1

Introduction

Awareness is growing about how physical appearance affects life experiences. In 2021, the House of Commons Women and Equalities Committee's inquiry into body image concluded that 'people face appearance-based discrimination on a daily basis, at work, in schools and in public spaces. In addition, a decade of soaring social media use, increased exposure to online advertising and a persistent and pervasive diet culture, mean that concerns about the way we look start younger, last longer, and affect more people than ever before'.[1] The impact of appearance on the way that others treat us, and on the way we feel about ourselves, is fast gaining recognition as a societal problem.

Against this backdrop, it is surprising that there is only one provision in the Equality Act 2010 ('the Act') which deals with appearance concerns – those affecting people with 'severe disfigurements'.[2] And even this limited provision has remained stubbornly consigned to the shadows. Since it was introduced in 1995,[3] it has produced few reported cases and has been largely ignored within academia. Moreover, many people living with a disfigurement are not even aware that this act exists,[4] despite surveys consistently indicating that they suffer elevated levels of discrimination, hate crime and socioeconomic disadvantage.[5] This suggests a mismatch; high instances of reported disfigurement discrimination relative to very low numbers of disfigurement discrimination

[1] House of Commons Women and Equalities Committee, *Changing the Perfect Picture: An Inquiry into Body Image* (Sixth Report of Session 2019-21, HC274) 5. Contains Parliamentary information licensed under the Open Parliament Licence v3.0.
[2] Equality Act 2010, sched 1 s3.
[3] Disability Discrimination Act 1995.
[4] Changing Faces, 'Disfigurement in the UK' (*Changing Faces*, 2017) 37. Nearly half of the respondents in this survey did not know that severe disfigurement was included within the scope of the Act.
[5] Ibid 12–41.

claims. Using this mismatch as a starting point, this book evaluates the law on disfigurement and appearance equality.

The evidence presented here will show that people with disfigurements often face prejudice, exclusion and discrimination across life contexts, including in employment in Great Britain,[6] which is the focus of this book. It will argue that the law's response to this evidence is flawed – both by its own limited scope and its failure to understand the perspectives of those people who may need to use it. And it will begin to sketch out different approaches to the complex social problem of discrimination against people with disfigurements.

1.1 About This Book

The first few chapters survey the relevant law on disfigurement equality and construct an evaluative framework of equality objectives. After this introduction, Chapter 2 explores an important premise which underlies this critique of the law: it examines the idea that disfigurement inequality is a problem which merits a *legal* response – namely the granting of protective rights under the Act. It concludes that, despite some uncomfortable distinctions, there is a compelling case for a legal response in this area. The nature of law's current response is then laid out. Relevant parts of the international legal framework – including EU law, the UN Convention on the Rights of Persons with Disabilities ('CRPD') and decisions of the European Court of Human Rights ('ECtHR') applying the European Convention on Human Rights ('ECHR') – are explained by reference to the models of disability which implicitly inform them.

Chapter 3 probes the meaning of the word 'equality'. It outlines a multidimensional, substantive conception of equality, as adopted by the UN Committee for the Rights of Persons with Disabilities. But it notes the Act's lack of engagement with some aspects of this ideal. The Act's scope is both more limited and more individualised than this substantive concept might demand. Making sense of what law *might* intend to contribute to meeting equality ideals is difficult but necessary, as it can provide a benchmark against which to evaluate the law. With this in mind, the chapter proposes five potential objectives, which are guided by the Act's scope. These range from changing attitudes and shaping perceived social norms through to influencing behaviours or compensating victims of

[6] The Act does not apply in Northern Ireland.

negative treatment. These potential objectives are used as a framework for assessment of law's contribution throughout the rest of the book.

The middle chapters scrutinise the law on severe disfigurement equality doctrinally and empirically to establish its limited impact, and the reasons for this. Drawing on original interview data about both life with a disfigurement and employer responses to it, they interrogate the gap between real life and the working of the law. Chapter 4 draws on both existing research and semi-structured interviews with people with visible differences to explain what we know about the human experience – both psychological and social – of having a disfigurement. For instance, are particular types of disfigurement more vulnerable to discrimination than others? Are certain life contexts impacted more acutely? Are coping mechanisms commonly used? It considers the link between physical appearance and perceived personality traits. And it challenges common assumptions – like the idea that more severe disfigurements are always worse to live with (an erroneous assumption which lives on undaunted in the law). Despite methodological difficulties in researching such a dynamic and underexplored area, the chapter identifies significant disadvantage in looking different. With this in mind, the chapter probes how people with lived experience of visible difference understand their experiences and relate them to the law. Exploring the legal consciousness of this group of people provides a partial insight into the low numbers of claims brought under the relevant part of equality law. It interrogates the gulf between what the law says on paper and how it works in real life, revealing tensions and mixed messages which undermine law's potential for effectiveness.

Chapter 5 addresses the application of the law on disfigurement from the point of view of employers. It analyses the findings from interviews with HR and equality, diversity and inclusion (EDI) professionals about their approaches to disfigurement equality at work. It explores employer approaches to visible difference in a variety of contexts – from recruitment to workplace culture to making reasonable adjustments. The chapter reveals considerable uncertainty amongst employers about how to address the social barriers of looking different. This uncertainty is addressed by guidance in Appendix 1. Moreover, drawing on literature about the legal consciousness of human resources departments, it also uncovers tensions in the daily reality of HR practice which may impact both their ability and motivation to create appearance-inclusive workplaces.

Chapter 6 uses doctrinal analysis to ask what the word 'disfigurement' means, and whether we can justify treating disfigurement differently from the related concepts of appearance and obesity. It identifies

significant gaps created by a law which only protects a small subset of people experiencing appearance disadvantage – those with severe disfigurements – and which may exclude many of those many of those disabled by social barriers because of other aesthetic differences, such as those experiencing hair loss, those whose bodies are differently sized or those with facial movement impairments (such as facial palsy or synkinesis). It doubts whether these inconsistencies and mixed messages can be justified. It also considers whether other protected characteristics – such as sex or age – can be drafted in to fill the gaps in legal protection but concludes that this may amplify the inconsistencies within the law.

Chapter 7 considers the severity threshold in the Act. Examining how the law establishes severity, it asks whether the threshold can be justified – particularly given that the Act's standard definition of disability (which is based on functional deficit) applies a lower threshold of substantiality. It argues that the severity threshold is out of step with the lived experience of visible difference and explores whether the concept of perceptive discrimination can be used to bypass this problematic threshold. The chapter also addresses the problem of complex conditions – those which include both an aspect of disfigurement and of function – and concludes that, mirroring academic debate about the rigidity of models of disability, the law's approach is not flexible enough to encompass all types of disabling barrier holistically.

Chapter 8 draws on sociological literature in debating whether law – however drafted – is capable of solving the complex problem of discrimination against people who look different. It argues that, although we should not expect too much of law in tackling the complex social problem of appearance bias, strategically targeted laws can sometimes play a part in changing attitudes, norms and behaviours. While prohibitions on discrimination are important for remedial purposes, other types of legal and social reform may be better placed to create the conditions for greater inclusion of people with visible differences.

The final chapters consider how relevant equality objectives might be better achieved. Chapter 9 draws on the evidence outlined earlier in the book to evaluate a range of possible legal interventions. Structured according to the five potential equality objectives outlined earlier, the measures include steps to increase the positive visibility of people with disfigurements in daily life, methods of motivating employers to become appearance-inclusive and changes to influential institutions outside the employment context. They also include a range of legislative reforms to replace the severe disfigurement provision with a better remedial

mechanism, such as the creation of a new protected characteristic of disfigurement or the reformulation of the definition of disability.

Chapter 10 questions whether law should widen its lens to address general appearance discrimination too. Would a protected characteristic of appearance offer viable legal rights to the many millions of us who do not have a disfigurement but are less-than-beautiful in some way? For example, is appearance objective enough to be adjudicated in law? Is a clear distinction between mutable and immutable aspects of appearance important – or even possible given increasing medico-cosmetic opportunities to change the way our bodies look? Do we have an unobjectionable nomenclature to describe appearance and attractiveness in legal terms? And could we swallow well-meaning employers' attempts to measure the attractiveness of their staff for the purposes of diversity monitoring? The discussion draws on examples of comparative laws in France and America. Both countries have adopted wider conceptions of appearance equality (despite the US having draconian ugly laws in place until the 1970s which prevented 'unsightly' beggars – such as those with disfigurements – from being seen in public).[7] And America's laws have seen a recent period of growth, with Binghampton, New York, the latest to vote such a law onto its statute books in 2023.[8] However, both sets of laws remain little used so far, despite evidence showing that appearance discrimination remains prevalent.[9] How could we ensure that a protected characteristic of appearance in the UK avoided a similar fate?

1.2 Key Claims

Three key claims will be developed throughout this book. The first, which is fleshed out in Chapter 2 primarily, is that there is an ideological tension about the meaning of disability in both the Act, and the international legal framework which has shaped it. That tension stems from whether disability should be conceptualised as an individual, functional limitation resulting from impairment, or as the result of the interaction between impairment and wider social barriers. The Act's main definition of disability epitomises the former approach, because it seeks to identify adverse effects on someone's ability to carry out activities resulting from

[7] On this, see Susan M Schweik, *The Ugly Laws: Disability in Public* (New York University Press 2009).
[8] New York City Administrative Code, Title 8 Chap 1 §8-107 (1).
[9] See Deborah Rhodes, *The Beauty Bias* (Oxford University Press 2010); and further Chapter 10.

impairment.[10] The severe disfigurement provision, on the other hand, represents the latter; the barriers resulting from looking different are usually rooted in society and the attitudes of others, not in function. The severe disfigurement provision is therefore a rare expression of social model principles in the Act. Despite this, the detail of the Act and case law under it still serve to reinforce the primacy of the individual, medical model of disability. For example, as Chapters 6 and 7 explore, narrowness in the way the disfigurement provision has been both drafted and interpreted undermines its social model logic.

The second claim, explored primarily in Chapters 4 and 5, is that this conceptual tension is also present in the lived experiences of both people with visible differences and HR managers within employers. The internalisation of medical model concepts shapes the way that these two different groups of actors perceive, apply and use the law, serving to undermine it even further. For example, many people with visible differences do not self-identify as disabled because they understand disability in purely functional terms. This impacts the way they feel about the law. And HR managers often see their role in supporting disabled employees in functional terms only, without anticipating the social barriers of looking different, or knowing how to create appearance-inclusive workplaces.

My third claim is that the rights to non-discrimination granted to people with severe disfigurements under the Act appear largely ineffective. There are few signs of the kinds of changes which the Act, judged by its own scope, might seem to aim for. There is sparse evidence of attitudinal or behavioural change towards people with visible differences in the workplace since severe disfigurement was first protected by disability equality law[11] and there are considerable limitations in the remedial mechanism which it offers to people who are discriminated against because of visible difference. I argue that, while changes to the Act hold some promise, we may be asking too much of even a reformed equality law, unless accompanied by other legal and policy interventions designed to address the social barriers of different appearances.

1.3 Scope and Limitations

As this area of law has received very little academic attention to date, there is a lot of ground to cover. As such, I have not been able to do

[10] Equality Act 2010 (n 2) s6.
[11] The Disability Discrimination Act 1995, sched 1 s3.

justice to everything which could be relevant and difficult choices have been necessary. These exclusions are not a reflection on the importance of the issues, but more on the practicalities of squeezing everything into one book. One exclusion relates to personal styling and image choices – hairstyles, make-up, piercings, clothing, tattoos and so on – as a form of self-expression. These choices matter to many people. The extent to which organisations should legitimately be able to control these appearance features as part of the worker/hirer relationship is debatable, especially when expecting workers to conform to a set appearance standard can place a greater demand to assimilate aesthetically on some groups of people than others[12] and can force people to engage in dangerous practices such as dieting and cosmetic surgery. Beyond a few brief mentions, this book does not set out to contribute to that debate.

Another exclusion relates to the overlap between appearance and other protected characteristics, such as sex, race, age and religion. This overlap can be found in the law itself – such as when hairstyles common among certain racial groups are banned, or when policies preventing the wearing of any religious symbols are imposed at work. The book makes a few brief allusions to this regulatory overlap but does not attempt the systematic analysis of gaps and inconsistencies which this topic deserves. The overlap can also be found in researching lived experiences. For example, although it is often assumed that visible difference matters less as you get older, studies show that this is not always the case, and other factors – such as job type – may impact too. A book on the complexity of appearance intersectionality would be valuable, but that is not a task undertaken here.

The last exclusion worthy of specific mention relates to appearance laws internationally. Notwithstanding a few brief forays in Chapters 2, 9 and 10 the book does not attempt to map visible difference laws internationally, concentrating instead on Britain. There are many unknowns in the international context. I am not aware, for example, of any resource which maps those countries that treat visible difference as a disability. Or indeed any research which seeks to understand the impact of disability status on the availability of healthcare or social security benefits for people affected by visible difference globally. Studies exploring the definitions and terminology relating to appearance globally would also be

[12] Kenji Yoshino, 'The Pressure to Cover' *New York Times magazine online* (New York, 15 January 2006) <www.nytimes.com/2006/01/15/magazine/the-pressure-to-cover.html> accessed 25 October 2023.

useful, particularly those which have found expression in the law. These gaps deserve to be written about, but I do not attempt to do so in this book.

Finally, I should stress that my two interview studies in this book were qualitative and small-scale by design, so no claim is made as to statistical representativeness. We would have much to learn from wider consultation with the visible difference community, and from long-term research measuring changes in attitudes and behaviours in response to legal changes and other interventions. I hope that this book will provide a foundation for future research to narrow the gaps in existing knowledge.

1.4 Terminology

Finally, a word about terminology. Some people and representative organisations in this area are reluctant to use the word 'disfigurement' to describe their appearance. 'Visible difference' is a frequently used alternative, but this is not straightforward in the context of legal research, not least because 'disfigurement' is the word used in the Act itself. The phrase 'visible difference' can also lack clarity, meaning different things to different people at different times. One might conclude, for example, that a broken leg is a visible difference because it is a physical variance which can be seen – but few of us would class a broken leg as a disfigurement. The same goes for hair which has been dyed purple. There are both points of overlap and points of difference between the terms 'visible difference' and 'disfigurement'. There are strong arguments to suggest that law's terminology should reflect the language adopted by the relevant community themselves, rather than imposing labels which are convenient for lawyers. But in this area and many others, law has not done so. As it is not possible to critique the legislation without engaging with its wording, the two terms ('disfigurement' and 'visible difference') are used interchangeably in this book, with visible difference intended as a synonym for disfigurement.

The concept of large body size also raises difficult terminological problems. There are many words used to describe people to whom this concept applies: fat, obese, overweight, large, corpulent and so on. Feelings run high about the correct term(s) to use, and views can change rapidly. 'Obese' tends to be favoured in medical contexts, but many people prefer not to use this word to describe themselves.[13] At one

[13] Deborah McPhail and Michael Orsini, 'Fat Acceptance as Social Justice' (2021) 193 *Canadian Medical Association Journal* E1398.

conference which I attended, the 'e' in the word 'obesity' was replaced by an asterisk for this reason. The fat acceptance movement, particularly in the US, seeks to reclaim the word 'fat' in a descriptive sense, to free it from the negative social connotations commonly attributed to it.[14] But again, many people feel uncomfortable with this choice of word. A recent study found that, where a discussion is necessary, many people prefer talking about variations in 'weight'.[15] Given the lack of a clear consensus on this issue, I have chosen to use a mixture of terms throughout the book.

The terminology of 'law' is also more complex than at first it might appear. As this book sets out to evaluate the effectiveness of a particular provision in the Act, law here refers to legislation, and the case law, regulations and guidance which accompany it. However, to end the definition there suggests that law is wholly separate from society; an authoritative source which exists independent of the way we use it. As the empirical work summarised in this book progressed, this interpretation became increasingly difficult to sustain; discussions with participants revealed different social understandings of law in real life, which often had a much greater impact on their choices than whatever the statute book said. Once they slide off the page of the statute book into real life, rights under equality law become tangled with issues of identity, workplace customs and social meanings. As Catherine Albiston and Gwendolyn Leachman argue, 'institutions, actors on the ground, and widely shared cultural beliefs shape what law will mean in practice',[16] leading to '[t]he insight that law can be found not only in the courts and legislature, but also in bureaucratic organizations like workplaces and schools, in prosecutorial and police discretionary decisions and in lawlike social customs and legal understandings that permeate everyday life'.[17] This book draws in aspects of both perspectives. It critiques the Act and accompanying decisions as a set of rules and considers the practical implications of using these in the courtroom. But in places it also turns its gaze on the juncture between law and real life to understand the meanings of law to employers and people with visible differences at work.

[14] Ibid.
[15] Adrian Brown and Stuart W Flint, 'Preferences and Emotional Response to Weight Related Terminology Used by Healthcare Professionals to Describe Body Weight in People Living with Overweight and Obesity' (2021) 11 Clinical Obesity 3.
[16] Catherine R Albiston and Gwendolyn M Leachman, 'Law as an Instrument of Social Change' in James Wright (ed) *International Encyclopaedia of the Social and Behavioural Sciences* 13 (2nd edn, Elsevier 2015) 543.
[17] Ibid.

2

Law's Response to Disfigurement Inequality

2.1 Justifying a Legal Response

This chapter addresses two related questions. First, it asks why disfigurement inequality is a problem which merits a *legal* response – namely protection under relevant legislation. Second, after setting out law's current response, it questions the logic of law's chosen form.

The answer to the first question – whether disfigurement inequality justifies a legal response – sounds obvious; as will be demonstrated, people with disfigurements can be unfairly disadvantaged financially, socially and emotionally by their appearance. But it doesn't automatically follow that law should intervene, because there are plenty of group disadvantages which equality law does not address. Legal measures may sometimes not be particularly apt; the disadvantage caused by poverty, for example, would seem better served by political measures to redistribute resources than by legal measures to promote equality and recognition. But other forms of group disadvantage – such as social class[1] or perhaps obesity – might seem apt for a legal response but remain outside the scope of equality law. Hence group disadvantage is not enough on its own to engage equality law; something more – disadvantage *plus* – is needed.

The search for 'disadvantage *plus*' criteria by which to assess groups calling for inclusion within equality law has generated a significant body of debate. Among them, three proposed criteria – immutability, dignity and stigma – have gained prominence in the discussion. Turning to the first of these criteria, immutability is the idea that rights under equality

[1] Campaigners have argued that social class should become a protected characteristic. See, for example, British Psychological Society, 'BPS Launches #Makeit10 Campaign' (2022) <www.bps.org.uk/psychologist/bps-launches-makeit10-campaign> accessed 25 October 2023. Cf Lizzie Barmes and Kate Malleson, 'The Case for Caution in Making Social Class a Protected Characteristic under the UK's Equality Act 2010' (Oxford Human Rights Hub, 3 August 2023) <https://ohrh.law.ox.ac.uk/the-case-for-caution-in-making-social-class-a-protected-characteristic-under-the-uks-equality-act-2010/> accessed 3 August 2023.