 2.2 The Deaf Equality Concepts

2.2 The Deaf Equality Concepts ......................................................................................... 234

## 2.3 How equality law works for Deaf people

2.3 How equality law works for Deaf people ..................................................................... 236

## 2.4 Sign language recognition

2.4 Sign language recognition ............................................................................................. 238

## 3 Scope for future work

3 Scope for future work ......................................................................................................... 240

## 4 Final remarks

4 Final remarks ..................................................................................................................... 242

# BIBLIOGRAPHY

BIBLIOGRAPHY .................................................................................................................... 244
ABSTRACT

Equality law is not working for Deaf\textsuperscript{1} people. The majority of deaf children attend mainstream schools without resource provision and are often denied the opportunity to engage with their deaf peers. Deaf people are likely to be in underemployment or unemployed and discrimination in the workplace is commonplace. There is evidence of injustice within the criminal justice system for deaf people, Deaf people are not able to serve their civic duty as jurors, and their access to legal advice services is dire. Deaf prisoners suffer a ‘double sentence’ when in prison, and deaf people generally do not have access to healthcare services.

Thus, this thesis seeks to explore why equality law is not working for Deaf people, and what can be done to ensure that it does. In order to answer this research question, after a consideration of what evidence exists to suggest that Deaf people continue to experience inequalities, an attempt is made to ascertain why the framing of Deaf people as disabled is problematic, giving rise to what is termed the ‘Deaf Legal Dilemma,’ whereby Deaf people are faced with a stark choice: accept the disability label, or have no access to any rights at all. There is then an attempt to determine which concepts of equality are relevant to Deaf people, utilising a specific methodology that allows the author to categorise these concepts into either formal, substantive or transformative equality thus establishing a standard of measurement by which it is

\textsuperscript{1} Note that throughout this thesis, reference is made to ‘deaf’ people instead of ‘Deaf’ when they are referred to as a collective or when it is not clear whether they are Deaf people or not. The word ‘Deaf’ will be used where appropriate, particularly when it is a clear reference to Deaf people. For clarification, ‘deaf’ means deaf people who are viewed as deaf in an audiological sense, while ‘Deaf’ refers to deaf people who consider themselves to have a Deaf identity and a culture-linguistic minority. More detail can be found in Chapters 1 and 2.
possible to determine how effective particular concepts of equality are in eradicating inequality.

A doctrinal analysis of equality law in the UK is then undertaken, incorporating the Universal Declaration of Human Rights, the European Convention on Human Rights, the Equality Act 2010 and the United Nations Convention on the Rights of Persons with Disabilities. These are critiqued in order to establish how they apply or may apply to Deaf people, and how effective they are in addressing their inequalities. The findings of this analysis are that the instruments examined are not effective, and sign language recognition is proposed as a solution. The conclusion reached is that sign language recognition proffers a *transformative* approach to the Deaf Legal Dilemma and should – at least in the long term - give Deaf people ‘equal and inalienable rights’ on par with hearing people, in full cognisance of their status as Sign Language Peoples.
ACKNOWLEDGMENTS

Firstly, I would like to extend my sincerest thanks to the University of Leicester, and specifically, the College of Art, Humanities and Law, for their support and in particular for providing me with a scholarship which not only meant that I did not have to pay tuition fees, but also provided me with additional income, thus allowing me to complete this thesis in six years.

Special mention must be made of my supervisors, Ms Pascale Lorber and Dr Lisa Rodgers, for their continuous support for the last six years. In particular, they have been unyielding in their criticism, particularly during the probation years, which at the time I thought was particularly harsh, but in hindsight was extremely valuable in assisting me to shape the focus of this thesis. I realise that the originality of my thesis was at times a challenge, as they were forced to stray out of their comfort zone of employment law. My gratitude to the both of them knows no bounds.

I would also like to thank Dr Loveday Hodson, who took over from Lisa as supervisor for one year during a period of maternity leave, for providing much needed support and guidance with the human rights aspect of this thesis. In addition, thanks also to Dr Mike Gulliver of the University of Bristol for his patience and understanding as I delved more deeply into the world of Deaf Studies, a field which I had never studied before embarking on this doctorate.

Particular thanks also go to the Royal Association for Deaf people (RAD). I worked for the Royal Association for Deaf people between 2003 and 2014, initially as an Advice Worker. Following qualification as a solicitor in 2007, and in being appointed Director of Legal Services, I was responsible for the establishment of the first national
deaf law centre. During this time, I delivered legal advice and information, advice and guidance services to deaf people with funding ranging from local authorities and grant-making trusts to Government departments.

Between 2008 and 2012, I managed and personally delivered a discrimination and human rights legal advice service to deaf people in England, Wales and Scotland with funding from the Equality and Human Rights Commission’s Legal Grants programme, and personally dealt with 479 enquiries and took on 228 cases on discrimination matters in the areas of employment, housing, education and goods, facilities and services, and represented clients at Court or Tribunal hearings. Altogether, over 700 individual deaf clients benefited from this service. I also delivered legal advice in employment and discrimination matters to deaf people across England and Wales funded by legal aid. In 10 years of employment, I estimate that I advised in excess of 2,000 deaf individuals on a range of issues.

As well as affording me the opportunity to qualify as a solicitor, RAD opened my eyes to the impact that inequality has had on the Deaf community, and it was this experience that provided the ultimate motivation to complete this thesis. Therefore, I would thank the following individuals who were instrumental in helping me to forge my legal career at RAD and in opening my eyes: Alison Bryan, Tom Fenton, Linda Isaac and Dr Jan Sheldon. I would also like to thank Neil Woodard, an Executive Coach, who coached me for a period of time in 2013 and helped me to realise that what I really wanted above all else was to embark on a PhD.

I would also like to say a heartfelt thank you to both Alison Bryan and John Walker who were both powerful Deaf role models who helped me to find my Deaf identity. I met Alison through the Law Society’s Group for Solicitors with Disabilities (now known
as the Lawyers with Disabilities Division) in 2002, and it was her who gave me the job of Advice Worker at RAD in 2003. I met John through the Newport Counselling and Befriending Service, as he was brought in to train a group of Peer Befrienders. Alison and John’s experiences and wealth of knowledge as Deaf individuals, as well as their robust principles and values and desire to change the status quo for the Deaf community, was nothing short of inspiring.

Above all, I would like to offer heartfelt thanks to my wife, Rachel, for her continuous support and patience during this momentous undertaking. I could never have done this without your support. After 18 years, I still love you with all my heart. Thanks also to our wonderful kids: Corey, Libby and Emily, who kindly allowed time for me to focus on research and writing despite it taking place during their formative years. Daddy will no longer be able to say to you: ‘Look, I’m working on my PhD,’ something I’m rather sure that you will all be very pleased about!
TABLE OF AUTHORITIES

1 Table of Cases

1.1 United Kingdom

Akerman-Livingstone v Aster Communities Limited [2015] UKSC 15

Alexander v Wallington General Commissioners and Inland Revenue Commissioners [1993] STC 588 (CA)

Appleby v Department for Work and Pensions [2003] CLY 2083 (County Court)

Archibald v Fife Council [2004] UKHL 32

Berry v GB Electronics Ltd EAT/0882/00

Bracking and others v Secretary of State for Work and Pensions [2013] EWCA Civ 1345

Chandhok and another v Tirkey UKEAT/0190/14/KN

Cherrington v Home Office [2015] WL 12591134 (ET)

Cockburn v Chief Adjudication Officer and another; Secretary of State for Social Security v Fairey 1997 3 All ER 844 (HL)

College of Ripon & St John v Hobbs 2001 WL 1560718 (ET)

Cordell v Foreign & Commonwealth Office UKEAT/0016/11/SM

Croft Vets Ltd v Butcher [2013] EqLR 1170 (EAT)

Cruickshank v VAW Motorcast [2002] ICR 729 (EAT)

Ealing London Borough Council v Race Relations Board [1972] AC 342 (HL)

Ekpe v Commissioner of Police for the Metropolis [2001] IRLR 605 (EAT)

Emmens v Molnlycke Healthcare Limited [2016] WL 05335357 (ET)

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

Fotheringham v Perth & Kinross [2013] WL 12111408 (ET)

Fox (Deceased) v British Airways plc [2015] WL 1786103 (EAT)


J v DLA Piper UK LLP UKEAT/0263/09/RN

James v Eastleigh Borough Council [1990] IRLR 288 (HL)

Jurga v Lavendale Montessori Ltd (2013) ET/3302379/12 and ET/3300884/13

Kelly v Covance Laboratories Ltd (2015) UKEAT/0186/15

Law Hospital Trust v Rush [2001] IRLR 611 (ScotCS)

London Borough of Lewisham v Malcolm [2008] IRLR 700 (HL)

Mallinson v Secretary of State for Social Security [1994] 1 WLR 630 (HL)

Mandla and another v Dowell Lee and another [1983] 2 AC 548 (HL)

McNicol v Balfour Beatty [2002] EWCA Civ 1074

McWhinney (Woolwich Crown Court, 9 November 1999)

Price v UK (2001) 34 EHRR 1285

R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158

R (Cushnie) v Secretary of State for Health [2014] EWHC 3626 (Admin)

R (Elias) v Secretary for State for Defence [2006] EWCA Civ 1293

R (Fakih) v Secretary of State for the Home Department [2014] UKUT 513

R (on the application of Atherton) v Secretary of State for Work and Pensions [2019] EWHC 395

R (Winder) v Sandwell Metropolitan Borough Council [2014] EWHC 2617

Re C (A Child) (Care Proceedings: Deaf Parent) [2014] EWCA Civ 128

Re Osman [1996] 1 Cr App Rep 126 (CCC)

Royal Bank of Scotland Group Plc v Allen [2009] EWCA Civ 1213

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 (HL)


Vicary v BT [1999] IRLR 680 (EAT)

Walker v Sita Information Networking Computing Ltd UKEAT/0097/12/KN

1.2 Court of Justice of the European Union

Case C-13/05 Chacón Navas v Eurest Colectividades SA [2006] ECR 1-6467
1.3 European Court of Human Rights

Senteges v Netherlands, App No 27677/02 (2003)

Hausch v Austria (2013) Unreported

Kacper Nowakowski v Poland, App No 32407/13 (ECtHR, 10 January 2017)

Glor v Switzerland, App No 13444/04 (ECtHR, 30 April 2009)

Alajos Kiss v Hungary, App No 38832/06 (ECtHR, 20 May 2010)

Jasinskis v Latvia, App No 45744/08 (ECtHR, 21 December 2010)

ZH v Hungary, App No 28973/11 (ECtHR, 8 November 2012)

1.4 Canada

Andrews v Law Society of British Columbia [1989] 1 SCR 143

Eldridge v British Columbia (Attorney General) 1997 3 SCR 624

Law v Canada (Minister of Employment and Immigration) [1999] 1 SCR 497

1.5 United Nations

F v Austria (2015) UN Doc CRPD/C/14/D/21/2014

Beasley v Australia (2016) UN Doc CRPD/C/15/D/13/2013

Lockrey v Australia (2016) UN Doc CRPD/C/15/D/13/2013

Gröninger v Germany (2014) UN Doc CRPD/C/D/2/2010


Noble v Australia (2016) UN Doc CRPD/C/16/D/7/2012


AM v Australia (2015) UN Doc CRPD/C/13/D/12/2013

2 Table of Legislation

2.1 Canada

Canada Pension Plan 1985

Canadian Charter of Rights and Freedoms, Part 1, Constitution Act 1982

Canadian Human Rights Act 1985

Employment Equity Act 1995

2.2 European Union

Reaching the most vulnerable: proposed supplement to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities Annex E/CN.5/2004/4

Resolution on sign languages, Official Journal C 379, 07/12/1998 P. 0066, 51998IP0985


2.3  **Finland**

Finnish Sign Language Act 2007

2.4  **Ireland**

Irish Sign Language Act 2017

2.5  **New Zealand**

Human Rights Act 1993

New Zealand Sign Language Act 2006

Social Security Act 1938

Social Security Act 1964

2.6  **United Kingdom**

2.6.1  **Acts**

British Sign Language (Scotland) Act 2015
Crime and Disorder Act 1998
Disability Discrimination Act 1995
Disability Discrimination Act 2005
Employment and Training Act 1973
Equality Act 2006
Equality Act 2010
European Communities Act 1972
European Union (Withdrawal) Act 2018
Gaelic Language (Scotland) Act 2006
Human Rights Act 1998
National Assistance Act 1948
Public Order Act 1986
Sex Discrimination Act 1975
Welsh Language Act 1993

2.6.2 Bills

Scottish Parliament Bill British Sign Language (Scotland) Bill as amended at Stage 2
Session 4 (2013)
2.6.3 Statutory Instruments

Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260

European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009/1181

2.7 United States of America

Americans with Disabilities Act 1990

3 Table of Conventions

3.1 Council of Europe

Council of Europe (4 November 1950) Convention for the Protection of Human Rights and Fundamental Freedoms (as amended)

Council of Europe, ‘Making sign language one of Europe’s official languages’ (2017) Doc 14330

Council of Europe, ‘Non-discrimination and the right to use sign languages in Europe’ (2014) Doc 13561

Council of Europe, ‘Protecting and promoting sign languages in Europe’ (2018) Resolution 2247


Council of Europe, European Charter for Regional or Minority Languages, Strasbourg, 5.XI.1992

Council of Europe, European Charter for Regional or Minority Languages, ETS No. 148.

Council of Europe, Framework convention for the protection of national minorities, Strasbourg, 1.II.1995

3.2 United Nations


United Nations General Assembly (19 December 1966) International Covenant on Civil and Political Rights Resolution 14668
United Nations General Assembly (20 December 1971) Declaration on the Rights of Mentally Retarded Persons A/RES/2856

United Nations General Assembly (9 December 1975) Declaration on the Rights of Disabled Persons A/RES/3447

United Nations General Assembly (20 December 1978) International Year of Disabled Persons A/RES/33/170


United Nations General Assembly (18 December 1992) Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities A/RES/47/135


3.3 **International Labour Convention**


International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries. 76th ILC Session (27 June 1989) No. 169
CHAPTER 1 – INTRODUCTION

1 Aims and objectives

The main premise of this thesis is that Deaf people\textsuperscript{1} continue to experience inequality, and that sign language recognition offers a potential solution. In order to evaluate this hypothesis, it is necessary to establish what evidence is present to suggest that Deaf people experience inequality and why, followed by a consideration of what equality attempts to achieve and how Deaf people are protected (or not) by international, European and UK equality law. Sign language recognition is regularly touted as the ultimate goal for Deaf communities around the world as a way of achieving equality,\textsuperscript{2} and so this potential solution will be examined in the context of this thesis.

2 Deaf people in the UK

Within the UK, there is conflicting evidence as to the numbers of deaf people. Action on Hearing Loss (AOHL) conducted research in 2015\textsuperscript{3} which claims that there are more than 11 million people in the UK with some form of hearing loss, or one in six of the population. From the total number of 11 million, more than 900,000 people are severely or profoundly deaf.\textsuperscript{4}

\textsuperscript{1} An explanation as to the use of the word ‘Deaf’ can be found on pages 2 to 3.
\textsuperscript{4} ibid 8.
By way of contrast, the January 2015 GP Patient Survey results state that there are 3,711 Deaf individuals who use sign language, which equates to 0.44 per cent of the 836,927 surveyed. According to the Annual Mid-Year Population Estimates for 2013, there are 53.9 million people living in England, 5.3 million in Scotland, 3.1 million in Wales and 1.8 million in Northern Ireland, a total of 64.1 million living in the UK. 15.8 per cent of the population in England responded to the ‘Deaf and use sign language’ question in the GP Patient Survey in 2014, so applying that across the board, we would expect a UK-wide response of 10,127,800. By applying 0.44 per cent to the total, we have an estimate of 44,562 individuals who are deaf and use sign language.

The 2011 Census on the other hand reveals that a small percentage (22,000) of respondents reported a sign language as their main language and that of these respondents 70 per cent (15,000) used British Sign Language (BSL). In contrast, the British Deaf Association (BDA) contends that there are 156,000 sign language users in the UK, exceeding the number of Gaelic language speakers (approximately 60,000) and approximately one quarter of the number of Welsh speakers (over 500,000). It is intended to adopt the BDA’s figure for the purposes of this thesis, as it was extrapolated from the Scottish Census, which showed a figure of 13,000 using BSL at home in Scotland, and applied to the UK as a whole. Nonetheless, it is important to note that the Scottish census asked the question in a different way, so that people who

---

5 The GP Patient Survey is conducted by Ipsos MORI on behalf of NHS England.
used BSL at home counted themselves as BSL users, and so did hearing relatives of Deaf BSL users.\textsuperscript{10}

Having considered the numbers of deaf people in the UK, it is incumbent to point out that deaf people are referred to in a number of different ways. ‘Deaf’ with a capital D refers to those born Deaf or deafened in early (sometimes late) childhood, for whom the sign languages, communities and cultures of the Deaf collective represent their primary experience and allegiance, many of whom perceive their experience as essentially akin to other language minorities.\textsuperscript{11} The lowercase ‘deaf’ refers to those for whom deafness is primarily an audiological experience. It is mainly used to describe those who lost some or all of their hearing in early or late life, and do not usually wish to have contact with signing Deaf communities, preferring to try and retain their membership of the majority society in which they were socialised.\textsuperscript{12} Deaf people are also referred to as ‘hearing impaired’ or ‘hard of hearing’: it is generally understood that ‘hearing impaired’ is the medical term that medical professionals use to describe deaf people, and ‘hard of hearing’ is a term generally reserved for older members of the human population with age-related hearing loss.\textsuperscript{13}

Corker goes further and argues that it is only a small section of the deaf population in the UK, ranging from between 22,000 and 156,000 individuals – according to the figures extrapolated above – that regard themselves as a linguistic and cultural minority group and distance themselves from impairment and disability in its

\textsuperscript{10} Feedback from Rachel O’Neill to author (27 July 2019).
\textsuperscript{11} Paddy Ladd, \textit{Understanding Deaf Culture: In Search of Deafhood} (Multilingual Matters Ltd 2003) xvii.
\textsuperscript{12} ibid.
medical/individual construction, that is, Deaf people. It is clear that alternative discourse on the self-definition posited by this group of deaf people is extremely visible and articulate and finds much favour with the dominant culture and the disability movement. However, not all members of this group of deaf people define themselves only in terms of minority group status; many are unfamiliar with the proposed distinction between minority group status and disability status in its social construction, or are unaware that alternative disability discourses such as the social model exist have been or are being produced. These form the majority of what AOHL estimates to be the 11 million deaf people in the UK. They are split into three distinct categories: (1) those who are aligned with the dominant culture’s individual medical construction of disability, not always by choice (‘hearing-impaired’); (2) those who define themselves in terms of the disability movement’s social construction of disability (‘audiologically deaf’); or (3) those who are uncommitted in their self-definition, perhaps because they do not feel sufficiently included in dialogue, theory or practice to make such a commitment (‘non-committed deaf’). For the purposes of this thesis, these four categories of deaf people (Deaf people and the majority three outlined above) collectively make up what is termed the ‘deaf community.’

Ladd argues that this division within the deaf community is socially produced, and that this is the manifestation of the oppression of this group of individuals. Nonetheless, recent discourse suggests that a number of researchers are moving away from the

15 ibid.
17 Corker (n 14) 9.
18 ibid 10.
practice of using the terms ‘Deaf’ versus ‘deaf’ and only use ‘deaf’ to talk about individuals, entities or theoretical concepts.\textsuperscript{20} They do so because the deaf dichotomy is in fact an over-simplification of an increasingly complex set of identities and language practices.\textsuperscript{21} Therefore, for the purposes of this thesis, reference will be made to ‘deaf’ people instead of ‘Deaf’ when they are referred to as a collective or when it is not clear whether they are Deaf people or not. The word ‘Deaf’ will be used where appropriate, particularly when it is a clear reference to Deaf people.

Throughout this thesis, there will also be reference to the ‘Deaf-World,’ ‘Disabled-World’ and ‘Hearing-World.’ Deaf-World is a term used by Lane, Bahan and Hoffmeister in their seminal work, \textit{A Journey into the Deaf-World}. It refers to the relationships among Deaf people, to the social network they have set up and not to any notion of geographical location, and those who share Deaf-World knowledge and experience of what it is to be Deaf.\textsuperscript{22} It is a term that this minority language group has designated themselves,\textsuperscript{23} and while Lane, Bahan and Hoffmeister make it clear that the Deaf-World does not necessarily include the much larger deaf and hearing impaired community,\textsuperscript{24} for the purposes of this thesis, all the deaf identity variations will be included within this term. The terms Disabled-World and Hearing-World are a natural by-product of the use of the term Deaf-World, in that the difference between these and the Deaf-World are clearly apparent, and at the very least, will be demonstrated in Chapter 2.

\textsuperscript{21} ibid 14.
\textsuperscript{22} Harlan L Lane, Robert Hoffmeister and Ben Bahan, \textit{A Journey into the Deaf-World} (DawnSignPress 1996) 5.
\textsuperscript{23} ibid.
\textsuperscript{24} ibid 5-6.
3 Motivation for the thesis

Following a preliminary literature review, the evidence of deaf people’s inequality is overwhelming. In 2014, the BDA commissioned a report which contains a number of case studies that illustrate the current state of play for deaf people and their families in the UK today. These include: the failure of a hospital to provide an interpreter which meant that a deaf woman was unable to provide informed consent for surgery to remove her appendix, a local college asking two deaf students not to return to a course after one term as their literacy skills did not meet the standard required, even though their respective Disabled Students Allowances had provision for language support, an employer failing to provide BSL/English Interpreters for meetings throughout his employment, an interview being withdrawn after an employer was asked to arrange a BSL/English Interpreter to attend, a local tax office refusing to make a face to face appointment with an interpreter for a deaf man having difficulty with his self-assessment tax returns, and a bank’s hearing loop system not working. Such instances of inequality will now be further explored in the areas of education, employment, the criminal justice system, accessing legal advice, prisons and health.

3.1 Inequality in education

The World Federation of the Deaf (WFD) estimates that 80 percent of the world’s deaf children do not attend schools where they might be more able to have contact with

---

25 Batterbury Magill (n 8) 25.
26 ibid 27.
27 ibid 33.
28 ibid 37.
29 ibid.
30 ibid 38.
31 ibid.
other Deaf people. In the past, deaf children were not in school and even might have been thought to be uneducable, a point corroborated by Lane who states ‘an educated Deaf person must be something akin to a raree-show’ (a cheap street show).

In 2009 in England, 71 per cent of deaf children failed to achieve the government benchmark of five General Certificates in Secondary Education (GCSE) at grades A* to C, including English and Maths. Recent statistics released by the Department of Education suggest that only 46 percent of deaf children achieved a GCSE at grade C or above in English and Maths in the academic year 2016/17, compared with 47 percent in 2015/16 and 38.4 percent in 2013/14. This is to be contrasted with 63.9 percent of all boys and girls who achieved a GCSE at grade C or above in English and Maths in 2016/17. In terms of Attainment 8, the average score achieved by deaf children was 37.4 in 2016/17, and 42.5 in 2015/16. In contrast, all boys and girls achieved an average score of 46.3 in 2016/17 (49.9 in 2015/16).

The Consortium for Research in Deaf Education’s (CRIDE) 2018 England-wide summary report adds that in 2017/18 there were at least 43,467 deaf children in

---

35 Action on Hearing Loss (n 3) 11.
37 ibid.
38 Introduced in 2016, Attainment 8 measures the achievement of a pupil across eight qualifications including mathematics (double weighted) and English (double weighted). Each individual grade a pupil achieves is assigned a point score, which is then used to calculate a pupil’s Attainment 8 score (Department for Education, ‘Progress 8: How Progress 8 and Attainment 8 measures are calculated’ (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/561021/Progress_8_and_Attainment_8_how_measures_are_calculated.pdf> accessed 21 April 2019).
39 ibid.
England, but only 1,271.7 Teachers of the Deaf posts, of which three percent were vacant. In Northern Ireland, there were at least 1,687 deaf children, with 34.2 Teacher of the Deaf posts, of which 15 percent were vacant. In Wales, there were 2,625 deaf children, and 62.8 Teacher of the Deaf posts, of which two percent were vacant.

Only 28 percent of severely and profoundly deaf children use sign language in some form in education and in 2014, CRIDE found that only 8.7 percent of Teachers of the Deaf UK-wide had a BSL qualification at Level 3 or above. This suggests that deaf children do not receive an education equal to that of their hearing peers, and almost certainly are not receiving a bilingual education, as even Level 3 does not provide the prerequisite level of fluency in the language, with Signature, the award body for Level 3 BSL, describing Level 3 allowing the learner to merely understand and use varied BSL in a range of work and social situations. In addition, deaf schools have been progressively closed down and replaced with mainstream provision, with the result that almost all deaf children have been disadvantaged by being denied access to native BSL. The 2017 CRIDE report specifically states that 78 percent of school-aged deaf children attend mainstream schools whereas six percent attend mainstream education, but only 1,271.7 Teachers of the Deaf posts, of which three percent were vacant. In Northern Ireland, there were at least 1,687 deaf children, with 34.2 Teacher of the Deaf posts, of which 15 percent were vacant. In Wales, there were 2,625 deaf children, and 62.8 Teacher of the Deaf posts, of which two percent were vacant.

Only 28 percent of severely and profoundly deaf children use sign language in some form in education and in 2014, CRIDE found that only 8.7 percent of Teachers of the Deaf UK-wide had a BSL qualification at Level 3 or above. This suggests that deaf children do not receive an education equal to that of their hearing peers, and almost certainly are not receiving a bilingual education, as even Level 3 does not provide the prerequisite level of fluency in the language, with Signature, the award body for Level 3 BSL, describing Level 3 allowing the learner to merely understand and use varied BSL in a range of work and social situations. In addition, deaf schools have been progressively closed down and replaced with mainstream provision, with the result that almost all deaf children have been disadvantaged by being denied access to native BSL. The 2017 CRIDE report specifically states that 78 percent of school-aged deaf children attend mainstream schools whereas six percent attend mainstream education.

---

44 CRIDE, ‘Report on 2014 survey on educational provision for deaf children’ (2014) <http://www.ndcs.org.uk/document.rm?id=9801> accessed 7 November 2015. Level 3 refers to the Signature’s Level 3 BSL qualification. The highest BSL qualification that can be achieved is Level 6. The majority have BSL Level 2 (48 percent), followed by Level 1 (35 percent), and 8 percent have no BSL qualifications at all.
46 Batterbury Magill (n 8) 30.
schools with resource provisions, while just three percent attend special schools for deaf children.\textsuperscript{47}

3.2 Inequality in employment

Lane, Hoffmeister and Bahan suggest that deaf people’s rights are violated routinely throughout the world as the absence of education for deaf children or unsuccessful education deprives them of free choice of employment and thus the means to earn a decent living.\textsuperscript{48} Similarly, in post-industrial societies, deaf people are being left behind as large segments of the workforce develop the skills and knowledge required for positions that process information and deliver technical services. Employer prejudices against deaf workers and the shortage or absence of interpreters often deprive the deaf worker of an even chance at a job opening.\textsuperscript{49}

In general, deaf people are more likely to be underemployed or unemployed due to the challenges they face to gain and remain in employment,\textsuperscript{50} and they face additional attitudinal and practical barriers.\textsuperscript{51} Even at a time of low unemployment, only 65 percent of deaf people are in employment, compared with 79 percent of people with no long-term health issue or disability.\textsuperscript{52}

In more recent research, Totaljobs conducted a survey of deaf jobseekers and employees which garnered 437 responses. They found that discrimination plays a large part in the working lives of deaf people, and that many deaf people are forced to


\textsuperscript{48} Lane, Hoffmeister and Bahan (n 22) 424.

\textsuperscript{49} ibid.


\textsuperscript{51} ibid.

\textsuperscript{52} Action on Hearing Loss (n 3) 79.
exit employment because of it.\textsuperscript{53} Furthermore, they found that the attitudes of employers and colleagues can prevent deaf people from fulfilling their potential, and often lead to them feeling isolated at work.\textsuperscript{54} There are also many perceived barriers to employment as the appropriate support available to help deaf people secure employment is not readily available, and there is a stark lack of deaf awareness across businesses and society.\textsuperscript{55}

\section*{3.3 Inequality in the criminal justice system}

There is limited evidence on deaf people’s experiences of crime and criminal justice.\textsuperscript{56} Nonetheless, as a starting point, in 1997, Brennan and Brown published the first full report of a research project which explored the extent to which deaf people have equal access to justice.\textsuperscript{57} The report refers to members of the legal profession, police and court officials being generally unaware of the offence caused to deaf people by using the term ‘deaf and dumb,’\textsuperscript{58} the treatment of deaf people in custody,\textsuperscript{59} ‘gagging’ deaf people by handcuffing their wrists behind their backs,\textsuperscript{60} and lack of interpreting provision.\textsuperscript{61} Subsequently, in 2000, Harrington and Turner\textsuperscript{62} raised various issues with regard to how deaf people are denied full access to the legal system such as the ways in which police behaviour clashes with deaf culture, the use of audist terminology, the lack of information given to deaf people in the absence of an

\begin{itemize}
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} Ibid.
\item \textsuperscript{57} Mary Brennan and Richard Brown, \textit{Equality before the law: Deaf people’s access to justice} (Douglas McLean 1997) 10.
\item \textsuperscript{58} Ibid 91.
\item \textsuperscript{59} Ibid 94-5.
\item \textsuperscript{60} Ibid 95-7.
\item \textsuperscript{61} Ibid 97-8.
\item \textsuperscript{62} Harrington and Turner (n 56) 169-179.
\end{itemize}
interpreter, among others. There is thus evidence, even when BSL/English interpreters are present that deaf people are still denied full access to the legal system, and therefore full access to justice, with the courts not sufficiently aware of the nature of signed language and deaf culture and the particular circumstances of the deaf community.  

Deaf BSL users are barred from jury service in the UK. There is established case law that confirms deaf individuals cannot serve on a jury because if a deaf individual is accompanied by a BSL/English Interpreter, there would be more than 12 individuals in the jury room making their deliberations. This is despite the fact that it has been established that deaf people have the capacity to make decisions as jurors, and that they can sufficiently comprehend courtroom discourse and jury deliberations through a sign language interpreter. The main concern has been that interpreters would inappropriately participate in confidential jury deliberations, and in Re Osman, Sir Verney observed:

> It has long been held that it is an incurable irregularity for an independent person to retire with the jury, even though he may take no part in the discussion. An interpreter would be bound to take a part even though not expressing any personal opinion.

In contrast, as New Zealand Sign Language is one of New Zealand’s three official languages, the courts in New Zealand are obliged to provide sign language

---

63 ibid 168.
64 McWhinney (Woolwich Crown Court, 9 November 1999).
interpreters when required, and under the New Zealand Juries Act 1981, deaf or blind persons may be jurors.\textsuperscript{69} In addition, deaf people have been serving as jurors since 1979 in the United States of America.\textsuperscript{70} Therefore, at least in the UK, deaf people are not treated equally to non-deaf individuals who may be asked to serve their public duty.

\textbf{3.4 Inequality in accessing legal advice}

To compound deaf people’s lack of access to justice, an Equality and Human Rights Commission (EHRC) report\textsuperscript{71} suggested that access to legal advice is extremely poor. Even if deaf people are made aware of the increasingly rare oases of advice, there is no guarantee that they will be able to access those services.\textsuperscript{72} Kyle, Sutherland and Stockley\textsuperscript{73} further concluded that deaf people often felt as if they were in a battle to be understood by their legal adviser\textsuperscript{74} and that communication is the ‘core issue’ between the deaf individual and their legal adviser: ‘For deaf people, it centres on lack of ‘deaf-friendliness’ of the contact and the perception that an interpreter is only engaged to help a deaf person, and not to facilitate the work of the lawyer.’\textsuperscript{75}

\textsuperscript{70} ibid.
\textsuperscript{72} ibid.
\textsuperscript{73} Jim Kyle, Hilary Sutherland and Sheryl Stockley, ‘Legal Choice - Silent Process: Engaging Legal Services When You Do Not Hear’ (Deaf Studies Trust 2012).
\textsuperscript{74} ibid 24.
\textsuperscript{75} Ibid 11.
3.5 Inequality in prisons

The Deaf Prison Project\(^{76}\) firmly established that deaf prisoners suffer a ‘double sentence’\(^{77}\) in that they face what are in effect additional forms of punishment, and serious issues of inequality of treatment between deaf and hearing prisoners.\(^{78}\) Given that there is a relatively small number of deaf people held in prison or on remand in the UK,\(^{79}\) it is most unlikely that any deaf individual will be placed with others who can communicate with him/her in a signed language. Few prison staff have been trained in BSL either. The result, from a deaf perspective, is that once imprisoned, and even while awaiting trial, the deaf person is left to feel extraordinarily isolated and lonely.\(^{80}\) Deaf prisoners are thus at a greater risk of social isolation and less able to utilise distraction strategies such as watching television or phoning friends or relatives, and communication with prison staff remains a major problem.\(^{81}\) Indeed, McCulloch suggests that deaf people face a partial justice system.\(^{82}\)

---

\(^{76}\) The Deaf Prison Project ran from 1999 to 2009, and helped to support Deaf prisoners by giving information, advice and support to Deaf people in prison and offered trained prison visitors and volunteers qualified in BSL; basic Deaf awareness training for prison and probation staff and information and advice to Deaf families with a family member in prison (Social Exclusion Unit, ‘Reducing Re-Offending by Ex-Prisoners’ (2002) <http://www.prisonstudies.org/sites/default/files/resources/downloads/reducing_report20pdf.pdf> accessed 18 July 2019, 76).


\(^{78}\) Brennan and Brown (n 57)109.

\(^{79}\) Gahir, O’Rourke, Monteiro and Reed estimate that there are between 63 and 100 sign language users in prison at any one time. Manjit Gahir, Susan O’Rourke, Brendan Monteiro and Rebecca Reed, ‘The Unmet Needs of Deaf Prisoners: a Survey of Prisons in England and Wales’ (2011) 1(1) International Journal on Mental Health and Deafness 58, 59.

\(^{80}\) Social Exclusion Unit (n 76) 178.

\(^{81}\) Gahir, O’Rourke, Monteiro and Reed (n 79) 59.

3.6 Inequality in health

In health matters, deaf people generally do not have access to healthcare services. It has been found that Deaf BSL users have poorer health which has been attributed to problems accessing health care and communicating with healthcare professionals, with deaf people finding it difficult to get help, missing potentially life-threatening health conditions, and offering poor treatment when a diagnosis is made. The incidence of acquired (not congenital) mental illness among deaf people is around 50 percent, double that of the majority society populations.

From the above, the general consensus is that deaf people continue to experience inequality, despite the existence of equality laws in the UK that purport to eliminate discrimination and increase equality of opportunity. The purpose of this thesis, therefore, is to explore why, despite the existence of such laws, deaf people continue to experience such inequality.

4 Scope of the thesis

Deaf people are often compartmentalised as part of the Disabled-World, which often ignores the Deaf-World to the extent that it is only their audiological status that has any significance or meaning. This is in stark contrast to Deaf people’s view of themselves, that is, as a culturo-linguistic group rich in history, culture and language. The conflict between the Disabled-World and the Deaf-World is manifested in how deaf people are protected by the law against discrimination and inequality; in order to

83 Alan Emond, Matthew Ridd and Hilary Sutherland, ‘Access to Primary Care Affects the Health of Deaf People’ (2015) 65 British Journal of General Practice 95, 95.
85 Batterbury, Ladd and Gulliver (n 32) 2912.
benefit from such protections, deaf people are generally forced to accept the disability label.

For some, this is anathema to their Deaf identity; for others, this is an acceptable compromise on the basis of intersectionality. A deaf individual has a multitude of identities, Deaf, deaf and disabled being but three of them. However, to what extent does this conflict – referred to in this thesis as the ‘Deaf Legal Dilemma’ – contribute to the inequalities that deaf people continue to experience? Is it this compartmentalisation that diminishes deaf people’s progress towards equality? Does society’s ignorance (whether deliberate or not) of Deaf identity contribute to the inequality deaf people experience?

In order to determine the impact of the Deaf Legal Dilemma on equality law, it is first of all necessary to consider hearing, disabled and Deaf discourse. Within this context, it will then be possible to explore what equality law aims to achieve in relation to deaf people, and where conflicts arise, and how these deaf people come under the auspices of international, European and UK equality law, and in particular, determine how they are defined and any ensuing tensions that exist as a result of these definitions and categorisations. Assuming that equality law is failing deaf people, we can then go on to look at what the various potential solutions are to this Deaf Legal Dilemma.

5 Structure of the thesis

Following this introductory chapter, the second chapter of this thesis provides the theoretical framework for the Deaf Legal Dilemma: in order to benefit from human

---

87 Kusters, Friedner, De Meulder and Emery (n 20).
rights, deaf people have to compromise their Deaf identity and be (mis)characterised as disabled people instead. It will be argued that this dilemma is a significant factor in reinforcing the status quo for deaf people as one of the most marginalised groups in society, as outlined above. In order to demonstrate this position, it is necessary to explore the connection between deafness and disability. This will be done by analysing hearing, disability and deaf discourses, and the various models within the Disabled-World and Deaf-World, in order to establish that there is a clear conflict between the Deaf-World and the Disabled-World and that equality law, which only allows deaf people to claim discrimination if they accept the label of disability, does not necessarily provide the most appropriate *operatus morandi* for deaf people.

The third chapter attempts to extrapolate from a range of concepts of equality what the Deaf Equality Concepts are. Various academics have attempted to provide an overview of what equality is, and it is to these that we turn to for initial guidance in this exploration of equality law. This exercise is necessary as in order to solve the Deaf Legal Dilemma, one must be fully cognisant as to what deaf people ultimately want. How is equality to be manifested?

Nonetheless, an undertaking to examine the theoretical perspectives of equality law is a challenging one. When one reads the word equality, it is usually mentioned as part of concepts such as discrimination, disadvantage, prejudice, understanding, distribution and justice, or as equality of opportunity or equality of outcome. A literature review also reveals terms such as liberty, difference and dignity. It can be either symmetrical or asymmetrical; formal, substantive or transformative; egalitarian, libertarian or utilitarian.
To assist an attempt to narrow down this wide-ranging field in order to explore which analyses of equality are relevant to the Deaf-World, a clear methodology is required. Westen provides such a methodology: a categorisation exercise of the various concepts of equality using formal, substantive and transformative equality as the ‘categories,’ or ‘precepts,’ with distinct aims and standards of measurement. In an ensuing consideration of the relevant equality analyses to the Deaf-World, it is possible to extrapolate which categories each concept of equality is more likely to fit. This extrapolation is fully exhibited in the third chapter.

In the fourth chapter, an attempt will be made to ascertain how Deaf Equality Concepts are manifested in the European Convention of Human Rights (ECHR), the Equality Act 2010 (EqA 2010) and the Convention for the Rights of Persons with Disabilities (CRPD), and whether these legal instruments promulgate the precepts of formal, substantive and/or transformative equality. By establishing how deaf people fit within the auspices of equality law, it will become clear that deaf people are deprived of their opportunities due to being grouped into the disabled collective. It will also become clear that the ability of deaf people to challenge the oppression they experience is restricted to varying degrees of severity with regard to the ECHR, the EqA 2010 and the CRPD.

Finally, in the penultimate chapter of the thesis, there will be a consideration of the incumbent question: what is the solution to current equality law’s limitations as a way of dealing with deaf people’s inequality? How can the ‘equal and inalienable’ rights of deaf people be protected? There is a potential solution available that could perhaps

---

89 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, as amended).
90 UN General Assembly (6 December 2006) CRPD 61st Session A/61/611.
provide some redress to the Deaf Legal Dilemma: sign language recognition. This option will be explored in Chapter 5 of the thesis. The final chapter then brings this thesis to an overall conclusion.

6 Methodology

In order to examine the above, the following methodologies have been employed: the doctrinal approach, the socio-legal approach and, to a limited extent, the comparative approach.

Indeed, legal scholarship has historically followed three broad traditions of a non-empirical kind, and this thesis will be no different. The first, commonly called ‘black-letter law,’ focuses heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside the law.91 The second is referred to as ‘law in context’ (socio-legal). In this approach, the starting point is not law but problems in society which are likely to be generalised or generalisable.92 The third type of legal research is international and comparative legal research; the reason for its inclusion is mainly because of the increasing influence of international and supra-national legal materials, and the increasing need for legal scholars to refer to materials from a variety of jurisdictions.93 It is proposed that for the thesis, all three types of legal research will be employed to varying degrees.

91 Mike McConville and Wing Hong Chui, Research Methods for Law (Edinburgh University Press 2007) 1.
92 ibid.
93 ibid 6-7.
6.1 The doctrinal approach

Doctrinal research is generally regarded as research into the law and legal concepts,\(^94\) which is by and large the traditional black-letter law approach that will be used in this thesis. This aims to ‘reveal the presence of a series of rules based upon a smaller number of general legal principles,’\(^95\) from the collection and analysis of a body of case law, together with any relevant legislation, sometimes from a historical perspective and may include secondary sources such as journal articles or other written commentaries on the case law and legislation.\(^96\)

Thus, this thesis will examine closely domestic legislation and common law (or equivalent) in the UK, New Zealand, Finland and Ireland, European law, and international law to ascertain the legal position of deaf people in the context of both equality law and sign language recognition. An undertaking to carry out doctrinal research within a number of legal jurisdictions is not without its pitfalls, as the characteristics of legal doctrine are certainly not identical in every country.\(^97\) Nevertheless, there appear to be some core features that most doctrinal research has in common both in European countries\(^98\) and in New Zealand, thus such analysis and comparison is not expected to prove problematic in this instance.

Modern scholars, most notably Cotterrell, argue that true legal scholarship must also entail a sociological understanding of law.\(^99\) This thesis thus strives to provide a

---


\(^{95}\) Michael Slater and Julie Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson Education Limited 2007) 44.

\(^{96}\) Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ in McConville and Hong Chui (n 91) 18-19.


\(^{98}\) ibid.

sociological understanding of deaf people and equality, and then uses these to frame a doctrinal discussion of equality law.

6.2 The socio-legal approach

Thomas has highlighted that the black-letter approach alone can be insufficient: ‘Empirically, law is a component part of the wider socio and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context.’\textsuperscript{100} In addition, Lord Scarman has advised:

There is no cosy little world of lawyers’ law in which learned men may frolic without raising socially controversial issues - I challenge anyone to identify an issue of law … so technical that it raises no social, political or economic issue.

If there is such a thing, I doubt if it would be worth doing anything about it.\textsuperscript{101}

Singhal and Malik also warn that doctrinal research alone is ‘too theoretical, too technical, uncritical, conservative, trivial and without due consideration of the social, economic and political significance of the legal process.’\textsuperscript{102}

Accordingly, as we are seeking to examine the impact of law on a particular group, it will also be necessary to carry out a socio-legal or 'law in action’ approach. There will thus be an investigation into the impact of equality law upon deaf people and Deaf identity. In addition, as socio-legal methodology embraces disciplines and subjects concerned with law as a social institution, with the effect of law, legal processes, institutions and services, and with the influence of social, political and

\textsuperscript{100} Phil Harris, ‘Curriculum Development in Legal Studies’ (1986) 20(2) Law Teacher 110, 112.
economic factors on the law and legal institutions,\textsuperscript{103} this provides the scope to include Deaf Studies literature, part of the sociology field, and bridge the gap between such literature and legal studies, ascertaining the extent to which such discourses are (or are not) reflected in the law.

There is a word of warning with regard to the undertaking of socio-legal research, however. Watkins and Burton explain that socio-legal scholars have been accused of producing research that is not particularly intellectually sophisticated and which is atheoretical and descriptive in nature\textsuperscript{104} and Cownie regards such research as methodically unsophisticated with poor quality data and questionable analysis.\textsuperscript{105} These concerns can be addressed by ensuring that this thesis is academically rigorous by steeping the doctrinal exploration of equality law in theory, namely that of hearing, disabled and Deaf discourse, and the theories of equality, which hereby provide a ‘lens’ through which equality law may be examined.

6.3 The comparative approach

Comparative legal research is regarded as the field of study devoted to both describing the content and style of legal systems and to exploring similarities and differences between them.\textsuperscript{106} It aims to facilitate an understanding of the operation of international law and legal systems and their impact on formulation of public policy in an era of global interdependence.\textsuperscript{107} It is often useful to ascertain the wider context of an area

\begin{itemize}
\item \textsuperscript{104} Fiona Cownie and Anthony Bradney, ‘Socio-legal studies: A challenge to the doctrinal approach’ in Dawn Watkins and Mandy Burton (eds), Research Methods in Law (2nd edn, Routledge 2017) 44.
\item \textsuperscript{105} Fiona Cownie, Legal Academics: Culture and Identities (Hart Publishing 2004) 65-66.
\item \textsuperscript{107} McConville Hong Chui (n 91) 7.
\end{itemize}
of law; it offers scope for more critical analysis and can provide ideas for improvements. In the present context, comparative legal research is useful as when one tries to reform one’s own legal system, we would do well to examine the way in which other jurisdictions have responded to the issue.\textsuperscript{108}

Thus, this methodology will be used in Chapter 5 to ascertain the likely effectiveness of the BSL (Scotland) Act 2015. At the time of submission, it is too early to ascertain how effective the BSL (Scotland) Act 2015 is in effecting change for the Deaf community in Scotland. This approach will then help to determine whether legal recognition of BSL could be replicated across the UK. Thus, it is necessary to look at other legal jurisdictions where national sign languages have been recognised in a similar fashion to Scotland. For this purpose, the national sign language acts of New Zealand, Finland and Ireland will be explored.

However, importing rules and solutions from abroad may not work because of a difference in context, hence a more thorough contextual approach may be required.\textsuperscript{109} Van Hoecke argues that in order to achieve a more thorough contextual approach, a number of issues should be considered,\textsuperscript{110} including the choice of legal system to be compared,\textsuperscript{111} which is predominantly influenced by one’s knowledge of languages,\textsuperscript{112} that is, English. Thus, choosing New Zealand and Ireland’s sign language acts is logical, as both countries’ language is predominantly English, but Finland is useful also, despite the language difference, because it is generally regarded as the most successful national sign language act.\textsuperscript{113} In any case, translations of legal texts in

\textsuperscript{108} Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) Law and Method 1, 3.
\textsuperscript{109} ibid.
\textsuperscript{110} ibid.
\textsuperscript{111} ibid.
\textsuperscript{112} ibid.
\textsuperscript{113} Maartje De Meulder, ‘Q&A Panel’ (Deaf Studies Conference, University of Wolverhampton, February 2019).
English are available, although they may rapidly be outdated. Relevant legislation, case law (if any) and doctrinal books and articles that provide the context for the sign language recognition in each country will be compared. In summary, therefore, this thesis will be of a doctrinal, socio-legal and comparative nature.

\[\text{\textsuperscript{114}}\text{Van Hoecke (n 108) 4.}\]
CHAPTER 2 – THE DEAF LEGAL DILEMMA

1 Introduction

The Deaf dilemma: retain some important rights as members of their society at the expense of being mischaracterised by that society and government or surrender some of those rights in the hope of gradually undermining that misconception.¹

There is an interesting conundrum to be found the world over: Deaf identity is often at odds with the laws that define discrimination against deaf people; so to receive the benefits or protections afforded by such laws, Deaf people may be forced to accept the imposition of a diminished or partial view of who they are. The purpose of this thesis is to establish whether this disparity between the Deaf identity and the laws that provide deaf people with rights as members of society – referred to as the ‘Deaf Legal Dilemma’ – is the reason deaf people are currently one of the most marginalised groups in society, as outlined in Chapter 1.

There has been too little examination of the connection between Deafness and disability. Because many Deaf activists have strongly defined themselves as a linguistic minority and not disabled, political bonds and political activity have been discouraged between Deaf people and disabled people.² This thesis is an attempt to redress this imbalance, albeit within a legal context. In order to establish how Deaf people are defined and framed by the law, it is first necessary to ascertain the

parameters of the Deaf- and Disabled-Worlds, which are grounded in the social sciences and thus require an exploration of relevant social theories. In essence, this chapter will be a predominantly (where possible) socio-legal study of the Deaf- and Disabled-Worlds.

Having already established that the scope of this thesis has been narrowed so that it will only look at the relationship between Deaf people and equality law, in order to determine the impact of the Deaf Legal Dilemma on equality law, it is first of all necessary to establish what exactly Deaf identity is. The focus of this chapter is thus to establish the various elements that make up the Deaf Legal Dilemma. At the outset, it is necessary to consider the relevant discourses which influence how society at large views disabled and deaf people, accounting for the way in which society ‘deals’ with them through equality law. Discourses are ways of constructing knowledge in the shape of ideas, images and practices which provide a way to talk about knowledge and conduct associated with a particular issue, with social activity and institutions as the context.\(^3\) It is these discussions that will assist in an understanding of how Deaf people are perceived in the Hearing-World.

The various modalities that make up the Disabled- and Deaf-Worlds are then considered, in an attempt to investigate the makeup of each of these worlds and thus identify areas where they may collide, or even collude. This will then reveal the various elements of the Deaf Legal Dilemma that need to be addressed in order to achieve equality for Deaf people. Then, the areas where there is a clear collision will be explored to determine the scope of the Deaf Legal Dilemma, its impact and whether

---

there is any hope for collusion (or indeed, if there is any desire for such collusion). This framework chapter will then allow us to proceed to an exploration of equality law.

2 The Hearing-World

By way of a backdrop to the discussions around Deaf identity and how it conflicts with the Disabled-World, it is necessary to consider the dominant discourse on deafness and disability, and the backdrop of the struggle of Deaf people for the right to self-definition

in the Hearing-World. We will first examine what is termed hearing discourse, that is, the dominant discourse, and how disability is framed by such discourse. An exploration of disability discourse will then ensue, to determine how closely aligned it is to hearing discourse, followed by Deaf discourse, and a consideration of how it differs to both hearing and disability discourses. Given that this thesis naturally presupposes that the Deaf-World is a positive experience, particularly as the author considers himself to be Deaf, as well as a multitude of other identities (see section 6); one may well ask why we do not consider Deaf discourse first. The simple answer is that hearing and disability discourse are arguably more dominant discourses than that of Deaf, and thus it is necessary to establish their perspectives of disabled and Deaf people, in order to then frame Deaf discourse within that context.

A very important source of social-contextual approaches to disability is found in normalisation theory. The word ‘normal’ only entered the English language around 1840, around the time that the pressures of industrialisation led governments to define, classify and control populations. Davis explains that ‘normal’ people tend to

4 Harlan L Lane, ‘Constructions of deafness’ (1995) 10(2) Disability and Society 171.
5 Davis (n 2) 24.
think of ‘the disabled’ as ‘the deaf, the blind, the orthopedically impaired and the mentally retarded.’ Disability presents itself to ‘normal’ people through two main modalities: function and appearance. In the functional modality, disability is conceived of as an inability to do something such as walk, talk, hear and see. This is part of a continuum of the many things that people can or cannot do. In terms of appearance, the disabled person is visualised, brought into a field of vision, and seen as a disabled person. The body of the disabled person is seen as marked by the disability. The missing limb, the blind gaze, use of sign language, wheelchair or prosthesis is seen by the ‘normal’ observer, and the power of the gaze to control, limit, and patrol the disabled person is brought to the fore, as well as a welter of powerful emotional responses such as horror, fear, pity, compassion and avoidance. This ‘normal,’ ‘natural’ response is a socially conditioned, politically generated response.

Another major point is that most constructions of disabilities assume that the disabled person is in some sense damaged while the observer is undamaged. Furthermore, there is an assumption that society at large is intact, normal, setting a norm, undamaged. Colin and Barnes argue that labelling someone as ‘not normal’ implies a value judgment on that person’s social worth. Davis elaborates that ‘the average, well-meaning “normal” observer feels sorry for that disabled person, feels awkward about relating to the person, believes that the Government or charity should provide special services, and gives thanks for not being disabled.’

---

7 Davis (n 2) 7.
8 ibid 11.
9 ibid 12.
10 ibid 13.
11 ibid 14.
12 Oliver and Barnes (n 6) 19.
13 Davis (n 2) 1-2.
If one is to look at the example of deaf people in the context of normalisation, why is being deaf considered a variation from the norm of human experience? Quite simply, deaf people lack a vital sense: hearing. Their choices are also restricted in that a deaf person can aspire to more than a limited education but there may be barriers, and their choices in employment will be severely restricted (see Chapter 1). This loss of choices, according to Lane, is largely the result of the social construction of what it means to be deaf rather than of any sensory limitation that deaf people have. In that sense, society largely creates the problems of being deaf. This is a crucial point in support of the social model of disability as outlined below. However, the issue is that a deaf person may value being Deaf and possess attitudes, values, mores, and knowledge particular to Deaf culture. Thus, something positive lies at the core of the meaning of deaf, and there is no implication of loss.

3 The Disabled-World

It has been established that the treatment of disabled persons has often been shaped by prevailing social conceptions of what constitutes a disability and the appropriate social role to be played by disabled persons, supported by the traditional view of disabled persons as economic non-participants in the new capitalist economies and as objects of pity and charity, rather than as individuals capable of active participation in society. Social policies of exclusion and segregation were justified by the pervasive belief that disabled people were incapable of coping with social and other major life activities.

---

15 ibid 367.
17 ibid.
For most able-bodied people, the issue of disability is a simple one. A person with a visible physical impairment or with a sensory or mental impairment is considered disabled, and deafness is – to all extents and purposes – a sensory impairment. Many writers addressing ethics and Deaf people simply adopt a naïve materialist view when it comes to disability. For example, Davis considers: ‘almost by definition Deaf persons … have a disability’ and ‘I maintain that the inability to hear is a deficit, a disability, a lack of perfect health.’ Deaf people have thus been subject to the globalising disability label, and it has widely led to the wrong questions and the wrong answers.

As Deaf people are generally regarded as disabled, this merits a consideration of what the term disability is, and how, on a social level, Deaf people are considered to be disabled. Davis suggests disability is an absolute category, that is, ‘one is either disabled or not.’ He also states that a disability is not an ‘object’ but a social person who has a body and lives in the world of the senses. The concept of disability regulates the bodies of those who are ‘normal’, as normalcy and disability are part of the same system. Many disabled people reject the term because of its connotation in relation to normalcy and believe that the term needs to be redefined.

Due to the dominance of the ‘able-bodied’ and their culture, there is no need for them to qualify the terms they use to label the services they have created for themselves, for example, ‘public railways’ is understood to mean ‘railway services for the able-bodied’ and the word ‘public’ equals ‘able-bodied.’ When referring to disabled people,

---

20 Lane (n 14) 296.
21 Davis (n 2) x.
22 Ibid.
23 Ibid.
24 Corker (n 4) 60.
however, a qualifier becomes necessary, for example, space on railway carriages needs to be identified as, say, space for a wheelchair or ‘disabled toilet.’ These are the foundations for the discourse of the dominant culture. However, the object of disability discourse is not the person using the wheelchair or the Deaf person but the set of social, historical, economic and cultural processes that regulate and control the way we think about and think through the body.

Therein lies the conundrum. Disabled people are involved, in varying degrees of intensity and effectiveness, in a struggle to capture the power of naming difference itself, that is, the difference between ‘normal’ and disabled people. This entails challenging definitions which isolate and marginalise and replacing them with those that engender solidarity and dignity. There is a refusal to accept the deficit and dependency role which has powerfully shaped policies and practices. The language used to describe these endeavours is that of a war, a struggle, a battle. The use of such discourse reminds us of the stubbornness and pervasiveness of that which is being opposed, that is, the dominant discourse. Barnes refers to this as institutional discrimination, the abolition of which would strike at the heart of social organisations within both the public and private sectors, and this problem cannot be confronted without being involved in political debate and taking up positions on a wide range of issues.

Perspectives of disability and impairment are not just realised in understandings and experience, but also within rights-based strategies for development and social change. It has been common for some years for the universal establishment of human rights

27 ibid 11-12.
to be identified as the single most important political development for disabled people. To be clear, when considering how disabled people are afforded legal protection, it is usually in relation to three main themes: civil rights, anti-discrimination legislation and human rights.

The main legislative provisions in UK civil rights law are now comprised in the UK by way of the Human Rights Act 1998 and the Equality Act 2010 (EqA 2010). Anti-discrimination legislation ensures that one of the fundamental human rights, freedom from discrimination, through qualified civil rights laws such as the Equality Act 2010, can be enforced and require changes in the behaviour of both individuals and the systems and structures of society. These laws are explored in more depth in Chapter 4, which examines how equality law works for Deaf people.

It is pertinent to ask at this juncture whether Deaf people have a disability. Lane has already considered this question, concluding that there are many reasons to resist the label of disability: Deaf people reject the suggestion that they have an impairment or disability; the Deaf-World is not ambivalent about being deaf; its members think it is a fine thing to be Deaf and favour more of it; and Deaf parents hope to have Deaf children with whom they can share their language, culture and unique experiences. Deaf people also do not attach particular importance to better medical care, rehabilitation services and personal assistance services, unlike the Disability Rights Movement, and do not have independent living goals, and while disabled people seek total integration into society at large, Deaf people cherish interdependence with other

---

30 ibid.
31 ibid 368-9.
Deaf people as well as seeking integration that honours their distinct language and culture.\textsuperscript{32} Thus, Lane argues, ‘disowning the disability label would be the honest thing to do,’\textsuperscript{33} particularly as the provisions that society makes for disabled people often do not suit the interests of Deaf people and may even run counter to them.\textsuperscript{34}

Lane elaborates on this point thus: when Deaf people embrace the label of disability, they encourage the untiring efforts of the technologies of normalisation to reify in biology what are in fact social disadvantages of Deaf people. Lane concludes that the disability label deflects attention from the need for social reforms, and worse yet, encourages the technologists of normalisation in their eugenic and surgical programmes aimed at eliminating or severely reducing the ranks of culturally Deaf people. The hearing agenda for Deaf people is constructed on the principle that members of the Deaf-World have a disability and because our society seeks to reduce the numbers of disabled people through preventative measures, hearing people have long sought measures that would reduce the number of Deaf people, ultimately eliminating this form of human variation and with it eliminating the Deaf-World.\textsuperscript{35}

Batterbury, Ladd and Gulliver go one step further and argue that this misapplication of the disability paradigm has led to the ongoing oppression of Sign Language Peoples’ (SLPs) communities and languages\textsuperscript{36} (see section 4.4).

To summarise, Lane offers four reasons why Deaf people should not be construed as a disability group: Deaf people themselves do not believe that they have a disability; the disability construction brings with it needless medical and surgical risks for the

\textsuperscript{32} ibid 369.
\textsuperscript{33} ibid.
\textsuperscript{34} ibid 369-370.
\textsuperscript{35} ibid 370.
Deaf child; it endangers the future of the Deaf-World; and it brings bad solutions to real problems because it is predicated on a misunderstanding.\textsuperscript{37}

An argument for Deaf people to embrace the disability label is that it has assisted them in gaining more of their rights, as can be seen within the present jurisdiction with the EqA 2010, using the protected characteristic of disability pursuant to section 6(1), and its anti-discrimination provisions, in particular the concept of reasonable adjustments.\textsuperscript{38} They have also been able to claim disability benefits such as Disability Living Allowance, Personal Independence Payment, Employment and Support Allowance, the disability element for Tax Credits, subsidised public transport, and utilise the Department of Work and Pensions’ Access to Work scheme. The charitable organisations that purportedly represent deaf people have also benefitted from funding in order to provide services for Deaf people. If Deaf people had not accepted the disability label – predominately the medical model of disability – they would have no rights whatsoever, other than those afforded to hearing people.

Throughout disability discourse, there is considerable mention of two widely cited models of disability: the medical or individual model, and the social model of disability. Knight explains that the medical model considers that it is disabled people’s functional limitation which is the root cause of the disadvantaged experiences, and that these disadvantages can only be rectified by treatment or cure\textsuperscript{39}, whereas the social model of disability, while recognising that impairment exists at the level of the individual person, though is not the fault of a disabled person, argues that many problems that disabled people experience in terms of leading a full life in society are due to social

\textsuperscript{37} Lane (n 1), 291.
\textsuperscript{38} EqA 2010, ss 20-21.
\textsuperscript{39} Pamela Knight, ‘Deafness and Disability’ in Susan Gregory and others (eds), \textit{Issues in Deaf Education} (Routledge 1998), 215.
inequalities. It is to these we now turn, as well as two additional models of disability which are of particular relevance to Deaf people: the minority group model and the cultural model.

3.1 The medical or individual model

Traditionally, disability has been understood among many people in the UK as primarily medical conditions or illnesses. Indeed, Bamforth, Malik and O’Cinneide suggest that the medical model remains very influential in how definitions of disability are framed and how legislation is interpreted, and thus disabled persons are usually required to classify themselves as afflicted by a medical condition and unable to operate within society in an ordinary manner, and at the same time have to argue that a failure to treat them equally and accommodate them constitutes unfair discrimination.

However, deaf and disabled people have made considerable efforts to distance themselves from such a perspective and have referred to themselves using a ‘social’ rather than a ‘medical’ perceptual framework. This is because it imposes a presumption of biological or physiological inferiority upon disabled persons. It emphasises individual loss or abilities thereby contributing to a dependency model of disability. Labels such as ‘invalid,’ ‘cripple,’ ‘spastic,’ ‘handicapped’ and ‘retarded’ all imply both a functional loss and a lack of worth. Such labels have tended to legitimate individual medical and negative views of disability, to the neglect of other

41 Bamforth, Malik and O’Cinneide (n 16) 977.
42 ibid.
perspectives, in particular, those of disabled people.\textsuperscript{44} Conversely, it is questionable whether the medical model provides sufficient protection against disability discrimination, particularly as it focuses too strongly on adaptation to prevailing norms and standards in society, instead of on the failure of the social environment to adjust to the needs and aspirations of people with impairments.\textsuperscript{45}

Shakespeare, a critic of the social model of disability\textsuperscript{46} (see section 3.2), argues that no authors have ever explicitly affiliated themselves to the medical model or individual model perspective.\textsuperscript{47} Instead, the International Classification of Impairments, Disabilities, and Handicaps (ICIDH) of the World Health Organisation (WHO) has become a ‘convenient symbol of the medical model’\textsuperscript{48} and the ‘official, international, underpinning of the medical model of disability.’\textsuperscript{49} It defines disability as consisting of three types of conditions: impairment, disability and handicap. Impairment is considered to be a loss or abnormality of psychological, physiological or anatomical structure or function\textsuperscript{50}, whereas disability is a restriction or lack (resulting from impairment) of ability to perform an activity in the manner within the range considered normal for a human being.\textsuperscript{51} Finally, a handicap is a disadvantage for a given individual, resulting from an impairment or disability that limits or prevents the fulfilment of a role that is normal (depending on age, sex and social and cultural factors) for that

\textsuperscript{44} Barton (n 26) 8.
\textsuperscript{46} Shakespeare goes as far as to suggest that disability studies would be better off without the social model. Tom Shakespeare, \textit{Disability Rights and Wrongs} (Routledge 2006) 28.
\textsuperscript{47} ibid 15.
\textsuperscript{48} ibid 15.
\textsuperscript{49} Rachel Hurst, ‘To Revise or Not to Revise?’ (2000) 15(7) Disability & Society 1083, 1083.
\textsuperscript{51} ibid 28.
individual.\textsuperscript{52} This definition is essentially rejected by the social model of disability (see section 3.2).

With regard to current UK legislation, disability is defined in section 6(1) of the EqA 2010 as a ‘physical or mental impairment that has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.’ McColgan confirms that the model of disability adopted by the EqA 2010 is a medical, rather than a social, one, and that the social model recognises the close connection between the limitation experienced by individuals with disabilities, the design and structure of their environments and the attitudes of the general population, and it identifies social barriers and the infrastructure of society as the cause of disability.\textsuperscript{53} The medical model by contrast locates the problem of disability in the disabled person, regarding disability as an individual impairment and referring solely to physical conditions or impairments. Monaghan too confirms that one of the main criticisms about the medical model is that it adopts a medical rather than a social concept of disability,\textsuperscript{54} although she states that the duties to make reasonable adjustments do at least go some way to satisfying the aims and to some extent to acknowledge the social model of disability.\textsuperscript{55} In particular, she states that the EqA 2010 is medically and functionally based, as it is concerned with diagnosis and the functional ability of persons who wish to be classified as disabled under its terms.\textsuperscript{56}

---

\textsuperscript{52} ibid 29.

\textsuperscript{53} Aileen McColgan, \textit{Discrimination Law: Text, Cases and Materials} (2nd edn, Hart Publishing 2005) 566. Note that while McColgan is referring to equivalent provisions within the DDA 1995, the definition of disability in the EqA 2010 compared to the DDA 1995 is largely unchanged, thus McColgan’s point here is still valid.

\textsuperscript{54} Karon Monaghan, \textit{Blackstone’s Guide to The Disability Discrimination Legislation} (Oxford University Press 2005) 18.

\textsuperscript{55} ibid 19.

\textsuperscript{56} ibid 64.
Within the European Union (EU), the Employment Equality Directive does not include a definition of disability or guidance on who is to be protected from discrimination on the grounds of disability, but the European Court of Justice has defined disability, for the purposes of the Employment Equality Directive,⁵⁷ as: 'a limitation which results in particular from physical, mental or psychological impairments and which hinder the participation of the person concerned in professional life.'⁵⁸ Therefore, the problem lies in the individual, and not in the reaction of society to the impairment.⁵⁹ Although the EU does appear to adopt a medical model of disability, the latter part of the definition suggests a relationship to the social model of disability on the basis of the individual's participation in professional life (bearing in mind that the Employment Equality Directive is concerned with employment). Indeed, Schiek, Waddington and Bell suggest that the social model is more in line with European policy towards disability than the purely medical approach.⁶⁰ Nonetheless, the general academic consensus is that the definition as set out in Chacón seems to be closer to the medical model of disability than to the social model, resembling the definition provided in the EqA 2010.⁶¹

Waddington and Lawson argue that a medicalised approach to defining disability does not always have to be a problem in practice, citing an example whereby in Ireland, the issue of establishing that a disability exists and therefore the individual in question is

---

⁵⁸ Case C-13/05 Chacón Navas v Eurest Colectividades SA (Chacón) [2006] ECR 1-6467.
⁶⁰ Schiek, Waddington and Bell (n 45) 132.
⁶¹ ibid 137. Both section 6(1) of the EqA 2010 and Chacón refer to ‘physical and mental impairments’ which have a ‘substantial adverse effect’ or ‘hinder’ the person’s ‘ability to carry out normal day-to-day activities’ in ‘professional life.’

CHAPTER 2 – THE DEAF LEGAL DILEMMA
protected by the law, does not seem to have been problematic, and the Irish courts have accepted that many different conditions can amount to a disability.\(^{62}\)

Wells further argues that anti-discrimination legislation based on the social model does not necessarily require a definition of disability with no reference to medical impairment at all, and that some reference is required for the sake of identifying issues as one of disability.\(^{63}\) Whittle concurs, but goes on to make two points in order to ensure that a social model definition of disability encourages a focus on the occurrence of disability discrimination itself rather than on the definition itself. These are: firstly, the social model definition of disability should not incorporate phraseology normally associated with an individual’s functional limitations and should not ignore the social dimension to disability, and secondly, the definition should be wide enough to ensure that the question for the judiciary is more to do with whether an individual’s impairment constitutes an appropriate disability for the purposes of the law.\(^{64}\) Thus, a wide definition of disability that leaves sufficient room to take account of the social aspects of disability is to be preferred over a purely medical definition from the perspective of inclusion and effective protection against discrimination.\(^{65}\)

Thus, it is argued that the Employment Equality Directive lends itself to a reading that is consistent with the social model of disability, unlike the EqA 2010. Likewise, the UN Convention on the Rights of Persons with Disabilities 2007 (CRPD) defines persons with disabilities as those ‘who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective

---

\(^{62}\) Waddington and Lawson (n 59) 24.


\(^{64}\) Ibid.

\(^{65}\) Schiek, Waddington and Bell (n 45) 135.
participation in society on an equal basis with others, which combines both the medical and social models of disability. This, according to Shakespeare, is referred to as an ‘interactional model,’ which explains how disability is always an interaction between individual and structural factors.

In relation to the medical model of disability, Woodward documents the existence of a widespread and powerful interpretation of Deaf people as ‘pathological’ and ‘fundamentally deficient.’ This ideology has led researchers who study deaf people to describe in detail the facts of hearing impairment, and to classify Deaf people in terms of the degree of their impairment. Other facts about them, such as their social and cultural lives, are then interpreted as consequences of these classifications. Therein lies the rub: Deaf people are often compartmentalised as part of the Disabled-World, often ignoring their participation in the Deaf-World as it is only their audiological status that has any significance or meaning.

3.2 The social model of disability

In contrast to the medical model of disability, Oliver argues that it is not the impairment that is the sole cause of problems in the lives of disabled people, but society itself, in terms of people’s attitudes and such things as building design and transport provision. It was the Union of the Physically Impaired Against Segregation’s (UPIAS) discussion paper, *Fundamental Principles of Disability*, that turned the understanding of disability completely on its head by arguing that it was not impairment

---

67 Shakespeare (n 46) 74-5.
71 UPIAS (n 40).
that was the main cause of the social exclusion of disabled people but the way society responded to people with impairments.\textsuperscript{72} This then led Oliver to invent the term, ‘social model of disability.’\textsuperscript{73} There has been much discussion regarding the social model of disability as a theory, an idea or a concept, but Oliver advocates that it is instead a practical tool like a hammer or screwdriver, and that too much time has been spent discussing it rather than as a tool to produce social and political change.\textsuperscript{74} It is meant to be policy-relevant in order to promote policies that will address and tackle institutional discrimination that is faced by disabled people.\textsuperscript{75} It has clearly been advocated by Oliver that the UPIAS was the inspiration for the social model of disability, but Shakespeare argues that the social model was not, and has never been, the only social-contextual approach to understanding the disability experience, and provides examples of where this had previously occurred.\textsuperscript{76}

Waddington concludes that the concept of disability is nothing but a social construction, a series of artificial constraints imposed on a group of persons who consequently become known as disabled.\textsuperscript{77} Oliver elaborates:

All disabled people experience disability as social restriction whether these restrictions occur as a consequence of inaccessible built environments, questionable notions of intelligence and social competence, the inability of the

\textsuperscript{72} Michael Oliver, \textit{Understanding Disability: From Theory to Practice} (2nd edn, Palgrave Macmillan 2009) 43.
\textsuperscript{73} ibid.
\textsuperscript{74} ibid 57.
\textsuperscript{75} ibid 9.
\textsuperscript{76} Shakespeare (n 46) 13.
general public to use sign language, the lack of reading material in Braille or hostile public attitudes with non-visible disabilities.\textsuperscript{78}

Ultimately, this perspective challenges both professional and public perceptions of disability. It involves more than changes to access and resource issues.\textsuperscript{79} Shakespeare further explains that the social model was crucial to the British disability movement for two reasons. First, it identified a political strategy: barrier removal. If people with impairments are disabled by society, then the priority is to dismantle these disabling barriers, in order to promote the inclusion of people with impairments by way of social transformation. In particular, if disability could be proven to be the result of discrimination, then civil rights are the ultimate solution.\textsuperscript{80} Second, the social model had a significant impact on disabled people themselves, as it enabled them to understand that it was society that was at fault, not themselves. They do not need to change; society needed to change.\textsuperscript{81} In addition, the social model of disability encouraged academics to turn their attention to topics such as discrimination, the relationship between disability and industrial capitalism, or the varying cultural representations of people with impairment.\textsuperscript{82} Thus, without the social model of disability, it would not have been possible – in theory – to undertake this thesis.

Traditionally, both disability and deafness have been understood among many people in the UK as primarily medical afflictions, and prefer a reference to themselves using a social rather than a medical perceptual framework.\textsuperscript{83} Indeed, Oliver suggests that this medicalisation underpinned by the individual model has not delivered adequate

\textsuperscript{78} Oliver (n 72) xiv.
\textsuperscript{79} Barton (n 26) 8.
\textsuperscript{80} Shakespeare (n 46) 30.
\textsuperscript{81} ibid.
\textsuperscript{82} ibid.
\textsuperscript{83} Finkelstein (n 25) 22-5.
services to disabled people who are widely given a lower priority when placed against
the competing needs of other groups.\textsuperscript{84} In addition, when investment is made in
individually-based interventions, Oliver argues that these have ever-diminishing
returns, at the expense of modifications to environments which are likely to benefit not
just those with impairments but other groups as well, whereas physical rehabilitation
will only benefit those privileged enough to access it.\textsuperscript{85} Oliver confirms that while the
UK Government accepts that problems are external to disabled people, its solutions
target individual disabled people.\textsuperscript{86}

Oliver himself acknowledges that there are five main criticisms of the social model of
disability that have come from within the disabled people’s movement and disability
studies. Firstly, the social model ignores or is unable to deal adequately with the
realities of impairment, and secondly, the model ignores the subjective experiences of
‘pain’ of both impairment and disability. Shakespeare has argued that the social model
of disability needs to be reconceptualised to include the experience of impairment, and
that this might be achieved by a more rigorous analysis of the role of culture in the
oppression of disabled people.\textsuperscript{87} His point is that there can be no impairment without
society, nor disability without impairment. Indeed, ‘it is difficult to determine where
impairment ends and disability starts.’\textsuperscript{88} It is necessary to have an impairment in order
to experience disabling barriers, and without this link, disability becomes a much
broader, vaguer term which describes any form of socially imposed restriction. In
addition, impairments are often caused by social arrangements such as poverty,
malnutrition, war and other collectively or individually imposed social processes. What

\textsuperscript{84} Oliver (n 72) 44.
\textsuperscript{85} ibid 45-6.
\textsuperscript{86} ibid 47.
\textsuperscript{87} Barton (n 26) 48.
\textsuperscript{88} Shakespeare (n 46) 38.
counts as impairment is also a social judgment, as the meaning of impairment is a cultural issue, related to the values and attitudes of the wider society.\footnote{ibid 34-5.} Thus, impairment is always a social construction.\footnote{ibid 35.}

Bamforth, Malik and O’Cinneide concur with this point, stating that the social model analysis can place too much emphasis upon externally-imposed barriers and can overlook or neglect the reality of the functional limitations that may affect individuals.\footnote{Bamforth, Malik and O’Cinneide (n 16) 978.}

In response to the separation of impairment and disability, Oliver makes it clear that it is not about the personal experience of impairment, but the collective experience of disablement.\footnote{Oliver (n 72) 48.}

Thirdly, Oliver acknowledges the criticism that the social model of disability is unable to incorporate other social divisions such as race, gender, ageing and sexuality. Oliver makes it clear that just because the social model has not so far adequately integrated these dimensions does not mean that it cannot ever do so.\footnote{ibid 49.} Indeed, Oliver goes as far as to say: ‘[i]t would be] far better if critics had spent less of their time criticising the social model for its perceived failures and instead put more effort into attempting to apply it in areas of racism, sexism and homosexuality.’\footnote{ibid.} This is encouraging for Deaf Studies academics, as there is clearly scope for integrating Deaf discourse within the social model of disability, giving credence to Corker’s suggestion that this is the way forward.\footnote{Corker (n 3) 49.}
Fourthly, the social model of disability does not address the issue of the dominant discourse’s consideration of disabled people, particularly as critics posit that it is not physical and environmental barriers that disabled people face, but the way cultural values position them. Oliver counters this argument by stating that any attempt to move disability politics into the realm of representation is fundamentally misguided and inappropriate when so many continue to experience life-threatening material deprivation.\textsuperscript{96}

Finally, there is a criticism that the social model of disability is inadequate as it is not equivalent to a theory of disablement. Oliver, however, has made it quite clear that it was not intended for the social model of disability to be a theory of disability, and that those theoretical debates still need to take place.\textsuperscript{97} Shakespeare supports this, stating that in the past thirty years, the social model has not been developed or revised or rethought, in contrast to other social movement ideologies such as feminism.\textsuperscript{98}

As we have seen above, the definition of disability within the EqA 2010 subscribes to the medical model of disability, whereas the European Court of Justice’s approach in \textit{Chacón} and the CRPD present a combination of both the medical and social models of disability. While these two models are the most widely used, there are an additional two models which may have particular relevance for the Deaf-World but are considered less important for the Disabled-World.

To place the social model of disability firmly into the context of the Deaf-World, Corker provides an example of how it would operate in the form of a deaf person: lack of access to ‘visually produced’ information is a disability which might be countered by

\textsuperscript{96} Oliver (n 72) 49.  
\textsuperscript{97} ibid.  
\textsuperscript{98} Shakespeare (n 46) 34.
removing communication and information barriers in society.\textsuperscript{99} The social model of disability recognises that the communication problems faced by Deaf people are not because they are unable to speak, but because the rest of society do not speak their language.\textsuperscript{100} However, although the social model of disability appears to be more favourable than the medical, it still fails to accurately describe the situation of the deaf community who face a dilemma with regard to the disability laws of the UK.

Corker questions whether the social model of disability can include the diversity of the Deaf experience in a meaningful and acceptable way without discrediting the considerable advances made by both deaf and disabled people in terms of self-definition, self-determination and political action. She argues that the failure to address these issues fully has created a number of paradoxes which, when considered together, have two main implications for deaf and disabled people: firstly, the consequences for collective empowerment as a result of the limitations place on both deaf and disabled people’s ability to engage in co-ordinated struggles for participation in key areas of social and political life. Secondly, how deaf and disabled people challenge and reorganise politics and services which appear confused in their philosophy, inconsistent and uncoordinated in structure and delivery, and which sometimes encourage unhelpful competition for resources both within and between their own communities.\textsuperscript{101}

Indeed, Corker goes as far as to say that Deaf people, whatever their social, linguistic or cultural affiliations, have been excluded from the development of the social model theory and dialogues because of the diminished role of language and discourse in the

\textsuperscript{99} Corker (n 3) 5.
\textsuperscript{100} Oliver (n 72) 57.
\textsuperscript{101} Corker (n 3) 6.
social model theory, and the mind-body split inherent in some social model thinking.\textsuperscript{102} As such, she contends that the social model does not go as far as it might in providing a radical and rounded alternative to the individual model of disability, as it sidelines discourses in relation to cultural processes. Without the full integration of these cultural processes, any reference to the cultural construction of disability and Deafness seems somewhat hollow.\textsuperscript{103}

Corker infers that the cause of these failings within the social model of disability has been due to the fact that the founders of the social model of disability were men.\textsuperscript{104} While outside the scope of this thesis, this does raise interesting questions regarding the role of Critical Legal Studies, and its disability offshoot, Critical Disability Theory, and how legal rules are indeterminate and political and social factors outside of those rules have a significant influence on defining the scope of law,\textsuperscript{105} including the way in which the dominant culture is likely to view deafness and disability.

3.3 The minority group model

This has only recently been challenged by another model, known as the socio-political or the ‘minority group’ perspective on disabilities. According to this model, a disability is the product of a constant interaction between the individual and his or her environment. Due to the power struggles in society, some groups are more disadvantaged than others, which means that more attention needs to be paid to anti-

\textsuperscript{102} ibid 38.
\textsuperscript{103} ibid.
\textsuperscript{104} ibid 45.
discrimination and equal opportunity measures instead of forcing the disabled individual to adapt to his or her non-disabled environment.¹⁰⁶

Shakespeare explains that the notion of disabled people as a minority group is a North American approach, contrasted with the British social model approach which sought to redefine ‘disability’ as social oppression. ¹⁰⁷ Essentially, the minority group approach calls for a civil rights legislation approach to guarantee individual rights in order to combat prejudice and discrimination against disabled people.¹⁰⁸ Indeed, the Americans with Disabilities Act 1990 adopts a minority rights approach:

[i]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society.¹⁰⁹

Bamforth, Malik and O’Cinneide consider that the minority group model is bound up with Weber’s post-integrationist theory. ¹¹⁰ Post-integrationism criticises integrationism, which suggests that it is through the attitudinal and environment changes compelled by anti-discrimination laws that disabled people will be able to take their rightful places in the world.¹¹¹ Instead, post-integrationist thinking argues that the reach of integrationism is limited, and instead explores new ideas about what equality means and how it should be applied in the disability context.¹¹² The minority group model calls for disabled groups to be classified and defined as a disadvantaged

¹⁰⁶ Hendriks and Degener (n 77) 346-347.
¹⁰⁷ Shakespeare (n 46) 24.
¹⁰⁸ Shakespeare (n 46) 24.
¹⁰⁹ Americans with Disabilities Act 1990, s 2(a)(7).
¹¹⁰ Bamforth, Malik and O’Cinneide (n 16) 980.
¹¹² ibid 912.
minority, and for group-centred action to eliminate the subordination and disadvantage that they face, drawing a direct analogy between race discrimination and disability discrimination, calling for the same group-centred remedial action to be taken in both cases, which means that the approaches adopted for race discrimination can be transplanted to the disability context,\(^{113}\) vis a vis the steps taken to deal with institutional racism as a result of the Stephen Lawrence inquiry.\(^{114}\) This model has the advantage of emphasising the history of disadvantage faced by disabled persons and the need for strong rights-based protection and institutional support for disabled people.\(^{115}\)

Thus, a precedent in the Americans with Disabilities Act 1990 exists for dealing with the Disabled-World as a minority group, and an approach that deals with the institutional discrimination of deaf and disabled people is an attractive one. However, this approach has also been criticised for encouraging an excessive emphasis upon defining who falls within the definition of ‘disabled,’ which is a contentious issue that could limit the reach and effectiveness of disability discrimination legislation.\(^{116}\)

Indeed, Bamforth, Malik and O’Cinneide agree that disabled persons often do not see themselves as part of a distinct social group and there is no real shared historical or social experience beyond a degree of shared disadvantage, which can vary considerably from group to group. In addition, there is an argument that it could reinforce perceptions of the separateness of disabled groups from the mainstream of society, lead to questions of conflict of resources between disabled and other groups and generate tensions within different disabled groups themselves as to who should

\(^{113}\) Bamforth, Malik and O’Cinneide (n 16) 980.
\(^{115}\) Bamforth, Malik and O’Cinneide (n 16) 980.
\(^{116}\) ibid.
come under the umbrella of ‘disability.’ Degener has also cautioned that there is a need to avoid essentialism, which runs the risk of trapping disabled persons in similar stereotypes as those that have contributed to their social exclusion.

When considering an application of the minority group model of disability to the Deaf-World, which generally has a more positive approach to the formation of Deaf identity – including the concept of Sign Language Peoples (SLPs) (see below) – much of the criticism falls away, which suggests that it could be of particular use to Deaf people. These criticisms, in relation to the Disabled-World, include how one should define who falls within the definition of disability in order to form part of such a minority group, and reinforces the idea that disabled people are separated, or should be separated, from mainstream society, which is not a favoured position as most disabled people aspire for integration into dominant society rather than segregation. For Deaf people, the opposite is generally true.

Bamforth, Malik and O’Cinneide contend that the minority group model’s approach to combating discrimination is to deal with institutional discrimination. To provide an indication of how addressing disadvantage at an institutional level would work in a Deaf-World context, Sweden provides an example. In the late 1990s a gang of deaf youths in Örebro, Sweden, carried out a number of violent acts, their victims random, non-deaf residents, their justification a response to years of oppression as a

---

117 ibid 981.
118 Essentialism is considered to be the perception that disabled groups are defined and separate by reason of their disability, which is deemed to be the key constituent factor in generating their self-identity. Theresia Degener, ‘Disabled Persons and Human Rights: The Legal Framework’, in Theresia Degener and Yolan Koster-Dreese (eds), Human Rights and Disabled persons (Kluwer Academic 1995) 9.
119 ibid.
120 Bamforth, Malik and O’Cinneide (n 16) x.
minority. After the incident, the Örebro police department started to train their officials in Swedish Sign Language, and a range of activities were implemented that reinforced the importance of sign language and the recognition of previously neglected social problems.

3.4 The cultural model

Since the politicisation of disability by the international disabled people’s movement, a growing number of academics have reconceptualised disability as a complex and sophisticated form of social oppression or institutional discrimination on a par with sexism, homophobia and racism. Thus, theoretical analysis has shifted from individuals and their impairments to disabling environments and hostile social attitudes. It is argued, however, that these studies have undervalued the role of culture, which here refers to a communally held set of values and beliefs, in the oppression of disabled people. Lawson argues that the emergence of the cultural model of disability could be seen as a response to the dominance of the social model, on the basis that the social model emphasises that it is society that disables disabled individuals, as opposed to the impairment itself.

Thus the cultural model of disability has been and is developing as a response to the criticisms of the medical, social and minority group models. The cultural model of disability differs in three major ways from previous efforts: firstly, it emphasises the various modes of thought depending on particular situations and circumstances which confirm the complexity of disability as both an existential, technical, and social

---

122 Ibid 46.
123 Barton (n 26) 48.
phenomenon, in other words defined and reflected by culture itself. Secondly, the lack of access, inadequacy or misrepresentation of information highlighted by the social model of disability presents the core of understanding disability as cultural. Finally, it points to culturally determined behaviour in which one develops and excels in an identity, community and worldview that embraces disability rather than rejecting it.125

The cultural model of disability is again not without its criticism. Vernon points out that disabled people are not a homogeneous group, so any notion that ‘disability culture’ is universal for all disabled people needs to be challenged.126 Concepts of culture amongst disabled people have varied dimensions, such as the feelings of disabled people who also consider themselves to belong to other oppressed groups, for example; disabled women and, more specifically, black disabled women.127

There is nonetheless a considerable body of work that clearly establishes the existence of a Deaf culture, suggesting that this model of disability may well work for Deaf people.

4 The Deaf-World

There is a significant body of Deaf discourse, which can either be considered an offshoot of disability discourse, or standalone. It is likely to be the latter, as Deaf discourse generally takes the stance that rather than a disability, Deafness is considered to be a culture in its own right.

127 Lawson (n 124) 215.
In the context of the Deaf-World, at present, research has been or is being conducted in the fields of British Sign Language (BSL) studies, linguistics, sociolinguistics, psycholinguistics, deaf children’s language development, sign language and the brain, genetics, residential care services, education of deaf children and language and literacy development, Deaf culture, Deaf identity, mental health, Deaf history, Deafhood, Deaf Geography, Deaf Space and sign language recognition. These all form part of Deaf discourse. It is thus argued that, in the field of Deaf Studies at least, a significant body of Deaf discourse has been and is developing, and to a certain extent, this discourse has become a means of exercising political autonomy, with varying degrees of success around the world.

A case in point is the recognition of BSL in the UK. There is ample evidence of the inequalities that Deaf people face in the UK (see Chapter 1), and as a result, the Scottish Parliament has seen fit to put BSL on the statute books and there are moves in Northern Ireland to do the same. The United Nations has enshrined sign languages within the CRPD and other countries in the world have recognised their national sign languages. However, the UK Government and Westminster continue to deny that Deaf BSL users need a BSL Act, despite strong support from the academic and Deaf community. This suggests that more needs to be done to

---

128 A comprehensive discussion of Deaf culture and identity can be found below.
129 BSL (Scotland) Act 2015.
convince the UK legislature otherwise, and it is hoped that this thesis will go some way in resolving the current impasse.

With overt control and social oppression being less likely given the existence of equality law, Ladd suggests that the dominant culture has manufactured structural divisions, or ‘split subcultures,’ within the deaf population by marginalising partially deaf and deafened people, hearing children of Deaf parents – otherwise known as Children of Deaf Adults (CODAs) – and hearing parents of Deaf children, who could all form part of a wider Deaf – rather sizeable – community. It also perpetuates a division between those with a ‘better education’ and grassroots Deaf people, and between mainstream Deaf life and the lives of Deaf minorities, with the latter including Black Deaf, gay and lesbian Deaf, disabled and Deaf-Blind people. Shakespeare also considers there to be similar structural divisions within the Disabled-World, and attributes this to the tendency to define relationships between deafness, disability and the dominant culture in terms of binary opposition, that is, one is either disabled or not, contrasted with the view that Deaf people do not see themselves as disabled. Corker further considers that the social model of disability and the linguistic minority construction of deafness both hinge upon binary oppositions, that is, between individual and society, and between Deaf and hearing. As a result, the cultural production and cultural strategies which aim to achieve liberation from oppression tend to focus on further reinforcing and giving credence to the opposite ends of the

---

135 Davis (n 2) 1.
136 Harlan L Lane, Robert Hoffmeister and Ben Bahan, A Journey into the Deaf-World (DawnSignPress 1996) 413.
137 Corker (n 3) 32.
difference dichotomies, that is, the Deaf-World and the Disabled-World, and to a certain extent, has the effect of cancelling each other out,\textsuperscript{138} weakening the Deaf and disability discourse in the process.

It is necessary to note that once it has been established what defines deaf people from a social perspective,\textsuperscript{139} it is incumbent to then consider what distinguishes them from a legal perspective. Legal theory is considered to be the body of scholarship that theorises about law\textsuperscript{140} and its main object is legal doctrine, the set of concepts and categories that law students learn in law schools: constitutional provisions, statutory enactments, administrative regulations, precedent.\textsuperscript{141} While a doctrinal consideration of what constitutes a Deaf person from a legal perspective will be reserved for Chapter 4, in order to provide the context for the Deaf Legal Dilemma, it is clear that the vast majority of people, including the Government and the judiciary, still define deafness as impaired hearing, use the term ‘deaf’ in its wider sense and, along with many deaf and disabled people themselves, do not make the distinction between impairment and disability.\textsuperscript{142} In other words, Deaf people are regarded as disabled as they have a hearing impairment. While there have been attempts to recognise the Deaf community as a cultural group, due to the dominant discourse, society largely continues to view deaf people through a medical lens.

In the following sections, the various groups or statuses – both actual and hypothetical – of the Deaf community will be introduced, mindful of the fact that it is necessary to

\textsuperscript{138} ibid.

\textsuperscript{139} That is, a social sciences perspective.

\textsuperscript{140} Kim Lane Scheppele, ‘Legal Theory and Social Theory’ (1994) 20 Annual Review of Sociology 383, 385.

\textsuperscript{141} ibid 384.

\textsuperscript{142} Corker (n 3) 62.
explore what is known as the Deaf identity, as it is arguably this concept that causes conflict between the Deaf-World and the Disabled- and Hearing-Worlds.

4.1 A culturo-linguistic group

Ladd argues that the Deaf community has been swept along with the social model movement largely because they lacked the power to make their own views known, and in so doing, many are uncomfortable with their inclusion because, however the social model movement might try to construct itself to assimilate Deaf people, the criterion for including Deaf communities in their ranks is that of physical deafness – in other words, the medical concept. Thus, the social model is suitable for needs arising out of individual hearing impairment, such as flashing light doorbells, text telephones and subtitles, and applies to Deaf and deaf people alike.\footnote{Paddy Ladd, \textit{Understanding Deaf Culture: In Search of Deafhood} (Multilingual Matters Ltd 2003) 15.}

As a potential solution to the collision between Deaf people and the medical and social models of disabilities, Ladd instead argues for a new perspective on Deafness that he describes as the culturo-linguistic model. Rather than seeing the Deaf community as a disabled group, or as a language minority, Ladd argues that Deaf people are a distinct group which cannot be categorised alongside disabled people or linguistic minorities, but only in their own terms as Deaf people.\footnote{ibid 15-17.} What distinguishes the Deaf community as a distinct group is what Ladd terms Deafhood,\footnote{A process by which Deaf individuals come to actualise their Deaf identity, Ladd (n 56) xviii.} and the fact that Deaf people use a different language distinguishes them considerably from disabled people in terms of their cultural framework for life as well as the way they interpret the world.\footnote{Wayne Morris, \textit{Theology Without Words} (Ashgate 2008) 13.}
The roots of Deaf culture as a culturo-linguistic group arise from what Ladd terms ‘Deaf cultural sites,’ including Deaf residential schools and Deaf clubs. Deaf residential schools were the domain where the community language was learned, where manifold aspects of socialisation into Deaf experience occurred, and where instruction in how to conduct one’s self in an alien majority society was provided by Deaf teachers and adults who worked in the schools. Deaf clubs were the traditional cornerstones of the Deaf community, many of which were founded in the nineteenth century and have their own history and traditions. Although Deaf Clubs are not absolutely vital to community membership, they are absolutely vital to community life, since they serve not only as a focus, but as a multi-generational entity within which Deaf values and norms are passed down through the history of the club. Ladd also refers to Deaf sport, the folk arts, Deaf visual arts, Deaf performing arts, Deaf communication media, Deaf working lives and Deaf higher education, all of which constitute part of Deaf culture.

By way of criticism of Ladd’s culturo-linguistic model, while the suggestion that Deaf culture exists in the context of deaf children born to two deaf parents would appear to be logical, it does not explain how those growing up in hearing families ‘belong’ to Deaf culture. Ladd counterbalances this criticism by arguing that there is a high rate of endogamous marriage, with 90 percent of all Deaf people who marry marrying another

---

147 Ladd (n 143) 297.
148 The past tense is used here as Deaf residential schools were more commonplace prior to the Second International Congress on Education of the Deaf 1880 at which it was decided that deaf children would be taught by oral means, in effect banning the use of sign language in teaching. A formal apology was issued by the International Congress on Education of the Deaf for this decision in 2010. Grumpy Old Deafies, ‘Milan 1880: ICED 2010 Regrets Milan 1880’ (2010) <http://www.grumpyoldeafies.com/2010/07/milan_1880_a_formal_apology_at.html> accessed 26 January 2017.
149 Ladd (n 143) 297.
150 ibid 46.
Deaf person:¹⁵¹ ‘Deaf people have one of the highest intermarriage rates of all social groupings.’¹⁵² Thus, even though some deaf children born into hearing families may not necessarily be part of Deaf culture throughout their childhood, unless they attend a Deaf residential school or Deaf clubs, they are statistically more likely to marry another Deaf person, thus becoming part of Deaf culture in this way.

There is also a linguistic argument, whereby since the deaf child’s first language will be sign language, and since very few hearing parents master it, the child has different linguistic skills from its parents. A cultural vacuum also exists between a Deaf person and the dominant society in terms of access to the information and culture of that society, and it is within that vacuum that Deaf people experience their collective similarities and shape their collective responses.¹⁵³

Ladd also argues that culture consists of ‘stories we tell to ourselves’ about ourselves, our place in the world, the reasons we hold such a place and the attitudes and behaviours we should adopt, and there is evidence to suggest that Deaf stories and folklore exist.¹⁵⁴ Finally, Ladd suggests that even when brought up outside the Deaf community or in oral schools, there is a major impulse in mainstreamed Deaf adolescents to pursue a journey towards the Deaf community, towards redefining and reshaping one’s self by moving from a hearing-impaired identity towards a Deaf one.¹⁵⁵

¹⁵¹ ibid 254.
¹⁵³ Ladd (n 143) 255.
¹⁵⁵ ibid 258.
4.2 Sign Language Peoples

SLPs are a territorially dispersed minority linguistic community with shared sign language, culture and experiences of exclusion and stigma; the community includes Deaf-SLPs and hearing people in the sign community.\textsuperscript{156} In other words, SLPs are the Deaf communities of the world.\textsuperscript{157} They see themselves as a linguistic minority, aspiring to social equality through language access, in contrast to the disability model.\textsuperscript{158} SLPs desire multicultural policies that value difference and their cultural-linguistic heritage, as they consider themselves to be a community with capabilities but deprived of opportunities, entitled to equality of resources with other indigenous minority language groups for the protection of their languages and heritage.\textsuperscript{159}

Batterbury has summarised what SLPs want; namely, education policies that teach hearing children BSL at school and for Deaf children to ensure sign bilingualism where both BSL and written English are used. They also wish to have their own television channel, formal legal recognition of BSL and resources to support their cultural heritage on a par with that offered to other indigenous groups.\textsuperscript{160}

Kusters et al argue that SLP communities are a ‘bricolage group’ that does not entirely fit with other groups like language minorities, ethnic minorities, gender groups, indigenous peoples, women and disabled people, and yet, they contain elements of all these groups.\textsuperscript{161} They too argue that the concept of SLPs represents Deaf people

\textsuperscript{158} Batterbury (n 156) 548.
\textsuperscript{159} ibid 550.
\textsuperscript{160} ibid 555-6.
as a collective that needs to be recognised as a culturo-linguistic minority requiring legal protection akin to that granted to other linguistic and cultural minorities.\textsuperscript{162}

The main criticism of the concept of SLPs is that it also includes hearing people in the sign community. This is made clear as academics have distinguished between Deaf and hearing members of the Deaf community by referring to ‘Deaf-SLPs’ and ‘hearing-SLPs.’\textsuperscript{163} As per Davis above, if CODAs are to be excluded from the protections that are afforded or will be afforded to Deaf people, that casts doubt on whether language can be the defining term that provides Deaf people with social equality in contrast to the disability model.\textsuperscript{164} This appears to be the only academic criticism levelled at SLPs, although one has to bear in mind that it is a relatively new concept that does not appear to have gained widespread approval. In the present context, therefore, it is not clear what SLPs contribute to the debate regarding what is or what constitutes a Deaf identity. At the very least, it appears to be nothing more than another label or concept to be attached to Deaf people or Deaf culture that focuses on the use of sign language and encapsulates hearing sign language users as well as deaf. At most, it is a holistic concept that places sign language firmly at the heart of the Deaf identity, which can be extended to CODAs and sign language interpreters.

4.3 An ethnic group

Along with Deafhood, another conceptualisation that may assist as the solution of the Deaf Legal Dilemma is that of Deaf ethnicity, a concept that has been developed by Lane, Pillard and Hedberg.\textsuperscript{165} This concept has been further developed by Ladd and

\textsuperscript{162} ibid 9.


\textsuperscript{164} Davis (n 2) 53.

\textsuperscript{165} Harlan L Lane, Richard C Pillard and Ulf Hedberg, People of the Eye: Deaf Ethnicity and Ancestry (Oxford University Press 2010).
Lane\textsuperscript{166} who bring together the concepts of ‘deaf’ and ‘ethnicity,’ concluding that if Deafhood is ‘the sum of all meanings of what ‘deaf’ might be,’ then Deaf ethnicity within any one country is ‘the sum of what might be termed the ‘collective manifestation of Deafhoods,’ and that ‘collective language, collective identity, collective culture, collective history, collective arts, collective epistemologies and ontologies’ are all are aspects of deaf ethnicity.\textsuperscript{167} Corker considers that deaf people should be included under the heading ‘race’ since the definition of race within existing legislation is very broad and incorporates ‘colour, race, nationality, or ethnic or national origins.’ She considers that such recognition would allow deaf people to view the archaeology of their oppression in relation to that of both disabled people and different cultural groups without sacrificing their collective identity.\textsuperscript{168}

Gordon refers to an ethnic group as a population entity that considers itself to have historical ancestry and identity – a sense of peoplehood, of constituting a ‘people’ – and is so regarded by others.\textsuperscript{169} Schermerhorn adopts a similar approach whereby an ethnic group is ‘a collectivity within a larger society having real or putative common ancestry, memories of a shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood.’\textsuperscript{170} Ladd argues that in the context of Deaf people, the sense of peoplehood – or as he puts it, Deafhood – can be based on a common language, nationality, religion, race, or some combination thereof.\textsuperscript{171} Ladd and Lane explain that the ethnic properties as evidenced within the

\textsuperscript{166} Paddy Ladd and Harlan L Lane, ‘Deaf Ethnicity, Deafhood, and Their Relationship’ (2013) 13 Sign Language Studies 565.
\textsuperscript{167} ibid 575-6.
\textsuperscript{168} Corker (n 3) 48.
\textsuperscript{169} M Gordon, The Scope of Sociology (Oxford University Press 1988) 129.
Deaf-World, are as follows: sign languages, bonding to one’s own kind through belonging to the Deaf community and a propensity to marry other deaf individuals, culture, social institutions such as schools, deaf clubs and churches, as well as associations focusing on professions, leisure, politics and socialising, the arts, history, territory, kinship, the socialisation of deaf children by unrelated deaf adults, and boundary maintenance through language and the different perceptions of deaf people held by the Hearing-, Disabled- and Deaf-Worlds. Overall, they argue that, in the context of the American Deaf-World, these ethnic properties are evident, and that ‘it seems likely that there is deaf ethnicity to be found wherever a sign language is found.’

As the concept of Deaf ethnicity has been clearly established, it is incumbent to explore whether such ethnicity could be brought within the parameters of race as a protected characteristic, affording those who qualify the anti-discrimination protections contained within the EqA 2010, and thus allowing Deaf people to move away from the disability label and embrace their cultural and ethnic identity.

Section 9(1) of the EqA 2010 states that race includes ‘colour, nationality, and ethnic or national origin.’ There is no official definition of race, with the House of Lords in *Mandla v Dowell Lee* (Mandla) referring to Simon LJ in *Ealing London Borough Council v Race Relations Board* who stated that ‘... “racial” is not a term of art, either legal ... or scientific. I apprehend that anthropologists would dispute how far the word “race” is biologically at all relevant to the species amusingly called homo sapiens.’

---

172 Ladd and Lane (n 166) 566.
173 ibid 568.
176 Mandla (n 174) [561].
This tells us how not to define race, and thus the definition of race should be used in its popular sense with a purposive approach. In Mandla, ethnic origin was defined as a cultural, rather than a strict racial question. It was further held in Chandhok and another v Tirkey that ethnic origin in section 9(1)(c) of the EqA 2010 had a wide and flexible ambit, suggesting that it would be, in theory, possible to widen the concept to include Deaf ethnicity. So far, there does not appear to be any element of the attempts to define race that could preclude Deaf people.

Returning to Mandla, Lord Fraser provided two essential and five relevant characteristics: (1) a long-shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; and (2) a cultural tradition of its own, including family and social customs and manners. The further relevant characteristics were held to be: (1) either a common geographical origin, or descent from a small number of common ancestors; (2) a common language, not necessarily peculiar to the group, (3) a common literature particular to the group, (4) a common religion different from that of neighbouring groups or from the general community surrounding it; and/or (5) being a minority or being an oppressed or dominant group within a larger community.

When applied to that of the Deaf community, it can be proven that Deaf people have the two essential characteristics: a long-shared history of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; have a cultural tradition of its own, including family and social customs and manners. Of the

---

177 Mandla (n 174) [550].
178 UAEAT/0190/14/KN.
179 Upon perusal of the Mandla law report, it is not specified what weighting the words essential and relevant are given, thus we can assume that the two essential characteristics are mandatory requirements, and the relevant characteristics, where found, provide further evidence to support claims that particular groups are to be considered ethnic groups.
180 Mandla (n 174) [562].
five relevant characteristics, there is evidence of four, the most obvious of which is the common language of BSL, common geographical origins whereby Deaf people tend to congregate around the cities and towns where deaf schools and colleges are or have been prevalent, a common literature, both in written and BSL form, and a minority group that is arguably oppressed. In relation to geography, Ladd confirms that Deaf communities do not generally choose to live in proximity, but that this is also true for other groups such as Jewish-Americans, and other former immigrant communities who initially lived together, which have subsequently dispersed, yet continue to claim a common cultural identity.\textsuperscript{181}

In respect of the fifth relevant characteristic, that of religion, there is very little in the way of academic research regarding the role that religion plays within the Deaf community. One would be forgiven for assuming that this would not be a characteristic of the Deaf community, given that most deaf people would have been born into a family who subscribe (if at all) to a particular religion. For example, if a deaf child was born into a white, Welsh family whose faith was that of the Church in Wales, that is, Anglican,\textsuperscript{182} it is likely that that deaf child would be brought up by his parents to respect the doctrines of the Church in Wales. If that deaf child were then to discover his Deaf identity and become involved with the Deaf community, it is unlikely that his religion would change. The same would be true for a deaf child born into a Muslim, Sikh, Hindu or Jewish family. However, Broesterhuizen argues that Deaf people often have been outsiders in a hearing Church, and that the message of the Church has not reached Deaf people because the language, symbols, culture of the traditional

\textsuperscript{181} Ladd (n 143) 255.
Church, and the view of Church people on Deafness are remote from the culture and daily life experiences of Deaf people.\textsuperscript{183} Thus, it is arguable that the shape a ‘Deaf religion’ could be in the form of union or collectivism whereby members of the Deaf community may congregate according to their religion to practise their faith in their own language with their peers.

This argument is supported by the initial findings of the Scripture, Dissent and Deaf Space research project, which looked at the spaces produced for Deaf people by the nineteenth century Church of England by Deaf people within the structure of those church spaces.\textsuperscript{184} Gulliver confirms that the practice of religion by Deaf people was more about having a core set of beliefs than a ‘religion’ per se, and that the core set was about validity as a visual people, which was manifested in choices around worship services in terms of visuality and language rather than what religion or denomination to follow.\textsuperscript{185} It is thus argued that this separation could constitute ‘Deaf religion,’ not in terms of the faith itself, but in terms of how faith is practised.

There are, however, some identifiable flaws in classifying the Deaf community as an ethnic group. As well as the issues prevalent when considering the Deaf community and SLPs in terms of their apparent exclusion of deaf and hard of hearing people and where hearing people such as CODAs and sign language interpreters fit in, Davis is concerned that labelling the Deaf community as an ethnic group will begin an association with the ‘brutal history of racial politics,’ whereby slavery, apartheid, miscegenation laws, and medical experiments have forged the apartness of the racialised minority and in which the oppressor group has created the oppressed. He

\textsuperscript{183} Marcel Broesterhuizen, ‘Faith in Deaf Culture’ (2005) 66 Theological Studies 304, 304.
\textsuperscript{184} More information can be found here: https://sdds.blogs.bristol.ac.uk.
\textsuperscript{185} Twitter Message from Mike Gulliver to author (14 May 2018).
thus questions whether this is the best model on which Deafness should base its
every existence. Conversely, Davis also argues that the ethnic model is dubious because
of the current association between ethnic groups and violence. Davis has not made
clear why aligning the Deaf community with racial politics and its associations would
be a sufficient enough issue to abandon this line of argument; one could argue that as
an oppressed group itself, the Deaf community may find a natural gravitation towards
racial oppression in any case, and the two can coexist peacefully. After all, when
considering the history of various racial groups, each racial group has not been treated
in the same way by the relevant dominant cultures.

Davis also argues that with the advent of the Internet, the mainstreaming of deaf
children into hearing classrooms, the decline of residential schooling for the deaf, and
the demise of Deaf clubs, it is harder to argue that the Deaf community is significantly
different from deaf people. In other words, ‘changes in the overall culture have to
some degree erased the sense of “otherness” that deaf people have historically held
on to as a way of defining themselves.’

A further argument against defining Deaf people as an ethnic group is that it
presupposes a ‘pure’ Deaf person, that is, those who were born to Deaf parents, or
gives precedence to the ‘Deaf elite,’ Deaf individuals could be seen as an elite if
they have attended schools or universities that are considered to be pre-eminent
institutions of Deaf education and academia, such as Mary Hare Grammar School, the
former Centre for Deaf Studies at Bristol University, the University of Central
Lancashire, the University of Wolverhampton, Gallaudet University in Washington DC

\[187\] ibid.
\[188\] ibid.
\[189\] ibid.
and the National Technical Institute of the Deaf at Rochester Institute of Technology. These categories exclude deaf and hard of hearing people and hearing children of Deaf adults. Other arguments put forward by Davis against the ethnic model include how Deafness ‘disappears’ in cyberspace, how one factors in a deaf individual’s choice ‘not to act deaf,’ and the fact that the vast majority of deaf people do not come from Deaf families, which means that the Deaf community is only ‘one generation thick.’

Other criticisms of the ethnic model in relation to the Deaf community include Sabatello’s contention that there is a need to differentiate between those who are legally recognised as ethnic, linguistic and religious communities and ‘other sorts of life-style cleavages, social movements and voluntary associations,’ and he clearly thinks that the Deaf community is one of the latter. Similarly, Tucker argues that rather than affording the Deaf community ethnic status, they should embrace the wealth of opportunities and potential life experiences available to them with cochlear implants, rather than insist on being segregated from the Hearing-World. Eckert argues that these two academics express major misunderstandings of Deaf identity and culture, and thus their views can be disregarded.

Davis considers the construct of Deaf people as a linguistic minority is ‘attractive, but flawed.’ While he concurs that it has removed the biological stigma of deafness perpetuated by dominant culture, given that the concept of identity is undergoing a postmodernist transformation whereby multiple identities appear to be the order of the

---

190 ibid.
191 ibid.
192 ibid.
193 The author disagrees with this statement; in the context of equality law, on the whole, Deaf people are generally only afforded protections if they accept that they have an impairment or if they accept that they are disabled.
day, Davis considers that the minority model of deaf identity is ‘too crude, too rigid, too limiting.’\textsuperscript{194} He also considers that the central problem with defining deaf people as a linguistic group is that to do so, ‘you have to patrol the fire wall between the deaf and non-deaf in very rigid ways.’\textsuperscript{195} As well as excluding deaf and hard of hearing people who do not use sign language, who would have to reassign themselves to some other camp, it also defines hearing, signing CODAs as Deaf, since they are native sign language users, akin to SLPs. One could argue that CODAs are not discriminated against by the Hearing-World, but if one takes that tack, then one has to abandon the idea that language is the key defining term.\textsuperscript{196}

Finally, it would appear that the case for using the ethnic group model in order to frame Deaf people’s experiences and as a way of securing recognition of its cultural and linguistic elements, is so far robust. There is clear scope for further research into this area, and it is hereby proffered that extending the protected characteristic of race within the EqA 2010 to include Deaf people could be a potential solution to the Deaf Legal Dilemma.

5 The concept of DEAF-GAIN

Up to this point, we have largely focused on the relevant disability and Deaf discourses that provide an overview of the collusions and collisions of the Disabled- and Deaf-Worlds. Before concluding this chapter, there is a concept that has been developed as part of Deaf discourse that provides a compelling argument for either a widening of the social model of disability to include Deaf culture and language or to recognise Deaf

\textsuperscript{194} Davis (n 186).
\textsuperscript{195} ibid.
\textsuperscript{196} ibid.
community as an ethnic group, in order to incorporate Deaf discourse into Hearing-discourse: DEAF-GAIN.197

The quality of life of disabled people depends on whether they can achieve a lifestyle of their choice. This in turn depends on their personal resources, the resources within society and their own unique situation. Disabled people can give a perspective on life which is both interesting and affirmative and can be used positively, although this is not generally recognised by non-disabled people.198

Within the context of the academic debate regarding whether Deaf people are disabled, the DEAF-GAIN concept has been developed.199 While being deaf is generally defined by the loss of hearing, DEAF-GAIN counters the frame of hearing loss by referring to the unique cognitive, creative, and cultural gains manifested through deaf ways of being in the world.200 There are more precise aspects to the nature of this gain, which include DEAF-BENEFIT, DEAF-CONTRIBUTE and DEAF-AHEAD.201 Examples of the social, psychological and cognitive benefits of being Deaf include enhanced and prolonged eye contact, intersubjective engagement, collectivist social patterns, transnational bonds, less auditory distraction and acute visuospatial aptitudes.202 DEAF-CONTRIBUTE refers to the contributions of deaf individuals, communities, and their languages to humanity as a whole, that is, to a more robust

197 BSL orthography requires that the quotation of key phrases in sign language be rendered in capitals and hyphenated when appropriate, as is the case here (Ladd (n 144) xx). In other words, ‘glossing’ is the technique used with Deaf discourse to refer to words and phrases framed by sign language.
200 ibid xv.
201 ibid xxiv.
202 ibid xxvi.
biocultural diversity, such as the new perspectives on human nature that have arisen from the study of signed languages.\textsuperscript{203} DEAF-AHEAD translates better into 'taking the lead,' and suggests that deaf people are either poised to transform or have already transformed their benefits and contributions into the public sphere in ways that represent thinking that is ahead of their hearing counterparts.\textsuperscript{204} These arguments further counter the resistance of the dominant culture towards Deaf discourse that clearly sets out the theoretical and moral grounds as to why Deaf people should not be considered to be part and parcel of the Disabled-World.

6 Conclusion

There are many powerful arguments in favour of Deaf people’s resisting the disability classification that the technologies of normalisation seek … but therein lies a dilemma.\textsuperscript{205}

It has been established that there is a clear conflict between the Deaf-World and the Disabled-World, which has arisen due to the little attention paid to the common interests, oppression, needs and rights, or implications of the specific barriers faced by each group in developing constructive dialogue. Corker suggests that a deeper understanding of these underlying issues could conceivably contribute a great deal both to academic debate and the future development of services and effective legislation.\textsuperscript{206} This is the driving force behind this thesis; it is hoped that the discussion of the collisions and collusions of the Disabled- and Deaf-Worlds will encourage further discussion among academics in disabled and Deaf discourses.

\textsuperscript{203} ibid xxviii.
\textsuperscript{204} ibid xxix.
\textsuperscript{205} Lane (n 14) 374-5.
\textsuperscript{206} Corker (n 3) 6.
Given the objections that Deaf people have in being considered to be disabled, which has been validated by Deaf discourse, the logical conclusion would be that equality law does not perhaps provide the most appropriate *operatus morandi* for Deaf people. While an exploration of the solutions to this quandary – what we refer to as the Deaf Legal Dilemma – will be proffered in Chapter 5, there appear to be two frontrunners from this chapter: extending the social model of disability to include culture, language, and the concept of DEAF-GAIN, or giving the Deaf community further rights through the ethnic model.

This chapter began with a consideration of discourses relevant to the present debate: whether Deaf people are disabled or not. This involved an exploration of what is termed hearing discourse, which is essentially the prevalent knowledge within the dominant culture, that is, hearing people, and in the context of disability, non-disabled people, including normalisation theory, which explains why ‘normal’ people tend to think of deaf and disabled people as ‘not normal’ or damaged. It is this discourse that has largely dominated the treatment of deaf and disabled people, and it was not until the Disability Rights Movement gained momentum during the 1980s and 1990s that disabled people’s rights not to be discriminated against on the basis of their disability was recognised. An in-depth examination of what constitutes Deaf discourse followed, which was necessary as such discourse is not widely known. This is particularly important as this thesis sits within a legal context and is the first attempt to bridge the vacuum between Deaf studies and the study of law.

Before moving on to consider the various models of disability and deafness that exist in academia, there was a reflection on what constitutes Deaf identity. By way of conclusion of what Deaf identity is, it would appear that Deaf discourse is gravitating in a direction that considers it as one of a multitude of identities that exist within any
single deaf individual. To apply this to the author, his identities would consist of being Deaf, deaf, disabled, White British, Welsh, a Newportonian, a husband, a father, a lawyer, a lecturer, an academic. To all extents and purposes, the majority of these identities are protected to some degree or other. For instance, the deaf, disabled, White British, Welsh and marital status identities are covered as protected characteristics by the EqA 2010, and the father, lawyer, lecturer and academic identities are protected under the auspices of employment law. What is missing, is legal protection as a Deaf person.

Thus, it is this identity that creates the Deaf Legal Dilemma: Deaf individuals who consider themselves to be part of the Deaf community, a culturo-linguistic minority and/or sign language person, part of SLPs, are not currently recognised as such by equality law, at least in the UK. Thus, in order to seek legal protections or benefits, Deaf individuals have to adhere to a disability label, with all it entails and with its associated meanings, which often are anathema to what makes up a Deaf identity.

The remainder of the chapter attempted to explore the different models that make up the Disabled- and Deaf-Worlds, in order to ascertain how some of these models, which provide categories within which Deaf people can be placed, contribute to the Deaf Legal Dilemma, and whether any provide a viable alternative in order to address the Deaf Legal Dilemma. These included the medical or individual model of disability, the social model of disability, the minority group model of disability, and the cultural model of disability. It has been made clear that the medical and social models of disability are what initiate or exacerbate the Deaf Legal Dilemma. However, it appears that extending the social model of disability to include language and culture is possible, in the founder of the social model, Oliver’s own words: ‘the fact that the social model has not so far adequately integrated these dimensions does not mean that it cannot ever
do so.\textsuperscript{207} The minority group and cultural models of disability have been discredited as beneficial to the Disabled-World, but they do appear to have some usefulness for the Deaf-World.

Within the Deaf-World section, three models have been considered: the culturo-linguistic model, SLPs, and the ethnic group model. The culturo-linguistic model clearly sets out why the label of disability is so alien to the Deaf community, affirming the Deaf Legal Dilemma and the need to resolve this conflict. The concept of SLPs appears to be nothing more than an extension of the culturo-linguistic model, and indeed has one fundamental flaw: it also includes hearing sign language users. Finally, the ethnic group model appears to be a viable solution to the Deaf Legal Dilemma, based on the ethnic origin provisions of the EqA 2010, which form part of the protected characteristic of race. Again, we will explore this further in Chapter 5.

Throughout this chapter reference was made to the Deaf-, Disabled- and Hearing-Worlds. While it would have been tempting to focus on the dichotomies between the Deaf-World and Hearing-World, with some academics going as far as to say that Deaf people have to ‘accept hearingness in one way because it is only through an understanding of it that they can progress in life,’\textsuperscript{208} whether Deaf people are considered part of the Hearing-World was not the issue here. There is a clear division between the two Worlds, a fact that is unlikely to ever be in dispute, although Preston refers to the fallacy of cultural dichotomisation in terms of either being Deaf or being hearing.\textsuperscript{209} Instead, it was sensible to focus on the Disabled-World, as it is – with Deaf and disabled dichotomies – where the lines begin to blur, that is, are Deaf people

\begin{footnotes}
\item[207] Oliver (n 72) 49.
\item[208] Corker (n 3) 36.
\item[209] Paul Preston, \textit{Mother Father Deaf: Living between Sound and Silence} (Harvard University Press 1995) 236.
\end{footnotes}
disabled? To complicate matters, some D/deaf people will consider themselves to be disabled, according to the identity or multiple identities that they ascribe to themselves. The questions that needed to be asked are: is it possible for Deaf people to be both Deaf and disabled, or there a clear division between the two Worlds? Or is it only deaf people who are disabled, whereas Deaf people are not? Is it a matter of choice or imposition? Are there varying degrees of disabledness?

That is not to say that the Hearing-World is no longer a relevant consideration for this thesis. The Hearing-World is the dominant culture, and therefore relevant Hearing discourse may need to be considered. In addition, there is a plausible argument that the Disabled-World is only the Disabled-World because the dominant culture has compartmentalised disabled people, including deaf people, into one collective group. Conversely, there is an additional argument that the Deaf-World is only the Deaf-World as it is of benefit to the dominant culture that Deaf people marginalise themselves in this way. However, in a similar vein, disabled people have also established themselves as a collective group by virtue of their involvement in the Disability Rights Movement during the 1980s and 1990s. The same rings true for the Deaf-World with its proclamations that it has a distinct culture, language and community.

Having now considered what the conflict between the Deaf-World and the Disabled-World is, it is necessary to undertake a doctrinal examination of equality law and ascertain how Deaf people fit within the theories of equality, and equality law in practice. It has already been argued that the issue of deaf people in the context of the law is irretrievably tied up with the concept of disability, and that there are clear reasons as to why Deaf people should not be classified as disabled; therefore it is not possible to maintain that the Deaf-World should remain solely within the remit of the Disabled-World. While some solutions to the Deaf Legal Dilemma have been put
forward, at this stage, it is by no means clear what the preferred solution, from the Deaf-World’s perspective, is, and whether the dominant culture would be open to adopting such a solution.
CHAPTER 3 – THE DEAF EQUALITY CONCEPTS

1 Introduction

In Chapter 1 we have explored how bilingual education and access to all areas of society and life is lacking for Deaf people, whereas in Chapter 2 we have looked at how hearing, disabled and Deaf discourses have created the Deaf Legal Dilemma. The theoretical underpinnings of equality law and how it is meant to provide rights to Deaf people are covered in Chapter 3, leading then to a doctrinal consideration of how far UK, European and international law goes in achieving equal rights for Deaf people in Chapter 4. We will then explore the potential solutions to the Deaf Legal Dilemma, particularly sign language recognition and how it can be achieved in Chapter 5.

Throughout Chapter 2, it was argued that Deaf people are deprived of their opportunities due to being grouped into the Disabled-World collective. An attempt will now be made to determine how Deaf people fit within the auspices of equality law, equality law being a prime example of how Disabled-World grouping occurs. The British Deaf Association (BDA) espouses that equality is what it stands for,¹ and on the international stage, the World Federation of the Deaf (WFD) highlights that one of its most important priorities in its work is to ensure human rights for Deaf people all over the world, in every aspect of life.² Thus, it would appear that what Deaf people want above all is equality. As we have already established why in Chapter 1, it is now necessary to explore exactly what equality is, and to consider many of the concepts and theoretical perspectives that come into play when we talk about being equal. The

rationale behind this is that doubts must be satisfactorily addressed if the idea of equality is to command reasoned loyalty and to establish a secure intellectual standing.\(^3\) Therefore, if we are to espouse equality law as a solution to the Deaf Legal Dilemma, we must establish its theoretical underpinnings.

Exploring what equality means will be no easy task given the complexity of the concepts and theoretical perspectives in relation to equality discourse. Hellman and Moreau argue that what makes this area of law such a difficult one is that there is no initial agreement among scholars as to what the important questions are, and at present, these appear to focus on doctrinal work on discrimination law, philosophical writings on the value of equality, and affirmative action.\(^4\) Indeed, a great deal of academic literature exists, ranging from theoretical discussions of the concept of equality to doctrinal analyses of legal provisions in national, European and international law.\(^5\) The aim, then, is to explore such theoretical discussions in this chapter, and to undertake a doctrinal analysis in relation to them in Chapter 4.

It is not intended to rehearse and explain the concept of equality in its entirety, inasmuch as the focus is on how equality relates, or is relevant to, the Deaf-World. Therefore, as each of the schools of thought surrounding equality are explored, consideration of their applicability to the Deaf-World will be attempted. It is pertinent to note that ‘different analyses of equality may be suited to different protected grounds,’\(^6\) bearing in mind Fraser’s suggestion that ‘class inequality is best

understood in terms of redistribution, and sexual orientation inequality best understood in terms of recognition.' 7 Consequently, what must be done is to discover which equality analyses lend themselves more closely to the Deaf-World.

After first considering some of the more general perspectives on equality, we will proceed to consider some concepts of equality that have been introduced by various academics and attempt to extrapolate their relevance or likely relevance to Deaf people. The various concepts of equality are then to be appended into one of the precepts of equality where possible, in order to provide ‘emerging rocks of certainty’8 upon which we can then go on to undertake our doctrinal and socio-legal analysis of equality law.

Generally speaking – by way of an introduction to the relevant analyses of equality – equal treatment manifests itself as treating likes alike and directly comparing the treatment of a complainant with an actual or hypothetical individual or individuals without the particular characteristic. Meanwhile, equality of opportunity is viewed as creating the necessary conditions to ensure a fair and equal starting point for all, and equality of outcome to eliminate disadvantages faced by particular social groups.9 In terms of their relationship to each other, Phillips suggests that equality of opportunity is the primary objective of equality, but equality of outcome is the test for identifying whether the objective has been achieved.10 Respect for the worth and dignity of each individual is considered a foundation for equality rights and tends to find expression in international treaties rather than domestic anti-discrimination law, and essentially

---

requires that everyone should be treated with respect by each other due to our common humanity. There is an argument that as a concept of equality, social inclusion goes beyond substantive equality, and that discrimination law should be concerned with it instead. Academics\textsuperscript{11} who advocate challenging oppression (or audism\textsuperscript{12} in the present context) as a concept of equality argue that the theories of justice should attend to the injustice and oppression experienced by groups in decisions relating to distribution. Finally, full participation as a concept is arguably fundamental to achieving social equality. There are also underlying themes relevant to each concept of equality, namely difference, recognition and individual and group identity, which have either already been discussed in Chapter 2, or will be discussed in general terms within this chapter prior to the exploration of each of these concepts, to provide a comprehensive interpretation of equality discourse that is relevant to the Deaf-World.

In order to discover which equality analyses are relevant to the Deaf-World, for the sake of clarification, human rights are also referred to as equal rights: one either is or is not a human being, and therefore should have the same human rights as everyone else.\textsuperscript{13} McColgan refers to human rights because, she argues, it has implications for the interpolation of statutory provisions, and it forms a significant part of the context in which these provisions operate.\textsuperscript{14} Therefore, consideration of human rights as well as equality generally is relevant here, and both terms can be used interchangeably in this chapter. Conversely, discrimination law is also a term that is referred to within the equality context, and Bamforth, Malik and O’Cinneide suggest that equality is the main

\textsuperscript{11} Such as Elizabeth C Anderson, Samuel Scheffler, Colm O’Cinneide and Irene M Young.
principle that has been used, and continues to be used, to justify discrimination law.\(^{15}\)

In essence, equality is a goal of discrimination law and policy.\(^{16}\) Thus, the precepts and concepts of equality provide the foundations for discrimination law.

In order to explore the Deaf Equality Concepts, this chapter will begin with a general overview of what is meant by the term, ‘equality.’ Following that exercise, each precept of equality – formal equality, substantive equality and transformative equality – will be looked at in turn, and will include an exploration of the concepts of equality that have been identified as relevant to the Deaf-World, namely equal treatment, equality of opportunity, respect for equal worth and dignity, equality of results and outcomes, social inclusion, challenging oppression and full participation. As has been stated earlier, socio-legal research has oft been criticised as being shallow and largely descriptive in nature. The rigorous analysis and discussion outlined above should reassure critics of socio-legal research that this thesis is a critically sophisticated undertaking.\(^{17}\)

2 What is equality?

Various academics have attempted to provide an overview of what equality is, and it is these that we turn for initial guidance in this exploration of equality law. When Weston published his book in 1990, he noted that his book was one of 30 to 40 books on equality that were expected to be published in English that year, following the publication of 370 books about equality in the decade from 1978 to 1987.\(^{18}\) In an

---


\(^{16}\) ibid 173.


attempt to bring these figures up to date, a search of the British Library Catalogue reveals that almost 2,000 books from 1997 onwards have been published to date on the subject of equality in some shape or form, 1,500 of which were published after 2002. Thus, we will attempt to explore some of the general concepts of equality from this body of work, and then consider the various strands that flow from these concepts that have been highlighted as particularly relevant to Deaf people.

Let us start with the word equality. It has been suggested rather than equality, we should think in terms of equalities in recognition of the fact that no single understanding of equality is complete, as while people appear to share the concept of equality, they have very different conceptions of it. Indeed, McIntyre J, speaking for the Supreme Court of Canada in Andrews v Law Society of British Columbia remarked that 'more than any of the rights and freedoms, [equality] lacks precise definition.' Iacobucci J explained that one of the difficulties in defining the concept of equality is the abstract nature of the word and the similarly abstract nature of words to describe them, and that part of the difficulty stems from its exalted status. McLachlin argues that there are a number of reasons for this conundrum: equality language is in itself rather general, which can result in concepts that are not quite comprehensive enough leaving them open to interpretation from jurisdiction to jurisdiction. In addition, what equality

---

19 The British Library was chosen for this exercise given that it has almost 57 million items in its Main Catalogue.
21 Vickers (n 6) 147.
22 Westen (n 18) xv.
24 ibid para [164].
25 Law v Canada (Minister of Employment and Immigration) [1999] 1 SCR 497, [507].
26 McLachlin (n 8) 19.
means is subjective and will depend on the conceptualiser’s view of society and what it should be.\textsuperscript{27}

Rather helpfully, Hepple has found that there are seven meanings of equality: respect for equal worth, dignity and identity as a fundamental human right; eliminating status discrimination and disadvantage; consistent treatment or formal equality; substantive equality of opportunity; equality of capabilities; equality of outcomes; and fairness,\textsuperscript{28} while McColgan has identified the following schools of thought in relation to equality: anti-discrimination; substantive and formal; luck egalitarianism; dignity; social inclusion; and a challenge to oppression.\textsuperscript{29} Fredman in turn suggests that the central principles of equality should be to break the cycle of disadvantage, to promote respect for the equal dignity and worth of all, to affirm community identities, and to facilitate full participation in society.\textsuperscript{30}

3 The precepts of equality

An undertaking to examine the theoretical perspectives of equality law is a challenging one. When one reads the word equality, it is usually mentioned as part of concepts such as discrimination, disadvantage, prejudice, understanding, distribution and justice, or as equality of opportunity or equality of outcome. A literature review also reveals terms such as liberty, difference and dignity. It can be either symmetrical or asymmetrical; formal, substantive or transformative; egalitarian, libertarian or utilitarian.

\textsuperscript{27} ibid 20.
\textsuperscript{29} Aileen McColgan, \textit{Human Rights Law in Perspective: Discrimination, Equality and the Law} (Bloomsbury 2014).
\textsuperscript{30} Sandra Fredman, ‘The Future of Equality in Britain’ (Equal Opportunities Commission 2002) 11-16 (as cited in McColgan (n 29) 27).
To assist an attempt to narrow down this wide-ranging field of options in order to explore which analyses of equality are relevant to the Deaf-World, some form of methodology is required.

Westen provides such a methodology. He explains that equality is sometimes used as a form of shorthand to refer to certain precepts about equality, that is, certain normative axioms whose truth is said to be inherent in or follow from the concept of equality. This contrasts with concepts of equality, which effectively particularise the precepts. Westen refers to the ‘formal principle of equality’ and the ‘presumption of equality,’ which are, he states, normative statements about how people ‘should’ be treated. It is from these statements that a method was devised, in what is essentially a categorisation exercise of the various concepts of equality. Formal, substantive and transformative equality are thus ‘categories,’ or ‘precepts,’ with distinct aims and standards of measurement, and in an ensuing consideration of the relevant equality analyses to the Deaf-World, it became clear that it was possible to extrapolate which categories each concept of equality was more likely to fit into. Some interpretations of the concepts have inevitably overlapped across two or more precepts, such is the nature of equality discourse. This chapter is therefore the result, and the succeeding sections will see this chosen methodology in action.

As a starting point, it would be prudent to provide an outline of what concepts of equality have been identified in the literature, and using the Westen methodology espoused in this thesis, demonstrate this methodology in action in the form of Table 1.

---

31 Westen (n 18).
32 Ibid 181.
33 Ibid.
Table 1

<table>
<thead>
<tr>
<th>Formal equality (symmetrical)</th>
<th>Substantive equality (asymmetrical)</th>
<th>Transformative equality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited conduct</td>
<td>Eliminating discrimination</td>
<td>Challenging oppression</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>Equality of capabilities</td>
<td>Difference-aware equality</td>
</tr>
<tr>
<td>Procedural equality of opportunity</td>
<td>Equality of results and outcomes</td>
<td>Full participation</td>
</tr>
<tr>
<td>Fairness</td>
<td>Social inclusion</td>
<td></td>
</tr>
<tr>
<td>Luck egalitarianism</td>
<td>Respect for equal worth and dignity</td>
<td></td>
</tr>
<tr>
<td>Substantive equality of opportunity</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Readings in the field of Deaf Studies appear to focus on discrimination,\textsuperscript{34} dignity,\textsuperscript{35} social inclusion\textsuperscript{36} and a challenge to oppression (or audism as it is known in the Deaf-World).\textsuperscript{37} Therefore, we will explore associated concepts of equality, focusing on equal treatment, equal worth and dignity, social inclusion, and the challenge to oppression. We will also explore equality of opportunity as, according to Schaar, it enjoys the most popularity among politicians, businessmen, social theorists, and freedom marchers,\textsuperscript{38} and equality of outcomes, which is considered to be a key measure of equality of opportunity; the two cannot be wholly separated.\textsuperscript{39} Finally, we will consider full participation, which is considered to be significant for any

\textsuperscript{34} Sarah CE Batterbury Magill, ‘Legal Status for BSL and ISL’ (BDA 2014) 8.
\textsuperscript{35} Harlan Lane, Robert Hoffmeister and Ben Bahan, A Journey into the Deaf-World (DawnSignPress 1996) 419-420.
\textsuperscript{36} Batterbury Magill (n 34) 22-4. Batterbury argues that Deaf sign language users are socially excluded, therefore social inclusion is relevant to this examination of equality law.
\textsuperscript{39} Phillips (n 10) 10.
consideration of transformative equality. It would appear that these additional perspectives could also be of particular use to the Deaf-World.

3.1 Formal equality

The most obvious meaning for equality is formal or symmetrical equality, which requires that like cases be treated alike, with a focus on consistent treatment of individuals rather than on achieving any particular outcome. This was the predominant theoretical equality model from the end of the Second World War until the end of the 1960s, and is the most widespread understanding of equality in existence, which tends to manifest itself in most anti-discrimination law, usually in the form of direct discrimination.

In practical terms, a formal approach to equality disfavours arbitrary decision-making processes, for example, when policies or people selectively disadvantage an individual due to a particular irrelevant trait that they possess, and it merely requires the judiciary to apply laws equally to all without further examination of the particular circumstances or context of the individual or group and consequently, the content of the law under review. To determine if formal equality’s imperative is met, a statute’s words are examined to see who it covers, and then the law is administered equally to everyone. Generally speaking, there is no consideration of people’s social context, or

---

40 Vickers (n 6) 147.
41 Vickers (n 6) 147.
42 Hepple (n 28) 21.
44 Such as section 13 of the Equality Act 2010.
45 ibid.
the law's content, to determine whether the law promotes equality. Rather, the focus is on the process of applying and enforcing the law and determining whether everyone covered by the law is treated in the same manner. As with the first variant of formal equality, this version involves a narrow compass of inquiry. Its range is the justice system, not the context of people's lives.47

This approach in essence protects against defects being introduced into the decision-making process and ensures that irrational and unfair decisions based on arbitrary criteria are kept out. Furthermore, it prevents the harm which may occur from any arbitrary decision-making process, by permitting the person the opportunity to secure a benefit which may otherwise have been denied.48 The supposed value of the neutrality of formal equality is merely an illusion, as it is questionable whether the law, legislature and the judiciary can claim to be truly neutral to all parties.49 In turn, by masquerading as an independent norm, formal equality blinds us to the real nature of substantive rights and creates a dichotomy between human rights and equality, wherein both principles appear to operate independently rather than in combination with one another.50

What appears common to any model of formal equality is the belief that social structures are constant and should not be changed, and that any difference in opportunities for participation in society associated with an individual’s personal

---

48 Equal Rights Trust (n 43).
49 This viewpoint is associated with Critical Legal Theory, which claims that some kind of preknowledge will invariably bear directly on legal decision-making, even though legal judgments derived from that knowledge appear to be objective in nature. Dennis Patterson, ‘Critical Legal Theory’ (Lecture Materials in Contemporary Anglo-American Jurisprudence 04-05, Università di Trento).
50 ibid.
51 By way of reminder, the word ‘difference’ is explored further in section 1.1.2 of Chapter 2, and essentially is the difference between ‘normal’ people and, in a wider context, anyone who is not considered ‘normal.’
characteristic must therefore be overcome by disassociating themselves or by accepting the difference in their opportunities, or to paraphrase Fredman: ‘the price of equal treatment is conforming to the norm.’ Thornton further elaborates that those who are most like what she refers to as ‘benchmark men,’ may be ‘let in,’ as their proximity to the ‘norm’ allows the boundary between the norm and other to be expanded a notch or two without causing undue instability. In this context, difference is perceived as something that is an individual or group trait rather than something that arises from the relationship between two groups and contingent on the perspective of the person labelling such difference. The practical effect of this is judicially-imposed determinations of a particular individual or group’s true or actual characteristics which may be unsubstantiated, including stereotypical assignments of sameness and difference.

In essence, therefore, formal equality suggests that a Deaf individual, in order to be treated equally, has to become ‘hearing’ and assimilate or emulate hearing culture instead of embracing Deaf culture, or at the very least conform with mainstream society and keep their Deaf identity a matter for their private and family life. If they are not prepared to do so, then they must accept that they are unable to avail themselves of the various opportunities presented to them. Thornton further criticises formal equality’s failure to consider the complex variables that can constitute one’s identity, as to complain formally of discrimination requires complainants to stress a single facet

52 Maria Ventegodt Liisberg, *Disability and employment: a contemporary disability human rights approach applied to Danish, Swedish and EU law and policy* (Intersentia 2011) 24.
55 Ibid 195.
56 Barclay (n 46) 168.
57 Ibid.
of their identity at the expense of others.\textsuperscript{58} Individuals should instead be treated according their own qualities and merits and not on the basis of detrimental stereotypes that may be attached to them.\textsuperscript{59} Essentially, this imposition can lead to powerful conformist and assimilationist pressures,\textsuperscript{60} as we have seen with dominant culture and disability discourses' impact on the Deaf-World.

Overall, Ventegodt Liisberg argues that formal equality is relatively simple and therefore potentially easy to implement, although it does not address structural disadvantage and therefore does not provide a foundation for prohibiting indirect discrimination nor does it allow for positive action.\textsuperscript{61} Most importantly, perhaps, is the fact that it provides an overly simplistic basis for integrated and comprehensive non-discrimination laws and measures, bearing in mind the richness and complexity of modern life and modern social relations.\textsuperscript{62} Thus, it is widely recognised that a formal approach has failed to eliminate entrenched structural, social and economic inequality and that a different approach is required in order to tackle the roots of inequality.\textsuperscript{63}

Having proffered an introduction to the precept of formal equality, before moving on to consider the substantive and transformative precepts, as part of our exercise to determine which equality analyses lend themselves more closely to the Deaf-World, we now turn to the concepts of equality identified as relevant to Deaf discourse associated with formal equality: equal treatment and equality of opportunity.

\textsuperscript{58} Thornton (n 54) 184.
\textsuperscript{59} Iris M Young, ‘Status Inequality and Social Groups’ (2002) 2(1) Issues in Legal Scholarship 6, 11.
\textsuperscript{60} ibid 9.
\textsuperscript{61} ibid 23.
\textsuperscript{62} Equal Rights Trust (n 43).
3.1.1 Equal treatment

The idea of formal equality can be traced back to Aristotle and his dictum that equality meant ‘things that are alike should be treated alike,’ thus supporting the position that a person’s individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain. Of course, a difficulty one is immediately faced with is determining when likes are alike, as when are two people sufficiently similar in order to qualify for equal treatment? Aristotle’s approach was a formal one, and he considered that ‘things [and persons] that are alike should be treated alike, while things that are unalike should be treated as unalike in proportion to their unlikeness.’ This principle stipulates that persons should be treated equally unless there is some reason for treating them differently, but this approach fails to provide a criteria for determining the respect in which two persons are equal or as an underlying basis for comparison. Indeed, Holmes argues that no two persons, not even identical twins, are qualitatively alike, thus differences will always exist between any two persons.

It is the comparator requirement that sees how equal treatment, and in particular, treating, an individual, like for like, might work in practice. One well documented drawback to formal equality when claims of inequality or discrimination are made is that a comparator is often required in order to prove that the treatment was prohibited. The comparator predominantly applied in the UK in proving direct discrimination is white, male, Christian, able-bodied and heterosexual, assuming the existence of a

---

64 ibid.
65 Aristotle, Ethica Nichomacesa 1131a-6 (W Ross tr, 1925) (as cited in Schiek, Waddington and Bell (n 5) 27).
66 Bamforth, Malik and O’Cinneide (n 15) 178.
‘universal individual’ which can neglect the variety and diversity of modern society.\textsuperscript{68} The fallacy of creating an abstract individual disregards group-based characteristics, such as the struggles against slavery, racism, and sexism, and in the present context, audism, and seeks to replace their use in allocative decision-making by merit-based criteria.\textsuperscript{69} Essentially, the merit argument can be represented in the form $S$ merits $X$ in virtue of $M$, where $S$ is a person, $X$ a mode of treatment or an outcome, and $M$ some feature possessed by $S$.\textsuperscript{70} McCrudden proffers two illustrative examples:

We might say that John ($S$) merits the award of the sports prize ($X$) in virtue of having run faster than anyone else competing in the race ($M$). Or, that Mary merits admission to law school in virtue of her qualities of determination, clarity of thought, and ability to work hard, which we think are likely to make her a good lawyer in the future. What is involved, in other words, is selection of a person for the purposes of distribution of a benefit to that person.\textsuperscript{71}

Thus, if we were to apply the merit argument to a Deaf-World example, we could say that a deaf person could be admitted to university due to their personal qualities and talent, that is, wholly based on their individual merit. The difficulty here is, what if that deaf person does not have the personal qualities and talent because of the effects of audism throughout their lives up to that point in time? That is the difficulty with the concept of equal treatment as manifested in discrimination law.

In effect, formal equality fails to recognise that it is only in some contexts that those characteristics are irrelevant and detrimental, and instead holds out as universal and

\textsuperscript{68} Equal Rights Trust (n 43).
\textsuperscript{69} It is these merit-based criteria that are of particular interest to luck egalitarians (see below).
\textsuperscript{71} ibid.
neutral the characteristics of the dominant group, and fails to address deeper entrenched patterns of social disadvantage. The ongoing effects of past discrimination mean that the opportunities and life course of many continue to be affected by their race, ethnicity, gender or deafness. Bourn and Whitmore sum up this point thus: ‘formal equality’s neutral, symmetrical application of the law ignores the structural and social conditions which form each individual.’ What is most frustrating about formal equality is the law’s preoccupation with how people are treated as opposed to the substantive situation they end up in. There is no point having more equal treatment in the world, or requiring people always to treat people equally, if people nevertheless do not end up equally situated.

By comparing a Deaf individual with a hearing one, the latter being part of the dominant culture, one is effectively imposing a requirement for assimilation or conformity rather than a demonstration of respect for individual dignity and diversity, as well as making it difficult to include disabled people who do not share the same capacities as those who are not disabled.

3.1.2 Equality of opportunity

The concept of equality of opportunity represents a departure from the traditional notion of formal equality or treating likes alike and unalikes unalike. Opportunities will be equal as long as there is no overt discrimination on the grounds of an irrelevant characteristic, or no legal impediment that prevents anyone from entering the race.

---

72 Fredman (n 53) 164
73 ibid 163.
74 Fredman (n 53) 165.
75 Colin Bourn and John Whitmore, Anti-Discrimination Law in Britain (Sweet & Maxwell 1996) [1-13].
76 Holmes (n 67) 178.
77 Hepple (n 28) 24.
78 Philips (n 10) 3.
Roemer states that there are two concepts of equality of opportunity, the first being that society ‘levels the playing field,’ so that everyone can compete for a position, and the second one being that all individuals possessing the attributes relevant for a position, will be included as an eligible candidate and will only be assessed by these attributes.\textsuperscript{79} However, Dworkin argues that to achieve true equality, equality should be found in the value of the resources that each person needs, not in the success he achieves,\textsuperscript{80} while Sreenivasan states that ‘when someone has refused an advantage, not having the advantage does not count against the justice of its distribution.’\textsuperscript{81} Thus an individual should be put in a position where he will have the opportunity, but the outcome is essentially a matter of fate, and if he chooses not to avail himself of the opportunity, there cannot be any inequality.

A far better description of equality of opportunity is perhaps ‘fair and open competition for scarce opportunities,’\textsuperscript{82} which is essentially a levelling of the playing field. The approach essentially entails the awarding of the scarce opportunities as a prize by way of a fair and open competition, from which no one is excluded on any irrelevant grounds and in which the organisers treat the contestants equally and without partisan prejudice.\textsuperscript{83} This does not mean ensuring that every competitor is as likely to succeed as every other, and organisers are not bound either to offset by handicapping or otherwise neutralising every actual competitive edge making success in fact more likely or even certain.\textsuperscript{84} As Flew states, the fact that the probabilities of winning are for a certain number of individuals less, is no proof at all that either had less than an

\begin{itemize}
\item \textsuperscript{80} Ronald Dworkin, \textit{Sovereign Virtue: The Theory and Practice of Equality} (Harvard University Press 2000) back cover.
\item \textsuperscript{81} Gopal Sreenivasan, ‘Equality, Opportunity, Ambiguity’ (2014) 13(1) Politics Philosophy Economics 82, 83.
\item \textsuperscript{82} Anthony Flew, ‘Four Kinds of Equality’ (1982) Reason Papers 17, 22.
\item \textsuperscript{83} Ibid 22-3.
\item \textsuperscript{84} Ibid 23.
\end{itemize}
equal chance.\textsuperscript{85} Equality of opportunity, therefore, is formal in nature, as it ensures equal treatment.

Equality of opportunity is partially based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination, because to fail to do so would leave people and groups at different starting points. However, while this leans towards the precept of substantive equality, equality of opportunity recognises the ‘shallow nature of formal equality’ and injects a substantive element into its framework,\textsuperscript{86} as equality of opportunity seeks to limit the application of full redistributive justice,\textsuperscript{87} it is not as substantive as it initially appears to be. This is because formal equality is considered necessary in order to maintain the principle of merit, that is, rewarding an individual based on their own merit, such as winning a sports prize for having run faster than anyone else competing in the race. To provide redress for those who are at a disadvantage, such as someone unable to compete in the race or who will run slower due to a disability, would constitute the substantive element, but such a substantive approach would not go as far as to, say, award the prize to an individual who had not run faster than anyone else due to their disability.

A more consistent conception of equality of opportunity, argue Hevia and Colón-Rios, should include natural talents among factors that should not influence the distribution of burden and benefits,\textsuperscript{88} and they go as far as to suggest that formal equality of opportunity should be rejected in favour of removing all the effects of misfortune on lives, as far as possible.\textsuperscript{89} This is to be distinguished from the role that choice

\textsuperscript{85}ibid.
\textsuperscript{86}Equal Rights Trust (n 43).
\textsuperscript{87}ibid.
\textsuperscript{89}ibid.
makes;\textsuperscript{90} under the equality of opportunity view, people should not be held responsible for the effects of brute luck, but should accept the costs of voluntarily taken gambles, which are the kind of scenarios in which option luck operates. Conversely, there is an implication that those who suffer misfortune are inherently inferior\textsuperscript{91} that is, ‘luck egalitarianism promotes pity for the unfortunate.’\textsuperscript{92}

Luck egalitarianism, a concept penned by Anderson,\textsuperscript{93} is one of the most significant theories of distributive justice, and the core idea is that inequalities in the advantages that people enjoy are acceptable if they derive from the choices that people have voluntarily made, but that inequalities derived from unchosen features of people’s circumstances are unjust.\textsuperscript{94} Strictly speaking, luck egalitarianism is directly relevant to equality of opportunity, as choices cannot be made in a vacuum; an opportunity must present itself in order to make such choices, which may in turn give rise to further inequality. While the prevailing political morality is prepared to tolerate significant distributive inequalities deriving from differences of talent and ability, luck egalitarianism denies that a person’s natural talent, creativity, intelligence, innovative skill, or entrepreneurial ability can be the basis for legitimate inequalities.\textsuperscript{95}

Luck egalitarianism has parallels with the concept of DEAF-GAIN, whereby while being deaf is generally defined by the loss of hearing, DEAF-GAIN counters the frame of hearing loss by referring to the unique cognitive, creative, and cultural gains

\textsuperscript{90} ibid.
\textsuperscript{91} Thomas Christiano, ‘Comment to Elizabeth Anderson’s What is the Point of Equality?’ (22 June 1999) <http://www.brown.edu/Departments/Philosophy/bears/9904chri.html> accessed 18 April 2017.
\textsuperscript{92} Hevia and Colón-Rios (n 88) 145.
\textsuperscript{95} ibid 6.
manifested through deaf ways of being in the world.\textsuperscript{96} On the opposite end of the spectrum, there are those within the Deaf-World who assume that the world ‘owes them a living,’ and are content to be ‘looked after’ by Government handouts and welfare schemes such as Access to Work.\textsuperscript{97} This gives scant regard, however, to the reason why such Deaf individuals find themselves in such a position, reverting back to disability discourse and the dominant culture’s perception of Deaf people as objects of charity, to be pitied and cared for, as outlined in Chapter 2. In light of these arguments, it might be suggested that with regard to the concept of DEAF-GAIN, luck egalitarianists would consider such a theory a legitimate basis for not dealing with the inequalities faced by individuals within the Deaf-World. This could serve as the justification for the inequalities experienced by Deaf people.

As the Deaf-World is full of Deaf people with natural talent, creativity, intelligence, innovative skill and entrepreneurial ability, which would thereby suggest that if Deaf individuals find themselves in circumstances where they face inequality as a result of their choices (as opposed to their circumstances),\textsuperscript{98} then such treatment or disadvantage can be justified on the basis that it was their choice to be in that situation in the first place. If we consider the case of Deaf people, Christiano suggests that one may understand Anderson as saying that luck egalitarians think that ‘being deaf is in and of itself worse than being able to hear.’\textsuperscript{99} Egalitarians must be committed to this

\textsuperscript{98} Scheffler refers to Kymlicka’s interpretation of Rawls’ distinction between people’s fortunes which depend on either “ambition sensitive” choices and “endowment sensitive” circumstances (ibid 8).
claim in order to justify redistributive measures to the deaf such as establishing special means of communication in public facilities.

According to Christiano, Anderson’s point of view subscribes to the view that luck egalitarians consider deaf people to be inherently inferior,¹⁰⁰ but he argues that luck egalitarians in general do not necessarily believe the lives of the deaf are inferior. He claims that instead, luck egalitarians only need to assume that, in a society in which coordination is based on ‘communication by sound’ – which is a useful and effective way for members of society to communicate with each other – deaf people are disadvantaged in terms of the process of communication within that society.¹⁰¹ If this is the case, then there does not seem to be any implication whatsoever regarding the inferior moral worth of the lives of the deaf, and instead, the only point that luck egalitarians appear to be making is that, in order to ‘give deaf people an equal resource base with which to communicate, [justice requires] to supply them with what is necessary to communicate with others.’¹⁰² This could be interpreted in one of two ways: in the provision of British Sign Language (BSL)/English Interpreters, which would be a substantive approach, or through the promotion, encouragement and recognition of BSL in all fields, including education, which would be transformative. Again, this illustrates how equality of opportunity has some leanings towards substantive equality.

It has been suggested that equality of opportunity is very much aligned with that of formal equality as opposed to substantive, and Fredman suggests that in order to achieve genuine equality of opportunity, positive measures are needed to ensure all

¹⁰⁰ ibid.
¹⁰¹ ibid.
¹⁰² Hevia and Colón-Rios (n 88) 147.
persons share a genuinely equal chance of satisfying the criteria for access to a particular social good.\footnote{Fredman (n 53) 167.} This demands resources for education and training, accessibility measures and alternative facilities. Thus, these positive duties should be used to effect changes in underlying discriminatory structures and to facilitate effective freedom of choice.\footnote{ibid 167.} With substantive equality entailing a duty to provide, Fredman argues that this can be broken down into two of the best known objectives of substantive equality: equality of opportunity and equality of results (discussed further in section 3.2.2).\footnote{ibid.} We can, therefore, consider the level playing-field required for a fair and open competition to be equality of opportunity, that is, formal equality, and the positive duties required to address any particular disadvantage experienced by competitors due to a particular characteristic, equality of results and subsequently, substantive equality.

Before moving on to the precept of substantive equality, we can see that the above analyses of equal treatment and equality of opportunity have some relevance to the Deaf-World, and we have critiqued these analyses in order to establish how useful they are in determining whether formal equality is a useful precept in order to achieve equality for Deaf people. The short answer is yes, but it has its clear limitations, and does not go far enough. Thus, we turn now to substantive equality.

### 3.2 Substantive equality

The shortcomings of the formal equality precept have led to a search for more substantive concepts of equality in which equality of outcome and the positive elements of equality of opportunity are the focus rather than equal treatment.\footnote{Vickers (n 6) 147.} In
contrast to formal equality, substantive equality is a call for a duty upon the state to take positive measures to promote equality. Looking back at the conceptions of formal equality of opportunity, it has been made clear that there is a leaning towards substantive positive measures, such as the removal of obstacles such as word-of-mouth recruitment, age limits or unjustifiable testing, which would be substantive in nature. However, Fredman acknowledges that this does not guarantee that the disadvantaged will be in a position to take advantage of these opportunities; those who lack the requisite qualifications as a result of past discrimination will still be unable to meet job-related criteria, for example.

Thus, substantive equality is concerned with what lies outside the lens of formal equality; the actual distribution of resources, opportunities and choices within a society. Substantive equality involves what Bakan calls social equality, whereby legislators enact laws for a society that already has unevenly distributed its social goods, such as money, choices, recognition and status. Every new law affects that distribution. Accordingly, an assessment of whether a law promotes or retards substantive equality requires looking at people’s economic, social and political circumstances at the existing distribution of resources and asking how the impugned law affects them. In other words, we cannot assess whether a policy promotes or impedes substantive equality without examining people’s circumstances independently of the words of the law itself.

Vickers puts forwards three models of the substantive concept of equality: the link between equality and individual dignity and identity; focusing on disadvantage and

---

107 McColgan (n 14) 22.
108 Fredman (n 53) 167.
109 Greschner (n 47) 303-4.
110 ibid 304.
distribution; and as a means of addressing social exclusion and promoting participation.\(^{111}\) Fredman sets out four specific aims of substantive equality as follows: to break the cycle of disadvantage\(^{112}\) associated with out-groups,\(^{113}\) to promote respect for the equal dignity and worth of all to redress stigma, stereotyping, humiliation and violence due to membership of an out-group, to positively affirm and celebrate identity within community, and to facilitate full participation in society.\(^{114}\) Some of these concepts will be explored further in the present context.

The advantages of substantive equality over formal are well documented, including the fact that it has normative content and recognises that special treatment may be required in order to take into account special characteristics.\(^{115}\) On the other hand, the standard of measure is dictated by the dominant culture, and it is still unclear when or what special characteristics would be entitled to special treatment. Conversely, such special treatment is an exception to the rule and has the effect of upholding the status quo, rather than subjecting general social structures to change to ensure equality. Finally, there is still a reliance on individuals to enforce their rights through the courts.\(^{116}\)

It has been mentioned that substantive equality involves an element of redistribution. There is much dispute as to when and to what extent redistribution is justified, which has been a major concern of political philosophers such as Rawls, Sen, Dworkin and

\(^{111}\) Vickers (n 6) 147.

\(^{112}\) A disadvantage can be considered an unfavourable circumstance or condition that reduces the chance of success or effectiveness (Oxford Dictionaries, ‘disadvantage – definition of disadvantage in English from the Oxford dictionary’ <http://www.oxforddictionaries.com/definition/english/disadvantage> accessed 9 September 2015).

\(^{113}\) It is argued that the Deaf-World is considered an ‘out-group’– to coin the term utilised by Fredman – as she also refers to an ‘out-group’ as a ‘disadvantaged group’, and it will be made clear in this chapter how (McColgan (n 14) 1).


\(^{115}\) Vendegodt Liisberg (n 52) 28.

\(^{116}\) ibid.
Cohen. In particular, it is argued that equality of outcome is inherently linked to the redistributive justice model and the achievement of a fairer distribution of benefits. Thus, the aforementioned positive measures can include the allocation of resources, resulting in a direct redistribution of resources and benefits; Schiek, Waddington and Bell argue that the aim of substantive equality starts not from a theory of law, but rather from a theory of justice, hence the association of the distributive justice concept with substantive equality (see section 3.1.2), although Fudge considers the redistributive potential of equality rights to be quite small due to the reliance on the individual enforcement model to challenge infringements of equality rights. Conversely, Fredman suggests that implementing substantive equality measures often protects states from having to justify distributive distributions. One way in which states commit themselves to achieving substantive equality outcomes is to provide for disadvantaged groups by way of welfare, making a political statement to develop the positive duty to provide in the process.

Albertyn and Goldblatt believe that disadvantage and difference are core characteristics of substantive equality, and argue that equality should be defined in terms of these central elements of the concept, rather than in terms of dignity. Indeed, it is argued that substantive equality aims to remedy the deficiencies of the difference model of equality, highlighted throughout this chapter.

118 Equal Rights Trust (n 43).
120 ibid 244.
121 ibid 164.
122 Fredman (n 114) abstract.
124 Vendegodt Liisberg (n 52) 47.
We will now consider some of the relevant analyses of equality associated with the Deaf-World that can be categorised as part of the substantive precept.

3.2.1 Respect for equal worth, dignity and identity

Respect for the worth and dignity of each individual has deep roots in Judeo-Christian culture, and in the philosophy of the Enlightenment. It plays a central role in modern discussions of human rights as a foundation for equality rights and is expressed in a number of international treaties, including the Universal Declaration of Human Rights (UDHR), the Charter of Fundamental Human Rights of the European Union (EU Charter) and the case law of the European Convention on Human Rights. The first Article of the UDHR proclaims, ‘all human beings are born free and equal in dignity and rights.’ The contemporary approach of bringing the equality and non-discrimination agenda within a human rights framework has the effect of highlighting other conceptions of equality that purely economic integrationist models largely seem to neglect. This approach is based on dignity, but dignity in this paradigm is meant to reflect the universality, indivisibility, and inter-relatedness of all human rights, as understood in present-day interpretations.

The relationship between dignity and equality is contested, with the meaning of dignity difficult to pin down and considered an even more abstract notion than that of ‘equality,’ as described at the outset of this chapter. Smith suggests that the law

---

125 Hepple (n 117) 7.
127 UN General Assembly (UNGA) (10 December 1948) UDHR Resolution 217 A (III) 183rd Session.
130 UDHR, art 1.
131 Equal Rights Trust (n 61) 6.
132 McColgan (n 14) 24.
will not be made any clearer by attempts to give content to the right not to be discriminated against by explaining that upholding ‘equality’ means respecting our ‘dignity’,134 and that dignity is something that is attributed to people because of something else, that dignity cannot replace rationality as a foundation for equality, because rationality is the foundation of human dignity.135 Interestingly, Iacobucci J ruled in Law v Canada that dignity ‘does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law,’136 thus firmly embracing a subjective approach to the concept,137 an approach supported by Reaume, who states that some substantive interest or value must underpin a claim if it is to have any critical bite at all.138 On the other hand, Greschner argues that the concept of dignity is too vague, general, malleable and emotive to be the core interest protected by equality rights, which should focus on individual interests in belonging to important communities.139 Moreau concurs that the conception of dignity does not have sufficient content to explain the precise nature of the wrongs done to individuals who are not treated with equal concern and respect.140 In addition, Fudge was highly critical of the role of dignity in the judgment of the Law case, suggesting that viewing equality through a dignity lens functions to limit substantive equality’s redistributive

---

134 ibid 523.
135 ibid 514.
136 ibid [53].
137 McColgan (n 14) 25.
139 Greschner (n 47) 299.
potential, and Grabham warns that continued reliance upon concepts such as ‘human dignity’ and ‘individual dignity’ can serve to reinforce oppressive norms.

Nonetheless, some academics support the notion that an emphasis on dignity provides a valuable underpinning to the concept of equality. Fredman’s view is that since dignity is inherent in the humanity of all people, no one can be excluded from its reach, and Vickers states that the concept of dignity inherently encompasses the concept of equality, as humans are equal in their humanity and moral worth. As Dworkin argues, by virtue of being human, all people share a fundamental right to equal concern and respect, and there is therefore an objective good in upholding their equality, and in attempting to create a society in which all can flourish.

Vickers confirms that a focus on dignity does not adhere to the principles of formal equality because the levelling down of protection may reduce the overall dignity of the groups being compared, and also focuses on increasing autonomy and dignity for individuals rather than achieving parity of treatment. It can also more readily allow for accommodation of difference than formal equality. This suggests therefore that dignity has substantive underpinnings. McLachlin goes further to suggest that the principle that all human beings are of equal worth and possessed of the same innate human dignity, which the law must uphold and protect, not just in form, but in substance, underpins substantive equality, and that dignity is essentially a

---

141 McColgan (n 14) 27.
143 Fredman (n 114) 155.
144 Vickers (n 6) 148.
146 Vickers (n 6) 148.
147 ibid.
148 McLachlin (n 8) 20.
cornerstone of human rights as it attacks the stigma, stereotyping and denigration inherent in most forms of discrimination.149

There is a general consensus that in order to recognise human dignity one must treat everyone with the respect due to our common humanity. It is Dworkin’s principle of ‘intrinsic value’, that each human life has a special kind of objective value.150 In practical terms, when we consider respect for equal worth, we can certainly say that if people belonging to a particular group have not been afforded treatment equal to that of the rest of the population this is a reflection that they have not been valued equally.151 Respecting the dignity of the individual also means respecting the differences between people that spring from their gender, or sexuality, or physical or mental abilities, or cultural experiences of religion or belief.152

It can also be argued that the concept of equality as founded on dignity creates room to provide broader recognition for differences rather than mere tolerance, going beyond substantive positive measures. The idea is that equality and dignity can mean more than just equalising of benefits and advantages as between different people, but can involve recognition of the uniqueness of individuals, and their distinctiveness. The concept of ‘recognition’ in this sense is based on the view that in order fully to realise human dignity, autonomy and equality, humans need to be able to develop a sense of personal identity and to have that identity recognised, respected and valued. Thus, the notion of equality will mean that it is important to preserve the self-respect and sense of self-worth of individuals,153 and in the context of Deaf people, as explained

149 ibid.
150 Hepple (n 117) 7.
151 ibid 8.
152 ibid.
153 Vickers (n 6) 149.
in Chapter 2, as yet Deaf people do not have recognition on their own terms, but only as part of disability discourse.

Nonetheless, equality as dignity or recognition does have some shortcomings.\textsuperscript{154} Firstly, terms such as the 'dignity and the equal moral worth of humanity' are imprecise and determining their content remains problematic.\textsuperscript{155} Vickers proffers an example: even if the concept of equality is based on the notion of dignity or recognition, this does not, of itself, determine whether its realisation requires the introduction of non-discrimination rules, or whether it requires the provision of fairly interventionist duties on public authorities.\textsuperscript{156} Secondly, using dignity and recognition can lead to the reifying of differences between groups. This can lead to pressure on individuals to conform to a given group culture or identity, in order to experience the gains of recognition, and the resulting conformity by groups seeking recognition can reduce intra-group discussion and development. This can be compared with the formal equality approach, which tends to expect ‘different’ individuals to conform to the norm. Thus, dignity and recognition, while justifying a more substantive concept of equality, may well not provide a sufficient theoretical basis for equality.\textsuperscript{157} Hepple concurs, stating that ‘while dignity is a background value for all human rights, it is too broad and ambiguous to be the basis of equality law.’\textsuperscript{158}

Looking at the concept of ‘dignity’ in relation to Deaf people from a somewhat practical viewpoint, Hepple argues that an approach to equality which focuses solely on human dignity is not sufficiently sensitive to conflicts of equality with individual liberty and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{154} ibid.
\item \textsuperscript{155} ibid 149-150.
\item \textsuperscript{156} ibid 150.
\item \textsuperscript{157} ibid 150-1.
\item \textsuperscript{158} Hepple (n 117) 12.
\end{itemize}
\end{footnotesize}
autonomy, suggesting that we should not tie ourselves up in knots over the relationship between dignity and equality. Instead, he argues, treating dignity as an overarching or superior value, a more satisfactory conclusion will be reached by applying the principle of proportionality.\(^{159}\) That is, state intervention through legal rights should be shown by evidence to be proportionate to the legitimate aim of protecting a specific public interest (such as social cohesion, economic efficiency or public health) as well as safeguarding the dignity of individuals. Moreover, the rights and duties that arise should be the result of a transparent and participatory decision-making process, one that relies on evidence, which make authorities accountable for the reasonableness of action that reduce individual choice.\(^{160}\)

So then, are members of the Deaf-World treated as autonomous individuals able to choose their destiny? Lane, Hoffmeister and Bahan contend that Deaf people around the world are deprived of fundamental human rights, with the WFD and the national organisations of Deaf people that are its members, such as the BDA, engaged in a ceaseless struggle to gain fundamental human rights for Deaf people.\(^{161}\) In a 1994 presentation to the Assistant Secretary General for Human Rights of the United Nations, the WFD affirmed that Deaf people are not accorded equal dignity and ‘there are even many who want to get rid of us.’\(^{162}\) This suggests that the answer is no, and thus, the concept of respect for dignity is of particular relevance to the Deaf-World.

\(^{159}\) Hepple (n 28) 22.
\(^{160}\) ibid.
\(^{161}\) Lane, Hoffmeister and Bahan (n 13) 419.
3.2.2 Equality of results and equality of outcomes

Equality of results is a notion of equality which extends beyond the requirement of consistent treatment, that is, formal equality, and demands that the outcomes be equal.\(^{163}\) Instead, it focuses on whether the equal treatment has had a harmful impact on individuals as a result of their individual characteristic.\(^{164}\) Flew refers to equality of results as ‘absolute equality,’ which demands that all goods be distributed equally.\(^{165}\) He argues that it is rare to find equality of result ideals rationalised and articulated systematically\(^{166}\) and sums up the two main objections to equality of results as, firstly, scarcely anyone insists that there must be no incentive income differentials whatsoever (in real terms, fewer and smaller incentives are offered); and secondly, no one at all suggests seriously that the law should enforce equality by ensuring that everyone has as much as everyone else.\(^{167}\) In other words, the two main aims of equality of results would be to: ensure that all individuals receive an equal distribution of incentive income, which would mean that everyone has as much as everyone else, and that law should reinforce this distribution in the name of equality. However, these are unlikely to ever happen.\(^{168}\)

In order to illustrate what is meant by equality of outcome, Phillips proffers an illuminating example: systems of political representation should deliver an equal outcome between women and men, and a proportionate outcome would be ethnic

---

\(^{163}\) Phillips (n 10) 16.

\(^{164}\) Fredman (n 114) 150.

\(^{165}\) Flew (n 82) 27.

\(^{166}\) ibid.

\(^{167}\) ibid 28.

\(^{168}\) Although this could change at some point in the future. A two-year social experiment is currently taking place in Finland, who from 1 January 2017 are paying 2,000 unemployed citizens aged 25 to 58 an unconditional monthly sum, which will be paid even if they find work. This distribution experiment is also being trialled in the Netherlands, the Italian city of Livorno and Ontario in Canada. Jon Henley, ‘Finland trials basic income for unemployed’ \textit{The Guardian} (London 3 January 2017) <https://www.theguardian.com/world/2017/jan/03/finland-trials-basic-income-for-unemployed> accessed 5 May 2017.
representatives aligned with proportions within the voting population. However, the
equal right to vote and stand for election (that is, equality of opportunity) does not
necessarily translate in any automatic way into parity between the sexes, nor does the
enfranchisement of ethnic minorities guarantee that individuals from these groups will
be elected to political office. Thus, when the political parties take further steps – such
as a quota system – in order to ensure an equitable distribution between men and
women, or white people and black, they step over into the equality of outcome
discourse.\textsuperscript{169} It is further argued that in order to give individuals with certain
characteristics equality of opportunity, there has to be an allocation of resources to
those with limitations so that they can achieve basic abilities,\textsuperscript{170} which is substantive
in its approach. However, outcome arguments make most sense when applied to
the distribution of resources and activities between social groups.\textsuperscript{171} Indeed, Phillips
argues that equality of outcome is far more pertinent as a measure of equality when
comparisons are made between groups rather than between individuals.\textsuperscript{172} This
concept of equality manifests itself through a spectrum of policies and legal
mechanisms in various jurisdictions. Reverse discrimination, positive discrimination
and positive action are just a few which have been put forward to represent this
concept.\textsuperscript{173}

Some of the criticisms of equality of results will now be examined. McColgan suggests
that it merely serves a diagnostic purpose, in that it highlights the existence of
obstacles rather than suggests an outcome, and is therefore an insufficient basis of

\textsuperscript{169} Phillips (n 10) 11.
\textsuperscript{170} George Gerapetritis, \textit{Affirmative Action Policies and Judicial Review Worldwide} (Springer 2016)
36.
\textsuperscript{171} Phillips (n 10) 24.
\textsuperscript{172} ibid 29.
\textsuperscript{173} Equal Rights Trust (n 61) 4.
equality law. Essentially, equality of results equalises where people end up rather than where or how they begin (which is equality of opportunity), and Phillips argues that this approach lacks sophistication as it immediately begs the question of what it is we are seeking to equalise. Is the aim to equalise Deaf people’s income, happiness or welfare, or all three, with that of hearing people’s? In addition, is using one of these metrics to deliver equality for Deaf people likely to result in inequality for hearing people?175

Another perceived danger of this approach is that it places too little emphasis on the importance of accommodating diversity by adapting existing structures. In this regard some philosophers and theorists believe that a focus on certain disadvantaged social groups under this conception of equality misdirects the wider debate away from more serious and arbitrary distinctions that lead to disadvantage.176

Thus, the concept of equality of outcome makes an important contribution to combating initiatives and processes involving the worst cases of disadvantage and discrimination to different groups. However, it remains a politically charged interpretation of equality, under which competing economic, social and political interests must be addressed and balanced.177 As a result, equal outcomes can be secured only by departing from equal opportunities in the context of political representation: ‘where the nature of representation is at issue, equality of outcome is not just a way of scrutinising the claims of equal opportunity, but it becomes an important objective in itself.’178

175 Phillips (n 10) 2.
176 Equal Rights Trust (n 61) 5.
177 ibid 6.
178 ibid 15.
Due to the fact that there is a clear link between equality of opportunity and results, it is necessary to explore their relationship in more detail. When outcomes are different (that is, unequal), the better explanation is that the opportunities were themselves unequal.\textsuperscript{179} Equality of outcome and result is distinguished from equality of opportunity, as equality of opportunity focuses on procedures and the individual, whilst equality of outcome and results focuses on groups and the results achieved.\textsuperscript{180} Phillips argues that equality of opportunity and equality of results are not opposing conceptions of equality, and on the contrary, closely linked.\textsuperscript{181} It was previously mentioned that equality of opportunity is the primary objective of equality, but equality of outcome is the test for identifying whether the objective has been achieved.\textsuperscript{182}

To explain the difference between equality of opportunity and equality of results in real terms, no person has a right to a high paying job or to a university place; everyone has a right to compete, on the basis of merit, for jobs and university admission. Equal opportunity is a human right; equality of results is not.\textsuperscript{183} Andreevska and Aziri argue that the effective enforcement of laws against discrimination can generate equality of opportunity for all members of society, but that enforcement of anti-discrimination laws will not produce equality of results. To move towards this type of equality, governments would need to use taxation, along with expenditure on health, education and welfare to redistribute income from affluent members of society to the poor.\textsuperscript{184}

\textsuperscript{179} Phillips (n 10) 10.
\textsuperscript{181} Phillips (n 10) 10.
\textsuperscript{182} ibid 14.
\textsuperscript{183} ibid 237.
\textsuperscript{184} ibid.
3.3 Transformative equality

The final concept of equality to be considered within this chapter is that of transformative equality. Kuyen and French suggest that ‘if formal equality was about ignoring difference, a universality approach is about expecting difference.’ In other words, there is no single norm against which all others are compared in order to evaluate whether a characteristic is relevant and can warrant different treatment. Transformative equality was first sparked by pressures from United States and Irish Catholic activists who wanted to promote fair representation in Northern Ireland, and was based on American models, eventually manifesting itself in the imposition of positive duties on public bodies.

Hepple argues that while substantive equality affords opportunities to people who have in the past been disproportionately excluded, without disturbing the underlying social framework that denies them genuine choice and generates inequitable outcomes, transformative equality is aimed at the dismantling of systemic inequalities and the eradication of poverty and disadvantage, which involves ensuring an ‘equality of capabilities,’ enabling people to have the skills they need to participate in society, to engage in productive activities and to participate in decision-making. The measures needed to achieve this include a positive role for institutions in removing barriers, and in ensuring that those who need more resources than others get them, that is, an element of redistribution, and it also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.

---

186 ibid.
188 Albertyn and Goldblatt (n 123) 249.
Fredman goes further by arguing that transformative equality implies a strong link between substantive equality and social and economic rights.\(^{189}\)

However, substantial disagreements still exist as to which jurisprudential or philosophical theories best encapsulate and describe these aspirations. In particular, dispute exists as to the extent to which these transformative ambitions should be stretched.\(^{190}\) How far should legal regulation be utilised to alter existing practices, concepts of merit, and the freedom of action of individuals and corporations? Considerable disagreement also exists as to what extent group differences should be institutionalised within law and policy, and in particular to what extent religious sensitivities, different beliefs, and differences between ethnic groups be reflected in legislation, policy and state practice. In other words, two areas of stark and often passionate disagreement exist: how much social engineering should be conducted via equality and anti-discrimination law, and how much group differentiation should be institutionalised?\(^{191}\)

O’Cinneide argues that there has been a greater recognition of the transformative aspirations inherent in concepts of equality, and a willingness to introduce some legal mechanisms that attempt to transform policies and practices that may have a discriminatory effect.\(^{192}\) However, the transformative potential of this new framework is finite and limited. To give it full effect, anti-subordination approaches\(^{193}\) may need

\(^{189}\) Hepple (n 28) 28-9.
\(^{190}\) O’Cinneide (n 9) 63.
\(^{191}\) ibid 64.
\(^{192}\) ibid 65.
\(^{193}\) O’Cinneide explains that anti-subordination approaches are primarily concerned with addressing group disadvantage and transforming social practices and require positive action to be taken towards achieving a goal of equality of respect or status, rather than just requiring avoidance of particular forms of action. Ibid 99.
to be adopted, and serious debates remain about how far the transformative dimension of equality norms should be applied.\footnote{194} In order to understand how transformative equality manifests itself, it is necessary to locate the impugned act within real life conditions within an understanding of how these reinforce both disadvantage and harm.\footnote{195} In practical terms, O’Cinneide suggests that this can be achieved by first examining the socio-economic conditions of the individuals and groups concerned, and second, identifying the impact of the impugned provision on social patterns and systemic forms of disadvantage. Finally, the grounds of discrimination should be looked at in an intersectional manner in order to ascertain the complex and compounded nature of group disadvantage and privilege.\footnote{196} Hepple goes further and advocates a reflexive regulation approach.\footnote{197} This involves three interlocking mechanisms, with the first being internal scrutiny by the organisation itself to ensure effective self-regulation.\footnote{198} The second is the involvement of interest groups (such as managers, employees and service users) who must be informed, consulted and engaged in the process of change.\footnote{199} The third is an enforcement agency (such as the Equality and Human Rights Commission (EHRC)) which should provide the back-up role of assistance, building capabilities and ultimately sanctioning where voluntary methods fail.\footnote{200} These mechanisms create a ‘triangular relationship’ between the three,\footnote{201} and in order to be effective, require

\begin{footnotesize}
\begin{enumerate}
\item ibid 100.
\item Albertyn and Goldblatt (n 123) 261.
\item ibid 262.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\end{enumerate}
\end{footnotesize}
‘bridging mechanisms’ to assist the ‘structural coupling’ between the legal system and the organisations in which the rules are to apply.202

In terms of conceptions, a number of writers have developed thinking about equality based on inclusion and participation. Fredman identifies a vision of equality based on the need to allow all groups an equal set of alternatives from which they can pursue their own version of a good life. She suggests that equality law should aim at a number of ends, such as breaching the cycle of disadvantage associated with out-groups, as well as promoting respect for the equal dignity of all and redressing stigma, stereotyping, humiliation and violence because of membership of an out-group, and affirming community identities. In effect, this vision embraces both recognition and redistribution and represent each of the precepts of equality presented in this chapter. She adds an additional aim, however, which is to facilitate full participation in society.203 It is argued that these approaches are in effect, a holistic way of dealing with inequalities.

In terms of whether transformative equality is present in UK law, O’Cinneide has stated quite clearly that the UK does not have transformative equality.204 Nonetheless, O’Cinneide, together with Bamforth and Malik, previously argued that there is a need to transform existing social norms so disabled people can be provided with genuine opportunities for self-realisation, and that the Disability Equality Duty205 had considerable potential for making a difference to how disabled persons are treated by

203 Vickers (n 6) 153-4.
205 This was introduced by the Disability Discrimination Act 2005, and later replaced by the Public Sector Equality Duty in the Equality Act 2010.
public authorities.\textsuperscript{206} This suggests, therefore, that the imposition of general equality duties on public authorities is evidence of a transformative approach to equality. This is further supported by Hepple, who believes that the EqA 2010 contains elements of transformative equality in its extended positive duties on public authorities,\textsuperscript{207} although he recognise\textsuperscript{s} that there are still major gaps in the Act and that a move towards legislation based on transformative equality is still necessary.\textsuperscript{208} Petrova agrees, and argues that transformative equality also extends to positive action.\textsuperscript{209}

It appears that while transformative equality is an as yet largely undeveloped precept of equality, inasmuch as the focus tends to be the difference between the formal and substantive models of equality, academics have alluded to transformative equality under a different heading. For example, Vendegodt Liisberg suggests that the last model of substantive equality is also known as the ‘proactive model,’ the ‘multidimensional disadvantage model,’ and the ‘diversity equality model.’\textsuperscript{210} She also refers to equality of results.

In relation to the diversity equality model, it underlines a positive and inclusive perception of human difference, and has an asymmetrical approach to achieving equality which recognises uneven distribution of power, privilege and advantage among different groups in society.\textsuperscript{211} Key to our argument that the diversity equality model is in fact transformative is that its measures to even out disadvantage are not seen as an exception to the rule of identical treatment; the model is actually forward-thinking and aims to change general structures in society so that they reflect the equal

\textsuperscript{206} Bamforth, Malik and O’Cinneide (n 23) 1100.
\textsuperscript{207} Hepple (n 28) 1.
\textsuperscript{208} Hepple (n 197) 21.
\textsuperscript{210} Vendegodt Liisberg (n 52) 47.
\textsuperscript{211} Ibid.
rights of different groups. Thus, society is diverse and general structures must reflect this.212 This model also does not rely mainly on individual claims to bring about change, but leaves the principal initiative with policy makers and implementers, providers of goods and services, employers and others, although individual rights should still be a necessary part of this approach as fall-back rights to be used if general structures are not changed to ensure full inclusion.213

This leads us to consider the weaknesses of the transformative approach. An obvious weakness is the reliance on policymakers to amend existing social structures, thus relying on their goodwill,214 which is no easy undertaking bearing in mind the strength of dominant discourse as outlined in Chapter 2. How this would work in practice would be to broaden the idea of what is normal, thus broadening the range of ‘normality’ and amending general social structures to reflect this norm.215 It is recognised that in some instances, it may be necessary to define some persons as disabled and some as non-disabled, but such a definition should not be a given.216 For such a dramatic undertaking to occur, there would need to be a seismic shift in society’s attitudes, and it is not entirely clear how this could be achieved.

In a similar guise to that of formal equality and substantive equality, there appear to be some overlap between substantive and transformative equality; it is to these intersections we now turn. Fraser explains that the most distinguishable difference between substantive and transformative equality is that substantive equality seeks to correct injustice without disturbing underlying social structures, while transformative

\[ \text{ibid.} \]  
\[ \text{ibid. 48.} \]  
\[ \text{ibid.} \]  
\[ \text{ibid. 49.} \]  
\[ \text{ibid.} \]
seeks to correct injustice by reconstructing the social structures. Fraser believes that whilst substantive equality would redress maldistribution through income transfers, relying heavily on welfare, transformative equality would redress unjust distribution at the root, by transforming the framework that generates it, hence it would be a cheaper and more effective way of achieving true equality. The advantage of Fredman's substantive equality approach is that it places the transformation of social structures front and centre in its account of what a coherent equality approach should aim to achieve. This account of equality norms is perhaps closer to their inherent aspirations and underpinning logic than the language of social inclusion, even if it does not always reflect their often limited impact in practice.

Young argues that transformative equality is preferable to substantive as the substantive distributive paradigm focuses on the allocation of material goods. It ignores social structures such as decision-making power, the division of labour and culture, or the symbolic meanings attached to people, actions and things. Instead, she argues, the focus should be on structures which exclude people from participating in determining their actions.

We will now consider some of the relevant analyses of equality associated with the transformative precept.

### 3.3.1 Social inclusion

Batterbury, in her report considering the legal status of BSL for the BDA, explores social inclusion through an exclusion lens, and argues that social exclusion for Deaf

---


Ibid 68.

O'Cinneide (n 9) 64.

people is a direct result of linguistic exclusion, which has manifested itself in the fact that Deaf people in the UK have experienced below average levels of school leaver achievements and below average access to health information, and higher than average levels of acquired mental ill health and exclusion from employment, criminal justice and civic engagement, although no statistical data about the social exclusion of Deaf people has been collected at a national level in the UK.

As has been seen, equality law is increasingly being placed as one of a number of responses to the problem of exclusion of certain individuals and groups from mainstream political, social and economic processes and institutions. Some who find equality of opportunity inadequate and ineffective as a means of achieving a fair society have suggested alternatives such as social inclusion, a concept introduced by Collins, who argues that it provides a more satisfactory intellectual basis for anti-discrimination legislation than approaches based on substantive equality. The full inclusion of disabled people in employment is dependent on access to education, to housing, to transport, to healthcare and, very often, to support with daily living.

Collins suggests that equality law is best viewed as part of an overall strategy of combating forms of social exclusion faced by particular disadvantaged groups, and therefore argues that UK equality law and policy can be regarded as built around a central structuring principle of social inclusion. The strength of this analysis is that it provides a coherent explanation for why anti-discrimination law prohibits certain types

---

221 Batterbury-Magill (n 34) 22.
222 ibid 22-3.
223 ibid 23.
225 Hepple (n 9) 30.
of harm inflicted upon specific excluded social groups. It also situates this legislation within a wider range of government initiatives and policy approaches that are closely concerned with addressing social exclusion.\footnote{O'Cinneide (n 19) 63.}

Collins also seeks to move thinking about discrimination law towards issues such as social inclusion. Again, the argument is that minority groups need to be encouraged to participate in civic life, so that their voice within the community can become stronger, leading to an end to their marginalisation. This may mean using both recognition and redistribution, not as ends in themselves, but rather as ways to achieve a more equal society in terms of economic distribution and social harmony which are the twin effects of inclusion.\footnote{Vickers (n 6) 154.}

A possible disadvantage of social inclusion analysis as a conceptual framework is that it may not adequately capture the potential transformative effect of equality law. Equality and anti-discrimination legal norms are capable of not simply removing obstacles to social inclusion by particular groups, but also of transforming existing social norms that are discriminatory in nature and effect. This transformative dimension is perhaps more often an aspiration than a reality.\footnote{Ibid.} Barnard also suggests that the law needs to be underpinned by the values of ‘solidarity’ in order to achieve the objectives of integration and participation of disadvantaged groups.\footnote{Catherine Barnard, ‘The Future of Equality Law: Equality and Beyond’ in Catherine Barnard, Simon Deakin, and Gillian S Morris (eds), The Future of Labour Law. Liber Amicorum Sir Bob Hepple (Hart Publishing 2004) 227.} She prefers this to the notion of social inclusion because it has a positive as well as a negative dimension.\footnote{Ibid 214.} While the negative side of solidarity prohibits discrimination and requires the removal of any measure or practice that constitutes an obstacle to an individual’s

\footnote{228 O'Cinneide (n 19) 63.} \footnote{229 Vickers (n 6) 154.} \footnote{229 Ibid.} \footnote{230 Ibid 214.}
participation, the positive side of solidarity imposes obligations to take active measures to integrate the individual into society. However, Hepple states that policies such as ‘social inclusion’ and ‘solidarity’ are even more uncertain than the principles of equal treatment and equal opportunity. It is hereby argued that social inclusion falls within the scope of a transformative approach to equality as opposed to formal or substantive. McColgan further confirms that discrimination law is best understood as being concerned with the social inclusion of out-groups, rather than a commitment to formal or even substantive equality.

Bamforth, Malik and O’Cinneide go further and suggest that in order to develop an analysis of discrimination law as social exclusion, there needs to be a comprehensive and detailed enquiry into which groups are at risk of social exclusion; what conditions cause and exacerbate social exclusion; and how the process of social exclusion operates. This will in turn allow a better understanding of discrimination as a structural problem as well as enabling a more refined understanding of the problem. It will also allow a better understanding of the remedial role of discrimination law and policy, that is, how, and at what stage in the process of social exclusion, should legal and policy intervention be introduced in order to eliminate or reduce the problem.

3.3.2 Challenging oppression

McColgan finds the focus of thinkers including Anderson, Scheffler and O’Cinneide on oppression appealing. When considering alternative conceptions of equality, including Collins’ social inclusion, O’Cinneide emphasises that a pluralist approach is

232 O’Cinneide (n 19) 20.
233 Ibid 22.
234 McColgan (n 14) 29.
235 Bamforth, Malik and O’Cinneide (n 23) 223-224.
236 McColgan (n 14) 37.
best, as different concepts are themselves entangled with the ideals of respect and equal worth, and measures are directed towards the elimination or amelioration of group disadvantage. Meanwhile, Anderson argues that diversities can never justify oppression, which she defines as the ‘dominat[ion], exploit[ation], marginali[sation], demean[ing] and inflict[ion] of violence’ by some groups of people upon others, and Scheffler states that equality is opposed to oppression.

Young treats discrimination as a form of oppression against certain social groups, and criticises the individualistic nature of equality law, in that it fails to capture the importance of groups and their particular experience. Instead, Young proposes an alternative: that the theory of justice should attend to factors other than individual rights and the distribution of resources such as the social structure and institutional context, issues of decision-making power and procedures, and the division of labour and culture. This should go some way to reduce social exclusion, and this conception makes it easier to understand the experience of injustice and oppression of groups as a distinct category rather than an amalgamation of individual actors. Therein lies the transformative element of equality.

There are ‘five faces of oppression’: exploitation, marginalisation, powerlessness, cultural imperialism and violence, and Bamforth, Malik and O’Cinneide argue that this is a more appropriate method of capturing a wider vision of social justice. Exploitation is concerned with the structural relation between social groups, whereby

---

237 O’Cinneide (n 19) 61.
238 ibid, 61-2.
239 Anderson (n 93) 312-313.
240 Scheffler (n 94) 21-22.
241 Bamforth, Malik and O’Cinneide (n 23) 224.
242 ibid 224-5.
243 Young (n 220) 42.
244 Bamforth, Malik and O’Cinneide (n 23) 225.
social rules about what work is, who does what for whom, how it is compensated, and how these rules manifest themselves is through a systematic process in which the energies of ‘the have-nots are expended to maintain and augment the power, status, and wealth of the haves.’

Marginalisation is considered to be ‘the most dangerous form of oppression’ and refers to the expulsion of people from useful participation in social life and thus potentially subjecting them to severe material deprivation and even extermination.

Powerlessness refers to a lack of authority, status and sense of self.

Cultural imperialism involves the universalisation of a dominant group’s experience and culture, and its establishment as the norm, involving ‘the paradox of experiencing oneself as invisible at the same time that one is marked out as different.’

Finally, violence, refers to systematic violence directed at members of a group simply because they are members of a group.

At first glance, these faces appear to have immediate relevance to the Deaf-World. While there is little research available as to the extent of exploitation of Deaf people or violence towards them by virtue of them being in the Deaf community, there is clear evidence of marginalisation and powerlessness as deaf people are not able to participate in social life in the Hearing-World due to communication and language barriers, are more likely to be unemployed, face a double sentence if imprisoned, cannot serve as a member of a jury, cannot access services, and deaf children do not receive the same standard of education as their hearing peers (see Chapter 2).

245 Young (n 220) 48.
246 ibid.
247 ibid.
248 ibid.
249 ibid.
Finally, colonial imperialism has parallels with Ladd’s argument that Deaf communities have undergone colonisation. In short, ‘it is … undeniable that in certain instances, domination of one language-using community by another can come to result in a process resembling colonialism.’ Colonialism describes a relationship between two or more groups in an unequal power relationship where ‘one not only controls and rules the other, but also endeavours to impose its cultural order on the subordinate group.’ Ladd argues that, in his examination of Deaf cultures, it was obvious that these cultures were not only directly affected by majority cultures, but that their own cultural patterns had become shaped by both acquiescence to and resistance against that cultural domination. In terms of examples, Lane examines parallels between colonialism and audism and locates economic motive in the profits to be made in hearing aid technology, cochlear implantation and genetic engineering, linking colonialisist parallels with the practices of rejecting native sign language use in schools, that is, the maintenance of oralism. Thus, it is clear that there is ample evidence that Deaf people have suffered colonial imperialism, the final face of oppression.

3.3.3 Full participation

Full participation and inclusion of everyone in major social institutions is fundamental to social equality. Active participation of the groups in question is crucial if intervention is to avoid being patronising, erroneous or unsuccessful. Thus, equality would be better achieved by ensuring greater participation in decision making; if decisions are

---

250 Paddy Ladd, Understanding Deaf Culture: In Search of Deafhood (Multilingual Matters Ltd 2003) 78.
251 ibid 79.
252 ibid. 79.
253 ibid.
254 ibid.
255 ibid. 29.
256 McColgan (n 14) 29.
made by consulting with a greater range of voices the needs of all groups should be better met.\textsuperscript{256}

Fraser provides another voice advocating full participation in society as an aim of equality, as a way of moving beyond the more traditional aims of recognition and redistribution, and their respective limitations, towards more general social justice. She suggests both lack of recognition and economic disadvantage can impede full participation in social life, due to lack of confidence or esteem, or lack of resources; and that fuller and more substantive conceptions of equality would involve working to increase participation in decision making by members of out-groups.\textsuperscript{257}

Increased participation in public life, education and employment will follow on from political and social recognition of, and valuing of, individual identity, because it creates the self-confidence in individuals which is necessary for them to flourish and take advantage of the opportunities available. Thus, the argument goes, the recognising and valuing of group and individual identity increases social inclusion and leads to greater economic equality.\textsuperscript{258}

Lane argues that Deaf people do not generally have the ‘chance at self-creating to the best of his or her abilities,’\textsuperscript{259} and should be crucial participants in the discussion and agreement concerning the lives of deaf children and adults and the roles of the professions that serve them. They have been excluded by law and by oppressive education, by statute or connivance from education most deaf children.\textsuperscript{260} Their counsel, which is needed by the parent of a new born deaf child more than any other,
is excluded from the home and the clinic.\textsuperscript{261} Their services as a language model for the deaf child are eschewed and the responsibility unconscionably given to the children’s hearing family, who cannot fulfil it.\textsuperscript{262} Indeed, their very existence is all but denied. They are not participants in the programmes of research on deaf people, and they are merely the passive objects of that research. Their role in programmes that provide services to deaf people is severely restricted.\textsuperscript{263} This therefore suggests that Deaf people are generally not allowed to participate fully in the decision-making processes perpetuated by state institutions.

If Deaf people’s dignity is affronted as suggested above, is it realistic to expect the Deaf-World to be involved in the decision-making process when it comes to their rights? Ladd suggests that Deaf (and hearing) people experience difficulties in penetrating the barriers around certain discourses in order to achieve change, with lay people on the other side of a media wall without sight of the Deaf community, which means that it is professionals within the science, medicine, education and social welfare spheres, as well as capitalist and economic influences, that have the ear of government and legal discourse, rather than Deaf people themselves.\textsuperscript{264}

This position that Deaf people appear to be in suggests that there is an urgent need for the Deaf-World to gain media prominence, so that their cultural beliefs and actions can be conveyed to both lay people and parents of new deaf children,\textsuperscript{265} and in turn raise awareness of the barriers that confront them in order to be involved in the decision-making process when it comes to deaf children’s rights. If one looks at the

\begin{flushleft}
\textsuperscript{261} ibid.
\textsuperscript{262} ibid.
\textsuperscript{263} ibid.
\textsuperscript{264} Ladd (n 250) 187-9.
\textsuperscript{265} ibid 189.
\end{flushleft}
example of the BSL (Scotland) Act 2015, during its passage through the Scottish Parliament, the Scottish Parliament sought to engage directly with BSL users and the Deaf community, published various key documents in BSL, broadcast evidence sessions with live BSL/English interpretation, and set up a BSL Facebook group to invite BSL users and others to share their views. On an international level, the WFD had a direct input into the formation of the CRPD, and in particular, articles 2, 9, 21, 24 and 30, all of which specifically refer to sign languages, which was perhaps the first time the Deaf-World was involved (and continues to be involved) in a decision-making process at UN level.

4 Conclusion

During the course of this chapter, we have been exposed to wide ranging concepts of equality, narrowed down according to which were more prevalent within Deaf discourse as well as equality discourse. Following a categorisation exercise of these concepts into precepts or emerging rocks of certainty, underpinned by various theories of justice, we then embarked on an exploration of the main features of each concept, and attempted to critique them, with the ultimate aim of ascertaining which of these different analyses of equality may be suited to the Deaf-World, or specifically, likely to resolve the Deaf Legal Dilemma explained at length in Chapter 2.

In order to undertake the challenging task of examining the relevant theoretical perspectives of equality law, a precept methodology was utilised, whereby formal, substantive and transformative equality were used as the three main categories of

---

266 Education and Culture Committee, *Stage 1 Report on the British Sign Language (Scotland) Bill* (Scottish Parliament 2015) 711-I, [4-5].


268 Vickers (n 6) 152.
equality law, within which concepts of equality that have been identified as relevant analyses to the Deaf-World were found to be more closely aligned to certain precepts than others.

Thus, the precept of formal equality considered the concepts of equal treatment and equality of opportunity, whereas substantive equality considered respect for equal worth, dignity and identity and equality of results, and finally, transformative equality included an examination of social inclusion, challenging oppression and seeking full participation. As we have seen, some interpretations of the concepts have inevitably intersected across two or more precepts, such is the nature of equality discourse.

Formal equality expects individuals to be treated like for like and is the precept that is most likely to be manifested in anti-discrimination law, generally in terms of direct discrimination. Generally speaking, it expects decision-makers to apply laws equally to all without examining in any detail any particular circumstances or the context of the individual, providing a seemingly objective approach in determining whether such an individual has experienced inequality in any given situation. However, this objectivity presupposes that the law is neutral, which is an assumption that critical legal theorists challenge, given that it tends to be ‘benchmark men’ who create the law in the first place, and that it is impossible for the decision-makers not to allow their personal characteristics and dominant discourse influence their decisions. Within the concept of equal treatment, difficulties can be encountered in the mere act of deciding when likes are alike, the precursor for a decision as to whether two individuals are sufficiently similar to justify equal treatment. The comparator test employed in UK discrimination law for the prohibited conduct of direct discrimination and failure to make reasonable adjustments has considerable flaws whereby this approach tends to ignore the complainant’s circumstances and focuses instead on whether they have been treated
in the same way their comparator would have been. Much of the criticism levelled at equal treatment can also be levelled at equality of opportunity, the second concept of equality generally associated with formal equality. Again, the circumstances that individuals find themselves in, this time when approaching the starting line when an opportunity presents itself, may put them at a disadvantage compared to others in successfully achieving the outcome of that opportunity.

Interestingly, it would appear that equality of opportunity includes elements of each precept of equality. There is a suggestion of formal equality as it is very much focused on providing opportunities without full consideration of what circumstances have led individuals to find themselves at a starting line; this means that each individual may not necessarily be equal in terms of merit-based criteria, and thus at a disadvantage. The substantive element derives from the allocation of resources to eliminate any such disadvantage, and the transformative from the positive duties imposed.

Substantive equality, in contrast to formal equality, requires the state to adopt more positive measures to promote equality, and moves away from the formal focus on equal treatment. It requires the implementation of redistribution of resources in an attempt to remove disadvantage, such as the duty to make reasonable adjustments and indirect discrimination. It will consider individuals’ circumstances independently of the law itself. In doing so, substantive equality is associated with the concepts of dignity and equal worth and equality of results. Respect of equal worth and dignity plays a central role in international law and is considered to be the foundation for equality rights, whereby ‘all human beings are born free and equal in dignity and rights.’

Thus, if individuals belonging to a particular group have not been afforded

\[\text{269 UDHR, art 1.}\]
equal treatment, they are considered to have not been valued equally and their dignity not respected. In practical terms, this concept allows for accommodation of difference. However, academics question whether the concept of dignity is too broad, abstract and ambiguous to use as a tool to combat inequality. Equality of results, which often manifests itself as equitable distribution, also faces criticism as it tends to merely serve a diagnostic purpose without really addressing the root of the problem, and it does not go so far as to state that in order to achieve equality of results, existing structures need to be changed.

It is clear that while formal and substantive equality have their uses in anti-discrimination law, it is unlikely that, due to their limitations, they will achieve equality for Deaf people. We thus need to go further. The precept of transformative equality has significant potential for the Deaf-World, however. It is a precept that expects difference and ignores norms against which all others are to be compared. There seems to be a wide consensus among scholars that transformative equality may go some way to dismantle systemic inequalities, as it has been established that it is these that formal and substantive equality do not quite manage to eliminate. Transformative equality at present tends to manifest itself within positive duties, requiring public institutions to take steps to remove barriers for disadvantaged groups. An obvious weakness is that this approach relies on policymakers to amend existing social structures, which some may say is nigh on impossible, as this would entail a direct challenge to dominant discourse. It is argued that the concepts of equality to be associated with transformative equality – in that they aim to achieve equality on a systemic level – are social inclusion, challenging oppression and full participation.

Social inclusion involves the implementation of a wide range of government initiatives and policy approaches which aim to ensure individuals are not excluded from
mainstream activities. A criticism of this concept is the fact that there has been very little research into which groups have been socially excluded. There has been an attempt to do such an activity for Deaf people,²⁷⁰ but this needs to be widened further. Challenging oppression has strong ties to Ladd’s contention that Deaf communities have been colonised by the dominant culture and is mainly concerned with dealing with oppression by looking to change social and institutional structures, decision-making powers and procedures, and the division of labour and culture. Finally, full participation expects active participation of all groups in major social institutions, again very much aligned with the precept of transformative equality.

In summary, a useful analogy that best explains the role the three precepts of equality play in addressing the Deaf Legal Dilemma – somewhat ironically given that much of the argument in Chapter 2 refuted the medical model of disability in the Deaf-World context – is of inequality as a disease, and formal, substantive and transformative equality being three different types of treatment. Effectively, formal and substantive measures tend to only treat the symptoms of inequality, whereas transformative equality will treat the disease itself. To eradicate the disease that is inequality altogether must be a preferable solution to merely alleviating or addressing individual acts of inequality, without making inroads in its ‘curing.’

Thus, we can assert with some degree of certainty that the following analyses of equality have some use in resolving the Deaf Legal Dilemma: equality of opportunity, respect for equal worth, dignity and identity, social inclusion and challenging oppression. The remainder, that is, prohibiting conduct and equality of results, do not

²⁷⁰ See Batterbury-Magill (n 34).
appear to have any relevance to the Deaf Legal Dilemma, or at the very least, are too weak or flawed to the extent that they would serve no purpose in this context.

It is clear to see that normalisation theory – as discussed in Chapter 2 – is surprisingly strong in the theoretical literature, thus confirming that where there is a misfit between the law and the theory, it is often the law that will give way to the normative foundations. The only possible solution to this tension is to adopt a pluralist approach, whereby one accepts that there is no single ‘equality,’ but instead, ‘equalities.’ As Khaitan puts it: ‘all [the various precepts and concepts of equality] have captured some essential truth about [equality] ... although none can explain everything on its own.’ McCrudden summarises:

[T]here is no one legal meaning of equality or discrimination applicable in the different circumstances ... there is no consistency in the circumstances in which weaker or stronger conceptions of equality and discrimination currently apply ... equality ... is ... essentially pluralistic in its sources, in its origins, in its meanings, in its application, and in its functions.

O’Cinneide acknowledges the pluralistic nature of equality in UK law. However, he also opines that the use of the term ‘pluralistic’ is a little generous, and that ‘fragmented,’ ‘disjointed’ or ‘piecemeal’ could also serve.

Having proffered a conceptual analysis of equality, in Chapter 4 we will move on to consider how equality has been enshrined in law, given that the main preoccupation

---

272 ibid 9.
273 Vickers (n 6) 147.
274 Khaitan (n 271) 10.
276 ibid.
of this thesis is to adopt a doctrinal approach to equality law, and in the process answer the overriding question: why Deaf people avail themselves of their legal rights, how they do it, and what the benefits and shortcomings in doing so are. As this doctrinal approach is undertaken, we will transplant these laws into a theoretical context, and determine which precepts of equality are currently enshrined in equality law, and then attempt to provide a potential solution to the Deaf Legal Dilemma manifested in these laws.

As we now proceed to Chapter 4’s exploration of equality law in practice, Hepple provides a word of warning: ‘no-one should pretend that all inequality can be remedied by law.’ Bearing in mind that the concept of equality has a multiple of philosophical interpretations, underpinned by precepts of equality and fleshed out by various examples, it goes without saying that if the concept of equality itself cannot be pinned down, how is it possible for law-makers to legislate in order to afford individuals equality rights? Obviously, there have been attempts to do so, and it is to these attempts we turn in the context of Deaf people; by doing so, we will consider which precepts and concepts such laws subscribe themselves to, continuing our exercise to determine which equality analyses are relevant to the Deaf-World.

---

277 Hepple (n 197) 22.
CHAPTER 4 – HOW EQUALITY LAW WORKS FOR DEAF PEOPLE

1 Introduction

In Chapter 2, the relevant discourses – hearing (or dominant culture), disabled and Deaf – for this thesis were identified, thereby establishing a theoretical framework that explained the difference between the Hearing-, Disabled- and Deaf-Worlds and why there is such a thing as a Deaf Legal Dilemma. To test the Deaf Legal Dilemma theory, equality law has been chosen as the subject, and Chapter 3 focused on what exactly equality is. In particular, it explains which concepts of equality are relevant to the Deaf-World, using Westen’s idea of using precepts in order to then categorise these concepts of equality, in an attempt to conclude which are worth exploring from both a doctrinal and socio-legal perspective. These concepts are equality of opportunity, respect for equal worth, dignity and identity, social inclusion, and challenging oppression (henceforth referred to as the ‘Deaf Equality Concepts’).

The next logical step is thus to explore the law identified as reflecting in some way the Deaf Equality Concepts from a doctrinal perspective, with the overarching aim being to examine their effectiveness in achieving equality for Deaf people. For the purposes of this exercise, the following legal instruments will be examined. There will be a consideration of the duty to make reasonable adjustments in the Equality Act 2010 (EqA 2010) (or ‘reasonable accommodation’ as it is commonly referred to outside of the UK) and how it relates to the concept of equality of opportunity; later, social inclusion will be considered in the context of the public sector equality duty (PSED)
pursuant to section 149 of the EqA 2010. The concept of equal worth, dignity and identity will be analysed by way of its manifestation in the United Nations (UN) Universal Declaration of Human Rights\(^1\) (UDHR); the UN Convention for the Rights of Persons with Disabilities\(^2\) (CRPD); and the European Court of Human Rights’\(^3\) (ECtHR) consideration of human rights cases related to disabled individuals who contend that their human rights have been infringed. Finally, challenging oppression will be considered by examining how individuals can enforce their equality rights through the various domestic and international instruments available to them throughout the chapter. The first precept is primarily found in the EqA 2010; the second is more prominent in several international instruments, while the third is found in the public sector equality duty enshrined in the EqA 2010.

In order to assess the effectiveness of the law, consideration will be given to the enforcement mechanisms available to Deaf individuals to challenge discrimination or other infringements of their rights under the law. It is worth bearing in mind that the most common mechanism of doing so is by way of the individual enforcement model. Equality law is primarily concerned with prohibiting discrimination and providing individuals who experience discrimination with a remedy. The law is concerned only with that individual instance of behaviour, which means the outcome does not affect other individuals or change societal structures. It is reactive rather than proactive, negative rather than positive, and continues to meet O’Cinneide’s description of this type of antidiscrimination law:\(^4\)

---

\(^1\) UN General Assembly (UNGA), Universal Declaration of Human Rights (10 December 1948) A/183/217.


\(^3\) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, as amended).

\(^4\) Dominique Allen, ‘Rethinking the Australian Model of Promoting Gender Equality’ in Kim Rubenstein and Katharine G Young (eds), The Public Law of Gender: From the Local to the Global (Cambridge University Press 2016) 405.
The individual enforcement model relies excessively on an approach that resembles sending a fire engine to fight a fire rather than preventing that fire in the first place.\(^5\)

Thus, this chapter aims to explore the effectiveness of equality laws with a view to explaining how they relate to the concepts of Deaf identity outlined in Chapter 2, how Deaf people come within the auspices of their individual provisions and any relevant case law, which precept of equality they can be ascribed to, and whether they fulfil their aim in achieving equality. In addition, this doctrinal examination will also consider the socio-legal aspects in order to critique the law and explore alternative ways in which these laws could be interpreted. In Chapter 5 thereafter, potential solutions to the Deaf Legal Dilemma will be discussed, providing an opportunity to explore ways in which equality law can be developed or changed in order to achieve equality for Deaf people.

2 Equality of opportunity: the Equality Act 2010

The first of the two Deaf Equality Concepts of equality that are associated with the EqA 2010 are equality of opportunity and social inclusion. Equality of opportunity was originally stated as being the main goal of UK discrimination law in the White Paper that led to the Sex Discrimination Act 1965,\(^6\) whereby everybody has ‘the same legal rights of access to all advantaged social positions,’ which means that differences in race, gender or class are not taken into account by the law;\(^7\) that is to say, formal

---


\(^7\) Martin Hevia and Joel Colon-Rios, ‘Contemporary Theories of Equality: a Critical Review’ (2013) 3 Victoria University of Wellington Legal Research Papers 131, 133.
equality. It has been made clear in Chapter 3 that equality of opportunity focuses on the attributes of individuals including their natural talents and considers that as long as there is fair and open competition, there is equality. This imposes a limit on redistributive justice, particularly in relation to the duty to make reasonable adjustments.

In the UK, the Disability Discrimination Act 1995 (DDA 1995) was the first anti-discrimination legislation affording disabled people protection; Bamforth, Malik and O’Cinneide suggest that the DDA 1995 broke new ground in its rejection of a symmetrical approach – considered to be reminiscent of formal equality – and the imposition of positive accommodation duties upon employers and service providers,\(^8\) representative of a substantive approach. Thus, the DDA 1995 was the first piece of anti-discrimination legislation in the UK that promoted a substantive equality of opportunity approach by way of the imposition of the duty to make reasonable adjustments on employers, service providers and educational institutions; subsequently, the DDA 1995 was amalgamated into the EqA 2010. The EqA 2010 retains much of the formal equality approach within its provisions, particularly in relation to what conduct is prohibited (that is, direct discrimination, indirect discrimination, harassment, victimisation and discrimination arising from disability). Its reasonable adjustment provisions, however, are reflective of the substantive approach (see sections 2.2. and 2.3), but the comparator requirement is nevertheless reminiscent of formal equality rather than substantive.

\(^8\) Bamforth, Malik and O’Cinneide (n 6) 1098.
2.1 The definition of disability

Disability is defined in section 6(1) of the EqA 2010 as a ‘physical or mental impairment that has a substantial and long-term adverse effect on [the disabled person’s] ability to carry out normal day-to-day activities.’

The case of Goodwin v Patent Office\(^9\) held that there are four key questions to consider when determining whether an individual meets the definition of disability contained in section 6(1). The first is whether the individual has a physical or mental impairment, which has to be considered in the context of ‘its ordinary and natural meaning.’\(^{11}\) It has clearly been established in Chapter 2 that deafness is considered to be a defect of the human body. Nonetheless, in Walker v Sita Information Networking Computing Ltd,\(^{12}\) it was held that what is important is the effect of the impairment, and not its cause. Therefore, how deafness is caused is not relevant, but what its effect on the individual is, such as communication and language acquisition. Indeed, in J v DLA Piper UK LLP,\(^{13}\) it was held that the focus should be the impairment’s effect on the individual’s day-to-day activities.

Applying this, it has been clearly set out in Chapter 2 that being deaf is largely considered to be a disability; an impairment for this purpose, in that it is a sensory ‘loss’ or lack of hearing which has a substantial and adverse effect on a deaf individual’s ability to carry out day-to-day activities such as listening, communication and in some cases, speaking, reading or writing.\(^{14}\) A search for any relevant case law that considers whether a deaf person meets the definition of disability was in vain, as

---

\(^{9}\) EqA 2010, s 6(1)


\(^{11}\) McNicol v Balfour Beatty [2002] EWCA Civ 1074.

\(^{12}\) Walker v Sita Information Networking Computing Ltd UKEAT/0097/12/KN.

\(^{13}\) J v DLA Piper UK LLP UKEAT/0263/09/RN.

\(^{14}\) See Chapter 1 for relevant statistics regarding the education of Deaf children.
was a search for any relevant case law that considered section 1 of the DDA 1995, which contained the previous definition of disability. This suggests that deaf claimants have generally not experienced any issues proving that they have a disability for the purposes of the DDA 1995 or the EqA 2010, although it is possible that this issue could have been considered at the first tier but not appealed. Instead, we can turn to the House of Lords Select Committee on the Equality Act, whereby they state that the EqA 2010 covers British Sign Language (BSL) users because it imposes on service providers a legal obligation to make reasonable adjustments in communicating with them; and where BSL is their first or only language, those adjustments will very often be the provision of BSL interpreters.\textsuperscript{15} Clearly this would not necessarily extend to deaf non-BSL users, and Action on Hearing Loss advises that an individual who wears hearing aids may fit the definition, depending on the situation, but those with minor hearing loss are unlikely to.\textsuperscript{16}

\subsection*{2.2 The duty to make reasonable adjustments}

Reasonable adjustment (also referred to as ‘reasonable accommodation’) is yet another facet of anti-discrimination law,\textsuperscript{17} and is described as the ‘cornerstone of protection’ for disabled people,\textsuperscript{18} and ‘key to the legislation.’\textsuperscript{19} The failure to make reasonable adjustments will invariably result in protected groups being disadvantaged or even entirely excluded, thus the duty to provide reasonable adjustments can be thought of as a form of remedy for discrimination, one that works by requiring


\textsuperscript{17} Tarunath Khaitan, \textit{A Theory of Discrimination Law} (Oxford University Press 2014) 76.

\textsuperscript{18} Bob Hepple, \textit{Equality: The Legal Framework} (2\textsuperscript{nd} edn, Hart Publishing 2014) 94.

\textsuperscript{19} Michael Connolly, \textit{Townshend-Smith on Discrimination law: Text, Cases and Materials} (2\textsuperscript{nd} edn, Cavendish Publishing 2004) 501.
exceptions to the general norm instead of a change in the norm itself in order to level the playing field, to continue the analogy. From this viewpoint, it can be argued that reasonable adjustments involve a measure of substantive equality. Indeed, Baroness Hale held in *Archibald v Fife Council* (Archibald) that reasonable adjustments are considered to be more favourable treatment:

The 1995 Act … does not regard the differences between disabled people and others [to be] irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.

Thus, at first glance, the duty to make reasonable adjustments will ensure equality of opportunity for disabled people.

2.3 The triggering of the duty to make reasonable adjustments

The failure to comply with any one of the reasonable adjustment duties amounts to discrimination against a disabled person to whom the duty is owed. These requirements fall into two categories: reactive duties where a provision, criterion or practice (PCP) substantially disadvantages a disabled person in employment, and anticipatory duties which require service providers and persons exercising public functions to take proactive steps to make their services accessible. Section 20 of the EqA 2010 imposes three requirements that amount to reasonable adjustments in

---

20 Khaitan (n 17) 77-8.
21 [2004] UKHL 32.
22 ibid para [47].
23 EqA 2010, s 20(3).
24 Connolly (n 19) 95-6.
the context of disability: the requirement for a PCP, a physical feature\textsuperscript{25} or an auxiliary aid\textsuperscript{26} (the arrangement).

The EqA 2010 espouses a form of formal equality with its failure to make reasonable adjustments\textsuperscript{27} provisions, as it requires an actual or theoretical comparator\textsuperscript{28} (as does direct discrimination). In the Archibald case, there were some differences of opinion in the speeches as to who the non-disabled comparator could be for the purposes of determining whether there was a substantial disadvantage.\textsuperscript{29} It could not simply be someone carrying out the same job, as this would not encompass someone in a unique role, or someone seeking promotion. It could be non-disabled people generally.\textsuperscript{30} The most helpful approach was held to be to focus upon identifying the correct arrangement, rather than on the correct comparator. Once achieved, the question of substantial disadvantage is likely to be an obvious one to resolve.\textsuperscript{31}

Once the duty has been triggered, that is, when a substantial disadvantage has been identified, ‘reasonableness’ is then a limit to the accommodation that can be sought.\textsuperscript{32} Burns and Sen Gupta argue that the key to reasonableness can be found in two concepts: practicality and effectiveness.\textsuperscript{33} The reasonable step must be practical to take, both in terms of feasibility and resources, and the more effective a step will be to take, the more reasonable it will be to take it.\textsuperscript{34} However, an adjustment that provides

\begin{thebibliography}{9}
\bibitem{25} EqA 2010, s 20(4).
\bibitem{26} EqA 2010, s 20(5).
\bibitem{27} EqA 2010, s 21.
\bibitem{28} EqA 2010, ss 13(1) and 20(3).
\bibitem{30} ibid.
\bibitem{31} ibid.
\bibitem{32} Khaitan (n 17) 76.
\bibitem{34} ibid.
\end{thebibliography}
only partial assistance is much less likely to be construed as reasonable, and therefore will not qualify as a reasonable adjustment.35

Although disabled employees have a legal right to seek reasonable adjustments, reasonable adjustments are often not put in place, confirming discrimination and disadvantage and suggesting that the reasonable adjustment position can be hampered by a restrictive interpretation of the law.36 This can be seen in the dearth of cases involving either the DDA 1995 or the EqA 2010 in relation to Deaf individuals. Nonetheless, there have been a few. In Finnigan v Northumbria Police Chief Constable,37 the police arrested a profoundly deaf claimant without an interpreter, and Finnigan claimed that the police had failed to make reasonable adjustments. It was held by the Court of Appeal that there had been no such failure, as Finnigan had been able to sell cannabis to undercover officers without an interpreter. In Appleby v Department for Work and Pensions38 (DWP), Appleby had attended his local jobcentre to produce his passport for an application for a National Insurance number. The DWP had applied a policy on using screened rooms for interviews which made it difficult for Appleby to use their service. He was also dealt with in an offhand, disrespectful manner by the DWP’s employees, who exhibited impatience and irritation with his apparent lack of understanding.39 The DWP, as a service provider, was held to have failed to comply with its duty to make reasonable adjustments making it impossible or unreasonably difficult for the disabled person to make use of any such service, pursuant to section 19(1)(b) of the DDA 1995.

35 ibid.
37 [2013] EWCA Civ 1191.
38 [2003] CLY 2083 (County Court) (Appleby).
39 ibid.
In *Berry v GB Electronics Ltd*,\(^{40}\) the Employment Appeal Tribunal (EAT) held that the criteria for redundancy selection applied by the employer, and also the manner in which Berry was advised of his dismissal, that is, the failure to make any reasonable adjustments for the meeting, had discriminated against him,\(^{41}\) and made a declaration to that effect. Berry was held to have been put under a disadvantage because, in relation to the categories of ability to learn, his attitude and being a team player, his deafness had affected his marks in a way that did not affect the marks of those who were not suffering from a disability and because no steps were taken to make any adjustment to take account of the detriment he suffered by being marked down.\(^{42}\)

Finally, in *Re C (A Child) (Care Proceedings: Deaf Parent)*,\(^{43}\) in a case where a Child of Deaf Adults (CODA) was taken into care due to apparent deficiencies in the parents’ ability to care for the child, the care and placement for adoption orders were set aside by the Court of Appeal on the basis that the parents’ disabilities had not been sufficiently taken into account in evaluating their case and their response to the proceedings, and that the court, the local authority and the Children and Family Court Advisory and Support Service (CAFCASS) had a duty under the EqA 2010 to provide the right level of support.\(^{44}\) It is clear from the above four cases that there has been a restrictive interpretation of the law in relation to reasonable adjustments.

### 2.3.1 Single, one-off adjustments

An interesting observation regarding the first three cases aforementioned, *Finnigan, Appleby* and *Berry*, is that the reasonable adjustments required tended to be of a

---

\(^{40}\) EAT/0882/00 (*Berry*).

\(^{41}\) ibid para [12].

\(^{42}\) ibid para [8].

\(^{43}\) [2014] EWCA Civ 128 (*Re C*).

\(^{44}\) ibid para [36].
single, one-off, nature, that is, during an arrest, a visit to the jobcentre and a
redundancy meeting. The fourth case, Re C, was about the provision of support by
the court, local authority and CAFCASS to parents subjected to child care
proceedings, which is slightly different as any such reasonable adjustments would
have been required on an intermittent basis rather than once, but they would
nevertheless be a series of one-off adjustments.

In the absence of any further case law, various organisations have put forward
suggestions as to what adjustments would be reasonable for Deaf people. The BDA
produced a leaflet entitled Guide to ‘Reasonable Adjustment’ for Employers of Deaf
people, which stipulated that the BDA would consider the following adjustments to be
reasonable: equipment such as an iPad or laptop to type difficult words or phrases to
avoid any possible misunderstandings, providing equipment or software to enable
Deaf employees to use Video Interpreting Services to communicate, and the utilisation
of BSL/English interpreters.45 Personnel Today suggests the use of text messaging
and email, amplified sound alerts built into PCs, a flashing screen on a mobile device
when a sound alert is triggered, Bluetooth to connect to hearing aids, captions for
videos, BSL on-demand services, video calling for signing or lipreading, palantypists
and stenographers, and voice recognition speech-to-text software.46 Action on
Hearing Loss also suggests adjusting the layout of a meeting room and using good

45 BDA, ‘Guide to “Reasonable Adjustment” for Employers of Deaf people’ <https://bda.org.uk/wp-
46 Personnel Today, ‘Hearing things: workplace adjustments for employees with a hearing impairment’
(Occupational Health and Wellbeing, 23 November 2015) <https://www.personneltoday.com/hr/hearing-things-workplace-adjustments-employees-hearing-
lighting to help lipreading.\textsuperscript{47} Aside from the provision of BSL/English interpreters, nearly all these adjustments would be single, one-off ones.

Meager and others conducted a study which confirmed that one-off/initial costs were much more likely to be incurred than ongoing/recurrent costs, and that approximately four-fifths of establishments incurring a cost when making these types of adjustments had incurred only initial costs when introducing the changes.\textsuperscript{48} Conversely, ongoing and recurrent costs were most likely to be incurred by establishments making adjustments for concessionary purposes, home delivery, and specific help, as well as those providing sign language interpretation and audio tapes.\textsuperscript{49} In many cases, a significant proportion reported that no costs were incurred, and these cases have been included in the average cost calculations with a value of zero. In a significant proportion of cases where a cost was incurred, respondents were unable to estimate it.\textsuperscript{50}

Upon a search of cases that considered various reasonable adjustments, the majority of the adjustments were ones where no or minimal costs were incurred, such as not allowing a dyslexic employee to give her account without reference and assistance from accompanying notes but from her memory alone in a disciplinary hearing,\textsuperscript{51} extending a time limit for an appeal against dismissal,\textsuperscript{52} providing hardware and IT software or transferring the claimant to an alternative role.\textsuperscript{53} In addition, adjustments

\textsuperscript{48} Nigel Meager and others, ‘Costs and benefits to service providers of making reasonable adjustments under Part III of the Disability Discrimination Act’ (Department of Work and Pensions Research Report No 169, Charlesworth Group 2002) 86.
\textsuperscript{49} ibid 87.
\textsuperscript{50} ibid 88.
\textsuperscript{51} Emmens \textit{v} Molnycke Healthcare Limited [2016] WL 05335357, para [2].
\textsuperscript{52} Fox (Deceased) \textit{v} British Airways plc [2015] WL 1786103 (EAT).
\textsuperscript{53} Cherrington \textit{v} Home Office [2015] WL 12591134 (ET), para [12a].
made by the respondent included a magnifying glass, a large key telephone, adjusted duties such as reading emails, adjusted hours of 10am to 4pm, and amended absence trigger points under the employer’s attendance management policy.\textsuperscript{54} In \textit{Croft Vets Ltd v Butcher},\textsuperscript{55} it was held that an employer’s failure to pay for private psychiatric services and counselling for an employee suffering from a severe depressive episode triggered by work-related stress was a failure to make reasonable adjustments. Written instructions, a well-structured work environment, clarifying aspects of a job and explaining etiquette and the unwritten rules of the workplace, and awareness training, were also all accepted as reasonable adjustments in respect of an employee with Asperger’s syndrome.\textsuperscript{56}

To transplant these reasonable adjustments into a Deaf context, it could be suggested that allowing a Deaf employee to give their account through BSL in a disciplinary hearing, allowing a Deaf employee more time to appeal against dismissal due to language barriers, allowing a BSL/English Interpreter to translate emails into BSL, amending hours to suit BSL/English Interpreter availability, and ignoring deaf-related absences, such as for audiology appointments, providing instructions in writing, explaining etiquette and unwritten rules, and Deaf awareness training, could all be considered reasonable adjustments.

\textbf{2.3.2 Recurrent adjustments}

At this juncture, it may be helpful to consider other cases that involved auxiliary aids akin to BSL/English Interpreters or lipspeakers for comparison, that is, recurrent adjustments as opposed to one-offs. In \textit{Tooley v Crown Prosecution Service}\textsuperscript{57} (CPS),

\begin{flushleft}
\textsuperscript{54} ibid para [48].
\textsuperscript{55} [2013] EqLR 1170.
\textsuperscript{56} \textit{Fotheringham v Perth & Kinross} [2013] WL 12111408 (ET), para [249].
\textsuperscript{57} [2016] WL 05335328 (Tooley).
\end{flushleft}
it was held that the respondent had failed to make reasonable adjustments in getting an emergency personal assistant for a barrister with multiple sclerosis.\textsuperscript{58} Although the costs involved are unknown, this case suggests that the CPS provided and presumably funded the provision of personal assistants for a disabled employee. Further, in \textit{Cherrington}, it was held that an adjustment should have made in addition to the ones listed above to provide a workplace buddy to assist the claimant by reading aloud emails, database and input data.\textsuperscript{59}

In terms of ongoing, higher cost adjustments, there is some ambiguity on what would now constitute a reasonable adjustment following the Employment Appeal Tribunal’s (EAT) decision in \textit{Cordell v Foreign & Commonwealth Office},\textsuperscript{60} which makes it clear that there is a cap on the costs an employer is expected to pay for adjustments. In this case, it was considered that £250,000 for lipspeakers\textsuperscript{61} to accompany a deaf diplomat in Kazakhstan was unreasonable because they would be recurrent. This is in contrast to \textit{Royal Bank of Scotland Group Plc v Allen},\textsuperscript{62} in which it was decided by the Court of Appeal that an adjustment costing £200,000 to install a wheelchair access at the bank’s Church Street branch in Sheffield, was reasonable, presumably because this would have been a one-off adjustment, with the additional benefit of allowing other customers using a wheelchair to access the branch. One can also surmise that the adjustments in \textit{Tooley} may have been considered reasonable as they can be fulfilled by the utilisation of individuals paid the minimum wage (provided they receive the

\textsuperscript{58} ibid para [189].

\textsuperscript{59} \textit{Cherrington} (n 53) para [12a].

\textsuperscript{60} UKEAT/0016/11/SM.

\textsuperscript{61} A lipspeaker is a hearing person who has been professionally trained to be easy to lipread. Association of Lipspeakers, ‘What is a Lipspeaker?’ <http://lipspeaking.co.uk> accessed 16 January 2016.

\textsuperscript{62} [2009] EWCA Civ 1213.
appropriate training), rather than specialist support such as BSL/English interpreters, lipspeakers and Palantypists.

The EAT’s judgment in Cordell upheld that of the Employment Tribunal as it was by no means clear that the cost of these reasonable adjustments would exceed the next largest expenditure for an individual by some £200,000 per annum.63 The EAT also provided a reminder of what the relevant non-exhaustive considerations may include, namely: the size of any budget dedicated to reasonable adjustments, what the employer has chosen to spend in what might be thought to be comparable situations, what other employers are prepared to spend and any collective agreement or other indication of what level of expenditure is regarded as appropriate by representative organisations.64 But such considerations can only help up to a point: even when they have been identified, they can be of no more than suggestive or supportive value.65 Therefore, there remains no objective measure for calibrating the value of one kind of expenditure against another.66

Thus, on the facts of Cordell, the recurrent adjustments required were not considered to be reasonable, and unfortunately a precedent has now been set, that a recurrent adjustment that would have cost £250,000 per annum, which constituted half of the FCO’s reasonable adjustments budget, was not reasonable. Conversely, the implication of the Cordell case is that if a deaf employee wished to progress their career by applying for an alternative role, and if there was doubt that the appropriate level of support could be provided in any event, then it is likely the adjustment would

63 ibid para [28].
64 ibid para [30].
65 ibid.
66 ibid.
be considered unreasonable, thereby imposing what in effect would be a ‘glass ceiling.’

This case also serves as a reminder that the provision of adjustments for Deaf people can be expensive. Most adjustments for disabled individuals tend to be simple and relatively cheap, such as a portable temporary ramp as opposed to a permanent one, or the provision of documents in extra-large print or sent to a Braille service for conversion. If one was to think in terms of the three situations where the duty to make reasonable adjustments are required by the EqA 2010, that is, where a substantial disadvantage has been created by a PCP, a feature of premises or the lack of an auxiliary aid or service, in light of the judgments in Allen and Cordell, it could be argued that a court or tribunal is more likely to find that an adjustment is reasonable in terms of a PCP or premises, than for the lack of an auxiliary aid or service, except where such an auxiliary aid or service is a one-off or a series of one-offs.

In order to relieve the financial pressure on an employer or service provider, a disabled person may benefit from funding for adjustments from their local authority’s social care budget, integrated community equipment services grants, disabled facilities grants, supporting people grant, Department for Work and Pensions Access to Work grants and help from the Independent Living Fund. An employer or service provider is

---

67 The existence of a glass ceiling implies that gender (or other) disadvantages are stronger at the top of the hierarchy than at lower levels and that those disadvantages become worse later in a person’s career. David Cotter and others, ‘The Glass Ceiling Effect’ (2001) 80(2) Social Forces 655, 655.
68 Burns and Gupta (n 33).
69 Access to Work has its origins in the Employment and Training Act 1973, which makes provision for the Secretary of State to “make such arrangements as he considers appropriate for the purpose of assisting persons to select, train for, obtain and retain employment suitable for their ages and capacities or of assisting persons to obtain suitable employees (including partners and other business associates),” which may include “arrangements for encouraging increases in the opportunities for employment and training that are available to women and girls or to disabled persons” (ss 1 and 2(b)).
required to take the availability of such financial assistance\textsuperscript{71} into due consideration in deciding whether or not to implement any adjustments, and conversely, to help them to determine whether an adjustment is reasonable or not. It is worth noting that in the case of \textit{Cordell}, Access to Work grants were not available to Cordell as ministerial government departments have agreed to fund all adjustments for staff directly employed by them and based at any location,\textsuperscript{72} thus the FCO was entirely responsible for any reasonable adjustments for its disabled staff. Had Cordell been able to tap into Access to Work funding, the EAT’s judgment could have been different, whereby the adjustments required for her to work in Kazakhstan may have been considered to be reasonable. In the case of \textit{Tooley}, it is possible that the recurrent financial obligation on the CPS for the provision of personal assistants could have been supported by direct payments or other sources of funding available to Tooley. In the context of recurrent adjustments, therefore, if the recipient of recurrent adjustments is able to secure funding for adjustments required from elsewhere, this may have a positive bearing on the reasonableness of such adjustments.

2.4 Enforcement

In our consideration of the Deaf Equality Concept of challenging oppression throughout this chapter, as equality is generally opposed to oppression and oppression can be manifested in either violence, exploitation, marginalization, powerlessness or cultural imperialism, it would be prudent to consider the effectiveness of the EqA 2010 in challenging such oppression. In order to ascertain the success of the individual enforcement model in terms of claims for disability

\textsuperscript{71} EqA 2010, s 18B(1)(e).
discrimination, the most obvious source of information would be Her Majesty’s Court and Tribunal Service, which compiles quarterly and annual statistics on all claims made and disposed of in its tribunals, including the Employment Tribunal (ET). It is worth noting that it is not possible to obtain statistics broken down by type of disability or by type of disability discrimination claims, only by the number of disability discrimination claims which were then settled via the Advisory, Conciliation and Arbitration Service (ACAS), or were successful or unsuccessful at hearing.

**Table 2**

<table>
<thead>
<tr>
<th></th>
<th>CLAIMS</th>
<th>SETTLED VIA</th>
<th>SUCCESSFUL</th>
<th>UNSUCCESSFUL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ACAS (%)</td>
<td>(%)</td>
<td>(%)</td>
<td>(%)</td>
</tr>
<tr>
<td>2007/08</td>
<td>5,800</td>
<td>44</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>2008/09</td>
<td>6,578</td>
<td>44</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>2009/10</td>
<td>7,547</td>
<td>45</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>2010/11</td>
<td>7,241</td>
<td>46</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>2011/12</td>
<td>7,676</td>
<td>45</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>2012/13</td>
<td>7,492</td>
<td>45</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>2013/14</td>
<td>5,196</td>
<td>42</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>2014/15</td>
<td>3,106</td>
<td>44</td>
<td>5</td>
<td>13</td>
</tr>
<tr>
<td>2015/16</td>
<td>3,470</td>
<td>43</td>
<td>5</td>
<td>12</td>
</tr>
</tbody>
</table>

It can be extrapolated from Table 2 that, aside from a decline in disability discrimination claims from 2013/14 mainly due to the introduction of ET fees, the number of claims settled via ACAS has remained stable at an average of 44 percent, an average of 3.5 percent claims were successful, and an average of 10.4 percent of unsuccessful claims. It is clear to see from these statistics that the individual enforcement model simply does not work across the board for disability discrimination claims that reach the final hearing, although almost half of all claims are being settled. Therefore, in this respect, the EqA 2010’s provisions generally are not an effective means for Deaf people to challenge oppression where there has been a lack of reasonable adjustments by employers. In relation to service providers, there are no equivalent statistics available to ascertain the success rate in the County Court for disability discrimination claims.

3 Equal worth, dignity and identity

Having now conducted a doctrinal analysis of law in relation to the Deaf Equality Concept of equality of opportunity, in order to explore the next Deaf Equality Concept, equal worth, dignity and identity, it is necessary to turn to both international and European human rights instruments as dignity plays a central role in discussions of human rights. The Deaf Equality Concepts of social inclusion and full participation will then be considered, as will challenging oppression in a consideration of the enforcement mechanisms available.
Interestingly, Iacobucci J argues that dignity is concerned with the manner in which a person legitimately feels when confronted by a particular law.\textsuperscript{74} Coupled with a general consensus amongst academics\textsuperscript{75} that dignity is inherent in the humanity of all people, or that all humans share a fundamental right to equal concern and respect, it is clear that dignity should be an overarching or superior value in all equality law, and is therefore particularly relevant to the present discussion.

In the new world order following the Second World War, equality was elevated to a fundamental human right by virtue of the UDHR which recognises the ‘equal and inalienable rights of all’.\textsuperscript{76} It is contended that the UDHR is illustrative of the precept of formal equality, given that it is a statement of rights expecting all human beings to be treated equally, with no suggestion of any positive action to remove disadvantage.

Meanwhile, the CRPD sets out what human rights mean in the context of disability. The first human rights treaty of the twenty-first century, it represents a major step towards realising the right of disabled people to be treated as full and equal citizens.\textsuperscript{77} The provisions of the CRPD are of particular relevance to Deaf people in that they refer to national sign languages, which is the first time an international human rights instrument has referred to Deaf people as a linguistic group.\textsuperscript{78}

The European Convention on Human Rights\textsuperscript{79} (ECHR) is widely regarded as the most effective international instrument for the protection of individual rights, and is our

\textsuperscript{74} Law v Canada (Minister of Employment and Immigration) [1999] 1 RCS 497, para [53].
\textsuperscript{75} Such as Sandra Fredman, Lucy Vickers and Ronald Dworkin.
\textsuperscript{76} UDHR, Preamble.
\textsuperscript{78} CRPD, art 3(b).
second example of formal equality.\textsuperscript{80} It actually went a step further than the UDHR by containing a complementary right in article 14\textsuperscript{81} to non-discrimination on the grounds of status in the exercise of convention rights.\textsuperscript{82} It also contains provisions such as the right to be informed, in a language that he understands, of the reasons for his arrest and charges against him,\textsuperscript{83} to the free assistance of an interpreter if he cannot understand or speak the language used in court.\textsuperscript{84}

\textbf{3.1 Universal Declaration of Human Rights}

The first Article of the UDHR proclaims, ‘all human beings are born free and equal in dignity and rights’\textsuperscript{85} and the preamble stipulates that ‘all members of the human family’ have ‘equal and inalienable rights’.\textsuperscript{86} Article 2 further states:

‘Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national, or social origin, property, birth or other status’.\textsuperscript{87}

The UDHR further stipulates that everyone has the right of equal access to public service in this country,\textsuperscript{88} to social security,\textsuperscript{89} to work,\textsuperscript{90} to a standard of living adequate for the health and well-being of himself and of his family,\textsuperscript{91} to education,\textsuperscript{92} and to

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{81}] ECHR, art 14.
\item[\textsuperscript{82}] ECHR, art 19.
\item[\textsuperscript{83}] ECHR, arts 5(2) and 6(3)(a).
\item[\textsuperscript{84}] ECHR, art 6(3)(e).
\item[\textsuperscript{85}] UDHR, art 1.
\item[\textsuperscript{86}] UDHR, preamble.
\item[\textsuperscript{87}] UDHR, art 2.
\item[\textsuperscript{88}] UDHR, art 21(2).
\item[\textsuperscript{89}] UDHR, art 22.
\item[\textsuperscript{90}] UDHR, art 23(1).
\item[\textsuperscript{91}] UDHR, art 25(1).
\item[\textsuperscript{92}] UDHR, art 26(1).
\end{itemize}
\end{footnotesize}
participate in the cultural life of the community and enjoy the arts. This means not only civil and political rights but also the extensive economic and social rights recognised in the UDHR were to be available without status discrimination, of particular importance as disability was not expressly mentioned in article 2.

Reverting to the Deaf Equality Concepts, we can see that ‘dignity’ is of particular importance in the context of the UDHR. Respect for worth and dignity plays a central role in the modern discussion of human rights with the UDHR, and the general consensus is that in order to recognise human dignity, one must treat everyone with respect due to our common humanity. McCrudden notes the idea that to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.

In order to evaluate progress for Deaf people on all these rights, it is proposed to choose a central core of rights, in much the same way as Risse and Sikkink, as it is not possible to evaluate progress on all the rights contained within the UDHR. From the four essential components identified by the WFD: the recognition and use of sign language, bilingual education, access to all areas of society and life, and sign language interpretation, we can define a central core of rights as follows: the right to work, to education and to participate in the cultural life of the community. Articles 23, 26 and 27 are what are considered economic, social and cultural rights, and they generally enjoy wider international support but are rarely referred to in

---

93 UDHR, art 27(1).
94 Hepple (n 18) 18.
95 ibid 20.
98 UDHR, art 23(1).
99 UDHR, art 26(1).
100 UDHR, art 27(1).
discussions of what constitutes customary international law, although there is an argument that some enjoy sufficiently widespread support to be at least candidates for rights recognised under customary international law, in particular, article 23(1): the right to work.\textsuperscript{101} From Chapter 2 it is clear that Deaf people do not have access to a bilingual education nor do they have access to all areas of life and society, hence their need to look at equality law as a form of redress for this imbalance. Unfortunately, it would appear that the UDHR does not offer an effective solution to such imbalance.

3.1.1 Enforcement

Strictly speaking, in order to deal with any alleged breaches of the UDHR – or to challenge any instances of oppression – the UN has a complaints procedure in place through which organisations or individuals can alert the UN to human rights breaches. If the UN receives a complaint of serious human rights abuses, it launches an investigation with the consent of the country involved. A debate may then be held on that country’s human rights abuses and a condemnation issued, if the allegations are upheld. The idea is that, by working with the country involved, the UN can help that country improve its human rights record. Ultimately, if neither the investigation nor the debate resolves the problems, a UN resolution may be passed condemning the country’s abuse of human rights.\textsuperscript{102} On numerous occasions, the International Court of Justice (ICJ) has also been called upon to decide questions relating to basic human rights, and in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court recalled the importance of


respecting the rules of international humanitarian law.\textsuperscript{103} However, it is worth noting that the ICJ’s jurisdiction is restricted to contentious cases between states,\textsuperscript{104} and only with the consent of the states concerned,\textsuperscript{105} thus the potential for the ICJ to hear cases related to the UDHR is severely limited.

It is also worth noting what legal effect, if any, the UDHR has on domestic law, as the mere fact that a state has accepted certain international obligations in the field of human rights does not automatically imply that those obligations have binding domestic effect. Instead, Sohn argues, it strengthens their obligations under the UN Charter by making them more precise. Members can no longer contend that they do not know what human rights they promised in the Charter to promote, as they have agreed the aforementioned common standard of achievement.\textsuperscript{106} According to Hannum, the UK adheres to a dualist conception of the relationship between international and domestic law, and the British courts have consistently held that ratified treaties, such as the UDHR, do not form part of the domestic law of the UK,\textsuperscript{107} with case law rejecting the UDHR as a source of law, such as Alexander v Wallington General Commissioners and Inland Revenue Commissioners.\textsuperscript{108}

Nonetheless, Hannum acknowledges that rules of customary international law will automatically form part of the common law in the UK, unless they conflict with existing law.\textsuperscript{109} Donnelly confirms that the UDHR imposes obligations on, and are exercised against, sovereign territorial states. Each state has the authority and responsibility to


\textsuperscript{104} ibid 33.

\textsuperscript{105} ibid 34.


\textsuperscript{107} Hannum (n 101) 292.

\textsuperscript{108} [1993] STC 588.

\textsuperscript{109} Hannum (n 101) 311.
implement and protect the rights within its territory. Nonetheless, while the vast majority of the world’s population has no direct domestic or international redress for violations of the UDHR, given the central importance of the UDHR in its international human rights firmament, it is the first instrument that should be consulted when attempting to identify the contemporary content of international human rights law.

To all extents and purposes, therefore, the UDHR can be, at most, considered part of domestic common law in the absence of any contrary law, and at the very least, as imposing an obligation to promote these rights. Lawson further explains that although international covenants are not directly enforceable by individuals, they will be highly influential both at EU level and within Member States. Indeed, the European Court of Justice (ECJ) has been known to assert that human rights derived from such instruments are observed as they form part of the general principles of Community law, although this may well change as a result of the UK leaving the EU. It should be noted that UK courts remain bound by rulings on EU law by the ECJ until exit day, although section 6 of the European Union (Withdrawal) Act 2018 provides that existing rulings of the ECJ on EU law could in principle be overridden by a contrary ruling of the Supreme Court. In respect of ECJ rulings given after exit day, the Act suggests that the UK courts are not bound by any principles laid down, or any decisions made, by the ECJ, but that they may have regard to anything done on or after exit day so far as it is relevant to any matter before the court or tribunal.

---

111 Hannum (n 101) 352.
115 European Union (Withdrawal) Act 2018, s 6(1)(a).
116 European Union (Withdrawal) Act 2018, s 6(2).
3.2 Convention of the Rights of Persons with Disabilities

The provisions of the CRPD refer to national sign languages, including the requirement of state parties to the treaty to provide professional sign language interpreters to facilitate accessibility to buildings and other facilities open to the public\textsuperscript{117} and in the context of freedom of expression and opinion, accepting and facilitating the use of sign languages\textsuperscript{118} and recognising and promoting the use of sign languages\textsuperscript{119} In terms of education, the CRPD stipulates that state parties should facilitate the learning of sign language and promote the linguistic identity of the deaf community\textsuperscript{120} and take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language\textsuperscript{121} Finally, the CRPD recognises that Deaf people are entitled to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture\textsuperscript{122} It is due to the express inclusion of Deaf people as sign language users, and in that it promotes equal worth, dignity and identity, it is thereby considered that the CRPD is considered potentially transformative.

3.2.1 The definition of disability

The CRPD definition of disability is in stark contrast to the provisions on disability in the EqA 2010, and article 1 is a ‘crucial touchstone in understanding the impact of the CRPD,’ evincing a predominantly social model of disability\textsuperscript{123} It defines persons with disabilities as those ‘who have long-term physical, mental, intellectual or sensory

\textsuperscript{117} CRPD, art 2(e).
\textsuperscript{118} CRPD, art 21(b).
\textsuperscript{119} CRPD, art 21(e).
\textsuperscript{120} CRPD, art 24(3)(b).
\textsuperscript{121} CRPD, art 24(4).
\textsuperscript{122} CRPD, art 30(4).
impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.\textsuperscript{124}

Jurisprudence emanating from the UN Committee on the Rights of Persons with Disabilities (the CRPD Committee) provides an insight into how deaf individuals who have submitted complaints to the Committee have met the definition of disability in article 1. In \textit{AM v Australia}\textsuperscript{125} and \textit{Beasley v Australia},\textsuperscript{126} the complainant was deaf and required Australian Sign Language interpreting to communicate with others, and in \textit{Lockrey v Australia},\textsuperscript{127} the complainant was deaf and required real-time stenocaptioning of formal communications in order to communicate with others. It is clear from these three communications that a Deaf sign language user and a deaf individual would fall within the auspices of the article 1 definition within the CRPD.

\subsection{Implementation}

The CRPD requires governments to designate one or more 'independent mechanisms' to 'promote, protect and monitor implementation' of the Convention, and the Equality and Human Rights Commission (EHRC) has been designated a member of the UK’s Independent Mechanism (UKIM). The UK declared the CRPD to be one of the Community treaties within the definition of section 1(2) of the European Communities Act 1972\textsuperscript{128} (ECA 1972), which means that the CRPD’s provisions must be given effect and enforced accordingly.\textsuperscript{129} In practice, however, this has not always happened (see

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{124} CRPD, art 1.
\item \textsuperscript{125} (2015) UN Doc CRPD/C/13/D/12/2013 (AM).
\item \textsuperscript{126} (2016) UN Doc CRPD/C/15/D/13/2013 (Beasley).
\item \textsuperscript{127} (2016) UN Doc CRPD/C/15/D/13/2013 (Lockrey).
\item \textsuperscript{128} European Communities (Definition of Treaties) (UN CRPD) Order 2009/1181 (CRPD Order).
\item \textsuperscript{129} ECA 1972, s 2(1).
\end{itemize}
\end{footnotesize}
below), and it remains to be seen whether the UK Government plans to repeal the ECA 1972 following the UK’s exit from the EU.

In addition, as the UK is a signatory to the ECHR by way of the Human Rights Act 1998 (HRA 1998), which enshrined the ECHR in UK law, the case law of the ECtHR is significant as the ECtHR has referred to the CRPD in two recent judgments, *Glor v Switzerland*130 and *Alajos Kiss v Hungary.*131 UK legislation must, so far as possible by virtue of the HRA 1998, be read and given effect in a way compatible with rights under the ECHR.132 In *Glor*, the ECtHR not only referred to the CRPD but also cited it as evidencing a ‘universal consensus or need to provide protection from disability discrimination,’133 and thus embedding the CRPD into ECHR jurisprudence. In *Alajos*, the ECtHR specifically interpreted articles of the ECHR in accordance with principles contained within the CRPD.134 An inevitable consequence is that the UK courts should refer to and use the CRPD in their interpretation of Treaties and Directives,135 and this appears to be materialising in UK jurisprudence, as Lady Hale referred to the obligations of reasonable accommodations under the CRPD in the context of social landlords’ duties in *Akerman-Livingstone v Aster Communities Limited*136 where it was considered whether the landlord’s claim for possession was unlawful discrimination:

[The right of disabled people … in respect of the accommodation which they occupy] … is consistent with the obligations which the [UK] has now undertaken under the [CRPD]. This defines discrimination on the basis of disability to include the “denial of reasonable accommodation” (article 2). States Parties are

---

130 App No 13444/04 (ECtHR, 30 April 2009).
131 App No 38832/06 (ECtHR, 20 May 2010).
132 HRA 1998, s 3(1).
133 Butlin (n 123) 430.
134 Alajos (n 131) para [14].
135 Butlin (n 123) 431.
required, not only to prohibit all discrimination on the basis of disability, but also “In order to promote equality and eliminate discrimination, [to] take all appropriate steps to ensure that reasonable accommodation is provided” (article 5(2) and (3)). By “reasonable accommodation” is meant adjustment to meet the particular needs of a disabled person.137

Somewhat in contrast, Andrews J in R (Aspinall) v Secretary of State for Work and Pensions138 (Aspinall) held that:

[t]he duty to have due regard encompasses the need to have due regard to the UK’s obligations under international law if and to the extent that they are relevant; but the CRPD does not affect the nature or extent of the duty, still less the way in which the court will approach the question whether the duty has been discharged.139

Darwin disagrees with this assessment, as there appears to have been no consideration of the fact that the CRPD has been incorporated into EU law by way of the CRPD Order, which gives CRPD legal effect in England and Wales, and is therefore a source of substantive domestic rights.140

In the UK, the Office for Disability Issues takes the lead in coordinating the UK’s state report to the CRPD, securing contributions from the devolved administrations, which are responsible for implementing CRPD in their jurisdictions.141 In relation to such

137 ibid para [25].


139 ibid para [40].


reports, Keith\textsuperscript{142} and Donnelly\textsuperscript{143} argue that these reports often exaggerate the degree of compliance. In support of this argument, the CRPD Committee’s review of the UK’s Initial Report\textsuperscript{144} which describes how the CRPD is being implemented in the UK, resulted in 60 recommendations for the UK Government to bring it closer to implementation of the CRPD.\textsuperscript{145} The BDA commented: ‘the Committee … condemned the UK Government’s attempts to misrepresent impact through unanswered questions, misused statistics and a smokescreen of statements on policies and legislation which fail to implement the rights of deaf and disabled people.’\textsuperscript{146} In response to this report, the UK Government denied the Committee’s findings: ‘[w]e’re disappointed that this report does not accurately reflect the evidence we gave to the UN, and fails to recognise all the progress we’ve made to empower disabled people in all aspects of their lives,’\textsuperscript{147} a response which echoes the general approach the Government appears to have taken to the CRPD.

Notwithstanding, the CRPD appears to have the potential for the Deaf-World to achieve equality for its members by way of a transformative approach.

\textsuperscript{143} Donnelly (n 110) 173.
\textsuperscript{144} CRPD Committee, ‘Consideration of reports submitted by States parties under article 35 of the Convention. Initial reports of States parties due in 2011: United Kingdom of Great Britain and Northern Ireland’ (24 November 2011) UN Doc CRPD/C/GBR/1.
3.2.3 Enforcement

The UK Government has ratified the Convention's Optional Protocol, which enables people with disabilities to make a complaint to the CRPD Committee if they believe that their Convention rights have been breached – that is, they have been oppressed – and they have exhausted means of redress via the UK or European Courts, whereupon the quasi-judicial committees charged with receiving individual complaints under these treaties consist of experts who evaluate the merits of ‘communications’ and issue ‘views’ as to whether the state party in question violated its treaty commitment.\(^{148}\) The Optional Protocol also gives the CRPD Committee authority to undertake inquiries, when reliable information is received into allegations of grave or systematic violations of Convention rights. Nonetheless, Cole argues that the individual complaints procedures will have a larger impact on human rights practices when compared with interstate complaints mechanisms – as per the process for UDHR breaches – as the latter have never been used and hence do not pose a credible threat to rights-abusing countries due to 'sovereignty costs'.\(^{149}\)

In contrast, individuals are less concerned about upholding sovereignty norms and thus more likely to file complaints,\(^{150}\) although this remains to be seen as only 19 complaints have been registered under the CRPD to date, one of which was related to the UK but was held to be inadmissible.\(^{151}\)


\(^{149}\) ibid 1141.

\(^{150}\) ibid.

If the Committee decides that the facts before it disclose a violation by the State party of the complainant’s rights under the treaty, it invites the State party to supply information within 180 days on the steps it has taken to give effect to its findings and recommendations. The State’s response is then transmitted to the complainant for comments. If the State party fails to take appropriate action, the case is kept under consideration by the Committee under the follow-up procedure. A dialogue is thus pursued with the State party and the case remains open until satisfactory measures are taken. All information related to this aspect of the procedure is not confidential and will thus be available for public consumption. Following the CRPD Committee’s recommendations, State parties are then required to submit a written response to the communication within six months, including any information on any action taken in the light of the views and recommendations of the Committee.

To date, only three are relevant to Deaf people. While AM’s was held to be inadmissible, Lockrey and Beasley’s communications were made in relation to the participation of deaf people in jury duty, whereupon they had been excluded from jury service as a result of needing an Auslan interpreter and real-time steno-captioning. The CRPD Committee agreed with Ms Beasley and Mr Lockrey and found that Australia was in breach of its obligations under the CRPD, particularly as Australia had argued that providing Auslan interpreters or steno-captioning affected the complexity, cost and duration of trials, yet ‘it [did] not provide any data or analysis to

---

153 Optional Protocol to the CRPD, art 5, and CRPD Committee Rules of Procedure, UN Doc CRPD/C/1/Rev.1, r 75.
155 ibid.
demonstrate that it would constitute a disproportionate or undue burden.' The CRPD Committee ordered Australia to take steps to compensate and reimburse Ms Beasley and Mr Lockrey for their legal costs, and also to take steps to permit them to participate in jury duty, and prevent the problem arising again. Australia did not provide a written response, and the position of deaf jurors in Australia remains unchanged.

It is clear that the individual complaints procedure associated with the CRPD provides a source of redress for Deaf people to challenge oppression, although this clearly has its limitations. The next question must therefore be: what complaints could Deaf people make under the provisions of the CRPD? Firstly, upon examination of the 19 complaints made so far to the CRPD Committee, in *HM v Sweden*, the CRPD Committee held that Sweden had failed to fulfil its obligations under the Convention in rejecting the complainant’s application for a building permit to build an indoor hydrotherapy pool at home to accommodate her disabilities, recommending that the State party reconsidered the application and provide adequate compensation. In *Mr X v Argentina* the authorities kept the complainant in prison, requiring him to attend hospital appointments as an outpatient via ambulance transfers, posing a serious risk to his life and health, rather than as an inpatient, which was held to be in breach of the Convention.

157 ibid.
160 ibid para [9.1].
In *Bujdosó and others v Hungary*, the State party had breached articles 12 and 29 of the Convention in respect of the six complainants who had intellectual reasonable adjustments and were placed under partial or general guardianship pursuant to judicial decisions and had been removed from the electoral register and unable to vote in the 2010 elections as a result. The CRPD Committee recommended that the State Party ensured that persons with disabilities should be able to exercise their political rights and in particular, their right to vote. The CRPD Committee also held that Germany’s model for the provision of integration subsidies did not effectively promote the employment of persons with reasonable adjustments as it tended to act as a deterrent for employers to employ individuals with disabilities due to its administrative complexities.

In *F v Austria*, stops along a railway network did not have a digital audio system installed which reproduces the written text of the digital information displays for visually impaired individuals, and the CRPD Committee held that Austria had failed to fulfil its obligations under the Convention. Finally, in *Noble v Australia*, an individual with a mental and intellectual disability was detained without entering a plea of guilty or not guilty on the basis of his legal incapacity for 10 years and three months despite the fact that he would probably have been sentenced to a term of imprisonment not exceeding two to three years had he been convicted.

If one was to extrapolate similar scenarios in respect of Deaf people, one could surmise that if, for whatever reason, Deaf individuals were under the guardianship of

---

163 ibid paras [10(b)(i)] and [10(b)(ii)].
164 *Gröninger v Germany* (2014) UN Doc CRPD/C/D/2/2010 (*Gröninger*).
166 (2016) UN Doc CRPD/C/16/D/7/2012.
167 ibid para [2.4].
others and were denied the right to vote, this would be a contravention of the CRPD. The imprisonment of a Deaf individual without providing that individual with the opportunity to enter a plea, and the lack of digital information displays where transport information was only available in audio format, could also be considered to be contraventions. What is most interesting perhaps is Gröninger, as the integration subsidies in this case has some parallels to the UK’s Access to Work scheme (see section 2.5).

3.3 European Convention on Human Rights

At first glance, the ECHR appears to have immense relevance to Deaf people, and in theory provides them with a means of enforcing rights such as the right to life\(^1\) and to protection from torture, slavery and forced labour;\(^2\) the right to a fair trial;\(^3\) the right of privacy and to a family life;\(^4\) the right to freedom of thought, conscience and religion, and to expression;\(^5\) and the right to associate and assemble.\(^6\)

There appears to have been a number of attempts to develop ECHR jurisprudence in relation to Deaf people. In Jasinskis v Latvia,\(^7\) where a deaf man had died whilst in police custody after sustaining serious head injuries in a fall down some stairs, the ECHR ruled that the police had violated article 2 in that they had a clear obligation under the domestic legislation and international standards, to at least provide him with a pen and paper to enable him to communicate his concerns about his state of health. In ZH v Hungary,\(^8\) a deaf man who also had a learning difficulty had contended that

\(^{168}\) HRA 1998, Schedule 1, Part 1, art 2.
\(^{169}\) HRA 1998, Schedule 1, Part 1, arts 3 and 4.
\(^{171}\) HRA 1998, Schedule 1, Part 1, art 8.
\(^{172}\) HRA 1998, Schedule 1, Part 1, arts 9 and 10.
\(^{173}\) HRA 1998, Schedule 1, Part 1, art 11.
\(^{174}\) App No 45744/08 (ECtHR, 21 December 2010).
\(^{175}\) App No 28973/11 (ECtHR, 8 November 2012).
his detention in prison for almost three months had amounted to inhuman and degrading treatment. The ECtHR held that there had been a violation of articles 3 and 5, as the authorities had not taken measures to accommodate his multiple disabilities within a reasonable time and did not take reasonable steps to enable him to challenge his detention respectively.

In contrast, in Hausch v Austria, the ECtHR dismissed an appeal against the Austrian’s Constitutional Court’s decision to dismiss a claim whereby Hausch objected to the obligation to pay full TV licence fees without being offered 100 percent subtitling, as the complaint did not show any violation of the rights and liberties contained within the ECHR. More recently, in Kacper Nowakowski v Poland, the ECtHR held that there had been a violation of article 8 as the Polish authorities had failed to envisage measures in relation to Nowakowski’s contact rights with his son that were more adapted to his disability, such as obtaining expert evidence from specialists familiar with the problems faced by Deaf people, and focusing on the communication barrier between father and son instead of reflecting on the possible means of overcoming it.

In contrast to the UDHR, Kay argues that the singular aspect of the success of the ECHR and the institutions created by it has been its acceptance as a genuine system of law, and that the existence of any legal system depends on the presence of certain indispensable political and social preconditions. All of the incorporated provisions

---

176 Unreported.
178 App no 32407/13 (ECtHR, 10 January 2017).
of the ECHR are of potential significance in the context of discrimination because they can provide a ‘hook’ for the application of the ‘parasitic’ article 14,\(^{181}\) that is, ‘enjoyment of the rights and freedoms … shall be secured without discrimination on any ground such as … language … political or other opinion, … national or social origin, association with a national minority, or other status’.\(^{182}\) A number of ECHR provisions are of particular relevance to discrimination because they themselves may be brought into play by discriminatory treatment: articles 3, 8 and 9 and article 1 of the First Protocol. It is worth noting, however, that only public authorities can be sued directly under the HRA 1998.\(^{183}\)

### 3.3.1 Enforcement

The ECHR’s falling grace is that for groups such as Deaf people, article 14 only comes into play if one of the other Convention rights has been infringed, and by a public authority. Lawson confirms that the concept of discrimination that has emerged from article 14 cases is narrow and has not yet offered a great deal of assistance to disabled people\(^{184}\) in challenging oppression.

It is clear that only a handful of judgments have been handed down by the ECtHR in relation to disabled people. Clements and Read contend that:

> the reason for the dearth of such cases at the ECtHR can be placed at the door of the usual culprits; the physical, social and economic barriers that prevent disabled people from exercising their rights. Some of these barriers to access are embedded in the circumstances in which many disabled people live their

---


\(^{182}\) ECHR, art 14.

\(^{183}\) HRA 1998, s 6.

\(^{184}\) Lawson (n 113) 275.
lives. Some are related to the unresponsiveness of the law, the judiciary and the practicalities of enforcement mechanisms to the needs and rights of disabled people. Other barriers reside within the judicial process itself. This is attributed to a number of factors. 

Firstly, the judicial misconception that somehow human rights are not seen as relevant to disabled people, due to a tendency to regard disabled people as ‘other,’ placing them in a separate category, a point already raised in Chapter 2. Secondly, disabled people are often viewed primarily as recipients of health and welfare services rather than citizens with the same rights as others, a factor that is generally unique to disabled people; as such to widen ECHR jurisprudence to include disabled people would require a ‘trade-off’ between services and civil rights, whereby the priority for many disabled people is to access decent public housing, income support and health and social care services, rather than to enforce their human rights. Thirdly, the language of the ECHR does not provide the wherewithal for allowing Strasbourg to ‘identify and address state responsibility for discrimination against disabled people.' In particular, the fact that article 14 of the ECHR (the prohibition of discrimination) does

---

186 ibid 28.
187 ibid 26.
188 ibid.
189 ibid.
190 ibid 28.
not specifically mention disability shows a lack of vision on the part of the drafters.\textsuperscript{191} The ECHR is similarly silent on the rights of children and gay and lesbian people, but this has not prevented the ECtHR developing jurisprudence which identifies, articulates and attempts to justify the injustice they experience.\textsuperscript{192}

This leads to a fourth point, that the plight of disabled people is not considered to be ‘fashionable.’ The ECtHR has challenged established modes of communication, requiring the language of human rights to be used in the domains of women, racial minorities and gay and lesbian people in new ways to accommodate new paradigms and create new conceptual vehicles.\textsuperscript{193} Compared to that of disabled people, the advent of the civil rights of women, racial minorities and gay and lesbian people has been more vocal, has received more media attention and stronger lobbying. Clement and Read suggest that despite the development of the social model of disability, emphasis tends to be on the discrimination faced by disabled people rather than their civil and human rights.\textsuperscript{194} Perhaps the solution is clear: Deaf and disabled people need to be more vocal about the failure of state institutions to recognise their civil and human rights, in order to influence future ECHR jurisprudence so that the ECtHR becomes more imaginative and finds new ways to express the language of the ECHR in favour of Deaf and disabled people.

Thus, the possibilities of human rights law to provide clear-cut answers to all legal and ethical questions emerging around Deaf people is subject to limitations,\textsuperscript{195} whereby Deaf people are generally unable to seek redress for inequalities or lack of access.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{191} ibid.
\item\textsuperscript{192} ibid.
\item\textsuperscript{193} ibid. 27.
\item\textsuperscript{194} ibid.
\item\textsuperscript{195} Aart Hendriks and Theresia Degener, ‘The Evolution of a European Perspective on Disability Legislation’ (1994) 1 European Journal of Health Law 343, 361.
\end{enumerate}
\end{footnotesize}
such as failing to be provided with a sign language interpreter, unless one of the absolute rights under the ECHR has also been infringed. There is also a clear reluctance on the part of the ECtHR's judiciary to adopt a visionary approach to developing jurisprudence in order to recognise the civil and human rights of Deaf and disabled people.

It is therefore argued that the ECHR is a further example of the formal, individual, equality paradigm, particularly as it does not even mention disability as a protected ground and does not contain any requirements on public authorities to take affirmative action, nor does it impose any positive duties. However, in Price v UK, Judge Greve did suggest that a civilised country such as the UK should try to ameliorate and compensate for the disabilities faced by a person, that is, positive action. Nonetheless, this attempt to introduce positive action in the context of the ECHR was watered down somewhat in Senteges v Netherlands, which held that a fair balance has to be struck between the competing interests of the individual and of the community as a whole, that is, there needs to be a ‘margin of appreciation.’ Nonetheless, the fact that the ECtHR did acknowledge the CRPD’s significance in Glor and Alajos could be construed as a sign that the ECtHR has begun to embrace the ethos behind the CRPD in its jurisprudence. This assertion in the context of Brexit, however, may not be permanent. While Brexit would not automatically enable the UK to withdraw from the ECHR, Brexit could provide the UK with the wherewithal to repeal the HRA 1998 and replace it with a Bill of Rights. Indeed, the UK Government has not provided any

---

196 (2001) 34 EHRR 1285.
198 This refers to the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the ECHR, Steven Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights' (Council of Europe 2000) 5.

4 Social inclusion: the public sector equality duty

The final Deaf Equality Concept to be considered in this chapter is social inclusion, which is essentially a ‘central structuring principle’ which situates legislation within government initiatives and policy approaches. Access to education, housing, transport, health care and support with daily living requires active measures to integrate marginalised groups into society, which is the aim of social inclusion. This approach arguably provides a more satisfactory basis for antidiscrimination legislation as part of an overall strategy to combat social exclusion. In other words, attempting to ‘cure’ the roots of social exclusion, rather than its symptoms. The EqA 2010’s Public Sector Equality Duty (PSED) provisions attempt to do just that, and it is argued that this approach epitomises transformative equality.

The first public sector duty in England was related to race, and was introduced by the Race Relations (Amendment) Act 2000, which imposed a duty on public sector organisations not to discriminate on grounds of race in the carrying out of their functions, and a duty to eliminate discrimination and to promote equality and good relations between different racial groups. The race PSED reflected a much richer understanding of equality and its causes than that reflected elsewhere in the law and
created duties on major public actors to take proactive steps to tackle race inequality, including taking action to promote good relations between different groups. Similar duties followed to promote equality on grounds of disability from 2006\textsuperscript{201} and on grounds of gender from 2007.\textsuperscript{202}

The PSED now forms part of the EqA 2010, sections 149 to 157, and is a somewhat watered-down version of the original PSEDs, as the public sector is no longer required to produce equality plans. The aim of the legislation is to make the promotion of equality on all the equality grounds central to the work of public authorities so that they take account of equality in the day-to-day work of policy making, service delivery, employment practice and other functions.\textsuperscript{203} It is argued that the EqA 2010’s PSED provisions form part of the transformative equality strand, and may assist in challenging oppression at its source. Indeed, Manfredi, Vickers and Clayton-Hathway argue that bridging mechanisms, along with elements of Hepple’s reflexive regulation triangle (see Chapter 2), both essential elements of transformative equality, can be seen in the structure of the PSED.\textsuperscript{204}

The PSED has been described as an ‘integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation,’\textsuperscript{205} and that its aim is to ‘integrate consideration of advancement of equality into the day-to-day business of all bodies subject to the duty.’\textsuperscript{206} One of the initial attractions of the duties

\textsuperscript{201} Disability Discrimination Act 2005.
\textsuperscript{204} ibid 373.
\textsuperscript{205} R (Elias) v Secretary for State for Defence [2006] EWCA Civ 1293, [274] (as cited in Bracking and others v Secretary of State for Work and Pensions (Bracking) [2013] EWCA Civ 1345, [26]).
was their potential to offer an alternative pathway to achieving equality that could run in tandem with the well-established individual litigation approach.  

Indeed, Bell suggests that the equality duties could ‘escape the narrow confines’ of the individual enforcement model, discussed elsewhere in this chapter.  

In practice, the EqA 2010 provides that public authorities, and those who exercise public functions, must have ‘due regard’ to the need to eliminate discrimination and other conduct prohibited by the Act, advance equality of opportunity, and foster good relations.  

The EqA 2010 sets out how those aims of the PSED can be met, and explains that the advancement of equality of opportunity can be achieved by removing or minimising disadvantage suffered by groups of individuals, taking steps to meet the needs of groups of individuals, and encouraging participation in public life.  

The fostering of good relations can be achieved by tackling prejudice and promoting understanding.  

Section 149(6) goes on to suggest that complying with these aims may involve treating some persons more favourably than others.  

The general duties outlined above can be distinguished from the specific duties, which provides Ministers of the Crown, Welsh or Scottish Ministers the power to impose specific duties upon certain identified public authorities by regulation.  

The Equality Act (Specific Duties) Regulations 2011 (Specific Duties Regulations) require that listed public authorities with 150 or more employees should publish information to

---

208 ibid.  
209 These duties were identified in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158; [2009] PTSR 1506, known as the ‘Brown principles,’ and added to by Bracking.  
210 EqA 2010, s 149(1)(a).  
211 EqA 2010, s 149(1)(b).  
212 EqA 2010, s 149(1)(c).  
213 EqA 2010, s 149(3).  
214 EqA 2010, s 149(5).  
215 SI 2011/2260.
demonstrate its compliance with the PSED,\textsuperscript{216} and specific and measurable equality objectives.\textsuperscript{217}

Although cases are few, the measure of success of the public sector equality duties is not so much via the law reports, but through the development of a culture of mainstreaming race, gender and disability equality measures in most public sector organisations. There is evidence to suggest that implementation in practice is limited, particularly by the development of bureaucratic responses, focusing on compliance rather than with achieving substantive equality outcomes. The criticism focuses on the fact that many organisations have developed bureaucratic processes to ensure compliance with the duty, rather than focusing on removing the inequality in question. In effect, a ‘tick box’ mentality has developed, focusing on procedures for decision making. This enables public bodies to show that they have considered equality issues, rather than focusing on the impact of decisions made, and whether they have been altered to ensure that equality issues are properly addressed.\textsuperscript{218} Nonetheless, despite its shortcomings, it is argued that the PSED is an example of transformative equality, a point supported by Hepple.\textsuperscript{219}

4.1 Enforcement

Section 156 of the EqA 2010 prevents private law claims from being brought in respect of any failure to perform the general duties, although such a breach may be relevant by way of the evidential background to a discrimination claim under the EqA 2010.\textsuperscript{220}

\textsuperscript{216} Specific Duties Regulations, reg 2.
\textsuperscript{217} Specific Duties Regulations, reg 3.
\textsuperscript{218} Lucy Vickers, ‘Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief’ (2011) 31(1) Legal Studies 135, 137.
\textsuperscript{219} Hepple (n 18) 18.
Otherwise, alleged breaches of the PSED are enforceable by way of judicial review proceedings. The specific duties can only be challenged by the EHRC, which can assess compliance of both general and specific duties and Schedule 2 of the Equality Act 2006 sets out the rules for carrying out such assessments. Where it identifies non-compliance with equality obligations, the EHRC can issue a compliance notice requiring compliance with the relevant duty, and if the public authority does not, the EHRC may apply to the court for an order requiring the body to comply.

A search for any PSED-related cases that include deaf people has not proved particularly fruitful, although in *R (Buxton) v Secretary of State for Work and Pensions (DWP)*, Buxton argued that the DWP’s limit on the amount of certain payments made under the Access to Work scheme was unlawful because it constituted a breach of the DWP’s PSED. This was rejected by Kerr J on the basis that ‘a decision on how to allocate resources as between different categories of persons sharing the same protected characteristic (albeit in different ways) was always likely to be an ambitious target for an allegation of breach of the equality duty.’ From October 2015, Access to Work awards would be capped at one and a half times average annual salary, setting a limit of £40,800 per person per year, uprated annually, but Buxton required annual BSL support of over £100,000, far in excess of the cap.

---

222 LexisPSL (n 219).
224 ibid para [1].
225 ibid para [78].
226 ibid para [33].
227 ibid para [39].
In addition, in *R (on the application of Atherton) v Secretary of State for Work and Pensions*,\(^{228}\) it was held that the Department for Work and Pensions (DWP) had failed to comply with its PSED over a period of years, but the claim for judicial review was dismissed as the DWP had offered the claimant a reasonable system of communication.\(^{229}\) This case is of particular note because the claimant had presented evidence from the National Deaf Children’s Society as follows:

> [T]he NCDS is aware of difficulties young deaf people have in requesting email communication as a reasonable adjustment. It has campaigned for an online application system and for the email address to be included on the DWP’s [Personal Independent Payment] website. The DWP ha[s] refused to publish a correspondence email address.

Upon a wider search of relevant case law, however, there appear to be two recurrent themes in recent PSED case law: firstly, the failure of public authorities to provide proper evidence of compliance with the PSED which is likely to lead to a finding of a breach of the duty, and secondly, the failure of public authorities to provide evidence that all relevant protected characteristics have been considered.\(^{230}\)

Some case studies provided by the EHRC provide examples of how the PSED can work in practice, thus demonstrating its transformative potential. Tower Hamlets Council used its PSED to improve the educational attainment of its pupils from 8 percent achieving five or more A-Cs at GCSE in 1990 to 62 percent in 2012 by identifying that the majority of underperforming students came from homes where

\(^{228}\) [2019] EWHC 395 (Admin).

\(^{229}\) ibid para [108].

\(^{230}\) Darwin (n 140) [12], referring to the cases of *R (Cushnie) v Secretary of State for Health* [2014] EWHC 3626 (Admin), [2015] PTSR 384, *R (Winder) v Sandwell Metropolitan Borough Council* [2014] EWHC 2617 and *R (Fakih) v Secretary of State for the Home Department* [2014] UKUT 513.
English was not the first language, and took the necessary steps to address that.\textsuperscript{231} Thames Valley Police implemented an 18 month programme to reduce police use of stop and search powers which before their actions had resulted in black people being up to six times more likely to be stopped and searched than white people. This included a revised policy, training for all officers and detailed statistical monitoring of stop and search patterns and resulted in a reduction to 3.2 percent of the stop and search of black individuals.\textsuperscript{232} The PSED has also seen an improvement in decision-making and transparency by public authorities, and efforts to mainstream equality in an organisation’s culture.\textsuperscript{233}

A report analysing supporting evidence of the PSED by the Oxford Brookes Centre for Diversity Policy Research and Practice in 2012\textsuperscript{234} revealed that the public authorities that successfully implemented the duty demonstrated a number of factors in common.\textsuperscript{235} These included: visible, committed, and coordinated leadership; appointed ‘champions’ or dedicated officers with equalities expertise; consultation and engagement with service users; and data collection and monitoring to form a strong evidence base.\textsuperscript{236} The same report does mention Deaf people. The PSED led to the adaptation of hospital wards and deaf awareness training for staff alongside a new intercom system for deaf patients to access wards.\textsuperscript{237} An independent evaluation of


\textsuperscript{233} ibid.


\textsuperscript{235} ibid 15.

\textsuperscript{236} ibid.

\textsuperscript{237} ibid 8; see also Elizabeth Sclater, ‘Making practice happen: Practitioners’ views on the most effective specific equality duties’ (ECHR 2009) 28.
the NHS Equality Delivery System conducted in 2012\textsuperscript{238} also showed early evidence of improvement in engagement with local voluntary and community organisations and patient groups, including Deaf people. There was also evidence of increased knowledge and awareness of equality with staff at all levels.\textsuperscript{239}

All in all, the case studies put forward to demonstrate how the PSED can and does work in practice supports the contention that the PSED is potentially transformative, as it has the wherewithal to effect positive changes in society either through the decision-making process of public authorities, increased consultation and engagement with employees and service users, and the gathering of data in order to substantiate the claims of inequality by marginalised groups.

5 Conclusion

With readings in the field of Deaf Studies focusing on dignity, social inclusion and equality as a challenge to oppression (or audism as it is known in the Deaf-World\textsuperscript{240}) and equality of opportunity being a widely regarded concept of equality,\textsuperscript{241} an attempt has been made to apply these Deaf Equality Concepts to the UDHR, ECHR, EqA 2010 and CRPD. Throughout this chapter, by establishing how Deaf people fit within the auspices of equality law, it has been made clear that Deaf people are deprived of their opportunities due to being grouped into the ‘disabled’ collective. It has been established that the ability of Deaf people to challenge the oppression they experience


\textsuperscript{239} Clayton-Hathway (n 234) 8.


(as outlined in Chapter 1) is severely restricted at various degrees with regard to the EqA 2010, the UDHR, the CRPD and the ECHR.

On the whole, there is more scope available to challenge oppression within the EqA 2010, as Deaf individuals can expect employers and service providers to implement adjustments in order to remove any substantial disadvantage experienced as a result of an arrangement imposed, and the duty is more likely than not to be triggered. However, there is a clear divide with regard to the nature of the adjustments, that is, single, one-off adjustments with respect of a PCP or physical feature are more likely to be considered reasonable than recurrent adjustments to address the lack of an auxiliary aid, which is the type of adjustment that Deaf people will need, usually in the form of communication professionals such as BSL/English interpreters, lipspeakers or Palantypists. Thus there is clearly equality of opportunity, but not equality of outcomes or results, as Deaf people have, at face value, the wherewithal to request that employers and service providers implement adjustments, but this is subject to a reasonableness test which determines whether or not the adjustment is in fact obligatory.

The comparator test imposed in respect of establishing the duty to make adjustments is clearly of a formal nature, whereas the making of adjustments, and thus removing any disadvantage caused by a disability (bearing in mind that the definition of disability in the EqA 2010 espouses the medical – rather than social – model of disability), is reminiscent of substantive equality. It has also been established that the individual enforcement model adopted by the EqA 2010 does not always make it possible to challenge oppression in the form of failure to make reasonable adjustments.
The EqA 2010 is a game of two halves, as its PSED provisions are a strong example of transformative equality and go some way to ‘cure’ the ‘disease’ that is inequality by encouraging social inclusion by way of active measures to integrate marginalised groups in society. However, the lack of enforcement mechanism – relying only on the generally difficult route of judicial review or the EHRC’s somewhat limited enforcement mechanisms – poses a barrier to Deaf people who wish to challenge oppression through this route.

While the UDHR’s formal aims are honourable in that it attempts to enshrine dignity, equal worth and identity in all human beings, the lack of mechanism for enforcing its ‘equal and inalienable rights’ render such overreaching aims somewhat futile, as well as its apparent lack of direct effect in UK law. Instead, it is in the ECHR that the principles and overarching ideas of the UDHR have been incorporated and have legal effect in the UK by virtue of the HRA 1998. As a result, the ECHR is generally accepted as a genuine system of law, albeit of a formal nature. There has been a number of ECHR cases considering whether the human rights of Deaf individuals have been infringed; however, once again, the opportunity for Deaf people to challenge oppression utilising the ECHR is severely limited not least due to the difficulty in bringing cases to the ECtHR, but also due to the fact that discrimination alone cannot be challenged unless one of the absolute rights has also been infringed.

The CRPD, in contrast, is both substantive and transformative, as it enshrines in international law for the first time, sign language rights, and an obligation on state signatories to accept and facilitate sign language and more besides, fully recognising the dignity, equal worth and identity of Deaf people. There is also evidence to suggest that the UK courts – the Supreme Court in this instance – are willing to consider the CRPD’s provisions as part of its decision-making process. Once again, however,
challenging oppression is confined to an individual enforcement model, and there has been little take-up of its individual complaint procedure to date, although initial results appear to be encouraging once the admissibility hurdle has been overcome. In addition, there is no legal obligation on states to respond to and address the views of the CRPD Committee on individual complaints, as in the case of Lockrey and Beasley.

It has been made clear throughout this chapter that current equality law – at domestic, European and international level – can only do so much at present and that it is only part of the solution242 to the Deaf Legal Dilemma. In Chapter 5, therefore, an attempt will be made to ascertain what the potential solutions are to this quandary.

CHAPTER 5 – SIGN LANGUAGE RECOGNITION: A SOLUTION TO THE DEAF LEGAL DILEMMA?

1 Introduction

Having established why equality law is not achieving equality for deaf people, at least in the UK, and that more instances of transformative equality need to be legislated in order to achieve the equality that deaf people desire, we now turn to potential solutions to the Deaf Legal Dilemma in this final substantive chapter. For this chapter, we will continue the critique of equality law in the context of sign language recognition and explore other legal jurisdictions to establish whether sign language recognition could be a potential solution to the Deaf Legal Dilemma. This approach is three-fold: to ascertain whether language recognition is transformative equality, and indeed, whether sign language recognition could be the solution to the Deaf Legal Dilemma, and above all, achieve equality for deaf people in a way that present equality law does not do.

Before proceeding on this basis, it is necessary to clarify that British Sign Language (BSL) is a language. Languages are commonly recognised as a ‘national’ language, an ‘official’ language, a ‘working’ language, a ‘regional’ language or a ‘minority’ language. De Meulder, Murray and McKee argue that whereas the status of national language often carries symbolic status, that of official language often has many practical implications. Generally, an official language is the language used by government to communicate with citizens, and likely also the language used or

---


2 ibid.
required to be used in institutions such as schools and in government mass media.\textsuperscript{3} Coupled with this outline, it is necessary to assert that language is one of the most important human abilities because it enables humans to gain information and to communicate effectively. It shapes our social lives and our relationships with other people and is important for developing full intellectual capacity.\textsuperscript{4}

The recognition of a minority language is thus one of a number of ways in which equality can be achieved for minority groups, as has been seen with Gaelic and Welsh in the UK.\textsuperscript{5} Chapter 2 argues that deaf people should be regarded as a culturo-linguistic group, that is, deaf people are a distinct group which cannot be categorised alongside disabled people or linguistic minorities, but only on their own terms as deaf people,\textsuperscript{6} or as a territorially dispersed minority linguistic community with shared sign language, culture and experiences of exclusion and stigma.\textsuperscript{7} Sign languages are natural languages in their own right, systematic and rule-based, with distinct lexicons of arbitrary signs and grammatical structures just as complex as spoken languages. In addition, sign language is not a universal language, with each country having its own national sign language, and some having more than one sign language.\textsuperscript{8} Ladd, Gulliver and Batterbury further argue that sign languages demonstrate all the features of Hockett’s natural language features.\textsuperscript{9} It is clear, therefore, that sign languages are to be regarded as minority languages, but, as will become clear, minority language

\begin{itemize}
\item \textsuperscript{3} ibid 2-3.
\item \textsuperscript{5} As a result of the enactment of the Gaelic Language (Scotland) Act 2015 and the Welsh Language Act 1993.
\item \textsuperscript{6} Paddy Ladd, \textit{Understanding Deaf Culture: In Search of Deafhood} (Multilingual Matters Ltd 2003) 15-17.
\item \textsuperscript{7} Sarah CE Batterbury, ‘Democratising policy theories: enhancing prospects for language justice for Sign Language Peoples’ (2014) 42(4) Policy & Politics 547, 547.
\item \textsuperscript{8} Nina Timmermans, ‘The Status of Sign Languages in Europe’ (Council of Europe Publishing 2005) 9.
\item \textsuperscript{9} Paddy Ladd, Mike Gulliver and Sarah CE Batterbury, ‘Reassessing Minority Language Empowerment from a Deaf Perspective: the Other 32 Languages’ (2003) Deaf Worlds 6, 8.
\end{itemize}
support for the formulation of sign language policies has been very limited, as the law rarely confers national or official language status or inclusion in language legislation or a constitutional framework for sign languages.

Sign language recognition appears to be the preferred approach to achieving equality for deaf people as it seeks to be able to retain a significant degree of cultural and linguistic self-determination, by first getting a legal confirmation (whether symbolic or not) that sign languages are indeed languages, having an identity value for those who sign them. After establishing this, it is important that legislation can bring about instrumental value for sign languages, and increased mobility for signers, and educational linguistic and language acquisition rights in the home and education.

While the law has historically been used to ‘look after’ deaf people, curb what deaf people can do or provide for them through national state welfare, sign language recognition is described as an exception to this trend because deaf people are often instrumental in the creation of this legislation. Although the law affords deaf people rights and protection, such as through the EqA 2010, the dominant group can still use the law as a mechanism to continue hearing hegemony and enjoy privilege, as explained in Chapter 2. However, as we have seen in Chapter 4, the UK has a relatively weak ‘rights culture’ and a certain reluctance to create legislation based on the concept of legally enforceable rights, which can be used to hold governments

11 De Meulder, Murray and McKee (n 1) 3.
13 ibid.
15 ibid 48.
accountable.\textsuperscript{16} Ideally, sign language policies would be created within a policy arena of minority language legislation, as this removes the emphasis from disability labelling and would offer parity with the treatment of other autochthonous minority languages.\textsuperscript{17}

To put matters into a wider context, Dunbar argues that British language policy has traditionally been directed at the integration of linguistic minorities through promoting the acquisition of English through the education system,\textsuperscript{18} and this, coupled with the disability labelling, could explain the apparent lack of progress in creating language legislation in respect of BSL. It is this reluctance that requires further analysis to ascertain whether sign language recognition in the UK is possible, and whether such legislation could bring about equality for deaf people, particularly as it is generally considered that sign languages are the key to deaf people’s social integration, as Stevens writes:

\begin{quote}
Instead of solely viewing deafness as a ‘deficit’ or medical condition in need of repair, more attention should be paid to improving access in all spheres of life: education, work, communication etc. In this context, sign languages are a pivotal key to social integration. Hence the issue of sign language recognition becomes a true question of human rights.\textsuperscript{19}
\end{quote}

This approach, however, comes with a warning from Krausneker:

\begin{quote}
Recognition of a sign language will not solve all the problems of its users at once – and maybe not even in the near future. But legal recognition of sign
\end{quote}

\textsuperscript{16} De Meulder (n 12) 4.
\textsuperscript{17} Batterbury (n 7) 257.
\textsuperscript{19} Helga Stevens, ‘Equal rights for Deaf people: From being a stranger in one’s own country to full citizenship through sign languages’, (International Congress on the Education of the Deaf 2005, Maastricht, July 2005).
languages will secure the social and legal space for its users to stop the tiresome work of constant self-defence and start creative, self-defined processes and developments. Legal recognition of a language will give a minority space to think and desire and plan and achieve the many other things its members need or want. Basic security in the form of language rights will influence educational and other most relevant practices deeply.\textsuperscript{20}

In short, we will consider in this final substantive chapter whether sign language recognition is a viable alternative to the status quo in achieving equality for deaf people. This will entail a consideration of the right to language and international instruments that provide for what are oft referred to as linguistic human rights. Subsequently, there will be a consideration of BSL in the UK to establish the current position, and legislative measures in Scotland, New Zealand, Ireland and Finland that have given these countries’ respective sign languages legal recognition as a point of comparison. The chapter will then end with an analysis of the criticisms associated with sign language legislation, so that a well-rounded conclusion can be made with regard to whether sign language recognition proffers a solution to the Deaf Legal Dilemma and will achieve transformative equality for deaf people.

2 A right to language

The ultimate goal for the calling for sign language legislation would be that it requires all levels of government to fund programmes for deaf children and their families to

learn a fully accessibly language: sign language. In other words, to protect deaf people’s right to language.\textsuperscript{21}

Such linguistic rights should be considered basic human rights, and Krausneker argues that Skutnabb-Kangas and Phillipson’s concept of linguistic human rights means – on an individual level – the right to positively identify with one’s language, to have others respect this identification, the right to a native language, to learn it, to have it developed in formal schooling by being taught through it, and the right to use it in official contexts.\textsuperscript{22} On a collective level, linguistic human rights include the right of minority groups to exist and be ‘different,’ to enjoy and develop the language and create educational settings in which one can influence and control the curricula, to teach the language, to be represented in political contexts as a group, to be able to independently and autonomously handle and decide on community matters with regard to work, culture, education, social affairs and religion, and to have the financial resources to achieve such aims.\textsuperscript{23}

It is clear to see that language is mentioned in various international laws and treaties, supporting the contention of Humphries et al that a right to language can be implied.\textsuperscript{24} Article 2 of the Universal Declaration on Human Rights\textsuperscript{25} stipulates that everyone is entitled to all rights and freedoms enshrined in it, regardless of language. At United Nations (UN) level, article 27 of the International Covenant on Civil and Political Rights


\textsuperscript{23} ibid 10.

\textsuperscript{24} Humphries and others (n 21) 880.

\textsuperscript{25} UNGA (10 December 1948) Universal Declaration of Human Rights Resolution 217 A (III) 183rd Session.
(ICCPR)\textsuperscript{26} confirms that recognised minorities have the right ‘to use their own language.’

To elaborate further, Muhlke argues that article 27 can be interpreted to mean that a state may not prohibit the use of sign language among deaf people, make it impossible for members of the deaf community to meet each other, or pressure members of the deaf community to integrate into majority society.\textsuperscript{27} In addition, scholars claim that article 27 also obligates states to take measures to protect and promote linguistic minorities.\textsuperscript{28} The Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities\textsuperscript{29} requires states to protect the existence of linguistic minorities and to provide opportunities for persons belonging to minorities to receive instruction in their mother tongue.\textsuperscript{30} Bearing in mind that states were adamant that the ICCPR should not oblige them to take such measures if it would stimulate minorities’ consciousness of cultural differences or help create new minorities during the drafting of article 27,\textsuperscript{31} Muhlke suggests that states may be obliged to take measures that promote the use and development of sign language within the deaf community, but not to take measures that would help deaf people whose native language is not sign language to learn sign language and gain entrance to the deaf community.\textsuperscript{32} Thus, the International Covenant on Civil and Political Rights\textsuperscript{33} (ICCPR) is of limited use in respect of sign languages. One further example is the UN

\textsuperscript{26} UNGA (16 December 1966) International Covenant on Economic, Social and Cultural Rights Resolution 2200A (XXI).
\textsuperscript{27} Muhlke (n 4) 740.
\textsuperscript{28} Ibid.
\textsuperscript{29} Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, Res 47/135 (18 December 1992).
\textsuperscript{30} Muhlke (n 4) 740.
\textsuperscript{31} Ibid 740.
\textsuperscript{32} Ibid 741.
Convention on the Rights of the Child which stipulates that children of linguistic minorities and indigenous children have the right to use their languages in their communities.\textsuperscript{34}

In the European context, article 14 of the European Convention for Human Rights (ECHR)\textsuperscript{35} prohibits discrimination in the enjoyment of the Convention’s rights and freedoms on the grounds of language, and article 5(2) confirms that individuals have the right to be informed of the reasons of their arrest in a language that they will understand, and the same applies in the case of criminal offences concerning the nature of a criminal accusation,\textsuperscript{36} and the right to be assisted by an interpreter in court.\textsuperscript{37}

Dunbar argues that language rights, such as those highlighted above, have not been given the status of fundamental rights under international law,\textsuperscript{38} even though the right to language can be implied. The reason for this is because the support provided is somewhat patchy, the rights themselves are of a limited nature, and almost all of the positive rights and state obligations are unenforceable, either because they are not legally binding under international law, or they have no real means of enforcement.\textsuperscript{39}

In addition, the positive rights are generally provided in a way that a one-sided reliance on government is created, with limited community control and input into the process of language planning and policy design and implementation.\textsuperscript{40} Human rights are regarded as ‘self-evident, implied in other ideas that are commonly intuited and

\begin{itemize}
  \item \textsuperscript{34} UNGA (20 November 1989) Convention on the Rights of the Child Resolution A/44/25, art 30.
  \item \textsuperscript{35} Council of Europe (4 November 1950) Convention for the Protection of Human Rights and Fundamental Freedoms (as amended).
  \item \textsuperscript{36} ECHR, art 6(3)(a).
  \item \textsuperscript{37} ECHR, rat 6(3)(e).
  \item \textsuperscript{38} Robert Dunbar, ‘Minority Language Rights in International Law’ (2001) 50 International and Comparative Law Quarterly 90, 120.
  \item \textsuperscript{39} ibid 120.
  \item \textsuperscript{40} ibid 121.
\end{itemize}
accepted,” and as nothing seems so inherent to human nature as the capacity to develop language, it is clear that people must have an opportunity to develop their linguistic capacity to the fullest extent possible. Therefore, sign language places the connection between human dignity and language squarely within the realm of human rights, as every human being must have the right to language and linguistic development because this right is a fundamental manifestation of the respect for human dignity. As an analysis of language law in relation to BSL is undertaken in this chapter, it will be possible to ascertain whether these arguments are valid.

The remainder of this section will be taken up by an exploration of the European Union, the Council of Europe and the United Nations’ approaches to sign language recognition. Such an undertaking is necessary in order to ascertain whether there are any legal mechanisms available for the recognition of sign languages at these levels, in the absence of domestic legislation in the UK.

2.1 The European Union’s approach

The European Union (EU) has no specific competence concerning the national, regional or minority languages of Member States. Article 167 of the Treaty on the Functioning of the EU, however, stipulates that Member States should respect national and regional diversity, article 3 of the Treaty of the EU stipulates that the EU should respect its rich linguistic diversity, while article 4(2) bestows upon the EU an obligation to respect the national identities of its Member States, including regional

---

42 Muhlke (n 4) 25.
43 Muhlke (n 4) 26.
and local self-government, while ensuring territorial integrity.\textsuperscript{46} The Charter of the Fundamental Rights of the EU\textsuperscript{47} (CFR) which is legally binding on EU institutions and national governments, refers to respect for linguistic diversity,\textsuperscript{48} and prohibits discrimination on the grounds of language.\textsuperscript{49}

Nevertheless, there are various documents and initiatives at European level that aim to safeguard the rights of Deaf people. These range from resolutions to reports and parliamentary recommendations. While they are often not legally binding, there is however a trend at European level to make the sign languages of Europe more visible at events and in the public arenas.\textsuperscript{50} The European Commission for example acknowledges them as an ‘important part of Europe’s multilingual diversity.’\textsuperscript{51}

The first important European document to mention sign language was issued by the European Parliament in 1988 by way of the Resolution on Sign Languages for the Deaf,\textsuperscript{52} which was restated in 1998.\textsuperscript{53} This was necessary as the 1988 resolution did not have the desired political effect.\textsuperscript{54} Both resolutions take a very broad view and recognise that sign languages are often the ‘only means of communication’ Deaf people have, asking for the legal recognition of sign languages in the EU Member States.\textsuperscript{55}

\begin{flushright}
\textsuperscript{46} Magdalena Pasikowska-Schnass, ‘Regional and minority languages in the European Union’ (European Parliamentary Research Service 2016) 5.  \\
\textsuperscript{47} EU, Charter of the Fundamental Rights of the EU [2002] C 326/02.  \\
\textsuperscript{48} CFR, art 22  \\
\textsuperscript{49} CFR, art 21.  \\
\textsuperscript{50} Mark Wheatley and Anna Pabsch, Sign Language Legislation in the European Union (2nd edn, European Union of the Deaf 2012) 31.  \\
\textsuperscript{52} Doc A2-302/8721.  \\
\textsuperscript{53} [1998] OJ C 379/57.  \\
\textsuperscript{54} Verena Krausneker, ‘Sign Languages in Europe: the Case of Minorised Minority Languages’ (Mercator International Symposium on European Minority Languages and Research, Aberystwyth, April 2003).  \\
\textsuperscript{55} Wheatley and Pabsch (n 50) 31.
\end{flushright}
As a result, the European Parliament has included sign language in a number of recent documents.\textsuperscript{56} Wheatley and Pabsch argue that this is not only due to the joint efforts of the European Union of the Deaf (EUD) and the first Deaf Member of the European Parliament (MEP), Dr Ádám Kósa, but also the launch of the European Disability Strategy 2010-2020.\textsuperscript{57} This states: ‘[t]he Commission will work to […] explore ways of facilitating the use of sign language […] in dealing with the EU institutions.’\textsuperscript{58}

MEP Kósa’s Report on the Mobility and Inclusion of People with Disabilities and the European Disability Strategy 2010-2020\textsuperscript{59} was adopted by a majority of MEPs at the European Parliament in Strasbourg on 25 October 2011. It asks the Commission to recognise sign languages as official languages\textsuperscript{60} in accordance with the Brussels Declaration, a document drawn up by the EUD,\textsuperscript{61} advocating the rights of Deaf people across Europe.\textsuperscript{62} Although originally not a legally binding document, its inclusion in the European Disability Strategy has given it political relevance that might eventually lead to full legal recognition.\textsuperscript{63}

Further, the European Parliament’s Resolution on Sign Languages and Professional Sign Language Interpreters,\textsuperscript{64} adopted by the European Parliament on 23 November 2016, recognises the need for qualified and professional sign language interpreters,

\textsuperscript{56} ibid 32.
\textsuperscript{58} ibid 6.
\textsuperscript{60} ibid [105].
\textsuperscript{62} Wheatley and Pabsch (n 50) 33.
\textsuperscript{63} ibid.
\textsuperscript{64} 2016/2952.
and that this need can only be met by the official recognition of national and regional sign language(s) in Member States and within EU institutions.\textsuperscript{65}

Overall, it can be noted that sign language legislation at EU level is mainly grounded in the European Community’s soft law,\textsuperscript{66} that is, it has no legal force but is persuasive.\textsuperscript{67}

2.2 The Council of Europe’s approach

In 2001, the UK ratified the European Charter of Regional and Minority Languages (ECRML),\textsuperscript{68} a treaty obligation of the UK, making it clear that the UK owes special obligations to its autochthonous minority language communities and that it is obliged to take positive measures both to protect and promote such languages.\textsuperscript{69} It focuses on the need to protect Europe’s rich linguistic legacy, including its traditional regional and minority languages, some of which are in danger of extinction if not protected and promoted.\textsuperscript{70} The ECRML outlines a number of important rights: the right to education in that language, teaching of the language’s history, use of the language in courts, by the media, for cultural activities, and in economic and social life.\textsuperscript{71} However, Bultrini argues the ECRML does not as such grant any individual or collective rights and that its direct object is the languages themselves and not the groups who speak them.\textsuperscript{72} It leaves it to the state to make an assessment in such cases and would only question

\begin{itemize}
  \item \textsuperscript{65} ibid [1].
  \item \textsuperscript{66} Wheatley and Pabsch (n 50) 36.
  \item \textsuperscript{67} Tony Storey and Chris Turner, \textit{Unlocking EU Law} (Routledge 2008) 61.
  \item \textsuperscript{68} CoE, European Charter for Regional or Minority Languages, ETS No. 148.
  \item \textsuperscript{69} Dunbar (n 18) 107.
  \item \textsuperscript{70} Pasikowska-Schnass (n 46) 3.
  \item \textsuperscript{71} Batterbury (n 7) 261.
  \item \textsuperscript{72} Antonio Bultrini, ‘Developments in the Field of the European Charter for Regional or Minority Languages’ (2002) 2 European Yearbook of Minority Issues 435, 436.
\end{itemize}
such an assessment in the case of a manifestly unjustified refusal to recognise the quality of being a language or the ‘traditionally spoken’ element.\textsuperscript{73}

While regional languages are defined in relation to the area they are spoken in, minority languages are defined in terms of the proportion of people who speak the language compared to the majority language.\textsuperscript{74} Alas, the ECRML does not provide a list of regional and minority languages or specific requirements on the number or percentage of speakers to be considered a minority or regional language.\textsuperscript{75} Instead, it is up to states to decide which languages to include, considering psychological and political aspects. Once a decision has been made, state parties are then required to choose from a list of 35 measures in Chapter III, which include judicial action, administrative measures, cultural, economic and social matters, as well as education, media and cross-border trade, to make sure regional and minority languages are not only used in everyday private life but also in the public sphere.\textsuperscript{76} The state parties must choose at least three measures in cultural activities and education, and at least one action in the remaining domains of public life,\textsuperscript{77} and send regular implementation reports to the Committee of Experts for examination.\textsuperscript{78}

The ratification of the ECRML was considered the most significant development of recent years, as it forced both the UK and its devolved institutions to develop for the first time a coherent language policy which is principled and proactive.\textsuperscript{79} It is generally regarded as providing the UK with the impetus to give legal status to Cornish, Irish

\textsuperscript{73} ibid.
\textsuperscript{74} ibid 3.
\textsuperscript{75} ibid 4.
\textsuperscript{76} ibid.
\textsuperscript{77} ibid 5.
\textsuperscript{78} ibid.
\textsuperscript{79} Dunbar (n 18) 126.
and Ulster Scots, Scots and Scottish Gaelic and Welsh. However, it would appear that the ECRML has not had this desired effect with regard to sign languages.

Part II of the ECRML contains a statement of principles which should guide state practice, and this is significant as governments in the UK have never clearly expressed the principles which guide their approaches to minority languages, with the possible exception of Welsh. The state reporting process may also be beneficial, as the ECRML’s mechanisms have given a platform to language groups and activists to raise with the Charter’s Committee of Experts a range of issues relating to autochthonous languages, and a visit to the UK in January 2003 marked perhaps the first time most public bodies in Scotland, Wales and Northern Ireland had to account for their decisions and explain their policies with respect to these languages; this is in itself a significant step forward.\(^\text{80}\)

The immediate impact of the ECRML has been limited mainly due to the restrictive and unimaginative approach the UK has taken to its ratification and implementation,\(^\text{81}\) and measures of support based on political expedience rather than any clear minority language policy.\(^\text{82}\) Indeed, the ECRML has been manifested in the UK through the enactment of the Welsh Language Act 1993, the Welsh Language (Wales) Measure 2011 and the Gaelic Language (Scotland) Act 2005. Dunbar contends that these legislative measures have created few language ‘rights’ exercisable by individuals or communities, and do little to regulate language use outside of the public sector.\(^\text{83}\) Nonetheless, the ECRML is a treaty obligation for the UK, and it makes it clear that

\(^{80}\) ibid 107-8.
\(^{81}\) ibid 107.
\(^{82}\) ibid 125.
\(^{83}\) ibid.
the UK owes a special obligation to its autochthonous minority language communities and must take positive measures to protect and promote such languages.\textsuperscript{84} Sign languages are specifically excluded from the ECRML as article 2.1 notes that signatories have agreed to apply it to ‘all the regional or minority languages spoken within its territory,’ thus excluding sign languages. Indeed, this approach has been described as ‘fatal for the deaf’.\textsuperscript{85} Moreover, Krausneker argues that sign languages do not fit in with the ECRML due to erroneous information and misinterpretations,\textsuperscript{86} and sign languages are consequently excluded.\textsuperscript{87} The reason for this is because the two organisations that support and work for minority languages, funded by the European Commission’s Department of Education, the Mercator European Research Centre (Mercator) and the European Bureau for Lesser Used Languages (EBLUL), do not agree that sign languages are languages for the purposes of the ECRML.\textsuperscript{88} It seems that between 1998 and the present day, a process took place within the CoE that led to a basic change of position regarding the legal protection of sign languages.\textsuperscript{89} The CoE recommended in 2001\textsuperscript{90} that the Committee of Ministers should give various sign languages utilised in Europe a protection similar to that afforded by the ECRML, by means of adoption of a recommendation to member states.\textsuperscript{91} There was a further recommendation made in 2003,\textsuperscript{92} whereby the CoE

\textsuperscript{84} Dunbar (n 18) 107.
\textsuperscript{86} Krausneker (n 54).
\textsuperscript{87} Batterbury (n 10) 261.
\textsuperscript{88} Krausneker details personal communications with Mercator that confirms their position, and both Mercator and EBLUL’s online databases do not provide a single entry on sign languages, Krausneker (n 54).
\textsuperscript{89} ibid 8.
\textsuperscript{90} CoE, ‘Rights of national minorities’ (2001) Recommendation 1492.
\textsuperscript{91} ibid para 12.xiii.
The Committee only recognised the need for and recommended the creation of some legal tool to protect the sign languages of Europe, requiring either a new instrument or the addition of a protocol to the ECRML, giving sign languages equal status to their spoken counterparts. This recommendation also called for the national recognition of sign languages in all member states.\(^93\)

Nevertheless, it appears that no further action was taken by the Committee of Ministers in relation to Recommendations 1492 and 1598. In 2014, a motion for a resolution\(^{94}\) which acknowledged that the UN Convention of the Rights of Persons with Disabilities (CRPD) had recognised the importance of sign languages, recommended that the Assembly should revisit the issue of the right to use sign languages in Europe by way of a new analysis of national legislation and best practices to guarantee the right to use sign languages at national level.\(^{95}\) This was not discussed in the Assembly and committed only those who signed it.\(^{96}\) There was a further proposal for a resolution to make sign language one of Europe’s official languages,\(^{97}\) but again this was not discussed in the Assembly, and was only binding on those that signed it.\(^{98}\) Finally, Resolution 2247\(^99\) was adopted by the Parliamentary Assembly on 23 November 2018, which stated that the official recognition of sign languages can make all the difference in terms of access to education, public services, employment and participation in political life.\(^{100}\)

---

\(^{93}\) Krausneker (n 54) 11.
\(^{95}\) ibid.
\(^{96}\) ibid.
\(^{97}\) CoE, ‘Making sign language one of Europe’s official languages’ (2017) Doc 14330.
\(^{98}\) ibid.
\(^{100}\) ibid para 2.
The Committee of Members confirmed that it had considered Resolution 2247 on 21 May 2019 and has drawn the recommendation to the attention of member States and communicated it to the competent entities of the Council of Europe for information and possible comments.\textsuperscript{101} It concurs with the Parliamentary Assembly of the importance of sign languages as natural languages of deaf persons,\textsuperscript{102} and commits to setting up a working group on the status and protection of sign languages in CoE Member States with a view to the possible drafting of standards for the protection of sign languages.\textsuperscript{103} This is progress of a sort, and may eventually see the recognition of sign languages as equivalent to or at least on a par with the regional and minority languages the ECRML was designed to protect.

\subsection*{2.3 The United Nations’ approach}

The Vienna Declaration and Programme of Action\textsuperscript{104} of 1993 resulted in the UN Standard Rules for the Equalisation of Opportunities for Persons with Disabilities (Standard Rules).\textsuperscript{105} These Standard Rules represent a strong moral obligation and political commitment of governments to take appropriate action to ensure the equalisation of opportunities, with the ideal being full equalisation, participation and enjoyment of all human rights by persons with disabilities. Towards this goal, the Standard Rules specify accommodation models and rules for political decision making. There are two main rules that have particular relevance for deaf people. Firstly, Standard Rule 5 recommends the use of appropriate technologies to provide access to spoken information, and a consideration of providing sign language in the

\begin{footnote}
\textsuperscript{101} CoE, ‘Protecting and promoting sign languages in Europe’ (2019) Doc. 14892, [1].
\textsuperscript{102} ibid [2].
\textsuperscript{103} ibid [8].
\end{footnote}
education of deaf children in their families and communities, and finally provision of
sign language interpretation to facilitate deaf people’s communication with others.\textsuperscript{106}
Standard Rule 6 recommends that deaf students are provided with educational access
to various levels of education either in special residential or mainstream schools,
where the latter would necessitate interpreters and other appropriate support
services.\textsuperscript{107}

Subsequent to the adoption of the Standard Rules, the Salamanca Statement was
published by the UN Educational, Scientific and Cultural Organisation (UNESCO) and
Ministry of Education and Science of Spain at a conference in 1994, stating: ‘The
importance of sign language as a medium of communication among the deaf, for
example, should be recognised and provision made to ensure all deaf persons have
access to education in their national sign language.’\textsuperscript{108}

The next significant international instrument of note relating to sign languages is the
CRPD, which establishes a right to language, granting a deaf child a right to access
both a sign language and spoken or written language. Humphries et al argue that as
these instruments otherwise concern the transmission of information via language,
they therefore implicitly recognise the right to language,\textsuperscript{109} and in particular, deaf
people’s right to language. Further, Humphries et al elaborate that language is a
human necessity, not just for the equal protection of the individual, but for the benefit
of society as a whole, thus it is in everyone’s interests to protect the right to language,
and implement not just international treaties, but also the Brussels Declaration of the

\textsuperscript{106} Standard Rule 5(7).
\textsuperscript{107} Standard Rule 6(2).
\textsuperscript{108} UNESCO, ‘The Salamanca Statement and Framework for Action on Special Needs Education’
\textsuperscript{109} Humphries and others (n 21) 878.
EUD (see section 2.1) and the Human Rights Declaration of the World Federation of the Deaf.\textsuperscript{110}

This provides the context for the ensuing discussion regarding sign language recognition in the UK. This will entail a consideration of the likely impact sign language recognition would have on Deaf people’s equality by evaluating the impact the BSL (Scotland) Act 2015, the New Zealand Sign Language Act 2006, the Finnish Sign Language Act 2006 and the Irish Sign Language Act 2017 have had on achieving equality for Deaf people. What is interesting is that despite the obligations imposed by the aforementioned international instruments, the UK has to date not gone as far as to legally recognise BSL.

3 Legislative measures

Dunbar posits a strong argument in favour of legislative intervention where speakers of minority languages suffer discrimination based on their language, or, where their language is closely associated with ethnicity or national origins, discrimination based on ethnicity or national origins.\textsuperscript{111} McLeod further argues that language legislation has increasingly been recognised as an essential component of strategies to sustain minority languages, as it can play a key role in shaping institutional provision, which in turn may significantly enhance the status of the language. In short, legislation is now generally perceived as a necessary instrument in a wider programme of language revitalisation.\textsuperscript{112}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{110} ibid 882.
\item \textsuperscript{111} Dunbar (n 18) 185.
\item \textsuperscript{112} Wilson McLeod, ‘Securing the Status of Gaelic? Implementing the Gaelic Language (Scotland) Act 2005’ 57 Scottish Affairs 19, 20.
\end{itemize}
\end{footnotesize}
The efforts of members of communities to win legislative support for minority language services, broadcasting, and education have been based on a desire to participate in British society, without having to sacrifice their linguistic and cultural identity.\textsuperscript{113} Deaf people are no exception, and Batterbury goes as far to argue that formal legal recognition would give deaf people actionable rights, and would clarify the status of BSL as an indigenous minority language.\textsuperscript{114} Alas, in the UK, languages are located in a contested political space, where power struggles between the vested interests of dominant and subordinate language groups predominate, and ultimately, the deaf community’s capacity to achieve social and language justice depends on the power and authority they are able to muster.\textsuperscript{115} One has to only look at the cases of Welsh and Gaelic, and more recently, BSL in Scotland, to ascertain the extent to which the latter statement is true.

It is useful to make a distinction here between implicit and explicit legal recognition.\textsuperscript{116} Explicit recognition refers to legislation which recognises sign language as a language in dedicated language laws, perhaps even as an official language or official minority language.\textsuperscript{117} Implicit recognition refers to legislation that implicitly acknowledges sign language via other measures, such as disability access.\textsuperscript{118} This approach can be found in the EqA 2010, the Police and Criminal Evidence Act 1984, the Broadcasting Act 1996, and the Mental Capacity Act 2005, all of which mention BSL.

\textsuperscript{113} ibid 191.
\textsuperscript{114} Batterbury (n 7) 566.
\textsuperscript{115} ibid 559.
\textsuperscript{116} Maartje De Meulder and Joseph J Murray, ‘Buttering Their Bread on Both Sides? The recognition of sign languages and the aspirations of deaf communities’ (2017) 41 Language Problems and Language Planning 136, 139.
\textsuperscript{117} ibid.
\textsuperscript{118} ibid.
3.1 The status of BSL in the UK

In contrast to the efforts at international and European level, the law in the UK has been very slow to respond to its considerable linguistic diversity, with the result that British legislative activity with respect to minority languages has too frequently been ad hoc, driven by events and political pressure matters more rather than by principle. There has not yet emerged a clear policy with respect to linguistic minorities.119 The reason for this, argues Dunbar, is due to the historical legacy of the UK’s monolingualism, which any attempt to legislate for language must confront,120 as the UK remains an overwhelmingly English-speaking state, and one in which linguistics still tends to be viewed as a ‘problem’ which must be overcome rather than a resource which should be fostered.121 Instead, the UK’s minority policy consists of protecting minorities from discrimination based on minority group membership under the EqA 2010 and the non-discrimination provisions of the ECHR and the Human Rights Act 1998, and by criminalising acts which threaten members of minority groups such as the offence of inciting racial hatred 122 and the crime of racially-motivated harassment,123 demonstrating the lack of positive state support for their languages, and instead focusing on discrimination which is not generally a problem for speakers of autochthonous languages, that is, languages native to the UK.124 McLeod agrees with this, arguing that the number of cases of discrimination on the basis of language are low:

119 Dunbar (n 18) 95.
120 ibid 96.
121 ibid 99.
124 Dunbar (n 18) 104.
The relationship between Britain’s autochthonous languages communities -- principally the Welsh and Scottish Gaelic communities -- and the [EqA 2010] has received little attention, both because these communities rarely register on the horizon of those in Britain's urban core, and because there is no intuitive link between these groups and racial legislation.\textsuperscript{125}

Indeed, there are very few court cases dealing with language policies,\textsuperscript{126} with the three most cited cases being that of \textit{Dziedziak v Future Electronic Ltd},\textsuperscript{127} \textit{Jurga v Lavendale Montessori Ltd}\textsuperscript{128} and \textit{Kelly v Covance Laboratories Ltd},\textsuperscript{129} all of which arose from employer instructions to employees not to speak in their own language.

Perhaps the most interesting development for autochthonous minority language communities in the UK has been the creation of devolved government,\textsuperscript{130} which has led to the Welsh Language Act 1993, the Welsh Language (Wales) Measure 2011 and the Gaelic Language (Scotland) Act 2005, as well as the BSL (Scotland) Act 2015, which will be explored later. The reason for this, argues Dunbar, is that the devolved institutions generally have more parliamentary and committee time available, allowing the profile of languages to be significantly raised amongst parliamentarians, bureaucrats, journalists and the public.\textsuperscript{131} However, the approach of the devolved institutions has generally been reactive, and guided by no clear principles or policies,\textsuperscript{132} and measures of support from the institutions have been based on political

\begin{itemize}
\item \textsuperscript{126} Sean Walsh, 'Requirements to speak only English in the UK workplace: the law on foreign language policy and discrimination at work' (30 July 2018) <https://hjsolicitors.co.uk/article/foreign-language-and-discrimination-at-work/> accessed 18 July 2019.
\item \textsuperscript{127} (2012) UKEAT/0270/11, [2012] EqLR 543.
\item \textsuperscript{128} (2013) ET/3302379/12 and ET/3300884/13.
\item \textsuperscript{129} (2015) UKEAT/0186/15.
\item \textsuperscript{130} Dunbar (n 18) 105.
\item \textsuperscript{131} ibid 106.
\item \textsuperscript{132} ibid 125.
\end{itemize}
expedience. For example, there are a significant number of Welsh-speakers in Wales and a history of political activism with respect to language issues, leading to the most developed legislation and policy of all the devolved institutions. In Northern Ireland, language issues have been highly political ones, playing a role in the peace process for Ulster-Scots. In contrast, the Scots tongue continues to be neglected in Scotland. This is despite the existence of a number of European and international instruments that would allow the UK to develop a coherent language policy (as discussed in the previous section).

Deaf people in the UK have fought for years to have their language recognised, beginning in the 1970s with the National Union of the Deaf challenging the status quo, and continuing when the British Deaf Association (BDA) published a manifesto asking for BSL to be recognised in 1982, followed by the publication of the report, ‘BSL – Britain’s Fourth Language: the case for the official recognition for British Sign Language’ on 26 October 1987.

The BDA’s current campaigning activity is focused on achieving legal status for BSL as a Minority Language in the UK, and to that end they have produced a report entitled ‘Transforming Deaf People’s Lives’ which explores how they ‘can break the cycle of linguistic deprivation that exists amongst Deaf people.’ The paper also

133 ibid 125.
134 ibid 126.
135 ibid.
136 ibid.
states that research is needed as supporting evidence for campaigns on legal rights linked to BSL,\textsuperscript{141} and a Discussion Paper was produced in 2014 exploring the legal status of BSL.\textsuperscript{142} Legal recognition of sign language assures linguistic development and therefore allows equalisation of deaf people,\textsuperscript{143} and thus it is important that its status is given legal protection.

Academics exploring language policy in the UK have tended to distinguish sign languages from autochthonous languages, but De Meulder\textsuperscript{144} suggests otherwise, confirming that at the very least BSL is one of the UK’s autochthonous minority languages. The UK’s autochthonous languages thus include Scottish Gaelic, Welsh, Cornish, Irish and Manx, BSL and Irish Sign Language (as used in Northern Ireland). With regard to the indigenous languages, all of the spoken autochthonous languages aforementioned have increasingly gained solid official support,\textsuperscript{145} particularly as Gaelic and Welsh are protected by the Gaelic Language (Scotland) Act 2005 and the Welsh Language Act 1993 respectively, but recognition of the UK’s sign languages has yet to receive similar support. Walters suggests that the suppression or non-recognition of minority languages can have political and constitutional implications which prudent governments would not wish to disregard,\textsuperscript{146} and yet this has been the case with regard to BSL since the 1970s. An attempt will be made to ascertain why this has been the case, predict how BSL recognition could be legislated and how it could be implemented practicably, and also to anticipate what impact such recognition

\textsuperscript{141} ibid 24.
\textsuperscript{142} SCE Batterbury Magill, ‘Legal Status for BSL and ISL’ (1\textsuperscript{st} edn, British Deaf Association 2014).
\textsuperscript{143} Humphries and others (n 21) 881.
\textsuperscript{146} DB Walters, ‘The Legal Recognition and Protection of Language Pluralism’ (A Comparative Study with Special Reference to Belgium, Quebec and Wales (1978) Acta Juridica 305, 305.
would have for deaf people’s equality by evaluating the impact sign language recognition has had in other countries, namely Scotland and New Zealand.

Between 1987 and 1999, the BSL campaign was centred around the then European Economic Community’s support for the recognition of sign languages\(^{147}\) and the ECRML, which did not include sign languages, culminating in a series of marches for BSL organised by an autonomous and radical deaf grassroots organisation, the Federation of Deaf People (FDP).\(^{148}\) On 27 June 1999, 4,000 people marched for BSL through London; a summary of the aim of the march was as follows:

> We demand that the British Government fully and unconditionally accept BSL as a bona fide language, native to this land, with full access through it for all who wish to use it.\(^{149}\)

Further BSL marches followed in the summer of 2000 and 2001,\(^{150}\) and BSL was finally ‘recognised’ as an official language as a language in its own right on 18 March 2003 by the Government department, the Department of Work and Pensions (DWP).\(^{151}\) Nonetheless, it soon became apparent that this ‘recognition’ meant very little, as the DWP subsequently awarded just £1.5 million to various voluntary organisations for a programme of initiatives to support this ‘recognition’, and nothing else since.\(^{152}\) It is surmised that this ‘recognition’ had little impact because the Government merely worked through existing channels and contacts with voluntary

---


\(^{149}\) FDP, ‘Summary of the Rationale for the March on Sunday 27 June 1999: Demanding Recognition of Sign Language’ (The Voice, September 1999) 3; Lawson, McLean, O’Neill and Wilks (n 138) 69.

\(^{150}\) Stiles (n 147).

\(^{151}\) Ladd, Gulliver and Batterbury (n 9) 16.

\(^{152}\) Bryan (n 138).
organisations for deaf people, handing out a relatively small amount of funding, rather than negotiating and listening to deaf people's own organisations. The FDP thus responded with further marches in 2003 in London and Bradford to show dissatisfaction with the 'recognition' funding, which had gone to organisations which 'have had very little involvement in our campaign till now.'

The FDP disbanded in 2004, yet it was not until 2012 that the BDA took up the mantle for BSL recognition once more with a BSL Symposium, aiming to establish a BSL Alliance to which organisations interested in promoting BSL were invited to join and to begin the process of working together to achieve agreed objectives set out in the national BSL Strategy *Transforming Deaf People’s Lives.* The strategy aimed to ‘break the cycle of linguistic deprivation that exists amongst deaf people’ over the next 10 years. This initiative culminated in the launch of the report, *Legal Status for BSL and ISL,* on 18 March 2014. This was a discussion document commissioned as part of the BDA’s commitment to achieving legal status for BSL and ISL by outlining the extent to which deaf people are denied their civil rights and providing case studies that show how the UK’s EqA 2010 and other legislation do not work as intended.

The House of Lords Select Committee on the Equality Act 2010 and Disability has to all extents and purposes dismissed the need for a BSL Act. When referring to the BSL (Scotland) Act 2015, the Committee opined that ‘we wonder whether this very significant cost (the £6 million estimated for writing and reviewing plans under the Act) might not be better employed in directly training more BSL interpreters and increasing

---


155 BDA (n 140) 7.

156 Sarah CE Batterbury Magill, ‘Legal Status for BSL and ISL’ (BDA 2014).
their availability where they are needed,’\textsuperscript{157} further stating that the EqA 2010 covers BSL users because it imposes on service providers a legal obligation to make reasonable adjustments in communicating with them; and where BSL is their first or only language, those adjustments will very often be the provision of BSL interpreters.\textsuperscript{158} This, together with the Minister for Disabled People, Justin Tomlinson MP’s statement that the (Conservative) Government has no appetite to legally recognise BSL as a minority language,\textsuperscript{159} suggests that there would be much to do in order to achieve a UK-wide BSL Act. However, many political parties, apart from the ruling Conservative Party, have included BSL recognition in their manifestos,\textsuperscript{160} which at the very least suggests a commitment by these parties to work towards a BSL Act for the UK in the near future.

The Westminster All-Party Parliamentary Group on Deafness aims to promote the interests of people who are deaf or have a hearing loss and is an informal group that is run by Members of the House of Commons and House of Lords who meet to discuss current issues facing people who are deaf or have a hearing loss and decide upon actions to address these issues.\textsuperscript{161} This All Party Group has neglected the issue of a

\textsuperscript{158} ibid [242].
BSL Act to date,\textsuperscript{162} and the BDA is currently in discussions with Members of Parliament who have publicly demonstrated their support for BSL to set up an alternative All Party Group on BSL in order to drive forward the agenda for a UK-wide BSL Act.\textsuperscript{163}

De Meulder argues that one of the reasons why the UK does not advocate a BSL Act is because instead of a direct relationship of engagement between minority language associations and the Government, such as the ones for Gaelic and Welsh, Deaf sign language users in the UK have traditionally been represented by charities for deaf people.\textsuperscript{164} Many of these charities have a somewhat ambiguous relationship with and attitude to BSL with some even holding an explicit agenda supporting policies which may result in the future eradication of the BSL community, through biomedical research projects such as stem cell technologies,\textsuperscript{165} reported by the press to be a ‘cure’ for deafness.\textsuperscript{166}

3.2 BSL (Scotland) Act 2015

The BSL (Scotland) Act 2015 was passed on 17 September 2015, received Royal Assent on 22 October 2015 and signified a new era in the BSL campaign for legal recognition across the UK,\textsuperscript{167} and can be referred to as a direct attempt to cause ‘procedural change to affect policy,’ and to ‘influence behaviour changes in target actions.’\textsuperscript{168} While the EqA 2010 is not within the matters that have been devolved to the Scottish Parliament, general equality duties have been imposed on many UK

\textsuperscript{162} Conversation Damian Barry, Executive Director of the BDA and author (18 May 2019).
\textsuperscript{163} ibid.
\textsuperscript{164} De Meulder (n 12) 8.
\textsuperscript{165} ibid.
\textsuperscript{166} Jo Willey, “‘Cure’ for deafness found” (The Daily Express, 14 May 2010) <https://www.express.co.uk/news/uk/174974/Cure-for-deafness-found> accessed 18 July 2019.
\textsuperscript{167} Lawson, McLean, O’Neill and Wilks (n 138) 67.
\textsuperscript{168} Margaret E Keck and Kathryn Sikkink, Activists Beyond Borders (Cornell University Press 1998) 201.
devolved and regional authorities\textsuperscript{169} by way of Schedule 5, Part II of the Scotland Act 1998, which gives the power to the Scottish Parliament to impose duties on any office-holder in the Scottish administration or any Scottish public authority subject to the control of Scottish Parliament to ensure their functions are carried out with due regard to the principle of equality of opportunity for all people.\textsuperscript{170} These powers had been used previously to impose equality duties on relevant local authorities in relation to housing and other local government functions.\textsuperscript{171}

The BSL (Scotland) Act 2015 aims to promote the use and understanding of BSL\textsuperscript{172} and requires the Scottish executive to prepare and publish a national plan in relation to BSL,\textsuperscript{173} which is expected to set out the Scottish Government’s BSL strategy.\textsuperscript{174} It also requires listed authorities, defined as ‘any body or office-holder (other than the Scottish Ministers themselves) which is a Scottish public authority with mixed functions or no reserved functions’\textsuperscript{175} to prepare and publish their own BSL plans,\textsuperscript{176} setting out measures to be taken in relation to the use of BSL.\textsuperscript{177}

The first National Plan by the Scottish Ministers was published on 24 October 2017,\textsuperscript{178} pursuant to section 1(5) of the Act. There are ten long-term goals. These include making information and services across the Scottish public sector accessible to BSL users, giving families and carers with deaf children information about BSL and Deaf

\textsuperscript{169} Nicholas Bamforth, Maleika Malik and Colm O’Cinneide, Discrimination Law: Theory and Context (Sweet & Maxwell, 2008) 431.
\textsuperscript{170} ibid 431-2.
\textsuperscript{171} ibid 432.
\textsuperscript{172} BSL (Scotland) Act 2015, s 1(1).
\textsuperscript{173} BSL (Scotland) Act 2015, s 1(2).
\textsuperscript{174} BSL (Scotland) Act 2015, s 1(3)(a).
\textsuperscript{175} BSL (Scotland) Act 2015, s 7.
\textsuperscript{176} BSL (Scotland) Act 2015, s 2(1).
\textsuperscript{177} BSL (Scotland) Act 2015, s 2(2)(a).
culture and offering support to learn to sign with their child. Children who use BSL will be encouraged to reach their full potential at school and be supported in their transition to post-school education. BSL users will be supported to develop the skills required to become valued members of the Scottish workforce and have equal access to employment opportunities. They will also be given access to information and services to live active, healthy lives, and access to public transport, Scotland’s culture, leisure, sports and art facilities, and civil and criminal justice systems. Finally, BSL users will be afforded the opportunity to represent the people of Scotland as elected politicians at national and local level.\textsuperscript{179} Local plans from local authorities have been drawn up in 2018 following the publication of the National Plan.\textsuperscript{180}

It is argued that the BSL (Scotland) Act 2015 demonstrates the traditional characteristics of a public sector equality duty, as it imposes a duty on Scottish Ministers to publish national plans in relation to BSL, and on listed authorities\textsuperscript{181} to publish authority plans. Both Scottish Ministers and listed authorities are required to consult in preparing their respective plans.\textsuperscript{182} Given that the aim of the Act is to promote the use and understanding of BSL, it is argued that the BSL (Scotland) Act 2015 is the strongest example of transformative equality in the UK, thus this is arguably the first example of an attempt at introducing a measure of transformative equality, something O’Cinneide stated did not exist in the UK prior to 2015.\textsuperscript{183}

The difficulty in assessing the effectiveness of the BSL (Scotland) Act 2015 is that, as mentioned, it is still very much in its early stages, with the first local plans only just

\textsuperscript{179} ibid.
\textsuperscript{180} Lawson, McLean, O’Neill and Wilks (n 138) 77.
\textsuperscript{181} A list of authorities can be found in the Schedule, and includes councils, health boards, post-16 education bodies and the Scottish Courts and Tribunals Service among others.
\textsuperscript{182} BSL (Scotland) Act 2015, ss 1(9) and 2(5).
\textsuperscript{183} Colm O’Cinneide, ‘Equality: Current and Future Directions of Travel’ (The Equality Act 2010: five-years on, Chester, 2015).
drawn up, and the first progress report not due until 2020, within the three years beginning with the date on which the first national plan is published.\textsuperscript{184} Following the publication of the first progress report, which will set out the Scottish Government’s views about progress made in relation to the promotion, the facilitation of promotion of BSL,\textsuperscript{185} and the progress made by the relevant listed authorities,\textsuperscript{186} it will be possible to ascertain whether the BSL (Scotland) Act 2015 is, indeed, working.

The signs to date suggest that there is wide engagement by the listed authorities in the production of their BSL plans. Aberdeenshire Council’s local BSL plan includes key actions such as ensuring information and services across Aberdeenshire are accessible to BSL users, offering D/deaf or Deafblind children and their families the right information and support at the right time to engage with BSL, BSL users to have full access to the cultural life of Aberdeenshire and encouragement to share BSL and Deaf Culture with the people of Aberdeenshire, and to be fully involved in democratic and public life in Aberdeenshire.\textsuperscript{187} Likewise, the University of Edinburgh’s local plan has 54 action points which cover every area of the university’s work. In particular, they committed to employing a BSL Officer and a BSL Teacher, and plan to explore opening two programmes of initial teacher education to fluent BSL users, deaf and hearing as a contribution to raise standards in sign bilingual education for deaf children, and to allow BSL to be taught as a school language.\textsuperscript{188} Other listed authorities worked together to produce shared BSL plans, such as the Scottish

\textsuperscript{184} BSL (Scotland) Act 2015, s 4(3)(a).
\textsuperscript{185} BSL (Scotland) Act 2015, s 4(2)(a).
\textsuperscript{186} BSL (Scotland) Act 2015, s (4)(2)(b).
Borders Council, NHS Borders and Borders College,\textsuperscript{189} and North Lanarkshire Council, South Lanarkshire Council and NHS Lanarkshire.\textsuperscript{190} The official Facebook page for the BSL (Scotland) Act 2015 has details of most if not all the listed authorities’ BSL plan consultations.\textsuperscript{191}

Meanwhile, the Scottish deaf community continue to complain of inequalities. A council cancelled their contracted BSL interpreter, citing lack of funding,\textsuperscript{192} and Lothian Deaf Counselling Service – the only one of its kind in Scotland – was closed by NHS Lothian after 10 years on 31 May 2018 without making alternative arrangements for its deaf patients and any new referrals.\textsuperscript{193} In addition, there are concerns that the general response to the BSL (Scotland) Act 2015 by the listed authorities is to provide access to services in BSL through the use of third-party BSL/English Interpreters, rather than directly in BSL.\textsuperscript{194}

De Meulder suggests that the BSL (Scotland) Act 2015 is reminiscent of other sign language acts in that they often give the impression that recognising a sign language primarily means providing more interpreters.\textsuperscript{195} While access to the majority of society is indeed an important aim of sign language recognition, the initial aspirations were not about interpreters in the first place, but about education and language acquisition

\textsuperscript{190} NHS Lanarkshire, ‘North Lanarkshire Council, South Lanarkshire Council & NHS Lanarkshire holding consultation on draft Shared BSL Plan’ (Twitter, 8 June 2018) <https://twitter.com/NHSLanarkshire/status/1005075619632287744> accessed 25 August 2018.
\textsuperscript{192} Fiona Stewart, ‘Council cancels their contracted #BSL interpreter’ (Twitter, 18 July 2018) <https://twitter.com/Mynameisnotfifi/status/10195944736874367312> accessed 25 August 2018.
\textsuperscript{194} ibid.
\textsuperscript{195} De Meulder (n 12) 6.
rights for deaf children. As such, the Act has significant weaknesses, including the absence of enforceable rights, the representation imbalance during the negotiation process,\textsuperscript{196} the perception of BSL as a tool to access public services, the question of who is benefitting from recognition, the absence of educational linguistic rights and cultural rights,\textsuperscript{197} and the omission of a statutory BSL board.\textsuperscript{198}

As it is not yet possible to ascertain the effectiveness of the BSL (Scotland) Act 2015, it is necessary to look to other legal jurisdictions where national sign languages have been recognised in a similar fashion to Scotland and the first progress review has been completed. New Zealand enacted the New Zealand Sign Language Act in 2006, and the first progress review was completed in September 2011. It is also possible to look at the Finnish Sign Language Act 2006, often regarded as a model for sign language legislation, and the Irish Sign Language Act, which was passed in December 2017.

### 3.3 New Zealand Sign Language Act 2006

The New Zealand Sign Language Act 2006 (NZSL Act 2006) received Royal Assent on 10 April 2006, and aims to promote and maintain the use of NSZL\textsuperscript{199} by declaring NZSL to be an official language of New Zealand,\textsuperscript{200} providing for the use of NZSL in legal proceedings,\textsuperscript{201} empowering the making of regulations setting competency standards for the interpretation in legal proceedings of NZSL\textsuperscript{202} and stating principles.

\textsuperscript{196} De Meulder argues that with the absence of a well-organised Deaf grassroots movement during the development of the bill, one wonders whose recognition this effectively is: that of the people who own the language and identify with it, or that of the service providers who purport to represent them. ibid 7.

\textsuperscript{197} De Meulder (n 14) 447.

\textsuperscript{198} ibid 464.

\textsuperscript{199} NZSL Act 2006, s 3.

\textsuperscript{200} NZSL Act 2006, s 3(a).

\textsuperscript{201} NZSL Act 2006, s 3(b).

\textsuperscript{202} NZSL Act 2006, s 3(c).
to guide government departments in the promotion and use of NZSL. McKee argues that the motivation behind the NZSL Act 2006 and its provisions was a need to clarify the status of NZSL and its users as existing legislation did not explicitly afford protection from discrimination on the grounds of language. Language rights are generally regarded to be part and parcel of race, ethnicity or national origin, but for deaf people in New Zealand, the right to communicate in sign language is only available under the ground of disability. Thus, the NZSL Act 2006 aims to alter this status quo by identifying NZSL users as a class of people entitled to interpreting provision alongside Māori speakers, and by requiring that interpreters be competent.

Immediately, it is clear that there are some marked differences between the NZSL Act 2006 and the BSL (Scotland) Act 2015, whereby the NZSL Act 2006 declares that NZSL is an official language, and the BSL (Scotland) Act 2015 does not. In addition, the NZSL Act 2006 expressly mentions the use of NZSL in legal proceedings, competency standards for interpretation in such proceedings and also expects government departments to promote and use NZSL. The BSL (Scotland) Act 2015 does not, although the Scottish Government has to produce a national plan, and the Scottish Courts and Tribunal Service is one of the authorities listed in the schedule to the BSL (Scotland) Act 2015 and has to prepare and publish a local BSL plan. In terms of similarity, both Acts do require the Government to review progress, although

---

203 NZSL Act 2006, s 3(d).
205 ibid.
the BSL (Scotland) Act 2015 specifies that this is to be carried out every six years, whereas the NZSL Act 2006 states that this should be done from ‘time to time.’ Generally, the NZSL Act 2006 is regarded to have achieved an important outcome: introducing a cultural-linguistic perspective on the deaf community into the public discourse of social policy, to counterbalance the prevailing medicalised view. This is why such legislation is regarded to be transformative. It has been established in Chapter 2 that the Deaf Legal Dilemma has come about because of the prevailing notion within the dominant culture that deaf people first and foremost have a medical condition, and that transformative legislation is required in order to challenge the dominant view of deaf people in order to combat their inequalities. In addition, the NZSL Act 2006 has increased the deaf community’s sense of political agency, providing moral leverage for engaging in rights-based lobbying for improved access to various domains of life. It is expected that the same will be true of BSL users in Scotland as a result of the BSL (Scotland) Act 2015.

Although the recognition of New Zealand Sign Language (NZSL) is still regarded as too recent to have had significant impact on the many inequalities deaf people face on a daily basis, a review of the NZSL Act 2006 was published in September 2011, confirming that ‘recognition as an official language ha[d] given the Deaf community more pride and confidence’ and ‘appears to have increased interest in NZSL in the hearing community, and that more people are learning and using NZSL.’ However,
there remain some issues, including lack of awareness of NZSL as a real language and one of New Zealand’s official languages,\textsuperscript{213} sporadic inclusion of NZSL at official events\textsuperscript{214} and a lack of active implementation by government departments.\textsuperscript{215} Indeed, the review goes as far as to suggest that government departments in general have provided negligible information in NZSL, in disregard of the principles of the Act.\textsuperscript{216}

However, the review concludes that while the NZSL Act 2006 is not functioning as well as it might, it considers that this may be the result of poor practice rather than being attributable to the Act itself,\textsuperscript{217} and that promoting best practice, and closer monitoring of implementation activities, is an appropriate way to address many of the issues identified by submitters.\textsuperscript{218} In short, it appears that the NZSL Act 2006 is not having its desired effect. Whether it ever will, remains to be seen.

When compared to the UK, New Zealand’s approach to sign language appears to be more forward-thinking, despite New Zealand traditionally operating according to a ‘dualist’ model of international treaty incorporation, meaning that international treaties are not directly enforceable in domestic courts unless parliament has enacted specific legislation to give the relevant treaty domestic force of law,\textsuperscript{219} in much the same way as the UK.

\textsuperscript{213} ibid.
\textsuperscript{214} ibid.
\textsuperscript{215} ibid 14.
\textsuperscript{216} Office for Disability Issues (n 211) 16.
\textsuperscript{217} ibid 24.
\textsuperscript{218} ibid 26.
3.4 Finnish Sign Language Act 2006

Finland is considered to be a leader in sign language user rights.\(^{220}\) It was the first European country to mention sign language in its constitution: ‘The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act.’\(^{221}\)

On 12 March 2005, the Finnish Parliament unanimously voted in favour of the Sign Language Act, which contains five different articles,\(^{222}\) the first providing definitions of ‘sign language’ and ‘signer.’ Article 2 states that the Act’s purpose is to promote the realisation of the linguistic rights of signers, whereas article 3 states that authorities must promote signers with opportunities to use and receive information in their own language. Article 4 sets out signers’ rights to receive teaching in their own language and to learn sign language as a subject, and the right to use sign language or interpretation and translation arranged by an authority, while article 5 merely confirms when the Act is to enter force. The Act does not create any new rights, but rather aims to promote the linguistic rights signers already have, in practice, and clarifies their status as a language and cultural group.\(^{223}\)

The Finnish Sign Language Act 2006 (FSLA 2006) is considered to be one of the most effective pieces or examples of sign language legislation,\(^{224}\) as it confers the rights of individuals to special legislation, covering education, health care, social care, the

---


\(^{221}\) Wheatley and Pabsch (n 50) 58.

\(^{222}\) Maartje De Meulder, ‘Promotion in Times of Endangerment: the Sign Language Act in Finland’ (2016) 16(2) Language Policy 189, 197.


\(^{224}\) Maartje De Meulder, ‘Q&A Session’ (Deaf Studies Conference, University of Wolverhampton, February 2019).
judiciary and broadcasting, whereas the primary legislation focuses on authorities’ duties. Its provisions are not linked to hearing status, and Finland so far is the only country in the world that has explicitly recognised its national sign languages in both the constitution and in language legislation, and implicitly recognised them in special legislation covering a range of areas. However, the Finnish Deaf Association maintains that ‘constitutional recognition has not sufficiently guaranteed the realisation of linguistic rights in practice.’

Theorists generally agree that the position of minority languages is most effectively strengthened when areas of activity are jointly planned, as is the case in Finland, where the Finnish Language Board co-ordinates such activity. The Finnish Language Board is a regulatory body that holds a statutory mandate to oversee language planning and decisions on language usage issues. The Language Planning Department of the Research Institute for the Languages of Finland (also known as the Finnish Language Office) is responsible for regulating current Finnish usage and implementing planning for minority languages (such as Swedish, Saami, Romany and Finnish Sign Language). Each of these languages has its own expert and a statutory Language Board, which issues decisions-in-principle and guidelines on standard usage within each linguistic community. There is no such equivalent in Scotland and New Zealand, nor in Ireland.

---

225 De Meulder (n 222) 198.
226 ibid 199.
227 ibid 203.
229 Reffell and McKee (n 220) 285.
230 ibid.
231 ibid.
3.5 Irish Sign Language Act 2017

The Irish Sign Language Act 2017 (ISL Act 2017) was signed into law on 24 December 2017.\textsuperscript{232} It contains 11 sections covering the recognition of Irish Sign Language (ISL) and the right to use it,\textsuperscript{233} ISL users’ statutory rights to access public services,\textsuperscript{234} the setting up of an accreditation and registration scheme for ISL interpreters\textsuperscript{235} and children’s rights in education.\textsuperscript{236} The Act also provides for the use of ISL in legal proceedings,\textsuperscript{237} and a review of the Act within three years and every five years subsequently.\textsuperscript{238} Bosco Conama states that such a review mechanism is largely absent in most sign language legislation, with the exception of the BSL (Scotland) Act 2015.\textsuperscript{239} It also contains provisions for broadcasting and events,\textsuperscript{240} services and activities.\textsuperscript{241} Alas, it is still too early to assess the actual impact of the Act on current national language policies,\textsuperscript{242} but when compared to the BSL (Scotland) Act 2015, the fact that the ISL Act 2017 expressly refers to a registration scheme for ISL interpreters, provides for children’s rights in education, and expressly covers events, services and activities, suggests that it is wider in scope and coverage.

4 Criticisms of sign language recognition

In order to assess whether sign language recognition is transformative equality in action, it is necessary to consider its flaws, and there are a number of issues with

\textsuperscript{232} John Bosco Conama, "Ah, That’s Not Necessary, You Can Read English Instead’: An Analysis of State Language Policy Concerning Irish Sign Language and Its Effects’ in De Meulder, Murray and McKee (n 1) 19.  
\textsuperscript{233} ISL Act 2017, s 3(1).  
\textsuperscript{234} ISL Act 2017, s 3(1).  
\textsuperscript{235} ISL Act 2017, s 7.  
\textsuperscript{236} ISL Act 2017, s 5.  
\textsuperscript{237} ISL Act 2017, s 4.  
\textsuperscript{238} ISL Act 2017, s 10(1).  
\textsuperscript{239} Bosco Conama (n 232) 26.  
\textsuperscript{240} ISL Act 2017, s 8.  
\textsuperscript{241} ISL Act 2017, s 9.  
\textsuperscript{242} Bosco Conama (n 232) 19.
regard to sign language recognition. De Meulder and Murray outline six challenges to sign language legislation: firstly, there may be a disparity between the Deaf community’s expectations and the government’s intentions during the drafting of the law. Secondly, there may be a lack of implementing legislation for constitutional recognition, that is, it may be that a constitution recognises sign language, but unless there is enabling legislation, it is unlikely to have any particular effect. Thirdly, a lack of implementation funding, mechanisms and provision for the ongoing maintenance of rights secured by law may result in inaction with regard to the implementation of any such legislation. Fourthly, an initial allocation of funds may be made that does not correspond with the Deaf community’s expectations, as transpired in the UK in 2003. Fifthly, governments may not make a sufficiently substantial commitment to financial resources to change government practices or to promote greater inclusion of sign language in public life. Finally, there may be challenges associated with the constitution and functioning of sign language bodies, such as the Finnish Language Board.

A view of SLPs from a medical perspective has led to confusion about the meaning of linguistic rights for them and has led governments to treat sign language planning differently than that for spoken languages. BSL signers are the only group whose first language is not English who must rely on disability discrimination legislation to secure access to services in their own language. This is caused by deaf people’s dual category status as both a linguistic minority and a disabled group, and also to the

243 De Meulder and Murray (n 116) 144.  
244 ibid.  
245 ibid.  
246 ibid.  
247 ibid.  
248 ibid.  
249 ibid 136.  
250 De Meulder (n 14) 1.
‘deficit frame,’ whereupon policies towards SLPs envisage them only as persons with disabilities, a concept that is discussed in more detail in Chapter 2. De Meulder and Murray argue that it is this deficit frame that has led to ‘misunderstandings, myths and devaluing ideologies about sign languages,’ which are then (consciously or unconsciously) used to deny them legal status. They refer to the limitations of the ECRML outlined above, and the CoE’s Resolution 2247 provides a further example, as it refers to sign language as ‘the natural languages of millions of deaf people worldwide,’ a ‘means of communication,’ and as a ‘vehicle for ensuring inclusion.’ It is unlikely that the CoE would ever discuss other minority languages in those terms.

Conversely, the BSL (Scotland) Act 2015 suggests that the public authorities should consult with ‘persons who represent users of BSL,’ which would be inconceivable for other minority languages and is reminiscent of the dominant culture view that deaf people need help and support as disabled people. The NZSL Act 2006 also guarantees access to the majority spoken language, invoking both disability rights and language rights.

In the same vein, most sign language legislation presupposes that there will be interpreters or that they have to be made available, and the provision of such interpreters seems to be perceived as a more logical and achievable option than, say, providing mainstream society with the opportunities to learn sign language. De Meulder argues that there might be several reasons why linguistic rights are primarily understood, and sustained, as having access to services through interpreters, with the

251 De Meulder and Murray (n 116) 141.
252 ibid 143.
254 BSL (Scotland) Act 2015, s 1(11)(b).
255 De Meulder and Murray (n 116) 142.
256 ibid 142.
257 De Meulder (n 12) 10-11.
predominant reasons being that of the dual category status of deaf people. This means that the categorisation of deaf people as disabled persons in public policy will usually be manifested in a right to interpreting services,\textsuperscript{258} suggesting substantive equality is at play. An example of how deaf people’s dual category status influenced the passage of the BSL (Scotland) Bill at Committee stage is that even though the Committee stated on several occasions that they wanted to treat BSL signers the same as any other language minority group in Scotland, in practice they did not always do that and also justified the legislation on deaf people’s perceived monolingualism in BSL.\textsuperscript{259} This is in stark contrast to Gaelic speakers’ efforts for legislative support, which were based on the promotion of difference-aware equality, ‘a desire to participate in British society, without having to sacrifice completely their linguistic and cultural identity.’\textsuperscript{260} This desire was manifested in Gaelic speakers’ right to access services in Gaelic, which entails access to services where frontline staff are competent in Gaelic; not access to services with an English-Gaelic interpreter.\textsuperscript{261} While Deaf sign language users justify the need for legislation on the same basis as other minority languages, these justifications seem not to be fully understood by policy makers and academics.\textsuperscript{262}

Political participation is hindered by recognition being offered by governments without substantial commitments to financial resources, changes in government practices or greater inclusion of sign languages in public life.\textsuperscript{263} For example, the empowerment of the Scottish Deaf community by way of the BSL (Scotland) Act 2015 has been met

\textsuperscript{258} ibid 11.
\textsuperscript{259} ibid 12.
\textsuperscript{260} ibid.
\textsuperscript{261} De Meulder and Murray (n 116) 142.
\textsuperscript{262} De Meulder (n 12) 13.
\textsuperscript{263} ibid.
with uncertainty and confusion, inasmuch as deaf people are unsure how to respond to consultations and rather than being empowered to suggest ways in which the public authorities can change their practices, tend to revert to criticism of the same public authorities regarding historical issues.\textsuperscript{264}

Finally, the development of the BSL (Scotland) Act 2015 further demonstrates Bryan and Emery’s point that the law, while giving deaf people protection and rights, can still be used by the dominant group to prescribe how and on what terms deaf people should engage with hearing society.\textsuperscript{265} However, De Meulder argues that the BSL (Scotland) Act 2015 did open up a space within the Scottish Parliament and changed the terms of engagement between Deaf sign language users and Scottish public policy and society.\textsuperscript{266}

5 Conclusion

Sign language legislation and the argument for sign language rights are clearly subject to a very particular set of discourses, as outlined in Chapter 2, which subject them to a degree of scrutiny not experienced by discourses for spoken minority language rights and legislation, which points to the political and societal contexts in which sign languages and Deaf sign language users operate.\textsuperscript{267} It is these discourses that have had a significant role in the enactment and implementation of sign language recognition, what De Meulder and Murray refer to as the dual category status of Deaf people as both a linguistic minority and a disabled group, and the deficit frame, whereby these Deaf people are viewed as a disabled group.

\textsuperscript{265} De Meulder (n 12) 15.
\textsuperscript{266} ibid.
\textsuperscript{267} De Meulder (n 12) 14.
By way of comparison, Nagy sets out the steps of a process which will allow a model of linguistic legislation, reflecting the view that the historical tradition of monolingualism has been slowly shifting towards acceptance of linguistic diversity: starting with the prohibition of minority languages and the expansion of an exclusive state language, followed by the giving of partial concessions in various domains of language use (implicit recognition), and then explicit recognition in the introduction of legal regulations on the use of minority languages.268 The state may then ensure language rights for minority speakers by allowing such rights to be enforceable, and then active state support for the promotion of the use of minority languages. It has been established in this chapter that these steps have not always been followed for sign language legislation.

This chapter set out to explore the right to language and how this right is applied by the EU, the Council of Europe and the United Nations. There are various documents and initiatives at European level that aim to safeguard the rights of Deaf people, ranging from resolutions to reports and parliamentary recommendations. Perhaps the most significant of these is the European Parliament’s Resolution on Sign Languages and Professional Sign Language Interpreters,269 adopted by the European Parliament on 23 November 2016, as it recognises the need for qualified and professional sign language interpreters, and that this need can only be met by the official recognition of national and regional sign language(s) in Member States and within EU institutions.270 Nonetheless, it would appear that sign language rights at EU level are mainly enshrined in soft law.

269 2016/2952 (RSP).
270 ibid [1].
The CoE’s position is similar, except for the existence of the ECRML, which makes it clear that the UK owes special obligations to its autochthonous minority language communities and it is obliged to take positive measures both to protect and promote such languages.\textsuperscript{271} The issue with the ECRML is that the CoE bodies associated with it are resolutely clear that ‘regional and minority languages’ do not include sign languages. However, with the Committee of Ministers’ consideration of Resolution 2247, it has committed to setting up a working group on the status and protection of sign languages in CoE Member States with a view to the possible drafting of standards for the protection of sign languages;\textsuperscript{272} it appears that progress for sign language rights may be made at CoE level.

Finally, at UN level, the CRPD establishes a clear right to language in respect of sign languages within its provisions, but the deficiencies of the enforcement mechanisms were well documented in Chapter 3.

It has been made clear throughout this chapter that there is little if any legislative support for other linguistic minorities in the UK, and this lacuna is difficult to justify.\textsuperscript{273} Instead, there is a tendency to limit legislative support to certain linguistic minorities in the UK, such as Gaels and Welsh-speakers; this raises further problems, because it is difficult to see why the same principles could not be applied in respect of members of other linguistic minorities.\textsuperscript{274} Nonetheless, there is an increasing tendency for some public bodies in the UK to offer minority language and other interpreting services to such persons. There is, at present, no legal framework which guarantees this, with the result that the linguistic needs of persons who have an inadequate command of

\textsuperscript{271} Dunbar (n 18) 107.
\textsuperscript{272} ibid [8].
\textsuperscript{273} Dunbar (n 18) 198.
\textsuperscript{274} ibid 192.
English and users of sign languages are simply not being met in a comprehensive and equitable manner.

Furthermore, many of the arguments in support of legislative provision for the autochthonous minority languages, such as the provision of substantive equality and the promotion of cultural diversity, are relevant to the question of support for speakers of community languages and users of sign languages. So, while the UK has taken positive steps with regard to Gaelic and Welsh, there is a clear argument for a much more comprehensive approach to minority language communities more generally, and more specifically, a need for a national policy relating to languages in the UK, akin to the Finnish model, encompassing different languages, different phases of language learning, and teacher education and supply, which is enabling and flexible.

Muhlke argues that in order to shift the discussion about the importance of sign language for deaf persons from a special needs to a human rights perspective, the international community should issue a declaration on the necessity of language and linguistic development for the enjoyment of human rights in general and on its special significance for deaf persons. Such a declaration could not only become a much-needed model for national legislation in this field, but could also bring deaf persons a step closer to the equal enjoyment of their human rights. It remains to be seen whether the CoE will produce such a declaration. The other option, proffered by De Meulder, is an international convention on SLPs’ rights. She argues that comparisons could be made with the International Labour Organisation’s Convention

---

275 ibid 198.
277 Muhlke (n 4) 761.
278 ibid 762.
Concerning Indigenous and Tribal Peoples\textsuperscript{280} and the UN Declaration on the Rights of Indigenous Peoples.\textsuperscript{281} An SLP convention or declaration on the rights of SLPs would go beyond mere linguistic recognition and entail important aspects of cultural recognition as well, including group rights, and could very well influence the further existence and health of future SLPs’ communities.\textsuperscript{282} Whether this will ever happen remains to be seen.

\textsuperscript{280} Convention concerning Indigenous and Tribal Peoples in Independent Countries. 76th ILC Session (27 June 1989) No. 169.
\textsuperscript{282} De Meulder (n 279) 170.
CHAPTER 6 - CONCLUSION

1 Introduction

Upon first glance of this thesis, some may say: ‘why should deaf people be treated differently to other disabled people? What is so special about deaf people that warrants a doctoral thesis dedicated to their social advancement and equality’? These are pertinent questions to ask, particularly as society perceives deaf people as disabled first and foremost, simply because they have lost a vital sense: hearing. Society’s response to the existence of such disabled people has generally been for Government and the legislature to ensure that they are ‘looked after,’ predominantly through the social welfare system.

Following the advancement of the Disability Rights Movement in the 1980s and 1990s, however, the rights of disabled people were brought to the attention of Parliament and eventually resulted in the enactment of the Disability Discrimination Act 1995 (DDA 1995), which provided disabled people with protection from disability discrimination for the first time. Deaf people, of course, were involved in the Disability Rights Movement, and so they too, found themselves falling within the auspices of the DDA 1995. With the amalgamation of all anti-discrimination legislation into the Equality Act 2010, this status quo for deaf people continued.

Alongside developments in disability rights, not only in the UK but also at European and international level, the field of Deaf Studies also took on a momentum of its own, and in particular, Deaf identity attracted significant academic attention. It gradually became clear that – as deaf people continued to experience inequality, as outlined in
Chapter One – that being part of the Disabled Rights Movement was not garnering the desired results, with the stumbling block being that many deaf people with a Deaf identity considered themselves to be part of a culturo-linguistic minority, rather than disabled. Perhaps then, the 'deaf are disabled' ideology was doing more harm than good, or at the very least was reinforcing the status quo in how deaf people were to be treated by society? This quandary gave rise to the questions: what is the status of Deaf people as a culturo-linguistic minority in international, European and domestic equality law? How effective are such laws in addressing their inequality? What impact does or would sign language recognition have in achieving equality for deaf people?

In order to prove the hypothesis of this thesis – namely that deaf people continue to experience inequality because they have been solely labelled as ‘disabled’ – the starting point for Chapter Two was to explore hearing, disabled and Deaf discourses and explore the various modalities within which members of the Disabled-World and Deaf-World may fall into or identify themselves with. The purpose of this was to establish exactly why being labelled ‘disabled’ simply does not compute for some deaf people, which is referred to as the Deaf Legal Dilemma. This was followed by an exploration of what is equality is in Chapter Three, a considerable undertaking as the word ‘equality’ is replete with numerous definitions and interpretations, in order to identify the Deaf Equality Concepts, that is, the concepts of equality that are most relevant to deaf people. In the process, a standard of measurement from which it is possible to evaluate the efficacy of equality law was developed, namely the precepts of formal, substantive and transformative equality. Transformative equality appears to be the precept most likely to achieve the type of equality that deaf people aspire to.
A detailed exploration of equality law ensued in Chapter Four, which attempted to achieve three things. Firstly, an assessment of which elements of international, European and UK equality law marry with the concepts of equality of opportunity, equal worth, dignity and identity and social inclusion. Secondly, which precept of equality each of these equality laws epitomise. Thirdly, how discrimination claims by deaf people have been dealt with, and what issues arose from these cases, or, in the absence of any relevant case law, what the likely issues would be. The purpose of this chapter was to establish clearly that the relationship between equality law and deaf people is not entirely harmonious.

In Chapter Five, a solution to the Deaf Legal Dilemma – and the issues raised in Chapter Four – was offered, that of sign language recognition. Following a consideration of the right to language from the perspective of the European Union, the Council of Europe and the United Nations, attention was then given to the status of British Sign Language in the UK, and an exploration of legislative measures relating to sign language in Scotland, New Zealand, Finland and Ireland.

In this final chapter, a summary of the entire work is presented, with an abridgment of the key findings throughout, and future work discussed, in conclusion of this thesis.

2 Key findings

2.1 The Deaf Legal Dilemma

Chapter Two began with a consideration of discourses relevant to the present debate: whether deaf people are disabled or not. This involved an exploration of what is termed hearing discourse, which is essentially the prevalent knowledge within the dominant culture, that is, hearing people. This exploration also included, in the context
of disability, non-disabled people, including normalisation theory, which explains why ‘normal’ people tend to think of deaf and disabled people as ‘not normal’ or damaged. It is this discourse that has largely dominated the treatment of deaf and disabled people, and it was not until the Disability Rights Movement gained momentum during the 1980s and 1990s that disabled people’s rights not to be discriminated against on the basis of their disability was recognised. An in-depth examination of what constitutes Deaf discourse followed, which was necessary as such discourse is not widely known.

By way of conclusion of a definition of Deaf identity, it would appear that Deaf discourse is gravitating in a direction that considers that Deaf identity is one of a multitude of identities that exist within any single deaf individual. To reiterate this point, the author identifies himself as being Deaf, deaf, disabled, White British, Welsh, a Newportonian, a husband, a father, a lawyer, a lecturer and an academic. To all extents and purposes, the majority of these identities are protected to some degree or other. For instance, the deaf, disabled, White British, Welsh and marital status identities are covered as protected characteristics by the EqA 2010, and the father, lawyer, lecturer and academic identities are protected under the auspices of employment law. What is missing, is legal protection as a Deaf person.

Thus, it is this identity that creates the Deaf Legal Dilemma, as Deaf individuals who consider themselves to be part of the Deaf community, a culturo-linguistic minority and/or sign language person, part of SLPs, are not currently recognised as such by equality law, at least in the UK. Thus, in order to seek legal protections or benefits, Deaf individuals have to adhere to a disability label, with all it entails and with its associated meanings, which are often anathema to what makes up Deaf identity.
The remainder of Chapter 2 explores the different models that make up the Disabled- and Deaf-Worlds, in order to ascertain how some of these models, which provide categories within which Deaf people can be placed, contribute to the Deaf Legal Dilemma, and whether any provide a viable alternative in order to address the Deaf Legal Dilemma. These include the medical or individual model of disability, the social model of disability, the minority group model of disability, and the cultural model of disability. It has been made clear that the medical and social models of disability are what initiate and exacerbate the Deaf Legal Dilemma.

Within the Deaf-World section, three models have been considered: the culturo-linguistic model, SLPs, and the ethnic group model. The culturo-linguistic model clearly sets out why the label of disability is so alien to the Deaf community, affirming the Deaf Legal Dilemma and the need to resolve this conflict. The concept of SLPs appears to be less an extension of the culturo-linguistic model but rather a narrower focus on a specific aspect (that is, language) which does not take account of the broader cultural aspects of the Deaf community, and indeed has one fundamental flaw: it also includes hearing sign language users. Finally, the ethnic group model appears to be a viable solution to the Deaf Legal Dilemma, based on the ethnic origin provisions of the EqA 2010, which form part of the protected characteristic of race, but as yet remains an untested theory.

2.2 The Deaf Equality Concepts

During the course of Chapter Three, a wide range of concepts of equality were narrowed down according to which are more prevalent within Deaf discourse as well as equality discourse. Following a categorisation exercise of these concepts into precepts or emerging rocks of certainty, underpinned by various theories of justice,
there was then a critique of the main features of each concept, with the ultimate aim of ascertaining which of these different analyses of equality may be suited to the Deaf-World,¹ or specifically, likely to resolve the Deaf Legal Dilemma explained at length in Chapter Two.

In order to undertake the challenging task of examining the relevant theoretical perspectives of equality law, a precept methodology was utilised, whereby formal, substantive and transformative equality were used as the three main categories of equality law, within which concepts of equality - that have been identified as relevant analyses to the Deaf-World – were found to be more closely aligned to some precepts more than others.

Thus, the precept of formal equality considered the concepts of equal treatment and equality of opportunity, whereas under the precept of substantive equality, respect for equal worth, dignity and identity and equality of results were considered. Finally, the consideration of transformative equality included an examination of social inclusion, challenging oppression and full participation. As we have seen, some interpretations of the concepts have inevitably intersected across two or more precepts; such is the nature of equality discourse.

It can be asserted with some degree of certainty that the following analyses of equality have some use in resolving the Deaf Legal Dilemma: equality of opportunity, respect for equal worth, dignity and identity, social inclusion and challenging oppression. The remainder, that is, prohibiting conduct and equality of results, do not appear to have

¹ Lucy Vickers, 'Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief' (2011) 31(1) Legal Studies 135, 152.
any relevance to the Deaf Legal Dilemma, or at the very least, are too weak or flawed to the extent that they would serve no purpose in this context.

Finally, it is concluded that transformative equality is the precept of equality that is not as prevalent in equality law as formal and substantive equality is, but it is clear that there is scope within the EqA 2010 by way of its public sector equality duty, and in the Convention of the Rights of Persons with Disabilities, for a transformative approach to be taken in order to reduce or eradicate inequalities, particularly for deaf people.

2.3 How equality law works for Deaf people

An attempt is made in Chapter Four to apply the Deaf Equality Concepts to the UDHR, ECHR, EqA 2010 and CRPD. Throughout this chapter, by establishing how deaf people fit within the auspices of equality law, it has been made clear that deaf people are deprived of their opportunities due to being grouped into the ‘disabled’ collective. It has been established that the ability of deaf people to challenge the oppression they experience (as outlined in Chapter One) is severely restricted to varying degrees with regard to the EqA 2010, the UDHR, the CRPD and the ECHR.

On the whole, there is more scope available to challenge oppression within the EqA 2010, as Deaf individuals can expect employers and service providers to implement adjustments in order to remove any substantial disadvantage experienced as a result of an arrangement imposed, and the duty is more likely than not to be triggered. However, there is a clear divide with regard to the nature of the adjustments, that is, single, one-off adjustments with respect of a provision, criterion, practice or physical feature, are more likely to be considered reasonable than recurrent adjustments to address the lack of an auxiliary aid, which is the type of adjustment that Deaf people will need, usually in the form of communication professionals such as British Sign
Language (BSL)/English interpreters, lipspeakers or Palantypists. Thus there is clearly equality of opportunity, but not equality of outcomes or results, as Deaf people have, at face value, the wherewithal to request that employers and service providers implement adjustments, but this is subject to a reasonableness test which determines whether or not the adjustment is in fact obligatory.

The comparator test imposed in respect of establishing the duty to make adjustments is clearly of a formal nature, whereas the making of adjustments, and thus removing any disadvantage caused by a disability (bearing in mind that the definition of disability in the EqA 2010 espouses the medical – rather than social – model of disability), is reminiscent of substantive equality. It has also been established that the individual enforcement model adopted by the EqA 2010 does not always make it possible to challenge oppression in the form of failure to make reasonable adjustments.

The EqA 2010’s PSED provisions are a strong example of transformative equality and go some way to ‘cure’ the ‘disease’ that is inequality by encouraging social inclusion by way of active measures to integrate marginalised groups in society. However, the lack of enforcement mechanism – relying only on the generally difficult route of judicial review or the ECHR – poses a barrier to Deaf people who wish to challenge oppression through this route.

While the UDHR’s formal aims are honourable, in that it attempts to enshrine dignity, equal worth and identity in all human beings, the lack of mechanism for enforcing its ‘equal and inalienable rights’ render such overarching aims somewhat futile, as well as its apparent lack of direct effect in UK law. Instead, it is in the ECHR that the principles and overarching ideas of the UDHR have been incorporated, and it does have legal effect in the UK by virtue of the HRA 1998, and as a result, the ECHR is
generally accepted as a genuine system of law, albeit of a formal nature. There have been a number of ECHR cases considering whether the human rights of Deaf individuals have been infringed; however, once again, the opportunity for Deaf people to challenge oppression utilising the ECHR is severely limited not least due to the difficulty in bringing cases to the E CtHR, but also due to the fact that discrimination alone cannot be challenged unless one of the absolute rights has also been infringed.

The CRPD, in contrast, is both substantive and transformative, as it enshrines in international law for the first time, sign language rights, and an obligation on state signatories to accept and facilitate sign language and more besides, fully recognising the dignity, equal worth and identify of Deaf people. Once again, however, challenging oppression is confined to an individual enforcement model, and there has been little take-up of its individual complaint procedure to date, although initial results appear to be encouraging once the admissibility hurdle has been overcome.

It has been made clear throughout Chapter Four that current equality law – at domestic, European and international level – can only do so much at present and that it is only part of the solution\(^2\) to the Deaf Legal Dilemma.

### 2.4 Sign language recognition

Having at this point in the thesis established why equality law is not achieving equality for deaf people, at least in the UK, and that more instances of transformative equality need to be legislated in order to achieve the equality that deaf people desire, a potential solution to the Deaf Legal Dilemma in place of anti-discrimination law is the legal recognition of sign language. This approach in Chapter Five was two-fold: to

ascertain whether language recognition is transformative equality, and indeed, whether sign language recognition could be the solution to the Deaf Legal Dilemma, and above all, achieve equality for deaf people in a way that present equality law does not.

Following the assertion that BSL is a language, and a minority language to boot, there is clearly precedent set in the UK for the recognition for minority languages, as has been the case for Gaelic, Welsh and Cornish. It is also established that there is currently no appetite in Westminster for UK-wide legislation for the recognition of BSL. In light of this situation, in order to ascertain whether sign language legislation would be transformative, a comparative approach was adopted in order to ascertain the effectiveness of legislative measures in Scotland, New Zealand, Finland and Ireland; countries that have introduced legislation recognising their national sign languages and affording a range of rights for sign language users.

Finland recognised its national language in 2005, and New Zealand in 2006, while Scotland did so in 2015 and Ireland in 2017. Their usefulness at this conjecture is limited; only New Zealand has so far had a Government-led review of the effectiveness of the New Zealand Sign Language Act 2006, as required by the Act. The Finnish Sign Language Act 2005 does not have equivalent provision for such a review, so literature assessing its efficacy is limited. The Scottish and Irish Sign Language Acts are too recent for the purposes of this thesis to be entirely useful in assessing how transformative they are in achieving equality for deaf people, but their content is nonetheless useful by way of comparison with the New Zealand and Finnish Sign Language Acts.
In short, it is clear that sign language recognition has transformative potential, but the evidence is not conclusive as yet. Nonetheless, despite its criticisms, sign language recognition appears to be a viable solution to the Deaf Legal Dilemma as it is somewhat neutral in terms of defining who or what a deaf person is and focuses instead on the language that they use. It does not offend a Deaf person’s cultural and identity sensibilities as it does not insist that they are disabled and does not frame them within a disability framework (inasmuch as the CRPD does). For those deaf individuals who do not use sign language (and indeed for hearing people generally), sign language recognition could change society’s attitudes towards deafness, encourage non-Deaf people to learn and use sign language, make sign language more visible and ‘normalised,’ in a similar fashion to the wearing of spectacles. If this is accomplished, perhaps then equality can be achieved for deaf people.

3 Scope for future work

Such is the nature of doctoral study that parameters had to be imposed on the scope of this thesis, but the process of writing has naturally led to the identification of themes that have not as yet been explored as they fell outside its bounds.

One such theme is a further doctrinal and/or empirical study of the impact of sign language recognition on deaf communities. This would entail an in-depth analysis of the impact of sign language acts in transforming society’s attitudes towards sign language and deaf people. This would build upon the seminal work of De Meulder, Murray and McKee, which is the first comprehensive overview of national laws

---

recognising sign languages, the impacts they have and the advocacy campaigns which led to their creation.  

Another theme would be an evaluation of the feasibility of deaf people obtaining additional rights as an ethnic group, which would allow them to benefit from additional protection under the auspices of race discrimination law. This would build upon the initial findings in section 3.3 of Chapter Two and consider whether deaf people would fit the requirements set out in the cases of Mandla v Dowell Lee\(^5\) and Chandhok and another v Tirkey\(^6\) as to what constitutes an ethnic group for the purposes of the EqA 2010.

This thesis looked at the Deaf Legal Dilemma in the context of equality law. A similar exercise could be undertaken in relation to social welfare law, which is an area of law that has had and continues to have particular significance for disabled people, including deaf people, given that they are often regarded to be one of the main groups to benefit from a social welfare state. This would require a thorough examination of the aims of social welfare law, in much the same way as equality was investigated in Chapter Three of this thesis, and a doctrinal analysis of social welfare law in relation to deaf people. In addition, by way of a solution to the Deaf Legal Dilemma in the context of social welfare, the likely effect of an introduction of a new welfare benefit or ‘communication vouchers’ to allow deaf individuals to have access to services could be explored.

---


5 Mandla and another v Dowell Lee and another [1983] 2 AC 548.

6 UKEAT/0190/14/KN.
A comparison of equality laws in other legal jurisdictions compared to that of the UK in protecting deaf people is another theme worth exploring. For example, the United States of America’s Americans with Disabilities Act 1990, and Canada’s Charter of Rights and Freedoms. Such a comparative legal research project would proffer an opportunity to ascertain whether the approaches of other jurisdictions could give rise to scope for reforms to the EqA 2010.

Another area with scope for future work is a consideration as to whether the social model of disability could be extended by reforming reasonable adjustments; that is, the threshold of what is ‘reasonable’ in that the reasonableness test is applied to both the employer or service provider and the disabled person. There is also scope to consider how the public sector equality duty could go further, and whether the human rights model of disability could either extend or replace the social model of disability as the prevalent paradigm when considering the rights of disabled people.

4 Final remarks

It is hoped this thesis will contribute to the wide range of literature within the equality sphere, and in particular, provide researchers interested in equality with the tools by which they are able to extrapolate the concepts of equality that are relevant to their respective areas, and also provide them with a standard of measurement with which they can assess the efficacy of equality law for particular groups.

A predominant consideration, and indeed motivation, for this thesis is to provide evidence that equality law alone is inadequate as a tool for achieving equality for deaf

---

7 Canadian Charter of Rights and Freedoms, Part 1, Constitution Act 1982. This includes express mention of the legal right of deaf people to the assistance of an interpreter in criminal proceedings in section 14, which was extended to medical services in the Supreme Court of Canada case of Eldridge v British Columbia (Attorney General) [1997] 3 SCR 624.
people and to provide clarity as to why simply reinforcing the status quo when it comes to deaf people is insufficient and unlikely to achieve equality for this minority group. It is clear that sign language recognition may be what is needed in order to transform the dominant culture’s perception of deaf people and sign language. With the evidence presented in this thesis, it is hoped that the UK legislature will follow the example of the Scottish Parliament (and indeed, other national parliaments) and enact a UK-wide BSL Act, and that non-government organisations such as the British Deaf Association will be able to use this thesis (or parts of it) in order to strengthen their campaign for BSL recognition. Of course, although this thesis is primarily focused on the UK, its findings can be transplanted to other legal jurisdictions around the world as justification for sign language recognition.
BIBLIOGRAPHY

1 Books

1.1 Authored Books

Aristotle, Ethica Nichomacesa 1131a-6 (W Ross tr, 1925)


Barton L, Disability and Society: Emerging Issues and Insights (Longman 1996)


Branson J and Miller D, *Damned for their difference: The cultural construction of Deaf people as disabled* (Gallaudet University Press 2002)


Corker, M, *Deaf Transitions: Images and Origins of Deaf Families, Deaf Communities and Deaf Identities* (Jessica Kingsley Publishers 1996)


Freeman, M, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014)


Lane HL, Pillard RC and Hedberg U, *People of the Eye: Deaf Ethnicity and Ancestry* (Oxford University Press 2010)


Shakespeare T, *Disability Rights and Wrongs* (Routledge 2006)


Van Cleve JV, *Deaf History Unveiled: interpretations from the new scholarship* (Gallaudet University Press 2002)

Ventegodt Liisberg M, *Disability and employment: a contemporary disability human rights approach applied to Danish, Swedish and EU law and policy* (Intersentia 2011)


### 1.2 Edited Books


Bauman H-DL (eds), *Open Your Eyes: Deaf Studies Talking* (University of Minnesota Press 2008)

Bauman H-DL and Murray JJ (eds) *Deaf Gain: Raising the Stakes for Human Diversity* (University of Minnesota Press 2014)


Ramcharan BG (ed), *The Concept and Present Status of the International Protection of Human Rights: Thirty Years after the Universal Declaration* (Springer Netherlands 1979)

Rioux M and others (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers 2011)


### 1.3 Contributions to Edited Books

Allen D, ‘Rethinking the Australian Model of Promoting Gender Equality’ in Rubenstein K and Young KG (eds), *The Public Law of Gender: From the Local to the Global* (Cambridge University Press 2016)


Bosco Conama J, “'Ah, That’s Not Necessary, You Can Read English Instead”: An Analysis of State Language Policy Concerning Irish Sign Language and Its Effects’ in De Meulder M, Murray JJ and McKee R, The Legal Recognition of Sign Languages: Advocacy and Outcomes around the World’ (Multilingual Matters 2019)


De Meulder M, ‘Sign Language Recognition: Tensions between Specificity and Universalism in International Deaf Discourses’ in Kusters A and Friedner M (eds), It’s
a Small World. International Deaf Spaces and Encounters (Gallaudet University Press 2015)


Dobinson I and Johns F, ‘Qualitative Legal Research’ in McConville M and Hong Chui W (eds), Research Methods for Law (Edinburgh University Press 2007)


Harmon K, 'Deaf Matters: Compulsory Hearing and Ability Trouble' in Emens EF and Stein MA (eds), Disability and Equality Law (Ashgate 2013)


Humphries T, ‘Deaf Culture and Cultures’ in Christensen KM and Delgado GL (eds), Multicultural Issues in Deafness (Longman 1993)


Knight P, ‘Deafness and Disability’ in Gregory S and others (eds), Issues in Deaf Education (Routledge 1998)

Krausneker V, ‘Sign languages and the minority language policy of the European Union’ in Metzger M (ed), Bilingualism and Identity in Deaf Communities (Gallaudet University Press 2000)


### 2 Journals


Broesterhuizen M, ‘Faith in Deaf Culture’ (2005) 66 Theological Studies 304
Bultrini A, ‘Developments in the Field of the European Charter for Regional or Minority Languages’ (2002) 2 European Yearbook of Minority Issues 435


Cotter D and others, ‘The Glass Ceiling Effect’ (2001) 80(2) Social Forces 655


Davis DS, ‘Cochlear Implants and the Claims of Culture? A Response to Lane and Grodin’ (1997) 7 Kennedy Institute of Ethics Journal 253

De Meulder M and Murray JJ, ‘Buttering Their Bread on Both Sides? The recognition of sign languages and the aspirations of deaf communities’ (2017) 41 Language Problems and Language Planning 136


De Meulder M, ‘Promotion in Times of Endangerment: the Sign Language Act in Finland’ (2016) 16(2) Language Policy 189


Duncan NJ and Hutchinson T, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) Deakin Law Review 83


Harris P, ‘Curriculum Development in Legal Studies’ (1986) 20(2) Law Teacher 110


Ladd P and Lane HL, ‘Deaf Ethnicity, Deafhood, and Their Relationship’ (2013) 13 Sign Language Studies 565

Lamb T, ‘Language Policy in Multilingual UK’ (2001) 23 The Language Learning Journal 4

Lane HL, ‘Constructions of deafness’ (1995) 10(2) Disability and Society 171

Lane HL, ‘Do Deaf People Have a Disability?’ (2002) 2(4) Sign Language Studies 356


McLachlin BM, ‘Equality, the Most Difficult Right’ (2001) 14 Supreme Court Law Review 34


Montgomery G, ‘Comment on Turner’ (1994) 84 Sign Language Studies 265


Van Hoecke M, ‘Methodology of Comparative Legal Research’ (2015) Law and Method 1

Vickers L, ‘Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief’ (2011) 31(1) Legal Studies 135

Walters DB, ‘The Legal Recognition and Protection of Language Pluralism’ (A Comparative Study with Special Reference to Belgium, Quebec and Wales (1978) Acta Juridica 305


Young IM, ‘Status Inequality and Social Groups’ (2002) 2(1) Issues in Legal Scholarship 6

2.1 Online Journals

Christiano T, ‘Comment to Elizabeth Anderson’s What is the Point of Equality?’ (22 June 1999) <http://www.brown.edu/Departments/Philosophy/bears/9904chri.html> accessed 18 April 2017


2.4 Working Papers


3 Reports


Batterbury Magill, SCE, ‘Legal Status for BSL and ISL’ (British Deaf Association 2014)


McCulloch D, ‘Not Hearing Us: an Exploration of the Experience of Deaf Prisoners in English and Welsh Prisons’ (Howard League for Penal Reform 2012)

Office of the High Commissioner for Human Rights, ‘Statistical Survey on individual complaints’

Pasikowska-Schnass M, ‘Regional and minority languages in the European Union’ (European Parliamentary Research Service 2016)


Social Exclusion Unit, ‘Reducing Re-Offending by Ex-Prisoners’ (2002)

<http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice...>
ce.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf> accessed 30 March 2015


4 Hansard and Parliamentary Reports

Education and Culture Committee, *Stage 1 Report on the British Sign Language (Scotland) Bill* (Scottish Parliament 2015) 711-I


5 Command Papers


6 United Nations Papers


BIBLIOGRAPHY 268
Office of the UN High Commissioner for Human Rights (OHCHR), ‘Committee on the Rights of Persons with Disabilities reviews report of the United Kingdom’ (24 August 2017)

Office of the United Nations High Commissioner for Human Rights, ‘Statistical Survey on individual complaints’

Office of the United Nations High Commissioner for Human Rights, ‘Individual Communications’
<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whathappens> accessed 18 January 2018

7 Council of Europe Papers


Krausneker V, ‘The protection and promotion of sign languages and the rights of their users in Council of Europe (CoE) member states: needs analysis’ (Council of Europe 2008)

Timmermans N, ‘The Status of Sign Languages in Europe’ (Council of Europe Publishing 2005)

8 European Convention on Human Rights Papers

Sclater E, ‘Making practice happen: Practitioners’ views on the most effective specific equality duties’ (European Convention on Human Rights 2009)

9 European Union Papers


10 Government Papers


Office for Disability Issues, ‘New Zealand Sign Language Act Review 2011’ (September 2011)


11 Non-Government Organisation Papers


Batterbury Magill SCE, Legal Status for BSL and ISL (1st edn, British Deaf Association 2014)


Equality and Human Rights Commission, ‘Your rights to equality from businesses providing goods, facilities or services to the public’ (1 June 2015)
Equality and Human Rights Commission, ‘Your rights to equality from the criminal and civil justice systems and national security’ (1 June 2015)

Equality and Human Rights Commission, ‘Your rights to equality from healthcare and social care services’ (1 June 2015)

Equality and Human Rights Commission, ‘Your rights to equality from local councils, government departments and immigration’ (1 June 2015)

European Union for the Deaf, ‘Overview of country-by-country analysis’ (2001) 4(10) EUD Update 1


McCulloch D, ‘Not Hearing Us: an Exploration of the Experience of Deaf Prisoners in English and Welsh Prisons’ (Howard League for Penal Reform 2012)


12 Conferences

Alanne K, ‘Sign Languages and Language Policy and Planning’ (Sign Language Rights: European and International Perspectives conference, Ál, Norway, February 2011)

Bob Hepple, ‘Keynote Address’ (The Equality Act 2010: five-years on, Chester, 2015)


Colm O’Cinneide, ‘Equality: Current and Future Directions of Travel’ (The Equality Act 2010: five-years on, Chester, 2015)

De Meulder M, ‘Q&A Panel’ (Deaf Studies Conference, University of Wolverhampton, February 2019)


Krausneker V, ‘Sign Languages in Europe: the Case of Minorised Minority Languages’ (Mercator International Symposium on European Minority Languages and Research, Aberystwyth, April 2003)


Patterson D, ‘Critical Legal Theory’ (Lecture Materials in Contemporary Anglo-American Jurisprudence 04-05, Università di Trento)


13 Theses


14 Websites and Blogs


Colin Allen, ‘British Deaf community doesn’t work as well with other disabled groups as they could, says World Federation of the Deaf President’ (Limping Chicken, 2 May 2014) <http://limpingchicken.com/2014/05/02/deaf-organisations-not-working-together-is-the-same-old-problem-says-president/> accessed 27 December 2015


Council of Europe, ‘Committee of Ministers’ <https://www.coe.int/en/web/cm> accessed 28 February 2019


LexisPSL, Practice Note - Public sector equality duty (Resource ID: 413481) <https://www.lexisnexis.com/uk/lexispsl/> accessed 7 April 2018


TLC Homecare, ‘Payment and funding’ (no date) <http://www.tlc-homecare.co.uk/children-a-families/payment-and-funding> accessed 2 March 2018


UK Parliament, ‘The Work Programme: experience of different user groups’ (3 January 2013)


15 Newspaper Articles

Federation of Deaf People, ‘Summary of the Rationale for the March on Sunday 27 June 1999: Demanding Recognition of Sign Language’ (The Voice, September 1999)

Heffernan C, ‘Stop Stonewalling Deaf Jurors’ (The Guardian, 20 July 2010)


16 Personal Communications

Conversation Damian Barry, Executive Director of the BDA and author (18 May 2019)

17 Social Media

De Meulder M,’ How the CoE refers to sign languages’ (Twitter, 26 February 2019) <https://twitter.com/mdemeulder/status/1100419320922996736> accessed 4 March 2019

Lockrey, M, ‘Confirmation that Australia hasn’t responded to CRPD Committee’s view on complaint’ (Twitter, 16 July 2019) <https://twitter.com/mlockrey/status/1150948233880825856?s=20> accessed 16 July 2019

NHS Lanarkshire, ‘North Lanarkshire Council, South Lanarkshire Council & NHS Lanarkshire holding consultation on draft Shared BSL Plan’ (Twitter, 8 June 2018) <https://twitter.com/NHSLanarkshire/status/1005075619632287744> accessed 25 August 2018

Stewart F, ‘Council cancels their contracted #BSL interpreter’ (Twitter, 18 July 2018) <https://twitter.com/Mynameisnotfifi/status/1019594473687437312> accessed 25 August 2018

18 Performance

Channel 4, ‘Sign On’ (4 and 11 November 1995)

Garfield P (dir.), Double Sentence (Soho Theatre, London 2009)

19 Other


