

Effect of the 2012 olympic games on disabled transportation



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The Olympic Games in 2012 can “ leave a legacy of accessible transport and facilities not just for disabled sportsmen and women, but for people with a disability in general.” ^[1]

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1. Introduction

The Labour government under Tony Blair has set out an ambitious agenda for tackling disability discrimination across society. Part of this agenda has involved amendments to the Disability Discrimination Act 1995 (DDA 1995) [2] in order to ensure that the lessons of the first ten years of the Act having been in force are taken into account. The DDA 1995 sets out, along with the regulations and orders made under the Act, the legislative framework the intention of which is to ensure that disabled people throughout the country have access to the same opportunities as the public at large. With London having been awarded the Olympic Games in 2012, the ability of this legislative framework to force through change, both on a functional level, and on a cultural one, will be put to the test. The purpose of this report is to examine and critically assess, within the context of transport in London and airline operators, whether or not this legislative framework is sufficient to meet the needs of disabled people coming up to the Olympic Games and beyond.

2. Methodology

In order to assess the readiness of London to meet the needs of disabled travellers during the Olympic Games and beyond within the confines of a research paper it is necessary to clearly define the scope of the intended research. In this case, the scope of the investigation is limited to transport in London, which includes taxis, trains, public authority vehicles, buses, the underground, aircraft and, to a lesser degree, accessibility to the buildings from which those transport vehicles leave from and arrive to.

In order for it to be concluded that London will be ready to meet the needs of disabled travellers by 2012, it will need to be shown, that the current legislative framework is sufficient; that where there are ambiguities within the legislation, the Courts have been willing to provide useful guidance to transport providers and disabled travellers generally; that the culture within the public transport industry has changed with managers and employees now aware of their obligations under the legislation; that there are adequate penalties in place to discourage those that fail to comply; and finally, that these previously mentioned factors will all work together to provide disabled travellers with a integrated means of getting around London by 2012.

In order to investigate these matters, it was necessary to look in detail at the provisions of the Disability Discrimination Act 1995 (DDA 1995), how the Act has been amended over the past eleven years, and in particular by the Disability Discrimination Act 2005 (DDA 2005), the various regulations and orders made under the DDA 1995 pertaining to public transport, cases decided dealing with the DDA 1995 and various commentary available from

both public transport service providers, disabled travellers and other stakeholders.

A survey of both rail and airline employees was also undertaken in order to gauge the level of understanding of the provisions of what is a complicated and often misinterpreted piece of legislation. The results of that survey are set out in Appendix A and discussed within the body of this report.

3. Evaluation

3.1 Legislation

One of the main aims of this report is to establish whether or not the amendments made to the DDA 1995 by the DDA 2005 have assisted in making the DDA 1995 more accessible or whether it remains, as noted by Lord Justice Mummery, “ without doubt an unusually complex piece of legislation which poses novel questions of interpretation.” [3]

3.1.1 DDA 1995

The primary piece of legislation dealing with discrimination against disabled people using public transport is the DDA 1995 which has been amended by the DDA 2005. The DDA 2005 received royal assent on the 7th April 2005. Its main purpose was to give effect to the submissions made by various groups relating to the operation of the DDA 1995 over the preceding ten years by providing for certain important amendments in relation to that legislation.

The DDA 2005 makes several substantial amendments to the DDA 1995.

Those that apply to public transport are set out in Sections 5 to 9. Section 5

inserts a new Section 21ZA into the DDA 1995 and replaces the existing exclusion of transport services from Sections 19 to 21 of the DDA 1995 with a more precise exclusion which relates to only those transport services which consist of vehicle provision and use. Section 21ZA(1)(b) excludes discrimination which relates to a service provided, or not provided, while a disabled person is travelling in a vehicle. Section 21ZA(2) excludes from the duty to provide adjustments, transport services involving providing or using a vehicle. Sections 21ZA(1) and (2) can be disapplied through regulations made by the Secretary of State under Section 21ZA(3). ^[4]

Section 6 of the DDA 2005 clarifies the timeframe for the bringing into force regulations dealing with all rail vehicles and the duty requiring rail operators to have in place measures allowing for disabled people to get on and off regulated rail vehicles in safety and without unreasonable difficulty and to be carried in regulated rail vehicles in safety and reasonable comfort. The Secretary of State is now required, under the new Section 46(4A) to ensure that all rail vehicles are regulated under the rail vehicles accessibility regulations by 1st January 2020. Section 6 also removes from the definition of “ rail vehicle” the exemption relating to vehicles first brought into use after 31st December 1998. This means that there is now no start date and the Secretary of State is able to make regulations which apply to all rail vehicles and for instance, make regulations which apply to rail vehicles first brought into service before 1998 and which are for example refurbished. This closes a potential loop-hole in the legislation and allows the Secretary of State to meet the deadline imposed by 46(6A). ^[5]

Section 6(3) clarifies the Secretary of State's powers to make exemption orders relating to regulated rail vehicles by specifically allowing the making of exemption orders which relate to the operational as well as the construction elements of the rail vehicle accessibility regulations. Section 6(4) clarifies the procedure to be followed by the Secretary of State when exercising their discretion under Section 67(5A) of the DDA 1995. This procedure applies to the making of exemption orders and requires the Secretary of State to consult the Disabled Persons Transport Advisory Committee, and any other bodies that may be appropriate, and furthermore, for such regulations to be subject to the draft affirmative procedure which allows for greater parliamentary scrutiny. In the same vein of providing closer scrutiny over the making of exemption orders, Section 6(5) of the DDA 2005 inserts a new section (67B) which requires an annual report to be produced by the Secretary of State detailing the exemption orders which have been made and containing details of the consultation process undertaken. [6]

Section 7 of the DDA 2005 deals with the new concept of rail accessibility compliance certificates and allows for the Secretary of State to make regulations appointing independent assessors responsible for granting and enforcing the certificates, setting out the mechanisms for the charging of fees and dispute resolution. The intention of the certification scheme is to ultimately prohibit regulated rail vehicles operating without a valid compliance certificate. These certificates will also provide a degree of flexibility with Section 47A(4) allowing the certificates to be subject to conditions. [7]

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Section 8 of the DDA 2005 replaces the criminal sanctions set out in the DDA 1995 for a breach of the rail vehicle accessibility regulations with a civil regime allowing the levying of penalties should an improvement notice and final notice issued by the Secretary of State not be complied with. It also provides the Secretary of State with new powers of inspection in cases in which it is suspected that a regulated rail vehicle fails to conform to the provisions of the rail vehicle accessibility regulations (Sections 47E and 47F). New sections 47D to 47L deal with the imposition of penalties on train operators. Section 47D to 47H deal with the amount, due date and recovery of penalties imposed under the Act. Most importantly, any penalty imposed cannot exceed 10% of the operator's "turnover". Section 47K sets out the procedure to be followed and the operator's right to object. If the operator is not satisfied with the penalty imposed by the Secretary of State, they have the right to appeal to a Court, whether or not they have lodged an appeal with the Secretary of State, but only on the grounds that either the penalty should not apply to them or that the level of the penalty is too high. [8]

Section 9 allows for the recognition in England and Wales of disabled persons' parking badges issued in foreign jurisdictions. This then allows for reciprocal recognition of UK badges in other EU countries. [9]

3. 1. 1. 1Meaning of Disability

The DDA 1995 defines a "disabled person" as someone who has a disability.

[10] A person has a disability if they have,

“...a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.” [11]

This is further clarified in Schedule 1 of the DDA 1995. A mental impairment is not exhaustively defined but it originally only included mental illnesses in cases in which that illness is clinically well-recognised. [12] This constraint has now been removed by Section 18(2) of the DDA 2005.

In addition, the DDA 2005 by way of Section 18(3) deems those suffering from HIV, Cancer or MS to be disabled before the symptoms set out in Section 1, or paragraph 8 of Schedule 1, have been experienced by them.

[13]

An impairment is held to be long-term if a person has had it for at least twelve months, it is expected to last for at least twelve months or it is likely to affect the person for the rest of their life. [14]

3. 1. 1. 2Meaning of Discrimination

Section 3A(1) of the DDA 1995 states that a disabled person is discriminated against if, for a reason relating to a disabled person’s disability, a person treats a disabled person less favourably than they would someone without a disability and the person alleged to be discriminating against the disabled person cannot show that it is justified to treat them in this way.

In order for the treatment referred to above to be justified, it must be both substantial and material to the particular cases’ circumstances. [15] However,

if the treatment amounts to direct discrimination, it cannot be justified. ^[16]

Similarly, if the person was required to make reasonable adjustments to cater for disabled people and has not done so, they will not be able to rely on a defence of the treatment being justified unless even if he had complied with the duty it would have been justified. ^[17]

More relevantly to the issue of public transport, a person is also held to have discriminated against a disabled person if when a duty to make reasonable adjustments in relation to disabled people is imposed on them, they fail to comply with that duty. ^[18]

3. 1. 1. 3Positive Duty under the DDA 2005

The DDA 2005 introduced the concept of a “ positive duty” for public authorities which makes it unlawful for them to, in the course of carrying out its functions, to discriminate against disabled people. ^[19] A similar “ positive duty” has not been included with respect to private companies and employers.

3. 1. 1. 4Taxis and Private Hire Vehicles

The DDA 1995 allows the Secretary of State to make regulations to ensure that it is possible for disabled persons; “ to get into and out of taxis in safety,” and “ to be carried in taxis in safety and in reasonable comfort;” and for disabled persons in wheelchairs; “ to be conveyed in safety into and out of taxis while remaining in their wheelchairs,” and “ to be carried in taxis in safety and in reasonable comfort while remaining in their wheelchairs.” It is

proposed that regulations are introduced in respect of all new Taxis by 2010 and all Taxis by 2020. [20]

One notable exception is that private hire vehicles are not provided for under the DDA 1995 however, this is not an exception that is likely to remain for long with both the Disabled Persons Transport Advisory Group and the Disability Rights Commission looking into the matter. [21]

3. 1. 1. 5Rail Vehicles

A “ rail vehicle” as amended by the DDA 2005 is a vehicle, “ constructed or adapted to carry passengers on any railway, tramway or prescribed system.” [22]

The DDA 1995 provides the Secretary of State with the power to make “ rail vehicle accessibility regulations.” [23] These regulations, made in 1998 and amended in 2000, cover several important areas. They allow the Secretary of State to require, by way of these regulations, transport operators to provide means for disabled persons to be able to get on and off regulated rail vehicles in safety and without difficulty and to be able to travel in those vehicles in safety and comfort. They also cover such matters as, “ wheelchair accessibility, the design of on-board accessible toilets, the size and location of handrails, handholds and control devices as well as the provision of audible warnings and other equipment.” [24]

The DDA 1995 also allows the Secretary of State to make an exception in relation to a case in which a rail vehicle operator is unable to meet the

requirements and makes an application for exemption. An example of such an exemption relating to London is the one granted to Gatwick Express (The Rail Vehicle Accessibility (Gatwick Express Class 458) Exemption Order 2006). This Order exempts Gatwick Express from some of the requirements of the regulations until April 2011. ^[25]

However, without doubt, the main hurdle that the government needs to overcome to ensure that the Olympic Games in 2012 are an inclusive event is the issue of accessibility to the London Underground. Transport for London currently lists as accessible by means other than stairs or escalators, only 40 of its 275 underground stations. ^[26] The pace of improvements taking place also fails to fill one with confidence. Over the next five years there will be an additional 27 step-free stations. The intention is then for 25% to be step-free by 2010 and 50% by 2015. ^[27]

As the Disabled Persons Transport Advisory Committee (DPTAC) correctly point out, if these figures are to be accepted, less than half of London's Underground stations will be accessible by way of stair-free means by the time of the Olympics in 2012 and this is a situation that they find unacceptable. ^[28] While being the main means of transport for many spectators who will arrive in London at the time of the Olympic Games, the Tube is also perhaps the most culturally significant icon that London possesses and it will reflect poorly on the country as a whole if accessibility to London Underground stations has not been addressed in a productive manner before 2012.

3. 1. 1. 6Public Transport Vehicles

The regulations applying to public transport vehicles are set out in the Public Service Vehicles Accessibility Regulations 2000. These regulations provide standards which are to be met and apply to “ all new public service vehicles (buses or coaches) introduced since 31st December 2000 with a capacity exceeding 22 passengers used to provide a local of scheduled service.” [29] They also set out deadlines for the meeting of the standards. For instance, wheel chair users must be able to access all small buses by the 1st January 2015, large single deck buses by the 1st January 2016 and double deck buses by the 1st January 2017. [30]

At present the accessibility by wheelchair users of buses nationwide stands at approximately 30%. [31] However, the DPTAC note that with respect to London’s buses, accessibility for wheelchair users is close to 100%. [32] The main concern with respect to buses in the capital is not in relation to compliance with the required modifications, but rather with the failure of some drivers to use the modifications available to assist their disabled passengers. [33] It should be noted that the Public Service Vehicles Accessibility Regulations 2000 do provide for a driver refusing to assist a disabled person in cases in which doing so would “ adversely affect his health or safety, your safety or that of other passengers or the safety of the vehicle.” [34] However, it should be stressed to all drivers that this exemption should only be relied upon in specific circumstances with clear examples being provided.

Finally, the DPTAC also suggest the greater availability of audible and visual information systems and this is an area that Transport for London is considering as an improvement for all their customers, not only those that are disabled. ^[35]

3. 1. 1. 7Aircraft and Ships

One of the main criticisms of the DDA 1995 is that it fails to specifically address the duties of ship and airline operators. While ports and airports will still need to comply with the requirements of the legislation, the DDA 1995 fails to provide in respect of ships and aircraft the same regulatory making powers that it provides with respect to taxis, rail and public transport vehicles. Ships and aircraft come under European laws dealing with anti-discrimination legislation, however it is still argued that for disability discrimination legislation to be effective, it must apply to all public transport vehicles that operate within the UK. This gap in the legislation is seem as a major hurdle to ensuring that there is consistency across all types of public transport coming up to the Olympic Games and beyond.

The DPTAC endorses this view and notes that “ aircraft and ships will be the first and last Olympic travel experience that most overseas participants and audiences will experience, and we believe that the Government should do all it can to ensure that that experience is a positive one.” ^[36] They also emphasise that aviation and shipping are currently covered by voluntary codes but that the government has made it clear that should these codes fail, they would be prepared to remove the exemption from Part 3 of the DDA

1995 that currently applies to them. ^[37] As Karen Buck, Parliamentary Under <https://assignbuster.com/effect-of-the-2012-olympic-games-on-disabled-transportation/>

Secretary of State for Transport sets out in her response to Tony Manwaring, CEO of Scope, the government is carrying out benchmarking tests in association with DPTAC the results of which were hoped to be available in early 2006. These exercises would then help determine whether or not it was necessary to lift the DDA 1995 Part 3 exemption currently granted to airline and shipping transport providers. ^[38]

3. 1. 1. 9DDA 1995: Comparison to other Anti-Discrimination Legislation

One of the most important differences between the DDA and other anti-discrimination legislation is that the DDA only applies to people who meet the criteria set out for being disabled. The Disability Rights Commission estimates that approximately ten million people have rights under the DDA 1995. ^[39] In contrast, other anti-discrimination legislation is much more pervasive in its application and applies to all members of society as long as they can show that the type of discrimination they are alleged to have suffered occurred.

Another important difference is that the DDA takes into account the fact that the aim of assisting people with a disability is not to ensure that they receive equal treatment but rather, treatment which is appropriate to their circumstances. As such, the DDA does not aim to restrict the ability of those dealing with disabled people to positively discriminate in their favour, rather accepting that where appropriate, disabled people need to be treated differently. ^[40] Under other anti-discrimination legislation, discrimination can never be justified.

3. 1. 1. 9 Criticisms

Jan Nesbitt, chair of the Disability Law Service, notes that, “ one of the weaknesses of the DDA has been that the service provision elements have been brought in over a lengthy period of time and some disabled people have had to wait for their needs to be met. There are some areas that are unsatisfactory, transport is still not covered, except for design features...”

[41]

The focus of the DDA 1995 is to put the duty to change on the public transport operators. This focus is sometimes referred to as being “ solution-oriented”. [42] A solution-oriented approach to disability discrimination is a positive and extremely powerful tool in combating discrimination. However, this approach can only genuinely apply to those with physical disabilities and this has lead some commentators to suggest that the DDA 1995 is in fact discriminatory in itself as it places much more emphasis on those with physical disabilities as opposed to those suffering from mental disabilities. This however could be said to simply reflect the relative ease of making adjustments for those with physical disabilities, compared to making adjustments for those suffering from mental illnesses.

People suffering from mental illnesses create a much more difficult problem for public transport providers to solve. There are no simple physical modifications that can be made to cater for people suffering from mental illnesses. This is further exacerbated by fact that it is often clear when someone is suffering from a physical impairment and staff can be trained to respond to their needs quickly and effectively. It is a lot more difficult to

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gauge whether or not someone is suffering from a mental illness, how best to assist them and whether or not they may pose a danger to staff and/or other members of the public.

A frightening prospect is that the legislation as it currently stands could allow public transport companies to segregate those with disabilities from the rest of the travelling public. While this is already done to some extent, eg spaces for people needing wheelchair access; it is only a short distance from an ID card which lists a person's disability, to a separate carriage for those with disabilities. The unfortunate aspect of this is that it would no doubt be argued that this solution provides the best means of catering for the individual needs of disabled people.

3. 2 Case Law

One of the leading cases decided under the DDA 1995 was *Clark v TDG Ltd (t/a Novacold)*.^[43] This was an appeal from the Employment Appeal Tribunal and was the first appeal decided by the Court of Appeal (Civil Division) under the DDA 1995. While that case dealt with employment law, Lord Justice Mummery's comments about the DDA 1995 and its relationship to other anti-discrimination legislation is still of importance to the area of public transport. Lord Justice Mummery stated,

“ Contrary to what might be reasonably assumed, the exercise of interpretation is not facilitated by familiarity with the pre-existing legislation prohibiting discrimination in the field of employment (and elsewhere) on the grounds of sex (Sex Discrimination Act 1975) and race (Race Discrimination Act 1976). Indeed, it may be positively misleading to approach the 1995 Act

with assumptions and concepts familiar from experience of the workings of the 1975 Act and the 1976 Act.

Unlike the earlier discrimination Acts the 1995 Act does not draw the crucial distinction between direct and indirect discrimination on specified grounds; it provides a defence of justification to less favourable treatment which would constitute direct discrimination and be without such a defence under the earlier Acts; and it does not replicate the express requirement of the 1975 Act (section 5(3)) and the 1976 Act (section 3(4)) that, when a comparison of the cases of persons of different sex or persons of different racial groups falls to be made, the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

One consequence of these differences is that the terms “ discriminate” and “ discrimination” are not used in Part II of the 1995 Act in the same sense as in the earlier Acts. Failure to discern and observe this difference in meaning in decision making (and in commentaries on both the 1995 Act and on decisions under it) can lead to serious conceptual confusion.”

The key question that Lord Justice Mummery concluded as being fundamental to whether or not a disabled person had been discriminated against was, “ is the treatment related to a complainant’s disability?” [44]

Andy Rickell, director of the British Council of Disable People has stated, in respect of the case law arising from the DDA 1995, “ Barristers are, and have been, running a coach and horses through disabled people’s rights.” [45] Jan

Nesbitt, chair of the Disability Law Service, concurred with Rickell's sentiments but added;

“ It's like any new piece of legislation, barristers will find loopholes because there's no case law so there's nothing to test against. I think what happened in the beginning was that a lot of disabled people, in employment tribunals particularly, conducted their own case, and fell at the first hurdle which was proving that they were a disabled person. Any good barrister will make their case. The definition of “ disability” is one of the things that's currently being reviewed so that tribunals and courts have a better understanding of it. In any case, it is important for disabled people to get access to legal representation when taking a case.” [46]

A case more relevant to transport was *Roads v Central Trains* . [47] This case involved a disabled resident of Norwich who relied on her electric wheelchair for mobility who brought a claim against Central Trains. The facts of the case revolved around the claimant not being able to access platform 1 at the station. The only means of accessing the platform from the side he was on was to either cross the footbridge or travel half a mile down the road where he could pass under the track and return on the other side. As both of these alternatives were not reasonable, the train company suggested the claimant, at no extra cost, take the train to a further station which was equipped with disabled access facilities, adding approximately one hour to the journey time. The claimant suggested that this was not reasonable and that the defendant company should have paid for a specially adapted taxi to drive him around to the other side. In the first instance, the Judge held that as the

nearest specially adapted taxi was based in Norwich which was some way from Thetford where the station was located, it was unreas