

Disfigurement: A visibly different approach to equality?

The Equality Act 2010 (“the Act”) provides that someone with a severe disfigurement should be treated as meeting the definition of disability¹. However, a lack of clear statutory guidance and case law on the meaning of ‘disfigurement’ mean that the parameters of this section of the Act remain uncertain. These parameters are under particular tension from the related concepts of appearance and disability, which partially overlap with disfigurement.

Through an analysis of the relationship between these three concepts, this paper will argue that ‘disfigurement’ should be read as encompassing a broader range of appearance-altering conditions than has, to date, been recognised. It will be argued that protection should extend beyond conditions such as scarring to include other visible differences.

The first part of this paper sets out what we know about the meaning of disfigurement, and how interpretive approaches can ascribe a clearer meaning to the relevant statutory provision. The second part considers how disfigurement differs from the concepts of appearance and disability, and how the relationship between these terms can be defined through an analysis of models of disability and relevant case law. It identifies several respects in which the current statutory provision seems to fall short of the implicit logic which drove its inclusion in the Act. Finally, the third part evaluates the extent to which a new definition of disfigurement could alleviate some of the identified weaknesses in the current law.

Part 1: What is a ‘disfigurement’?

The law on disfigurement in the workplace has, until recently, received little academic consideration. In a previous article², I sought to argue that the severity threshold (which someone with a disfigurement must meet to qualify as disabled under the Equality Act 2010³) is flawed. But another problem remains: with the law as it currently stands, what types of condition are likely to fall within the severe disfigurement provision? This is the first question which this paper seeks to address.

Given the much-debated definition of disability in the Equality Act 2010, it is strange that there is no equivalent definition of severe disfigurement. S. 3, Schedule 1 simply provides that:

¹ Equality Act 2010 Sched 1, Pt 1, S.3(1). The person must still show that the ‘long-term’ requirement is met.

² Hannah Saunders, ‘The invisible law of visible difference : disfigurement in the workplace’ (2018) *Industrial law journal*

³ (n1).

“An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.”

EU law yields no definition of disfigurement; the disfigurement provision in the Equality Act 2010 does not stem from EU law expressly. The Convention on the Rights of Persons with Disabilities provides no definition either, although its wide description of disability as a social construct would include those with a visible difference⁴. There is a partial explanation of the concept of severe disfigurement in the Equality Act Guidance⁵. This provides:

‘Examples of disfigurements include scars, birthmarks, limb or postural deformation (including restricted bodily development), or diseases of the skin. Assessing severity will be mainly a matter of the degree of the disfigurement which may involve taking into account factors such as the nature, size, and prominence of the disfigurement. However, it may be necessary to take account of where the disfigurement in question is (e.g. on the back as opposed to the face).’

The guidance does not pretend to be comprehensive – the types of disfigurement listed are examples only. Scars and birthmarks are perhaps the most commonly envisaged type of disfigurement which (provided they meet the severity threshold) fall readily within the scope of the provision, as do some skin conditions, such as severe psoriasis⁶. The other examples given, however, are a more curious choice. Without question, limb deformation (to use the terminology of the Guidance) can affect others’ perceptions of someone’s appearance. In 2009, for example, the BBC received numerous complaints from viewers about the appearance of a children’s TV presenter whose arm stopped at the elbow⁷. But the inclusion of limb deformation as one of only five listed examples of severe disfigurement is surprising because most limb deformities will also produce functional effects on what the affected person can do; a deformation of the hand will often impact on tasks involving manual dexterity, while a deformation of the leg or foot may impair mobility.

The same argument can be made for many postural deformities; people with these conditions unable to demonstrate a substantial adverse effect on their ability to carry out normal day to day activities may be in a minority of people with similar conditions. For example, in the case of *Hutchison 3G UK Ltd v Edwards*⁸, the EAT

⁴ UN Convention on the Rights of Persons with Disabilities A/RES/61/106 (adopted 24 January 2007), Article 1.

⁵ Office for Disability Issues, ‘Guidance on matters to be taken into account in determining questions relating the issue of disability, (2011) para B25.

⁶ *Cosgrove v Northern Ireland Ambulance Service* [2007] IRLR 397.

⁷ Anonymous, ‘Ex-CBeebies presenter: ‘Parents criticised my decision not to wear prosthetic arm’, *ITV*(2017) <<https://www.itv.com/news/2017-05-04/ex-cbeebies-presenter-cerrie-burnell-parents-rang-up-complaining-about-my-arm/>>accessed 31 January 2019.

⁸ *Hutchison 3G UK Ltd v Edwards* [2014] UKEAT/0467/13/DM.

upheld the Tribunal's finding that the Claimant's chest deformity caused by Poland syndrome was both a severe disfigurement and a physical impairment which had a substantial and long-term effect on the Claimant's ability to carry out normal day-to-day activities.

So, without doubting that limb and postural deformations conditions merit equality rights as disabilities (whether by virtue of their functional effects or their aesthetic impact), their express inclusion in the guidance on severe disfigurement in place of many other disfiguring conditions misses an opportunity to expressly extend, rather than overlap with, the scope of protection provided by s.6.

There have been relatively few reported cases under the severe disfigurement provision, but those reported have not really moved much beyond the examples given in the Guidance. For example, *Hutchison*, cited above, concerned a postural deformity of the chest cavity; *Cosgrove*⁹, *Blyth*¹⁰ and *Whyte*¹¹ concerned skin conditions (psoriasis and folliculitis); *Johansson*¹² and *Hand*¹³ (both decisions of the Northern Ireland Industrial Tribunals, applying similar severe disfigurement wording) and *Griffiths*¹⁴ all concerned facial scarring. It is not clear *why* the reported case law is so limited: this is an area currently under research, but it is possible that the lack of a clear definition may be one factor deterring claims.

Principles of statutory interpretation can also be used to understand the scope of the severe disfigurement provision in Schedule 1 of the Act. In the case of *Goodwin v Patent Office*¹⁵, the EAT stated (of the Disability Discrimination Act 1995, which preceded the Act) that "with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question."¹⁶ The EAT specifically urged Tribunals to consider the relevant Code of Practice and Guidance. In this instance, however, neither document is instructive on the definition of the term disfigurement, beyond the loose parameters in the Guidance quoted above. The extent to which wider Parliamentary records can be taken into account in the search for Parliament's intended meaning is debatable¹⁷. However, that debate need not trouble us here, as extensive searches of Hansard have not revealed any detailed debates about the meaning of disfigurement itself, beyond of

⁹ (n6). Note that *Cosgrove* is a decision of the Northern Ireland Court of Appeal.

¹⁰ *Blyth v Historic Scotland* [2001] Xpert HR, <<https://www.xperthr.co.uk/law-reports/psoriasis-not-severe-disfigurement/66497/>> accessed 29 April 2019.

¹¹ *Whyte v First Capital East Limited* [2005] UKEAT/0686/04/DM.

¹² *Johansson v Fountain Street Community Development Association* [2005] NIIT 311_03.

¹³ *Hand v The Police Authority for Northern Ireland* [2002] NIIT 1691_01.

¹⁴ *Griffiths v Lancashire County Council* [2009] (unreported) (ET).

¹⁵ [1999] IRLR 4, para 2.

¹⁶ *Ibid*, para 2.

¹⁷ In *Pepper v Hart* [1992] 3 WLR 1032, the House of Lords appeared to relax the rules about using explanations from parliamentary records in statutory interpretation. However, see also Johan Steyn, 'Pepper v Hart; A Re-examination' (2001) 21 Oxford Journal of Legal Studies 59.

cited examples of scars and birthmarks. Ironically, one MP remarked during a standing committee debate that ‘there are many types of severe disfigurement and we can all imagine what they might be’¹⁸. The debates do, however, reveal a concern that the severe disfigurement provision should be ‘comprehensive’¹⁹, and not unjustifiably watered down in due course (for example by excluding from protection purportedly ‘blameworthy’ disfigurements such as a burns injury resulting from solvent abuse, or scars from self-harm). A purposive analysis of Parliamentary records therefore perhaps brings with it a small glimmer of optimism, if not clarity, as to the intended comprehensiveness of the severe disfigurement provision.

A literal interpretation, on the other hand, involves assessing the natural and ordinary meaning of the Act: what the words of the statute actually mean. The Oxford dictionary defines disfigurement as “something which spoils the appearance of someone or something; a blemish”²⁰, whereas Black’s legal dictionary defines it as “the result of an accident or an injury that impairs the beauty, symmetry and appearance.”²¹ The focus on accidents and injuries in the Blacks definition perhaps arises because disfigurement in legal terms usually occurs in a personal injury context, where someone or something is to blame. The case law under the Act is not limited in this way, however; disfigurements present from birth and natural causes are recognised as well as those acquired later. Setting this causation aspect aside, however, both dictionary definitions have at their core the idea of impaired appearance.

This idea of ‘impaired appearance’ is interesting because it is a semantic hybrid of two concepts: disability (through the concept of impairment²²) and appearance. In theoretical terms, disfigurement can be thought of as occupying a middle position between the concepts of appearance and disability, as portrayed in the diagram below.

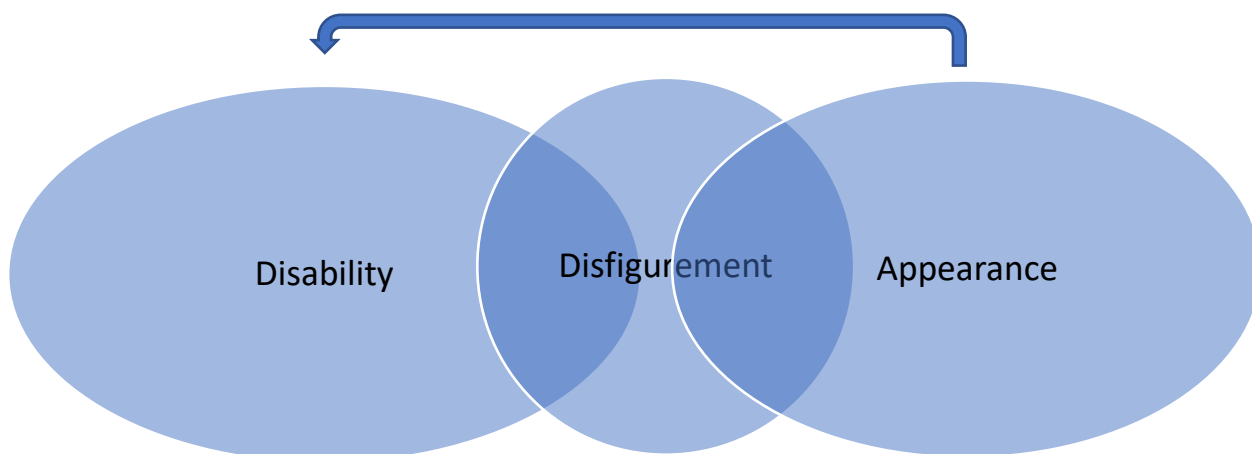
¹⁸ House of Commons Standing Committee E debate, 7 February 1995, per David Hanson.

¹⁹ Ibid.

²⁰ See Oxford Dictionaries online, <<https://en.oxforddictionaries.com/definition/disfigurement>> accessed 29 April 2019.

²¹ Blacks legal dictionary online, <<https://thelawdictionary.org>> accessed 29 April 2019. In *Blyth v Historic Scotland*, the Tribunal noted that “Disfigurement is variously defined in recognised dictionaries as a blemish, defacement, defect, deformity, or something which mars or spoils the appearance”; see *Blyth (n10)*. A similar focus can be found in some US case law; in *Superior Min. Co. v. Industrial Commission (1923) 309 Ill. 339, 141 N.E. 165* the court defined disfigurement as “that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner”.

²²The relationship between impairment and disability is influenced by models of disability, discussed further in Part 2 below.



In legal terms, being able to differentiate these three concepts is vital because they have different legal consequences - people with a disability or a severe disfigurement (represented by the overlap between disability and disfigurement) are granted equality rights. People who have an imperfection of appearance, or a moderate disfigurement, are not. Understanding the relationship between these concepts is therefore key to defining where disfigurement (and disability) stop, and appearance begins.

Part 2: Disability, disfigurement and appearance

A: The relationship between disfigurement and disability

The relationship between disability and disfigurement stems from two related factors; first, models of disability, and second, legislation.

Turning first to models of disability, the last thirty years have brought an increased willingness to question the idea of disability as an individual medical problem. Before then, disability was based on an analysis of the limitations on an individual resulting from medical impairment – what the person couldn't do. This inward-focused understanding of disability is often referred to as the 'medical model'. The medical model would define the disability of someone in a wheelchair by reference to her physical inability to climb stairs, for example; the 'problem' of disability is located within the individual.

A major criticism of the medical model approach is that it blames the person for her disability and helps to perpetuate stereotypes of disabled people as helpless, in need of either “care or cure”²³. This encourages an approach focusing on charity and welfare, rather than rights, serving to increase stereotypes of dependence. It aims, where possible, to treat disability in medical terms to achieve sameness or non-disabled norms²⁴ in society, often contributing to the removal of individual choice and control from disabled people. By locating the ‘problem’ within the individual, the medical model approach assumes that, where possible, the person’s difference should be treated to enable him to meet the non-disabled norms of society²⁵. It ignores the role of society in preventing impairment from becoming disability.

Many people with a visible difference would not be disabled under medical model principles, because disfigurements often don’t hinder the individual in doing particular activities. They are, however, hindered by social attitudes towards someone who looks different. This shift in focus – from the impairment of the individual to the barriers she encounters within society - has become known as the social model of disability²⁶. The social model asserts that disability is located not in the body of the person or what he/she can’t do, but in a society which oppresses people with impairments and creates disability by gearing itself towards those without impairments. According to the social model of disability, those with impairments face numerous barriers, ranging from environmental barriers (such as low accessibility of the built and technological environment) through to institutional barriers (such as social security rules), and attitudinal barriers (which tend to associate impairment with a lack of ability). It is the interaction between someone’s impairment and society which disables her, not her impairment itself.

Applying the social model, it is clear that people with disfigurements do indeed face societal barriers. Many people with a visible difference face both social²⁷ and professional²⁸ barriers and discrimination, and some psychological suffering as a result²⁹. The evidence also suggests that the barriers are not significantly reduced for those with mild

²³ Gary Albrecht and others, *Encyclopaedia of Disability* (SAGE Reference 2006), 515.

²⁴ Andrea Broderick, 'The Long and Winding Road to Equality and Inclusion for Persons with Disabilities' (PhD, Maastricht 2015) 22.

²⁵ Anna Lawson, *Disability and equality law in Britain : the role of reasonable adjustment* (Hart Publishing 2008), 11.

²⁶ The social model concept has its roots in the work of the Union of the Physically Impaired Against Segregation. See UPIAS and the Disability Alliance, 'Fundamental Principles of Disability' (1975), 14, <<https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf>> accessed 9 April 2018.

²⁷ See, for example, Andrew Thompson and Gerry Kent, 'Adjusting to disfigurement: processes involved in dealing with being visibly different' (2001) 21 *Clinical Psychology Review* 663, 666; Marlene Rankin and Gregory Borah, 'Perceived Functional Impact of Abnormal Facial Appearance' (2002) 111 *Plastic & Reconstructive Surgery* 2140; Changing Faces, *Disfigurement in the UK* (Changing Faces 2017).

²⁸ See, for example, Daniel S Hamermesh, *Beauty Pays* (Princeton University Press 2011), 47; Anna Stone and Toby Wright, 'When your face doesn't fit: employment discrimination against people with facial disfigurements' (2013) 43 *Journal of Applied Social Psychology* 515, 516.

²⁹ See, for example, R. Newell and I. Marks, 'Phobic nature of social difficulty in facially disfigured people' (2000) 176 *The British journal of psychiatry : the journal of mental science* 177, 177.

or moderate, rather than severe disfigurements³⁰. The social model therefore explains the overlapping conceptual relationship between disability and disfigurement: attitudes facing someone who looks different can be disabling.

This conceptual overlap is reinforced by the law. The Act categorises severe disfigurement as a deemed disability. Its definition of disability in section 6 is functional; the disadvantage which it seeks to capture and respond to is rooted in a medical model analysis. The severe disfigurement provision, on the other hand, seeks to capture another type of disadvantage. The Act is not express about the nature of this but, implicitly, appearance-related disadvantage is its target, rooted in a social model analysis and the attitudes of society towards people who look different. (It is worth clarifying here that the 'disadvantage' referred to should perhaps more accurately be termed 'difference'. Some writers have argued powerfully against assumptions that any departure from physical 'normality' should necessarily be seen as disadvantageous or inferior rather than simply different³¹. Concepts of disadvantage are, however, intricately bound up in the Act's medical model-led definition of disability, with its focus not on difference but 'adverse' effects, which explains the use of the term 'disadvantage' here.)

In the case of both the definition of disability in section 6 and the severe disfigurement provision, the relevant type of disadvantage must result from impairment. This means that those who are placed at serious functional disadvantage, perhaps by having a lower than average IQ or a personality trait of low self-confidence, do not fall, without more, within the protection of the Act. Similarly, it is clear that the Act does not intend to protect pure differences of appearance (without impairment) even where these produce severe disadvantage. This is so despite evidence showing that people can face attitudinal barriers because of the way they look *without* having an impairment. Appearance and disfigurement are part of a spectrum, and beautiful people have a better chance at leading beautiful lives³². They are likely to be perceived by others not just as more attractive, but also more socially adept, and more successful³³. The implicit corollary of this is that we less than beautiful people – who don't have a disfigurement but are prone to a few spots, whose ears stick out more than we'd like, or who are carrying an extra stone in weight - are relatively disadvantaged because of it. Impairment thus acts as a filter, separating the 'unlucky' disadvantage of appearance and function from the actionable disadvantage of appearance and function resulting from impairment.

³⁰ See, for example, Frances Cooke Macgregor, 'Social and Psychological Implications of Dentofacial Disfigurement' (1970) 40 *The Angle Orthodontist* 231, 232; Nichola Rumsey and others, 'Altered body image: appearance-related concerns of people with visible disfigurement' (2004) 48 *Journal of Advanced Nursing* 443, 450; Marijke E. P. Van Den Elzen and others, 'Adults with congenital or acquired facial disfigurement: Impact of appearance on social functioning' (2012) 40 *Journal of Cranio-Maxillofacial Surgery* 777, 781.

³¹ Ron Amundson, 'Biological Normality and the ADA' in Leslie Pickering Francis and Anita Silvers (eds), *Americans with Disabilities* (Routledge 2000), 103.

³² See, for example, Karen Dion, Ellen Berscheid and Elaine Walster, 'What is beautiful is good' (1972) 24 *Journal of Personality and Social Psychology* 285, 286; Judith H. Langlois and others, 'Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review' (2000) 126 *Psychological Bulletin* 390, 403.

³³ *Ibid.*

It could be argued that the scope of the law is wrong; that disadvantage (or, stepping back from the law's assumptions of inferiority, difference) should be the sole determinant of equality rights, and that extra 'filters' such as impairment, and criteria as to duration and substantiality / severity, are unwarranted. David Wasserman, for example, argues that "many physical and mental differences not classified as impairments elicit equally contemptuous, dismissive, patronizing and oversolicitous responses, that can be equally handicapping"³⁴. Conversely, a counter-argument could be made that, the wider the distribution of equality rights, the more diluted they become, unable to serve the needs of those who need them most³⁵, thus additional filters such as impairment serve to concentrate the rights where they are most needed.

These arguments are not developed further in this paper because the focus here is not to address what the law should, as a matter of principle and legal theory, protect. Instead, this paper evaluates an even more basic requirement: whether the Act's current drafting *achieves* its underlying choices. If, as suggested above, the aim of the severe disfigurement provision is to counter appearance-related disadvantage which meets specific thresholds, the relevant question can be framed as follows: do all people who experience severe, long-term appearance-related disadvantage resulting from impairment receive equality rights under the Act?

B: The relationship between disfigurement and appearance

As noted above, disfigurement and appearance are part of a spectrum but equality law engages with one part of that spectrum only: an impairment which consists of a severe disfigurement³⁶. The first step in understanding the relationship between disfigurement and appearance is therefore to analyse the filter of impairment.

The term 'impairment' is included in the Act's provisions on both functional and appearance-related disadvantage (disability and severe disfigurement respectively). Impairment is not defined in the Act but case law determines that a physical impairment means "something wrong with them physically"³⁷, and it is an undemanding threshold which is to be given its 'ordinary and natural meaning'³⁸.

³⁴ David Wasserman, 'Stigma without impairment' in Leslie Pickering Francis and Anita Silvers (eds), *Americans with Disabilities* (Routledge 2000), 151.

³⁵ See *ibid*, 153 for a discussion of these arguments.

³⁶ The severity threshold is also relevant here but has been discussed in detail in a previous article. See Saunders (n2).

³⁷ *Rugamer v Sony Music Entertainment UK Limited* [2001] IRLR 644 para 34.

³⁸ *McNicol v Balfour Beatty* [2002] IRLR 711, para 17.

The Guidance on the definition of disability is clear that, in determining whether an impairment exists, it is not necessary for tribunals to identify its cause³⁹. In most situations, this benefits claimants, who are relieved from the obligation of proving why they have a particular impairment – they simply have to prove its existence, which can often be helped by a consideration of the effects of the alleged impairment on the ability to perform day to day activities. Sometimes Tribunals have adopted a ‘back to front’ approach by identifying the effects on day to day activities first, and assuming that “as a matter of common-sense inference” any effects found must point to the presence of an impairment producing them⁴⁰. Accordingly, someone can still be disabled even when doctors cannot identify a cause for the problem they are experiencing. Although this sounds simple, closer examination of the legal concept of impairment reveals fault lines beneath the surface.

The first fault line is that a binary distinction between impairment and non-impairment (i.e. physical norms) is often too simplistic. Numerous degrees of human functioning exist, making an assessment of what is ‘normal’ or ‘impaired’ tricky. Mary Crossley argues that “the immense variety found in human bodies makes it quite difficult to draw a bright line between those bodily characteristics that are considered impairments and those that are not”⁴¹. A second, related, fault line appears where an issue falls close to the dividing line between appearance and disfigurement. The binary distinction between impairment and physical ‘normality’ is joined by a third category: imperfections of appearance. These are both undefined and unprotected. So how does the law differentiate what is ‘wrong’ (i.e. impairment), from what is ‘normal’ or unimpaired, from what looks different in some way?

The challenge of separating appearance from impairment sometimes encourages Tribunals to fall back on the physiological cause underlying a condition⁴². Although this sits uncomfortably with the Guidance which, as outlined above, places the emphasis on the effect of an impairment rather than its cause, a focus on biomedical causation is clearly identifiable in case law under the Act. In *Hussain v Sky In-Home Services Ltd*⁴³, a male claimant who was 4’8” (without a proven, relied-on, medical cause) was held not to have a physical impairment. Yet someone of a similar height due to restricted bodily development appears likely to qualify for protection given the express inclusion of this condition in the Guidance on the meaning of ‘severe disfigurement’⁴⁴. The Employment Tribunal made a particular point of noting that the Claimant’s short stature had not been expressly argued as resulting from a hormone deficiency, despite a suggestion of this in a doctor’s letter. The physiological cause of a characteristic *is* therefore sometimes relevant to its status as an impairment.

³⁹ Equality and Human Rights Commission, *Equality Act 2010 Code of Practice, Employment*, (The Stationery office Limited 2011), Schedule 1 Para 7.

⁴⁰ *J -v- DLA Piper LLP* UKEAT/0263/09/RN, para 38.

⁴¹ Mary Crossley, 'Impairment and Embodiment' in Leslie Pickering Francis and Anita Silvers (eds), *Americans with Disabilities* (Routledge 2000), 112.

⁴² See also Wasserman (n34), 149, on this point.

⁴³ *ET/2300908/16*

⁴⁴ Restricted bodily development is generally interpreted as a final adult height of 4’10” or less; see Restricted Growth Association, (undated), <<https://rgauk.org/about-restricted-growth>> accessed 29 April 2019.

Judging impairment by reference to biomedical causation is not always clear cut, however. As the boundaries of medical knowledge expand, we know more about how our bodies work, and we know the medical causes for a lot of traits which the law might not want to recognise as impairments. The issue of hair loss illustrates this. In the Scottish case of *Campbell v Falkirk Council*⁴⁵, the claimant (a 61 year old man) complained of unfair dismissal and disability discrimination. His disability claim relied on the fact that he was balding. Mr Campbell's claim was actually made under the standard definition of disability rather than the severe disfigurement provision, but this made little difference as both require the presence of an impairment, which the Tribunal found was not satisfied. The Tribunal commented that "if baldness was to be regarded as an impairment then perhaps a physical feature such as a big nose, big ears or being smaller than average height might of themselves be regarded as an impairment under the DDA."⁴⁶

The reason for the claimant's hair loss in this case is not expressly referenced in the judgment, but male pattern baldness (also known as androgenetic alopecia) commonly occurs as a part of the ageing process. Statistics suggest that up to 50% of men aged over 50 experience male pattern baldness⁴⁷, and on that basis, the Tribunal's finding that hair loss was not an impairment (and therefore a matter of appearance but not disability or disfigurement) is unremarkable. Yet there is an identified physiological cause for male pattern baldness: both genetic and hormonal factors tend to play a part, inducing the hair follicles to shrink permanently, making them unable to support hair growth⁴⁸. Why is this biomedical reason less valid than that underlying other types of impairment? A biomedical causative approach doesn't always explain why the law finds impairment in some aesthetic characteristics but not in others.

The distinction in *Campbell* becomes more complex still when we consider other causes of baldness. Alopecia areata, for example, is much rarer than male pattern baldness and can cause partial or total hair loss of the head and body at any stage of life, but predominantly in those under thirty⁴⁹. It is believed to result from an autoimmune condition and, unlike male pattern baldness, it tends not to occur gradually over years but suddenly, repeatedly and in clumps. It is commonly associated with stress and can be very traumatic for those affected, as well as very visible to other people. If different types of hair loss should be treated differently by the law (and it is submitted here that those

⁴⁵ *Campbell v Falkirk Council* [2008] S/136261/07

⁴⁶ *Ibid*, para 15.

⁴⁷ William Cranwell and Rodney Sinclair, 'Male Androgenetic Alopecia' (2016) *Endotext* <<https://www.ncbi.nlm.nih.gov/books/NBK278957/>> accessed 31 January 2019.

⁴⁸ Alopecia UK, (undated), <<https://www alopecia.org.uk/Pages/FAQs/Category/types-of-alopecia> > accessed 30 January 2019.

⁴⁹ Anonymous, 'Hair loss reversed in alopecia areata sufferers', *BBC* <<https://www.bbc.co.uk/news/health-28834058>> accessed 30 January 2019.

suffering from alopecia areata *do* satisfy the criteria of impairment), clarity on the issue of non-functional impairment is crucial to ensuring that the boundaries of protection are properly drawn⁵⁰.

So, the presence of a physiological cause underpinning a particular condition doesn't always offer a reliable way of sifting impairment from imperfections of appearance. But an additional filter is perhaps implicit: prevalence. Male pattern baldness was (at least within Mr Campbell's demographic) extremely common. The prevalence of a condition does not necessarily reduce the social barriers or stigma that it engenders⁵¹, and it is often associated with distributive arguments about opening the floodgates⁵². But prevalence perhaps becomes an even greater obstacle when it comes to conditions which only impact appearance; it is harder to argue that an aesthetic characteristic is a physical 'wrong' (i.e. an impairment) when it is shared with a significant proportion of the relevant population. Prevalence blurs with appearance 'normality', making it harder to prove impairment.

Case law suggests that prevalence is being used as a blunt tool. In *Hussain*, for example, the Employment Tribunal, as part of its reasoning for finding that the (adult male) Claimant's short stature was not an impairment, relied on the fact that women and children are often short too⁵³. The implicit logic appears to be that a man is not impaired on the basis of short stature because being short is prevalent among a lot of other people – including children. But clearly the social experience of being 4'8" must be very different for a man than for a child. The Tribunal's blunt comparison fails to take into account the relative nature of appearance which must be salient if taking prevalence into account to differentiate appearance from impairment.

By way of further example, consider again the issue of hair loss. Despite placing particular importance on facial disfigurements due to their visibility, the Guidance⁵⁴ is silent about (often very visible) hair conditions. Remembering *Campbell*⁵⁵, the decision (that baldness – presumably male pattern baldness - was not an impairment) implies a keenness to distinguish (unprotected) issues of appearance from (protected) issues of disability and disfigurement. The comparative examples cited by the Tribunal (a big nose, big ears or being smaller than average) are common physical appearance traits. But while male pattern baldness may be a common feature of appearance for men of Mr Campbell's age, it is much less common in young women. An 18-year old woman with severe male pattern baldness

⁵⁰ Because alopecia affects the hair follicles, which are part of the skin, it can arguably be thought of as a skin condition, and skin conditions are listed in the Guidance as a potential form of severe disfigurement. The International Classification of Functioning, Disability and Health also lists baldness as a 'problem of skin function' – see World Health Organisation, 'A practical manual for using the International Classification of Functioning, Disability and Health (draft)', <<https://www.who.int/classifications/drafticfpracticalmanual2.pdf?ua=1>> accessed 29 April 2019, para 2.3. This argument may help anyone seeking to claim that alopecia is a severe disfigurement.

⁵¹ Obesity is one example of this. See Part 2C below.

⁵² For an example of a recent case where the issue of prevalence has been expressly acknowledged as a policy argument in restricting the definition of disability, see *Taylor v Ladbrokes Betting and Gaming Limited*, [2017], UKEAT/0353/15/DA, para 9.

⁵³ (n43) para 32.

⁵⁴ (n5).

⁵⁵ (n45).

(despite the name, it can happen to women too) would stand out to a much greater degree from her peers for this reason. Yet, neither the Act nor the Guidance expressly situate the threshold of impairment or severe disfigurement within the context of the personal characteristics of the person affected.

Hair loss is not the only example of a condition which can fall either side of the cusp of impairment according to personal context. Consider, for example, a man with enlarged breast tissue, which would be considered aesthetically normal for women⁵⁶; or significant facial hair growth on a woman, which would be considered a common feature of appearance for men; or wrinkled skin⁵⁷ or varicose veins on an adolescent, which may be a prevalent appearance trait in older people. The need for context applies to the concept of severe disfigurement, too, as well as impairment. It is submitted that a condition such as vitiligo, which causes patches of bleached skin to appear, may readily meet the threshold of impairment irrespective of personal context, but a relative approach may help some people with vitiligo (especially those with darker skin tones) to meet the threshold of severe disfigurement.

Just as disability is individually determined (by assessing the effects of an impairment on that specific person's ability to carry out normal day to day activities, rather than the typical impact of that condition on people generally⁵⁸), so potential disfigurements should be assessed individually relative to that person's appearance. Disfigurement (and impairment as one aspect of the legal test) should not be viewed as a universal standard irrespective of context, but as a measure of the extent to which that person's appearance is impaired by 'something wrong with them physically'⁵⁹. The law needs to recognise that a condition which may be a relatively commonplace appearance flaw within one demographic can have a much greater negative impact on the appearance of someone within another demographic.

It is worth clarifying that the contextual approach presented here is not based on misplaced assumptions about appearance 'mattering more' to certain groups of people. The law has, until recently, been coloured by such an assumption in relation to personal injury, with the JC Guidance prior to 2017⁶⁰ providing that damages for a woman who sustained a facial disfigurement should be greater than those for a man sustaining a similar injury. This appears to have been based on an erroneous assumption that the extent to which appearance 'matters' to someone will be affected by their gender (an assumption which has been challenged by a considerable body of research in the social sciences⁶¹). Instead, the proposition argued here is that a characteristic which is a commonplace appearance

⁵⁶ Gynecomastia is swelling of the breast tissue in men due to hormonal imbalance

⁵⁷ Genetic and Rare Diseases Information Center, 'Wrinkly skin syndrome' (2016) <<https://rarediseases.info.nih.gov/diseases/273/wrinkly-skin-syndrome>> accessed 1 February 2019.

⁵⁸ *Paterson v The Commissioner of the Police of the Metropolis* [2007] UKEAT 0635/06, para 39.

⁵⁹ *Rugamer* (n37) para 34.

⁶⁰ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th Edition, OUP, 2015), 81.

⁶¹ See, for example, Nichola Rumsey and Diana Harcourt, 'Body image and disfigurement: issues and interventions' (2004) 1 *Body Image* 83, 88; Thompson and Kent (n27) 668. Interestingly, the most recent 14th edition of the Judicial College guidelines still includes an uplift of damages for younger people.

characteristic for a person of one demographic (such as thinning hair for an older man, or acne for a teenager) may be an impairment for another.

So, in assessing whether the law achieves its aim of protecting all people who experience severe, long-term appearance-related disadvantage resulting from impairment, the concept of impairment comes under particular strain. This results in some people being excluded from protection even where the characteristic in question has an underlying physiological cause, and makes the person stand out within their demographic, creating social barriers for that reason. The concept of impairment, as it applies to non-functional limitations, is in urgent need of review.

Setting the issue of impairment aside, the meaning of 'disfigurement' is also problematic. The apparent logic behind the severe disfigurement provision is, as identified above, one of appearance-related disadvantage. Yet the Act doesn't use the word 'appearance', but 'disfigurement'. The two concepts are connected (especially when linked by impairment) but it is arguable that common usage of the word 'disfigurement' creates a narrower subset of appearance-related disadvantage. Instinctively, 'disfigurement' is usually associated with certain types of appearance-related impairments, such as scars and birthmarks, at the expense of others, such as stained and missing teeth, hair loss, or other impairments which have the potential to create appearance disadvantage. This creates a mismatch between the underlying logic of the law and its scope.

Whereas the noun of (severe) disfigurement suggests that there is a static, self-contained 'thing' (such as a scar, a birthmark or similar) to be judged, the logic of appearance-disadvantage plus impairment would include an impairment which has a *disfiguring effect*, without the condition itself *being* a disfigurement.

The example of facial movement impairments illustrates this point. A facial movement impairment is any condition which affects the way that the face moves, voluntarily or involuntarily. Tourette syndrome, for example, can cause involuntary facial tics and fleeting contortions of the face. While some sufferers also experience other symptoms such as vocal tics (which would be likely to meet the usual definition of disability because of the impact on speech), for others the disruption of facial expressions is the defining feature of the condition⁶². Similarly, synkinesis can cause involuntary grimaces to be triggered by voluntary movements, such as smiling, and facial palsy means paralysis in part of the face which can prevent or affect normal facial movements such as smiling.

There are strong arguments suggesting that the law should not treat facial movement impairments differently from other types of visible difference, because the case law on disfigurement places importance on a number of factors

⁶² In *Vatcher v Kelly Services (UK) Ltd* [1999] UKEAT 595_99_0510, the Claimant had facial tics of Tourette's syndrome which did not meet the standard definition of disability. The EAT refused to hear his contention that this amounted to a severe disfigurement for procedural reasons: they determined that the argument had not been made at the original hearing.

present in facial movement disorders. First, case law demonstrates that an impairment which hinders facial expressions (as facial movement disorders often do) is more likely to meet the definition of severe disfigurement. In the *Johansson v Fountain Street Community Development Association*⁶³, for example, the fact that the Claimant's facial expressions were found to be 'normal and appropriate'⁶⁴ contributed to a finding by the Northern Ireland Industrial Tribunal that the Claimant's disfigurement was not severe. Second, impairments affecting facial movement often create (intermittent or ongoing) facial asymmetry. Consistent with a strong body of research demonstrating the importance of facial symmetry to judgments about appearance⁶⁵, the limited case law on severe disfigurement shows that Tribunals are often prepared to take facial asymmetry resulting from an impairment into account in determining whether the threshold is met⁶⁶. Third, facial movement impairments are not easy to disguise with make-up, and very likely to be visible at a distance. This is another factor that features strongly in reported case law. In *Griffiths*⁶⁷, for example, the Tribunal placed importance on the fact that, when the Tribunal clerk was asked what the Claimant looked like, she described him as a 'balding man with glasses and moustache' without noticing his facial scar. Similarly, in *Hand*⁶⁸, the Tribunal noted that the scarring was visible both when the Claimant came to the front to give evidence, and when she sat further back in the room, and decided that she had a severe disfigurement. These three practical arguments suggest a degree of commonality between facial movement disorders and other types of disfigurement, which may be useful to anyone wishing to argue a facial movement impairment as a severe disfigurement.

Yet, despite this commonality, instinctively some facial movement impairments (particularly those which cause excessive facial movements rather than facial paralysis) feel like an awkward fit with the severe disfigurement provision as it is currently drafted.⁶⁹ When preparing this paper, not one person who was consulted informally on the issue⁷⁰ instinctively aligned conditions such as Tourette syndrome and synkinesis with the concept of severe disfigurement. It is submitted that the reason for this disconnect is linguistic. The phrase 'which consists of a severe disfigurement'⁷¹ in the Act implies an unchanging state. This doesn't lend itself easily to conditions which can alter from one moment to the next. This is reinforced by the examples given in the Guidance of which almost all (with the exception of a small proportion of skin conditions) would usually be permanent and unchanging. We might tend to describe a scar as a disfigurement but a condition which causes involuntary additional facial movements as a

⁶³ (n12).

⁶⁴ *Ibid*, para 7.

⁶⁵ See Domagoj Svegar, 'What does facial symmetry reveal about health and personality?' (2016) 47 Polish Psychological Bulletin 356, for a summary of some recent research on this issue.

⁶⁶ *Hand* (n13) para 2(b).

⁶⁷ *Griffiths v Lancashire CC*, 2009 (ET) unreported; see Sue Johnstone, "'Disfigurement" was not a disability' EOR 2009 193, 31.

⁶⁸ *Hand* (n13) para 2(b).

⁶⁹ It is submitted that facial movement impairments which prevent, rather than create, facial movement – such as facial palsy – are an easier fit within the implicitly static concept of 'disfigurement'.

⁷⁰ No attempt is made to suggest that these informal consultations were academically rigorous, but simply informal discussions with colleagues and a practising lawyer on the general principles.

⁷¹ (n1).

disfiguring condition; the latter description focuses more on the appearance-altering power of the condition rather than the appearance of the condition itself. A definition which allowed greater focus on disfiguring *effects*, rather than *disfigurement*, may resolve this disconnect. This focus may benefit people with conditions beyond facial movement disorders too – the severe dandruff-like skin flakes in the eyebrows and scalp produced by seborrheic dermatitis, or the visual impact of excessive facial perspiration are examples of conditions which are a difficult fit within the word *disfigurement* because of their processual, ongoing nature, but which surely produce a disfiguring effect and appearance-related disadvantage.

In summary, common usage of the word ‘disfigurement’ highlights a narrow subset of appearance-related impairments, which risks making other appearance-related impairments (such as facial movement disorders, and conditions which can produce varying degrees of disadvantage according to the personal characteristics of the person concerned) legally invisible.

C. The relationship between disability and appearance

Given the positioning of the concept of disfigurement, one might not expect significant overlap between the areas of disability and appearance without the engagement of disfigurement too. However, obesity is one area where this overlap occurs.

Some obese people will experience functional effects from their size, such as restricted mobility or joint pain. If sufficiently substantial and long term, these functional effects would bring them within the reach of disability law. But some people are obese without it affecting what they can do. This was alleged to be the case in the recent ECJ decision of *Kaltoft*⁷², where the claimant argued that he had been dismissed from his job because he was obese, but that his size did not prevent him from fulfilling his role⁷³. His case was that he was discriminated against because he was fat, not because his weight impacted on his activities.

On this point, there is strong evidence that people who are overweight are stigmatised because of it⁷⁴. This can take a number of forms; from stereotypes of laziness and low self-control, to health policy-induced stigma designed to encourage people to lose weight. Under a social model analysis, there clearly are barriers hindering overweight people even when their ability to carry out day to day activities is not affected. Research from America suggests that those who feel stigmatised because of their weight are more at risk of a variety of adverse psychological and physical

⁷² Case C-354/13 *FOA v Kommunernes Landsforening (Kaltoft)* [2014] FOA ECLI:EU:C:2014:2463.

⁷³ Bruno Waterfield and Justin Huggler, 'I don't feel my weight is a big problem,' says Dane in EU obesity ruling' *The Telegraph* (24 May 2019) <<https://www.telegraph.co.uk/lifestyle/wellbeing/diet/11302442/I-dont-feel-my-weight-is-a-big-problem-says-Dane-in-EU-obesity-ruling.html>> accessed 24 May 2019.

⁷⁴ World Health Organisation, 'Weight bias and obesity stigma: considerations for the WHO European region' (undated), <http://www.euro.who.int/_data/assets/pdf_file/0017/351026/WeightBias.pdf> accessed 24 May 2019.

health consequences, including further increases in obesity levels⁷⁵. Weight stigmatisation therefore seems to have a complex interaction with disability.

In *Kaltoft*, the ECJ considered when obesity could be a disability. They began by reaffirming a definition of disability from the earlier case of *Ring*, which partially reflects a social model understanding of disability:

‘a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’⁷⁶.

This definition locates disability in the interaction between impairment and external barriers (which could presumably include attitudinal barriers and stigmatisation). However, the ECJ then progressed to narrow its analysis by suggesting that this definition would be fulfilled only in cases of functional limitation, such as “reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity”⁷⁷. The examples given appear to suggest that the ECJ’s interpretation of a ‘limitation’ is a functional one such that obesity will only be a disability if it produces functional limits or hindrances on what the person can do, such as walking upstairs, or performing daily work tasks without getting out of breath. If this was their intent, the decision appears to take a significant step back from the social model of disability, as it fails to recognise the stigma barriers faced by Mr Kaltoft on account of his size⁷⁸. This implicit inconsistency perhaps indicates that further clarification of the law on obesity is likely in the future.

Despite apparently strong reasons for recognising non-functional obesity as a disability, it is possible that one complication in doing so, as touched on earlier, is the issue of prevalence. Obesity is very common (it is estimated that over 25% of the UK adult population is obese, and around 3% of us are morbidly obese with a BMI over 40⁷⁹). Indeed, some studies predict that morbid obesity levels in the UK are set to double over the next twenty years⁸⁰. Extending equality rights to people with all degrees of obesity would represent a significant expansion of the numbers (on paper, at least) of disabled people. This could give rise to (possibly ill-founded⁸¹) policy concerns about opening the floodgates, both in terms of numbers of potential claims and other duties on employers such as the need to make

⁷⁵ Rebecca M. Puhl and Chelsea A. Heuer, 'Obesity stigma: important considerations for public health' (2010) 100 *The American Journal of Public Health* 1019, 1023.

⁷⁶ *Kaltoft* (n72) para 53.

⁷⁷ *Kaltoft* (ibid) para 60.

⁷⁸ Lisa Waddington, 'Saying All the Right Things and Still Getting it Wrong' (2015) 22 *Maastricht Journal of European and Comparative Law* 576, 587.

⁷⁹ Carl Baker, 'House of Commons Briefing Paper No 3336' (20 March 2018).

⁸⁰ Bethany Minelle, 'Morbid obesity in Britain to double within twenty years', (2018), *Sky* <<https://news.sky.com/story/morbid-obesity-in-britain-to-double-within-20-years-11385734>> accessed 30 January 2019.

⁸¹ Wasserman (n34) 154.

reasonable adjustments. Although not expressly mentioned in *Kaltoft*, the prevalence of (non-functional) obesity does perhaps makes it more likely to be viewed by some as an issue of appearance rather than impairment.

There is already a considerable body of scholarship which considers whether, and how, obesity should trigger equality rights, but the legal relationship between disfigurement and obesity merits further exploration. *Kaltoft* was not a British case so the claimant would not have been able to argue that the severe disfigurement provision in s.3 of Schedule 1 applied. However, regardless of the jurisdictional aspect, this probably would not have helped him in any event; to suggest that obesity could be a severe disfigurement seems to stretch the current statutory wording beyond breaking point linguistically. It is also extremely doubtful whether many people who are overweight would self-identify as having a severe disfigurement.

But the ongoing tussle over equality rights for people who are obese has an important ramification for disfigurement law; if obesity is not recognised, this creates inconsistency with a number of other conditions which may be more likely to fall under the severe disfigurement provision. Conditions such as lipoedema, lymphedema and elephantiasis, for example, all cause bodily swelling, usually just in the legs and ankles, (and, for lipoedema, the arms). These conditions are not caused by overeating (lipoedema is thought to be hereditary fat cell deposit problem affecting women, primary lymphedema is caused by a genetic problem in the lymphatic drainage system, and elephantiasis is a reaction to mosquito bites) and they can all affect people irrespective of their prior BMI. Like obesity, sometimes they limit what the person can do. They can be painful and can reduce mobility, but not in all cases. They are much less common than obesity among the population (both elephantiasis and primary lymphedema are rare, and lipoedema is thought to affect up to 11% of women⁸², of whom only a much smaller percentage would be severe cases potentially qualifying as a severe disfigurement), which helps to avoid suggestions that these conditions are common matters of appearance only, rather than impairments. Yet observers (and sometimes even medical professionals) often mistake conditions such as lipoedema for obesity⁸³, which suggests that the experiences and social barriers faced by all groups are likely to be similar.

A further inconsistency could arise in respect of formerly obese people who, having lost weight, may be left with excess skin. Despite a lack of case law on this point, it is arguable that this excess skin could be viewed as a type of skin condition resulting in (severe) disfigurement, leading to the slightly illogical conclusion that, while obesity is not treated as a disability in the absence of functional consequences, the visible effects of *former* obesity may be. The law's approach to social, rather than functional, disability risks creating exclusions and inconsistencies which are difficult to justify.

⁸² Donald W. Buck and Karen L. Herbst, 'Lipedema: A relatively common disease with extremely common misconceptions' (2016) *Plastic Reconstructive Surgery Global Open* 10434(9) e1043.

⁸³ *Ibid.*

An alternative claim for someone struggling to reach the disability threshold to bring a discrimination claim may be a perceptive discrimination claim. Perceptive discrimination allows a claimant to succeed in a disability discrimination claim when she is not disabled, but where the person discriminating believes her to be so. The discriminator does not have to be aware of the legal test for disability in the Act⁸⁴ in order to perceive someone as disabled. He merely has to perceive that the various aspects of the definition of disability would be satisfied factually, even if he doesn't know what they are legally.

Perceptions can sometimes be formed on the basis of the way someone looks, rather than acts. A perception could relate to the aesthetics of a condition (i.e. a perception that someone's scar is a severe disfigurement) but it can also relate to assumed function. Seeing that someone is obese or visibly different may lead to a (false) perception that he will be less able to perform work functions. Similarly, an employer may assume that a member of staff must be having cancer treatment because she has suddenly lost her hair. Or that a colleague with a red, bulbous nose caused by the skin condition rhinophyma must be an alcoholic. Or indeed that someone who is extremely thin must have an eating disorder.

However, perceptive discrimination claims are not a panacea for appearance-related issues. In the perceived alcoholism example above, for example, it is doubtful whether this would qualify as a perceived disability because alcoholism is excluded from protection as a disability under the Equality Act 2010⁸⁵. Although the policy reasons for excluding alcoholism would not apply to the person with rhinophyma who was disadvantaged by the perception, it is hard to imagine how the courts would resolve this given the wording of the Act. A similar issue could arise from scars perceived to relate to illegal drug use – also an excluded condition under the Act⁸⁶. More commonly, though, perceived disability claims face the hurdle of proving that the discriminator's perception met the various aspects of the legal test. This ironically favours the employer who discriminates through casual prejudice against the way that overweight people look, rather than because he has put his mind to the likely functional impact of a long-term medical condition. Therefore, although perceptive discrimination provides a useful bridge between issues of appearance and disability in limited circumstances, it is not enough on its own to solve the tension apparent between the concepts.

In summary, the boundaries between the concepts of appearance, disfigurement and disability are blurred at the edges, leading to likely uncertainty and the potential for inconsistency in situations falling close to these boundaries. A comparison of the Act's wording with its implicit logic of protecting those who experience severe, long-term appearance-related disadvantage resulting from impairment reveals a mismatch, suggesting that the Act is not

⁸⁴ *The Chief Constable of Norfolk v Coffey* UKEAT/0260/16/BA, para 51.

⁸⁵ The Equality Act 2010 (Disability) Regulations 2010, s.3.

⁸⁶ *Ibid.*

meeting its own aims. The following section addresses the extent to which this mismatch can be addressed by further definition of the concept of severe disfigurement.

Part 3: Defining disfigurement

This paper has sought to demonstrate that there are problems of both clarity and breadth (whether actual or perceived) in the concept of severe disfigurement. There are multiple solutions to these problems, including: i) amending the existing legislation within its current protected characteristic of disability⁸⁷; ii) introducing one or more new protected characteristics of disfigurement⁸⁸, appearance⁸⁹ or even obesity; or iii) providing better guidance and definition of the existing provision. In the present political and legislative climate, the latter option appears to offer the most pragmatic approach to this issue, as it requires minimal legislative change. Possible approaches to a definition will now be discussed.

To recap, the above analysis argues that any definition of ‘an impairment which consists of a severe disfigurement’ must satisfy four key requirements. First, it needs to realign the concept of disfigurement with its (arguably wider) underpinnings as impairments resulting in appearance-related disadvantage. This added breadth would make the inclusion of conditions such as certain facial movement impairments and alopecia easier – those which affect appearance but may not commonly be associated with the term ‘disfigurement’. Second, it needs to provide clarity so that claimants are not deterred from bringing a claim due to uncertainty over what sort of conditions are covered, and so that employers understand their obligations. Third, it needs to take into account contextuality, to recognise that some conditions may have a greater adverse effect on specific groups of people. Finally, it should provide support for the filter of ‘impairment’ by helping to differentiate cases of pure appearance (which do not stem from impairment) from cases of disfigurement (which do stem from impairment).

A basic framework for a definition could perhaps follow a similar approach to that taken in s.6 of the Act:

‘an impairment which has a [substantial/severe]⁹⁰ adverse effect on that person’s appearance’.

⁸⁷ An amendment could, for example, be made to the definition of disability in s.6 to include impairments which have a substantial adverse effect on the person’s appearance as well as those which have a substantial adverse effect on the person’s ability to carry out normal day to day activities. Alternatively, the current definition of disability could be rewritten in line with a social model understanding of disability, which would not necessitate distinguishing between functional and aesthetic impairments.

⁸⁸ See Saunders (n2) for a more detailed discussion on this point.

⁸⁹ Ibid.

⁹⁰ Clearly the definition would need to provide the same level of severity / substantiality as the disfigurement provision in s.3, Part 1, Schedule 1. The author’s view is that neither a threshold of severity nor substantiality are required, but substantiality would certainly be preferable to severity, in line with the approach of s.6 of the Equality Act 2010.

Consistent with the approach taken under s.6, this wording measures the impact of the impairment on the claimant's own appearance rather than trying to judge it relative to external norms of appearance. This avoids difficult definitions or decisions about where a range of 'normal appearance' falls, which can change over time and be socially and culturally relative. It also avoids the distasteful process of judging an individual's appearance relative to external 'norms' which would do little to promote the dignity of the person and may deter claims. The proposed definition also makes significant progress toward achieving the first three of the four key requirements identified above; it helps to realign disfigurement with the wider concept of appearance-related disadvantage; it helps to provide clarity on the scope of the provision (particularly when accompanied by some more detailed examples in the relevant statutory guidance); and the reference to '*that person's appearance*' allows personal contextuality to be taken into account in determining whether the severe disfigurement threshold is met.

However, this definition alone doesn't solve the fourth requirement of helping to distinguish impairments from appearance imperfections. One way to ease this distinction could be to exclude specified physical characteristics (such as height, weight, hair loss/presence, eye colour etc) which fall within normal ranges for someone of the claimant's gender, age, race and other relevant personal characteristics. Although this does involve reference to an external standard (i.e. a normal range), in this instance it relates only to assessing the relevant physical characteristic (such as height or eye colour), not to making judgments of overall appearance, with the added intrusiveness this entails. There is some international precedent for such an approach. The Interpretive Guidance to the Americans with Disabilities Act (as amended by the ADAAA) refers to an impairment of cosmetic disfigurement as excluding 'physical characteristics such as eye colour, hair colour, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder'⁹¹. Provided that this list of exclusions was not engaged, Tribunals would be free to adopt a more relaxed approach to the concept of impairment, which is more in line with the body of case law surrounding functional impairment set out above. Given the historically low number of reported claims under the severe disfigurement provision, relaxing the collar of impairment in respect of aesthetic conditions is unlikely to lead to justified policy concerns about floodgates, especially given the current (arguably excessive) criterion of *severe* disfigurement.

How would a definition similar to this apply to some of the borderline cases discussed earlier? Some outcomes may well be unaffected. The decision in *Campbell* relating to male pattern baldness, for example, would seem likely to fall foul of an impairment exclusion relating to hair loss within the normal range for a man in his sixties, likely prompting no change to the finding of no impairment. Other cases, however, could lead to a different outcome. The height of 4'8" in *Hussain* seems more likely to fall outside the normal height range for an adult male, so a finding of impairment could well follow. (Whether the Tribunal found that the Claimant's height amounted to a *severe*

⁹¹ Title 29 CFR Appendix to Part 1630, Interpretive Guidance of Title 1 of the Americans with Disabilities Act 1630.2(h)

disfigurement or disability is, of course a separate matter). In both of these cases, the result could be different if the claimant's personal characteristics were altered in a relevant way.

The proposed definition might also impact on a minority of cases relating to obesity; given the prevalence of mild to moderate obesity, a finding of impairment (i.e. weight outside of the normal range) may be limited to cases of morbid obesity. A claimant would still need to fulfil the remaining aspects of the definition of disability, but a return to the spirit of the *Ring* definition could achieve this by reference to social, rather than physical, limitations resulting from morbid obesity. Conditions like synkinesis and other facial movement impairments would perhaps also be more likely to be included by the proposed definition, due to the increased breadth (or at least perceived breadth) which it provides.

Conclusion

The relationships between matters of appearance, disfigurement and disability are becoming increasingly complex. On the one hand, we are more aware, through research, of the stigmatising judgments we make based on appearance, and the social barriers resulting from this. On the other hand, as our society changes, appearances change too – soaring levels of obesity are the most obvious example – which brings issues of appearance to the fore as they begin to affect more people, and 'normal ranges' of appearance change over time. Although general appearance is not a protected characteristic, the social model of disability, with its focus on barriers, is helping to narrow the gap between appearance, disfigurement and disability by recognising that not all barriers are functional, and stigma can exist without impairment. This creates tension as the courts grapple with a desire not to open the scope of disability so wide that they are protecting issues of appearance through the back door and imposing a disproportionate burden on employers.

The tension stems, perhaps, from trying to impose binary legal categories (disabled or not, severely disfigured or not) onto spectrums which include both appearance and impairment, and the stigma which can accompany them. The areas where this tension is most apparent are those where the protected areas under the Act (disability, and severe disfigurement as a subset of that) meet issues of appearance. At these transition boundaries, we find inconsistency.

Principles of statutory interpretation provide some opportunity to argue that the term 'disfigurement' in the Act should be construed widely. Both a literal and a purposive approach to the statute suggest (in admittedly vague terms) that the 'disfigurement' provision has appearance-related disadvantage resulting from impairment at its core. The social model of disability reinforces this; the disability created by visible difference is not limited to a narrow

subset of conditions brought to mind by common usage of the word 'disfigurement'. A definition targeting appearance-related disadvantage resulting from impairment would help to realign the term disfigurement with the Act's underlying aims.

The least disruptive way of achieving this reform in the medium term is to provide increased definition of the existing concepts⁹². Perhaps, then, that MP will be proved right: 'there are many types of severe disfigurement and we can all imagine what they might be'⁹³.

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⁹² It is also suggested that a number of small legislative changes should be made to the Act to deal with problems relating to the severity threshold and complex conditions. See Saunders (n2).

⁹³ David Hanson (n18).