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# Disability Discrimination

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## Introduction

The Disability Discrimination Act (DDA) was passed in 1995 to introduce new measures aimed at ending the discrimination which many disabled people face in their everyday lives. The DDA and later amendments create the following "rights" (with some exemptions) for anyone defined as a "disabled person":

- Not to be discriminated against in employment;
- Not to be discriminated against in education;
- Not to be discriminated against in the provision of goods, facilities and services; and
- Not to be discriminated against in the selling or letting of land and property.

Under the DDA discrimination occurs where:

- a disabled person is treated less favourably than someone else; and
- the treatment is for a reason relating to the person's disability; and
- the treatment cannot be justified.

Discrimination also occurs where;

- there is a failure to make a reasonable adjustment for a disabled person; and
- that failure cannot be justified.

The Act also allows the Government to set minimum standards so that disabled people can use public transport easily.

In April 2005 a new Disability Discrimination Act was passed which amends or extends existing provisions in the DDA 1995, including:

- making it unlawful for operators of transport vehicles to discriminate against disabled people;
- making it easier for disabled people to rent property and for tenants to make disability-related adaptations;

- making sure that private clubs with 25 or more members cannot keep disabled people out, just because they have a disability;
- extending protection to cover
- people who have HIV, cancer and multiple sclerosis from the moment they are diagnosed;
- ensuring that discrimination law covers all the activities of the public sector;
- requiring public bodies to promote equality of opportunity for disabled people.

Further amendments have been made to the legislation. Of particular note, from 1 October 2004 businesses and other organisations are required to take reasonable steps to tackle physical features that act as a barrier to disabled people who want to access their services. This may mean to remove, alter or provide a reasonable means of avoiding physical features of a building which make access impossible or unreasonably difficult for disabled people. Examples include:

- putting in a ramp to replace steps;
- providing larger, well defined signs for people with a visual impairment;
- improving access to toilet or washing facilities.

From that date, employers with less than 15 employees were also brought under the scope of the DDA for the first time. All employers are now covered by the Act with the sole exception of the armed forces.


From December 2006, there is a new legal duty on all public sector organisations to promote equality of opportunity for disabled people.

## DDA v other anti-discrimination legislation

There are some important differences between the DDA and other anti-discrimination legislation – such as the Sex Discrimination Act 1975 and the Race Relations Act 1976. These differences mean that drawing on precedents from the other legislation needs to be done carefully.

1. So-called "positive discrimination" is not unlawful under the DDA, whereas, generally, it is under other anti-discrimination legislation. It is not unlawful to provide more favourable treatment to a disabled person than is provided to a non-disabled person.
2. The concept of "indirect discrimination" does not feature in the DDA as it does in other anti-discrimination legislation. However, the Act does make it unlawful to provide less favourable treatment to a disabled person for a reason related to that person's disability. It also contains provisions that require the alleged discriminator to make reasonable adjustments. No such "reasonable adjustment" duty is to be found in other anti-discrimination legislation.
3. Under the other anti-discrimination legislation, less favourable treatment cannot be justified. However, the DDA allows for a particular form of less favourable treatment of disabled people to be justified in certain circumstances.

For more information on the disability definition visit: [www.equalityhumanrights.com/en/yourrights/equalityanddiscrimination/Disability/Pages/Introduction.aspx](http://www.equalityhumanrights.com/en/yourrights/equalityanddiscrimination/Disability/Pages/Introduction.aspx)

|  Disability Employment in 2004 | Number of firms | Number of Employees | Average number of Employees per firm | Disabled Employees | Average number of Disabled Employees per firm |
|---|-----------------|---------------------|--------------------------------------|--------------------|---|
| 1 Employee  | 500,000         | 500,000             | 1.00                                 | 60,000             | 0.12  |
| 2 - 4 Employees   | 310,000         | 1,300,000           | 4.19                                 | 100,000            | 0.32  |
| 5 - 10 Employees  | 200,000         | 1,300,000           | 6.50                                 | 150,000            | 0.75  |
| 11-14 Employees   | 75,000          | 800,000             | 10.67                                | 70,000             | 0.93  |
| 15-19 Employees   | 45,000          | 750,000             | 16.67                                | 60,000             | 1.33  |
| 20 or more Employees  | 90,000          | 12,000,000          | 133.33                               | 1,300,000          | 14.44   |
| All   | 1,220,000       | 16,650,000          | 4.12                                 | 440,000            | 1.43  |

## Who is Disabled?

### Definition of Disability

In order to be protected by the Act, a person must meet the Act's definition of disability.

A disabled person is a person with:

**'a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities'.**

This means that, in general:

- the person must have an impairment that is either physical or mental;
- the impairment must have adverse effects which are substantial (neither minor or trivial);
- the substantial adverse effects must be long-term (the effect of the impairment has lasted or is likely to last for at least 12 months - there are special rules covering recurring or fluctuating conditions); and
- the long-term substantial adverse effects must be effects on normal day-to-day activities (normal day-to-day activities include everyday things like eating, washing, walking and going shopping and must affect one of the 'capacities' listed in the Act which include mobility, manual dexterity, speech, hearing, seeing and memory; some conditions such as a tendency to set fires and hay fever, are specifically excluded).

Meaning of 'impairment'

In many cases, there will be no dispute whether a person has impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition. Whether a person is disabled for the purposes of the Act is generally determined by reference to the **effect** that impairment has on that person's ability to carry out normal day-to-day activities. It is not possible to provide an exhaustive list of conditions that qualify as impairments for the purposes of the Act. Any attempt to do so would inevitably become out of date as medical knowledge advanced.

It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious.

A disability can arise from a wide range of impairments which can be:

- sensory impairments, such as those affecting sight or hearing;
- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME)/chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;
- progressive, such as motor neurone disease, muscular dystrophy, forms of dementia and lupus (SLE);
- organ specific, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease;
- developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia;
- learning difficulties;
- mental health conditions and mental illnesses, such as depression, schizophrenia, eating disorders, bipolar affective disorders, obsessive compulsive disorders, as well as personality disorders and some self-harming behaviour;
- produced by injury to the body or brain.

It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

Where impairment arises from, or consists of, a mental illness, that illness no longer has to be clinically well-recognised in order for it to be regarded as a mental impairment for the purposes of the Act.

The following people are deemed to meet the definition of disability from the point of diagnosis without having to show that they have an impairment that has (or is likely to have) a substantial, adverse, long-term effect on the ability to carry out normal day-to-day activities:

- A person who has cancer, HIV infection or multiple sclerosis;
- A person who is certified as blind or partially sighted by a consultant ophthalmologist, or is registered as such with a local authority.

Provisions allow for people with a past disability to be covered by the scope of the Act. There are also additional provisions relating to people with progressive conditions.

For more information on the disability definition, visit [www.drc-gb.org/pdf/DefnOfDisability.pdf](http://www.drc-gb.org/pdf/DefnOfDisability.pdf)

## The DDA 1995

The Disability Discrimination Act 1995 (DDA) was passed in 1995 to address the discrimination that many disabled people face.

| The DDA   | Area covered  | What it says   |
|-----------|---|--|
| Part 1    | Definition of disability  | Provides information and guidance on what constitutes disability for the purposes of the Act, and who is protected under it.   |
| Part 2    | Employment  | Prohibits discrimination in relation to employment of disabled people, including recruitment, training, promotion, benefits, dismissal, etc.<br><br>It requires employers to make "reasonable adjustments" for a disabled person put at a substantial disadvantage by a provision, criterion or practice, or a physical feature of premises.<br><br>It also prohibits discrimination by trade organisations and qualifications bodies.<br><br>Provides procedures for enforcement and provision of remedies for discrimination.  |
| Part 3    | Provision of goods, facilities and services.<br><br>Disposal or management of premises or land<br><br>Private clubs | It requires service providers to make "reasonable adjustments" for disabled people. A service provider is required to take reasonable steps to: <ul style="list-style-type: none"> <li>- change a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled people to make use of its services;</li> <li>- provide an auxiliary aid or service if it would enable (or make it easier for) disabled people to make use of its services.</li> </ul> In addition, where a physical feature makes it impossible or unreasonably difficult for disabled people to make use of services, a service provider has to take reasonable steps to: <ul style="list-style-type: none"> <li>- remove the feature; or</li> <li>- alter it so that it no longer has that effect; or</li> <li>- provide a reasonable means of avoiding it;</li> <li>- provide a reasonable alternative method of making the service available.</li> </ul> It prohibits discrimination by private clubs.<br><br>Provides procedures for enforcement and provision of remedies for discrimination. |
| Part 4    | Education   | Amended by the Special Educational Needs and Disability Act 2001, part 4 prohibits discrimination in relation to: <ul style="list-style-type: none"> <li>- school admissions, exclusions, and the education or associated services provided to pupils;</li> <li>- further and higher education admissions, exclusions, and student services.</li> </ul> Responsible bodies for schools and further and higher education institutions must make reasonable adjustments to ensure that disabled pupils or students (or prospective pupils or students) are not placed at a substantial disadvantage in comparison with their non-disabled peers.<br><br>Responsible bodies for further and higher education are also required to provide auxiliary aids or services and have a duty to make adjustments to physical features.<br><br>Provides procedures for enforcement and provision of remedies for discrimination.   |
| Part 5    | Transport   | Provides the Secretary of State with powers to establish minimum access criteria for public transport vehicles to be phased in over time. The use of transport is excluded from the requirements of Part 3 of the Act – but other facilities offered by transport providers are not e.g. public areas at stations and booking facilities.  |
| Part 6    | National Disability Council   | The National Disability Council was set up to advise the Government on Parts 2 and 3 of the DDA. It was abolished when the Disability Rights Commission came into operation in April 2000.   |
| Part 7    | Supplementary Issues  | Details duties and responsibilities covering: <ul style="list-style-type: none"> <li>- Codes of Practice;</li> <li>- Victimisation;</li> <li>- Liability of employers;</li> <li>- Help for people suffering discrimination;</li> <li>- Aiding unlawful acts;</li> <li>- Exclusion for acts done with statutory authority or done for the purpose of safeguarding national security.</li> </ul>   |
| Part 8    | Miscellaneous   | Other issues, including government appointments, regulations and interpretation.   |
| Schedules | 1-8   | Assorted schedules containing, among other things, provisions relating to the meaning of disability (Schedule 1); relevance of past disabilities (Schedule 2); and listing of responsible bodies for schools and educational institutions (Schedules 4A and 4B).   |

# Amendments to the Legislation

Different parts of the legislation took effect at different times, and the original Act has been subject to a number of amendments.

Amongst other areas, the legislation now protects disabled people in:

- Employment (Part 2);
- Access to services, premises and private clubs (Part 3);
- Education (Part 4);

Some of the key dates in the history of the development of the DDA are as follows:

### December 1996

- Part 2: unlawful for employers with 20 or more employees to discriminate against disabled employees;
- Part 3: unlawful for service providers to treat disabled people less favourably for a reason related to their disability.

### December 1998

- Part 2: employment provisions extended to cover employers with 15 or more employees (previously 20 or more).

### October 1999

- Part 3: service providers must alter a policy, practice or procedure which prevents a disabled person accessing a service, or provide an auxiliary aid or service, or provide a service by a reasonable alternative means.

### September 2002

- Part 4 (amended by the Special Educational Needs and Disability Act): schools, colleges, universities and providers of adult education and youth services are required to ensure they do not discriminate against disabled people.

### April 2003

- Definition: People who are registered as blind or partially sighted, or registered as blind or partially sighted by a local authority, automatically deemed as disabled for DDA purposes.

### September 2003

- Part 4 (amended by the Special Educational Needs and Disability Act): post-16 education providers are required to provide auxiliary aids as a reasonable adjustment.

### October 2004

- Part 2: unlawful for all employers (with the exception of the Armed Forces) to discriminate against disabled employers, regardless of the number of people they employ (previously applied to businesses with 15 or more employees).
  - New occupations such as police and partners in firms are covered. New relationships such as practical work experience and employment services are covered.
  - New provisions on discriminatory advertisements.
  - Four kinds of discrimination – direct discrimination, failure to make reasonable adjustments, disability-related discrimination and victimisation.
  - Justification is not relevant in cases about direct discrimination or failure to make reasonable adjustments.
  - New provisions on harassment.
- Part 3: service providers must make reasonable adjustments to physical features of their premises to overcome barriers to access.

### September 2005

- Part 4: post-16 education providers are required to make reasonable adjustments to physical features of premises where these put disabled people at a substantial disadvantage.

### December 2005

- (Definition): The scope of the DDA was extended to cover, effectively from the point of diagnosis, people with HIV infection, cancer or multiple sclerosis.
- The requirement that a mental illness must be "clinically well-recognised" is removed.
- Part 2: third party publishers (e.g. newspapers) are liable for publishing discriminatory advertisements.
- Unlawful for locally-electable authorities to treat their members less favourably.
- Part 3: A new DL56 questionnaire - relating to complaints under the DDA relating to rights of access - came into force.
- Less favourable treatment of disabled people by private clubs is unlawful.

### September 2006

- Part 4: post-16 education provisions amended in respect of vocational training in the further and higher education sector.
  - New direct discrimination duty
  - The removal of the justification defence for a failure to make

### Discrimination by Association – Important new case

The Advocate General has given his opinion on whether EU law protects employees who are associated with disabled people, such as carers, from discrimination in the case of *Coleman v Attridge Law*.

Sharon Coleman, an employee of Attridge Law brought a claim for constructive dismissal and disability discrimination on various grounds including Attridge Law's refusal to give her the same flexibility as regards her working arrangements as those of her colleagues with non-disabled children.

The Advocate General, (whose opinion is usually followed by the European Court of Justice (ECJ)) has stated that direct discrimination and/or harassment by association is prohibited by the EC Equal Treatment Framework Directive. However, currently the UK law only legislates for discrimination against a worker on the grounds of the disabled person's disability.

The Advocate General further indicated that the same principle will apply to other forms of discrimination including discrimination on grounds of religion or belief, disability, age or sexual orientation).

The case will now be decided upon by the ECJ. If Coleman is successful in her claim the UK Government may need to change the relevant legislation to conform with the Directive.

The Advocate General's opinion can be read at: [www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2008/C303\\_06\\_0.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2008/C303_06_0.html)

- reasonable adjustments
- New harassment duty
- The reversal of burden of proof
- New duty prohibiting discriminatory advertisements
- New duty prohibiting instructions or pressure to discriminate
- New specific duties that apply after the relationship between the student and education provider has ended
- New specific provisions in relation to qualifications
- The introduction of competence standards.

### December 2006

- Disability Equality Duty in force. The duty is aimed at tackling systemic discrimination, and ensuring that public authorities build disability equality into everything that they do. Public authorities must, when carrying out their functions, have due regard to the need to:
  - promote equality of opportunity between disabled people and other people
  - eliminate discrimination that is unlawful under the Act
  - eliminate harassment of disabled people that is related to their disability
  - promote positive attitudes towards disabled people
  - encourage participation by disabled people in public life
  - take steps to meet disabled peoples' needs, even if this requires more favourable treatment.
- Part 3 of the DDA affecting private clubs, public authority functions, and providers of premises and transport services.
  - Include the functions of public authorities (such as arrests by the police) where not already covered.
  - New duties for the providers of premises to make reasonable adjustments
  - New duties for providers of transport services to make reasonable adjustments
  - New duty for private clubs (which have been subject to provisions concerning less favourable treatment of disabled people since December 2005) to make reasonable adjustments.

For further information see  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## Enforcement of Rights under the DDA

### Disability Discrimination in employment

An individual who believes that he or she has been discriminated against on grounds of disability during employment may bring an action in an Employment Tribunal. If found guilty of disability discrimination, an employer may be ordered to pay an award of compensation. There is no cap on the amount of compensation which may be awarded. More information can be found in the employment section, later in this publication.

### Other forms of Disability Discrimination

A claim of unlawful discrimination will be the subject of civil proceedings "in the same way as any other claim". Proceedings will be through the County Court and appeals will go to the Court of Appeal. As with employment cases, damages may include compensation for injury to feelings. The court will be able to order mandatory action (and not just recommend it like the employment tribunals) and could commit a person for non-compliance with its order. Legal Aid will be available for proceedings. The Secretary of State may establish or arrange an advice and assistance service with a view to promoting settlement of disputes out of court, that is, a type of conciliation service.

### Employers Forum on Disability

The Employers' Forum on Disability is the world's leading employers' organisation focused on disability as it affects business. Funded and managed by over 400 members, they aim to make it easier to recruit and retain disabled employees and to serve disabled customers. Their website includes publications, events, and information on the DDA at [www.employersforum.co.uk/www/index.htm](http://www.employersforum.co.uk/www/index.htm)

## Discrimination in Employment

It is unlawful for employers to discriminate against disabled people for a reason related to their disability, in all aspects of employment, unless this can be justified. For example, an employer shouldn't refuse to interview, employ, train or promote a disabled person, simply because of their disability. The word "related" seems to provide a basis for challenging indirect discrimination. For example, if a person is blind and uses a dog, the definition would cover an employer's behaviour towards the person because of the person's need to be accompanied by the dog - which is a reason relating to the disability but not the same as the disability.

Disabled workers share the same general employment rights as other workers, but there are also some special provisions for them under the DDA. For example, under the DDA, it is unlawful for employers to discriminate against disabled people for a reason related to their disability, in all aspects of employment, unless this can be justified.

The DDA covers:

- application forms;
- interview arrangements;
- proficiency tests;
- job offers;
- terms of employment;
- promotion, transfer or training opportunities;
- work-related benefits such as access to recreation or refreshment facilities;
- dismissal or redundancy.

The DDA also covers work-based training opportunities for employees.

### Reasonable adjustments in the workplace

Under the DDA an employer has a duty to consider making 'reasonable adjustments' to make sure a disabled person is not put at a substantial disadvantage by employment arrangements or any physical feature of the workplace.

Effective adjustments to allow disabled people to access and use facilities often involve little or no cost to a business. For example, someone with mobility problems might need to be transferred from a third-

floor office to an easily accessible ground-floor one. Someone with impaired hearing may need a telephone amplifier.

An employer may be justified in refusing to carry out an adjustment where it is impractical, or the cost is too high. The Access to Work programme provides practical support to employers to help overcome barriers in the workplace. It can provide advice on appropriate adjustments and possibly some financial help towards the cost of the adjustments. Information on the programme is available on the Jobcentre Plus website at: [www.jobcentreplus.gov.uk](http://www.jobcentreplus.gov.uk)

Examples of the sort of adjustments that may need consideration and discussion with the disabled employee include:

- allocating some of the disabled employee's duties to someone else;
- transferring the disabled employee to another post or another place of work;
- making adjustments to the premises, e.g. widening doors or installing visible fire alarms;
- being flexible about working hours – allowing the disabled employee to have different core working hours and to be away from the office for assessment, treatment or rehabilitation;
- providing training;
- providing modified equipment or procedures;
- making instructions and manuals more accessible;
- providing a reader or interpreter;
- providing supervision;
- things to consider at work.

It should be noted that there is no automatic right to a reasonable adjustment - rather, it should be seen as a part of the right not to be discriminated against on the grounds of disability. For example, an employee cannot demand the removal of disabling barriers unless those barriers have a direct disabling effect on that employee.

The Equality and Human Rights Commission provides detailed guidance and advice about whether an adjustment is reasonable or not. Issues for consideration include:

- How effective will an adjustment be?
- How significantly will the adjustment reduce the disadvantage caused by the disability?
- Is it practical?
- Will it cause much disruption?

### Action points for employers

Employers who fall under the requirements of the Act should review their practices and employment procedures to ensure that they do not contravene the Act. In particular, employers should review their recruitment procedures so that they are able to identify any employees who have a disability and determine whether any steps should be taken to accommodate their disability, and bear in mind the provisions of the Act when taking decisions in relation to recruitment and in relation to employees during the course of their employment and on its termination.



- Will it help other people in the workplace?
- Is the cost prohibitive?

In deciding if it is reasonable to require an employer to undertake a particular action the same issues will be taken into account by Employment Tribunals.

In summary, an employer will be found to be discriminating if she/he fails to comply with the duty to make adjustments and cannot show that the failure to comply is justified in terms of the above framework.

### *Recruitment and selection*

In a strict legal sense in the case of recruitment and selection an employer will not have to make any reasonable adjustments unless the applicant concerned has told the employer that she/he is applying for a job. Thus there is no legal obligation on an employer to be proactive in the sense of catering for all hypothetical disabled applicants. Experience shows, that if procedures and practices are not in place for providing an accessible Recruitment and Selection process, organisations will find that even the most modest of reasonable adjustments (for example, getting a British Sign Language interpreter or a wheelchair accessible interview room) will prove difficult, and delays could mess up the whole schedule. Furthermore, once an employer knows that an applicant has a particular impairment, the onus is on the employer to provide an accessible process - it is not up to the disabled applicant to request 'reasonable adjustments'.

### *Justification*

The definition of discrimination given in the DDA is different from that in the Race and Sex discrimination legislation, since the scope for justified discrimination is far greater. There is no absolute prohibition of discrimination on the grounds of disability as such. Instead some forms of discrimination will be allowable if reasons for it can be given, that is, if it is "justified" in terms of the Act.

### *When the employer may have a justification defence*

The DDA says that an employer may be able to justify disability-related discrimination. For example, a person might be treated unfairly for a reason relating to their disability, such as disability related sickness absence.

The DDA states that disability-related discrimination can **only** be justified if:

- the reason for the less favourable treatment is both material to the circumstances of the case and substantial.

**Material** means that there must be a strong link between the reason given for the treatment and the circumstances of the case.

**Substantial** means that the reason must carry real weight. The reason must be more than minor or trivial.

A tribunal will expect the employer's defence to be based on a reasonable and fair assessment of the relevant circumstances and available information. The employer will have to satisfy the tribunal that they considered whether there were any adjustments that could be made to accommodate the person's disability and that no reasonable adjustments could be made.

### *When there is no justification defence*

The DDA says clearly that an employer, or potential employer, can never justify the following types of discrimination:

- Direct discrimination (for example, where an employer refuses to offer someone a job, purely because he or she is disabled);
- A failure to make a reasonable adjustment (the employer's only 'defence' here would be that the required adjustment was not 'reasonable');
- Victimisation (for example, where a person is treated unfairly, because he or she has brought a claim or taken some other action in connection with the DDA);
- Harassment (for example, where a disabled person is subjected to bullying and name-calling because of their impairment).

### The Web Access Centre – guidance on website accessibility for all

The Royal National Institute for the Blind provides The Web Access Centre - a source of information for web designers, developers, content authors and website managers that offers advice on how to plan, build and test accessible websites.

It also provides an accessibility audit service.

Further information is available at:  
[www.mib.org.uk/webaccesscentre](http://www.mib.org.uk/webaccesscentre)

### Enforcement of the Employment section

A complaint of discrimination may be presented to an Employment Tribunal (ET) generally within three months of treatment complained of and disabled employees will have recourse to the law regardless of their length of service. If an ET finds that discrimination has taken place it can:

- **Make a declaration of rights:** that is, a disabled person who has won a case against an employer will be entitled to a formal declaration as to her/his respective rights and the employer's duties. This is the most likely outcome where the complainant has suffered no measurable loss or where there is a point of legal principle at stake;
- **Order compensation:** which may also include compensation for injury to feelings;
- **Make a recommendation or recommendations:** to obviate or reduce the adverse (discriminatory) effects faced by the complainant.

If an employment tribunal makes a recommendation and an employer fails (without reasonable justification) to comply with it, the tribunal can then order compensation or increase this if it has already ordered it. Save for compensation for injury to feelings (which is likely to be limited to a prescribed maximum), the potential compensation award will be unlimited.

The DDA anticipates that there will be an attempt to reach a conciliated settlement between the two parties before going to an ET. In this respect an Advisory, Conciliation and Arbitration Service (ACAS) officer will be asked to seek conciliation between parties.

The DDA makes provision for disabled people to use a prescribed questionnaire procedure in order to obtain evidence of reasons for treatment. That is, questionnaires can be provided and employers will have a legal duty to fill them in and give details relevant to the case. Answers will be admissible in evidence to an employment tribunal.

No legal aid will be available for tribunal cases. However, limited advice may be obtained under the "green form" scheme where one or two hours of free legal advice can be given. Also, Law Centres and Citizens Advice Bureau may be able to support people at an employment tribunal. And, Trade

Union legal departments or national disability organisations may provide a legal service to complainants.

Where a tribunal finds that disability discrimination has occurred, penalties can be high for employers, since there is no limit on compensation.

There are no length-of-service or age requirements in bringing a claim and where the claimant is an employee, he or she does not need to have left your employment.

### Discrimination in Education

The Special Educational Needs and Disability Act 2001 amended the Disability Discrimination Act 1995 (DDA) to make it unlawful for education providers to discriminate against disabled pupils, students and adult learners - and to make sure disabled people are not disadvantaged in comparison to people who are not disabled.

This means that there is a legal duty, under the DDA, on the following education providers not to treat disabled people less favourably than their non-disabled peers:

- local education authorities (LEAs);
- schools;
- colleges;
- universities;
- providers of adult education;
- the statutory youth service.

The post-16 provisions of Part 4 of the Act came into force on 1 September 2006 in respect of vocational training and related services such as recreational and training facilities. The provisions mostly effect higher education institutions, further education institutions and local education authorities securing higher and further education, including adult and community education.

### Reasonable adjustments

The above listed education providers must make reasonable adjustments, by providing an auxiliary aid for example, to ensure that disabled people in education do not suffer a substantial disadvantage in comparison to people who are not disabled.

### Disability: Employment Retention Bill reintroduced

The Employment Retention Bill had its first reading in the House of Commons on 29 January 2008.

This is a Private Member's Bill which seeks to amend the Employment Rights Act 1996 by making provision for a statutory right to rehabilitation leave (disability leave) for newly disabled people and people whose existing impairments change.

The Bill was originally introduced in the 2006/2007 parliamentary session but was delayed to the 2007/2008 parliamentary session.

The Bill is available at: [www.publications.parliament.uk/pa/pabills/2006/07/employment\\_retention.htm](http://www.publications.parliament.uk/pa/pabills/2006/07/employment_retention.htm)

Making 'reasonable adjustments' means:

- changing any practice, policy or procedure which makes it impossible or unreasonably difficult for disabled people to use a service (for example, waiving a no dogs policy for blind students accompanied by their guide dog);
- providing an auxiliary aid or service which would enable disabled people to use a service (for example, providing a British Sign Language interpreter at a public meeting where deaf people will be present); and
- overcoming a physical feature by providing services by alternative methods.

## Discrimination in the Provision of Goods, Facilities and Services

The DDA imposes duties on a "provider of services". This is defined as a person (but includes legal entities such as local authorities and other organisations) who "is concerned with the provision in the United Kingdom of services to the public or a section of the public". Such "services" include "the provision of any goods or facilities" and it is irrelevant whether or not payment is made for them.

"Goods" would appear to be any personal or movable property. "Facilities" is not defined and presumably means anything which is neither goods nor services.

The Act does give some examples of services, for instance, access to any place the public can enter; access to and use of communication or information services; accommodation or facilities for entertainment, recreation or refreshment. It also explicitly includes "...the services of any local or other public authority". This part therefore has a major potential impact for local authority service provision. In Committee the Minister confirmed that facilities for telecommunication, the judicial system and legal proceedings, and broadcasting services are intended to be covered as well.

Since 1 October 2004, small employers and all high street services have been required by law to open up to disabled people or face

potential legal action. Failure or refusal to provide a service that is offered to other people to a disabled person is discrimination unless it can be justified.

### General prohibition on discrimination

The Act makes it unlawful for a provider of services to discriminate against a disabled person in the following ways:

- If she/he refuses to provide goods, facilities or services which he/she provides or is prepared to provide to other members of the public;
- If she/he fails to comply with the duty to make reasonable adjustments where the effect of such a failure is to make it "impossible or unreasonably difficult for the disabled person to make use of" the service;
- If she/he provides a service to a disabled person to a lesser standard or in a manner which is unsatisfactory compared to how those services would be provided to a non-disabled person;
- If she/he offers a service on different terms to those offered to a non-disabled person.

The definition of discrimination given in this part of the legislation is similar to that in the employment part. A provider of services discriminates against a disabled person if all the following conditions are satisfied:

- The service provider treats the disabled person less favourably than he/she treats or would treat other members of the public; and
- Such less favourable treatment is for a reason which relates to the disabled person's disability; and
- The service provider cannot show the treatment is justified.

### Access to shops, cafes and everyday services

The DDA gives disabled people important rights of access to everyday services. Everyday services include services provided by local councils, doctors' surgeries, hotels, banks, pubs, theatres, hairdressers, places of worship, courts and voluntary groups such as play groups. Non-educational services provided by schools are also included. Access to services is not just about installing ramps and widening doorways for wheelchair users – it is about making services easier to use for all disabled people, including people who are blind, deaf or have a learning disability.

### "Recurring" Disability

The Court of Appeal has resolved a series of inconsistent EAT decisions on whether somebody qualifies as disabled, when their symptoms have ceased but are 'likely to recur'. The controversial question has been, 'can a tribunal take subsequent events into account?' The answer, it now seems, is 'no'.

In *Richmond Adult Community College v McDougall*, the Claimant had a job offer withdrawn when medical evidence demonstrated she suffered from a persistent delusional disorder. In fact, whilst the condition was lifelong, she had not suffered an episode for three years. Sadly, she subsequently suffered a relapse shortly after the job offer was withdrawn and she was committed under the Mental Health Act.

The EAT held that the tribunal ought to have considered this relapse when deciding whether her symptoms were 'likely to recur'. There were previous inconsistent decisions on the point. The EAT essentially thought that it was unattractive to ask a tribunal to ignore the reality of what had actually happened.

The Court of Appeal has now held that this approach is impermissible. The likelihood of recurrence must be judged at the date of the act of discrimination, and subsequent events cannot be taken into account. As Rimer LJ states (para. 33), "In short, the statute requires a prophecy to be made."

The case can be viewed at: [www.bailii.org/ew/cases/EWCA/Civ/2008/4.html](http://www.bailii.org/ew/cases/EWCA/Civ/2008/4.html)

**Source: Daniel Barnett**

### Reasonable adjustments

Under the DDA, it is unlawful for service providers to treat disabled people less favourably than other people for a reason related to their disability. Service providers now have to make 'reasonable adjustments' to the way they deliver their services so that disabled people can use them.

Examples of reasonable adjustments include:

- installing an induction loop for people who are hearing impaired;
- giving the option to book tickets by e-mail as well as by phone;
- providing disability awareness training for staff who have contact with the public;
- providing larger, well-defined signage for people with impaired vision;
- putting in a ramp at the entrance to a building instead of, or as well as, steps.

What is considered a 'reasonable adjustment' for a large organisation like a bank may be different to a reasonable adjustment for a small local shop. It's about what is practical in the service provider's individual situation and what resources the business may have. They will not be required to make changes which are impractical or beyond their means. For example, a newspaper publisher wouldn't have to convert all her/his newspapers into talking newspapers in order to accommodate blind people. Or, a climbing school wouldn't have to alter its climbing walls to accommodate wheelchair users who wish to abseil.

More information can be found in the document *Making access to goods and services easier for disabled people* from the Equality and Human Rights Commission available at:  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

### Justification

There are five situations in which discrimination may be justifiable. A service provider must show that at the time of the discrimination, in her/his opinion, one of these was satisfied and that it is reasonable for her/him to hold that opinion. (How the law on justification develops will be crucial because the adjustment duty still appears to provide scope for segregation and differential treatment).

- The less favourable treatment is necessary in order to avoid endangering the health or safety of any person;

- The disabled person is incapable of entering into an enforceable agreement or of giving an informed consent;
- Where refusal of a service is "necessary" for the provider to be able to provide the service to other members of the public;
- Where the less favourable treatment concerns the standard (or quality) of the service offered if it is "reasonably necessary" for the service provider to be able to provide the service to the disabled person or other members of the public;
- Where less favourable treatment can be justified as reflecting an unreasonable greater cost to the provider of providing her/his services to the disabled person.

Where a service provider is subject to a duty to make adjustments (say, from a past case), then the justification defence is only available if that duty has been complied with, or it is reasonable for the provider to believe that even if she/he had complied with it, the way in which she/he treated the disabled customer would have still been justified.

On 1 October 2004, the definitions of discrimination and the relevance of justification to those definitions were changed. See "The Disability Discrimination (Amendment) Bill" section in this publication for further details.

## Discrimination in the Selling or Letting of Land and Property

Separate provisions in the Act render unlawful certain specified behaviours concerning the disposal (such as selling or renting) of premises or the management of premises. Local authorities, as major providers of rented housing are subject to these provisions.

It is unlawful to discriminate against a disabled person when selling or renting property in the following ways:

- In the terms on which premises are offered to be disposed of (for example, asking a higher selling price to disabled buyers);

- By refusing to dispose of premises to the disabled person (for example, it is illegal to say that you won't sell a house to someone simply because they are disabled);
- In the treatment of the disabled person in relation to any list of persons in need of premises of the sort in question.

It is also unlawful for someone who manages premises to discriminate against a person occupying those premises in the following ways:

- In the way that person permits the disabled person to make use of any benefits or facilities (for example, banning disabled people from certain areas);
- By refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities;
- By evicting the disabled person, or subjecting her/him to any other detriment on the grounds of disability.

As with the other sections of the DDA discrimination regarding premises is defined as less favourable treatment for a reason which relates to the disabled person's disability. Again, a person is justified in treating a disabled person less favourably if, in her/his opinion, one of a list of prescribed conditions is satisfied, and it is thought to be "reasonable" for her/him to hold that opinion. The prescribed conditions are similar to those given in the previous sections of the Act and can be summarised as follows:

- The treatment is necessary in order not to endanger the health or safety of any person (which may include the disabled person her/himself);
- The disabled person is incapable of entering into an enforceable agreement;
- Where the less favourable treatment relates to the way the disabled person is permitted to make use of any benefits or facilities but such treatment is necessary for the disabled person or occupiers of other premises forming part of the building to make use of the benefit or facility;
- Where the treatment is refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities and it is necessary for occupiers of other premises forming part of the building to make use of this benefit or facility.

Regulations will allow for the extension of the list of justified less favourable treatment. The big difference between the Act's treatment of premises and other sections of the Act is that there is no duty to make adjustments to buildings. Also, there is no mention of new houses being built to accessible standards. The Government intends to continue to rely on Building Regulations to provide a legislative framework for access to premises.

### Equality Act 2010

The Equality Act 2010 received Royal Assent on 8 April 2010 and the Government has now published accompanying Explanatory Notes. These summarise the background to the Act and set out the range of existing discrimination and equalities legislation. They also provide a summary of the Act and an overview of its structure, as well as more detail on many of its provisions. The purpose of the notes is to assist in developing an understanding of the Act and they are intended to be read in conjunction with it. They do not form part of the Act, nor have they been endorsed by Parliament.

The Act has two main purposes: (a) to harmonise discrimination law and to (b) to strengthen the law to support progress on equality. It prohibits direct and indirect discrimination, discrimination arising from disability, harassment and victimisation and provides protection against discrimination on the grounds of:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; and
- sexual orientation.

The Government Equalities Office currently envisages that the provisions in the Act will come into force as follows:

- October 2010: Main provisions.
- April 2011: The integrated public sector Equality Duty, the Socio-economic Duty and dual discrimination protection.
- 2012: The ban on age discrimination in provision of goods, facilities, services and public functions.
- 2013: Private and voluntary sector gender pay transparency regulations (if required) and political parties publishing diversity data.

**The explanatory notes are available at:**

[www.opsi.gov.uk/acts/acts2010/en/ukpgaen\\_20100015\\_en.pdf](http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100015_en.pdf)

**Source:**

[www.equalities.gov.uk/equality\\_act\\_2010.asp](http://www.equalities.gov.uk/equality_act_2010.asp)

## Equality and Human Rights Commission

On 30 October 2003, the Government announced that a single Equality and Human Rights Commission (CEHR) would be set up to replace the three existing organisations tackling race, sex and disability discrimination. The move sees the demise of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission, though the new body's remit also tackles discrimination on grounds of sexual orientation, religion or age, as well as a brief to promote human rights.

The CEHR is effective from 1 October 2007 as legislated for by the Equality Act 2006. The new Commission is a Non-Departmental Public Body (NDPB) and independent influential champion whose stated purpose is to reduce inequality, eliminate discrimination, strengthen good relations between people and protect human rights.

The CEHR has taken on all of the powers of the existing Commissions as well as new powers to enforce legislation more effectively and promote equality for all. The Commission will champion the diverse communities that make up modern Britain in their struggle against discrimination.

It will also promote awareness and understanding of human rights and encourage good practice by public authorities in meeting their Human Rights Act obligations. New powers to take human rights cases will give a new arrow to the bow of many minorities who suffer discrimination.

The Commission covers England, Scotland and Wales. In Scotland and Wales there will be statutory committees responsible for the work of the CEHR.

Further information on the CEHR can be viewed at:  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## Codes of Practice

The Government and the Disability Rights Commission produced a number of Codes of Practice, explaining legal rights and requirements under the DDA. These Codes are practical guidance - particularly for disabled people, employers, service providers and education institutions - rather than definitive statements of the law. However, courts and tribunals must take them into account. The codes of practice are now available from the Equality and Human Rights Commission at can be accessed at:  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## Further Information

This guide is for general interest - it is always essential to take advice on specific issues. We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

If you would like to receive further information about this subject or other publications, please call us – see our contact details on the next page.

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