

Disability Discrimination Act 1995

Code of Practice

**Rights of Access:
services to the public,
public authority functions,
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Foreword

The Disability Rights Commission (DRC) has written and produced this Code of Practice on Part 3 (and related housing provisions) of the Disability Discrimination Act (DDA). The Code is a revision of the consultative draft Code published by the DRC in August 2005 to take account of further duties introduced in the DDA 2005.

The DRC undertook a wide-ranging consultation involving both disabled people and those affected by the duties introduced in the DDA 2005. Those affected by the DDA 2005 duties are landlords and those managing premises, organisations that carry out public functions and private clubs. Another important change made by the 2005 Act is to extend the DDA to cover the use of transport vehicles. This is dealt with separately in a supplementary Code of Practice on provision and use of transport vehicles published in April 2006.

There are no other changes to the duties of those already covered by Part 3 of the DDA. Whilst the Part 3 Code has needed to be substantially restructured to accommodate the new provisions, and therefore looks different in places, care has been taken to retain the existing text wherever possible to reflect continuity. At one or two places changes of substance to the existing text have been made to reflect evolving caselaw.

The Code sets out our understanding of the law but there is undoubtedly some ambiguity and there are some areas which will require testing in the courts. The DRC has produced a range of information to help service providers and landlords in relation to their duties.

The Code is a major tool in helping achieve the DRC's aim of 'A society where all disabled people can participate fully as equal citizens'. Making services, private clubs and housing accessible to disabled people is also good for business. I am sure that this Code will be a valuable resource in this important undertaking.

This Code replaces the Part 3 Code which was published in 2002. It will come into force on 4 December 2006.

Bert Massie CBE

Chairman,
Disability Rights Commission

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1 Introduction

Background to and purpose of Part 3 of the Act

- 1.1 On 2 December 1996, the Disability Discrimination Act 1995 (the Act) brought in measures to prevent discrimination against disabled people. Part 3 of the Act, which deals with services and premises, was amended most recently by the Disability Discrimination Act 2005 (the 2005 Act) to expand its scope. The Code of Practice on rights of access, goods, facilities, services and premises (the Code) has been revised and expanded to reflect these changes as well as the introduction of Part 5B, which deals with improvements to rented dwelling houses in England and Wales, and parallel changes to Scottish legislation.

Services

- 1.2 Part 3 of the Act in its original form prohibited discrimination in connection with the provision of goods, facilities and services to the public. It did not, therefore, apply to the provision of services by private clubs to their members, as they are not in law members of the public. Similarly, the Act did not apply to the exercise of certain functions by public authorities (such as arrests by the police) as these do not constitute the provision of a service to the public.
- 1.3 Discrimination in relation to these areas is now prohibited in specified circumstances under Part 3 of the Act.

ss 21B–21E,
ss 21F–21J

Premises

- 1.4 Whilst discrimination in relation to premises has been covered by the Act from the start, no duty was imposed on those controlling premises to make reasonable adjustments. The Act has now been amended by the 2005 Act to introduce a duty to make certain adjustments in relation to let premises.
- 1.5 In addition, the Act contains a new Part 5B, which will assist certain tenants in England and Wales to make improvements to their dwelling houses unless it is reasonable for a landlord to withhold consent to these improvements. Parallel provisions also apply in relation to Scotland, under the Housing (Scotland) Act 2006.

OTHER KEY CHANGES INTRODUCED BY THE 2005 ACT

Transport

- 1.6 The Act previously excluded any service so far as it consisted of the use of a means of transport. Following amendments by the 2005 Act, and Regulations made under it, the use of transport provided by means of certain vehicles is now covered by Part 3 of the Act. The duty to make adjustments applies in a slightly different way to vehicles and is not addressed in this Code – see the separate supplementary Code on provision and use of transport vehicles.

Implementation

- 1.7 The changes introduced by the 2005 Act are being implemented in stages. The provisions relating to less favourable treatment in private clubs and those relating to the questions procedure took

effect on 5 December 2005 and the remainder take effect on 4 December 2006. **The Code is written on the basis that all the new provisions are in force although the guidance contained in it will not have legal effect in relation to any particular provision of the Act, or of the Housing (Scotland) Act 2006 until that provision is actually in force.**

Purpose of the Code

- 1.8 The Code describes the duties imposed by Part 3 (and Part 5B and other legislation about premises improvements) of the Act and provides practical guidance on how to prevent discrimination. The Code helps disabled people to understand the law and assists those with obligations under Part 3 or Part 5B (and relevant housing legislation, including Scottish legislation) to avoid complaints and litigation by adopting good practice. It also aims to advance the elimination of discrimination against disabled people and to encourage good practice.
- 1.9 This Code applies to England, Wales and Scotland. A similar but separate Code applies to Northern Ireland.

Status of the Code

- 1.10 The Code does not impose legal obligations. Nor is it an authoritative statement of the law – that is a matter for the courts. It is, however, a ‘statutory’ Code. This means that it has been approved by Parliament and it is admissible as evidence in legal proceedings under the Act. Courts (or employment tribunals in respect of employment services and group insurance services provided to employees) must take into account any part of the Code that appears to them to be relevant to any question arising in those proceedings. If those

ss 51(3)–(5)

with obligations under Parts 3 and 5B of the Act (and other relevant legislation) follow the guidance in the Code, it may help to avoid an adverse judgment by a court in any proceedings.

How to use the Code

1.11 The Code deals with two distinct areas of discrimination: services (a generic term meaning services to the public, public authority functions and private clubs) and premises. The two areas operate in different ways, so their core provisions are dealt with separately in the Code. The contents of the chapters of the Code are outlined below, followed by an explanation of how best to use the Code.

General

- Chapter 1 (this chapter) gives a general introduction to the Code and to the background to the new provisions in Parts 3 and 5B.
- Chapter 2 describes who has rights under the Act.
- Chapter 3 outlines the areas of discrimination and other areas covered by this Code.

Generic services

- Chapter 4 indicates what unlawful discrimination is in relation to services and how to avoid discrimination.
- Chapter 5 explains the duty not to treat a disabled person less favourably.
- Chapter 6 explains the principles of the duty to make reasonable adjustments.

- Chapter 7 explains how the duty of reasonable adjustments works in practice.
- Chapter 8 deals with justification.
- Chapter 9 deals with the specific rules affecting insurance, guarantees and deposits relating to certain types of services.

Specific services

- Chapter 10 deals specifically with the duties on those providing services to the public.
- Chapter 11 deals specifically with the duties on public authorities when carrying out functions.
- Chapter 12 deals specifically with the duties on private clubs.

Premises

- Chapter 13 gives a general introduction to the premises provisions, to what is unlawful and how to avoid discrimination.
- Chapter 14 explains the duty not to treat a disabled person less favourably.
- Chapter 15 explains the duty of reasonable adjustments.
- Chapter 16 explains the provisions relating to commonholds.
- Chapter 17 deals with the small dwellings exemption, justification and other exemptions.
- Chapter 18 describes the provisions giving tenants the right to make improvements to their premises, and in particular the right not to have a landlord's consent unreasonably withheld, in England and Wales.

- Chapter 19 describes the provisions giving tenants the right to carry out works to their premises, and in particular the right not to have a landlord's consent unreasonably withheld, in Scotland.

General

- Chapter 20 describes other actions made unlawful by the Act, relevant to both services and premises, and explains what happens if discrimination is alleged.

Appendices

- Appendix A gives more information on what is meant by 'disability' and 'disabled person' (separate statutory guidance relating to the definition of disability has been issued under the Act – see paragraph 2.6).
- Appendix B deals with the effect of Building Regulations and leases on the duty to make reasonable adjustments in relation to services.

1.12 In order to understand the law properly it is necessary to read all the relevant chapters of the Code. Each chapter of the Code should be viewed as part of an overall explanation of Part 3 of the Act and the Regulations made under it, apart from Chapters 18 and 19, which deal exclusively with unreasonably withholding consent to make improvements to premises.

1.13 The Code should not be read too narrowly or literally. It is intended to explain the principles of the law, to illustrate how the Act might operate in certain situations and to provide general guidance on good practice. There are some questions which the Code cannot resolve and which must await the

authoritative interpretation of the courts. The Code is not intended to be a substitute for taking appropriate advice on the legal consequences of particular situations.

Examples in the Code

- 1.14 Examples of good practice and how the Act is likely to work are given in boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples should not be treated as complete or authoritative statements of the law.
- 1.15 While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. They can often be used to test how the law might apply in analogous situations involving different disabilities, or different activities covered by Part 3 of the Act. They attempt to use as many different varieties of disability and situations as possible to demonstrate the breadth and scope of the Act. References to male or female disabled people are given for realism and could, of course, apply to either sex.
- 1.16 The examples used in the Code in relation to Part 3 are intended to illustrate solely how the Act applies in relation to the particular situation covered. They do not deal with any other legislation, such as housing-specific legislation, which may affect the situation portrayed in the example.

References in the Code

- 1.17 References to 'the Act' mean the Disability Discrimination Act 1995 as amended by the

Disability Discrimination Act 2005, and other provisions (such as the Special Educational Needs and Disability Act 2001). For the most part, references to 'the Act' are to Part 3 (or, in Chapter 18, Part 5B) of the Disability Discrimination Act as amended.

1.18 As explained in paragraph 1.11, certain parts of the Code discuss concepts which are common to the provision of services to the public, public authority functions and private clubs. In those chapters common terms are used to refer to all these three areas of activity:

- 'services' includes services to the public, public authority functions and membership, benefits, facilities or services of private clubs
- 'service providers' include providers of services to the public, public authorities exercising functions and private clubs
- 'users' or 'customers' of services include those seeking to access services to the public, those affected by the exercise of public authority functions, and those seeking membership, benefits, facilities or services of private clubs.

1.19 Where this approach is taken, it is clearly explained at the outset of the relevant chapter or at the relevant part of the chapter.

1.20 References to the Act are shown in the margins. For example, s 1(1) means section 1(1) of the Act and Sch 1 means Schedule 1 to the Act. Where reference is made to Regulations, the Statutory Instrument number is shown at the start of a paragraph (for example, SI 2005/1836). Regulations have the same force of law as the Act.

Changes to the legislation

- 1.21 This Code refers to the law as it is expected at the time of writing (May 2006) to be on 4 December 2006. There may be subsequent changes to the Act or to other legislation which may have an effect on the duties explained in the Code, and you will need to ensure that you keep up-to-date with any developments which may affect the Act's provisions. You can get information about this from the Disability Rights Commission (see paragraph 1.23 below for contact details).

Further information

- 1.22 Copies of the Disability Discrimination Acts 1995 and 2005 and Regulations made under them, and the Housing (Scotland) Act 2006 can be purchased from The Stationery Office. Separate Codes covering other aspects of the Act, and guidance relating to the definition of disability, are also available from The Stationery Office. The text of all the DRC's Codes (including this Code) can also be downloaded free of charge from the DRC website: www.drc-gb.org. The Code and information about the Act are also available in alternative formats.
- 1.23 Free information about the Act can be obtained by contacting the DRC Helpline:

Website: www.drc-gb.org
Telephone: 08457 622 633
Textphone: 08457 622 644
Fax: 08457 778 878

Post: DRC Helpline
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CV37 9BR

2 Who has rights under the Act?

2.1 An adult or child has protection from discrimination under the Act if they are a disabled person. A disabled person is someone who has a physical or mental impairment which has an effect on their ability to carry out normal day-to-day activities. That effect must be:

- substantial (that is, more than minor or trivial)
- adverse; and
- long term (that is, it has lasted or is likely to last for at least a year or for the rest of the life of the person affected).

2.2 Physical or mental impairment includes sensory impairments. Hidden impairments are also covered (for example, mental illness or mental health problems, learning disabilities, and conditions such as diabetes or epilepsy).

2.3 The Act also specifically covers anyone who has cancer, HIV or multiple sclerosis.

2.4 Those carrying out duties under the Act should not use any definition of 'disabled person' which is narrower than that in the Act.

A large supermarket has its own car park with spaces close to the entrance for use by disabled customers which are reserved for those with a blue badge car parking concession. After the introduction of the duty to make reasonable

ss 1-2,
Schs 1-2

adjustments, the supermarket recognises that it must also provide appropriate assistance to all disabled people who find it unreasonably difficult to access its services and not just to those with a blue badge. For example, the supermarket also offers a carry-to-car service for disabled people who are unable to carry their shopping themselves, but who might not be blue badge holders.

2.5 People who have had a disability within the terms of the Act in the past are protected from discrimination even if they no longer have the disability.

A person with a past history of mental illness who met the definition of 'disabled person' in the Act is turned down for travel insurance because of a blanket exclusion policy, even though she has not had any recurrence of her mental illness for many years. The provider of insurance services would be acting unlawfully under the Act unless it is able to justify the exclusion in accordance with the special rules on insurance services set out in Regulations (see Chapter 9).

2.6 For a fuller understanding of the concept of disability under the Act, reference should be made to Appendix A of this Code. A Government publication, 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', provides additional help in understanding the concept of disability and in identifying disabled persons (see paragraph 2.1 above). Where relevant, the Guidance must be taken into account in any legal proceedings.

3 Areas of discrimination and other areas covered by this Code

3.1 This chapter provides an overview of the provisions of the Act which are covered by the Code and of what is not covered. In practice, more than one duty may be relevant to a person or organisation if, for example, they both provide services and carry out functions (but a person cannot be subject to more than one duty in respect of the same action). Thus, public authorities, private clubs and those who manage or dispose of premises may also be providing services to the public and will have those duties in addition to the ones explicitly applying to them. This applies also to those who are generally outside the scope of Part 3 (such as schools or manufacturers) if they provide services to the public, as explained below.

PART 3 PROVISIONS COVERED BY THE CODE

Services to the public

3.2 The Act imposes duties on those who provide services to the public. Subject to certain exceptions, the provisions affect everyone concerned with the provision in the United Kingdom of services to the public or to a section of the public, whether in the private, public or voluntary sectors. It does not matter if services are provided free (such as access to a public park) or in return for payment (for example, a meal in a restaurant). Under the Act, the provision of services to the public includes the provision of

s 19(2)

goods or facilities (and so the term 'services' includes the provision of goods and facilities).

s 19(3)

3.3 Among the services which are covered are those provided to the public by local councils, government departments and agencies, the emergency services, charities, voluntary organisations, hotels, restaurants, pubs, post offices, banks, building societies, solicitors, accountants, telecommunications and broadcasting organisations, public utilities (such as gas, electricity and water suppliers), railway stations, airports, national parks, sports stadia, leisure centres, advice agencies, theatres, cinemas, hairdressers, shops, market stalls, petrol stations, telesales businesses, places of worship, courts, hospitals, and clinics. This list is for illustration only and does not cover all the services falling under the Act.

3.4 More detail is provided on services to the public in Chapter 10.

Public authority functions

ss 21B–21C

3.5 The Act now prohibits discrimination in relation to the carrying out of functions by a public authority, unless specifically excluded. 'Public authorities' cover a wide range of bodies and include, for example, local authorities and government departments, as well as other bodies certain of whose functions are of a public nature.

s 21B(7)

3.6 These public authority function provisions only apply where the treatment is not covered by any other part of the Act – in this sense they are 'residual' provisions and when the Code refers to functions, it is referring to them in this residual sense.

- 3.7 In practice, however, the duties imposed on public authorities when providing a service and those imposed when carrying out a function are broadly similar.
- 3.8 More detail is provided on the public authority function provisions in Chapter 11.

Private clubs

What private clubs are covered by the Act?

- 3.9 The 'private club' provisions of the Act apply to any association of persons (referred to in the Code as a 'private club') whether or not incorporated, if:
- it has 25 or more members
 - admission to membership is regulated by its constitution and the process conducted in such a way that its members do not constitute a section of the general public; and
 - it is not a trade organisation (for information on trade organisations, reference should be made to the Part 2 Code of Practice on trade organisations and qualifications bodies).
- 3.10 It does not matter whether the club's activities are carried out for profit or not.

s 21F

A club providing dining and social facilities exclusively to its members requires that applicants for membership provide character testimonials from three existing members before a decision can be made about the membership application. This club is likely to be covered by the private club provisions, as it is not providing services to the public and it has a constitution which regulates admission to membership on the basis of personal criteria.

3.11 Simply calling a service a 'club' does not necessarily mean that the courts will consider it to be a private club. For example, commercially run businesses which may require membership – such as a health club or a video rental shop – would normally still be providing services to the public and would therefore be covered by the provisions of the Act relating to services to the public.

A health club in a hotel is open to the public. Club members pay an annual subscription and are provided with a membership card. Before using the club's fitness equipment, a member must undergo a fitness test. Although members have to satisfy certain requirements in order to use some of the facilities, compliance with a genuine selection procedure for membership is not a condition of using the club. The club is providing services to the public and is likely to be covered by the provisions relating to services to the public.

3.12 In practice, however, the duties imposed on private clubs and on those providing a service to the public are broadly similar.

3.13 More detail is provided on private clubs in Chapter 12.

Transport

3.14 Transport providers have a duty to the public under Part 3 of the Act to avoid discrimination against disabled people, and to make reasonable adjustments for them, in respect of services which do not involve the use or provision of the vehicle itself. These matters include timetables, booking facilities, waiting rooms etc at airports, ferry terminals, and bus, coach and rail stations. The

guidance in this Code will apply to these elements of the service.

- 3.15 Part 3 of the Act does not apply in relation to a transport service where a disabled person is discriminated against in the provision or use of a vehicle provided in the course of that service. However, the Act empowers the Secretary of State to lift this exemption and Regulations giving effect to this in relation to certain vehicles are in force from 4 December 2006. The duty to make adjustments applies in a slightly different way to the use of vehicles than it does to other services, and so the provisions as they apply to transport vehicles are dealt with in detail in a separate supplementary Code, the Code of Practice on provision and use of transport vehicles.

A disabled woman requires assistance both to locate her train and to take her seat on board. There will be an obligation under the Act to take reasonable steps to provide her with assistance both on the station concourse in finding the train and on the train itself. This Code will cover the provisions as they apply to assistance provided on the concourse, whilst the Code of Practice on provision and use of transport vehicles will cover the provisions as they relate to assistance on the train itself.

Disposal and management of premises

- 3.16 Those who are managing or disposing of premises have an obligation under the Act not to treat disabled people less favourably. 'Disposing of' includes selling. There is also an obligation on 'a controller of premises' (broadly, landlords and managers) to make reasonable adjustments to let premises. Similar duties apply in relation to

**s 21ZA,
Disability
Discrimination
(Transport
Vehicles)
Regulations
2005
SI 2005/3190**

3

**ss 22–24,
ss 24A–24L**

commonhold premises. It should be noted, however, that disposing of premises does not include the hire of premises or the booking of rooms in hotels or guest houses to members of the public. These are covered by the provisions relating to services to the public. The premises provisions also do not apply to bookings made by club members of club residential accommodation. This is covered by the provisions relating to private clubs.

3.17 Those managing or disposing of premises may also have duties as providers of services to the public where they are providing services to the public – for example, the services of an estate agent.

3.18 More detail is provided on these premises provisions in Chapters 13 to 17.

Improvements to premises

3.19 The Act also places duties on landlords not to withhold consent unreasonably from tenants who wish to make disability-related improvements to their home in England and Wales.

3.20 More detail is given on these provisions, and on related provisions in the Housing Acts 1980 and 1985, in Chapter 18.

3.21 In Scotland, the Housing (Scotland) Act 2006 gives parallel rights in relation to tenants in Scotland, and these are dealt with in Chapter 19.

WHAT IS NOT COVERED BY THE CODE?

Education

- 3.22 Part 4 of the Act (as amended by the Special Educational Needs and Disability Act 2001) prohibits discrimination relating to disabled pupils and students. Where a Part 4 duty applies, Part 3 cannot apply.
- 3.23 There will be some educational or training services, however, which do fall within Part 3 and to which this Code will apply. These include non-statutory youth services, such as clubs and activities run by voluntary organisations, the Scouts, Girl Guides or church youth clubs, as well as private training courses.
- 3.24 In addition, non-educational services provided by schools are likely to be subject to the services provisions of Part 3 (for example, services to parents such as parent-teacher meetings), as well as services provided by colleges or universities which are not wholly or mainly for students.

A privately run college that offers typing courses is providing a service which is likely to be subject to Part 3 of the Act.

A parent-teacher association holds a fundraising event which is open to the public, in a school hall. This is a provision of a service which is likely to be subject to Part 3 of the Act.

s 19(5A)

3

s 21B

A university puts on a conference that is aimed at both students and the general public. Even if the majority of people who attend are students, the conference is still likely to be subject to Part 3 of the Act.

A school sending letters to parents about their children's progress is likely to be providing a service to the public and so be subject to Part 3 of the Act.

- 3.25 Non-educational activities that do not constitute services to the public are likely to amount to the exercise of a public authority function, and therefore be covered by those provisions of the Act.

A school providing papers to its governors for their meeting is likely to be carrying out a public authority function, and in that respect the school is subject to those provisions of the Act.

Transport vehicles

- 3.26 As explained in paragraph 3.15, the Part 3 provisions of the Act as they apply to the provision and use of transport vehicles are dealt with in detail in the supplementary Code of Practice on the provision and use of transport vehicles.
- 3.27 Part 5 of the Act empowers the Secretary of State to make Regulations setting access standards for rail vehicles, buses, coaches and taxis. The

SI 1998/2456,
SI 2000/3215,
SI 2000/1970,
SI 2000/3318,
SI 2002/2981

Government has produced Regulations in relation to trains, buses and coaches.

- 3.28 It is unlawful for the drivers of licensed taxis to refuse to carry, or to make any extra charge for carrying, a guide, hearing or other prescribed assistance dog accompanying a disabled passenger, or not to allow the dog to remain with the passenger. Similar provisions also apply to the drivers of licensed private-hire vehicles, and in England and Wales to the vehicle operators.

s 37,
SI 2000/2990

Employment services

- 3.29 Employment services, which means vocational guidance or training services, or services designed to assist people to find or keep jobs, or to establish themselves in self-employment, receive distinctive treatment under the Act. Whilst the general principles outlined in Chapters 5 to 7 of this Code will apply in relation to employment services, the precise nature of the provisions covering them is detailed in Chapter 11 of the Code of Practice on employment and occupation.

s 21A

Manufacture and design of products

- 3.30 The manufacture and design of products are not in themselves covered by Part 3 of the Act because they do not involve the provision of services directly to the public. Nothing in the Act requires manufacturers or designers to make changes to their products, packaging or instructions. However, it makes good business sense for manufacturers and designers to make their goods (and user information) more accessible to disabled customers, and they should consider doing so as a matter of good practice.

s 19(2)(b)

A manufacturer of garden tools distributes its products only through high street shops. The Act does not require the manufacturer to design or market the goods so as to be easily usable by disabled purchasers.

A food-processing company produces tinned food which it supplies to a supermarket chain. Regardless of whether the tins are branded with the supermarket's own label or with that of the producer, the food-processing company is not supplying goods to the public and so does not have duties under the Act. The supermarket is likely to have duties under the Act because it is supplying goods to the public, but these duties do not extend to the labelling or packaging of the tinned food.

3.31 However, if a manufacturer does provide services direct to the public, then it may have duties under the Act as a service provider.

A manufacturer of electrical goods provides a free guarantee. A purchaser of the goods is then entitled to have the goods replaced by the manufacturer if they are faulty within six months of purchase. For a fixed sum, the manufacturer also provides an optional extended guarantee covering the goods against defects for up to two years after purchase. In both cases, the manufacturer is providing a service to the public (the guarantee) and is subject to the Act in relation to the provision of that service (but not in relation to the goods themselves).

A manufacturer of self-assembly furniture sells its products directly to the public by mail and telephone order and through a factory shop on its premises. It has duties under the Act because it is providing a service to the public. For example, it may have to make reasonable adjustments to the way in which it provides its service.

4 What is unlawful discrimination in relation to services and how can it be avoided?

Introduction

- 4.1 This chapter provides an overview of what is meant by 'discrimination' in relation to services to the public, public authority functions and private clubs ('the three areas of activity'). It also sets out steps that can be taken in relation to all three areas of activity to prevent discrimination from arising.
- 4.2 The principles relating to discrimination in relation to these three areas of activity are similar. Therefore, in this chapter, as explained in paragraph 1.18, the term 'service provider', and terms which flow from this, are used generically to refer to all those who have duties in these areas.

What does the Act make unlawful in relation to services?

- 4.3 The Act makes it unlawful for service providers to discriminate against a disabled person in relation to the service in question.
- 4.4 The circumstances in which it is unlawful to discriminate in respect of these three areas of activity are detailed in Chapters 10, 11 and 12.

DISCRIMINATION

What does the Act mean by 'discrimination' in relation to service providers?

- 4.5 The Act says that there are two forms of discrimination against a disabled person.
- 4.6 One form of discrimination occurs when a service provider:
- treats a disabled person less favourably – for a reason relating to the disabled person's disability – than it treats (or would treat) others to whom that reason does not (or would not) apply; and
 - cannot show that the treatment is justified.
- 4.7 The concept of 'less favourable treatment' is considered in more detail in Chapter 5. Whether and when less favourable treatment of a disabled person might be justified is considered in Chapter 8, and also in the activity-specific Chapters 10, 11 and 12.
- 4.8 The other form of discrimination occurs when a service provider:
- fails to comply with a duty to make reasonable adjustments (imposed on it by section 21, 21E, or Regulations under section 21H of the Act) in relation to the disabled person in specified circumstances; and
 - cannot show that the failure is justified.
- 4.9 The duty to make reasonable adjustments is covered in greater detail in Chapters 6 and 7. Whether and when a service provider might be able to justify a failure to make a reasonable

adjustment is considered in Chapter 8 and also in the activity-specific Chapters 10, 11 and 12.

Limitations of the provisions

- 4.10 Section 59 of the Act provides that a service provider is not required to do anything under the Act that will result in a breach of legal obligations under any other legislation or enactment. However, it is only in cases where a legal obligation is specific in its requirements – leaving a service provider with no choice other than to act in a particular way – that the provisions of the Act may be overridden.

s 59

A person with arthritis wishes to visit an old country house which is open to the public. However, he cannot get into the building as there is a flight of steps at the entrance, with no ramp or handrail. He asks the owner why these have not been installed. The owner's response is that the house is a listed building, and purely because of this status he is not required to make any changes to it. As section 59 only applies when a service provider has no option but to act in a certain way, his refusal to seek consent to make changes to the building is likely to be unlawful.

- 4.11 Where the making of a reasonable adjustment requires alterations to a listed building, listed building consent will need to be sought from the relevant authority. Consent will usually be given to make some changes to listed buildings, and so a service provider cannot rely upon section 59 in these circumstances. Appendix B provides further information about listed building and other consents.

4.12 Nothing in the Act makes unlawful any actions taken for the purpose of safeguarding national security.

Legal liability for employees

s 58(1)

4.13 Under the Act, service providers are legally responsible for the actions of their employees in the course of their employment. Employees who discriminate against a disabled person will usually be regarded as acting in the course of their employment, even if the service provider has issued express instructions not to discriminate.

s 58(5),
s 58(1)

4.14 However, in legal proceedings against a service provider based on the actions of an employee, it is a defence that the service provider took 'such steps as were reasonably practicable' to prevent such actions. A policy on disability which is communicated to employees is likely to be central to such a defence. It is not a defence for the service provider simply to show that the action took place without its knowledge or approval.

4.15 All those involved in providing services – from the most senior director or manager to the most junior employee, whether full or part time, permanent or temporary – are affected by the duties in the Act. It does not matter whether the person involved in providing the services is self-employed or an employee, volunteer, contractor or agent.

What steps should a service provider consider?

- 4.16 Service providers are more likely to be able to comply with their duties under Part 3 of the Act and prevent their employees from discriminating against disabled customers if they consider the following steps:
- informing all staff that it is unlawful to discriminate against disabled people
 - establishing a positive policy on the provision of services to ensure inclusion of disabled people and communicating it to all staff
 - monitoring the implementation and effectiveness of such a policy
 - carrying out and acting on the results of an access audit carried out by a suitably qualified person
 - training staff to understand the service provider's policy towards disabled people, their legal obligations and the duty of reasonable adjustments
 - providing regular training to staff which is relevant to the adjustments to be made
 - providing disability awareness and disability equality training for all staff, including those not providing a direct service to the public
 - addressing acts of disability discrimination by staff as part of disciplinary rules and procedures
 - having a customer complaints procedure that is easy for disabled people to use
 - consulting disabled customers, disabled staff and disability organisations

- regularly reviewing whether services are accessible to disabled people; and
- regularly reviewing the effectiveness of reasonable adjustments made for disabled people in accordance with the Act, and acting on the findings of those reviews.

5 The duty not to treat a disabled person less favourably in relation to services

Introduction

- 5.1 This chapter addresses the duty of providers of services to the public, public authorities carrying out functions, and private clubs, to ensure that disabled people are not treated less favourably than other people when using their services. The circumstances in which it is unlawful to discriminate in respect of these three areas of activity are detailed in Chapters 10, 11 and 12.
- 5.2 The principles relating to less favourable treatment in relation to the three areas of activity are similar. Therefore, in this chapter, as explained in paragraph 1.18, the term ‘service provider’ and terms which flow from this are used generically to refer to all those who have duties in these areas.

What does the Act say?

- 5.3 One form of discrimination against a disabled person occurs where a service provider:
- treats a disabled person less favourably for a reason relating to the disabled person’s disability, than it treats (or would treat) others to whom that reason does not (or would not) apply; and
 - cannot show that it is justified.

s 20(1)(a),
s 21D(1)(a),
s 21G(1)(a)

s 20(1)(b),
s 21D(1)(b),
s 21G(1)(b)

Less favourable treatment

- 5.4 A service provider discriminates against a disabled person if it treats him less favourably for a disability-related reason (and it cannot show that the treatment is justified). In establishing whether a disabled person has been treated less favourably, the treatment of the disabled person is compared to how the service provider treats (or would treat) other people to whom the reason for the treatment does not (or would not) apply. Whether and when a service provider might be able to justify the less favourable treatment of a disabled person is considered in Chapter 8 and in the activity-specific Chapters 10, 11 and 12.

A football club admits visiting supporters to its stadium. However, one visiting supporter is refused entry because he has cerebral palsy and has difficulty controlling and co-ordinating his movements. No other visiting supporter is refused entry. This would amount to less favourable treatment for a reason related to disability and, unless the football club can justify its actions, would be an unlawful refusal of service contrary to the Act.

- 5.5 Bad treatment is not necessarily the same as less favourable treatment, although, where a service provider acts unfairly or inflexibly, a court might draw inferences that discrimination has occurred.

All the supporters of a visiting team are refused entry to the stadium by the football club in the example in paragraph 5.4 above. A visiting supporter with cerebral palsy is being treated no differently from all the other visiting supporters. He has not been subjected to any less favourable

treatment for a reason related to disability. However, if the football club refused entry to all the visiting supporters because one of their number has cerebral palsy, that could amount to unlawful discrimination against the disabled supporter.

- 5.6 The comparison can also be between the way in which one disabled person is treated and the way in which people with other disabilities are treated.

The football club in the example in paragraph 5.4 above refused entry to the disabled supporter with cerebral palsy. It cannot claim that it did not discriminate simply because people with other disabilities were allowed entry. The supporter with cerebral palsy has been less favourably treated in comparison with other members of the public, including the supporters with other disabilities.

- 5.7 A disabled person does not have to show that others were treated more favourably than they were. It is still less favourable treatment if others would have been treated better.

A party of adults with learning disabilities has exclusively booked a restaurant for a special dinner. The restaurant staff spend most of the evening making fun of the party and provide it with worse service than normal. The fact that there are no other diners in the restaurant that evening does not mean that the disabled people have not been treated less favourably than other people. Other diners would not have been treated in this way.

A visually impaired couple applies to adopt a child. At the first interview, the local authority officer responsible for the matter says that they are 'wasting his time', as their visual impairment would make it too difficult for them to adopt. The fact that no one else is being interviewed there at that time does not mean that the disabled people have not been treated less favourably than other people. Others attending their first adoption interview would not have been treated in this manner.

- 5.8 There must be a connection between the less favourable treatment and a reason related to the disabled person's disability.

A publican refuses to serve a disabled person whom he knows has epilepsy. He gives her no reason for refusing to serve her. Other customers in the pub are not refused service. A court is likely to draw an inference of discrimination in the absence of a reasonable explanation. However, if the ground for refusing her service is because she has no money, then the treatment is not for a reason which is related to the disabled person's disability.

- 5.9 If the treatment is caused by the fact that the person is disabled, that is treatment which 'relates to' the disability. Treating a disabled person less favourably for a reason related to their disability cannot be excused on the basis that another customer who behaved similarly (but for a reason not related to disability) would be treated in the same way. Broadly speaking, this means that a disabled person will have been treated less

favourably if they would not have received the treatment but for their disability.

A deaf couple who use British Sign Language (BSL) are refused entry to a private club as guests of a club member. The person overseeing entry to the club assumes that other members might mistake communication using BSL as threatening gestures. This refusal to admit them as guests of the club is for a reason related to disability. It is likely to be unlawful even though the private club would have refused entry to any potential guest who made similar gestures.

A mother seeks admission to a privately run nursery for her son who has Hirschprung's disease, which means that he does not have full bowel control. The nursery says that they cannot admit any child until the child is toilet trained. The refusal to admit the boy is for a reason related to his disability. It will be unlawful unless it can be justified under the Act.

A private members' club rejects applicants for membership who do not satisfy its 'image' in one respect or another. A woman with a severe facial disfigurement is refused membership of the club. Even though the club also does not allow entrance to many non-disabled people, for example, because it does not consider that they are attractive enough, the woman with the severe disfigurement has been treated less favourably for a reason related to her disability. This is likely to be unlawful.

5.10 Nevertheless, the Act cannot be used as a pretext for disruptive or antisocial behaviour unrelated to a person's disability.

A disco ejects a person with an artificial arm because he has drunk too much and has become abusive and disorderly. The disco would have ejected any other patron in similar circumstances. The ejection (or refusal to serve) is not for a reason related to the disabled person's disability and is unlikely to be unlawful.

5

Must a service provider know that a person is disabled?

5.11 A service provider may have treated a disabled person less favourably for a reason related to their disability even if it did not know the person was disabled. The test which has generally been adopted by the courts is whether, as a matter of fact, this was the reason why the disabled person was less favourably treated.

A pub employee orders a customer who is lying prone on a bench seat to leave the premises because he assumes she has had too much to drink. However, the customer is lying down as a result of a disability rather than alcoholic consumption. The refusal of further service is for 'a reason which relates to the disabled person's disability'. This will be unlawful unless the service provider is able to show that the treatment in question is justified, as defined by the Act.

A member of staff at Jobcentre Plus refuses to interview a member of the public who wishes to complete an application for Jobseekers Allowance because he is swearing. However, his swearing is a result of his having Tourette's syndrome. The refusal to interview relates to the disabled person's disability and will be unlawful unless the treatment is justified as defined by the Act.

- 5.12 As explained in Chapter 2, the Act only protects those who fall within the Act's definition of 'disabled person'. This definition has been the subject of developing interpretation by the courts. Moreover, some disabilities are not visible, or the extent of the impairment may be masked. It may not be practicable for service providers, or their employees, to make accurate assessments as to whether particular individuals fall within the statutory definition.
- 5.13 Service providers seeking to avoid discrimination, therefore, should instruct their staff that their obligations under the Act extend to everyone who falls within the definition of 'disability' and not just to those who appear to be disabled. They may also decide that it would be prudent to instruct their staff not to attempt to make a fine judgement as to whether a particular individual falls within the statutory definition, but that they should focus instead on meeting the needs of each customer.

Can service providers treat a disabled person more favourably?

- 5.14 The Act does not prohibit positive action in favour of disabled people (unless this would be unlawful under other legislation). Therefore, service

providers may provide services on more favourable terms to a disabled person.

A private club puts on a cabaret evening for members and their guests, at a small charge. The club offers free entry to a personal support worker accompanying a disabled person. This allows the disabled person to enjoy the cabaret without having to pay two entrance fees. This is within the law.

- 5.15 Less favourable treatment may be justified if it falls within specified conditions. Justification is considered in Chapter 8 and in the activity-specific Chapters 10, 11 and 12.

6 Making changes for disabled people: the duty to make reasonable adjustments

Introduction

- 6.1 This chapter is concerned with the principles of the duty to make reasonable adjustments for disabled people in relation to services to the public, public authority functions and private clubs ('the three areas of activity'), whilst Chapter 7 deals with the practical application of the duty. The circumstances in which it is unlawful to discriminate in respect of these three areas of activity are detailed in Chapters 10, 11 and 12. These chapters also provide more detail of the specific wording of the reasonable adjustment duty in relation to these three areas.
- 6.2 The principles relating to the duty to make reasonable adjustments in relation to these three areas of activity are similar. Therefore, in this chapter, as explained in paragraph 1.18, the term 'service provider' and terms which flow from this are used generically to refer to all those who have duties in these areas.
- 6.3 The duty to make reasonable adjustments is a cornerstone of the Act and requires service providers to take positive steps to ensure that disabled people can access services. This goes beyond simply avoiding treating disabled people less favourably for a disability-related reason.
- 6.4 The policy of the Act is not a minimalist policy of simply ensuring that some access is available to disabled people; it is, so far as is reasonably

s 21,
s 21E,
s 21H,
The Disability
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practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public. Accordingly, the purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large.

What does the Act say?

s 20(2),
s 21D(2),
s 21G(6)

s 20(2)(a),
s 21D(2)(a),
s 21G(6)(a)

6

s 20(2)(b),
s 21D(2)(b),
s 21G(6)(b)

6.5 One form of discrimination against a disabled person occurs where a service provider:

- fails to comply with a duty to make reasonable adjustments imposed on it in relation to the disabled person in specified circumstances; and
- cannot show that the failure to comply with that duty is justified.

6.6 Whether and when a service provider might be able to justify a failure to make a reasonable adjustment is considered in Chapter 8.

6.7 As explained in paragraph 4.13, under the Act service providers are legally responsible for the actions of their employees in the course of their employment. An employee who discriminates against a disabled customer will usually be regarded as acting in the course of their employment. This applies equally in respect of a failure by the employees of a service provider to comply with the duty to make reasonable adjustments.

What is the duty to make reasonable adjustments?

- 6.8 Service providers have a legal duty to take such steps as it is reasonable for them to have to take in all the circumstances of the case in the situations described below. The duty to take reasonable steps is referred to in this Code as the duty to make reasonable adjustments.
- 6.9 The duty to make reasonable adjustments comprises a series of duties falling into three areas:
- changing practices, policies and procedures
 - providing auxiliary aids and services
 - overcoming a physical feature by:
 - removing the feature
 - altering it
 - avoiding it; or
 - providing the service by an alternative method.

General approach to making reasonable adjustments

- 6.10 It is important that service providers do not assume that the only way to make services accessible to disabled people is to make a physical alteration to their premises (such as installing a ramp or widening a doorway). Often, minor measures such as allowing more time to serve a disabled customer will help disabled people to use a service. Disability awareness training for staff is also likely to be appropriate. However, adjustments in the form of physical alterations

s 21,
s 21E,
s 21H,
The Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258

may be the only answer if other measures are not sufficient to overcome barriers to access.

- 6.11 A service provider should be able to identify the more obvious physical barriers or other impediments for disabled people in accessing its services. Regularly reviewing the way in which it provides services to the public, for example, via periodic access audits, might help a service provider identify any less obvious or unintentional barriers to access for disabled people. Obtaining the views of disabled customers and disabled employees will also assist a service provider. Disabled people know best what hurdles they face in trying to use the services provided. They can identify difficulties in accessing services and might also suggest solutions involving the provision of reasonable adjustments. In addition, local and national disability groups or organisations of disabled people have extensive experience that service providers can draw upon. Listening carefully and responding to what disabled people really want helps service providers find the best way of meeting disabled people's requirements and expectations.
- 6.12 Employee training is also an important factor in providing reasonable adjustments. Employees should be generally aware of the requirements of disabled customers and potential customers and should appreciate how to respond appropriately to requests for a reasonable adjustment. They should know how to provide an auxiliary service and how to use any auxiliary aids that the service provider offers. Employees could also be encouraged to acquire additional skills in serving disabled people, for example, communicating with hearing-impaired people and those with speech impairments. Providing such training may help to avoid a finding of unlawful discrimination

(see Chapter 4, paragraph 4.16 for further information regarding this).

Use of reasonable adjustment examples

- 6.13 Sections 21, 21E, and the private clubs Regulations (The Disability Discrimination (Private Clubs etc) Regulations 2005 SI 2005/3258) refer to such steps as it is reasonable, in all the circumstances of the case, for the service provider 'to have to take' in order to make its services accessible to disabled people. The examples in this Code generally use the same language in discussing whether the step in the example concerned is likely to be a reasonable step for the service provider 'to have to take'. This is not intended to indicate that the step considered in the example is the only way in which the service provider can meet its duty under the Act. In any particular case, the service provider's duty to make reasonable adjustments might be discharged by taking a different step or steps.

To whom is the duty to make reasonable adjustments owed?

- 6.14 A service provider's duty to make reasonable adjustments is a duty owed to disabled people at large. It is not simply a duty that is weighed in relation to each individual disabled person who wants to access a service provider's services. Disabled people are a diverse group with different requirements that service providers need to consider.
- 6.15 No single aspect of the way in which a service is delivered will obstruct access to the service for all disabled people, or, in most cases, for disabled people generally. A policy, or a feature of the premises, which obstructs access to a service for

persons with a particular type of disability may present no difficulties for others with a different disability. The phrase 'disabled persons', which is used in relation to the duty, means that service providers need to consider features that impede people with one or more kinds of disability – for example, those with visual impairments or those with mobility impairments.

At what point does the duty to make reasonable adjustments arise?

- 6.16 Service providers should not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should be thinking now about the accessibility of their services to disabled people. Service providers should be planning continually for the reasonable adjustments they need to make, whether or not they already have disabled customers. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. In many cases, it is appropriate to ask customers to identify whether they have any particular requirements and, if so, what adjustments may need to be made. Failure to anticipate the need for an adjustment may render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defence to a claim that it was reasonable to have provided one.

A formal invitation is published inviting members of the public to make submissions and to attend a public inquiry. The invitation indicates that reasonable adjustments will be made on request if this will assist disabled people to make

submissions or to attend the inquiry. This helps to ensure that the public inquiry is accessible.

A working men's club reviews its facilities and recognises that it may not be accessible to individuals with a hearing impairment. It makes enquiries as to the availability of BSL interpreters and the use of induction loops, and also provides training for staff in communicating with deaf people and some basic BSL signs. An induction loop is fitted. If a BSL user joins the club, the staff know how to obtain a BSL interpreter where appropriate. They can communicate with deaf people using basic BSL or other means for day-to-day transactions, thus helping to ensure that the club's facilities are accessible.

Does the duty of reasonable adjustment apply even if the service provider does not know that the person is disabled?

- 6.17 A service provider owes a duty of reasonable adjustment to 'disabled persons' as defined by the Act. This is a duty to disabled people at large, and applies regardless of whether the service provider knows that a particular member of the public is disabled or whether it currently has disabled customers.
- 6.18 For this reason, employees should be made aware that they may be discriminating unlawfully even if they do not know that a customer is disabled, and they should be reminded that not all impairments are visible. As explained in this chapter and in Chapter 7, the duty of reasonable adjustment is best met by the service provider trying to anticipate the types of problems which could

arise, and by training its employees to enquire rather than act on assumptions. The aim should be that, when disabled customers request services, the service provider has already taken all reasonable steps to ensure that they can be served.

Must service providers anticipate every barrier?

- 6.19 Service providers cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and take reasonable steps to overcome are features that may impede persons with particular kinds of disability – for example, people with visual impairments or mobility impairments.
- 6.20 When considering the provision of a reasonable adjustment, a service provider should be flexible in its approach. However, there may be situations where it is not reasonable for a service provider to anticipate a particular requirement.
- 6.21 Once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services, it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that they face in accessing services, or has suggested a reasonable solution to that difficulty.

How long does the duty continue?

- 6.22 The duty to make reasonable adjustments is a continuing duty. Service providers should keep the duty under regular review in light of their experience with disabled people wishing to access

their services. In this respect it is an evolving duty, and not something that needs simply to be considered once and once only, and then forgotten. What was originally a reasonable step to take might no longer be sufficient and the provision of further or different adjustments might then have to be considered.

A large sports complex amends its 'no dogs' policy to allow entry to assistance dogs. It offers assistance dog users a tour of the complex to acquaint them with routes. This is likely to be a reasonable step for it to have to take at this stage. However, the complex then starts building work and this encroaches on paths within the complex, making it difficult for assistance dog users to negotiate their way around. Offering an initial tour is therefore no longer an effective adjustment as it does not make the complex accessible to assistance dog users. The service provider therefore decides to offer assistance dog users appropriate additional assistance from staff whilst the building work is being undertaken. This is likely to be a reasonable step for the service provider to have to take in the circumstances then existing.

6.23 Equally, a step that might previously have been an unreasonable one for a service provider to have to take could subsequently become a reasonable step in light of changed circumstances. For example, technological developments may provide new or better solutions to the problems of inaccessible services.

A library has a small number of computers for the public to use. When the computers were originally installed, the library investigated the

option of incorporating text-to-speech software for people with a visual impairment. It rejected the option because the software was very expensive and not particularly effective. It would not have been a reasonable step for the library to have to take at that stage. The library proposes to replace the computers. It makes enquiries and establishes that text-to-speech software is now efficient and within the library's budget. The library decides to install the software on the replacement computers. This is likely to be a reasonable step for the library to have to take at this time.

What is meant by 'reasonable steps'?

6.24 The duty to make reasonable adjustments places service providers under a responsibility to take such steps as it is reasonable, in all the circumstances of the case, for it to have to take in order to make reasonable adjustments. The Act does not specify that any particular factors should be taken into account. What is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case. It will vary according to:

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

6.25 However, without intending to be exhaustive, the following are some of the factors which might be taken into account when considering what is reasonable:

- whether taking any particular steps would be effective in overcoming the difficulty that disabled people face in accessing the services in question
- the extent to which it is practicable for the service provider to take the steps
- the financial and other costs of making the adjustment
- the extent of any disruption which taking the steps would cause
- the extent of the service provider's financial and other resources
- the amount of any resources already spent on making adjustments; and
- the availability of financial or other assistance.

Customers in a busy post office are served by staff at a counter after queuing in line. A disabled customer with severe arthritis wishes to purchase a TV licence. He experiences pain if he has to stand for more than a couple of minutes. Other customers would not expect to have to undergo similar discomfort in order to buy a TV licence. Thus, the post office's queuing policy makes it unreasonably difficult for the disabled person to use the service. Consideration will have to be given as to how the queuing policy could be adjusted so as to accommodate the requirements of such disabled customers.

The post office staff could ask the customer to take a seat and then serve him in the same way as if he had queued. Alternatively, it might provide a separate service desk with seating for disabled customers. Depending on the size of the

post office, these might be reasonable steps to have to take to adjust the queuing policy. However, it is not likely to be a reasonable step for the post office to send a member of staff to the disabled customer's home in order to sell him the TV licence. The time and expense involved would probably be an unreasonable use of the post office's resources, particularly in proportion to the degree of benefit to the disabled customer.

- 6.26 It is more likely to be reasonable for a service provider with substantial financial resources to have to make an adjustment with a significant cost than for a service provider with fewer resources. The resources available to the service provider as a whole are likely to be taken into account as well as other demands on those resources. Where the resources of the service provider are spread across more than one business unit or profit centre, the demands on them all are likely to be taken into account in assessing reasonableness.

A small retailer has two shops within close proximity to each other. It has conducted an audit to identify what adjustments for disabled people will be needed. At one of its shops, customers with mobility impairments cannot use all the services provided. The other shop can be easily reached by such customers and offers the same services, all of which are accessible to disabled people. Although the retailer originally hoped to make its services in both shops equally accessible, it is constrained by its limited resources. Therefore, for the present, it decides not to make all the services at the first shop accessible to customers with mobility

impairments. In these circumstances, it is unlikely to be in breach of the Act.

- 6.27 Service providers should bear in mind that there are no hard and fast solutions. Action which may result in reasonable access to services being achieved for some disabled people may not necessarily do so for others. Equally, it is not enough for service providers to make some changes if they still leave their services impossible or unreasonably difficult for disabled people to use.

The organiser of a large public conference provides qualified BSL interpreters to enable deaf delegates to follow and participate in the conference. However, this does not assist delegates with mobility impairments or visual disabilities to access the conference, nor does it help delegates with hearing impairments, and who do not use BSL but can lip-read. The conference organiser will need to consider the requirements of these delegates also.

- 6.28 Similarly, a service provider will not have taken reasonable steps if it attempts to provide an auxiliary aid or service which in practice does not help disabled people to access the service provider's services. The way in which an auxiliary aid or service is provided may be just as important as the auxiliary aid or service itself.

Despite providing qualified BSL interpreters for deaf delegates who use BSL, the conference organiser fails to ensure that those delegates

have the option to be seated near and in full view of the interpreters (who are themselves in a well-lit area). As a result, not all those delegates are able to follow the interpretation. The auxiliary service provided has not been effective in making the conference fully accessible to those deaf delegates.

- 6.29 Once a service provider has decided to put a reasonable adjustment in place, it is important to draw its existence to the attention of disabled people. The service provider should also establish a means for letting disabled people know about the adjustment. This might be done by a simple sign or notice at the entrance to the service provider's premises or at a service point. Alternatively, the availability of a reasonable adjustment might be highlighted in forms or documents used by the service provider, such as publicity materials. In all cases, it is important to use a means of communication which is itself accessible to disabled people. Failing to make people aware of the adjustment, if it is not obvious, may be tantamount to not making the adjustment at all.

An airport provides transfer by electric buggy between check-in and gates for passengers with mobility impairments. Prominent signs at the entrance to the arrival and departure halls and at check-in desks assist disabled passengers in accessing that auxiliary service.

A hospital has its forms and explanatory literature in accessible alternative formats such as large print, audio tape and Braille. A

prominent note to that effect on the literature sent to patients, or a specific mention of this by reception staff when a patient first visits the hospital, assists disabled patients to access the service.

- 6.30 If, having considered the issue thoroughly, there are genuinely no steps that it would be reasonable for a service provider to take to make its services accessible, the service provider is unlikely to be in breach of the law if it makes no changes. Such a situation is likely to be rare.

Cost of providing reasonable adjustments

- 6.31 The Act specifically prohibits a provider of services to the public, or a private club, from passing on the additional costs of complying with the duty to make reasonable adjustments to disabled customers alone. The costs of providing reasonable adjustments are part of their general expenses. The public authority function provisions are drafted differently and do not contain a specific prohibition on passing on the costs. However, in general, public authorities are prohibited from charging for carrying out their functions unless it is specifically provided for by an Act of Parliament.

A public authority provides print copies of consultation documents free of charge. It charges disabled people for copies of consultation documents that are required in alternative formats such as Braille, large print, on audio or videotape or in Easy Read because of the extra time and cost it takes to prepare them. The charge is unlikely to be within the law.

s 20(5),
s 21G(4)

A guest house has installed an audio-visual fire alarm in one of its guest bedrooms in order to accommodate visitors with a sensory impairment. In order to recover the costs of this installation, the landlady charges disabled guests a higher daily charge for that room, although it is otherwise identical to other bedrooms. This increased charge is unlikely to be within the law.

A golf club charges higher fees to individuals with mobility impairments to cover the extra costs of purchasing a new electronic golf buggy which enables mobility-impaired members to access the course. This increase in fees is unlikely to be within the law.

6.32 Sometimes a service provider makes an additional service available to customers for which there is a charge. If the additional service is itself a reasonable adjustment that the service provider has to provide under the Act to any of its disabled customers, those disabled customers cannot be charged for that service in accordance with the principles outlined in paragraph 6.31.

A wine merchant runs an online shopping service and charges all customers for home delivery. Its customers include disabled people with mobility impairments. Since this online service is not impossible or unreasonably difficult for disabled people with mobility impairments to use, home delivery, in these circumstances, will not be a reasonable adjustment that the wine merchant has to make under the Act. Therefore, the wine merchant can

charge disabled customers in the same way as other customers for this service.

However, another wine merchant has a shop which is inaccessible to disabled people with mobility impairments. Home delivery in these circumstances might be a reasonable adjustment for the wine merchant to have to make for these customers. The wine merchant could not then charge such customers for home delivery, even though it charges other customers for home delivery.

What is 'impossible or unreasonably difficult'?

- 6.33 A failure to comply with the duty to make reasonable adjustments in relation to providers of services to the public and private clubs will only amount to unlawful discrimination in specified circumstances. These circumstances are that the effect of the failure is to make it impossible or 'unreasonably difficult' for the disabled person to make use of services or of clubs (more detail is given in Chapters 10 and 12) and that the failure is not justified.
- 6.34 In the case of public authorities carrying out functions, there are two types of functions: those which are like services, conferring a benefit; and those which are 'negative' in impact regardless of who is subjected to them (for example, the police arresting someone). In the case of a benefit, a failure to comply with the duty to make reasonable adjustments will amount to discrimination where a particular barrier makes it impossible or unreasonably difficult to receive the benefit. In the case of a 'negative' function, a

s 19(1)(b),
s 21E,
**The Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258
regs 6(4), 7(3),
8(3), 9(3)**

s 21B(1),
s 21D(2)

failure will amount to discrimination where a particular barrier makes the impact of the function more severe than for non-disabled people (described in the Act as 'unreasonably adverse'). More detail is given on this in Chapter 11.

- 6.35 The Act does not define what is meant by 'unreasonably difficult', or 'unreasonably adverse'. However, the two phrases are intended to represent the same level of difficulty in accessing services or functions that disabled people may face.
- 6.36 However, when considering whether services are unreasonably difficult for disabled people to use, or whether disabled people's experiences are unreasonably adverse, service providers should take account of whether the time, inconvenience, effort, discomfort, anxiety or loss of dignity entailed in using the service would be considered unreasonable by other people if they had to endure similar difficulties (see the example at paragraph 6.25 above).

What happens if the duty to make reasonable adjustments is not complied with?

- 6.37 Where a service provider does not comply with the duty to make reasonable adjustments in the circumstances outlined in Chapters 10 to 12, and it cannot justify that failure, it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this (see Chapter 20 for more detail about claims).

7 Reasonable adjustments in practice

Introduction

- 7.1 Chapter 6 outlines the concept of the duty to make reasonable adjustments and provides an overview of the legal principles which underpin it. This chapter explains and illustrates how the duty works in practice.
- 7.2 As explained in Chapter 6, the duty to make reasonable adjustments comprises a series of duties falling into three areas:
- changing practices, policies and procedures
 - providing auxiliary aids and services
 - overcoming a physical feature by:
 - removing the feature
 - altering it
 - providing a reasonable means of avoiding it; or
 - providing the service by a reasonable alternative method.
- 7.3 A physical feature includes, for example, a feature arising from the design or construction of a building or the approach or access to premises (and see paragraph 7.43 below).
- 7.4 This chapter considers each of these duties in turn.

7.5 The three areas of activity (services to the public, public authority functions and private clubs) are governed by the same underlying principles in relation to discrimination. Therefore, in this chapter, as explained in paragraph 1.18, the term 'service provider' and terms which flow from this are used generically to refer to all those who have duties in these areas.

7.6 In addition, in this chapter the term 'impossible or unreasonably difficult' encompasses 'unreasonably adverse' (the equivalent phrasing in relation to certain public authority functions – see Chapter 6, paragraphs 6.34 to 6.36, and Chapter 11 for further details).

PRACTICES, POLICIES AND PROCEDURES

What is a practice, policy or procedure and what is the duty to change it?

7.7 When a service provider is providing services to its customers, it will have established a particular way of doing this. Its practices (including policies and procedures) may be set out formally, or may have become established informally or through custom. The terms practice, policy or procedure cover:

- what a service provider actually does (its practice)
- what a service provider intends to do (its policy); and
- how a service provider plans to go about it (its procedure).

7.8 The three terms overlap, and it is not always sensible to treat them as separate concepts.

7.9 A service provider might have a practice which – perhaps unintentionally – makes it impossible or unreasonably difficult for disabled people to make use of its services. In such a case, the service provider must take such steps as it is reasonable for it to have to take, in all the circumstances, to change the practice so that it no longer has such an effect. This may simply mean instructing staff to waive a practice or amending a policy to allow exceptions, or abandoning it altogether. Often, such a change involves little more than an extension of the courtesies which most service providers already show to their customers.

s 21(1),
s 21E(1),
s 21E(2),
The
Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258
regs 6(1), 7(1),
8(1), 9(1)

A private club has a policy of refusing entry during the evening to male members who do not wear a collar and tie. A disabled member who wishes to attend in the evening is unable to wear a tie because he has psoriasis (a severe skin complaint) of the face and neck. Unless the club is prepared to waive its policy, its effect is to exclude the disabled member from the club. This is likely to be unlawful.

A video rental shop allows only people who can provide a driving licence as proof of their identity to become members. This automatically excludes some disabled people from joining because the nature of their disabilities prevents them from obtaining a driving licence (for example, blind people or some people with epilepsy or mental health problems). The shop would be required to take reasonable steps to change this practice. It does so by being prepared to accept alternative forms of identification from its customers. This is likely to be a reasonable step for the shop to have to take.

A prison has a policy of opening its library and health centre every morning from 10am until 11am. This makes it unreasonably difficult for disabled prisoners who have morning medical appointments at the health centre to use the library. The prison amends its policy to allow the library to open for an hour in the evening as well. This is likely to be a reasonable step for the prison to have to take.

What are 'reasonable steps' in relation to practices, policies and procedures?

- 7.10 The Act does not define what are 'reasonable steps' for a service provider to have to take in order to change its practices. The kinds of factors which may be relevant are described in paragraphs 6.24 to 6.25 above.
- 7.11 The purpose of taking the steps is to ensure that the practice no longer has the effect of making it impossible or unreasonably difficult for disabled people to use a service. Where there is an adjustment that the service provider could reasonably put in place and which would make the service accessible, it is not sufficient for the service provider to take some lesser step that would not result in the service being accessible.

A medium-sized supermarket installs one extra-wide checkout lane designed for customers who are wheelchair users or are accompanied by infants. However, the checkout lane is also designated as an express lane available only to shoppers with 10 or fewer items. The effect of this practice is to exclude wheelchair users from taking advantage of the accessible checkout

unless they are making only a few purchases. It is likely to be a reasonable step for the supermarket to have to take to amend its practice by designating another checkout lane as the express lane.

AUXILIARY AIDS AND SERVICES

What is the duty to provide auxiliary aids or services?

- 7.12 A service provider must take reasonable steps to provide auxiliary aids or services if this would enable (or make it easier for) disabled people to make use of any services.

What is an auxiliary aid or service?

- 7.13 The Act gives two examples of auxiliary aids or services: the provision of information on audio tape and the provision of a sign language interpreter.

A building society provides information on an audio tape about its savings accounts. A customer with a visual impairment can use the audio tape at home or in a branch to decide whether to open an account. This is an auxiliary aid.

A Jobcentre Plus office has a member of staff able to communicate with deaf clients who use British Sign Language. This is an auxiliary service.

s 21(4),
ss 21E(6)–(7),
The Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258
regs 6(3), 7(2),
8(2), 9(2)
s 21(4)

7.14 But these are only illustrations of the kinds of auxiliary aids or services which a service provider might need to consider. An auxiliary aid or service might be the provision of a special piece of equipment or simply extra staff assistance to disabled people. In some cases a technological solution might be available.

A large supermarket provides specially designed shopping baskets and trolleys that can be easily used by disabled shoppers in a wheelchair or with reduced mobility. It also provides electronic hand-held bar code readers with synthesised voice output which help customers with a visual impairment to identify goods and prices. These are auxiliary aids that enable disabled shoppers to make use of the supermarket's services.

Disabled customers with a visual impairment or a learning disability may need assistance in a large supermarket to locate items on their shopping list. The supermarket instructs one of its employees to find the items for them. The supermarket is providing an auxiliary service which makes its goods accessible.

7.15 In any event, service providers should ensure that any auxiliary aids they provide are carefully chosen and properly maintained. It would also be advisable to have in place contingency arrangements in case of an unexpected failure of an auxiliary aid.

A person with a hearing impairment is attending a performance at a theatre. When booking the tickets he is told that the theatre auditorium has

an induction loop. However, the theatre does not check that the loop is working and on the day of the performance the system is not working properly. Although the theatre has provided an auxiliary aid, its failure to check that the loop is working properly means that the theatre is unlikely to have taken reasonable steps to enable disabled people to make use of its services.

A polling station is located in a building with a small step. To ensure access for disabled voters, the presiding officer ensures that there is a portable ramp. However, the officer does not check that the ramp is in a good state of repair and on the day of the election the ramp is unusable. Although an auxiliary aid has been provided, the failure to check that it is usable means that it is unlikely that reasonable steps have been taken to enable disabled people to make use of the voting facilities.

7.16 Nothing in the Act requires a service provider to provide an auxiliary aid or service to be used for personal purposes unconnected to the services being provided or to be taken away by the disabled person after use.

A solicitors' firm lends an audio tape recorder to a client with multiple disabilities who is unable to communicate in writing or to attend the firm's office. The client uses this auxiliary aid in order to record his instructions or witness statement. The client would be expected to return the recorder after use.

Health workers at a blood donation centre provide a pager to an individual whose impairment means that she is unable to speak so that she can alert the staff members if she needs to attract their attention. The blood donor would be expected to return the pager after use.

What are 'reasonable steps' in relation to auxiliary aids or services?

- 7.17 The duty to provide auxiliary aids or services requires the service provider to take such steps as it is reasonable for it to have to take, in all the circumstances of the case, to make its services accessible to disabled people. What might be reasonable for a large service provider (or one with substantial resources) might not be reasonable for a smaller service provider. The size of the service provider, the resources available to it, and the cost of the auxiliary service are relevant factors.

A large national museum has hourly guided tours of a popular major exhibition. It provides a radio microphone system for hearing-aid users to accompany the tour and on one day a week has a BSL interpreter available. The museum advertises this service and encourages BSL users to book space with the interpreter on tours for that day. These are likely to be reasonable steps for the museum to have to take.

A small, private museum with limited resources provides a daily guided tour of its exhibits. It investigates the provision of equipment for hearing-aid users such as an induction loop in

the main gallery or a radio microphone system to accompany the tour, but, after careful consideration, it rejects both options as too expensive and impracticable. Instead, with little effort or cost, the museum decides to provide good quality audio-taped guides (with an option of plug-in neck loops) that can be used by people with hearing aids who want to follow the guided tour. This is likely to be a reasonable step for the museum to have to take.

- 7.18 The reasonableness of the service provider's response to disabled people's requirements will inevitably vary with the circumstances. The kinds of factors which may be relevant are described in paragraphs 6.24 to 6.25 above.
- 7.19 A service provider will have to consider what steps it can reasonably take to meet the individual requirements of disabled people. How effectively the service provider is able to do so will depend largely on how far it has anticipated the requirements of its disabled customers. Many things that seem impossible at the time they are confronted might have been accommodated relatively easily if prior thought had been given to the question.
- 7.20 The Act leaves open what particular auxiliary aids or services might be provided in specific circumstances. Disabled people may be able to help the service provider to identify difficulties in accessing the service and what kind of auxiliary aid or service will overcome them. It is good practice to include disabled customers in the process of considering what reasonable adjustments should be made. However, the duty

remains on the service provider to determine what steps it needs to take.

Using auxiliary aids or services to improve communication

7.21 In many cases, a service provider will need to consider providing auxiliary aids or services to improve communication with people with a sensory impairment (such as those affecting hearing or sight), a speech impairment, or learning disabilities. The type of auxiliary aid or service will vary according to the importance, length, complexity, or frequency of the communication involved. In some cases, more than one type of auxiliary aid or service might be appropriate, as different people have different communication requirements. Account should also be taken of people with multiple communication disabilities, such as deaf-blindness or combined speech and hearing disabilities.

A cinema offers patrons a telephone booking service. Its booking office installs a textphone and trains its staff to use it. This offers access to deaf patrons and is likely to be a reasonable step for the cinema to have to take.

The operator of a booking office of a small heritage railway decides to communicate with passengers who have speech or hearing impairments by exchanging written notes. This is likely to be a reasonable step for this service provider to have to take.

However, it is unlikely to be a sufficient reasonable adjustment for the operator of a ticket office at a mainline rail terminus to make for such passengers. Instead, it installs an induction loop system and a textphone. These are likely to be reasonable steps for a large station to have to take.

A person with both learning and mobility disabilities needs to move to a more accessible property. The local authority choice-based letting scheme advertises properties in a weekly paper as available to people with different categories of assessed need. The properties are allocated on a first-come, first-served basis. The local authority agrees with the disabled person that it will allocate a staff member to provide the necessary assistance to enable him to have equal access to housing choice. This is likely to be a reasonable step for the local authority to have to take.

Provision for people with a hearing disability

7.22 For people with hearing disabilities, the range of auxiliary aids or services which it might be reasonable to provide to ensure that services are accessible might include one or more of the following:

- written information (such as a leaflet or guide) using clear accessible language
- a facility for taking and exchanging written notes
- an electronic or manual note-taking service

- induction loop or infrared broadcast systems
- a radio microphone system
- subtitles
- videos/DVDs or CD-ROMs with BSL interpretation
- access to a video interpreting service
- information displayed on a computer screen
- accessible websites
- textphones, telephone amplifiers and telephones with built-in inductive couplers
- teletext displays
- videophones
- audio-visual fire alarms or a vibrating pager linked to the alarm system
- qualified BSL interpreters, lip-speakers or deaf-blind manual communicators
- a verbatim speech-to-text transcription service, provided by a qualified speech-to-text reporter.

A deaf defendant (or defender) in court proceedings uses BSL as his main form of communication. The court arranges for a qualified BSL interpreter to interpret and voice-over his evidence in court. This is likely to be a reasonable step for the court to have to take.

A probate office offers BSL interpreters for BSL users at probate appointments. This is likely to be a reasonable step for the probate office to have to take.

A hearing-impaired person who lip-reads as her main form of communication wants a secured loan from a bank. In the initial stages it might be reasonable for the bank to communicate with her by providing printed literature or information displayed on a computer screen. However, before a secured loan agreement is signed, this particular bank usually gives a borrower an oral explanation of its contents. At that stage it is likely to be reasonable, with the customer's consent, for the bank to arrange for a qualified lip-speaker to be present so that any complex aspects of the agreement can be fully explained and communicated.

A television broadcasting company provides teletext subtitles to some of its programmes. This allows viewers with a hearing impairment to follow the programmes more easily. This is likely to be a reasonable step for the broadcasting company to have to take.

A hospital physiotherapist has a new patient who uses BSL as his main means of communication. The hospital arranges for a qualified BSL interpreter to be present at the initial assessment, which requires a good level of communication on both sides. At this initial assessment the physiotherapist and the disabled patient also discuss what other forms of communication services or aids would be suitable. They agree that for major assessments a BSL interpreter will be used but that at routine treatment appointments they will communicate with a notepad and pen. This is because these appointments do not require the same level or

intensity of communication. These are likely to be reasonable steps for the hospital to have to take.

Several pupils at a primary school have deaf parents whose preferred means of communication is BSL. The parents communicate with their children's class teachers individually through note-taking and lip-reading on a day-to-day basis. However, at a special event arranged for parents, the school arranges for a BSL interpreter to attend so that the required level of detail can be communicated between the parents and their children's teachers. These are likely to be reasonable steps for the school to have to take.

- 7.23 Service providers should bear in mind that hearing impairments take many forms and are of varying degrees. What might be a reasonable auxiliary aid or service for a person with tinnitus or reduced hearing might not be a reasonable adjustment for someone who is profoundly deaf.

The operator of a coach station fits an induction loop system at its ticket office. This ensures that customers who have reduced hearing and use hearing aids are able to communicate effectively with the booking office staff. However, this does not help profoundly deaf customers. The operator of the coach company instructs its staff to take time to communicate by using a pen and notepad to discover what the customer wants and to give information. Staff are also trained to speak looking directly at the customer to allow those customers who can lip-read to do so.

These are likely to be reasonable steps for the coach station to have to take.

- 7.24 For a deaf person who uses British Sign Language as his or her main form of communication, having a qualified BSL interpreter is the most effective method of communication. This is because for people whose first language is BSL (rather than spoken or written English) exchange of written notes or lip-reading can be an uncertain means of communication.

A private club has a number of deaf members who use BSL. A member of staff attends a BSL sign language course so that he can communicate with the members. However, for special events, shows and presentations organised for all members, the club arranges for a BSL interpreter to attend. These are likely to be reasonable steps for the club to have to take.

- 7.25 British Sign Language interpretation may not be easily available and should be arranged in advance wherever possible. If an interpreter is not available, the service provider should consider an alternative method of communication, in consultation with the deaf person.
- 7.26 Where sign language interpretation is used as an auxiliary service the interpreter should be capable of communicating accurately and efficiently with both the disabled person and the other parties involved. Other interpretation services such as lip-speakers and Makaton communicators should similarly be capable of communicating accurately and effectively.

Provision for people with a visual impairment

7.27 For people with visual impairments, the range of auxiliary aids or services which it may be reasonable to provide to ensure that services are accessible might include one or more of the following:

- readers
- documents in large or clear print, Moon or Braille
- information on computer disk or email
- information on audio tape
- telephone services to supplement other information
- spoken announcements or verbal communication
- accessible websites
- assistance with guiding
- audio description services
- large-print or tactile maps/plans and three-dimensional models; and
- touch facilities (for example, interactive exhibits in a museum or gallery).

A private club's dining room changes its menus daily. For that reason it considers that it is not practicable to provide menus in alternative formats, such as Braille. However, its staff spend a little time reading aloud the menu for blind diners, and the restaurant ensures that there is a large-print copy available. These are likely to be reasonable steps for the club to have to take.

A utility company supplying gas and electricity to domestic customers sends out quarterly bills. On request, the company is willing to provide the bills in alternative formats such as Braille or large print for customers with visual impairments. This is likely to be a reasonable step for the utility company to have to take.

Every year a local authority sends out information to its residents about new council tax rates. Because the information is important, the council provides copies in large print. On request, it is also prepared to supply the information in alternative media such as Braille or audio tape, or to explain the new rates to individual residents with visual impairments. These are likely to be reasonable steps for the council to have to take.

A customer with a visual impairment wishes to buy a compact disc player from a small specialist hi-fi shop. The shop arranges for a member of staff to assist the customer by reading out product details, packaging information, or prices. This is likely to be a reasonable step for the shop to have to take.

7.28 As with other forms of sensory impairments, visual disabilities are of varying kinds and degrees. Service providers need to consider what is the most appropriate auxiliary aid or service to provide. More than one auxiliary aid or service may be necessary according to the circumstances.

A small estate agent is reviewing the accessibility of its sales literature for clients who are partially sighted or blind. Because of the nature of the service it provides and the size of its business, the estate agent concludes that it is not practicable to make particulars of houses for sale available in Braille. However, the estate agent decides to change the print size and redesign the appearance of its written sales particulars. This makes the estate agent's sales information more accessible to its partially sighted clients, but does not assist those who are blind. It therefore also decides to put the information on audio tape on request. These are likely to be reasonable steps for the estate agent to have to take.

A housing benefit office ensures that claim forms and information literature are available in large print for partially sighted claimants. It also arranges for the forms and literature to be provided in Braille or on audio tape on request. These are likely to be reasonable steps for the housing benefit office to have to take.

A tax office ensures that copies of self-assessment forms are available in large print to enable visually impaired people who require large print to complete their tax returns. It also provides assistance for visually impaired people in completing the forms. These are likely to be reasonable steps for the tax office to have to take.

Provision for people with other disabilities or multiple disabilities

7.29 There are many examples of how auxiliary aids or services can be used to improve communication with people who have hearing disabilities or visual impairments. Service providers should also consider how communication barriers can be overcome for people with other disabilities. For example, a customer with a learning disability may be able to access a service by the provision of documents in large, clear print and plain language, or by the use of colour coding and illustrations.

A coach company issues its ticket office staff with cards showing destinations, types of tickets and prices. It trains the staff so that customers with learning disabilities can point to or ask for the options on the card that they want. These are likely to be reasonable steps for the coach company to have to take.

7.30 Service providers should not assume that their services are made accessible to customers with multiple disabilities simply by providing auxiliary aids or services that are suitable for people with individual disabilities.

7.31 For example, deaf-blind people (individuals who have a severe combined sight and hearing impairment) are not necessarily assisted in accessing services by the simple provision of communication aids designed for use by people with hearing disabilities or visual impairments. Such aids could assist deaf-blind people if appropriately used (for example, information leaflets produced in Braille or Moon, or good lighting and acoustics, induction loop systems,

etc). However, what is appropriate will depend on the nature and extent of the individual's dual sensory impairment and the methods he or she uses to communicate and access information. Adjustments which may be of assistance to a deaf-blind person might include engaging a deaf-blind manual interpreter for important meetings or having a member of staff trained in specific ways to help a deaf-blind person. Where service providers give their staff disability awareness training, they should consider including ways of helping deaf-blind people, such as guiding them safely and tracing capital letters and numbers on the palm of the hand.

A branch of a bank with a regular customer who is deaf-blind has a particular staff member trained in communicating with deaf-blind people. At the customer's request, the bank arranges for statements and letters to be sent in Braille. These are likely to be reasonable steps for the bank to have to take.

OVERCOMING BARRIERS CREATED BY PHYSICAL FEATURES

What is the duty to make reasonable adjustments in relation to physical features?

- 7.32 Where a 'physical feature' makes it impossible or unreasonably difficult for disabled people to make use of a service, a service provider must take reasonable steps to:
- remove the feature
 - alter it so that it no longer has that effect

s 21(2),
ss 21E(3)–(4),
The Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258
reg 6(2)

- provide a reasonable means of avoiding the feature; or
- provide a reasonable alternative method of making the service available to disabled people.

7.33 The meaning of a 'physical feature' is explained in paragraph 7.43 below and includes, for example, a feature arising from the design or construction of a building or the approach or access to premises. Appendix B provides information about how Building Regulations and leases affect reasonable adjustments to physical features.

What are a service provider's obligations in respect of physical features?

7.34 The Act and Regulations do not require a service provider to adopt one way of meeting its obligations over another. The focus of the Act and Regulations is on results. Where there is a physical barrier, the service provider's aim should be to make its services accessible to disabled people and, in particular, to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large.

7.35 For example, a service provider may decide to provide a service through the option of an alternative method. If a disabled person were to bring a claim against the service provider for a failure to make reasonable adjustments, the court determining the claim will be able to consider the other options which the service provider could have adopted in making the service accessible.

s 21(2),
ss 21E(3)–(4),
SI 2005/3258
reg 6(2)

An estate agent is marketing a new residential property development. It decides to hold detailed presentations for prospective buyers at the company's premises, at which there will be a talk illustrated with slides. However, the only meeting room available in the building is inaccessible to many disabled people. The estate agent obtains a quotation to make its premises more accessible, but the cost is more than it anticipated, and it delays making the alterations.

When disabled people who are unable to attend a presentation, because the room is inaccessible to them, make enquiries, they are merely sent copies of comparatively brief promotional literature. This is unlikely to be a reasonable alternative method of making the service available.

If an issue arose under the Act as to whether the estate agent had failed to comply with its obligations to disabled people who are unable to make use of its service, consideration would be given to the reasonableness of making the service available by any of the four different ways set out in the Act for complying with the duty to make reasonable adjustments in relation to barriers created by physical features.

In this case, this would involve consideration of whether it would have been reasonable to avoid the feature, such as by holding the meeting at another venue, whether there was a more effective alternative method of providing the service that could reasonably have been adopted, or whether the cost the company would have incurred in altering its premises was such that this would have been a reasonable step for it to have to take.

Adopting an 'inclusive' approach

- 7.36 It is in the interests of both service providers and disabled people to overcome physical features that prevent or limit disabled people from using the services that are offered. The Act does not place the different options for overcoming a physical feature explicitly in a hierarchy. However, when considering which option to adopt, service providers must balance and compare the alternatives in light of the policy of the Act, which is, so far as is reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public. Adopting this approach is in any event good practice, achieves an inclusive solution and resolves the problem permanently.
- 7.37 It is, in particular, recognised good practice for a service provider to consider first whether a physical feature that creates a barrier for disabled people can be removed or altered.
- 7.38 This is because removing or altering the barriers created by a physical feature is an 'inclusive' approach to adjustments. It makes the services available to everyone in the same way. In contrast, an alternative method of service offers disabled people a different form of service than is provided for non-disabled people.
- 7.39 Removing or altering the barriers created by a physical feature is also preferable to any alternative arrangements from the standpoint of the dignity of disabled people. In addition, it is likely to be in the long-term interests of the service provider, since it will avoid the ongoing costs of providing services by alternative means and may expand the customer base.

7.40 Therefore, it is recommended that :

- a service provider should first consider whether any physical features that create a barrier for disabled people can be removed or altered
- if that is not reasonable, a service provider should then consider providing a reasonable means of avoiding the physical feature
- if that is also not reasonable, the service provider should then consider providing a reasonable alternative method of making the service available to disabled people.

How can service providers identify possible adjustments?

7.41 Service providers are more likely to be able to comply with their duty to make adjustments in relation to physical features if they arrange for an access audit of their premises to be conducted by a suitably qualified person and draft an access plan or strategy. Acting on the results of such an evaluation may reduce the likelihood of legal claims against the service provider.

7.42 In carrying out an audit, it is recommended that service providers seek the views of people with different disabilities, or those representing them, to assist in identifying barriers and developing effective solutions. Service providers can also draw on the extensive experience of local and national disability groups or organisations of disabled people.

What is a 'physical feature'?

7.43 Regulations describe the following things as physical features:

- any feature arising from the design or construction of a building on the premises occupied by the service provider
- any feature on those premises of any approach to, exit from, or access to such a building
- any fixtures, fittings, furnishings, furniture, equipment, or materials in or on such premises
- any fixtures, fittings, furnishings, furniture, equipment, or materials brought onto premises (other than those occupied by the service provider) by or on behalf of the service provider in the course of (and for the purpose of) providing services
- any other physical element or quality of land contained in the premises occupied by the service provider.

7.44 All these features are covered, whether temporary or permanent. A building means an erection or structure of any kind.

7.45 Physical features include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, public facilities (such as telephones, counters or service desks), lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items (such as equipment and display racks). Physical features also include the sheer

The Disability Discrimination (Private Clubs etc) Regulations 2005
SI 2005/3258
reg 10,
The Disability Discrimination (Service Providers and Public Authorities Carrying Out Functions) Regulations 2005
SI 2005/2901
reg 9

scale of premises (for example, the size of an airport). This is not an exhaustive list.

- 7.46 Where physical features are within the boundaries of a service provider's premises and are making it impossible or unreasonably difficult for disabled people to use the service, then the duty to make reasonable adjustments will apply. This will be the case even if the physical features are outdoors – for example, the paths and seating in a pub garden.

Removing the physical feature

- 7.47 Removing the physical feature may be a reasonable step – and the most effective one – for a service provider to take.

Display units at the entrance of a small shop restrict the ability of wheelchair users to enter the shop. The owner decides that, without any significant loss of selling space, the display units can be removed and repositioned elsewhere in the shop. This is likely to be a reasonable step for the shop to have to take.

Altering the physical feature

- 7.48 Altering the physical feature so that it no longer has the effect of making it impossible or unreasonably difficult for disabled people to use the services may also be a reasonable step for a service provider to take.

A private members' club has a high bar, making it unreasonably difficult for wheelchair users to be served at the bar. The club lowers the bar so

that wheelchair users can be served more easily. This is likely to be a reasonable step to have to take.

Providing a reasonable means of avoiding the physical feature

- 7.49 Providing a reasonable means of avoiding the physical feature may also be a reasonable step for a service provider to take.

A probation service holds meetings in its offices with offenders who have been given community rehabilitation orders. The meeting room has two steps into it, which means that those who are wheelchair users or who have mobility impairments cannot use the room. The probation service decides to install a permanent ramp at the side of the two steps to enable disabled offenders to attend meetings. This is likely to be a reasonable step for the probation service to have to take.

- 7.50 The Act requires that any means of avoiding the physical feature must be a 'reasonable' one. Relevant considerations in this respect may include whether the provision of the service in this way significantly offends the dignity of disabled people and the extent to which it causes disabled people inconvenience or anxiety.

A local authority's planning office is located in a building whose front entrance is only accessible by a flight of stairs. At ground level there is a bell and a sign saying 'Please ring for disabled access'. However, the bell is not answered

promptly, even in bad weather, so that a disabled person meeting officials often has to wait for an unreasonable amount of time before gaining access to the building. This is unlikely to be a reasonable means of avoiding the feature.

Providing a reasonable alternative method of making services available

7.51 Providing a reasonable alternative method of making services available to disabled people may also be a reasonable step for a service provider to take. The Act requires that any alternative method of making services available must be a 'reasonable' one. Relevant considerations in this respect may include whether the provision of the service in this way significantly offends the dignity of disabled people and the extent to which it causes disabled people inconvenience.

The changing facilities in a women-only gym are located in a room that is only accessible by stairs. The service provider suggests to disabled users of the gym with mobility impairments that they can change in a corner of the gym itself. This is unlikely to be a reasonable alternative method of making the service available, since it may significantly infringe upon their dignity.

8

Can less favourable treatment or a failure to make a reasonable adjustment be justified?

Introduction

- 8.1 This chapter explains the meaning of justification and how it is approached in relation to services to the public, public authority functions and private clubs. It looks in particular at the two grounds of justification which are common to all these areas of activity (health and safety and incapacity to contract). The grounds which are specific to these three individual areas of activity are dealt with in the relevant chapters (10, 11 or 12).
- 8.2 There are special rules on justification affecting the provision of insurance, guarantees and deposits. These are dealt with in Chapter 9.
- 8.3 The three areas of activity are governed by the same underlying principles in relation to discrimination. Therefore, in this chapter, as explained in paragraph 1.18, the term 'service provider' and terms which flow from this are used generically to refer to all those who have duties in these areas.
- 8.4 Service providers should not be looking for reasons or excuses to discriminate against disabled people who wish to use their services. It is in their own best interests to ensure that their services are fully accessible to all customers.
- 8.5 However, in limited circumstances, the Act does permit less favourable treatment of a disabled person, or a failure to make a reasonable

adjustment, to be justified. This cannot be used as a reason for a general exclusion of disabled people from access to services.

Less favourable treatment

8.6 As outlined in previous chapters, one form of discrimination against a disabled person occurs where:

- for a reason which relates to the disabled person's disability, a service provider treats the disabled person less favourably than it treats or would treat others to whom that reason does not or would not apply; and
- it cannot show that the treatment in question is justified.

Failure to make reasonable adjustments

8.7 A service provider also discriminates against a disabled person if:

- it fails to comply with a duty to make reasonable adjustments imposed on it under the Act in relation to the disabled person in certain circumstances; and
- it cannot show that the failure to comply with that duty is justified.

8.8 Treating a disabled person less favourably for a reason related to disability or failing to comply with a duty to make reasonable adjustments may be justified only if:

- the service provider believes that one or more of the relevant conditions detailed in paragraphs 8.16 to 8.22, or the activity-specific chapter are satisfied; and

s 20(1)(a),
s 21D(1)(a),
s 21G(1)(a)

s 20(1)(b),
s 21D(1)(b),
s 21G(1)(b)

s 20(2)(a),
s 21D(2)(a),
s 21G(6)(a)

s 20(2)(b),
s 21D(2)(b),
s 21G(6)(b)

s 20(3)(a),
s 21D(3)(a),
s 21G(2)(a)

- it is reasonable in all the circumstances of the case for the service provider to hold that opinion.

s 20(3)(b),
s 21D(3)(b),
s 21G(2)(b)

8.9 There is an additional ground of justification applicable to public authority functions (where treatment or a failure to make adjustments is a 'proportionate means of achieving a legitimate aim'). This is detailed in Chapter 11. The general comments below, from paragraphs 8.13 to 8.15, do not apply in relation to this specific justification.

s 21D(5)

8.10 The conditions of justification specified in the Act which apply in relation to all services providers are:

- health or safety; and

s 20(4)(a),
s 21D(4)(a),
s 21G(3)(a),
The Disability
Discrimination
(Private Clubs
etc)
Regulations
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reg 13(2)(a)

- the disabled person being incapable of entering into a contract.

8.11 These are explained in more detail in paragraphs 8.16 to 8.22 below.

s 20(4)(b),
s 21D(4)(b),
s 21G(3)(b),
The Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258
reg 13(2)(b)

8.12 If the reason for less favourable treatment or failure to comply with a duty to make reasonable adjustments does not fall within one of the relevant conditions outlined here or in the activity-specific chapters (for example, in the case of a public authority function, the reason does not amount to a proportionate means of achieving a

legitimate aim), it cannot be justified and will therefore be unlawful.

The general approach to justification

- 8.13 The test of justification is twofold: did the service provider believe that at least one of the specified conditions was satisfied (a subjective test); and was that belief reasonably held (an objective test)? A service provider does not have to be an expert on disability, but it should take into account all the circumstances, including any information which is available, any advice which it would be reasonable to seek, and the opinion of the disabled person. The service provider should also consider whether it could make reasonable adjustments so that there would no longer be any less favourable treatment to justify; for example, by amending an evacuation procedure where a refusal of service might otherwise be justified on health and safety grounds. The lawfulness of what a service provider does or fails to do will be judged by what it knew (or could reasonably have known), what it did and why it did it at the time of the alleged discriminatory act.
- 8.14 In some instances, it will not be clear whether any of the justifications apply. It may be shown subsequently that a service provider was mistaken in its opinion in a particular case. Coming to an incorrect conclusion does not necessarily mean that the service provider has discriminated unlawfully against a disabled person. In such cases, a service provider may be able to justify less favourable treatment or a failure to make reasonable adjustments if it can show that it was reasonable, in all the circumstances of the case, for it to hold that opinion at the time.

8.15 If a disabled person can show that they have been treated less favourably than others for a reason related to their disability, it is for the service provider to show that the action taken was justified. Similarly, if a disabled person can show that the service provider has failed to comply with a duty to make reasonable adjustments in relation to the disabled person, it is for the service provider to show that the failure was justified. In either case, the justification must fall within one of the relevant categories of justification set out in the Act and which are described below and in the activity-specific chapters. Some of the categories of justification only apply to particular acts of otherwise unlawful discrimination.

Health or safety

8.16 The Act does not require a service provider to do anything which would endanger the health or safety of any person. A service provider can justify less favourable treatment or a failure to make an adjustment if it is necessary in order not to endanger the health or safety of any person, including the disabled person in question.

An amusement park operator refuses to allow a person with muscular dystrophy onto a physically demanding, high-speed ride. Because of her disability, the disabled person uses walking sticks and cannot stand unaided. The ride requires users to brace themselves using their legs. The refusal is based on genuine concerns for the health or safety of the disabled person and other users of the ride. This is likely to be justified.

8.17 The justification cannot apply unless the service provider reasonably believes that the treatment is

s 20(4)(a),
s 20(9),
s 21D(4)(a),
s 21G(3)(a),
**The Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258
reg 13(2)(a)**

necessary in order not to endanger the health or safety of any person. Health or safety reasons which are based on generalisations and stereotyping of disabled people provide no defence. For example, fire regulations should not be used as an excuse to place unnecessary restrictions on wheelchair users based on the assumption that wheelchair users would be an automatic hazard in a fire. It is for the management of the establishment concerned, with advice from the licensing authority or local fire officer, to make any special provision needed. Service providers should ensure that any action taken in relation to health or safety is proportionate to the risk. In many cases organisations will have a risk assessment procedure. Any risk assessment should take full account of a disabled person's circumstances when a service provider is seeking to rely on such an assessment. There must be a balance between protecting against the risk and restricting disabled people from using the service. Disabled people are entitled to make the same choices and to take the same risks within the same limits as other people.

Although there are adequate means of escape, a cinema manager turns away a wheelchair user because she assumes, without checking, that he could be in danger in the event of a fire. Although she genuinely believes that refusing admission to wheelchair users is necessary in order not to endanger the health or safety of either the disabled person or other cinema-goers, the cinema manager has not made enquiries as to whether there are adequate means of escape. Her belief is therefore unlikely to be reasonably held. In these circumstances, the refusal of admission is unlikely to be justified.

- 8.18 As indicated in paragraph 8.13 above, before a service provider relies on health or safety to justify less favourable treatment of a disabled person, it should consider whether a reasonable adjustment could be made which would allow the disabled person to access the service without concerns for health or safety. Similarly, if health or safety is used to justify a failure to make a particular reasonable adjustment, the service provider should consider whether there is any alternative adjustment that could be made to allow the disabled person to use the service.

An outdoor centre provides adventure weekends involving strenuous physical effort and some personal risk. On safety grounds, it has a policy of requiring its customers to undergo a medical examination before they are admitted to the course. This tends to screen out customers who are disabled as a result of high blood pressure or heart conditions. This is likely to be justified. However, the centre might make adjustments to its policy by admitting the disabled customers to any parts of the course which do not create a safety risk.

Incapacity to contract

- 8.19 The Act does not require a service provider to contract with a disabled person who is incapable of entering into a legally enforceable agreement or of giving an informed consent. If a disabled person is unable to understand a particular transaction, a service provider may refuse to enter into a contract. This reason may justify any less favourable treatment or a failure to make reasonable adjustments.

s 20(4)(b),
s 20(9),
s 21D(4)(b),
s 21G(3)(b),
**The Disability
Discrimination
(Private Clubs
etc)
Regulations
2005
SI 2005/3258
reg 13(2)(b)**

8.20 Any such refusal must be reasonable. A person may be able to understand less complicated transactions, but have difficulty with more complex ones. Unless there is clear evidence to the contrary, a service provider should assume that a disabled person is able to enter into any contract.

A jeweller refuses to sell a pair of earrings to a person with a learning disability. It claims that she does not understand the nature of the transaction. This is even though her order is clear and she is able to pay for the earrings. This is unlikely to be justified.

A person with senile dementia applies for a mortgage loan from a building society to finance the purchase of a house. Although he has the means of keeping up with the mortgage loan repayments, the building society has sound reasons for believing that the disabled person does not understand the nature of the legal agreement and obligations involved. The building society refuses his application. This is likely to be justified.

A long-term patient in a psychiatric hospital wishes to open a bank account. The bank wrongly assumes that because she is in a hospital she is incapable of managing her affairs. It refuses to open an account unless it is provided with an enduring power of attorney. The bank continues with its refusal despite being provided with good evidence that the person has full capacity to manage her own affairs. This is unlikely to be justified.

A local authority offers loans to homeowners at competitive rates of interest to allow them to make improvements to their property. However, in order to qualify for the loan the applicant must sign a contract undertaking to repay the loan within five years. An application from a person with Alzheimer's disease is refused, on the basis that he cannot understand the commitment to repay the loan within a specified timeframe. This refusal is likely to be justified.

- 8.21 Regulations made under the Act prevent service providers from justifying less favourable treatment of a disabled person on the grounds of incapacity to contract or inability to give an informed consent where another person is legally acting on behalf of the disabled person. For example, that other person may be acting under a power of attorney (or, in Scotland, under a power exercisable in relation to the disabled person's property or affairs in consequence of the appointment of a guardian, tutor or judicial factor).

A salesman refuses to rent a television to a woman simply because she is legally acting on behalf of her son who has a mental health problem. This is less favourable treatment of the son and is unlikely to be justified.

- 8.22 Before a service provider seeks to justify any form of discrimination against a disabled person on the grounds of incapability of entering into an enforceable agreement or of giving an informed consent, the service provider should consider whether a reasonable adjustment could be made to solve this problem. For example, it might be

The Disability Discrimination (Services Providers and Public Authorities Carrying out Functions) Regulations 2005
SI 2005/2901
and The Disability Discrimination (Private Clubs etc) Regulations 2005
SI 2005/3258

possible to prepare a contractual document in plain English to overcome an inability to give an informed consent.

8.23 In addition to the two grounds of justification detailed above, there are specific grounds which apply only to providers of services to the public, or public authorities when carrying out functions, or private clubs. These additional justifications are dealt with in Chapters 10, 11 and 12 respectively.

9

Special justifications affecting insurance, guarantees and deposits

Introduction

- 9.1 There are special rules affecting providers of services to the public in respect of insurance services. There are also special rules affecting providers of services to the public and private clubs in respect of guarantees and deposits for goods and facilities. These are detailed in this chapter.

INSURANCE

When is disability relevant to the provision of insurance services?

- 9.2 In some circumstances, the fact that a person is disabled may be a relevant factor in deciding whether to provide insurance services (including life assurance) to that person and, if so, on what terms. Regulations made under the Act provide special rules to deal with those circumstances.
- 9.3 The special rules on insurance only apply to the provision of insurance services by an insurer. They are relevant where a provider of insurance services, for a reason which relates to a disabled person's disability, treats a disabled person less favourably than it treats or would treat others to whom that reason does not or would not apply.

The Disability Discrimination (Service Providers and Public Authorities Carrying out Functions) Regulations 2005
SI 2005/2901

reg 4(1)

A disabled person with a history of cancer applies for a life insurance policy. The insurance company refuses to provide life insurance to her. Whether the refusal of insurance is justified will depend on the application of the special rules on insurance services.

A disabled person with diabetes applies to a motor insurer for comprehensive insurance on his motor car. The insurer is willing to provide insurance cover to the disabled person but, because of his disability, only at a higher premium than would be charged to other motorists. Whether the less favourable terms on which the insurance cover is provided are justified will depend on the application of the special rules on insurance services.

reg 4(2)

9.4 The special rules state that disability-related less favourable treatment in the provision of insurance services is deemed to be justified if all the following conditions are satisfied:

- it is in connection with insurance business carried on by the provider of services to the public
- it is based on information which is relevant to the assessment of the risk to be insured
- the information is from a source on which it is reasonable to rely; and
- the less favourable treatment is reasonable having regard to the information relied on and any other relevant factors.

In the first example in paragraph 9.3 above, the insurer has based its refusal of life insurance on clear medical evidence from a cancer specialist that the disabled person is unlikely to live for more than six months. In the circumstances, the refusal of insurance is likely to be justified because all the conditions above are satisfied.

A person with a diagnosis of manic depression applies for motor insurance. He is told that he will have to pay double the normal premium because of his condition. The insurer is relying on actuarial data relating to the risks posed by a person driving when in a manic episode. However, the applicant produces credible evidence that he has been stable on medication for some years and has an unblemished driving record. In these circumstances, the charging of a higher premium in this case is unlikely to be justified because not all of the conditions above have been fully satisfied.

What is information relevant to the assessment of an insurance risk?

- 9.5 Information which might be relevant to the assessment of the risk to be insured includes actuarial or statistical data or a medical report. The information must also be current and from a source on which it is reasonable to rely. An insurer cannot rely on untested assumptions or stereotypes or generalisations in respect of a disabled person.

reg 4(2)(b)

In the second example in paragraph 9.3 above, if the motor insurer has based its decision to charge an increased premium on sound medical evidence and reliable statistical data, it is likely to be able to justify the increased premium.

What is the practical effect of the special rules on insurance?

- 9.6 An insurer should not adopt a general policy or practice of refusing to insure disabled people or people with particular disabilities unless this can be justified by reference to the four conditions set out in paragraph 9.4 above. Similarly, unless justifiable in this way, an insurer should not adopt a general policy or practice of only insuring disabled people or people with particular disabilities on additional or adverse terms or conditions.

A private health insurer is considering an application for private health insurance from a disabled person with chronic bronchitis and emphysema. The insurer is willing to provide health insurance to her, but on the condition that claims resulting from respiratory illnesses are excluded from cover. That decision is based on relevant and reliable medical evidence relating to the individual applicant for insurance. This is likely to be reasonable and therefore justified.

- 9.7 The special rules on insurance services recognise that insurers may need to distinguish between individuals when assessing the risks which are the subject of an insurance proposal or insurance policy. However, it is for the insurer to show that there is an additional risk associated with a

disabled person which arises from his or her disability. Blanket assumptions should be avoided.

Existing insurance policies, cover documents and master policies

9.8 The Regulations include special provisions for insurance policies which came into existence before 2 December 1996. The effect of these provisions is that less favourable treatment of a disabled person which results from a policy that existed before 2 December 1996 will be treated as automatically justified, unless the policy fell for renewal or review on or after 2 December 1996, and the less favourable treatment occurred on or after the date when the renewal or review was due. Once renewed or reviewed, or once the date for renewal or review has passed, less favourable treatment in relation to the insurance policy falls within the special rules concerning justification set out above. There are also similar provisions for cover documents and master policies.

GUARANTEES

9.9 Providers of services to the public frequently give their customers guarantees in respect of goods, or services or facilities. Private clubs may also provide guarantees in respect of benefits, facilities or services. Regulations contain special rules relating to guarantees. Manufacturers who offer guarantees will also be covered by these provisions.

reg 5

The Disability Discrimination (Service Providers and Public Authorities Carrying out Functions) Regulations 2005
SI 2005/2901
and The Disability Discrimination (Private Clubs etc) Regulations 2005
SI 2005/3258

SI 2005/2901
reg 7,
SI 2005/3258
reg 4

9.10 The special rules deal with situations where a disabled person's disability results in higher than average wear or tear to goods, services, benefits or facilities supplied and where it would not be reasonable to expect providers of services to the public, or clubs, to honour a guarantee.

What is a guarantee?

SI 2005/2901
reg 7(3),
SI 2005/3258
reg 4(3)

9.11 A guarantee includes any document (however described) under which:

SI 2005/2901
reg 7(2)(a)(i),
SI 2005/3258
reg 4(2)(a)(i)

- the purchase price of services, facilities or benefits provided will be refunded if they are not of satisfactory quality; or

SI 2005/2901
reg 7(2)(a)(ii),
SI 2005/3258
reg 4(2)(a)(ii)

- services or benefits in the form of goods provided will be replaced or repaired if not of satisfactory quality.

SI 2005/2901
reg 7(2)(a),
SI 2005/3258
reg 4(2)(a)

It does not matter whether the guarantee is legally binding.

9

A double-glazing firm gives customers a document described as a 'warranty'. The document promises to refund the purchase price of the double glazing within six months if the customer is not completely happy with their quality. This is a guarantee.

A manufacturer of telephones and answer machines distributes its products to high street stores. The high street stores sell the products to their customers. In the product packaging there is a card from the manufacturer promising to

replace or repair its products free of charge if defective within one year of purchase. The card has to be completed and returned to the manufacturer by the purchaser. This is a guarantee.

A retail chain of stores undertakes to replace goods if they wear out or break within three months of purchase. Although this practice is not contained in a formal document and might not be legally enforceable, it is likely to be a guarantee.

Guarantees and less favourable treatment of disabled persons

9.12 The Regulations deal with the question of less favourable treatment of disabled people in respect of guarantees. The special rules apply where, in respect of a guarantee, a provider of services to the public, or a private club, for a reason which relates to a disabled person's disability, treats a disabled person less favourably than it treats or would treat others to whom that reason does not or would not apply.

9.13 Less favourable treatment of a disabled person in respect of a guarantee may be justified if all the following conditions are satisfied:

- a guarantee has been provided (as explained in paragraph 9.11)
- damage has occurred for a reason which relates to the disabled person's disability
- there is a refusal to provide a replacement, repair or refund under the guarantee

SI 2005/2901
reg 7(1),
SI 2005/3258
reg 4(1)

SI 2005/2901
reg 7(2),
SI 2005/3258
reg 4(2)

- that refusal is because the damage is above the level at which the guarantee would normally be honoured; and
- the refusal is reasonable in all the circumstances of the case.

A disabled person with a mobility impairment buys a pair of shoes from the retail chain of stores in the third example in paragraph 9.11 above. He wears out the left shoe after a few months because his left foot has to bear most of his weight. The store refuses to provide a new pair of shoes because the old pair has undergone abnormal wear and tear. This is likely to be justified.

A wheelchair user has ordered a new front door from the double-glazing firm in the first example in paragraph 9.11 above. Despite being properly installed, within a few weeks the door is marked, scuffed and misaligned. This is because, as she enters and leaves her house, the customer's wheelchair regularly catches the door. The customer is unhappy because the firm specifically stated that the door would be able to withstand contact with her wheelchair. The double-glazing firm refuses to refund the purchase price on the ground that this represents abnormal wear and tear. In the light of the firm's express statement, this is unlikely to be justified.

DEPOSITS

- 9.14 A provider of services to the public may be prepared to provide goods or facilities for hire or rent on a 'sale or return' basis. A private club may also provide such goods or facilities. The

customer or member is then often required to pay a deposit which is refundable if the goods or facilities are returned undamaged. The Regulations provide special rules to deal with the question of whether the provider of services to the public or the private club can refuse to return the deposit in full if damage has occurred to the goods or facilities because of the customer's disability or a reason related to it.

9.15 The special rules apply where, in relation to a deposit, a provider of services to the public, or a private club, for a reason which relates to a disabled person's disability, treats a disabled person less favourably than it treats (or would treat) others to whom that reason does not (or would not) apply.

**SI 2005/2901
reg 8(1),
SI 2005/3258
reg 5(1)**

9.16 Less favourable treatment of a disabled person in respect of a deposit may be justified if all the following conditions are satisfied:

**SI 2005/2901
reg 8(2),
SI 2005/3258
reg 5(2)**

- goods (which may take the form of benefits or services) or facilities are provided
- the disabled person is required to provide a deposit
- the deposit is refundable if the goods or facilities are undamaged
- damage has occurred to the goods or facilities for a reason which relates to the disabled person's disability
- there is a refusal to refund some or all of the deposit
- that refusal is because the damage is above the level at which some or all of the deposit would normally be refunded; and

- the refusal is reasonable in all the circumstances of the case.

A disabled person hires an evening suit from a menswear hire shop. The hire shop requires all customers to pay a deposit against damage to the hired clothing. Because of the nature of his disability, the disabled person wears a leg calliper. This causes abnormal wear and tear to the suit. When the suit is returned, the hire shop retains part of the deposit against the cost of repairing the damage. This is likely to be justified.

s 19(1)(d),
ss 21F(2)–(5)

9.17 The special rules on deposits do not justify a provider of services to the public or a private club charging a disabled person a higher deposit than it would charge to other people. Similarly, there will be no justification for charging a disabled person a deposit where other people would not be expected to pay such a deposit. In either case, this could amount to discrimination in the terms on which goods or facilities are provided to the disabled person.

9.18 Where a disabled person is required to pay a deposit, repayment of the deposit may only be refused if any damage to the goods or facilities is above the level at which some or all of the deposit would normally be refunded. If the damage is of a level where the deposit would normally be repaid, either in full or in part, a disabled person must not be treated less favourably than any other person who has paid a deposit and has caused comparable damage to the goods or facilities.

9.19 A refusal to refund a deposit to a disabled person must be reasonable in all the circumstances of the case. Withholding the whole or part of a deposit is unlikely to be justified if the amount withheld exceeds the loss suffered by the service provider or private club as a result of the damage.

SI 2005/2901
reg 8(2)(c),
SI 2005/3258
reg 5(2)(c)

10 Providers of services to the public

Introduction

10.1 Chapters 3 and 4 briefly indicate what a provider of services to the public is and what it is that is unlawful under the Act. Chapters 5, 6 and 7 explain the nature of 'discrimination' in relation to services to the public, public authorities carrying out functions, and private clubs, as the same principles apply to all these areas under the Act. This chapter considers in greater depth what is unlawful under the Act in relation to the provision of services to the public, including the application of the reasonable adjustment duty. In this chapter, therefore, references to 'services' and 'service provider' relate only to services to the public.

SCOPE

10.2 A provider of services is anyone who is concerned with the provision in the United Kingdom of services to the public, or to a section of the public. 'Services' includes the provision of goods and facilities. Paragraph 3.3 of Chapter 3 lists some examples of services which are covered.

s 19(2)

What is the provision of services to the public?

10.3 In most cases a provider of services to the public will be providing services to a disabled person in that person's individual or personal capacity. However, sometimes a disabled person will be accessing services on behalf of an organisation

(perhaps as an employee or representative of that organisation). For instance, as part of a business relationship between that organisation and the service provider, a disabled employee or representative of the organisation might have to visit areas of the service provider's premises where a section of the public is normally admitted. The service provider is likely to owe the disabled person duties under the Act during such visits.

- 10.4 It is important to remember that it is the provision of the service that is affected by these provisions of the Act and not the nature of the service or business, or the type of establishment from which it is provided. In many cases a service provider is providing a service by a number of different means. In some cases, however, each of those means of service might be regarded as a service in itself and subject to the Act.

If a bank provides its services from temporary or mobile premises during a two-week tennis tournament, those services are still covered by the Act.

A bank branch provides a cash withdrawal service over the counter from Monday to Friday during opening hours. It also provides a 24-hour cash withdrawal facility all through the week from cash machines (ATMs). To the extent that the ATM service is available when the counter service is not, the bank is likely to be providing an additional service which is subject to the duties in the Act.

A local leisure centre based in premises owned by a local authority is subject to the Act because it provides a service to the public and not, for example, because its services are provided from a public building.

A television company invites members of the public to participate in a game show by telephoning its national call centre. This is the provision of a service to the public and is subject to the Act.

10.5 A wide range of services is covered by the Act, including access to and use of any place which members of the public are permitted to enter. For example, toilet facilities and in-store restaurants open to the public are covered, and a provider of services to the public might have to make changes to entrances, fire exits and emergency escape procedures that make it impossible or unreasonably difficult for disabled people to use its service.

A service provider converts a large building for use as retail premises. It recognises that it must take reasonable steps, possibly including adjustments to the premises, in order to provide a means of escape in an emergency which is accessible for disabled people.

s 19(3)

Services provided to the public in shared premises and the duty in relation to common areas

s 19(3)

- 10.6 The Act says that 'services' include 'access to and use of any place which members of the public are permitted to enter'. Thus, a person who permits 'members of the public' to enter such a place is providing a service to those people consisting of access to and use of that place.
- 10.7 Complex issues arise in the case of premises with more than one occupier, where there are common areas such as entrance halls, stairways and lifts. The Act does not expressly state whether or not the landlord (including any operator of the common parts) in such a case is a service provider for the purposes of the Act in respect of those common areas. Therefore, it does not make it explicit whether the landlord is under a duty to make reasonable adjustments to the common parts to render them accessible to disabled people.
- 10.8 Whether the landlord is under such an obligation is likely to depend on whether the place is one in 'which members of the public are permitted to enter'. If members of the public are permitted to enter the premises, then the landlord is likely to be a provider of services to the public in respect of access to the premises. If members of the public are not permitted to enter the premises, then the landlord is unlikely to be a service provider under the Act.
- 10.9 However, the Act does not define who are 'members of the public', except to the extent that the definition of provider of services refers to the provision of services to 'the public or to a section of the public'.

10.10 Members of the public are clearly permitted to enter some places. A shopping mall is an example. If the owner of a shopping mall leases shop units to individual retailers, then the owner will be responsible for the common areas, such as access roads, pavements, car parks, toilets, lifts and stairs. By allowing members of the public to use these common parts, the owner is providing services to the public and is subject to the Act.

10.11 The situation of an office building with more than one occupier is not so clear. Whether the landlord is himself a provider of services to the public in respect of the common parts is likely to depend upon whether members of the public are permitted to enter the premises.

10.12 There appears to be no single test that determines whether a place is one in which members of the public are permitted to enter. Whether or not a person entering the premises is a member of the public is likely to depend on all the circumstances of the case. A number of factors may be relevant, including:

- whether tenants who are providers of services to the public are actually providing services in the building rather than from the building
- whether those admitted to the building are there for the purposes of the occupier (such as employees or maintenance and service personnel) or whether they are there for purposes of their own (such as existing or potential clients or customers); and
- the nature and extent of the security and screening arrangements in place.

10.13 Thus, a building that is normally used only by employees of the tenants is unlikely to be

regarded as a place that members of the public are permitted to enter. Conversely, a building that is normally used by customers or clients of tenants may well be a place that members of the public are permitted to enter.

- 10.14 Because the issue is complex, landlords of premises with more than one occupier should not assume that they are not service providers for the purposes of the Act. They should anticipate that they may have responsibilities to make the common parts accessible to disabled people. They are advised to keep up-to-date with how the law in this respect is being interpreted.
- 10.15 If tenants are providing services to the public in their own right from the premises, then they will have a duty under the Act to take reasonable steps to make their services accessible to disabled people (see Chapters 6 and 7 and paragraphs 10.25 to 10.40 below). Where the common parts make it impossible or unreasonably difficult for disabled people to use their services, asking the landlord to make such alterations as are required in order to make the premises accessible is likely to be a reasonable step for the tenant to have to take.
- 10.16 If access through the common parts remains impossible or unreasonably difficult for disabled people, tenants should recognise that they may have duties themselves to provide a reasonable means of avoiding the physical feature concerned, or a reasonable alternative method of making their services available to disabled people. In any event, it makes commercial sense for service providers to anticipate the needs of their disabled customers or potential customers when determining the location of their premises, or negotiating a lease, by ensuring that the common

parts of the premises that they lease are accessible.

Services provided to the public by more than one provider

10.17 A service to the public might appear to be provided by more than one service provider. In such a case, it may be important to identify who is actually responsible for the provision of the service which has given rise to the alleged discrimination. In some cases, liability under the Act may be shared among a number of service providers. It is possible, for example, for two service providers to have full liability under the Act, and any obligations under the Act must be met by those providers. It is irrelevant how they decide between them what to do in order to meet their duties; what is important is that the obligations under the Act are in fact met, and that the services provided are accessible to disabled people.

A bank provides a cash machine facility inside a supermarket. Although the facility is located on the supermarket's premises, the service is being provided by the bank. The bank is likely to be responsible for any duties that may arise under the Act in respect of the cash machine. However, the supermarket is likely to be responsible for ensuring that the cash machine is physically accessible to disabled customers using its premises.

An airport grants a franchise to a crèche to provide its services in a part of the airport. Although the crèche is located on the airport's

premises, the service is being provided by the franchisee. The franchisee is likely to be responsible for any duties that may arise under the Act in respect of the crèche. However, access through the airport to the crèche is the responsibility of the airport.

A training company provides a non-residential conference at a hotel. The training company is responsible for any duties that may arise under the Act in respect of the conduct of the conference and the choice of an accessible venue. However, the hotel may provide some services that are part of the conference facilities, such as toilets, for which it is responsible under the Act. In addition, services provided by the hotel that are ancillary to the conference (for example, accommodation the night before the conference) are also those for which the hotel is likely to be liable under the Act.

WHAT IS UNLAWFUL?

10.18 The Act says that it is unlawful for a service provider to discriminate against a disabled person by:

- refusing to provide (or deliberately not providing) any service which it offers or provides to members of the public
- providing service of a lower standard or in a worse manner
- providing service on worse terms; or
- failing to comply with a duty to make reasonable adjustments (under section 21 of

s 19(1)

s 19(1)(a)

s 19(1)(c)

s 19(1)(d)

s 19(1)(b)

the Act) if that failure has the effect of making it impossible or unreasonably difficult for the disabled person to make use of any such service.

‘Discrimination’ is explained in Chapters 5 to 7.

Refusal or non-provision of service

10.19 A service provider cannot refuse to provide (or deliberately not provide) a service to a disabled person that it offers to other people, unless the refusal (or non-provision) can be justified.

s 19(1)(a)

A party of disabled children is on a visit to a zoo. Without explanation, the manager refuses to allow the children to enter the zoo. This is a refusal of a service and is likely to be unlawful.

Bar staff in a pub pretend not to see a disabled person who is trying to be served at the bar. This is a non-provision of a service and is likely to be unlawful.

10.20 Although there is nothing unlawful about genuinely seeking to assist disabled people by informing them where they might get service better suited to their requirements, refusing to serve a disabled person may be unlawful irrespective of the intention or motive. For example, a service provider cannot refuse to serve a disabled person simply on the ground that another provider caters better for disability-related requirements.

An assistant in a small shop refuses to serve a disabled person, arguing that a nearby larger shop can offer a better service to disabled people. This is a refusal of service and is likely to be against the law.

10.21 Spurious reasons cannot be used to refuse to serve a disabled person, even if the service provider thinks that serving the disabled person will upset or raise objections from other customers.

A disabled person with a learning disability wishes to book a hotel room. The hotel receptionist pretends that all rooms are taken in order to refuse his booking because of his disability. This is likely to be against the law.

Standard or manner of service

s 19(1)(c)

10.22 A service provider must not offer a disabled person a lower standard of service than it offers other people, or serve a disabled person in a worse manner, without justification. A lower standard of service might include harassment of a disabled customer, or being offhand or rude towards them.

The manager of a fast-food outlet tells a person with a severe facial disfigurement that he must sit at a table out of sight of other customers, despite other tables being free. This is likely to be unlawful.

A theatre manager allots a seat with an obstructed view, despite other seats being available, to a visually impaired woman on the assumption that she would not be able to see the whole stage anyway. This is likely to be unlawful.

- 10.23 A service provider does not have to stock special products for disabled people to avoid providing a worse standard of service (although as a matter of good practice it might consider doing so). However, if the provider would take orders from other customers for products that it does not normally stock, it would be likely to be unlawful to refuse to take such an order from a disabled person.

A disabled customer with a visual impairment wishes to buy a large-print edition of a book from a bookshop. The bookshop does not stock large-print books. This is not against the law. However, the disabled customer asks the bookshop to order a large-print copy of the book. If the bookshop would usually take special orders from non-disabled customers, a refusal to accept the disabled customer's order is likely to be unlawful.

Terms of service

- 10.24 A service provider should not provide a service to a disabled person on terms that are worse than the terms offered to other people without justification. Worse terms include charging more for services or imposing extra conditions for using a service (but see paragraphs 10.49 and 10.50 below).

s 19(1)(d)

A person who has Usher's syndrome (and who, as a consequence, is deaf-blind) is booking a holiday. The travel agent asks her for a larger deposit than required from other customers. The travel agent believes, without good reason, that because of her disability she is more likely to cancel her holiday. This is likely to be unlawful.

A disabled customer who is partially sighted applies for a hire purchase loan from a finance company. The company is willing to lend to the customer, but on the condition that he should have his signature to the loan agreement witnessed by a solicitor. The company would not ask other borrowers to do this. This is likely to be unlawful.

REASONABLE ADJUSTMENTS

s 19(1)(b)

- 10.25 A service provider will be acting unlawfully if it fails to comply with a duty to make reasonable adjustments (under section 21 of the Act) and that failure has the effect of making it impossible or unreasonably difficult for the disabled person to make use of any service.
- 10.26 As indicated in Chapter 6, when considering whether services are unreasonably difficult for disabled people to use, providers of services to the public should take into account whether the time, inconvenience, effort, discomfort, anxiety or loss of dignity entailed in using the service would be considered unreasonable by other people if they had to endure similar difficulties.

10.27 The principles underlying the duty to make adjustments are explained in Chapters 6 and 7. In particular, the duty is an anticipatory one, owed to disabled people at large.

10.28 The duty to make reasonable adjustments is a series of duties which falls into three areas. The duty requires a service provider to:

- change a practice, policy, or procedure that makes it impossible or unreasonably difficult for disabled people to make use of its services s 21(1)
- provide an auxiliary aid or service if it would enable (or make it easier for) disabled people to make use of its services; and s 21(4)
- overcome a physical feature which makes it impossible or unreasonably difficult for disabled people to make use of its services by:
 - removing the feature s 21(2)
 - altering it so that it no longer has that effect s 21(2)(a)
 - providing a reasonable means of avoiding it; or s 21(2)(b)
 - providing a reasonable alternative method of making the services available. s 21(2)(c)

Practices, policies and procedures

10.29 A practice may have the effect of excluding or screening out disabled people from enjoying access to services. Or the practice may create a barrier or hurdle that makes it unreasonably difficult for disabled people to access the services. In such cases, unless the practice can be justified, a reasonable step for a service provider to have to take might be to abandon it entirely or to amend or modify it so that it no longer has that effect. s 21(1)

A town hall has procedures for the evacuation of the building in the event of a fire or emergency. Visitors are required to leave the building by designated routes. The emergency procedures are part of the way in which the town hall provides services to its visitors. It modifies the procedures (with the agreement of the local fire authority) to allow visitors with mobility impairments or sensory disabilities to be evacuated safely. This is likely to be a reasonable step for the town hall to have to take.

A hotel refurbishes a number of rooms on each floor making them fully accessible to disabled guests. However, the hotel's reservations system allocates rooms on a first-come, first-served basis as guests arrive and register. The effect is that on some occasions the specially refurbished rooms are allocated to non-disabled guests, and late-arriving disabled guests cannot be accommodated in those rooms. The hotel decides to change its reservation policy so that the accessible rooms are either reserved for disabled guests in advance or are allocated last of all. This is likely to be a reasonable step for the hotel to have to take.

Auxiliary aids and services

s 21(4)

10.30 What is an appropriate auxiliary aid or service will vary according to the type of service provider, the nature of the services being provided, and the requirements of the disabled customers or potential customers. Auxiliary aids and services are not limited to aids in communication.

A community centre is accessible by two raised steps. It provides a suitably chosen portable ramp that helps disabled people with a mobility impairment to enter the premises safely. This is an auxiliary aid that is suited to the requirements of those people.

A new cinema complex has deep airline-style seats. A disabled patron with restricted growth finds it difficult to see the screen when using such a seat. The cinema provides a bolster cushion on request which enables him to enjoy the film. This is an auxiliary aid appropriate to the circumstances.

A museum provides a written guide to its exhibits. It wants to make the exhibits accessible to visitors with learning disabilities. The museum produces a version of the guide that uses plain language text and pictures to explain the exhibits. This is an auxiliary aid suited to visitors with learning disabilities and may also benefit other people.

A petrol station's management decides that an assistant will help disabled people use the petrol pumps on request. It places a prominent notice at the pumps advertising this. This is an auxiliary service.

Physical features

s 21(2)

10.31 Physical features (see paragraph 7.43 which explains the meaning of this) often create barriers that impede disabled people from accessing services. The duty to make reasonable adjustments requires service providers to overcome such physical features by:

s 21(2)(a)

- removing the feature

s 21(2)(b)

- altering it

s 21(2)(c)

- providing a reasonable means of avoiding it; or

s 21(2)(d)

- providing the service by a reasonable alternative method.

10.32 The approach to this duty is outlined in Chapter 7. A service provider may have to adopt any of the options under the duty in order to make their services accessible. However, where there is more than one way in which the service could be made accessible, the service provider will need to consider the policy of the Act, and the purpose of the duty, which is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to those who are not disabled.

Removing the feature

10.33 In many cases, the most appropriate step to take to address a physical barrier to a service (and a reasonable step to take) will be to remove it.

A countryside visitor centre includes, as an attraction, a lakeside walk. However, a stile prevents access to the lakeside walk for those

with mobility difficulties. The park authority that runs the centre removes the stile and replaces it with an accessible gate. This is likely to be a reasonable step for the service provider to have to take.

Altering the feature

- 10.34 Altering the physical feature so that it no longer has the effect of making it impossible or unreasonably difficult for disabled people to use the services provided to the public may also be a reasonable step for a service provider to take.

A local religious group holds prayer meetings in a building with a stepped entrance. The room in which the prayer meetings are held has a narrow entrance door. To ensure that its prayer meetings are accessible to disabled people, the religious group installs a permanent ramp at the entrance to the building. It also widens the door to the room. These are likely to be reasonable steps for the religious group to have to take.

Providing a reasonable means of avoiding the feature

- 10.35 In other cases, providing a means of avoiding the feature so as to ensure that disabled people can access the service may be a reasonable step to take.

A public art gallery is accessible by a flight of stairs at its front entrance. It is housed in a listed building, and has not been able to obtain consent

to install a ramped entrance to the gallery. A side entrance for staff use is fully accessible and always open. The gallery arranges for people with mobility impairments to use this entrance. This is likely to be a reasonable step for the gallery to have to take. It could of course go further and adopt an inclusive approach by also making the side entrance available to everyone.

10.36 As explained in paragraph 7.50, any means of avoiding the feature must be a reasonable one.

Providing a reasonable alternative method of service

10.37 A service provider may provide a reasonable alternative method of providing the service.

A small self-service pharmacist's shop has goods displayed on high shelving separated by narrow aisles. It is not practicable to alter this arrangement. The goods are not easily accessible to many disabled people. The shop decides to provide a customer assistance service. On request, a member of staff locates goods and brings them to the cash till for a disabled customer. This is the provision of a service by an alternative method, which makes the service accessible for disabled people. This is likely to be a reasonable step for the shop to have to take.

10.38 As explained in paragraph 7.51, any alternative method must be a reasonable one.

Protecting the fundamental nature of a business or service

10.39 The Act does not require a service provider to take any steps that would fundamentally alter the nature of its service, trade, profession or business. This means that a service provider does not have to comply with a duty to make reasonable adjustments in a way that would so alter the nature of its business that the service provider would effectively be providing a completely different kind of service.

s 21(6)

A restaurant refuses to deliver a meal to the home of a disabled person with severe agoraphobia (a fear of public or open spaces) on the grounds that this would result in the provision of a different kind of service. This is unlikely to be against the law. However, if the restaurant already provides a home delivery service, it is likely to be discriminatory to refuse to serve the disabled person in this way.

A night club with low-level lighting is not required to adjust the lighting to accommodate customers who are partially sighted if this would fundamentally change the atmosphere or ambience of the club.

A hair and beauty salon provides appointments to clients at its premises in a town centre. A disabled person with a respiratory impairment is unable to travel into town because this exacerbates her disability. She asks the salon to provide her with an appointment at home. The salon refuses as it does not provide a home

appointment service to any of its clients. This is likely to be within the law.

10.40 However, there might be an alternative reasonable adjustment which would ensure the accessibility of the services. If this can be provided without fundamentally altering the nature of the services or business, it would be a reasonable step for the service provider to have to take.

JUSTIFICATION

10.41 Treating a disabled person less favourably for a reason related to the person's disability, or failing to comply with a duty to make reasonable adjustments, will be unlawful unless it can be justified under the Act.

10.42 Chapter 8 sets out the general approach to justification and deals with the two conditions applicable to the three different areas of activity – health and safety, and incapacity to contract. In addition to the conditions set out at paragraphs 8.16 and 8.19, there are conditions which are specific only to those providing services to the public. These are detailed below.

The service provider is otherwise unable to provide the service to the public

10.43 A service provider can justify refusing to provide (or deliberately not providing) a service to a disabled person if this is necessary because the provider would otherwise be unable to provide the service to other members of the public.

ss 20(4)(c)–(e)

s 20(4)(c)

A tour guide refuses to allow a person with a severe mobility impairment on a tour of old city walls because he has well-founded reasons to believe that the extra help the guide would have to give her would prevent the party from completing the tour. This is likely to be justified.

10.44 However, refusing service to a disabled person is only justifiable if other people would be effectively prevented from using the service at all unless the service provider treated the disabled person less favourably than other people. It is not enough that those other people would be inconvenienced or delayed.

Disabled customers with a speech impairment or a learning disability may have difficulty in explaining to a bank cashier what their service requirements are. If the cashier asks the disabled customers to go to the back of the queue so as not to delay other customers waiting to be served, this is unlikely to be justified.

10.45 Before a service provider seeks to rely on this justification for a refusal of provision (or a non-provision) of services to a disabled person, it should first consider whether there are any reasonable adjustments that could be made to allow the disabled person to enjoy the service.

In the example in paragraph 10.43 above, the tour guide might consider whether an additional guide could be provided without fundamentally changing the nature of the service. This would be

an example of an auxiliary service and might be a reasonable step for the tour guide to have to take.

s 20(4)(d)

To enable the service provider to provide the service to the disabled person or other members of the public

10.46 A service provider can justify providing service of a lower standard or in a worse manner or on worse terms (an inferior service) if this is necessary in order to be able to provide the service to the disabled person or other members of the public.

A hotel restricts a wheelchair user's choice of bedrooms to those with level access to the lifts. Those rooms tend to be noisier and have restricted views. The disabled person would otherwise be unable to use the hotel. The restriction in this particular hotel is necessary in order to provide the service to the disabled guest. This is likely to be justified.

10.47 However, providing an inferior service to a disabled person is only justifiable if other people or the disabled person would be effectively prevented from using the service at all unless the disabled person is treated less favourably than other people. A service provider cannot justify such treatment of a disabled person simply because of other people's preferences or prejudices.

A public fitness centre restricts the times a customer who has AIDS is allowed to use its facilities. The other users have objected to his presence and use of the centre's facilities because of a groundless fear that they might become infected with AIDS merely by attending the same gym as him. Despite his reassurances, the centre has bowed to the pressure of the other customers. This is unlikely to be justified.

- 10.48 Before a service provider seeks to rely on this justification for an inferior service to a disabled person, it should first consider whether there are any reasonable adjustments that could be made to allow the disabled person to enjoy the service.

Greater cost of providing a tailor-made service

- 10.49 A service provider can justify providing a service on different terms, including charging a disabled person more for some services than it charges other people in certain circumstances. These are where the service is individually tailored to the requirements of the disabled customer. If a higher charge or other difference in terms reflects the additional cost or expense of meeting the disabled person's specification, then that would justify the higher charge.

A disabled customer orders a bed which is specifically made to accommodate her disability. The store charges more for this bed than it does for a standard one, as the specially made bed costs more to make. This is likely to be justified.

s 20(4)(e)

- 10.50 However, justification on this ground cannot apply where the extra cost results from the provision of a reasonable adjustment – (see paragraph 6.31 for further details).
- 10.51 Chapter 4, paragraphs 4.10 to 4.12, details the other limitations which apply to all parts of the Act.

11 Public authority functions

Introduction

- 11.1 Chapters 3 and 4 briefly indicate what a public authority is and what it is that is unlawful under the Act. Chapters 5, 6 and 7 explain the nature of 'discrimination' in relation to services to the public, public authorities carrying out functions, and private clubs, as the same principles apply to all these areas under the Act. This chapter looks at the key questions to be answered in determining what a public authority function is and whether the public authority function provisions apply. It considers in greater depth what is unlawful under the Act, including the duty to make reasonable adjustments.
- 11.2 The Code does not deal with the Disability Equality Duty, which has particular relevance for public authorities. More information about this duty can be found in the Code of Practice on the duty to promote disability equality (England and Wales) and the Code of Practice on the duty to promote disability equality (Scotland).
- 11.3 The Act prohibits a public authority from discriminating against a disabled person in carrying out its functions. Although in principle the term 'function' covers every activity of a public authority, the specific provisions relating to public authority functions will only apply where other parts of the Act do not already apply. Thus, where a public authority is providing a service to the public or employing or educating someone, the

s 21B(1)

provisions of the Act relating to service to the public, employment or education will apply. In this sense the prohibition of discrimination in relation to public authority functions is a residual provision, and when this Code refers to 'public authority functions' it is used in this residual sense.

11.4 In order to determine whether or not the public authority function duties apply to a particular action (or failure to act), there are three questions to be asked:

- Is the organisation a public authority for the purposes of the Act and not explicitly excluded from the public authority provisions?
- Is the activity a function of the authority and one that is not explicitly exempt from the Act?
and
- Is the activity covered by another section or part of the Act?

What public authorities are covered by the public authority provisions of the Act?

s 21B(2)

11.5 Every public authority is covered by the Act unless it is specifically exempted. There is no definition of a public authority in the Act, although the Act does say that a public authority includes 'any person certain of whose functions are functions of a public nature'. In relation to a particular act, a person will not be a public authority by virtue of this if the act is private. For example, a private security company which runs a prison will be covered in respect of functions relating to the running of that prison, but will not be covered in respect of anything it carries out in a private capacity, such as the provision of security for banks. Public authorities will include:

- Ministers, Scottish Ministers, the Welsh Assembly, government departments, and executive agencies (such as the Home Office and its executive agencies, including the Prison Service and the Immigration and Nationality Directorate)
- local authorities
- governing bodies of higher education institutions, colleges and universities
- NHS trusts and boards
- Chief Officers of Police, Police Authorities, the Independent Police Complaints Authority and the Criminal Injuries Compensation Authority
- the Crown Prosecution Service and Crown Office
- courts and tribunals (though see exceptions below at paragraph 11.9)
- inspection and audit agencies such as the National Audit Office, Audit Scotland, Audit Commission, Her Majesty's Inspectorate of Constabulary (HMIC), the Healthcare Commission
- the Housing Corporation; and
- certain publicly funded museums and other cultural bodies or institutions.

11.6 This is for illustrative purposes only and is not an exhaustive list of all the public authorities falling under these sections of the Act.

11.7 There are some public authorities which are excluded from these provisions. They are:

- both Houses of Parliament

- a person exercising functions in connection with proceedings in Parliament
- the Security Service
- the Secret Intelligence Service
- the Government Communications Headquarters; and
- a unit or part of a unit of any of the naval, military or air forces of the Crown, which is required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

What is a function and is it covered by these provisions?

11.8 'Function' is the term used to describe the activities of public authorities. In principle, all the activities of a public authority are functions – these include activities such as those relating to employment of staff, budgeting decisions, or decisions on entitlement to the payment of state benefits. However, in the case of a person or body only certain of whose functions are functions of a public nature (such as a private company running a prison), it will not be covered by these provisions where the nature of the act is private (such as the same company providing security staff to a supermarket).

Exceptions to the public authority provisions

11.9 The Act says that the public authority function provisions do not apply to:

- A judicial act (whether done by a court tribunal or other person).

s 21C(1)(a)

A father who is visually impaired applies to court for a residence order in respect of his child. The court refuses his application. He believes that this is because of his disability. As the decision of the court amounts to a judicial act, he cannot bring a claim under the Act relating to the decision (although he may be able to use the usual appeal routes).

- An act done on the instructions or on behalf of a person acting in a judicial capacity.

A listing clerk in the county court, acting on the instructions of a district judge, transfers a case to another local county court where the availability of judges to hear the claim is greater. However, the new court is not accessible to the disabled claimant. As the transfer was made on the instructions of a person acting in a judicial capacity, the disabled person cannot bring a claim under the Act relating to this matter (although there may be other means by which to challenge it).

- Or a decision not to institute or not to continue criminal proceedings and acts done in relation to such decisions.

A disabled person who has reported disability-related harassment to the police is told that proceedings will not be taken against the alleged harasser. As this is a decision not to institute criminal proceedings, the disabled person cannot bring a claim under the Act relating to the decision (although there may be other means by which to challenge it).

s 21C(1)(b)

s 21C(4)

s 21C(2)

11.10 The provisions also do not apply to any act relating to legislation of the UK or Scottish Parliaments, the National Assembly for Wales, or the Privy Council, or any act done under such legislation.

Does another section of the Act apply?

s 21B(7)

11.11 As indicated above, the public authority function provisions are 'residual' provisions, in that they apply where other provisions of the Act do not. The interactions with other provisions of the Act are outlined below.

Circumstances in which the public authority function provisions do not apply

11.12 The public authority function provisions do not apply to anything that:

s 21B(7)(a)

- is unlawful under any other provision of the Act; or

s 21B(7)(b)

- would be unlawful under any such provision but for the operation of a proviso or an exception contained in the Act or in Regulations made under the Act. For example, under Part 4 of the Act the duty of adjustment on schools excludes any requirement to make reasonable adjustments to the physical features of their premises. The public authority function provisions cannot be used to ensure that a school makes physical changes to its premises in relation to education and associated services, because of the limitation in Part 4 on making changes to physical features.

ss 21B(8)–(9)

11.13 There are two exceptions to this general principle, concerning appointment of an individual to an

office or post and his treatment in that office or post – see paragraph 11.16 for further details.

- 11.14 The paragraphs below consider the overlap of the different Parts of the Act with the public authority function provisions.

FUNCTIONS COVERED BY OTHER SECTIONS OF THE ACT

Interaction with Part 2: employment and occupation provisions

- 11.15 Part 2 of the Act prohibits discrimination in relation to employment and occupation. A public authority's actions as an employer are covered by the provisions of Part 2.

A visually impaired teacher who is employed by a public authority wishes to make a complaint about its failure to provide her with information in accessible formats to enable her to do her job. This is covered by Part 2 and not the public authority function provisions.

Appointment to an office or post

- 11.16 Appointment to certain offices or posts, such as judges and chairmen or members of non-departmental public bodies, is covered by Part 2 of the Act where an individual provides services personally under the direction of another person in return for remuneration, or the post is one to which appointments are made by or on the recommendation of the Government (including the Scottish Ministers and the National Assembly for Wales) or subject to its approval.

ss 4C–4F

s 21B(8)

11.17 Certain 'voluntary' post-holders do not meet these conditions and so fall outside the scope of Part 2 – for example, school governors or those on the Board of Governors of NHS Foundation Trusts. In these cases, the duties under the public authority function provisions apply. The provisions cover both the appointment of a person to a post and functions of the public authority in relation to the person whilst in post.

s 21B(9)

11.18 The provisions also cover certain elected office- or post-holders (other than councillors, who are already covered by Part 2 of the Act). Broadly, where the relevant employment provisions do not apply to the office or post in question, and it is not an excluded office or post (see paragraph 11.19 below), the public authority function provisions will apply to functions of the relevant public authority in relation to a candidate or prospective candidate for these public offices. These provisions also apply to functions of the authority in relation to the elected office-holder once he holds office. For example, functions of a local education authority in organising an election of parent school governors would be covered by the public authority provisions, as would the authority's functions in relation to the parent governor once elected.

**s 21B(9)(a),
s 15A(1)**

11.19 The provisions in relation to candidates or prospective candidates for election do not apply where the office or post is membership of either House of Parliament, the Scottish Parliament, the National Assembly for Wales, or any of the authorities specified in the Part 2 councillor provisions (for information on these see the Part 2 Code of Practice on employment and occupation and accompanying guidance).

A visually impaired person who sits on the board of governors of an NHS Foundation Trust wishes to make a complaint about the failure of the Trust to provide him with information in accessible formats. As this non-executive appointment is not covered by the Part 2 employment and occupation provisions, the public authority function provisions of the Act will apply.

Interaction with the other provisions of Part 3: services to the public and premises

- 11.20 Whether or not an activity performed by a public body is a service to the public or a function for the purposes of the Act depends on all the circumstances of the case. Many of the activities of a public authority amount to the provision of services to the public – for example, the provision of library or leisure services, or access to information provided by the authority. In those circumstances, the activities are subject to the sections of the Act relating to the provision of a service to the public (see Chapter 10).
- 11.21 Activities covered by the public authority provisions are those activities which can only be carried out by public authorities and which are not similar in kind to the services that can be performed by private persons. An example of such an activity would be an authority's law enforcement functions. Often, an authority will be acting under a statutory power or duty when performing such a function.

A police officer is organising a community safety meeting and prepares literature to hand out about crime prevention. The material is not

available in large print despite such a request from two members of the public who regularly attend these meetings. In providing information to the community on crime prevention, the police are likely to be providing a service and therefore subject to the provisions relating to the provision of services to the public rather than the public authority function provisions.

A police officer is interviewing an individual with a hearing impairment, who is a potential witness to a crime. The police officer is likely to be carrying out a public authority function when conducting this interview. A request for the attendance of a BSL interpreter is covered by the provisions relating to public authority functions rather than those relating to the provision of services to the public.

A highway authority has placed some benches on the pavement of a busy main road that is also a shopping street. These benches are very low and have no armrests. Some disabled people are finding them very difficult to use. The highway authority is likely to be providing a service in placing benches on the street and subject to the provisions relating to services to the public rather than the public authority function provisions.

A highway authority is installing a new pedestrian crossing at a busy junction. The highway authority is likely to be carrying out a public function in determining where to site the

pedestrian crossing and what type of crossing it will be and so be subject to the provisions relating to public authority functions rather than those relating to services to the public.

- 11.22 In practice, however, the duties imposed on public authorities when providing a service to the public and those imposed when performing a function are broadly similar (see Chapters 5, 6 and 7 for the principles behind those duties, as well as Chapter 10 covering provision of services to the public).
- 11.23 Where a public authority is acting as a landlord of premises or maintaining a housing waiting list it will be covered by the premises provisions of the Act (see Chapters 13 to 19).

Interaction with Part 4: the education provisions

- 11.24 Part 4 of the Act prohibits discrimination in relation to education provided by specified 'responsible bodies'. Those bodies are, broadly, schools and state-funded further and higher education. Discrimination by a responsible body in the carrying out of an education-related function is covered by the provisions of Part 4.

A parent wishes to complain about a school's insistence that her son wears school trousers even though they aggravate his skin condition. As this relates to 'education and associated services', it is covered by the Part 4 provisions rather than those relating to public authority functions.

A visually impaired parent-governor of a school cannot access the materials provided for the governors' meetings as they are supplied in a format which is too small for her to read. The school or the local education authority is carrying out a public authority function in providing these materials and is subject to the public authority provisions of the Act, rather than the provisions of Part 4.

DISCRIMINATION IN THE CARRYING OUT OF A PUBLIC AUTHORITY FUNCTION

What is unlawful?

s 21B(1)

11.25 The Act makes it unlawful for a public authority to discriminate against a disabled person in carrying out its functions. For the purpose of the public authority function provisions, a public authority discriminates against a disabled person if:

s 21D(1)(a)

- for a reason relating to a disabled person's disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and

s 21D(1)(b)

- it cannot show that the treatment in question is justified in accordance with one of the specific grounds of justification laid down in the Act.

11.26 More information is provided on justification below and in Chapter 8.

11.27 A public authority also discriminates for these purposes if:

s 21D(2)(a)

- it fails to comply with a duty imposed on it by section 21E (the reasonable adjustment duty)

in circumstances in which the effect of the failure is to make it:

- impossible or unreasonably difficult for the disabled person to receive any benefit that is (or may be) conferred by the carrying out of a function by the authority; or
 - unreasonably adverse for the disabled person to experience any detriment which he is (or may be) subjected to by the authority in carrying out a function; and
- it cannot show that its failure to comply with the duty is justified in accordance with one of the specific grounds of justification laid down in the Act.

s 21D(2)(b)

The principles applicable to the two different forms of discrimination are outlined in Chapters 5 to 7.

Less favourable treatment

11.28 One of the forms of discrimination occurs where, for a reason relating to a disabled person's disability, the public authority treats him less favourably than it treats or would treat others to whom that reason does not or would not apply, without justification. In brief, this means that the treatment of the disabled person is compared to how the public authority treats (or would treat) other people to whom the reason for the treatment does not (or would not) apply. Broadly speaking, a disabled person will have been treated less favourably if he would not have received the treatment but for his disability.

s 21D(1)

11.29 There are various ways in which the exercise of a function may adversely affect a disabled person.

Some of them are set out below, although they are not intended to be exhaustive.

11.30 There may be a refusal to allow a disabled person to benefit from the exercise of a function.

A couple apply to adopt a child. One of them is disabled. They are told that they cannot adopt because the disabled partner would be unable to care for a child. This is less favourable treatment for a reason relating to their disability and will be unlawful unless it can be justified in accordance with the Act.

11.31 A disabled person may be treated differently in the way a function is performed. The function may be carried out in an offensive manner, or a disabled person may have a benefit conferred in a more restrictive way.

A disabled couple apply to adopt a child. They are approved as adoptive parents but are told that, because of their disabilities, they will only be eligible to adopt a child who is over five years of age. This is less favourable treatment for a reason relating to their disabilities, and will be unlawful unless it can be justified in accordance with the Act.

A disabled person who is claiming a social security benefit is asked to attend an interview about his claim. The interviewing officer is extremely offensive to the disabled person, making derogatory comments about his disability. This is less favourable treatment for a reason relating to his disability and is likely to be unlawful.

A disabled woman who has married a UK citizen has received entry clearance based on her marriage to him. An immigration officer at the port of entry is checking that she has correct entry clearance. The officer says that he does not believe that anyone would genuinely want to marry her, because of her disability. This is less favourable treatment for a reason relating to her disability and is likely to be unlawful.

Discrimination and the duty to make reasonable adjustments

11.32 The other form of discrimination against a disabled person occurs where a public authority exercising a function fails to comply with a duty to make reasonable adjustments in circumstances in which the failure makes it:

- impossible or unreasonably difficult for the disabled person to receive any benefit that is or may be conferred by the carrying out of a function by the authority; or
- unreasonably adverse for the disabled person to experience being subjected to any detriment to which a person is (or may be) subjected by the carrying out of a function by the authority, ie the person is particularly badly affected by their treatment

and in each case it cannot show that the failure is justified.

The duty to make reasonable adjustments

11.33 The duty to make reasonable adjustments is a series of duties which falls into three areas:

s 21D(2)

- practices, policies and procedures
- auxiliary aids and services; and
- physical features.

11.34 The principles underlying the duty to make adjustments are explained in Chapters 6 and 7. In particular, the duty is an anticipatory one, owed to disabled people at large.

11.35 The duty to make reasonable adjustments may require public authorities to exercise a function in a different way for a disabled person (such as visiting them at home rather than requiring them to attend a place such as a government building) or to do something extra (such as providing an interpreter for a deaf person).

11.36 The wording in relation to the duty to make adjustments reflects the different ways in which the carrying out of functions impacts upon disabled people. As explained in paragraph 6.4, the policy of the Act is not a minimalist one. The aim of these provisions is to ensure that disabled people do not have a worse experience in relation to public authority functions. The duty applies, broadly, where disabled people are disadvantaged in some way because of their disability by the carrying out of a function.

‘Impossible or unreasonably difficult’

11.37 The exercise of some functions by public authorities confers a benefit, such as the payment of state benefits or receipt of tax allowances. ‘Benefits’ would also cover, for example, a decision by a local authority on whether to permit a disabled person to adopt a child, or the making of grants to members of the public. In relation to these functions, it is unlawful for a public

authority to discriminate against a disabled person in failing to comply with the duty to make reasonable adjustments when the effect of that failure is to make it 'impossible or unreasonably difficult' for a disabled person to receive the benefit. The aim of the duty to make reasonable adjustments in these circumstances is to provide access to the benefit as close as it is reasonably possible to get to the way in which access to it is normally offered to the public at large.

'Unreasonably adverse'

- 11.38 The exercise of other functions may have an adverse effect on the person who is on the receiving end of them – for example, being arrested, or being subjected to immigration control (these are 'negative' functions). In relation to these functions, it is unlawful for a public authority to discriminate against a disabled person in failing to comply with the duty to make reasonable adjustments when the effect of that failure is to make it unreasonably adverse for the disabled person to experience being subjected to the detriment. The aim of the reasonable adjustment duty in these circumstances is to ensure that disabled people do not have a worse experience in relation to the exercise of these functions than other people.
- 11.39 The Act does not define what is meant by 'unreasonably difficult' in any of the contexts in which it is used, nor does it define what is meant by 'unreasonably adverse', although the two phrases are intended to represent the same level of difficulty faced by disabled people.

ss 21D(1)–(2),
ss 21E(1)–(4),
(6)–(7)

11.40 When considering if the way in which a function is carried out places disabled people under this level of difficulty, public authorities should take into account whether the time, inconvenience, effort, discomfort, anxiety or loss of dignity entailed in receiving a benefit or being subject to the detriment by the exercise of the function would be considered unreasonable by other people if they had to endure similar difficulties.

WHAT IS THE DUTY TO MAKE REASONABLE ADJUSTMENTS?

Practices, policies and procedures

ss 21E(1)–(2)

11.41 Where a public authority has a practice, policy or procedure which makes it:

- impossible or unreasonably difficult for disabled people to receive any benefit that is (or may be) conferred by the carrying out of a function; or
- more severe (unreasonably adverse) for disabled people to be subjected to any detriment by the carrying out of a function than for non-disabled people

then the authority must take reasonable steps to change the practice, policy or procedure so that it no longer has that effect.

An ombudsman has a policy that all complaints must be made in writing. This policy makes it unreasonably difficult for disabled people with dyslexia, for example, to use the complaints procedure. The ombudsman amends his policy to permit disabled people who cannot use a written complaints procedure to make their

complaint over the telephone. This is likely to be a reasonable step for it to have to take.

A police force has a policy of not carrying any dogs in police cars. This means that disabled people who are dependent on guide or assistance dogs have a much worse experience if they are arrested as they do not have the support of their dog. The force amends this policy so that, in these circumstances, the dog can be carried in the car with the arrested person. This is likely to be a reasonable step for the police force to have to take.

Auxiliary aids and services

11.42 Where an auxiliary aid or service would:

- enable or make it easier for disabled people to receive any benefit that is or may be conferred by the carrying out of a function; or
- reduce the severity of any detriment experienced by disabled people as a result of the exercise of the function

then the authority must take reasonable steps to provide that auxiliary aid or service.

11.43 As indicated in Chapter 7, 'auxiliary aids and services' is a very broad term and covers assistance such as the provision of a sign language interpreter, letters in accessible formats (on tape or in Braille or large print for instance), or help from a member of staff in completing a form. More than one of these measures may be

ss 21E(6)–(7)

necessary to ensure that a disabled person is not disadvantaged in the exercise of a function.

A pub manager, who is deaf and a BSL user, makes an application for extended opening hours. The licensing authority receives representations from other interested parties and arranges a hearing to consider the application. The authority arranges for a BSL interpreter to attend the hearing so that the pub manager is able to participate. This is likely to be a reasonable step for the authority to take.

A charitable society wishes to raise money for a sporting event aimed at local children. The society's secretary, who is deaf and a BSL user, makes an application to the local authority's licence office. The authority invites the secretary to its offices to discuss the application. The licensing officer arranges for a BSL interpreter to attend the meeting so that the secretary can explain the purpose of the application and participate fully in the meeting. This is likely to be a reasonable step for the authority to take.

A person with both learning and mobility difficulties needs to make adaptations to her property to make it more accessible. She wishes to apply for a Disabled Facilities Grant but is unable to complete the relevant forms on her own. The local authority, which administers the Grant scheme, allocates a staff member to provide her with the necessary assistance to complete the application. This is likely to be a reasonable step for the authority to take.

Physical features

11.44 Where a physical feature makes it:

ss 21E(3)–(4)

- impossible or unreasonably difficult for disabled people to receive any benefit conferred by the carrying out of a function; or
- more severe (unreasonably adverse) for disabled people to be subjected to detriment by the carrying out of a function than for non-disabled people

then the public authority must take reasonable steps to:

- remove the feature
- alter it so that it no longer has that effect
- provide a reasonable means of avoiding the feature; or
- adopt a reasonable alternative method of carrying out the function.

11.45 The approach to this duty is outlined in Chapter 7. A public authority may have to adopt any of the options under the duty in order to make their functions accessible. However, where there is more than one way in which the function could be made accessible, the public authority will need to consider the policy of the Act, and the purpose of the duty, which is to provide access to a function as close as it is reasonably possible to get to the standard normally offered to those who are not disabled.

Removing the feature

A local authority planning department is accessed by a small step. The authority ensures that the step is removed and replaced by a ramp to enable disabled people making planning applications to access the department. This is likely to be a reasonable step for it to have to take.

Altering a feature

The interview rooms at a police station have narrow doors which do not allow a wheelchair to get through. The police station widens the doorways necessary to ensure that wheelchair users can get into the interview rooms. This is likely to be a reasonable step for it to have to take.

Providing a reasonable means of avoiding the feature

The front entrance to a government department building has two steps leading up to it. The department has requested planning permission to build a ramp at the front, and is waiting for a response to this request. In the meantime, it permits the accessible side entrance – which is usually reserved for Ministers and their aides – to be used by disabled visitors who cannot use the steps. This is likely to be a reasonable step for it to have to take.

As explained in paragraph 7.50, any means of avoiding the feature must be a reasonable one.

Adopting a reasonable alternative method of carrying out the function

A local tax office which conducts interviews for tax assessment is located on the third floor of a building with no lift access. It offers telephone interviews for people with mobility impairments. Where this is not feasible (for example, because someone with a mobility impairment also has a hearing impairment), staff will visit people in their homes. These are likely to be reasonable steps for the tax office to have to take.

As explained in paragraph 7.51, any alternative method must be a reasonable one.

JUSTIFICATION

- 11.46 Treating a disabled person less favourably for a reason related to their disability, or failing to comply with a duty to make reasonable adjustments, is unlawful unless it can be justified under the Act.
- 11.47 Chapter 8 sets out the general approach to justification and deals with the two conditions applicable to services to the public, public authority functions and private clubs – health and safety and incapacity to contract. In addition to the conditions set out above at paragraphs 8.16 and 8.19, there are conditions which are specific only to public authority functions.
- 11.48 In addition, there is a ground of justification applicable only to public authority functions which, unlike the other grounds of justification, has a purely objective test. This is explained in paragraphs 11.53 to 11.55.

ss 21D(3)–(4)

s 21D(5)

11.49 In order to rely upon the first two conditions of justification listed below, the authority must satisfy the 'twofold' test for justification referred to in Chapter 8 – the authority must believe that the condition is satisfied and it must be reasonable for it to hold such a belief.

Substantial extra costs

s 21D(4)(c)

11.50 A public authority can justify treating a disabled person less favourably in the carrying out of a function if treating the disabled person equally favourably would, in the particular case, involve substantial extra costs and, having regard to resources, the extra costs in that particular case would be too great. This justification cannot be used in a case where the treatment complained of relates to the duty to make reasonable adjustments.

11.51 This justification is not intended to be used in every case where some extra cost is involved. The extra costs must be substantial, and this must be judged taking into account the resources of the public authority and the circumstances of the particular case.

11.52 It is likely that public authorities with larger resources will have more difficulty in relying upon this justification than those with fewer resources. Equally, however, the particular circumstances of the case – and the effect of the less favourable treatment on the disabled person – will need to be considered.

A Local Education Authority (LEA) offers grants of up to £200 to students to assist with further education costs. A disabled student explains that in order for him to access his preferred college of

further education he would have to move home and he requests a grant of £22,000. Complying with this request would severely limit the resources the LEA would have available to assist other students. A refusal of this request is likely to be justified.

Protecting the rights and freedoms of others

11.53 A public authority can justify treating a disabled person less favourably, or failing to comply with a duty to make reasonable adjustments, where this is necessary for the protection of the rights and freedoms of other people. This condition is designed to protect public bodies from charges of disability discrimination in circumstances where avoiding less favourable treatment of a disabled person, or making a reasonable adjustment, would have significant detrimental consequences for the rights and freedoms of others which outweigh the effect of the less favourable treatment on the disabled person. However, the treatment must be 'necessary'. Before seeking to rely upon this justification, public authorities should consider whether or not any reasonable adjustments could be made to avoid the necessity for the treatment.

A disabled couple who both have terminal cancer and who are unlikely to live beyond one year are refused permission to adopt a child. This is likely to be justified as the welfare of the child is paramount in the adoption process. Adoption by a couple with a terminal illness would have a negative impact on the child's welfare and future security.

s 21D(4)(d)

Proportionate means of achieving a legitimate aim

s 21D(5)

- 11.54 A public authority can justify treating a disabled person less favourably, or failing to comply with a duty to make reasonable adjustments, if the act of the public authority giving rise to the treatment or failure is a proportionate means of achieving a legitimate aim.
- 11.55 The principle of proportionality is an accepted principle of administrative law that is designed to deal with a public authority having to choose between a number of courses of action. A public authority is only able to rely on this justification in relation to those matters of public interest (for example, the detection of crime) which, on an objective assessment of proportionality, can be said to be sufficiently important to override the right not to be discriminated against.
- 11.56 To demonstrate that an act is a proportionate means of achieving a legitimate aim, the public authority must show that:
- there is a pressing policy need that supports the aim which the treatment is designed to achieve, and it is therefore a 'legitimate' aim; and
 - the authority's action is causally related to achieving that aim; and
 - there was no other way to achieve the aim that had a less detrimental impact on the rights of disabled people.

A local authority suspends its on-street parking on one side of the road because it needs to make repairs to the centre of the carriageway, and

needs to use the space normally reserved for parking for traffic. A disabled resident finds it very difficult to cross the road from his car to his home instead of using the disabled person's parking space provided outside his house. It is unlikely that the authority could justify suspending parking on his side of the road if it would be possible to suspend parking on the opposite side instead. Whilst there is a legitimate policy need (the need to maintain the flow of traffic), and the proposed action would achieve that policy aim, the authority's proposed action would not be the option that was least detrimental to disabled people. In the circumstances it would not be a proportionate means of achieving a legitimate aim.

SPECIFIC LIMITATIONS OF THE PUBLIC AUTHORITY FUNCTION PROVISIONS

No power to take steps

11.57 The Act does not require a public authority, when carrying out a function covered by this part of the Act, to take any steps which it has no power to take.

s 21E(9)

A deaf person who uses British Sign Language wishes to take part in jury service, but can only do so with the assistance of a sign language interpreter. Whilst disabled people are not prohibited from jury service, the court cannot provide a BSL interpreter as a reasonable adjustment, because criminal law does not permit there to be an 'extra' person in the jury room for any reason. In these circumstances, the public authority does not have the power to take

the steps required to enable the deaf person to take part in jury service.

11.58 Chapter 4, paragraphs 4.10 to 4.12, details the other limitations which apply to all parts of the Act.

12 Private clubs

Introduction

12.1 Chapters 3 and 4 briefly indicate what a private club is and what it is that is unlawful under the Act. Chapters 5, 6 and 7 explain the nature of 'discrimination' in relation to services to the public, public authorities carrying out functions, and private clubs, as the same principles apply to all these areas under the Act. This chapter considers in greater depth what is unlawful under the Act in relation to private clubs, including the reasonable adjustment duty.

What is a private club?

12.2 As explained in Chapter 3, the private club provisions of the Act apply to any association of persons, whether incorporated or not, if:

- it has 25 or more members
- admission to membership is regulated by its constitution and the process is conducted in such a way that its members do not constitute a section of the general public; and
- it is not a trade organisation (such as a trade union or a professional organisation like the British Medical Association). For information on trade organisations, reference should be made to the Part 2 Code of Practice on trade organisations and qualifications bodies.

s 21F(1)

12.3 It does not matter whether the club's activities are carried out for profit or not.

12.4 Private clubs may include special interest clubs, such as a film club or cricket club, or clubs for particular groups of people, such as military or political clubs or associations.

Number of members

s 21F(1)(a)

12.5 The requirement for at least 25 members does not mean that there must be this number actively participating in the club. It is sufficient if there are 25 or more people who are members of the club.

Members of the public

s 21F(1)(b)

12.6 As indicated above, the club must run its affairs in such a way that its members do not constitute a section of the general public (otherwise the club would be covered by the provisions relating to services to the public). This means that it must operate a policy of membership selection genuinely based on personal criteria. This will usually involve, for example, applicants for membership being required to make a personal application, being sponsored or nominated by other members as to their good character, and undergoing some form of selection process, such as voting by existing members.

A club providing dining and social facilities exclusively to its members requires that applicants for membership provide testimonials to their good character from three existing members before a decision is made on the membership application. This club is likely to fall within the private club provisions of the Act.

12.7 Private members' clubs may take many legal forms: some are unincorporated associations, some are incorporated under the Companies Act 1985, and others take the form of friendly societies, such as working men's clubs. Regardless of the legal form of the club, so long as it meets the conditions outlined at paragraph 12.2 above, it will have the duties set out in this chapter.

12.8 The club's constitution may be in writing but it does not have to be. If there are rules which govern things such as membership, this may be sufficient to amount to a constitution.

12.9 If the club does not have a constitution which governs admission to its membership and is not conducted in such a way that its members are not in fact a section of the public then it is likely to be providing a service to the public and will be covered by the provisions detailed in Chapter 10.

Who has protection under the private club provisions?

12.10 The Act says that the duties under these provisions are owed to the following people:

- disabled applicants or potential applicants for membership
- disabled members of the club
- disabled associates of the club; and
- disabled guests or potential guests.

12.11 A 'member' of a club is a person who belongs to the club and has been admitted to membership as provided for by the constitution.

ss 21F–21J

s 21J(1)(a)

12

s 21J(1)(b)

12.12 An 'associate' is a person who, although not a member of the club, has some or all of the rights enjoyed by members under its constitution, for example, the right to go into other clubs.

What is unlawful?

12.13 The Act makes it unlawful for a club to discriminate against a potential or existing disabled member, associate or guest, in certain circumstances. 'Discrimination' is explained in Chapters 5 to 7.

Potential members

s 21F(2)

12.14 The Act makes it unlawful for a private club to discriminate against a disabled person who is not a member of the private club:

- in the terms on which it is prepared to admit him to membership; or
- by refusing or deliberately omitting to accept his application for membership.

A person with a severe facial disfigurement applies to join a bridge club which has 28 members. The club rejects his application, as it believes that members would feel uncomfortable playing bridge with someone who has such a disfigurement. This is likely to be unlawful.

A person with a past history of mental illness, who met the definition of 'disabled person' in the Act, is turned down for membership of a private club on the basis of this history. This is likely to be unlawful.

Members and associates: membership and club benefits

12.15 The Act also makes it unlawful for a private club to discriminate against a disabled member or associate:

- in the way in which it affords him access to club benefits
- by refusing or deliberately omitting to afford him access to club benefits
- in the case of a member, by depriving him of membership, or
- by varying the terms on which he is a member
- in the case of an associate, by depriving him of his rights as an associate, or
- by varying those rights; or
- in either case, by subjecting him to any other detriment.

12.16 'Club benefits' in this Code are benefits, facilities or services provided by the club. This might include access to bars and restaurants on the club premises or use of any club facilities off site (such as holiday homes owned by the club).

A member of a private members' club wishes to use the pool table in the club house. He has shortened arms as a result of thalidomide and has to play pool with his cue the opposite way round to other members. The club prohibits him from using the pool table, as the club manager wrongly believes that he may damage the table by playing in this way. This is likely to be unlawful.

s 21F(3)

Guests and potential guests

s 21F(4)

12.17 It is unlawful for a private club to discriminate against a disabled person in his capacity as a guest of the club:

- in the way it affords him access to club benefits
- by refusing or deliberately omitting to afford him access to club benefits; or
- by subjecting him to any other detriment.

s 21F(5)

12.18 It is also unlawful for a private club to discriminate against a disabled person:

- in the terms on which it is prepared to invite him, or permit a member or associate to invite him, to be a guest
- by refusing or deliberately omitting to invite him to be a guest; or
- by not permitting a member or associate to invite him to be a guest.

A private club is holding its annual dinner. The spouses of members are also invited to the dinner as guests of the club. However, the spouse of one member is a wheelchair user and the club is aware that the venue for the event is not accessible to wheelchair users. The club does not invite the spouse to the dinner. This is likely to be unlawful.

s 21F(6),
s 21H

12.19 In addition, it is unlawful for a private club to discriminate against a disabled person in failing to comply with the duty to make reasonable adjustments.

THE DUTY TO MAKE REASONABLE ADJUSTMENTS

What is unlawful?

12.20 A private club acts unlawfully if it fails to comply with a duty to make reasonable adjustments in circumstances in which the failure makes it impossible or unreasonably difficult for the disabled person to access or retain membership, retain associate rights, or access club benefits. The duty to make adjustments is contained in Regulations made under the Act and which have the same binding status as the Act itself. As indicated in Chapter 6, when considering whether the relevant aspect of the club is unreasonably difficult for disabled people to access, private clubs should take into account whether the time, inconvenience, effort, discomfort, anxiety or loss of dignity entailed in accessing the relevant aspect of the club would be considered unreasonable by other people if they had to endure similar difficulties.

The duty to make reasonable adjustments

12.21 The duty to make reasonable adjustments is a series of duties which falls into three areas:

- practices, policies and procedures
- auxiliary aids and services; and
- physical features.

12.22 The principles underlying the duty to make adjustments are explained in Chapters 6 and 7. In particular, the duty is an anticipatory one, owed to disabled people at large.

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12.23 The way in which the reasonable adjustment duty is framed is slightly different according to the relationship of the disabled person with the club, ie whether the particular duty arises in relation to members, associates or guests, or potential members or guests. It also depends on the activity in question: whether it concerns club benefits or issues relating to membership.

Members, associates and guests: club benefits

reg 6(1)

12.24 A private club must take reasonable steps to:

- change a practice, policy or procedure which makes, or would make, it impossible or unreasonably difficult for disabled members, associates or guests to make use of club benefits it provides, or is prepared to provide, to other members, associates or guests.

A private social club with 30 members usually holds its annual dinner upstairs in a small local restaurant. There is no lift to the upper floor and so the room is not accessible to two disabled members who have severe difficulty in climbing stairs. The restaurant has ground-floor space of equal quality at a similar price and although the club prefers the privacy of the upstairs room, it changes the venue to the downstairs room. This is likely to be a reasonable step for the club to have to take.

reg 6(3)

12.25 A private club must take reasonable steps to:

- provide an auxiliary aid or service where it would enable or make it easier for disabled members, associates or guests to make use of

club benefits which it provides or is prepared to provide to other members, associates or guests.

A club with a regular programme of academic lectures and practical presentations for its members arranges for copies of the lecturer's notes to be available in large print or on audio tape (in advance of the lecture). It installs an induction loop and also provides a sign language interpreter on request. In addition, it uses large print on the display panels and improves the lighting used so that it is brighter and more direct. These are likely to be reasonable steps for the club to have to take.

A private dining club has a disabled member who has difficulty in using the cutlery provided at the club's functions. The club provides easy-hold cutlery for this member. This is likely to be a reasonable step for the club to take.

12.26 Where a physical feature makes or would make it impossible or unreasonably difficult for disabled members, associates or guests to make use of club benefits which the club provides, or is prepared to provide, to other members, associates or guests, then the private club must take reasonable steps to:

- remove the feature
- alter it so that it no longer has that effect
- provide a reasonable means of avoiding the feature; or
- adopt a reasonable alternative method of providing the club benefits.

reg 6(2)

12.27 The approach to this duty is outlined in Chapter 7. A club may have to adopt any of the options under the duty in order to make the club accessible. However, where there is more than one way in which the club could be made accessible, the club will need to consider the policy of the Act, and the purpose of the duty, which is to provide access to a club or club benefits as close as it is reasonably possible to get to the standard normally offered to those who are not disabled.

A private golf club becomes aware that a significant number of its members are experiencing difficulties in getting around the club's grounds because of their mobility impairments. The club levels all the gradients in its grounds to ensure that members with mobility impairments can access the club's facilities. This is likely to be a reasonable step for it to have to take.

Members and associates: retention of membership or associate rights

12.28 A club must take reasonable steps to:

- change a practice, policy or procedure which makes or would make it impossible or unreasonably difficult for disabled members or associates, in comparison with members or associates who are not disabled, to retain their membership or associate rights, or to avoid having them varied.

reg 7(1)

A club has a membership renewal policy which requires members who wish to renew their membership to attend the club in person on the date on which their existing membership would expire. The club alters that policy to allow disabled members who have hospital appointments on that date to attend on another date. This is likely to be a reasonable step for the club to have to take.

12.29 A club must take reasonable steps to:

- provide an auxiliary aid or service where it would enable or make it easier for disabled members or associates to retain their membership or to avoid having their membership or association rights varied.

reg 7(2)

A club provides its renewal forms in large print and on audio tape for members who cannot read standard print. These are likely to be reasonable steps for the club to have to take.

Potential members

12.30 A club must take reasonable steps to:

- change a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled people, in comparison with non-disabled people, to be admitted as members of the club.

reg 8(1)

Auxiliary aids and services

12.31 A club must take reasonable steps to:

reg 8(2)

- provide an auxiliary aid or service where it would enable or make it easier for disabled people to be admitted as members.

Potential guests

12.32 A club must take reasonable steps to:

reg 9(1)

- change a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled people, in comparison with non-disabled people, to be invited as guests of the club.

12.33 A club must take reasonable steps to:

reg 9(2)

- provide an auxiliary aid or service where it would enable or make it easier for disabled people to be invited as guests of the club.

What is a reasonable step?

12.34 The factors listed in Chapter 6 at paragraphs 6.25 and 6.26 are the ones which might be taken into account when determining what is a 'reasonable' adjustment to make. In particular, it is more likely to be reasonable for a club with substantial financial resources to have to make an adjustment which involves significant cost than a club with fewer financial resources. It is the resources of the club that are important rather than the size of its membership. A club with a large number of members may have few resources if it charges low membership fees, whilst a club with a small membership may have significant resources if its membership fees are high.

Limitations of the provisions

12.35 Where a private club meets in the house of one of its members or associates there is no obligation on that member or associate to make changes to the physical features of those premises (for example, installing a grab rail in the toilet). Clubs may still need to seek the occupier's permission to make any necessary changes, including temporary ones – such as the provision of a portable induction loop. Or the club may have to arrange a change of venue to ensure that disabled members have access to club benefits.

reg 14(b)

12.36 The Act does not require a private club to take any steps that would fundamentally alter the nature of the club benefits in question, or the nature of the club.

s 21G

A private wine club meets specifically to drink and discuss the merits of different types of wine. A prospective member who has hepatitis B and so cannot tolerate alcohol wishes to join the wine club and asks that it expand its activity to include the tasting of fruit juices. This would fundamentally alter the nature of the club.

JUSTIFICATION

12.37 Treating a disabled person less favourably for a reason related to disability or failing to comply with a duty to make reasonable adjustments will be unlawful unless it can be justified under the Act.

s 21G

12.38 Chapter 8 sets out the general approach to justification and deals with the two conditions applicable to the three different areas of activity – health and safety and incapacity to contract. These

two conditions apply in relation to both less favourable treatment and a failure to make a reasonable adjustment. As well as these conditions, there are additional conditions which are specific only to clubs. These are detailed below. They apply only in relation to less favourable treatment.

Treatment necessary to provide club benefits to members, associates or guests or the disabled person

12.39 A private club can justify less favourable treatment of a disabled person in:

- offering worse terms of membership to a disabled person, varying terms of membership of a member or varying the rights of an associate
- providing worse access to a club benefit for a member associate or guest
- subjecting a member, associate or guest to any other detriment
- offering worse terms on which to invite a guest or to permit a guest to be invited

if the treatment is necessary in order to be able to provide club benefits to members, associates or guests of the club or the disabled person.

12.40 However, subjecting a disabled person to such less favourable treatment in these ways is only justifiable if other people or the disabled person would otherwise be effectively prevented from accessing the benefits. A private club cannot justify such treatment of a disabled person simply because of other people's preferences or prejudices.

12.41 Before a private club seeks to rely on this justification, it should first consider whether there are any reasonable adjustments that could be made to allow the disabled person to enjoy membership and/or club benefits.

Private club otherwise unable to provide club benefits

s 21G(3)(d)

12.42 A private club can justify less favourable treatment of a disabled person in:

- refusing him membership
- refusing club benefits to him as a member, associate or guest
- depriving a disabled person of membership or of associate rights; or
- refusing to invite a disabled person to be a guest or refusing to allow a member or associate to invite a disabled person to be a guest

if the treatment is necessary because the club would otherwise be unable to provide club benefits to members, associates or guests of the club.

A person with a disability which seriously affects her short-term memory applies to join a private bridge club with a very high standard of competitive play. The club refuses to admit her to membership on the basis that her short-term memory loss would seriously affect her ability to play competitively. This is likely to be justified.

12.43 However, treating a disabled person in this way is only justifiable if other people would otherwise be effectively prevented from having access to the benefits. It is not enough that those other people would be inconvenienced or delayed.

An individual with arthritis plays bridge more slowly than other players as he has difficulty in picking up the cards. As a result, he is refused membership of a private bridge club. The slight delay does not prevent other members completing their games and so the refusal of membership is unlikely to be justified.

12.44 Before a private club seeks to rely on this justification for less favourable treatment, it should first consider whether there are any reasonable adjustments that could be made to allow the disabled person to enjoy club benefits.

Different treatment and greater cost

12.45 In general terms, a private club can justify certain less favourable treatment, including charging a disabled person more than others, where the club's benefits are 'bespoke' to the disabled person. It cannot be used where the cost arises from the duty to make reasonable adjustments – in such cases the costs must be shared across all the club users.

This justification applies in relation to membership, benefits and guests.

Cost and terms of membership

12.46 A private club can justify offering membership on different terms where the difference between the

terms on which membership is offered to the disabled person and those on which it is offered to other people accurately reflect the greater cost of providing club benefits to the disabled person.

Cost and access to benefits

s 21G(3)(f)

12.47 A private club can also justify less favourable treatment in relation to access by a disabled member or guest to club benefits, or in relation to variation of terms of membership or rights of associates, where the difference between the club's treatment of the disabled person and its treatment of others accurately reflects the greater cost of providing club benefits to the disabled person.

A private golf club offers two lessons a week to all its members as part of their membership terms. However, it offers only one lesson a week for a disabled member. This is because a specialist coach is needed for the lesson and the cost of employing him is double that of the coaches usually used by the club. This is likely to be justified, as it reflects the greater cost to the club of providing the golf lessons.

Cost and the invitation of guests

s 21G(3)(g)

12.48 A private club can justify less favourable treatment in relation to the terms on which a disabled person is invited, or a member or associate is permitted to invite him, to be a guest of the club where these terms accurately reflect the greater cost of providing club benefits to the disabled person.

12.49 Chapter 4 details the other limitations which apply to all parts of the Act.

13 Discrimination in relation to premises (including commonholds)

Introduction

13.1 This chapter and the following six chapters of the Code deal with the duties not to discriminate against disabled people in the context of the provision and management of premises; and the provisions relating to the making of improvements to premises. The content of the chapters are outlined below.

- This chapter provides an overview of what is meant by discrimination and sets out steps that can be taken to prevent discrimination from arising.
- Chapter 14 deals with the provisions relating to less favourable treatment.
- Chapter 15 deals with the provisions relating to reasonable adjustments.
- Chapter 16 deals with commonholds, to which both the less favourable treatment and reasonable adjustment provisions apply.
- Chapter 17 deals with the small dwellings exemption, deposits, other justifications and exemptions.
- Chapter 18 deals with the provisions on improvements to premises in England and Wales.
- Chapter 19 deals with the provisions on works to premises in Scotland.

**ss 22–24L,
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- 13.2 The premises provisions apply only to premises in the United Kingdom.
- 13.3 The provisions relating to less favourable treatment apply to all types of disposals of premises, including sales and lettings. The reasonable adjustment provisions apply only to premises that are let, or to be let, and cover all forms of tenure, including long leases, assured shorthold tenancies, shorthold tenancies, and secure tenancies. This is not an exhaustive list.

Other duties

- 13.4 Persons selling or managing premises – as well as those offering premises to let – may also be covered by the provisions relating to service providers (for example, estate agencies, accommodation bureaux or management companies). In that respect they will have to ensure that the services which they provide are accessible to disabled people and should consult the other relevant parts of this Code (see in particular Chapters 5, 6, 7 and 10).

Terminology used in the premises chapters

- 13.5 The term ‘premises provider’ is used to refer generically to anyone concerned with the disposal, management, letting, assignment or other provision of premises, including landlords, managers, commonhold associations and those selling premises.
- 13.6 In the case of let property, a ‘controller’ of the premises is the person who lets or seeks to let the premises, or who manages the premises. Thus, a controller is a landlord or manager of rented premises. This would include a management or residents’ committee of a block of flats, and any

other person who, in practice, has control over how the premises are let or managed.

- 13.7 Commonhold is a system of freehold ownership which is suitable for blocks of flats, shops, offices and other multiple occupation premises in England and Wales. A commonhold is made up of individual freehold properties which are known as commonhold units.
- 13.8 The persons referred to in these chapters as having obligations under the Act may include a legal entity such as a company, but, for convenience, they are referred to in these chapters as 'he', 'she', 'it' or 'they'. A reference to a person includes a legal entity such as a company.
- 13.9 Where reference is made to a tenant, this includes a long-leaseholder.
- 13.10 The examples used in Chapters 13 to 17 are intended to illustrate solely how the Disability Discrimination Act 1995 applies in relation to premises. They do not deal with any other legislation, such as housing-specific legislation which may also affect the situation portrayed in the example. In addition, the Code does not deal with the Disability Equality Duty imposed on public authorities. This may affect the way that public authorities deal with premises that they own or manage and they will need to bear that duty in mind. More detail can be found in the Code of Practice on the duty to promote disability equality (England and Wales) and the Code of Practice on the duty to promote disability equality (Scotland).

What is unlawful discrimination in relation to premises and how can it be avoided?

- 13.11 Those who are managing or disposing of premises have an obligation under the Act not to treat disabled people less favourably. There is also an obligation on a controller of premises to make reasonable adjustments to let premises or premises to let.
- 13.12 The Act and Regulations made under it place similar obligations on commonhold associations.
- 13.13 The Act makes it unlawful to discriminate against a disabled person in relation to disposal and management of premises and the withholding of licence or consent. Different provisions apply, depending on the area of discrimination concerned, although the underlying concept is the same. Chapters 14, 15, 16 and 17 deal in more detail with what is unlawful in relation to premises.
- 13.14 The Act says that there are two forms of discrimination against a disabled person.
- 13.15 One form of discrimination occurs when a premises provider:
- treats a disabled person less favourably, for a reason relating to the disabled person's disability, than it treats (or would treat) others to whom that reason does not (or would not) apply; and
 - cannot show that the treatment is justified.
- 13.16 The concept of less favourable treatment is considered in more detail in Chapter 14. Whether and when less favourable treatment of a disabled

s 24(1)

person might be justified is considered in Chapter 17.

13.17 The other form of discrimination occurs when a controller of let premises or premises to let:

s 24A(2),
s 24G(2)

- fails to comply with a duty to make reasonable adjustments imposed on it by section 24C, 24D, or 24J of the Act, in relation to the disabled person in specified circumstances; and
- cannot show that the failure is justified.

13.18 The duty on controllers to make reasonable adjustments is considered in greater detail in Chapter 15. Whether and when a controller might be able to justify a failure to make a reasonable adjustment is considered in Chapter 17.

13.19 Those letting and managing premises will be subject to both the less favourable treatment provisions and the reasonable adjustment duties.

Legal liability for employees

13.20 Under the Act, premises providers, like service providers, are legally responsible for the actions of their employees in the course of their employment. Employees who discriminate against a disabled person will usually be regarded as acting in the course of their employment, even if the premises provider has issued express instructions not to discriminate.

s 58(1)

13.21 However, in legal proceedings against a premises provider based on the actions of an employee, it is a defence that the premises provider took such steps as were 'reasonably practicable' to prevent such actions. A policy on disability which is

s 58(1),
s 58(5)

communicated to employees is likely to be central to such a defence. It is not a defence simply to show that the action took place without the knowledge or approval of the premises provider.

What steps should a premises provider consider?

13.22 Premises providers are more likely to be able to comply with their duties under the Act and to prevent their employees from discriminating against disabled people if they consider certain steps:

- Informing staff that it is unlawful to discriminate against disabled people.
- Establishing a positive disability policy, including responding to disability-related harassment, and communicating it to staff.
- Training staff to understand the policy, their legal obligations and the duty of reasonable adjustments.
- Monitoring the implementation and effectiveness of such a policy.
- Providing disability awareness and disability equality training for staff.
- Addressing acts of disability discrimination by staff as part of disciplinary rules and procedures.
- Having a complaints procedure that is easy for disabled people to use.
- Consulting with disabled people, disabled staff and disability organisations.
- Ensuring that staff attend regular staff training relevant to the adjustments to be made.

13.23 In addition, it would be advisable for landlords to discuss a disabled tenant's potential requirements at an early stage in the tenancy. Where problems arise in a tenancy – for example, alleged antisocial behaviour – there may be an adjustment which would resolve the problem. Talking to disabled people about their needs will enable landlords to make the most suitable adjustments and enable tenants to make the most of their premises occupation.

14 The duty not to treat a disabled person less favourably in relation to premises

Introduction

- 14.1 This chapter explains the duty to ensure that disabled people are not treated less favourably than other people in relation to disposal and management of premises, and the withholding of licence or consent for a disposal. The principles underlying the concept of less favourable treatment in relation to premises are the same as those relating to services. They are dealt with in more detail in Chapter 5.
- 14.2 The provisions outlined in this chapter do not apply where the small dwellings exemption applies. This exemption is outlined in Chapter 17.

What does the Act mean by 'discrimination' in relation to disposal and management of premises and withholding of licence or consent?

- 14.3 As explained in paragraph 13.13, the Act makes it unlawful to discriminate against a disabled person in relation to disposal and management of premises and the withholding of licence or consent.
- 14.4 For the purpose of these provisions a person discriminates against a disabled person if they:
- treat the disabled person less favourably, for a reason relating to the disabled person's disability, than they treat (or would treat)

s 24(1)

others to whom that reason does not (or would not) apply; and

- cannot show that the treatment is justified.

What is less favourable treatment?

- 14.5 Someone disposing of or managing premises, or a person whose licence or consent is required for the disposal of premises, discriminates against a disabled person if it treats him less favourably for a disability-related reason (and it cannot show that the treatment is justified). In establishing whether a disabled person has been treated less favourably, the treatment is compared to how other people, to whom the reason for the treatment does not apply, are or would be treated.
- 14.6 If the treatment is caused by the fact that the person is disabled, that is treatment which 'relates to' the disability. Treating a disabled person less favourably for a reason related to his disability cannot be excused on the basis that another person who behaved similarly, but for a reason not related to disability, would be treated in the same way. Broadly speaking, this means that a disabled person will have been treated less favourably if he would not have received the treatment but for his disability. Whether and when less favourable treatment of a disabled person may be justified is considered in Chapter 17.

A landlord asks a deaf person for a non-refundable deposit as a condition of him renting a flat because he wrongly believes that the tenant will be less reliable than others because of his disability. This is less favourable treatment for a reason relating to his disability. Unless justified, this will be unlawful.

A housing association has a blanket policy of requiring all new tenants with a history of mental health problems to have only a short-term tenancy in the first instance. This is so that the association can see whether such tenants are suitable. This policy is not applied to other new tenants and is likely to be unlawful.

- 14.7 There must be a connection between the less favourable treatment and a reason related to the disabled person's disability.

The owner of an office block refuses to lease office space to a disabled self-employed businesswoman. This is because the owner has evidence that she is bankrupt and would be unable to pay the rent. The less favourable treatment of the disabled person is not for a reason related to her disability and is likely to be lawful.

DISPOSAL OF PREMISES

What is a 'disposal' under the Act?

- 14.8 The term 'disposal' covers both the sale and letting of premises, and any other form of legal disposal (for example, by licence). It includes the grant of a right to occupy the premises. Where the premises are comprised in or the subject of a tenancy, it includes:
- assigning (or the assignment of) the tenancy
 - sub-letting the premises or any part of them; or

s 22(6)

- parting with possession of the premises or any part of them.

14.9 Disposing of premises does not, however, include the hire of premises to members of the public, the booking of rooms in hotels or guest houses, or the hire of premises to members of a private club in the context of the club's activities. These are covered by the provisions relating to services to the public and private clubs (see Chapters 10 and 12).

What is meant by 'premises' and 'tenancy'?

s 22(8),
s 68(1)

14.10 Premises include land of any description. For example, dwelling-houses, office blocks, flats, bed-sits, factory premises, industrial or commercial sites, and agricultural land are covered by these provisions.

s 22(6)

14.11 The Act applies to the granting and assignment of tenancies and sub-leases. A tenancy includes a tenancy created:

- by a lease or sub-lease
- by an agreement for a lease or sub-lease
- by a tenancy agreement; or
- by or under any enactment (for example, a statutory tenancy).

Does the Act apply to all disposals of premises?

s 22(2)

14.12 The Act does not apply to every disposal of premises. The provisions which prohibit less favourable treatment by a person with power to dispose of premises do not apply to an owner-occupier if that person:

- owns an estate or interest in the premises; and
- wholly occupies the premises.

14.13 However, if the owner-occupier:

- uses the services of an estate agent; or
- publishes, or arranges to be published, an advertisement or notice (whether to the public or not),

for the purpose of disposing of the premises, that is a disposal of premises to which the Act applies. An estate agent is anyone carrying on a trade or profession providing services for the purpose of finding premises for people seeking to acquire them or assisting in the disposal of premises. This includes letting agents.

WHAT IS UNLAWFUL IN RELATION TO DISPOSAL OF PREMISES?

Terms of disposal

14.14 It is unlawful for a person with power to dispose of any premises to discriminate against a disabled person in the terms on which premises are offered to them.

A tenant who had a prolonged period of mental illness but has now recovered is charged a higher rent for a flat than a non-disabled person would be charged, as the landlord wrongly believes that the tenant may be irregular in his payments. This is likely to be unlawful.

s 22(2)

s 22(a)

s 22(b)

s 22(6)

s 22(1)(a)

A house owner who is using an estate agent to sell his house agrees to sell it to a disabled person, subject to contract. He requires the disabled person to pay a 25 per cent deposit as a condition of continuing with the sale. The house owner would not ask for such a large deposit from a non-disabled person. This is likely to be unlawful.

Refusal of disposal

s 22(1)(b)

14.15 It is unlawful to discriminate against a disabled person by refusing to dispose of premises to them.

A commercial landlord refuses to let office space to a self-employed businessman who had Hodgkin's disease five years ago but is now fully recovered. Without any supporting evidence, the landlord believes that his former disability may recur and that he will then be unable to keep up the rent payments. This is likely to be unlawful.

Treatment in relation to housing lists

s 22(1)(c)

14.16 It is unlawful for a person with power to dispose of any premises to discriminate against a disabled person in the treatment of that disabled person in relation to any list of people in need of premises.

A private letting agency refuses to place people with any form of disability on its waiting lists. This is likely to be unlawful.

A person has been on a council housing list for some time. He is then involved in a serious motor accident resulting in permanent paraplegia (paralysis of the legs). Despite the fact that suitable housing is available for him, the council allocates housing to other people who have been on the list for a shorter period than the newly disabled person, simply because of his disability. This is likely to be unlawful.

WHAT IS UNLAWFUL IN RELATION TO THE MANAGEMENT OF PREMISES?

14.17 It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (see paragraphs 14.4 and 14.7 above).

s 22(3)

Who is a 'person managing any premises'?

14.18 The Act is not simply concerned with discrimination against disabled people by property owners. A property management agency, accommodation bureau, housekeeper, estate agent or rent collection service may also be liable under the Act for discrimination in connection with managing premises, as would the managing agents of commercial premises.

Use of benefits or facilities

14.19 It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises:

- in the way they permit the disabled person to make use of any benefits or facilities; or

s 22(3)(a)

- by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities.

14.20 Benefits or facilities include, for example, laundry facilities, access to a garden and parking facilities.

A property management company manages and controls a residential block of flats on behalf of the landlord-owner. The block has a basement swimming pool and a communal garden for use by the tenants. A disabled tenant with a severe disfigurement is told by the company that he can only use the swimming pool at restricted times because other tenants feel uncomfortable in his presence. This is likely to be unlawful.

The company also refuses to allow the disabled child of one of the tenants to use the communal garden. The child has attention deficit disorder and other tenants object to his use of the garden. This is likely to be unlawful.

Eviction

14.21 It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting the disabled person. This prohibition does not prevent the eviction of a disabled tenant where the law allows it, for example, where they are in arrears of rent or have breached other terms of the tenancy, and where the reason for this is not related to their disability (or if it is, it can be justified under the Act). However, in each case, appropriate court action needs to be taken to obtain an eviction order. Nor does the Act prevent a landlord from

giving the requisite two months' notice that an assured shorthold tenancy will not be renewed, provided that the reason for giving the notice is not related to the disabled person's disability or, if it is, that the treatment is justifiable under the Act.

A tenant of a house has recently been diagnosed with AIDS. His landlord gives him notice to quit the house purely because he has found out about the AIDS diagnosis. This is likely to be unlawful.

Other detriment

14.22 It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by subjecting them to any other detriment. This includes subjecting a disabled person to harassment (for example, physical attack, damage to their property, verbal abuse or other similar behaviour) which deprives them of the peaceful enjoyment of their premises. It may also include treating a request for assistance from a disabled tenant, who is being harassed, less seriously than similar requests from other tenants.

A block of flats is managed by a management committee of tenants. The members of the committee harass a disabled tenant who has sickle-cell disease and who is mobility impaired. They believe that her use of a wheelchair causes above-average wear and tear to the doors and carpets in communal areas, and that this will lead to an increase in their annual maintenance charges. The members' behaviour is likely to be unlawful.

s 22(3)(c)

A disabled tenant is being harassed by other tenants on the basis of his disability. He complains to his landlord, but nothing is done about it, although the landlord normally takes prompt action to deal with complaints about other types of antisocial behaviour. In these circumstances, the landlord's failure to take action is likely to amount to a detriment, and to be unlawful.

Withholding of licence or consent

ss 22(4)–(5)

14.23 It is unlawful for any person whose licence or consent is required for the disposal of any premises, comprised in or (in Scotland) the subject of a tenancy, to discriminate against a disabled person by withholding that licence or consent. It is irrelevant whether the tenancy was created before or after the passing of the Act.

A tenant of a house occupies the premises under a tenancy agreement with a right to sub-let the house with the prior consent of the landlord-owner. The tenant is being posted to work abroad for a year. He wishes to sub-let the house to a disabled person who has partial paralysis as a result of polio. The owner of the house refuses to consent to the sub-letting. She wrongly assumes that the disabled person will be unable to keep up rent payments and may cause damage to the fabric of the house. This is likely to be unlawful.

15 The duty to make reasonable adjustments in relation to premises

Introduction

- 15.1 This chapter explains the duty to make reasonable adjustments in relation to let premises. The concept of the duty is similar to the duty of adjustment in respect of services (dealt with in Chapters 6 and 7) but the duty in relation to premises operates in a different way. The duty to make reasonable adjustments in relation to let premises and premises to let arises only in relation to an individual disabled person, and only if the adjustment is requested. It is not, therefore, anticipatory in nature. This is the key respect in which it differs from the corresponding provisions relating to services.
- 15.2 The provisions outlined in this chapter do not apply where the small dwellings exemption applies. This exemption is outlined in Chapter 17. Paragraphs 15.22 to 15.23 detail the owner-occupier exception which applies specifically in relation to the duty to make reasonable adjustments. Justification of a failure to comply with the duty to make adjustments is dealt with in Chapter 17.

The duty to make reasonable adjustments

- 15.3 The duty to make reasonable adjustments requires reasonable steps to be taken to address the barriers which may be experienced by a disabled tenant, prospective tenant or lawful occupier, created by the way in which premises

are managed or let. The aim of the duty is to ensure that disabled people can rent and enjoy premises and facilities associated with them in a similar way to non-disabled people, by removing barriers to their occupation or enjoyment.

- 15.4 The duty goes beyond simply avoiding treating a disabled person less favourably for a disability-related reason. This duty to take reasonable steps is referred to in this chapter as the duty to make reasonable adjustments.

Who has a duty to make adjustments?

- 15.5 The duty to make reasonable adjustments rests on landlords and managers of rented premises or premises which are available to rent. The Act refers to these people collectively as controllers of premises which are 'let' or 'to let'. These terms, which are also used in this Code, are explained more fully below.

Who is a controller of the premises?

- 15.6 A 'controller' of the premises is the person who lets or seeks to let the premises, or who manages the premises. Thus a controller is a landlord or manager of rented premises. This would include a management or residents' committee of a block of flats, and any other person who, in practice, has control over how the premises are let or managed.
- 15.7 Those who are selling premises, as opposed to letting or managing them, do not have a duty under the premises provisions to make reasonable adjustments. Those who sell on an existing lease of premises are therefore not subject to the duty to make adjustments in relation to the sale of those premises. In contrast, a person who grants a

lease of premises is thereby letting them, and these duties will apply.

What premises does the duty apply to?

- 15.8 The duty applies to any premises which are let or which are to let. The letting of both commercial and residential premises is covered. Letting is defined widely to include sub-letting, and the granting of contractual licences to occupy premises (ie where the legal relationship created is not one of landlord and tenant).

s 24A(4)

15

What does the Act make unlawful in relation to reasonable adjustments?

- 15.9 The Act makes it unlawful for a controller of let premises to discriminate against a disabled person who is a tenant or who is otherwise lawfully occupying the premises.
- 15.10 It is also unlawful for a controller of premises which are to let to discriminate against a disabled person who is considering taking a letting of the premises.
- 15.11 A controller of let premises or of premises which are to let discriminates against a disabled person if:
- he fails to comply with a duty to make reasonable adjustments in relation to the disabled person; and
 - he cannot show that the failure to comply with the duty is justified.

s 24A,
s 24G

The duty to make reasonable adjustments

15.12 The duty on controllers to make reasonable adjustments in relation to the letting of premises comprises a series of duties falling into three areas:

s 24C, 24J

- providing auxiliary aids and services

s 24D, 24J

- changing practices, policies and procedures; and

s 24D

- changing a term of the letting (this applies only to premises that are let).

s 24E(1),
s 24J(5)

15.13 The duties on controllers do not require them to take any steps which would consist of or include the removal or alteration of a physical feature. The definition of a physical feature therefore affects the scope of the duties.

What is a physical feature?

**The Disability
Discrimination
(Premises)
Regulations
2006**
SI 2006/887
reg 4(2)

15.14 Regulations (referred to as the 2006 Regulations) made under the Act make provision for various things to be treated as physical features. The following are treated as physical features:

- any feature arising from the design or construction of the premises
- any feature of any approach to, exit from or access to the premises
- any fixtures in or on the premises
- any other physical element or quality of any land comprised in the premises.

reg 4(3)

15.15 Any furniture, furnishings, material, equipment or other chattels in or on the premises are **not** to be treated as a physical feature.

What is an alteration of a physical feature?

15.16 Steps are unlikely to be treated as consisting of or including the alteration of a physical feature where they have only an incidental effect on a physical feature. For example, attaching something to a physical feature, such as a wall, with a screw is unlikely to amount to an alteration of the physical feature. However, something more significant, such as installing a concrete ramp between a step and a path, is likely to amount to an alteration of a physical feature.

15.17 The 2006 Regulations specify that the following are not to be treated as alterations of physical features:

reg 4(4)

- the replacement or provision of any signs or notices
- the replacement of any taps or door handles
- the replacement, provision or adaptation of any door bell, or door entry system
- changes to the colour of any surface (such as a wall or a door, for example).

15.18 This means that the reasonable adjustment duty may apply in respect of these things. Whether any of these will have to be provided will depend on the circumstances of the case and whether it is reasonable to do so.

15.19 Although there is no duty to make adjustments to physical features, the obligation under the reasonable adjustment provisions to change a term of a letting in certain circumstances may also operate to permit the making of a disability-related improvement (see paragraphs 15.42 to 15.43 for further detail).

s 24B,
s 24H

s 24B,
s 24H

15.20 In addition, there is an obligation in certain circumstances for a landlord not to withhold consent unreasonably for disability-related improvements or works – these provisions are detailed in Chapters 18 and 19.

Does the Act apply to all lettings of premises?

15.21 The Act does not apply to all lettings. The small dwellings exemption which is detailed in Chapter 17 applies to exclude those dwellings from these provisions.

15.22 In addition, the provisions relating to reasonable adjustments do not apply if the premises are or have at any time been the principal or only home of the individual who lets or wishes to let them. However if:

- in the case of let premises, since entering into the letting, a professional manager has been used to manage the premises; or
- in the case of premises to let, an estate agent has been used to let the premises

then the duty to make adjustments does apply in relation to the premises.

15.23 Where an estate agent has been used to let the premises, but an agent is not used to manage the premises once they have been let, then the duty to make reasonable adjustments will not apply in relation to the let premises.

A landlord uses an estate agent to let his flat. The duty to make adjustments applies in relation to letting the premises. Once they are let, the

landlord does not use an agent, but manages the premises himself. The duty to make adjustments does not apply in relation to the let premises.

Who do controllers of premises have to make adjustments for?

- 15.24 The duty to make adjustments applies in relation to a 'relevant disabled person'. In the case of let premises, this means the tenant or other disabled person who is lawfully occupying the premises, such as the disabled child or spouse of a tenant. In the case of premises to let, the relevant disabled person is the disabled person who is considering taking a letting of the premises.
- 15.25 As explained in paragraph 15.1, unlike the duty to make adjustments in relation to services, the duty in relation to premises is an individual duty. It is owed only to a disabled person when certain conditions have been met. However, there is nothing to prevent landlords from making adjustments in advance of a request, and in many cases this may be a more cost-effective way of ensuring access to premises or facilities and benefits.

**s 24E(3),
s 24J(6)**

A housing association ensures that the standard terms of its tenancies are available in large print, Braille and on BSL video. This means that there will be little or no delay when a disabled person requests tenancy terms in an accessible format.

s 24C(1),
s 24D(2)(b),
ss 24J(1)(a)–(b),
ss 24J(3)(c)–(d),
s 24J(6)

A request to provide a reasonable adjustment

- 15.26 The duty to make reasonable adjustments only arises if the controller of the premises is requested to make such an adjustment by a person to whom the premises are let or who wishes to take a letting of the premises, or someone on their behalf.
- 15.27 The request may be in writing but does not have to be. It could be made verbally, during a formal meeting or in a telephone call. It does not have to specifically ask for ‘an auxiliary aid or service’ or a change to a ‘practice, policy, procedure’ or a term of the letting. It will amount to a request for the purposes of the Act if it is reasonable to assume from what is said or written that an auxiliary aid or service or a change to a practice, policy, procedure or term has been requested. In some cases, for example where an individual requests a BSL interpreter, it will be obvious from the disability-specific nature of the request that the person is requesting an auxiliary aid or service, or a change to a practice, policy, procedure or term, and the landlord will have been put on notice as to this.

A landlord is speaking to a prospective tenant on the telephone to arrange a meeting to sign a tenancy agreement. During the conversation, the tenant explains that she is visually impaired and finds the print in the tenancy agreement too small. The tenant is identifying an impairment and it is likely that it would be reasonable to regard this as being a request for an auxiliary aid, such as a tenancy agreement in an accessible format.

A deaf man is moving into a new housing association property. On his application form he declared that he was a British Sign Language user and would need an interpreter at face-to-face meetings. This is likely to amount to a request for an auxiliary service in the form of a sign language interpreter.

A tenant with learning disabilities does not understand some of the information sent to him by his local authority landlord. His key worker visits the local housing office and asks for future information to be provided in Easy Read or for a housing officer to visit the tenant to talk through the information with him. This is a request for an auxiliary aid or service, made on behalf of the disabled person.

15.28 There are specific provisions regarding requests for certain auxiliary aids and services. These are detailed in paragraph 15.30 below.

The duty to provide an auxiliary aid or service

15.29 Where certain conditions are met (see paragraphs 15.34 and 15.35 for details of these conditions), a controller of premises must take reasonable steps to provide an auxiliary aid or service. An auxiliary aid or service could include the provision of information in accessible formats, such as large print or audio tape, or the provision of a sign language interpreter at a meeting. Chapter 7, paragraphs 7.21 to 7.31, provides information about the sorts of auxiliary aids and services which might be appropriate.

15.30 In addition, the 2006 Regulations state that the following are to be treated as auxiliary aids or services:

- The removal, replacement or provision of any furniture, furnishings, materials, equipment or other chattels (so long as it would not be a fixture when installed).
- The replacement or provision of any signs or notices.
- The replacement of any taps or door handles.
- The replacement, provision or adaptation of any door bell or door entry system.
- Changes to the colour of any surface (such as, for example, a wall or door).

reg 5(3)

A request for any of the above is to be regarded as a request for steps to be taken to provide an auxiliary aid or service. These might include, for example, moving a sign nearer a light so that it can be seen more easily by a person with a visual impairment, putting a lever door handle in place of a round-headed one to help a person with arthritis, providing a door entry system so that a deaf person knows that someone is at the door, or changing the colour of the walls or doors. Whether it would be reasonable to provide such an aid or service will depend upon the circumstances of the case.

What is a fixture?

reg 5(2)

15.31 The 2006 Regulations provide that fixtures are to be treated as physical features and thus, where the provision of any furniture, furnishings, materials, equipment or other chattels would be a fixture when installed, then it is not to be treated as an auxiliary aid or service.

15.32 What is a fixture will depend upon all the circumstances of the case and, in particular, how, to what extent and for what purpose it is fixed or annexed to the premises. The intentions of the parties in relation to it are also relevant. Generally, though, if an object cannot be removed without serious damage to, or destruction of, some part of the property, or if it is something which is done to effect a permanent improvement in the premises, then it is likely to be a fixture (for example, built-in cupboards). If something is fitted only to further the enjoyment of that thing, it is not likely to be a fixture but a chattel (for example, where a wall hanging is attached to the wall so that it can be properly displayed).

When does the duty to provide an auxiliary aid or service arise?

15.33 The duty to provide an auxiliary aid or service arises where, in addition to a request having been made in accordance with paragraphs 15.26 to 15.28 above, the relevant conditions outlined in paragraphs 15.34 or 15.35 are met.

15.34 In relation to let premises, the conditions are **either:**

- the auxiliary aid or service would enable or make it easier for a disabled person to enjoy the premises, but would be of little or no practical use to him if he were neither the tenant of the premises nor occupying them; and
- it would be impossible or unreasonably difficult for the disabled person to enjoy the premises if the auxiliary aid or service were not provided

or

s 24C

- the auxiliary aid or service would enable or make it easier for a disabled person to make use of any benefit or facility, which he is entitled to use, but would be of little or no practical use to him if he were neither the tenant of the premises nor occupying them; and
- if the auxiliary aid or service were not provided, it would be impossible or unreasonably difficult for the disabled person to make use of the benefit or facility.

Benefits or facilities include, for example, laundry facilities, access to a garden, or parking facilities.

ss 24J(1)–(2)

15.35 In relation to premises to let, the conditions are that:

- the auxiliary aid or service would enable or make it easier for the disabled person to take a letting of the premises, but would be of little or no practical use to him if he were not considering taking a letting of the premises; and
- if the auxiliary aid or service were not provided, it would be impossible or unreasonably difficult for the disabled person to take a letting.

The disabled child of a tenant has started using a wheelchair. She lives with her family in a rented ground-floor flat but is unable to leave the flat without being carried, as she cannot get down the one step at the entrance to the block of flats. A portable ramp would allow her to get down the step in her wheelchair and enable her to enjoy the premises. The tenant discusses this with his

landlord who agrees to provide a portable ramp and gives it to the family to use. This is likely to be a reasonable step for the landlord to have to take.

A person with arthritis who rents a furnished flat finds it very difficult to get out of the chairs in the flat because they are too low. He asks his landlord to change one of the chairs for a higher, more suitable one. The landlord agrees and finds a chair in another of his flats that the disabled person can easily get out of. This is likely to be a reasonable step for the landlord to have to take.

A landlord is replacing all the carpets in a property which she rents out. One of the tenants who is a wheelchair user requests laminate flooring as it is easier to manoeuvre a wheelchair on. The landlord refuses the request as such flooring would exacerbate noise levels experienced by tenants in the flats below. The landlord agrees instead to fit short-pile durable carpet which assists the tenant in the wheelchair without raising the noise levels. This is likely to be a reasonable step for the landlord to have to take.

A landlord of furnished premises receives a number of complaints from other tenants about a tenant with a hearing impairment who has the volume on his television turned up so that it is very loud. The other residents are also hostile to the tenant because of the noise, and this hostility makes it unreasonably difficult for the tenant to

enjoy the premises. The landlord discusses the complaints with the tenant, who asks for the provision of headphones in order to reduce the noise. The landlord provides the tenant with a set of headphones to enable him to watch television without disturbing the other tenants. This is likely to be a reasonable step for the landlord to have to take.

A management company employs a caretaker to carry out maintenance of an apartment block. The caretaker is responsible for the upkeep of the external and common parts of the building. A disabled tenant with arthritis is unable to change fuses when they need replacing and raises this with the management company. The company agrees that the caretaker will replace fuses for him. This is the provision of an auxiliary service, and is likely to be a reasonable step for the management company to have to take.

The duty to change practices, policies and procedures

- 15.36 Where certain conditions are met (see paragraph 15.38 for details of these conditions) a controller of premises must take reasonable steps to change a practice, policy or procedure.
- 15.37 Chapter 7, paragraphs 7.9 to 7.11, give examples of the kind of practices, policies and procedures that may present barriers to disabled people. These might include, for example, a no-animals policy.

When does the duty to change practices, policies and procedures arise?

15.38 The duty to change practices, policies and procedures arises where, in addition to a request having been made in accordance with paragraphs 15.26 to 15.28 above, the relevant conditions outlined below are met:

- in relation to let premises, a controller of premises has a practice, policy or procedure which has the effect of making it impossible or unreasonably difficult for a disabled person to enjoy the premises or to make use of any benefit or facility which he is entitled to use
- in relation to premises to let, a controller of premises has a practice, policy or procedure which makes it impossible or unreasonably difficult for a disabled person to take a letting of the premises; and
- in relation to both let premises and premises to let, the practice, policy or procedure would not have that effect if the relevant disabled person did not have a disability.

ss 24D(1)(a),
(2)–(3)

ss 24J(3)–(4)

A landlord has a practice of informing tenants of any rent arrears by letter in the first instance, with a follow-up visit if the arrears do not decrease. A tenant with learning difficulties tells the landlord that he cannot read standard written letters and so he would not be aware of any arrears. This would make him extremely worried about his security of tenure. The landlord agrees to change his practice so that he will visit the tenant in person if there are rent arrears, instead of sending a letter, as well as providing him with an Easy Read statement. These are likely to be reasonable steps for the landlord to have to take.

A disabled tenant with a learning disability is accused of antisocial behaviour by a neighbour who reports that he is playing football against her house late into the evening and is rude to her when she asks him to stop. The housing association's policy in these circumstances is to send a letter to a tenant accused of antisocial behaviour warning them about the complaint and detailing the potential effect on their tenancy if the behaviour persists. The disabled tenant's key worker contacts the housing association and explains that he cannot read the letter sent to him. The housing association alters its policy by agreeing to visit the disabled tenant personally to explain the complaint to him and talk to him about his behaviour. This is likely to be a reasonable step for the housing association to have to take.

A disabled tenant complains to her landlord that she is being harassed by her neighbours because of her disability, which is making her feel very vulnerable and upset. The landlord has a specific racial harassment policy but does not apply this in relation to disability. The landlord's policy of responding on an ad-hoc basis to claims of disability-related harassment is ineffective, and the policy makes it unreasonably difficult for the disabled tenant to enjoy the premises. She asks for her complaint to be treated more seriously. The landlord decides to follow the procedure it already has in place for complaints of racial harassment. This is likely to be a reasonable step for the landlord to have to take.

A landlord is considering the introduction of a new parking policy for residents, which will limit the ability of tenants to park on the premises. A disabled resident with a mobility impairment, who is dependent on her car for her mobility, contacts the landlord and explains the problems that she will experience under the new policy. The landlord agrees to reconsider the parking policy or, if it is introduced, to waive any term that would prevent her from parking on the premises.

Duty to change terms

- 15.39 Where certain conditions are met (see paragraphs 15.41 and 15.42 below for these conditions) a controller of let premises must take reasonable steps to change a term of the letting.
- 15.40 Terms of tenancies will also be subject to the provisions of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No 2083) and some of the examples used here may in any event be contrary to these Regulations (such as that relating to permitting an assistance dog to be on the premises). They are used here solely to illustrate the provisions of the Disability Discrimination Act 1995 as amended.

When does the duty to change terms arise?

- 15.41 The duty to change terms arises where, in addition to a request having been made in accordance with paragraphs 15.26 to 15.28 above, the following conditions are met:
- a term of the letting makes it impossible or unreasonably difficult for a disabled person to

ss 24D(1)(b)–(3)

enjoy the premises, or to make use of any benefit or facility which he is entitled to use; and

- the term would not have that effect if the disabled person did not have a disability.

A tenant develops a hearing impairment and wishes to have an assistance dog. A term of her tenancy agreement states that tenants cannot keep animals on the premises. The tenant raises this term with her landlord who agrees to change it so that she can keep an assistance dog on the premises. This is likely to be a reasonable step for the landlord to have to take.

A disabled tenant cannot access the drying area in her block of flats because of her disability. The landlord agrees not to enforce the term of the tenancy prohibiting her from hanging out clothes on her balcony, so that she can use her balcony to dry clothes. This is likely to be a reasonable step for the landlord to have to take.

Where a term of the letting prohibits the making of disability-related improvements

15.42 The 2006 Regulations provide that a particular change to terms may have to be made in the following circumstances. Where

- a controller of let premises is subject to a duty to change a term of the letting of a dwelling house
- the duty has arisen because a term of the letting prohibits the person to whom the

- premises are let (the tenant) from making alterations or improvements to the premises
- the terms of the letting contain no exception to that prohibition for alterations or improvements to be made with the consent of the controller
 - the tenant has requested permission to make an improvement to the premises
 - the term prohibiting the improvement would no longer have the effect of making it impossible or unreasonably difficult for the disabled person to enjoy the premises or make use of any benefit or facility if the particular improvement were excluded from the prohibition; and
 - it would be reasonable in all the circumstances for the tenant to make the improvement

it is reasonable for the controller to have to take steps to change the term, so far as it relates to the improvement in question, so that it becomes a term which permits the making of that improvement, subject to the imposition of reasonable conditions by the controller.

A person with increasing mobility problems is unable to get to the upper floor of her rented house. She asks her landlord for permission to install a stairlift, at her own expense. Although there is a term in her lease prohibiting alterations from being made, the landlord changes the term to allow her to install the stairlift. This is likely to be a reasonable step for the landlord to have to take.

15.43 Chapter 18 provides guidance about consent to make improvements where there is no term prohibiting improvements from being made in relation to England and Wales. Chapter 19 provides similar guidance in relation to the relevant Scottish provisions.

What if third-party consent is required for a change to terms?

reg 6

15.44 A controller of let premises may be required to obtain the consent of another person to change a term of a letting. If the change would otherwise be a reasonable one for the controller to have to make under the reasonable adjustment duty, the 2006 Regulations provide that it is reasonable for the controller to have to request that consent but it is not reasonable for him to have to change the term of the letting before that consent is obtained. Thus, if the controller does not obtain the consent, he will not be in breach of the Act if he does not make a change.

What is meant by reasonable steps?

15.45 The duty to make reasonable adjustments places controllers of premises under a duty to take such steps as it is reasonable in all the circumstances of the case for them to have to take in order to make adjustments. The Act does not specify that any particular factors should be taken into account (although see paragraph 15.42 for specific provisions relating to terms of a letting). What is a reasonable step for a particular controller of premises to have to take depends on all the circumstances of the case.

15.46 Without intending to be exhaustive, the following are some of the factors which might be taken into account when considering what is reasonable:

- the nature of the letting (eg the type and length)
- the effect of the disability on the individual disabled person
- the effectiveness of any proposed step
- the extent to which it is practicable to take the steps
- the financial and other costs of making the adjustment
- the extent of any disruption and the effect on other tenants which taking the steps would cause
- the scale of the controller's operation (for example, the number and/or value of holdings)
- the extent of the controller's financial and other resources
- the amount of resources already spent on making adjustments
- the availability of financial or other assistance; and
- in the case of an adjustment affecting the controller's private household, the extent to which taking the step would cause disruption to the household or any person living there.

A private landlord who has one tenant who is a British Sign Language user is asked to provide the tenancy agreement on video in BSL. This is an expensive and time-consuming process which she cannot afford, so it is unlikely to be a reasonable step for the landlord to have to take. However, the landlord and the disabled person

agree that a short meeting to go through the tenancy agreement together would be helpful and the landlord agrees to pay for the BSL interpreter to attend the meeting. These are likely to be reasonable steps for the landlord to have to take.

A large housing association is asked to provide a tenancy agreement on video in BSL. The housing association has a budget set aside for providing accessible information and so this is likely to be a reasonable step for it to have to take. As its tenancy agreements are standard ones, the association will also be able to use the video for other tenants using BSL.

A disabled tenant on the first floor needs to use an electric scooter for mobility outdoors. The lift is too narrow to accommodate the scooter, and the landlord has a policy of not allowing tenants to leave items in the downstairs hallway. Although there are garages which tenants can use, they are too far from the premises for the disabled tenant to use. This makes it extremely difficult for the tenant to enjoy the premises, as she experiences pain and fatigue in getting from the garage to the premises. The tenant asks the landlord if he will waive this policy and allow her to leave the scooter in the hallway on a regular basis. After examining the scooter and the hallway the landlord decides that this is not practicable because it would significantly impede the entry to the ground-floor flats. Changing the policy is therefore unlikely to be a reasonable step for the landlord to have to take.

A housing association has a team of maintenance contractors to carry out works and repairs necessary on the association's properties. The works are carried out in order of receipt of the request. This policy sometimes results in a delay between the request for a reasonable adjustment and the completion of any work required (such as the installation of easy-to-use taps) as the request may not appear to be a priority one, despite its impact upon the disabled person concerned. To minimise the delay, the policy is altered so that a request for a reasonable adjustment is given priority over non-emergency work. This is likely to be a reasonable step for the housing association to have to take.

A landlord has two flats, one of which he lets unfurnished on a long lease and the other furnished. The unfurnished flat is let to a disabled person who, because of his increasing mobility difficulties, asks the landlord to provide a chair with a riser. It is unlikely to be reasonable for the landlord to have to take steps to provide the chair because the flat was let unfurnished. However, if the disabled person had been renting the furnished flat and one of the chairs supplied by the landlord was no longer suitable, replacing the chair is likely to be a reasonable step for the landlord to have to take.

Impossible or unreasonably difficult

15.47 The duty to make adjustments arises where a practice, policy or procedure, or a term of the letting, or the absence of an auxiliary aid or service, makes it impossible or unreasonably difficult for a disabled person to enjoy premises

which are let or make use of associated facilities and benefits. In the case of premises to let, the duty arises where a practice, policy or procedure or the absence of an auxiliary aid or service makes it impossible or unreasonably difficult for a disabled person to take a letting of the premises.

- 15.48 The Act does not define ‘impossible or unreasonably difficult’. However, in considering whether it applies in any particular case, controllers of premises should take account of whether the time, inconvenience, effort, discomfort or loss of dignity entailed by the disabled person in renting or seeking to rent premises, or in making use of benefits or facilities, would be considered unreasonable by other people if they had to endure similar difficulties.

Victimisation

s 24F

- 15.49 In addition to the general victimisation provisions contained in the Act (and detailed in Chapter 20 of the Code) there are particular provisions relating to these reasonable adjustment duties. The Act protects any tenant – whether disabled or not – from victimisation by a controller of let premises (for example, evicting him or increasing the rent) because of the extra costs incurred in meeting a reasonable adjustment duty.

- 15.50 The Act makes it unlawful for a controller of let premises to discriminate against a person to whom the premises are let where there is a duty to make reasonable adjustments for a disabled person who is lawfully occupying the premises (for example, the disabled spouse or child of the tenant).

s 24F(2)

- 15.51 Discrimination in these circumstances occurs where:

- the controller treats the tenant less favourably than he treats, or would treat, other persons whose circumstances are the same as the tenant; and
- he does so because of costs incurred in taking steps to avoid liability under section 24A(1) (the reasonable adjustment duty) for failure to comply with the duty.

15.52 In comparing the circumstances of the person who is alleging less favourable treatment with other persons, the request which gave rise to the imposition of the reasonable adjustment duty, as well as the disability of a person to whom the premises are let or who is a lawful occupier of the premises, is to be disregarded.

A non-disabled tenant has asked for and been provided with a reasonable adjustment in the form of a short-pile carpet for his daughter, who is a wheelchair user. The landlord increases the tenant's rent shortly afterwards, with no prior notice. No-one else's rent has been increased and the increase seems to be purely because the tenant has requested an adjustment. This is likely to amount to discrimination and to be unlawful.

16 Commonholds in England and Wales

16.1 The Act and the 2006 Regulations made under it place a commonhold association under a duty not to discriminate against a disabled person in certain circumstances by treating them less favourably for a disability-related reason, or by failing to make a reasonable adjustment, without justification. This chapter considers those provisions.

What is meant by 'commonhold'?

16.2 Commonhold is a system of freehold ownership which is suitable for blocks of flats, shops, offices and other multiple-occupation premises in England and Wales.

16.3 A commonhold development consists of interdependent freehold properties, referred to as 'commonhold units'. Each unit is owned by the unit-holder. The common parts (such as the entrance hall and staircases) are owned and managed by the commonhold association, which is a limited company. Each of the unit-holders (or one of them where a unit is jointly owned) is a member of the company. In commonhold there is no landlord and tenant relationship between the unit-holders and the commonhold association.

16.4 A 'commonhold unit' means a commonhold unit specified in a commonhold community statement (CCS) which meets the conditions set out in Part 1 of the Commonhold and Leasehold Reform Act

2002. The CCS sets out rules which govern the way in which the commonhold will be managed.

- 16.5 A person is the unit-holder of a commonhold unit if he is entitled to be registered as the owner of the freehold estate in the unit (whether or not he is registered).

WHAT DOES THE ACT MAKE UNLAWFUL IN RELATION TO LESS FAVOURABLE TREATMENT BY COMMONHOLD ASSOCIATIONS?

Withholding licence or consent for a disposal

- 16.6 It is unlawful for any person whose licence or consent is required for the disposal of an interest in a commonhold unit to discriminate against a disabled person by withholding that licence or consent for the disposal of the interest to the disabled person.
- 16.7 A 'disposal' in this context includes the grant of a right to occupy the unit; and an 'interest in a commonhold unit' includes an interest in only part of a commonhold unit.

A tenant of a unit-holder wishes to grant a sub-lease to a disabled person with an assistance dog. She is told by the commonhold association that she cannot do so because one of the other unit-holders has objected to a dog being on the premises. This will be unlawful unless it can be justified under the Act.

Refusing to be a party to the disposal

- 16.8 Where the disposal of an interest in a commonhold unit requires some other person to be a party to the disposal, it is unlawful for that other person to discriminate against a disabled person by deliberately not being a party to the disposal.

s 22A(2)

Managing premises

- 16.9 The 2006 Regulations provide that a commonhold association is to be treated as the person who manages the premises. This means that the duties in relation to managing premises, outlined above at paragraphs 14.17 to 14.23, apply. In particular, it is unlawful for a commonhold association to discriminate against a disabled person:

s 22(3)
reg 8(1)

- in the way it permits the disabled person to make use of any benefits or facilities
- by refusing to allow (or deliberately not permitting) them to make use of any benefits or facilities; or
- by subjecting them to any detriment.

- 16.10 For the purposes of the provisions outlined above discrimination means treating the disabled person less favourably for a reason relating to their disability, than others to whom that reason does not apply would be treated, without justification. This concept is explained in Chapter 5 and also in Chapter 14. When treatment can be justified is explained in Chapter 17.

What does the Act make unlawful in relation to reasonable adjustments by commonhold associations?

16.11 The 2006 Regulations provide that:

- commonhold premises are treated as premises that are let
- a commonhold association is treated as a person who manages the premises (and who thus falls within the definition of the controller of premises)
- the terms of a CCS and any other applicable terms are treated as terms of a letting
- any benefit or facility which a disabled person is entitled to use under the CCS or other applicable terms is treated as a benefit or facility which they are entitled to use under a letting
- a person lawfully occupying a commonhold unit (although not a unit-holder nor a person occupying the premises under a letting) is treated as a person lawfully occupying the premises under a letting.

As a result of these provisions, the reasonable adjustment duties explained in Chapter 15 will apply in relation to commonhold premises.

16.12 It is unlawful for a commonhold association to discriminate against a disabled person who is a unit-holder. Discrimination in this context means failing to comply with the duty to make reasonable adjustments in relation to the disabled person without justification. The concept of reasonable adjustments is explained in Chapters 6 and 7, and, specifically in relation to premises, in Chapter 15. When a failure to make reasonable

adjustments can be justified is explained in Chapter 17.

16.13 The duty on commonhold associations to make reasonable adjustments in relation to commonhold premises comprises a series of duties falling into three areas:

- providing auxiliary aids and services
- changing practices, policies and procedures; and
- changing a term of the CCS.

16.14 The duties are subject to the same conditions as apply to let premises, as detailed in Chapter 15, and the approach to these duties is outlined there.

17 Justification and exemptions

17.1 This chapter details the small dwellings exemption which applies to the premises provisions of Part 3. It also explains the circumstances in which less favourable treatment, and a failure to make reasonable adjustments, may be justified; the special provisions relating to deposits; and the other exemptions from the premises provisions.

THE SMALL DWELLINGS EXEMPTION

17.2 The provisions of the Act prohibiting discrimination by landlords, managers and certain other persons against disabled people in relation to premises do not apply to certain small dwellings. This exemption only applies to houses or other residential property. It does not apply to commercial or industrial premises. A number of conditions must be satisfied before a small dwelling is exempted.

17.3 First, the person concerned, referred to in the Act as the 'relevant occupier', must:

- reside on the premises
- intend to continue to reside on the premises; and
- be sharing accommodation on the premises with other people who are not members of the relevant occupier's household.

s 23(1)

s 23(2)(a)

s 23(2)(a)

s 23(2)(b)

- ss 23(6)–(7)** 17.4 Who the ‘relevant occupier’ is will depend on which part of the premises provisions is being considered:
- s 23(6)(a)** ■ in relation to premises disposal, the relevant occupier means the person with power to dispose of premises, or a near relative of his
 - s 23(6)(a)** ■ in relation to premises management, the relevant occupier means the person managing the premises, or a near relative of his
 - s 23(6)(b)** ■ in relation to the withholding of a licence or consent, the relevant occupier means the person whose licence or consent is required for the disposal of premises, or a near relative of his; and
 - s 24H(4),
s 24B(4)** ■ in relation to the duty to make adjustments, the relevant occupier means a controller of the let premises or premises to let, or a near relative of his.
- s 23(7)** 17.5 A ‘near relative’ for this purpose means a person’s spouse (ie husband or wife) or civil partner, partner, parent, child, grandparent, grandchild or brother or sister (whether of full- or half-blood or by marriage or civil partnership). The term ‘partner’ means the other member of a couple consisting of a man and a woman who are not married to each other but are living together as husband and wife; or two people of the same sex who are not civil partners of each other but are living together as if they were civil partners.
- s 23(2)(c)** 17.6 Second, the shared accommodation must not be storage accommodation or a means of access.
- s 23(2)(d)** 17.7 Third, the premises must be ‘small premises’.

When are premises 'small premises'?

17.8 Premises are 'small premises' if the following conditions are satisfied:

- only the 'relevant occupier' and members of his or her household reside in the accommodation occupied by him or her
- the premises include residential accommodation for at least one other household
- that other residential accommodation is let (or is available for letting) on a separate tenancy or similar agreement for each other household; and
- there are not normally more than two such other households.

The basement and ground floor of a large Victorian house have been converted into two self-contained flats which are let to tenants under separate tenancies by the house owner. The house owner and her family continue to reside exclusively in the remaining floors of the house.

The house satisfies the Act's definition of small premises (but the house may still not be exempt from the Act, see paragraph 17.10 below).

17.9 Alternatively, premises are 'small premises' if there is not normally residential accommodation on the premises for more than six people in addition to the 'relevant occupier' and any members of his or her household.

The owner of a four-bedroom detached house has converted two bedrooms into bed-sit

ss 23(3)–(4)

s 23(4)(a)

s 23(4)(b)

s 23(4)(c)

s 23(4)(d)

s 23(3),
s 23(5)

accommodation for two people. He continues to live in the house with his family. The house satisfies the Act's definition of small premises.

When does the small dwellings exemption apply?

- 17.10 The small dwellings exemption is likely to apply to a multi-occupancy residential building with shared accommodation. All the conditions in paragraphs 17.3 to 17.7 above must be satisfied if the exemption is to apply.

The converted Victorian house in the example in paragraph 17.8 above has a communal entrance door and hallway giving private access to the two flats and the remainder of the house. Although the house satisfies the definition of small premises, the small dwellings exemption does not apply. This is because the owner of the house resides on the premises but does not share any accommodation (other than means of access) with the tenants of the two self-contained flats.

The four-bedroom detached house in the example in paragraph 17.9 above has a bathroom and kitchen which is shared by the owner (and his family) with the tenants of the bed-sit rooms. Not only does the house satisfy the definition of small premises, it is also subject to the small dwellings exemption. This is because the house owner lives in the house and shares some accommodation (other than access or storage accommodation) with the tenants of the bed-sit rooms.

JUSTIFICATION

17.11 Less favourable treatment of a disabled person for a reason relating to disability, or a failure to comply with the reasonable adjustment duty in relation to an individual, amounts to discrimination unless that treatment or failure can be shown to be justified.

s 24(1)(b),
s 24K

17.12 Treating a disabled person less favourably for a reason related to disability or failing to make a reasonable adjustment may be justified only if:

s 24(2),
s 24K

- the premises provider believes that one or more of the relevant conditions in paragraph 17.13 below are satisfied; and
- it is reasonable in all the circumstances of the case for that person to hold that opinion.

s 24(2)(a),
s 24K(1)(a)

s 24(2)(b),
s 24K(1)(b)

17.13 The Act sets out five possible conditions which could apply, but for ease of explanation this Code deals with them under four headings:

s 24(3),
s 24K(2)

- health or safety
- incapacity to contract
- treatment necessary in order for the disabled person or other occupiers to use a benefit or facility; and
- treatment to recover extra costs.

As will be seen, these conditions do not apply to all forms of discrimination in relation to premises (for example, the only conditions applicable to a failure to make reasonable adjustments are health and safety and incapacity to contract).

17.14 At the time of the alleged discrimination, the person seeking to rely on the justification must

reasonably believe that one of those relevant conditions is satisfied to justify less favourable treatment. These conditions are similar to (but not exactly the same as) the conditions that apply to justifying discrimination in the provision of services. The general approach to justification is the same (see paragraphs 8.13 to 8.15 above). Before seeking to rely on any of these justifications, it is advisable for controllers of let premises (including commonholds), or premises to let, who are under a duty to make reasonable adjustments, to consider whether any reasonable adjustments could be made which would remove the need for the less favourable treatment and allow the disabled person to enjoy the premises or benefits.

- 17.15 The first two justification conditions detailed below apply to all aspects of the premises provisions – to disposal and management of premises (including commonholds), to the withholding of a licence or consent, and to the letting of premises by controllers (including commonholds) in relation to the reasonable adjustment duty. The other conditions apply in the circumstances specified.

Health or safety

- 17.16 In any case of alleged discrimination, the less favourable treatment of a disabled person or a failure to make reasonable adjustments may be justified only if it is reasonably believed that the treatment or failure is necessary in order not to endanger the health or safety of any person, including the disabled person in question.

s 24(3)(a),
s 24K(2)(a)

A landlord refuses to let a third-floor flat to a disabled person who has had a stroke resulting in mobility problems and who lives alone. The disabled person is clearly unable to negotiate the stairs in safety or use the fire escape or other escape routes in an emergency. The landlord believes that there is a health or safety risk to the disabled person. The landlord has considered whether or not a reasonable adjustment could be made to remove the risk but there is nothing which would do this. Provided it is reasonable for the landlord to hold that opinion, the refusal to let is likely to be justified.

A landlord refuses to let a flat to someone with AIDS, believing him to be a health risk to other tenants. The prospective tenant provides the landlord with government literature confirming that AIDS is not a health risk, but the landlord continues to refuse to let the flat. The landlord's opinion that the prospective tenant is a health risk is unlikely to be a reasonable one for the landlord to hold and so the refusal to let is unlikely to be justified.

Incapacity to contract

- 17.17 In any case of alleged discrimination, the less favourable treatment of a disabled person or failure to make reasonable adjustments may be justified if it is reasonably believed that the disabled person is incapable of entering into an enforceable agreement or of giving an informed consent, and for that reason the treatment is reasonable in the particular case.

s 24(3)(b),
s 24K(2)(b)

The owner of a lock-up garage refuses to rent it to a person with Alzheimer’s disease. Despite the owner attempting to explain that she expects to be paid a weekly rent for the garage, the disabled person appears incapable of understanding the legal obligation involved. The garage owner believes that the disabled person is incapable of entering into an enforceable agreement. This is likely to be a reasonable opinion for the garage owner to hold and the refusal to rent the garage is therefore likely to be justified.

17.18 The 2006 Regulations prevent the justification on grounds of incapacity to contract or inability to give an informed consent being used where another person is legally acting on behalf of the disabled person. For example, that other person may be acting under an appointment made by the Court of Protection or a power of attorney (or, in Scotland, under a power exercisable in relation to the disabled person’s property or affairs in consequence of the appointment of a guardian, tutor or judicial factor).

If the disabled person in the above example at 17.17 has someone legally acting on his behalf (under a power of attorney) the refusal to rent the garage would therefore not be justified under this ground.

Treatment necessary in order for the disabled person or other occupiers to use a benefit or facility

ss 24(3)(c)–(d)

17.19 In a case of alleged discrimination by a person managing premises (including commonhold associations):

- in the way a disabled person occupying the premises is permitted to make use of any benefit or facility; or
- by refusing (or deliberately omitting) to permit a disabled person occupying the premises to make use of any benefit or facility,

less favourable treatment of the disabled person may be justified if it is reasonably believed that the 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.

A disabled tenant with a mobility impairment is prevented by the management agency of a block of flats from parking in front of the main entrance to the block. The agency requires him to park in the car park at the back of the block. Although this causes the disabled tenant inconvenience and difficulty, no reasonable adjustment is possible because there is insufficient space at the front of the building, and the disabled tenant's car frequently causes an obstruction to other tenants. The management agency's decision is likely to be justified.

A landlord refuses to allow a disabled tenant with a learning disability to use the shared laundry facilities in a block of flats because the disabled tenant frequently breaks the washing machines as she does not understand the instructions. However, there is a caretaker on site who could, as a reasonable adjustment, assist her with using the machines. In light of this, the landlord cannot show that refusal is necessary to enable other tenants to use the facilities. The landlord's refusal is unlikely to be justified.

ss 24(3)(e)–
(3B)

Extra costs

17.20 The Act provides that certain treatment can be justified where a person letting or proposing to let premises to a disabled person, or managing rented premises occupied by a disabled person, incurs additional costs as a result of a disabled person's disability.

In the case of alleged discrimination in:

- the terms on which a disposal of premises is offered; or
- subjecting a disabled person to a detriment (other than eviction)

the less favourable treatment may be justified if the terms are less favourable or the disabled person is subjected to the detriment in order to recover costs which are incurred as a result of the disabled person's disability.

s 24(e)(ii),
s 24(f)(ii)

17.21 The Act specifically prohibits this justification from applying where the extra cost results from compliance with the duty to make reasonable adjustments.

Deposits

17.22 A person with power to dispose of any premises may be prepared to grant a tenant a right to occupy the premises on the condition that the tenant pays a deposit. The deposit is usually refundable at the end of the occupation if the premises and its contents are undamaged. The 2006 Regulations provide special rules to deal with the question of whether the person with power to dispose of the premises can refuse to return the disabled tenant's deposit in full or in part.

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17.23 The special rules apply where, in relation to a deposit, a person with power to dispose of the premises:

- for a reason which relates to a disabled person's disability treats a disabled person less favourably than it treats (or would treat) others to whom that reason does not (or would not) apply.

17.24 Less favourable treatment of a disabled person in respect of a deposit may be justified if all the following conditions are satisfied:

- the person with power to dispose of the premises has granted the disabled person a right to occupy premises (whether under a formal tenancy agreement or otherwise)
- the disabled person is required to provide a deposit
- the deposit is refundable at the end of the occupation if the premises and its contents are undamaged
- damage has occurred to the premises or its contents for a reason which relates to the disabled person's disability
- the person with the power to dispose of the premises refuses to refund some or all of the deposit
- that refusal is because the damage is above the level at which he or she would normally refund the deposit in full or in part; and
- the refusal is reasonable in all the circumstances of the case.

reg 3(1)

reg 3(2)

17

A disabled person rents a flat for 12 months. The landlord requires all tenants to pay a deposit against damage to the flat and its furnishings. Because of the nature of her disability, the disabled person uses a wheelchair. In this particular case, it causes abnormal wear and tear to the carpets in the flat. At the end of the tenancy, the landlord retains part of the deposit against the cost of repairing the damage. This is likely to be justified.

s 22(1)(a)

17.25 The special rules on deposits do not justify a person with power to dispose of premises charging a disabled person a higher deposit than it would charge to other people. Similarly, a person with power to dispose of premises is not justified in charging a disabled person a deposit where he or she would not expect other people to pay such a deposit. In either case, this could amount to unlawful discrimination in the terms on which the premises are offered for disposal to the disabled person.

reg 3(2)

17.26 Where a person with power to dispose of premises requires a disabled person to pay a deposit, he or she may only refuse to repay the deposit if any damage to the premises or its contents is above the level at which he or she would normally refund some or all of the deposit. If the damage is of a level where he or she would normally repay the deposit, a disabled person must not be treated less favourably than any other person who has paid a deposit and has caused comparable damage to the premises or its contents.

reg 3(2)

17.27 A refusal to refund a deposit to a disabled person must be reasonable in all the circumstances of the

case. A person with power to dispose of premises is unlikely to be justified in withholding the whole or part of a deposit if the amount withheld exceeds the loss suffered by that person as a result of the damage. In addition, withholding part or the whole of a deposit may not be justified where a reasonable adjustment could have made a difference to the damage caused.

In the example at 17.24 above, the disabled person asks for shorter-pile carpets which will make it easier to move about in the flat and will not be subject to so much damage. It would be reasonable for the landlord to provide the alternative carpeting or flooring but he does not do so. Withholding part of the deposit is unlikely to be justified in these circumstances.

Other provisions

17.28 The premises provisions do not operate where other specified provisions of the DDA apply (or would apply if they were not expressly excluded). In particular, they do not apply in relation to:

- the provision of premises in the course of the provision of services to the public, such as in a hotel, or the provision of holiday accommodation by a tour operator (see Chapter 10 for details of these provisions)
- the provision of premises in the course of an employment relationship or an occupation (see the Code of Practice on employment and occupation)
- the provision of premises to a student or prospective student by a responsible body within the meaning of Chapter 1 or 2 of Part 4 of the Act or by an education authority

discharging any functions mentioned in section 28F of the Act (see the Code of Practice, schools and Code of Practice, post-16); and

- the provision of premises by a private club as part of the benefits, facilities and services it provides to those protected by section 21F of the Act (see Chapter 12 for details of these provisions).

18 Improvements to rented dwelling houses – England and Wales only

Introduction

- 18.1 A disabled person may need an improvement made to the premises in order to remain comfortably in their home. There is no obligation in the premises provisions of the Act for a landlord to make any alterations to physical features of rented premises (see Chapter 15, paragraph 15.13). There is provision, however, enabling a tenant in certain circumstances to obtain consent to carry out disability-related improvements themselves by way of a reasonable adjustment in the form of a change to a term of the tenancy. This only applies where a term of the letting prohibits alterations or improvements being made to the premises. In these circumstances, the provisions in this chapter will not apply, and tenants will have to rely upon the reasonable adjustment provisions. More detail is provided on the reasonable adjustment provisions in Chapter 15.
- 18.2 Many tenants have statutory rights in relation to the making of improvements to their homes. Broadly, landlords cannot unreasonably withhold consent for them to make improvements to their dwellings. These rights are contained in the Housing Act 1980 and the Housing Act 1985 (the Housing Acts).
- 18.3 For those not already covered by the Housing Acts, but who are entitled under their lease to make improvements with the consent of their

landlord, the Disability Discrimination Act 2005 (DDA 2005) amends the DDA 1995 (the amended DDA) so that such tenants also have rights not to have consent to make a 'relevant' improvement unreasonably withheld by their landlord. A 'relevant' improvement, discussed further at paragraphs 18.20 and 18.21, is one relating specifically to a disabled person.

- 18.4 The 1927 Landlord and Tenant Act (the 1927 Act) also contains some provisions regarding improvements. However, in the majority of circumstances tenants will be able to rely upon one of the Housing Acts or the amended DDA. For this reason, the 1927 Act is only touched upon at the end of this chapter, which deals primarily with the Housing Acts and the amended DDA.
- 18.5 The amended DDA also gives the Disability Rights Commission the power to prepare and issue Codes of Practice giving practical guidance to landlords and tenants not only on the provisions in the amended DDA but also on the provisions of the Housing Acts and the 1927 Act mentioned above as they relate to 'relevant' improvements. This Code, and in particular this chapter, has been issued under this power. In any case where it appears relevant, the court must take this Code of Practice into account.
- 18.6 These provisions only apply in relation to England and Wales. Chapter 19 deals with the parallel provisions which are in place in Scotland, under the Housing (Scotland) Acts 2001 and 2006.
- 18.7 This chapter of the Code:
- outlines the improvement provisions in the Housing Acts mentioned at paragraph 18.2 above and explains when they apply

- details the provisions contained in the amended DDA relating to making relevant improvements, and when they apply; and
- provides guidance on what factors need to be taken into account in determining when consent is unreasonably withheld; and when conditions attached to consent might be reasonable or unreasonable.

18.8 As indicated above, the focus of this chapter of the Code is on improvements, described in the amended DDA as 'relevant' improvements, as these relate specifically to a disabled person. This is explained in more detail in paragraphs 18.20 and 18.21 below.

18.9 Whilst this chapter provides an overview of the Housing Acts and the amended DDA in relation to relevant improvements, this is a very complicated area of law, and disabled people who wish to use these provisions are advised to seek expert assistance before doing so.

WITHHOLDING CONSENT

What do the Housing Acts and the amended DDA say about withholding consent?

18.10 The Housing Act 1980 sections 81 to 85 and the Housing Act 1985 sections 97 to 99 apply to secure tenancies, protected tenancies and statutory tenancies.

18.11 Section 49G of the amended DDA applies in circumstances where the Housing Acts do not apply, provided that the conditions outlined in paragraph 18.13 are met.

18.12 Section 49G of the amended DDA applies to all leases of residential property other than:

- protected tenancies (which has the same meaning as in section 1 of the Rent Act 1977)
- statutory tenancies (in accordance with section 2 of the Rent Act 1977); or
- secure tenancies (which has the same meaning as in section 79 of the Housing Act 1985).

18.13 It applies where:

- a disabled person is the tenant or lawful occupier or prospective occupier of the premises
- the premises are or are intended to be their only or principal home
- the tenant is entitled under the lease (which includes a sub-lease or other tenancy) to make improvements to the premises with the consent of the landlord
- the tenant applies to the landlord to make a 'relevant improvement'; and
- the lease does not already provide for rights similar to those set out below.

s 49G(8)

18.14 The amended DDA provisions apply to a dwelling house. A 'dwelling house' is a broad term with an established legal meaning as premises (which could be a house, a part of a house or a flat) which are suitable for all the major activities of life. It also includes any land (such as a garden) which is let as part of the premises.

s 49G(2)

18.15 Where section 49G of the amended DDA applies, and a landlord unreasonably withholds consent to

the making of relevant improvements, the consent is nevertheless taken to have been given.

- 18.16 The Housing Acts have similar effect, in that, where they apply, they write into the lease a term that the tenant will not make any improvement without the written consent of the landlord. The landlord's consent is not to be unreasonably withheld. Where consent is unreasonably withheld, it is to be treated as if it has been given.
- 18.17 It would be possible in both the circumstances outlined above for a tenant to go ahead and make the improvement. However, before doing so, the tenant should be certain that the landlord has acted unreasonably. It would be advisable for any tenant who is considering making an improvement in these circumstances to seek expert advice before doing so (and see also paragraph 18.33 below for more information in relation to this). Where the proposal for improvement is particularly complicated, it may be advisable for a tenant to seek a declaration from the court as to the reasonableness of the landlord's decision before going ahead with any improvements.
- 18.18 In relation to both the Housing Acts and the amended DDA, where the tenant has applied in writing for consent and the landlord refuses to give it, the landlord must give the tenant a written statement of the reasons why consent was refused. If the landlord does not respond to the request and so does not actually give consent, or the landlord refuses to give the consent within a reasonable time, the consent is taken to have been withheld. In any court proceedings, it is for the landlord to show that it was not unreasonable to withhold consent (or to impose any condition – see paragraph 18.26 below).

18.19 The provisions of the Housing Act 1980 do not apply where the tenant has been given notice that possession might be recovered under certain cases (cases are grounds on which possession might be recovered under housing legislation) or that the tenancy is to be a protected shorthold tenancy.

What is a relevant improvement?

18.20 An 'improvement' means any alteration in or addition to premises and includes:

- any addition to or alteration in a landlord's fittings and fixtures
- any addition or alteration connected with the provision of services to the premises
- the erection of a wireless or television aerial; and
- the carrying out of external decoration (although in certain circumstances this will not be included in the definition).

18.21 An improvement to premises is a relevant improvement if, having regard to the disability which the disabled person concerned has, it is likely to make it easier for the disabled person to enjoy the premises. The sorts of improvements which might fall within the scope of this provision will depend upon the nature of an individual's disability and the effect upon him of that disability. For example, a disabled person with a mobility impairment may need a grab rail in his accommodation to enable him to move about the premises effectively. This is potentially a 'relevant' improvement. Many of these improvements will not harm the landlord's interests and may in some cases enhance them.

When will withholding consent be 'unreasonable'?

18.22 Neither the Housing Acts nor the amended DDA explicitly state when consent will be unreasonably withheld. It will depend upon all the circumstances of the particular case. However, when considering the question of 'reasonableness' in relation to relevant improvements, landlords should give due weight in particular to the needs of the disabled person for whom the improvement has been requested. This should be balanced against any other factors to be taken into account.

A couple and their daughter live in a two-storey apartment in a large block of flats. The couple ask the landlord for his consent to carry out a large programme of work to enable their daughter, who is a newly disabled wheelchair user, to move back into the family home. The renovations will require building, plumbing and electrical work over an eight-week period and will cause noise, disruption and inconvenience to the other residents during this time. However, without the work being done the negative effect on the life of the disabled person will be substantial. The landlord agrees in the circumstances to give consent for the work to be carried out but limits the work to between 9am and 5pm on weekdays in order to minimise the disruption to other residents. This example could apply both to tenants covered by the Housing Acts and those covered by the amended DDA.

18.23 The Housing Acts lay down factors to be taken into account when determining whether or not it is unreasonable to withhold consent to an improvement. These factors are:

- the extent to which the improvement would make the dwelling house less safe for occupiers
- the extent to which the improvement would cause the landlord to incur expenditure which he would otherwise be unlikely to incur; and
- the extent to which the improvement would reduce the price of the dwelling house if sold or the rent to be obtained.

18.24 The amended DDA does not set out any factors which might be taken into account in determining whether or not it is unreasonable to withhold consent but the factors listed in paragraph 18.23 above are also likely to be relevant to improvements under the amended DDA.

18.25 In addition, and without intending to be exhaustive, the following are also some of the factors which should be taken into account when considering whether or not it would be unreasonable to withhold consent for relevant improvements for disabled occupiers under either the Housing Acts or the amended DDA:

- the impact upon the disabled person of any refusal of consent
- the ability of the tenant to pay for the improvement
- the scale of the proposed adaptations
- the feasibility of the works
- the length of the term remaining under the letting
- the nature of the tenancy (eg the type and length)

- the nature of the premises (eg their type, design, age and quality)
- the extent of any disruption and the effect on other occupiers of adjoining premises
- the effect of, and compliance with, planning and Building Regulations requirements; and
- the desirability or practicability of reinstatement of the premises at the end of the lease.

A disabled couple want to replace the bathroom in their rented accommodation with a walk-in shower. However, the nature of the water pressure in the building means that it would not be possible for a working shower to be installed. In these circumstances, the installation of the shower would not be feasible and it is likely to be reasonable for the landlord to withhold consent for the works.

Conditions attached to consent

18.26 The Housing Acts and the amended DDA provide that a landlord may attach a condition or conditions to his consent to the making of an improvement. Any condition should be reasonable. If a landlord gives consent to the making of an improvement subject to a condition which is unreasonable, the consent must be taken to have been unreasonably withheld. In any question as to whether the consent of the landlord was unreasonably withheld, or a condition imposed by the landlord unreasonable, it is for the landlord to show that it was not.

18.27 If the tenant fails to comply with a reasonable condition imposed by the landlord on the making

of a relevant improvement, the failure is to be treated as a breach by the tenant of an obligation of his tenancy. This could have serious consequences, and may lead to the repossession of the premises.

18.28 The Housing Acts and the amended DDA do not state what conditions it would or would not be reasonable to attach to any consent. Whether a condition is likely to be reasonable or not will depend upon all the circumstances of the case. For example, it is likely to be reasonable to attach a condition of reinstatement where the improvement proposed would substantially reduce the value of the dwelling house. It is not likely to be reasonable to attach such a condition where the improvement would increase the value of the dwelling house or be cost-neutral.

18.29 Conditions which are likely to be reasonable to attach include requirements that the tenant:

- obtains any necessary planning permission and other statutory consents
- carries out the improvements in accordance with the plans and specifications approved by the landlord
- allows the landlord a reasonable opportunity to inspect the improvements
- reimburses the landlord's reasonable costs incurred in connection with the giving of consent; or
- is responsible for paying for and arranging ongoing maintenance.

A wheelchair user who is a private tenant of a furnished flat asks his landlord for permission to

install a new shower to replace the existing inaccessible one. The landlord agrees to give consent on condition that the shower is of the same quality and colour scheme as the existing one. This is likely to be a reasonable condition to attach.

A recently disabled woman wishes to install a walk-in shower in her rented accommodation. The plumbing and layout of the building's walls and floors would make this difficult to achieve without substantial modification to the premises and the removal of the bath. The removal of the bath would also make it more difficult to let the property in the future, as it is usually let to families, who generally prefer baths. The landlord considers withholding consent but first meets with the tenant who explains her need for the shower. In view of the impact which the refusal would have on the tenant's life, the landlord agrees to give consent subject to the tenant reinstating the bathroom features at the end of the tenancy. This is likely to be a reasonable condition to attach.

What if a landlord needs consent from a third party to making improvements?

18.30 A landlord may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage) under which he cannot alter the premises or give consent for others to alter the premises without a third-party's consent. Where a landlord has received a request for consent to make a relevant improvement, it would be advisable for him to seek consent from the third party. If this consent is refused, it is likely to be

reasonable for the landlord to refuse consent for the tenant to make the relevant improvement.

What if a landlord needs consent from a superior landlord to making improvements?

18.31 A landlord may himself have a superior landlord without whose consent he cannot alter premises or give consent for others to alter them. Where a landlord has received a request for consent to make a relevant improvement, he will need to seek consent from the superior landlord. If this consent is refused, it is likely to be reasonable for the landlord to refuse consent for the tenant to make the relevant improvement.

Who has the right to make improvements?

18.32 It is only the tenant of the dwelling house who has the right not to have a request to make an improvement unreasonably withheld and who will then have the right to make the improvement. However, the improvement does not have to be for the tenant themselves – it may be for any disabled person who is lawfully occupying (or going to occupy) the dwelling house (for example, a member of the tenant's family).

What do these provisions mean in practice?

18.33 Where, following a request from a tenant, a landlord has unreasonably withheld consent to a relevant improvement, the landlord's consent will be taken as having been given. In addition, where the landlord has neither given nor refused consent within a reasonable time following a written request, consent will be taken as having been given. It would be possible in these circumstances

for a tenant to go ahead and make the improvement.

- 18.34 Before doing so, however, the tenant should be certain that the landlord has acted unreasonably. This is an objective test – it is not enough simply for the tenant himself to believe that a landlord has been unreasonable. Where a court is asked to determine whether the landlord’s decision is reasonable, it would need to consider whether a ‘reasonable person’, knowing all the relevant facts, and taking into account all the circumstances, would conclude that the withholding of consent was unreasonable. It would be advisable for any tenant who is considering making an improvement in these circumstances to seek expert advice before doing so.

What does the 1927 Act say about withholding consent?

- 18.35 Section 19(2) of the Landlord and Tenant Act 1927 applies to all leases (other than those which are secure, protected or statutory tenancies, and certain agricultural and mining leases) which contain a covenant, condition or agreement against the making of improvements without licence or consent. Where such a condition is in a lease, it will be deemed to be subject to a proviso that the landlord’s licence or consent to make improvements is not to be unreasonably withheld. The effect of this is that where a landlord withholds his consent to improvements unreasonably, consent is taken to have been given, and the tenant can go ahead and make the improvements. The Act provides no specific guidance on when it might or might not be unreasonable to withhold consent.

18.36 The 1927 Act states that the landlord can require as a condition of consent the following:

- payment of a reasonable sum in respect of any damage or diminution in the value of the premises or any neighbouring premises belonging to the landlord
- payment of a reasonable sum in respect of any legal or other expenses properly incurred in connection with such licence or consent; and
- in the case of an improvement which does not add to the letting value, and where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was carried out.

18.37 The considerations outlined above at paragraphs 18.25 and 18.29, in relation to the reasonableness of withholding consent and of conditions attached to consent, apply equally in respect of relevant improvements under the 1927 Landlord and Tenant Act as they apply to relevant improvements under the Housing Acts and the amended DDA.

What if the lease contains an absolute prohibition on making any improvements?

18.38 Where there is a term in a lease which prohibits improvements from being made, the reasonable adjustment provisions in relation to premises provide a mechanism whereby the term may, in certain circumstances, be changed so that a tenant may make disability-related improvements. More detail is given of this in paragraph 15.42.

What if the lease is silent about improvements?

18.39 The improvement provisions in the Housing Acts, the 1927 Act, and the amended DDA do not affect the position where the lease says nothing either way about making improvements. In these circumstances, tenants can make changes to the leased premises so long as they do not thereby breach any other covenant and so long as those changes do not amount to 'waste' (ie alterations which would damage premises).

What happens if there is a dispute about consent to improvements?

18.40 How a dispute under these provisions is dealt with will depend upon the type of tenancy which is held and therefore which relevant legislation governs the procedure.

18.41 Where there has been a refusal to give consent, and the case is brought on the basis of section 19(2) of the Landlord and Tenant Act 1927, the amended DDA, or the wording of the lease itself, a tenant can apply to the county court under section 53 of the Landlord and Tenant Act 1954 for a declaration that the refusal to consent to an improvement was unreasonable.

18.42 Protected, statutory or secure tenants can also seek a declaration from the county court but this would be under the relevant provisions of the Housing Acts.

18.43 If a landlord were to bring possession proceedings or an action for damages against a tenant who had gone ahead with improvements even though the landlord had refused consent, the tenant could defend the case on the basis that the landlord had

acted unreasonably in refusing consent. The court could be asked to make a declaration as to whether the refusal was unreasonable.

18.44 The Disability Rights Commission has established an independent conciliation service for disputes under certain Parts of the Disability Discrimination Act with a view to promoting settlement of such disputes otherwise than through the courts. This conciliation service also covers disputes relating to relevant improvements under any of the Acts mentioned in this chapter. Details of the Disability Rights Commission can be found in Chapter 20.

19 Works to rented dwelling houses – Scotland only

Introduction

- 19.1 A disabled person may need to carry out work in order to remain comfortably in their home. There is no obligation in the premises provisions of the Disability Discrimination Act for a landlord to make any alterations to physical features of rented houses (see Chapter 15, paragraph 15.13). There is provision, however, enabling a tenant in certain circumstances to obtain consent to carry out disability-related improvements themselves by way of a reasonable adjustment in the form of a change to a term of the tenancy. This only applies where a term of the letting prohibits alterations or improvements being made to the premises. In these circumstances, the provisions in this chapter will not apply, and tenants will have to rely upon the reasonable adjustment provisions. More detail is provided on the reasonable adjustment provisions in Chapter 15.
- 19.2 Many tenants have statutory rights in relation to carrying out work to their homes. This chapter is divided into two parts, each dealing with different forms of tenancy. It is important to be clear what type of tenancy exists when considering what rights a tenant has.
- 19.3 Tenants in the social rented sector must apply to their landlord for consent to carry out any work on their home and landlords cannot unreasonably withhold consent for the work. This right is contained in the Housing (Scotland) Act 2001 (the

2001 Act). For further information on the application of the 2001 Act in relation to disabled occupants, see paragraphs 19.18 to 19.41.

19.4 Tenants in private rented accommodation can apply to their landlord for consent to carry out work which will make the house suitable for the accommodation, welfare or employment of a disabled occupant, and again a landlord cannot unreasonably withhold consent to the request. This right is contained in the Housing (Scotland) Act 2006 (the 2006 Act). For further information on the application of the 2006 Act in relation to disabled occupants, see paragraphs 19.43 to 19.64.

s 53A(1F)

19.5 The Equality Act 2006 amends the DDA 1995 (the amended DDA) to give the Disability Rights Commission the power to prepare and issue Codes of Practice giving practical guidance to landlords and tenants of rented housing in Scotland in respect of disability-related works. This Code, and in particular this chapter, has been issued under this power. In any case where it appears relevant, the court must take this Code of Practice into account.

19.6 The guidance contained in this chapter only applies in relation to Scotland. Chapter 18 deals with the parallel provisions which are in place in England and Wales.

19.7 This chapter of the Code:

- explains when the 2001 Act and the 2006 Act apply
- outlines the provisions relating to carrying out disability-related work in the 2001 Act
- outlines the provisions relating to carrying out disability-related work in the 2006 Act

- provides guidance on what factors need to be taken into account in determining when consent is unreasonably withheld, and when conditions attached to consent might be reasonable or unreasonable in relation to each Act.

19.8 As indicated above, the focus of this chapter of the Code is on the right to carry out work described in the 2001 and 2006 Acts, as that right relates specifically to a disabled person. In particular, the rights contained in the 2001 Act do not relate solely to the rights of disabled occupiers of houses, but this Code deals only with the rights of such disabled occupiers.

19.9 Whilst this chapter provides an overview of the two Housing Acts in relation to work needed to accommodate disability, this is a very complicated area of law, and disabled people who wish to use these provisions are advised to seek expert assistance before doing so.

Which Housing Act is relevant?

19.10 It is important to be clear about what type of tenancy exists and therefore which of the Housing Acts apply, as there are important differences in the two pieces of legislation.

19.11 The 2001 Act, sections 28 to 31, and Part 1 of Schedule 5 (as amended by the 2006 Act) apply to Scottish secure tenancies and short Scottish secure tenancies.

19.12 A Scottish secure tenancy exists where:

- the house is let as a separate dwelling
- the landlord is a local authority, a registered social landlord, or Scottish Water

- if the landlord is a co-operative housing association, the tenant is a member of the association
- the house is the tenant's only or principal home.

19.13 A short Scottish secure tenancy exists where:

- a tenancy would otherwise be a Scottish secure tenancy
- the tenancy is for six months or more
- one of the particular provisions of Schedule 6 of the 2001 Act applies; and
- the necessary notice advising the tenant that the tenancy is a short Scottish secure tenancy has been served on the tenant.

19.14 For information about the 2001 Act and the rights of disabled occupants please read paragraphs 19.18 to 19.41.

19.15 The Housing (Scotland) Act 2006, sections 52 and 53, apply to all tenancies of any house let for human habitation other than Scottish secure tenancies and short Scottish secure tenancies.

19.16 For information about the 2006 Act and the rights of disabled occupants please read paragraphs 19.43 to 19.64.

HOUSING (SCOTLAND) ACT 2001

What does the 2001 Act say about withholding consent?

19.17 A tenant cannot carry out any work on his house without the landlord's consent. The tenant must

apply for such consent and the landlord cannot unreasonably withhold consent to the application.

- 19.18 The term 'house' is defined as including any part of a building occupied as a dwelling including a flat, together with any garden or outhouses attached to the dwelling.
- 19.19 There is no specific right for disabled tenants, or tenants on behalf of disabled occupants, of a house to carry out work related to their disability. However, the right to apply for consent to carry out work would clearly include consent in relation to any disability-related work. See paragraph 19.21 for the definition of work.
- 19.20 When making an application, the tenant must specify exactly what work is intended. The landlord can then consent to the work, consent subject to the imposition of reasonable conditions, or refuse consent so long as the refusal is not unreasonable. The landlord must reply to the tenant with his decision within one month of the application being made. Both the application and the reply should be in writing.

What does 'work' mean?

- 19.21 'Work' is defined as including:
- alterations, improvements or enlargements of the house or of any fittings or fixtures
 - addition of new fixtures and fittings
 - erection of a garage, shed or other structure.
- 19.22 This definition is not exhaustive. It explains what can be included within the definition, but does not restrict it to only those actions listed. The sorts of work related to disability which might fall within

the scope of this provision will depend upon the nature of an individual's disability and the effect upon him of that disability. For example, a disabled person with a mobility impairment may need a grab rail in his accommodation to enable him to move about the premises effectively. This is potentially a piece of work covered by the legislation. Many of these improvements will not harm the landlord's interests and may in some cases enhance them.

When will withholding consent be 'reasonable' or 'unreasonable'?

- 19.23 The 2001 Act does not explicitly state when withholding consent will be reasonable and when it will not. It will depend upon all the circumstances of the particular case. However, when considering the question of 'reasonableness' in relation to disability-related work, landlords should give due weight in particular to the needs of the disabled person for whom the work has been requested. This must be balanced against any other factors to be taken into account.

A couple and their daughter live in a two-storey apartment in a large block of flats. The couple ask the landlord for his consent to carry out a large programme of work to enable their daughter, who is a newly disabled wheelchair user, to move back into the family home. The renovations will require building, plumbing and electrical work over an eight-week period and will cause noise, disruption and inconvenience to the other residents during this time. However, without the work being done the negative effect on the life of the disabled person will be substantial.

The landlord agrees in the circumstances to give consent for the work to be carried out but limits the work to between 9am and 5pm on weekdays in order to minimise the disruption to other residents.

19.24 The 2001 Act allows an appeal against a landlord's refusal of consent (see paragraph 19.36 for more details). When deciding whether a landlord's refusal of consent is reasonable or unreasonable, the court must take account of:

- the safety of the occupiers of the house or of any other premises
- any expenditure which the landlord is likely to incur as a result of the work
- whether the work is likely to reduce the value of the house or of any premises it forms part of, or will make the house or premises less suitable for selling or letting
- any effect the work is likely to have on the size of the accommodation provided by the house
- the terms of this Code of Practice.

Given that courts must consider these issues, it is advisable for landlords also to consider them when making decisions on consent to work.

19.25 As previously noted, the 2001 Act does not directly address the issue of work required to accommodate disabled occupants. However, the requirement for the court, and therefore for landlords, to take account of this Code means that landlords and courts must, when considering whether a landlord's decision is reasonable, take account of:

- the nature of an individual's disability
- the effect upon him of that disability
- the relationship between the work which the tenant has applied to carry out and the disability
- the disabled occupant's needs; and
- the effect upon the wellbeing of the disabled person of carrying out or not carrying out the work.

These issues need to be weighed carefully against any other factors to be taken into account.

19.26 In addition, and without intending to be exhaustive, the following are also some of the factors which should be taken into account when considering whether or not consent has been unreasonably withheld for work required by disabled occupiers:

- the impact upon the disabled person of any refusal of consent
- the ability of the tenant to pay for the work
- the scale of the proposed adaptations
- the feasibility of the works
- the length of the term remaining under the letting
- the nature of the tenancy (eg the type and length)
- the nature of the premises (eg their type, design, age and quality)
- the extent of any disruption and the effect on other occupiers of adjoining premises

- the effect of, and compliance with, planning and Building Regulations requirements; and
- the desirability or practicability of reinstatement of the premises at the end of the lease.

A disabled couple want to replace the bathroom in their rented accommodation with a walk-in shower. However, the nature of the water pressure in the building means that it would not be possible for a working shower to be installed. In these circumstances, the installation of the shower would not be feasible and it is likely to be reasonable to withhold consent for the works.

Conditions attached to consent

19.27 The 2001 Act explicitly provides that a landlord may attach conditions to his consent to any work. Any condition should be reasonable. For example, it is likely to be reasonable to attach a condition of reinstatement where the improvement proposed would substantially reduce the value of the dwelling house. It is not likely to be reasonable to attach such a condition where the improvement would increase the value of the dwelling house or be cost-neutral.

19.28 The issues to be considered when deciding whether to attach conditions, or which conditions are reasonable, are the same as those for deciding whether to grant consent. These are:

- the safety of the occupiers of the house or of any other premises
- any expenditure which the landlord is likely to incur as a result of the work

- whether the work is likely to reduce the value of the house or of any premises it forms part of, or will make the house or premises less suitable for selling or letting
- any effect the work is likely to have on the size of the accommodation provided by the house
- the terms of this Code of Practice.

19.29 The 2001 Act also states that a condition may be imposed specifying the standard to which any work must be carried out. When considering whether to attach such a condition, the landlord must have regard to the age and condition of the house and the likely cost of complying with the condition. Any such condition must also be reasonable.

19.30 Other conditions which are likely to be reasonable to attach include requirements that the tenant:

- obtains any necessary planning permission and other statutory consents
- carries out the work in accordance with the plans and specifications approved by the landlord
- allows the landlord a reasonable opportunity to inspect the work; or
- is responsible for paying for and arranging ongoing maintenance.

A wheelchair user who is a private tenant of a furnished flat asks his landlord for permission to install a new shower to replace the existing inaccessible one. The landlord agrees to give consent on condition that the shower is of the

same quality and colour scheme as the existing one. This is likely to be a reasonable condition to attach.

A recently disabled woman wishes to install a walk-in shower in her rented accommodation. The changes to the plumbing and layout of the building's walls and floors would make this difficult to achieve without substantial modification to the premises and the removal of the bath. This removal would also make it more difficult to let the property in the future, as it is usually let to families, who generally prefer baths. The landlord considers withholding consent but first meets with the tenant who explains her need for the shower. In view of the impact which the refusal would have on the tenant's life, the landlord agrees to give consent subject to the tenant reinstating the bathroom features at the end of the tenancy. This is likely to be a reasonable condition to attach.

What if a landlord needs consent from a third party to carry out work?

- 19.31 A landlord may be bound by the terms of an agreement or other legally binding obligation under which he cannot alter the premises or give consent for others to alter the premises without a third-party's consent.
- 19.32 The 2001 Act does not explicitly deal with this matter. However, it would be reasonable for a landlord to apply for any third-party consents where such application is required to be made by the landlord. If the third-party consent has been refused, it is likely to be reasonable for the

landlord to refuse consent for the tenant to carry out the work.

Who has the right to carry out work?

19.33 It is only the tenant of the house who has the right to apply to carry out work and not to have consent for such an application unreasonably withheld, and who will then have the right to carry out the work. However, the disabled person needing the work may be a disabled tenant or a disabled person who is lawfully occupying (or going to occupy) the house, for example a member of the tenant's family.

What if the lease contains an absolute prohibition on carrying out work or is silent on the issue?

19.34 This will make no difference because the 2001 Act inserts the duty to apply for consent to carry out work and the right not to have consent unreasonably withheld, into every Scottish secure tenancy or short Scottish secure tenancy.

What do these provisions mean in practice?

19.35 The tenant must apply for consent to carry out work on his home. His application must detail the work to be carried out. The landlord must reply to that application within one month. If the landlord fails to reply to the tenant's request within one month or fails to set out reasons for refusing consent, he will be taken to have consented to the work. The tenant may therefore carry out the work.

What happens if there is a dispute about consent to work?

- 19.36 The 2001 Act states that if a tenant is aggrieved by the landlord's decision to refuse consent, or by any conditions attached to the granting of consent, he can raise a summary application in the Sheriff Court. If the court believes the refusal of consent, or the condition attached, to be unreasonable it must order the landlord to consent or to withdraw the condition. The time limit for raising such an action is 21 days from the landlord's decision.
- 19.37 The Disability Rights Commission has established an independent conciliation service for disputes under parts of the Disability Discrimination Act with a view to promoting settlement of such disputes otherwise than through the courts. This conciliation service also covers disputes relating to work under both of the Housing Acts mentioned in this chapter. Details of the Disability Rights Commission can be found in Chapter 20.

Is there any right to be reimbursed for the costs of work, or to be compensated for improvements to the house?

- 19.38 A right to reimbursement and to compensation does exist in some circumstances.
- 19.39 When a tenancy comes to an end, the landlord can make a payment to the tenant in relation to any improvement work he carried out, which the landlord had consented to. Not all work may be improvement work. The amount of such a payment is a matter for the landlord but cannot be more than the actual cost of the work less any grant the tenant received.

19.40 The 2001 Act also makes provision for a right to compensation for improvements. The details of the compensation scheme are contained in The Scottish Secure Tenants (Compensation for Improvements) Regulations 2002. These Regulations specify work, known as 'qualifying improvement work', which attracts a right to compensation. Again, this right does not relate specifically to work carried out to accommodate disability, but included in the list of qualifying work is the installation or replacement of a bath or shower, heating, a wash hand basin or toilet and kitchen work surfaces, amongst others. Where such work has been carried out a formula is given for calculating compensation, payable at the end of the tenancy period. No payment will be less than £100 or more than £4,000. There are a number of qualifications to this right and detailed advice should be taken on its application.

Can the work carried out affect the rent?

19.41 The 2001 Act states that no account can be taken of any improvement in the value of the house, or improvement in the amenities in the house, resulting from the work carried out by the tenant when setting that tenant's rent.

HOUSING (SCOTLAND) ACT 2006

19.42 Before reading this section of the chapter it is important to be clear on the type of tenancy covered by the 2006 Act. See paragraph 19.15 for further information.

What does the 2006 Act say about withholding consent?

19.43 The 2006 Act gives a tenant the right to apply to their landlord to carry out any work which the

tenant considers necessary to make the house suitable for the accommodation, welfare or employment of any disabled person living in the house, or intending to live in it, as their main home. The term 'welfare' includes the general wellbeing of the disabled person. The landlord cannot withhold his consent unreasonably. See paragraph 19.46 for the definition of 'work'.

19.44 The term 'house' is defined as any living accommodation which can be occupied as a separate dwelling. This does not include mobile homes or any accommodation which is not a building. 'House' includes the interior and exterior of the accommodation and any facilities owned in common with others, as well as any garden or outhouses attached to the accommodation, even where those are shared with others.

19.45 The tenant is required to make an application to the landlord to allow work to be carried out. Such an application must specify exactly what work is intended. The landlord can then consent to the work, consent subject to the imposition of reasonable conditions, or refuse consent so long as the refusal is not unreasonable. The landlord must reply to the tenant with his decision within one month of the request being made (for information on the consequences of the landlord not replying in time, see paragraph 19.61).

What does 'work' mean?

19.46 In the 2006 Act 'work' is defined as including:

- maintenance
- repair; and
- improvement.

19.47 This definition is not exhaustive. It explains what can be included within the definition, but does not restrict it to only those actions listed. The sorts of work which might fall within the scope of this provision will depend upon the nature of an individual's disability and the effect upon him of that disability. For example, a disabled person with a mobility impairment may need a grab rail in his accommodation to enable him to move about the premises effectively. This is potentially a piece of work covered by the legislation. Much of this work will not harm the landlord's interests and may in some cases enhance them.

When will withholding consent be 'reasonable' or 'unreasonable'?

19.48 The 2006 Act states that it is reasonable for a landlord to refuse consent to an application to carry out work if carrying out the work would make the landlord liable to a legal sanction or remedy. However, where the landlord can take steps to avoid such a liability so that he can then consent to the work, he must take such steps where it is reasonable to do so. For example, if he needs permission for the work from his mortgage holder, then he must take reasonable steps to get that permission. The landlord can recover the expenses of taking any such step from the tenant, even if he then decides not to grant consent.

19.49 The 2006 Act lists issues which a landlord may wish to consider when deciding whether it is reasonable or unreasonable to consent to work. These are:

- the disabled person's disability

- whether the work proposed is necessary to make the house suitable for the disabled occupant
- the safety of the occupiers of the house or any other premises
- any costs which the landlord is likely to incur as a result of the proposed work
- whether the proposed work is likely to reduce the value of the house or other parts of the premises
- whether the proposed work is likely to make the house or other parts of the premises less suitable for sale or let
- whether the house can be reinstated to its previous condition
- the terms of this Code.

A couple and their daughter live in a two-storey apartment in a large block of flats. The couple ask the landlord for his consent to carry out a large programme of work to enable their daughter, who is a newly-disabled wheelchair user, to move back into the family home. The renovations will require building, plumbing and electrical work over an eight-week period and will cause noise, disruption and inconvenience to the other residents during this time. However, without the work being done the negative effect on the life of the disabled person will be substantial.

The landlord agrees in the circumstances to give consent for the work to be carried out but limits the work to between 9am and 5pm on weekdays in order to minimise the disruption to other residents.

19.50 As well as these issues listed in the legislation, when considering whether consent should be given to any proposed work, landlords should also give due weight to:

- the nature of an individual's disability
- the effect upon him of that disability
- the relationship between the work which the tenant has applied to carry out and the disability
- the disabled occupant's needs
- the effect upon the wellbeing of the disabled person of carrying out or not carrying out the work
- the impact upon the disabled person of any refusal of consent
- the ability of the tenant to pay for the work
- the scale of the proposed adaptations
- the feasibility of the works
- the length of the term remaining under the letting
- the nature of the tenancy (eg the type and length)
- the nature of the premises (eg their type, design, age and quality)
- the extent of any disruption and the effect on other occupiers of adjoining premises
- the effect of, and compliance with, planning and Building Regulations requirements.

These issues need to be weighed carefully against any other factors to be taken into account.

A disabled couple want to replace the bathroom in their rented accommodation with a walk-in shower. However, the nature of the water pressure in the building means that it would not be possible for a working shower to be installed. In these circumstances, the installation of the shower would not be feasible and it is likely to be reasonable to withhold consent for the works.

Conditions attached to consent

19.51 The 2006 Act explicitly provides that a landlord may attach a condition or conditions to his consent to carry out work. Any condition should be reasonable. For example, it is likely to be reasonable to attach a condition of reinstatement where the improvement proposed would substantially reduce the value of the dwelling house. It is not likely to be reasonable to attach such a condition where the improvement would increase the value of the dwelling house or be cost-neutral.

19.52 The Act lists issues for a landlord to consider when deciding whether to attach conditions, or which conditions are reasonable. These are the same issues as those for deciding whether to grant consent. The issues are:

- the disabled person's disability
- whether the work proposed is necessary to make the house suitable for the disabled occupant
- the safety of the occupiers of the house or any other premises
- any costs which the landlord is likely to incur as a result of the proposed work

- whether the proposed work is likely to reduce the value of the house or other parts of the premises
- whether the proposed work is likely to make the house or other parts of the premises less suitable for sale or let
- whether the house can be reinstated to its previous condition
- the terms of this Code.

19.53 The 2006 Act also states that a condition may be imposed specifying the standard to which any work must be carried out. When considering whether to attach such a condition, the landlord must have regard to the age and condition of the house and the likely cost of complying with the condition. A condition may also be imposed requiring the tenant to reinstate the house to its previous condition at the end of the tenancy. Such conditions must still be reasonable before they can be applied.

19.54 A landlord can also attach a condition, if failing to comply with that condition would make the landlord liable to a legal sanction or remedy. However, where the landlord can take steps to avoid such a liability without attaching the condition, he must take such steps where it is reasonable to do so. The landlord can recover the expenses of taking any such steps from the tenant.

19.55 Conditions which are likely to be reasonable to attach include requirements that the tenant:

- obtains any necessary planning permission and other statutory consents

- carries out the work in accordance with the plans and specifications approved by the landlord
- allows the landlord a reasonable opportunity to inspect the work; or
- is responsible for paying for and arranging ongoing maintenance.

A wheelchair user who is a private tenant of a furnished flat asks his landlord for permission to install a new shower to replace the existing inaccessible one. The landlord agrees to give consent on condition that the shower is of the same quality and colour scheme as the existing one. This is likely to be a reasonable condition to attach.

A recently disabled woman wishes to install a walk-in shower in her rented accommodation. The changes to the plumbing and layout of the building's walls and floors would make this difficult to achieve without substantial modification to the premises and the removal of the bath. This removal would also make it more difficult to let the property in the future, as it is usually let to families, who generally prefer baths. The landlord considers withholding consent but first meets with the tenant who explains her need for the shower. In view of the impact which the refusal would have on the tenant's life, the landlord agrees to give consent subject to the tenant reinstating the bathroom features at the end of the tenancy. This is likely to be a reasonable condition to attach.

What if a landlord needs consent to carry out work from a third party?

- 19.56 A landlord may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage) under which he cannot alter the premises or give consent for others to alter the premises without a third-party's consent.
- 19.57 The 2006 Act states that where it is the landlord who must apply for such consent, the tenant can request him to do so. The landlord must then take reasonable steps to acquire the consent and can recover any expenses incurred in doing so from the tenant. If the third-party consent has been refused, it is likely to be reasonable for the landlord to refuse consent for the tenant to carry out the work. However, the landlord cannot use the need to obtain such third-party consent as a reason to refuse his own consent to the work or to attach any condition to his consent.

Who has the right to carry out work?

- 19.58 It is only the tenant of the house who has the right to apply to carry out work and not to have consent for such an application unreasonably withheld, and who will then have the right to carry out the work. However, the disabled person needing the work to be carried out may be a disabled tenant or a disabled person who is lawfully occupying (or going to occupy) the house, for example a member of the tenant's family.

What if the lease contains an absolute prohibition on carrying out work or is silent on the issue?

- 19.59 The 2006 Act states that a lease or other agreement cannot remove or modify the right to

apply to carry out work, or remove the landlord's duty not to unreasonably withhold consent. These rights and duties exist regardless of the terms of the lease or agreement.

What do these provisions mean in practice?

19.60 The tenant must apply for consent to carry out work on his home. His application must detail the work to be carried out. The application does not need to be made in writing, but it would be good practice to ensure that a written record of the request is created. The landlord must reply to that application within one month. If the landlord fails to reply to the tenant's request to carry out work within one month, he will be taken to have refused consent. The tenant therefore cannot proceed with the work without applying to a court for permission (see paragraph 19.61).

What happens if there is a dispute about consent to work?

19.61 If a tenant is aggrieved by the landlord's decision to refuse consent, or by any conditions attached to the granting of consent, the tenant can raise a summary application in the Sheriff Court. If the court believes the refusal of consent, or the condition attached, to be unreasonable it must order the landlord to consent or to withdraw the condition. The time limit for raising such an action is six months from the landlord's decision.

19.62 The Disability Rights Commission has established an independent conciliation service for disputes under parts of the Disability Discrimination Act with a view to promoting settlement of such disputes other than through the courts. This conciliation service also covers disputes relating to work under both of the Housing Acts mentioned

in this chapter. Details of the Disability Rights Commission can be found in Chapter 20.

Is there any right to be reimbursed for the costs of work, or to be compensated for improvements to the house?

- 19.63 Tenants under the 2006 Act have no rights under the legislation to be reimbursed for the cost of work, or to be compensated if the work improves the property. It is, however, open to the landlord and tenant to agree contractually to reimbursement or compensation.

Can the work carried out affect the rent?

- 19.64 The 2006 Act is silent on this matter. The rent payable and any system for reviewing that rent should be contained in each individual tenancy agreement. In some instances the Rent (Scotland) Acts contain specific arrangements for seeking changes to the rent if the landlord and tenant cannot agree.

20 Other provisions under the Act

Introduction

20.1 A number of other provisions of the Act are relevant to understanding the protection which the Act affords disabled people in respect of services and premises. These provisions also assist those with duties under Part 3 of the Act to appreciate the extent of their responsibilities under the legislation. In this chapter, 'service or premises provider' is used to mean all the areas covered in the Code, other than the provisions relating to improvements (or works) to premises.

Victimisation

20.2 Victimisation is a special form of discrimination covered by the Act. It applies whether or not the person victimised is a disabled person. For the purposes of Part 3 of the Act, victimisation is treated as discrimination. There is also specific provision in relation to victimisation and the reasonable adjustment duty imposed on controllers of let premises – this is detailed in Chapter 15 at paragraphs 15.49 to 15.52.

20.3 The Act says that a person discriminates against another person (the victim) if he or she treats the victim less favourably than he or she treats (or would treat) other people in the same circumstances because the victim has:

- brought proceedings under the Act (whether or not proceedings are later withdrawn); or

s 55,
s 19,
s 21B,
s 21F,
s 22

s 55(1),
s 55(2)(a),
s 55(3)

s 55(1),
s 55(2)(b),
s 55(3)

- given evidence or information in connection with such proceedings; or
- done anything else under or by reference to the Act; or
- alleged someone has contravened the Act (whether or not the allegation is later dropped),

or because the person believes or suspects that the victim had done or intends to do any of the above things.

A non-disabled person acts as a witness in a complaint by a disabled person of disability discrimination by a police officer. Later, in retaliation, other police officers refuse to provide local crime prevention services, which the police provide to the public, to the non-disabled person. This is victimisation and is likely to be unlawful.

s 55(4)

20.4 It is not victimisation to treat a person less favourably because that person has made an allegation which was false and not made in good faith.

A disabled person makes an allegation in a local newspaper that a local private members' club discriminates against disabled people. That allegation is untrue and is made without any foundation as part of a personal vendetta against the club manager. The private members' club subsequently bars the disabled person from the club. In the circumstances, this is not victimisation and is likely to be lawful.

Aiding unlawful acts

20.5 The Act says that a person who knowingly helps someone else to do something made unlawful by the Act is also to be treated as having done the same kind of unlawful act.

s 57(1)

A bar owner instructs his bartender employee not to serve a group of people with learning disabilities. The employee knows that this is likely to be against the law, but feels compelled to comply with the instruction. When the disabled people request service, the bartender refuses to serve them. It is likely that the bar owner is acting unlawfully and the bartender may also be liable for aiding the owner's unlawful act.

20.6 A person does not knowingly aid someone else to do something unlawful if:

s 57(3)

- that other person makes a statement to him or her that it would not be unlawful because of any provision of the Act; and
- he or she acts in reliance on that statement; and
- it is reasonable to rely on the statement.

20.7 A person who knowingly or recklessly makes such a statement which is false or misleading in a material respect is guilty of a criminal offence and will be liable on conviction to a fine up to level 5 on the standard scale (£5,000 at present).

ss 57(4)–(5)

The owner of a small newsagent's shop tells his staff that the provisions of the Act on providing services do not apply to small businesses. The

owner knows this is not legally correct. He instructs his staff to refuse to serve disabled customers who are patients at a psychiatric clinic next door. Relying on the owner's statement, the staff follow those instructions. It is likely that the shop owner is acting unlawfully and has committed a criminal offence, but it is unlikely that the staff are liable for knowingly aiding an unlawful act.

Liability for employees' and agents' acts

s 58(1),
s 57(2)

20.8 Service and premises providers may be employers. The Act says that employers are responsible for anything done by their employees in the course of their employment. It is not a defence for the employer simply to show that the act took place without its knowledge or approval. If the employer is liable for the act of an employee in this way, the employee might also be treated as having knowingly aided the employer to do the act (see paragraphs 20.5 and 20.6 above).

A waiter in a café refuses to serve a disabled customer whom he knows has had tuberculosis in the past. He wrongly believes that the customer still has an infectious disease. It is likely that the refusal of service is unlawful. Although the owner of the café is unaware that this is happening, the owner may be liable under the Act. The waiter might also be liable if he has knowingly aided the employer.

s 58(5)

20.9 If a claim under the Act is made against an employer based on anything done by an employee, it is a defence that the employer took such steps as were reasonably practicable to

prevent such acts. It is important that employers should develop policies on disability matters and communicate these to their employees. All staff should be made aware that it is unlawful to discriminate against disabled people (see Chapter 4, and in relation to premises, Chapter 13, for further information on steps which can be taken in relation to staff training and avoiding discrimination).

Unknown to her employer, the receptionist in an estate agent refuses to give details of houses for rent to a client with a mental health condition. The estate agent has issued clear instructions to its staff about their obligations under the Act, has provided disability awareness training, and regularly checks that staff are complying with the law. It is likely that the receptionist has acted unlawfully but that her employer will have a defence under the Act.

20.10 Employers are also liable for anything done by their agents, if done with their authority. That authority may be expressed or implied and may have been given before or after the act in question. The agent may also be taken to have aided the employer to commit an unlawful act.

Terms of agreements

20.11 Any term in an agreement is void (that is, unenforceable) if its effect is to:

- require someone to do something which would be unlawful under Part 3 of the Act
- exclude or limit the operation of Part 3; or
- prevent someone making a claim under Part 3.

ss 58(2)–(3),
s 57(2)

s 26(1)

20.12 However, an agreement to settle or compromise a claim brought under the Act is not affected by this rule.

A landlord's lease includes a term allowing a tenant to sub-let the premises, but the term forbids the tenant from sub-letting to people with learning disabilities. This term is not legally binding.

A travel agent accepts a booking from a disabled customer for a holiday at a hotel in the UK. The terms of booking exclude any liability of the travel agent or the hotel under the Act. This term is not legally binding.

What happens if there is a dispute under the Act?

20.13 A person who believes that a service or premises provider has unlawfully discriminated against them may bring civil proceedings. Those proceedings take place in the County Court in England and Wales (in Scotland, the Sheriff Court) or, in respect of group insurance services provided to employees, and in respect of employment services, an Employment Tribunal. Similar proceedings may also be brought against a person who has aided someone else to commit an unlawful act. Court action must be brought within six months of the alleged discrimination, or three months where the claim is made to an Employment Tribunal.

20.14 Separate provisions govern cases concerning a landlord's unreasonable withholding of consent to an improvement (or works) and these are

explained in Chapters 18 and 19. Claims relating to insurance services provided to employees, and employment services, are brought in the employment tribunal, and details about the tribunal can be found in the Code of Practice on employment and occupation. The paragraphs below on legal proceedings do not apply to these areas.

- 20.15 Before legal proceedings are begun, it may be sensible to make a complaint to see whether the issue can be determined to the satisfaction of both parties. In addition, a disabled person can request information relevant to his claim from the person against whom the claim is made. This is known as the 'questions procedure'. There is a standard form of questionnaire and accompanying booklet which explains how the procedure works. These are available from the Disability Rights Commission Helpline.
- 20.16 Even when legal proceedings have been brought, the defendant (or defender in Scotland) may wish to attempt to settle the matter through discussion with the complainant. Any discrimination may have been unintentional and the dispute may be capable of being resolved by negotiation.
- 20.17 The Disability Rights Commission (see paragraph 20.19 below) has established an independent conciliation service for disputes arising under Part 3 of the Act with a view to promoting the settlement of such disputes other than through the courts. The time limit for bringing an action in court is extended by two months when a person is referred to the conciliation service by the Commission.

**s 28 and
Sch 3, para 6(2)
as amended by
the Disability
Rights
Commission
Act 1999**

What happens if a dispute cannot be resolved?

s 25(2),
s 25(5)

20.18 If a dispute cannot be resolved by conciliation or agreement, and the complainant has brought legal proceedings, the matter will have to be decided by a court. If successful, a disabled person could be awarded compensation for any financial loss, including injury to feelings. The disabled person may also seek an injunction (in Scotland, an interdict) to prevent the service or premises provider repeating any discriminatory act in the future. The court may make a declaration as to the rights and responsibilities of the parties involved.

The Disability Rights Commission

20.19 The Disability Rights Commission has statutory powers to work towards the elimination of discrimination and to promote the equalisation of opportunity in respect of the provision of services to disabled people. In particular, the Commission:

- keeps the Act under review
- supplies assistance and support to disabled litigants under the Act (and also under the relevant provisions of housing legislation described in Chapters 18 and 19)
- provides information and advice to anyone with rights or obligations under the Act
- carries out formal investigations
- prepares new or revised Codes of Practice; and
- arranges independent conciliation of disputes under the legislation.

Disability
Rights
Commission
Act 1999

20

20.20 The Commission may be contacted at DRC Information, Freepost, MID 02164, Stratford upon Avon, CV37 9BR. For other contact details, please see paragraph 1.23 above.

Appendix A

The meaning of disability

This Appendix is included to aid understanding about who is covered by the Act. A Government publication, 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', is also available.

When is a person disabled?

A person has a disability if he has 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.

What about people who have recovered from a disability?

People who have had a disability within the definition are protected from discrimination even if they have since recovered (though those with past disabilities are not covered by the provisions relating to improvements to dwelling houses detailed in Chapters 18 and 19).

What does 'impairment' cover?

It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

What is a 'substantial' adverse effect?

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

What is a 'long-term' effect?

A long-term effect of an impairment is one:

- which has lasted at least 12 months; or
- where the total period for which it lasts is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected.

Effects which are not long term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, and the effects of temporary infections, from which a person would be likely to recover within 12 months.

What if the effects come and go over a period of time?

If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as

continuing if it is likely to recur; that is, if it is more probable than not that the effect will recur.

What are 'normal day-to-day activities'?

They are activities which are carried out by most people on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition. The test of whether an impairment affects normal day-to-day activities is whether it affects one of the broad categories of capacity listed in Schedule 1 to the Act. They are:

- mobility
- manual dexterity
- physical co-ordination
- continence
- ability to lift, carry or otherwise move everyday objects
- speech, hearing or eyesight
- memory or ability to concentrate, learn or understand; or
- perception of the risk of physical danger.

What about treatment?

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment).

In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (ie the impairment has been cured).

Does this include people who wear spectacles?

No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

Are there any other people who are automatically treated as disabled under the Act?

Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. In addition, people who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist, are automatically treated under the Act as being disabled. People who are not registered or certified as blind or partially sighted will be covered by the Act if they can establish that they meet the Act's definition of disability.

What about people who know their condition is going to get worse over time?

Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment is likely eventually to have a substantial adverse effect on such ability.

Are people with genetic conditions covered?

If a genetic condition has no effect on the ability to carry out normal day-to-day activities, the person is not covered. Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.

Are any conditions specifically excluded from the coverage of the Act?

Yes. Certain conditions are to be regarded as not amounting to impairments for the purposes of the Act. These are:

- addiction to or dependency on alcohol, nicotine, or any other substance (other than as a result of the substance being medically prescribed)
- seasonal allergic rhinitis (eg hay fever), except where it aggravates the effect of another condition
- tendency to set fires

- tendency to steal
- tendency to physical or sexual abuse of other persons
- exhibitionism
- voyeurism.

Also, disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing, are to be treated as not having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

Appendix B

How do Building Regulations and leases affect reasonable adjustments?

Introduction

1. In Chapters 6 and 7 of the Code, an explanation is given of the duty to make reasonable adjustments and how it works in practice, including the duties that apply in respect of overcoming physical barriers. This Appendix explains how Building Regulations and leases affect the duty to make reasonable adjustments to physical features in relation to the provision of services to the public, public authority functions and private clubs. The three areas of activity are governed by the same underlying principles in relation to discrimination. Therefore, in this chapter, as explained in paragraph 1.18, the term 'service provider' and terms which flow from this are used generically to refer to all those who have duties in these areas.

Building Regulations

2. A building in England or Wales that complies with Part M of the Building Regulations (see paragraph 4 below) should make reasonable provision for all people, regardless of disability, age or gender, to gain access to and use the building and its facilities. This chapter focuses specifically on the application of the Regulations in relation to disabled people. Broadly, a building will comply with Part M when its physical features (or aspects of physical features) accord with those described

Approved
Document M
ISBN 011
752447 6,
ISBN 011
753469 2,
ISBN 011
753901 5

in the Approved Document M (see paragraph 7 below). These will make reasonable provision for disabled people to gain access to and use a building and its facilities. As the paragraphs below explain, an exemption set out in Regulations (see paragraph 16 below) means that a service provider who provides services from a building will not have to make alterations or adjustments to physical features which accord with Approved Document M if 10 years or less have passed since their construction or installation.

3. The Approved Document M is not mandatory, however, and it is open to a developer to comply with Part M in other ways. In addition, only certain features are addressed in the Approved Document. Where a building complies with Part M any alternative treatment of those features must enable any disabled person to use the building with the same degree of ease as would have been the case had those features (or aspects of those features) accorded with those set out in the Approved Document. Therefore a service provider who provides services from such a building is unlikely to have to make alterations or adjustments to those specific features if 10 years or less have passed since their construction or installation (see paragraph 9 below). The position is similar in Scotland (see paragraph 14 below).

Requirements

4. Since 1985, Building Regulations in England and Wales have required reasonable provision to be made for disabled people to gain access to and to use new buildings (and some extensions). Part M of the Building Regulations (originally called 'Access and facilities for disabled people'), was extended in 1992, again in 1999 and it was modified in 2004 (and is now called 'Access to and

use of buildings’). It now applies to:

- new buildings
 - extensions to existing buildings, other than dwellings, including routes through the existing building if no independent access is provided, but not the remainder of the existing building itself
 - material alterations to buildings, other than dwellings; and
 - buildings or parts of a building, other than dwellings, that are subject to a material change of use.
5. Buildings to which Part M applies should make reasonable provision for access and use by anyone, including disabled people.
 6. Where an extension has its own entrance it is treated as a new building, but where it is accessed through the existing building the extension need not be any more accessible than the existing building. When alterations or extensions are made they should not have the effect of reducing the level of access to the existing building.
 7. Guidance is issued to accompany the Building Regulations. For Part M of the Building Regulations in England and Wales this is the Approved Document M. This sets out a number of ‘objectives’ to be met, ‘design considerations’ and technical details of design solutions (called ‘provisions’). These provisions suggest one way in which the requirements of the Regulations might be met but there is no obligation to adopt any of them. Most buildings will have followed the guidance in the Approved Document, but some

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will have adopted other acceptable design solutions.

8. Some disabled people might find it impossible or unreasonably difficult to use services or to benefit from a public authority function provided at a building even though the building meets the requirements of Part M. In relation to certain public authority functions which have a detrimental impact, such as being arrested, disabled people may be particularly badly affected by the exercise of the function. In this situation, if a physical feature accords with the appropriate 1992, 1999 or 2004 Approved Document to Part M that was effective at that time, and it was provided in or in connection with a building for the purpose of assisting people to have access to the building or to use facilities provided in the building, an exemption provided by Regulations (The Disability Discrimination (Service Providers and Public Authorities Carrying out Functions) Regulations 2005 (SI 2005/2901), reg 11, The Disability Discrimination (Private Clubs etc) Regulations 2005 (SI 2005/3258), reg 12 – both referred to in this chapter as ‘the Regulations’) means that the service provider will not have to make adjustments to that feature if 10 years or less have passed since it was constructed or installed. This is explained in more detail in paragraph 16 below.
9. A building with features which do not accord with the effective edition of the Approved Document may have been accepted as meeting the requirements of Part M. If the feature is one which is covered by the Approved Document (for example, a lift) then, provided it enables any disabled person to access and use the building with the same degree of ease as would have been the case had the feature accorded with the Approved Document, it is unlikely to be

reasonable for a service provider to have to make adjustments to that feature if 10 years or less have passed since its installation or construction. This is because the Regulations are not intended to deter people from adopting effective innovative or alternative design. Where a feature is one which is not covered by the Approved Document (for example, signage) then under the DDA the service provider may still have to make adjustments to that feature in order to comply with its duties under the Act.

A new gym facility constructed in 2005 was subject to scrutiny by a Building Control Officer. In his opinion the design made reasonable provision for access and use by people, including disabled people, such as to satisfy Part M of the Building Regulations. Within the shower units the modern design does not incorporate shower curtains but has flexible shower screens which move into flush recesses. Although this does not comply with Approved Document M (as there is no shower curtain), because the shower screens can be easily operated from the shower seat and use of the shower is facilitated with the same degree of ease as it would be with a curtain, it is unlikely to be reasonable for a service provider to have to make adjustments to that feature as less than 10 years have passed since its installation.

Scotland

10. Similar provisions to those in England and Wales were also introduced in Scotland in 1985 when 'facilities for disabled persons' were added to the Building Standards (Scotland) Regulations. As in England and Wales, there have been various versions. From April 1991 until April 2000 the

SSI 2004/406

detailed requirements for compliance with the Building Standards (Scotland) Regulations 1990 were set out in Part T of the Technical Standards. In April 2000 Part T was discontinued and its requirements were integrated into the general Technical Standards. In 2003, the Building (Scotland) Act 2003 was passed and a new system of building standards, based upon the Building (Scotland) Regulations, came into operation in May 2005. Guidance on compliance with the functional standards set out in the Regulations is given in the Scottish Building Standards Agency (SBSA) Technical Handbooks.

11. In Scotland the Building Regulations and guidance apply to:
 - new buildings
 - extensions to existing buildings but not the existing buildings themselves; and
 - parts of a building that are altered or that are adversely affected by an alteration being carried out elsewhere in the building.
12. The Technical Standards also applied to buildings that were subject to a change of use in certain circumstances. The Building (Scotland) Regulations 2004 and their Technical Handbooks are now applied more fully in relation to change of use, but only to specifically defined conversions.
13. The Technical Standards stipulated requirements that must be met in order to comply with the Building Standards Regulations. The Building (Scotland) Regulations 2004 list 64 functional standards that must be met. Guidance is given on meeting these standards in the SBSA Technical Handbooks. As with the Approved Documents in England and Wales, the Technical Handbooks offer

one way in which the requirements of the standards might be met but there is no obligation to adopt this method.

14. Other than listed exceptions, no building work of a type that is subject to the Regulations may be carried out without a warrant from the Local Authority. The Local Authority will only grant a warrant if the building works proposed comply with the standards relevant at the time of application. Where work complies with the relevant standards, it is unlikely to be reasonable for a service provider to have to make adjustments to relevant physical features for a period of 10 years from their installation or construction.
15. A specific exemption from the duty to make reasonable adjustments to physical features applies where those features accord with the relevant version of Part T or the corresponding requirements in the Technical Standards introduced in April 2000 and March 2002 (see paragraph 21 below); or for work subject to the Building (Scotland) Act 2003, the corresponding provisions in the Technical Handbook or an equivalent solution that has been accepted as meeting the relevant standards set out in the Building (Scotland) Regulations 2004.

Where the exemption applies in England and Wales

16. The overall effect of the Regulations (those relating to private clubs, and service providers and public authorities carrying out functions) is that, for a period of 10 years, a service provider in England and Wales need not remove or alter any aspect of a physical feature of a building that accords with the relevant objectives, design

SI 2005/2901
reg 11, Sch 1,
paras 1–2,
SI 2005/3258,
reg 12, Sch 1,
paras 1–2

considerations and provisions in the Approved Document M. At the date of publication of the Code, the effective edition of the Approved Document M will be either the 1992, 1999 or 2004 edition. For building works where the Building Regulations applied, the effective edition will be the version which applied in meeting those Building Regulations. For building works where the Building Regulations did not apply, the effective edition will be that which was in force when those works commenced.

17. The service provider may still, however, be required to provide:
 - a reasonable means of avoiding that feature; or
 - a reasonable alternative method of making services available.

18. In England and Wales there are areas of development, such as alterations that are not 'material alterations', where Part M of the Building Regulations does not require that accessibility be improved. Despite the absence of any legal obligation under the Building Regulations, a service provider may still decide to adopt the guidance in the Approved Document M. Physical features that the service provider includes that accord with the objectives, design considerations and provisions set out in the relevant Approved Document M will not have to be removed or altered if 10 years or less have passed since their construction or installation.

A corner shop was converted to a social services neighbourhood office in 1997. A ramp was installed to the front door and all internal doors

were widened. The length and gradient of the ramp accord with the provisions set out in the applicable Approved Document M (1992) and the doors provide the recommended clear opening width. The service provider would not be required under Part 3 of the DDA to alter the length or gradient of the ramp or the internal door widths before 2007.

19. The 10-year exemption period commences from the date the installation of that feature was completed or, where the physical feature is installed as part of a larger building project, from the date the works in relation to that project were completed. The Regulations do not stipulate how the date will be established. However, it is likely that in the majority of cases it will be the day on which the service provider is able to make use of the physical feature. Where industry-standard forms of contract are used this is known as 'practical completion' and is the date on which the contractor hands over the work to the service provider.

The toilets in a restaurant were redecorated in 1998. The service provider took the opportunity to install handrails in one of the cubicles, in accordance with the provisions of the applicable Approved Document M (1992), to assist people with ambulant disabilities. The service provider finished the work and the toilets were brought back into use on 15 June 1998. The service provider would be exempted from any requirement under Part 3 to replace or alter those handrails before 15 June 2008, when the exemption lapses.

**SI 2005/2901
Sch 1,
para 1(3),
SI 2005/3258
Sch 1,
para 1(3)**

The construction of a large department store in England began in 1997 and practical completion was achieved on 27 July 1999. The width of the main entrance and the dimensions of the lobby accord with those set out in the provisions of the applicable Approved Document M (1992). The service provider would be exempted from any requirement under Part 3 to replace or alter the width of the door or the size of the lobby before 27 July 2009, when the exemption lapses.

20. If new guidance is brought into effect to replace the 2004 edition of the Approved Document M, new DDA Regulations might provide a similar exemption. Service providers whose premises include physical features that are constructed in accordance with the revised design guidance should check whether the Regulations have been further amended before relying on them to justify a decision not to remove or alter any of those features.

Where the exemption applies in Scotland

21. The Regulations make similar provisions in Scotland but take into account the fact that in Scotland the requirements to provide access and facilities for anyone, including disabled people, were dispersed among the general Technical Standards (see paragraph 10 above). This approach is continued in the Technical Handbooks that now provide guidance in relation to the Building (Scotland) Regulations 2004. However, the general effect of the Regulations remains the same. That is, for a period of 10 years, a service provider need not remove or alter any aspect of a physical feature of a building that accords with the relevant version of Part T or the corresponding

SI 2005/2901
reg 11,
SI 2005/3258
reg 12,
SSI 1999/173,
SSI 2001/320,
SSI 2004/406,
SI 2005/1121

requirements now included in other Technical Standards introduced in April 2000 and March 2002; or accords with the relevant functional standards and guidance in the Technical Handbook or an equivalent solution that has been accepted as meeting the relevant standards set out in the Building (Scotland) Regulations 2004.

22. The relevant standard will be that which was in effect at the time the works to install the physical feature commenced, provided they did not commence before 30 June 1994. Where an application for a warrant for the construction or change of use of the building has been made and granted, the works are deemed to commence on the day the application for the warrant was made.
23. The service provider may still, however, be required to provide:
- a reasonable means of avoiding that feature; or
 - a reasonable alternative method of making services available.
24. The 10-year exemption period commences from the date the installation of that feature was completed or, where the physical feature is installed as part of a larger building project, from the date the works in relation to that project were completed. The Regulations do not stipulate how the date will be established. However, it is likely that in the majority of cases it will be the day on which the service provider is able to make use of the physical feature.

**SI 2005/2901
Sch 1,
para 1(2),
SI 2005/3258
Sch 1,
para 3(a)**

**SI 2005/2901
Sch 1, para 1,
SI 2005/3258
Sch 1, para 1**

The construction of a health centre in Scotland was completed in 1998 in accordance with the

applicable version of Part T. The health authority, as the service provider in these circumstances, is not exempt from the duty to remove or alter any physical feature of the building beyond 2008 when the 10-year period elapses.

25. If new building provisions are brought into effect, new DDA Regulations might provide a similar exemption. Service providers whose premises are constructed in accordance with future provisions should check whether the Regulations have been amended before relying on them to justify a decision not to remove or alter any of those features.

Application of the exemption throughout Great Britain

26. The exemption relates only to the particular aspect of the physical feature in question that accords with the provisions of the Approved Document M in England and Wales or with the relevant Technical Standard or functional standards and guidance in the Technical Handbook in Scotland and not to the building as a whole.

The dimensions of the risers and treads of steps to the entrance of a multi-screen cinema (built in 1996) accord with the provisions of the relevant Approved Document M (1992). Those aspects of the steps will not have to be altered for a period of 10 years from the date their installation was complete. That is not to say that the service provider will not have to improve access to its premises in other ways and it may still have to consider improving the accessibility of the steps

by, for instance, improving the lighting or fitting a non-slip surface treatment.

27. Where a particular aspect of a physical feature accorded with the applicable provision in the relevant Approved Document M, or Technical Standard or the functional standards and guidance in the Technical Handbook in Scotland, no alteration will be required, so long as it continues to accord with the provision. The exemption will last for 10 years from the date that the feature was constructed or installed. It will not apply to other aspects of the same feature if they did not conform with or were not covered by these provisions.

The clear opening width of the door to a restaurant (built in Wales in 1998) conformed to the relevant provision of the Approved Document M. The service provider would not be expected to consider altering the width of the door, under Part 3 of the DDA, until 2008. If, however, in 2002 the door was replaced by a narrower one, which no longer provided the clear opening width described in the provisions of the Approved Document M, then this aspect of the feature would no longer be exempt from a possible requirement for alteration.

In any event, the service provider might have to consider altering other aspects of the door's design (for example, the type of handle, the colour or the weight of the door) that are not covered by the Approved Document M.

28. Service providers should be aware of the limited scope of the Approved Document M or Technical

Standards or the Technical Handbook in Scotland. For those aspects of design that fall beyond their scope, service providers are recommended to take account of the wealth of published advice on the principles and practice of 'inclusive design'. For instance, Building Regulations do not cover the design of the external environment (except for those features that are needed to provide access to the building from the edge of the site and from car parking within the site) nor do they cover the provision of signage.

The design of a new visitors' centre in a Welsh country park adopts in full the guidance provided in the Approved Document M. Once the centre is open to the public the manager receives a number of complaints from people with mobility and visual impairments who find that stiles and gates along the centre's nature trail are extremely difficult to negotiate. There is no guidance on the design of these physical features in the Approved Document M. Consequently they would not be exempt from a possible requirement for alteration under Part 3 of the DDA.

There is very poor signage to assist people with visual impairments within the visitors' centre with the result that some people become disorientated and are unable to locate the toilets or cafeteria. The service provider would be expected to consider what reasonable steps might be taken to remedy the situation, including the provision of clearer signage.

29. The Approved Document M in England and Wales and the Technical Standards and Technical Handbook in Scotland describe circumstances where the requirement might be met despite the

fact that certain physical features, which would facilitate access, are not provided on the premises. The exemption only applies to a physical feature that was included (and which accords with the provisions of) in the relevant Approved Document M or Technical Standard, or the functional standards and guidance in the Technical Handbook. It does not apply to a physical feature that was not required and therefore not included on the premises. The service provider will need to consider whether the provision of those features would be reasonable under Part 3 of the DDA.

The designer of a library built in Scotland in 1997 was careful to adopt all relevant provisions of Part T of the Technical Standards. A deaf person who uses a hearing aid cannot participate fully in seminars convened in the small meeting room because there is no induction loop in it. The exemption does not apply even though the Technical Standard states that induction loops need not be provided in meeting rooms of this size. The service provider would have to consider whether it would be reasonable under Part 3 of the DDA to provide an induction loop in this room.

Leases, binding obligations and reasonable adjustments

30. Set out in paragraphs 32 to 51 below are those issues which are relevant to service providers who occupy premises under a lease, or other binding obligation, in terms of their duty to make reasonable adjustments, particularly in relation to removing or altering physical barriers. These include arrangements for obtaining consent for alterations.

31. Service providers should remember that even where consent is not given for removing or altering a physical feature, they still have a duty to consider providing a reasonable means of avoiding a feature or providing the service by a reasonable alternative means (see Chapters 6 and 7).

What about the need to obtain statutory consent for some building changes?

32. A service provider might have to obtain statutory consent before making adjustments involving changes to premises. Such consents include planning permission, Building Regulations approval or a building warrant in Scotland, listed building consent, scheduled monument consent and fire Regulations approval. The DDA does not override the need to obtain such consents.
33. Service providers should plan for and anticipate the need to obtain consent to make a particular adjustment. It might take time to obtain such consent, but it could be reasonable to make an interim or other adjustment – one that does not require consent – in the meantime.

An historic country house is open to the public. To enable visitors with mobility impairments to visit the house, the owners are considering installing a ramped entrance. In the circumstances, installing a ramp is likely to be a reasonable adjustment for the service provider to have to make.

However, the service provider in this case needs statutory consent to do so because the house is a listed building. The service provider consults the local planning authority and learns that consent

is likely to be given in a few weeks. In the meantime, as a temporary measure only, the service provider arranges for disabled visitors to use an inconvenient but accessible entrance at the side of the house. Although not ideal, this is likely to be an acceptable solution for a limited period while statutory consent is being obtained.

34. Where consent has been refused, there is likely to be a means of appeal. Whether or not the service provider's duty to take such steps as it is reasonable to take includes pursuing an appeal will depend on the circumstances of the case.

What if a binding obligation other than a lease prevents a building being altered?

35. The service provider may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage, charge or restrictive covenant or, in Scotland, a feu disposition) under which he cannot alter the premises without someone else's consent. In these circumstances, the Regulations provide that it is reasonable for the service provider to have to request that consent, but that it is not reasonable for the service provider to have to make an alteration before having obtained that consent.

A church holds social functions in the church hall, built with the assistance of a bank loan. The bank loan is secured by way of a charge on the hall under which the bank's consent is required for any changes. The church is proposing to make alterations to the hall to comply with its duty to make reasonable adjustments. It is reasonable for the church to have to seek the

**SI 2005/2901
reg 10,
SI 2005/3258
reg 11**

bank's consent but it is not reasonable for the church to have to make the alteration if the bank does not give its consent.

What happens if a lease says that certain changes to premises cannot be made?

s 27(2)

36. Special provisions apply where a service provider occupies premises under a lease, the terms of which prevent it from making an alteration to the premises. In such circumstances, if the alteration is one which the service provider proposes to make in order to comply with a duty of reasonable adjustment, the DDA overrides the terms of the lease so as to entitle the service provider to make the alteration with the consent of its landlord ('the lessor'). In such a case the service provider must first write to the lessor asking for consent to make the alteration. The lessor cannot unreasonably withhold consent but may attach reasonable conditions to the consent.

Sch 4, Part 2,
para 5

37. If the service provider fails to make a written application to the lessor for consent to the alteration, the service provider will not be able to rely upon the fact that the lease has a term preventing it from making alterations to the premises to defend its failure to make an alteration. In these circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the service provider to have made the alteration.

A service provider occupies premises under a lease, a term of which says that the service provider cannot make alterations to a staircase.

When deciding whether or not it was reasonable for the service provider to make an alteration to the staircase in order to make it more accessible to disabled people, a court will ignore the terms of the lease unless the service provider has written to ask the lessor for permission to make the alteration.

What happens if the lessor has a 'superior' lessor?

38. The service provider's lessor may himself hold a lease the terms of which prevent him from consenting to the alteration without the consent of his landlord ('the superior lessor'). Regulations made under the DDA (referred to as the 2001 Regulations) cover this by modifying the effect of any superior lease so as to require the lessee of that lease to apply in writing to his lessor (the 'superior lessor' in this context) if he wishes to consent to the alteration. As with the service provider's lessor, the superior lessor must not withhold such consent unreasonably but may attach reasonable conditions to the lease.

A bakery occupies the premises under a lease, the terms of which prevent it from making alterations without the consent of its landlord. The landlord holds the premises under a lease which has a similar term. The landlord receives an application from the bakery for consent to alter the premises. He is entitled to consent to the application if he receives the consent of his landlord. He writes to his landlord asking for that consent. His landlord cannot unreasonably refuse to give consent but may consent subject to reasonable conditions.

**SI 2001/3253
reg 9, as
amended by
SI 2005/2901
reg 13**

39. Where a superior lessor receives an application from his lessee the provisions described in paragraphs 40 to 51 below apply as if his lessee were the service provider.

How will arrangements for gaining consent work?

reg 5(2), (6)

40. Once the application has been made, as a general rule the lessor has 42 days, beginning with the day on which he receives the application, to reply in writing to the service provider (or the person who made the application on its behalf). If he fails to do so he is taken to have withheld his consent to the alteration and the provisions described in paragraph 52 below apply.

reg 5(3), (4)

41. However, the lessor has 21 days to make a written request for any plans and specifications that it is reasonable for him to require and which were not included with the application. If he makes such a request the 42-day period will begin with the day on which he receives the plans and specifications. It would be sensible, in order to ensure that the application is dealt with as speedily as possible, for service providers to include the plans and specifications with the application for consent.

reg 5(2), (4)

42. If the lessor replies consenting to the application subject to obtaining the consent of another person (required under a superior lease or because of a binding obligation), but he fails to seek the consent of the other person within 42 days of receiving the application (or receiving the plans and specifications, if these arrive later), he will be taken to have withheld his consent and the provisions described in paragraph 52 below apply.

43. The 2001 Regulations provide that a lessor will be treated as not having sought the consent of another person unless:

- the lessor has applied in writing to the other person indicating that the occupier has asked for consent for an alteration in order to comply with a duty to make reasonable adjustments, and the lessor has given his consent conditionally upon obtaining the other person's consent; and
- he has submitted to the other person any plans and specifications which he has received.

44. A lessor who receives the consent required from another person will also be taken to have withheld his consent if he fails within 14 days to let the service provider (or the person who made the application on behalf of the service provider) know in writing that he has received consent.

reg 5(7)

reg 5(5)

A gift shop wishes to alter its entrance to make it more accessible. It applies to the lessor for consent to make the alteration and encloses plans and specifications with the application. The lessor is content for the alteration to be made but he has mortgaged the premises with a bank. The terms of the mortgage require him to obtain the bank's consent before making or permitting any alteration.

Within 42 days of receiving the application the lessor writes to the shop saying that he will consent to the alteration if the bank agrees. At the same time he applies in writing to the bank for consent. He encloses the plans and specifications with the application and makes it

clear that the shop wishes to make the alteration to comply with the reasonable adjustments duty. He also makes it clear to the bank that he has consented to the alteration, provided the bank gives its consent. The bank replies to the lessor, giving its consent and the lessor informs the shop of this within 14 days of receiving the consent.

When is it unreasonable for a lessor to withhold consent?

45. Whether withholding consent will be reasonable or not will depend on the specific circumstances. For example, if a particular adjustment is likely to result in a substantial permanent reduction in the value of the lessor's interest in the premises, the lessor is likely to be acting reasonably in withholding consent. The lessor is also likely to be acting reasonably if he withholds consent because an adjustment would cause significant disruption or inconvenience to other tenants (for example, where the premises consist of multiple adjoining units).
46. A trivial or arbitrary reason would almost certainly be unreasonable. Many reasonable adjustments to premises will not harm the lessor's interests and so it would generally be unreasonable to withhold consent for them.

A florist occupies shop premises in a row of shops which are part of a new marina complex. The shop is leased from the marina owner. To comply with its duties under the DDA, the florist wishes to improve the accessibility of the shop to disabled people by the provision of a wider front

door. It seeks permission to do so from the marina owner who refuses permission on the ground that all the shops in the marina must have the same appearance. It is likely to be unreasonable to withhold consent in these circumstances.

47. The 2001 Regulations provide that it is unreasonable for a lessor to withhold consent in circumstances where the lease says that consent will be given to alterations of the kind for which consent has been sought.

reg 6

48. The 2001 Regulations provide that withholding consent will be reasonable where:

reg 7

- there is a binding obligation requiring the consent of any person to the alteration
- the lessor has taken steps to seek consent; and
- consent has not been given or has been given subject to a condition making it reasonable for the lessor to withhold his consent.

49. Withholding consent will also be reasonable where a lessor does not know, and could not reasonably be expected to know, that the alteration is a reasonable adjustment.

In the example in paragraph 46 above, the original developer of the marina sold it to the present owner (the lessor of the florist shop) with an enforceable restrictive covenant requiring the developer's consent to any alteration to the façade or appearance of the marina shops. The lessor has applied for that consent, but it has

been refused. In these circumstances, it will be reasonable for the lessor to refuse permission to the florist to make the alterations requested.

What conditions would it be reasonable for a lessor to make when giving consent?

50. The 2001 Regulations set out some conditions which it is reasonable for a lessor to make. Depending on the circumstances of the case, there may be other conditions which it would be reasonable for a lessor to require the service provider to meet. Where a lessor imposes other conditions (for example, a reinstatement condition) their reasonableness may be challenged in the courts (see paragraph 52 below).
51. The conditions set out in the Regulations as ones which a lessor may reasonably require a service provider to meet are that it:
- obtains any necessary planning permission and other statutory consents
 - carries out the work in accordance with any plans and specifications approved by the lessor
 - allows the lessor a reasonable opportunity to inspect the work (whether before or after it is completed)
 - reimburses the lessor's reasonable costs incurred in connection with the giving of consent; or
 - obtains the consent of another person required under a binding obligation or superior lease.

reg 8

What happens if the lessor refuses consent or attaches conditions to consent?

Reference to court

52. If the service provider has written to the lessor for consent to make an alteration and the lessor has refused consent or has attached conditions to his consent, the service provider or a disabled person who has an interest in the proposed alteration may refer the matter to a County Court or, in Scotland, the Sheriff Court. The court will decide whether the lessor's refusal or any of the conditions are unreasonable. If it decides that they are, it may make an appropriate declaration or authorise the service provider to make the alteration under a court order (which may impose conditions on the service provider). Where the service provider occupies premises under a sub-lease or sub-tenancy, these provisions are modified to apply also to the service provider's landlord.

**Sch 4, Part 2,
para 6
SI 2001/3253
reg 9(5), (6)**

Joining lessors in proceedings

53. In any legal proceedings on a claim under Part 3 of the DDA (other than a case involving group insurance or employment services), involving a failure to make an alteration to premises, the disabled person concerned or the service provider may ask the court to direct that the lessor be made a party to the proceedings. The court will grant that request if it is made before the hearing of the claim begins (unless it appears to the court that a different lessor should be made a party to the proceedings). It may refuse the request if it is made after the hearing of the claim begins. The request will not be granted if it is made after the court has determined the claim.

**Sch 4, Part 2,
para 7
SI 2001/3253
reg 9(7)**

54. Where the lessor has been made a party to the proceedings, the court may determine whether the lessor has unreasonably refused consent to the alteration or has consented subject to unreasonable conditions. In either case, the court can:
- make an appropriate declaration
 - make an order authorising the service provider to make a specified alteration; or
 - order the lessor to pay compensation to the disabled person.
55. The court may require the service provider to comply with any conditions specified in the order. If the court orders the lessor to pay compensation, it cannot also order the service provider to do so.

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