TRAMPOLINE PARKS: ACCESSIBILITY AND SAFETY FOR SERVICE USERS WITH DOWN'S SYNDROME

1. INTRODUCTION TO THIS GUIDANCE

This guide will give you an overview of how equality and personal injury law applies to Trampoline Parks and looks at the particular issue of ensuring accessibility and safety for service users with Down's Syndrome.

Equality and personal injury law applies to Trampoline Parks regardless of the size of your Park and whether you provide the service for free or charge for it.

Equality law and personal injury law affects everyone responsible for running your business or who might do something on its behalf, including staff.

Practical guidance for Members on risk mitigation is at paragraph 10 onwards.

2. THE EQUALITY ACT

The Equality Act 2010 (the EqA) protects all service users from being discriminated against on the basis of a number of Protected Characteristics, being:

- Age
- Disability
- Gender Reassignment
- Pregnancy and Maternity (which includes breastfeeding)
- Race
- Religion or Belief
- Sex
- Sexual Orientation

Service users with Down's Syndrome are likely to have protection under the EqA by reason of their condition being a disability.

3. PERSONAL INJURY LAW

The Health and Safety at Work Act 1974 requires businesses to do what is reasonably practicable to ensure the health and safety of not only their staff, but also other parties who could be affected by that business activity e.g. service users, members of the public, volunteer staff, visiting contractors and spectators.

Additionally, the Occupiers Liability Act 1957 imposes a duty to take reasonable care to ensure that a visitor using the premises (eg a service user) will be reasonably safe for the purposes for which they are permitted to be there.

The duty of care is broad and includes;

- Carrying out health and safety risk assessments for all business activities at all locations
- Ensuring that all equipment used in connection with the business is suitable for its intended use, regularly inspected and properly maintained.
- Ensuring that where appropriate (as per risk assessment) participants use suitable protective clothing and equipment
- Providing suitable instruction and supervision in relation to the use of any equipment or participation in an activity.
- Providing employees with adequate health and safety training.

Risk assessments

The Management of Health and Safety at Work Regulations 1999 (MHSWR) make risk assessments mandatory. They have a key role in active risk management, accident prevention and claims case management. Risk assessments should be undertaken by appropriately qualified staff with active consideration being given to the risks arising out of the activity and use of equipment and should consider the range of users who may participate in that activity such as those with Down's Syndrome.

Risk assessments should be reviewed regularly, and no less than annually and after an incident (injury or near miss). Risk assessments must be signed and dated and should include the date of the next planned review.

The purpose of risk assessments are to identify the risks arising out of a particular activity and any mitigation measures needed to eliminate the risk (primary objective) or failing that, to reduce the risks identified to the lowest reasonably practicable level.

If that cannot be achieved, the activity should not take place. When carrying out a risk assessment, consideration should be given both to the likelihood of the risk, and the severity of the outcome, when assessing what mitigation measures are needed.

For example, the risk of an event occurring may be very low, but if the outcome could result in serious injury then mitigation measures to eliminate or reduce the risk are required. If those mitigation measures do not reduce the risk to a reasonably acceptable level, then the activity should not be conducted.

Waivers and disclaimers

It is not possible in UK law to exclude liability for death or personal injury caused by the negligence of a service provider or their staff. Although liability disclaimers and waivers are extensively used in the leisure industry, in effect they are doing no more than alerting the service user/participant to the risks. They are **not** an effective measure to absolve the service provider of liability if injury has been sustained in consequence of negligence (eg if an injury is caused by defective equipment, inadequate training or supervision, or as in the case of groups of users who are known to have increased risk of injury -a failure to assess that additional risk and apply mitigation measures.)

Risk assessments therefore remain an essential tool to enable a service provider to assess risk, implement mitigation measures and thereby reduce the risk of an accident and a claim. In the event of claim, it is essential that the risk assessment in force at the time is preserved to support your defence of any personal injury claim.

4. POTENTIAL CLAIMS

There are six main types of disability discrimination:

1. Direct Disability Discrimination
2. Indirect Disability Discrimination
3. Discrimination arising from disability
4. Failure to make reasonable adjustments
5. Harassment
6. Victimisation

4.1 Direct Disability Discrimination

Direct disability discrimination is when someone treats a service user worse than another person in a similar situation, because of their disability.

Example

If you excluded all service users with Downs Syndrome without reason or justification other than their condition, this would constitute direct discrimination.

4.2 Indirect Discrimination

Indirect discrimination happens when an organisation has a particular policy or way of working that has a greater adverse impact on disabled people compared to people who are not disabled.

Indirect disability discrimination is unlawful unless the organisation is able to show that there is a good reason for the policy, and that it is proportionate. This is known as objective justification.

Example

If you excluded all child service users from accessing the Park's full facilities by reason of a blanket minimum height requirement. As most children with Down's syndrome are often shorter in stature to their peers, such a policy would be indirectly discriminatory unless it could be objectively justified, such as on health and safety grounds.

4.3 Discrimination arising from disability

Discrimination arising from disability happens when an organisation treats a service user badly because of something connected to their disability, such as having an assistance dog or needing additional training by reason of learning impairments.

Discrimination arising from disability is unlawful unless an organisation is able to show that there is a good reason for the treatment, and it is proportionate. This is known as objective justification.

Example

Placing restrictions or extra costs on Service Users with Down's Syndrome on the misguided belief that they would not understand health and safety instructions or require higher levels of teaching/supervision would be discrimination arising from disability.

Such restrictions or extra costs would be unlawful unless it can be objectively justified, but this example would be unlikely to be justified.

4.4 Failure to make Reasonable Adjustments

Trampoline Parks must make adjustments to their service, where:

- A service users would be disadvantaged by an aspect of the service you provide because of their disability, and
- It would be reasonable to make the changes to your service to remove the disadvantage.

The Duty

The duty to make reasonable adjustments in goods and services is anticipatory.

This means you must not wait for a service user to ask you to make adjustments. You are legally obliged to consider in advance (and to continually review) what changes you need to make your services to ensure that they are accessible to all disabled service users, including those with Down's Syndrome.

Changes to be considered

The obligation to consider reasonable adjustments involves you considering the following:

1. **Changes to the way that you implement your service:** You may have a certain way of doing or providing your service, such as a policy, rule or practice which makes it more difficult for a disabled service user to access or use your services. The EqA calls these provisions,

criterions and practices (PCPs). Examples of PCPs which you might need to review include appointment booking systems; how you communicate with service users in writing, on the phone or online; a blanket policy for example, that disadvantages service users if they have a learning difficulty.

2. **Change a physical feature:** Sometimes the physical features of a building - for example, steps, doors or passageways, may make it more difficult for a disabled service user to access or use it.
3. **Provide extra aids or services:** Sometimes you may need to provide particular aids or equipment so that disabled service users can access your services. The EqA calls these auxiliary aids and services.

Reasonableness of the Adjustment

The EHRC Services Code states that what is a reasonable step for a service provider to take depends on all the circumstances of the case.

It is an objective test based on the following relevant considerations:

- The type of service provided.
- The nature of the service provider, its size and resources.
- The effect of the disability on the individual disabled person.

The EHRC Services Code sets out a non-exhaustive list of factors which might be taken into account when considering what is reasonable:

- Would the step effectively overcome the substantial disadvantage?
- Is it practicable for the service provider to take the steps?
- What are the financial or other costs of making the adjustment?
- Would taking the step cause any disruption?
- What is the service provider's financial and other resources?
- How much of the service provider's resources have already been spent on making adjustments?
- Is there any financial or other assistance available?

Limits on the duty to make reasonable adjustments

You do not have to make changes if this would fundamentally change the nature of the service you offer. For example, a restaurant which offers a dining in the dark experience could refuse to leave the lights on for a deaf customer who needs to be able to lip read to communicate.

4.5 Harassment

Harassment occurs when you or your staff treats a disabled service user by reason of their disability in a way that makes them feel humiliated, offended or degraded.

Harassment can never be justified.

Example

Staff teasing or bullying a service user by reason of their Down's Syndrome would be examples of disability harassment.

4.6 Victimisation

Victimisation is when you treat a service user badly because they made a complaint of discrimination under the Equality Act in relation to your treatment of them or another.

Importantly, the complaint of discrimination by the complainant does not need to be substantiated to be protected under the victimisation law, it just needs to have been reasonably believed by the Complainant.

Victimisation can never be justified.

Example

Barring a parent who has raised concerns of disability discrimination on behalf of their child with Down's syndrome would be an example of disability victimisation.

5. EXCEPTIONS IN EQUALITY LAW THAT APPLY TO BUSINESSES

There are a number of exemptions under the EqA but those that will commonly apply to Trampoline Parks and service users with Down's Syndrome relate to the following:

More favourable treatment of disabled people than non-disabled people

The aim of this exception is to remove barriers that disabled people would otherwise face in accessing services.

An example would be allowing the parents/carers of service users with Down's Syndrome entry at discounted or free entry cost.

Conditions on who takes part in your activities, based on people's protected characteristics

It *may* also be possible to justify differences of treatment of service users with Down's Syndrome where there are genuine and meaningful health and safety considerations.

Trampoline Parks can only rely on this exception in relation to health or safety, if the imposed condition is *proportionate* to the risk.

The Equality Human Rights Commission (the EHRC) advises that:

"Disabled people are entitled to make the same choices and to take the same risks within the same limits as other people. Health and safety law does not require you as a service provider to remove all conceivable risk, but to ensure that risk is properly appreciated, understood and managed. Don't make assumptions; instead, assess the person's situation, and consider reasonable adjustments to reduce any risks, your duty not to discriminate and, where appropriate, the disabled person's own views. There must be a balance between protecting against the risk and restricting disabled people from access to services."

6. LIABILITIES UNDER THE EQUALITY ACT 2010

Discrimination in the provision of goods and services are brought in the County Court. Claimants must bring a claim within six months of the discriminatory act unless the discrimination is continuous/a policy or it would be just and equitable to extend time.

The County Court can Order:

Declaratory Relief: The Court can confirm in a publicly available Order that you have discriminated against the service user on the basis of their disability

Compensatory Relief: The Court can order you to pay financial compensation for any direct financial losses suffered by the service user and for injury to feelings

Injunctive Relief: The Court can order you to do or not to do something that is considered discriminatory. This is called an **injunction**.

Though Compensation Claims are generally less than those commonly seen in Employment Tribunal discrimination claims, depending on the complexity of the claim, the Claimant's legal costs of litigating can also be recovered by the successful Claimant.

Therefore, in addition to financial compensation, Trampoline Parks found guilty of discrimination will not only incur their own legal costs of defending the claim, but also the legal costs of a successful Claimant.

7. LIABILITY FOR COMPENSATION FOR INJURIES

Claims for damages for personal injuries are usually brought in the County Court. Claims must be issued within three years of the accident occurring unless the injured person is under aged 18 at the time of the incident. If so, they have until their 21st birthday in which to issue a claim.

Many claims in this industry occur to children and it is essential therefore that where an injury occurs to a child, an extended period is applied for the preservation of any documents in relation to the incident (accident reports, CCTV footage, witness statements, pre-opening checks, maintenance records, risk assessments applicable at the time of the incident). A recommended document destruction period of 18 years is advised.

8. PROSECUTION FOR BREACHES OF THE HEALTH AND SAFETY AT WORK ACT

A failure to comply with the Health and Safety At Work Act or Management of Health and Safety at Work Regulations could lead to the prosecution of the business and its senior executives.

Senior executives will face potential personal criminal liability if the business commits an offence due to their act or default. Senior executives have a duty to be 'as proactive as someone in their position ought reasonably to be" when considering health and safety issues.

In the event of a serious accident (eg a fatality) this could result in substantial fines for the business and/or custodial sentences for senior executives.

Additionally, the Health and Safety Executive have the power, (prior to any prosecution and with no prior warning) to serve Improvement or Prohibition notices. The latter can require all operations to cease immediately until such time as the HSE agree that the defect has been remedied. Such action could cause significant operational and PR issues.

The number of custodial sentences has increased over the last 5 years, with new guidelines issued in 2018 which increased the length of custodial sentences for those convicted of gross negligence in the workplace.

9. WHY ARE THERE INCREASING COMPLAINTS/ CLAIMS OF DISCRIMINATION BY SERVICE USERS WITH DOWN'S SYNDROME?

The Down's Syndrome Association have published guidance on *"Neck instability in people who have Down's syndrome"* which advises:

i. That underlying neck instability is more common in people who have Down's Syndrome than in the general population,

ii. That there is risk of significant damage caused by neck instability that can result in paralysis or death,

iii. As a result, safe sporting practices are essential for those with Down's Syndrome, Trampolining carries a high risk of neck injury for all participants.

Accordingly, the British Gymnastics Association policy *"Health, Safety & Welfare Guidance – Safe Participation"* provides:

i. before anyone takes part in a gymnastics activity, clubs and particularly coaches and instructors must ensure that each participant is sufficiently fit and healthy,
ii. as a coach or instructor, it is mandatory to ensure that all gymnasts with Down's Syndrome are medically screened for neck instability prior to participating in any gymnastic activity,
iii. once screened, if the gymnast with Down's Syndrome does not have atlanto-axial instability, they will be approved to participate.

Consequently, the Industry's Trade Body the Active Indoor Leisure Association in their press release of the 03 April 2024, have advised:

"Trampoline Parks hold a duty of care to their visitors, and are expected to follow the latest & most relevant guidance for the safety of all participants.

In 2018, British Gymnastics published their latest guidance for participation in trampolining for those with Down's Syndrome. British Gymnastics require that all participants who have Down's Syndrome and wish to participate in trampolining, be screened by a qualified medical practitioner before taking part in the activity.

The Active Indoor Leisure Association have adopted this guidance as being the appropriate pathway to mitigate the severity of risks faced by those with Atlanto-Axial Instability.

The media surrounding this matter identifies a need to;

1. *improve 'consistency of approach' throughout the trampoline park industry, when exercising this guidance.*
2. *liaise with representatives of the Down's Syndrome community & relevant medical bodies to update guidance where practicable, & reduce the felt by those without Atlanto-Axial Instability when accessing trampoline parks (sic)*

The Active Indoor Leisure Association has appointed a working group to coordinate with stakeholders to meet the needs identified above.

We look forwards to developing safer trampoline park activity for all."

As a result of such aforementioned guidance, Trampoline Parks have adapted their health and safety conditions to require service users with Down's Syndrome (or those with neck instability) to obtain evidence that a GP or paediatrician has screened them using the test developed by the British Gymnastics Association for Atlanto-Axial Instability (the **"Policy"**). Therefore, medical approval for participation in the Trampoline Park is a recommended condition of taking part in any trampolining activities.

Complaints are therefore being brought by service users with Down's Syndrome's (and or their parents) on the basis that the Policy is discriminatory.

In view of current medical opinion, the guidance of the aforementioned professional bodies and indeed various Down's Syndrome Associations, such discrimination claims, *in the absence of poor policy implementation* are unlikely to be discriminatory.

10. GUIDANCE ON ENSURING THAT SUCH HEALTH AND SAFETY POLICY IS PROPERLY IMPLEMENTED

To mitigate against complaints and claims in the first place and to place your business in the best possible position to respond to any claims of discrimination, we recommend the following policy implementation:

10.1 Health and Safety Risk Assessments and Reports

It is important to appreciate that service providers cannot simply assume risks and appropriate safeguards. They need to be supported by appropriate risk assessments, as required by the Management of Health and Safety at Work Regulations.

Therefore, any provisions, criterions and practices that restrict or fetter access to your services by reasons of disability, must be supported by a current health and safety risk assessment and if relevant, a report addressing the Equality law exceptions (listed earlier) explaining why, having conducted a risk assessment you have concluded it is necessary in order to comply with your health and safety duties, to distinguish your treatment of service users with Down's Syndrome in a particular way by imposing particular conditions or restrictions.

Any such conclusions, reports and risk assessments, which lead to the implementation of restrictive policies towards some users, should therefore be reviewed annually, to ensure that your Policy reflects prevailing medical opinion and professional body guidance.

10.2 Clear and Transparent Terms and Conditions

It is important that your Terms and Conditions make clear:

- The requirement for medical clearance for Down's Syndrome users;
- That such requirement is clearly expressed as being:
  i. For the health and safety of all users
  ii. That the Policy is in compliance with the guidance of British Gymnastics Association, the Down's Syndrome Association and the Industry's Trade Body, the Active Indoor Leisure Association.
- That the Park's commitment to open accessibility is subject to limitation only where after careful analysis by risk assessment and consideration of current guidance, it is in the health and safety interests of all service users.

The terms and conditions should be supported by a risk assessment, addressing the access needs of specified vulnerable user groups (there may be other groups to include in this review) and as regards those with Down's Syndrome, it should refer to the available guidance (of the British Gymnastics Association, the Down's Syndrome Association and the Industry's Trade Body, the Active Indoor Leisure Association) and conclude within the mitigation measures, the necessity for users to provide medical clearance using the recommended format advocated by the British Gymnastics Association. As indicated above, this risk assessment should be actively reviewed at least annually, and any new evidence or medical guidance taken into account when assessing risk and mitigation measures.

It is our experience that many complaints and claims are caused in part by Trampoline Parks not making clear why the restriction / Policy is in place and service users misunderstanding of the scope of disability discrimination.

Therefore, your Terms and Conditions should be used as an opportunity to educate your service users not only of the Policy but the medical basis and health and safety purpose of the Policy.

10.3 Adequate Notice of the Policy

It is our experience that the vast majority of complaints and or claims of disability discrimination arise in circumstances where service users and or their parents attend a Trampoline Park unaware of the Policy.

This naturally causes upset when they realise by reason of the Policy that they or their children cannot participate in the full facilities of the Park, and this is often the true genesis of a complaint/claim.

We therefore recommend that as part of the online booking process that the condition is clearly notified to all service users, that they are required to acknowledge notice of such policy within the booking process and that it is built into your standard disclaimers.

We also recommend that the Policy is clearly displayed at the point of entrance and in the queueing/reception areas through appropriate notices.

10.4 Equality/Accessibility Policy

It is important to demonstrate that you operate a Trampoline Park that does not discriminate against any service users in relation to a protected characteristic.

Therefore, you should have an Equality Policy that should include specific wording regarding your Park's commitment to open accessibility.

The use of an Equality Policy will also help you check that you have thought about equality in the way that you operate your Park.

10.5 Staff Training

Please ensure that all your staff who deal with customers are given equality training, to make sure they know the right and wrong ways to behave and in particular the reasons for the Policy and how to convey it to service users.

It is our experience that a number of complaints and claims arising out of the operation of the Policy may be due (in part) to staff not advising users in advance of the existence of the Policy and the reasons for it and when they do inform users that they are unable to use the Park's facilities, doing so in public areas and thereby adding to the upset and distress experienced by being turned away.

10.6 Implementation of additional Reasonable Adjustments

In addition to the reasonable adjustment of allowing service users with Down's Syndrome to participate with an appropriate medical certification, you may also wish to consider implementing additional reasonable adjustments to further mitigate against the restrictions of the Policy. Your approach to other reasonable adjustments should be guided by your risk assessment findings.

We recommend that your Park operates dedicated Accessibility Days, for groups of service users with differing disabilities. In such regard, we recommend:

i. To ensure wide participation in such Accessibility Days they should be scheduled on a dynamic basis rather than a static fixed day basis.
ii. That different Accessibility Days focus on supporting differing disability needs, such as those service users with physical or learning or other neuro diverse requirements.
iii. That they involve reduced service user numbers
iv. That they involve reduced noise and flashing lights
v. That they include longer and greater service user engagement in relation to your health and safety induction
vi. That carers are allowed access for free or at a discounted rate
vii. That there are increased levels of staffing on those days
viii. That you operate outreach events to different disability groups/associations

10.7 Complaints Process

It is also important that your Park operates a Complaint Policy, which is accessible both in hardcopy and online, with a dedicated email address to ensure that it is reviewed and responded to by an appropriately trained member of staff.

We also recommend that any complaint process has an appeal process to a different and more senior member of staff than who decided the original complaint.

It is our experience that service users are more inclined to go straight to a solicitor or commence legal action where there is not an appropriate complaint process.

A complaint process therefore is a valuable process in avoiding unnecessary litigation, as it affords you an opportunity to respond to the complaints through evidencing the purpose and legitimacy of the Policy.

11. SEEK EARLY GUIDANCE

- Policyholders must ensure that Tower Insurance Brokers (as Mutual Managers of the FEC Mutual Ltd) is notified as soon as practicable of an occurrence or any circumstance that may result in a claim.
- Policyholders must not voluntarily make a payment, assume any obligation, or incur any expense without the cover provider's consent (they must not admit liability).
- Contact the FEC Mutual Managers team at Tower Insurance Brokers in the first instance.

12. CONCLUSIONS

Where Trampoline Parks appropriately implement the Policy, we are confident that there will likely be a reduction in complaints and or claims. Furthermore, such implementation will also place your Park in a stronger position to defend any claims brought.

Failure to implement the Policy appropriately is however likely to involve increased levels of complaints/claims, high levels of compensation sought and with associated greater risks in successfully defending the Policy.

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