

Implementation of the Disability Discrimination Act 2005 (DDA 2005)

Outcomes of: "Disability Discrimination Bill: Consultation on private clubs; premises; the definition of disability and the questions procedure"

Introduction

1. This paper, which is being placed in the Libraries of both Houses of Parliament, provides information on the outcomes of a public consultation exercise carried out by the Government between 16 December 2004 and 18 March 2005.

2. The consultation sought views on the Government's proposals for using certain regulation-making powers in the Disability Discrimination Act 2005, which gained Royal Assent on 7 April 2005, in respect of the Act's provisions on private clubs, premises, the definition of disability and a new "Questions Procedure".

3. The document was sent to around 500 organisations including a wide range of professional and representative bodies with an interest in private clubs, rented premises and cancer, as well as disability organisations and others.

4. This paper also provides information on, and sets out the Government's conclusions in relation to, the separate but connected review of discrimination experienced by people with minor forms of cancer.

Proposals in the consultation document:

5. In broad terms, the consultation document set out the following Government proposals:

Private clubs:

6. The document proposed that private clubs – being brought within scope of civil rights legislation for the first time - should be subject to broadly similar duties as already apply to other providers of goods, services and facilities under the Disability Discrimination Act 1995 (DDA 1995). Specific issues consulted upon were:

- Setting the "trigger" for the duty at the point where it is *impossible or unreasonably difficult* for the disabled person to use the benefits, facilities, services etc provided by the club for its members;
- Making the duty to make adjustments *anticipatory*;
- Setting out the same limited range of defences to justify not making a reasonable adjustment as currently applies to service providers;

- Whether duties to make reasonable adjustments should be modified in special circumstances, particularly in respect of political associations
- The implementation timetable for reasonable adjustments
- The likely regulatory impact of the Government's proposals and information on the costs of training associated with compliance for these proposed new duties

Premises:

7. The DDA 2005 extends existing duties so that landlords have to make reasonable adjustments in certain circumstances. The document sought views on:

- Whether and how regulations should specify what is to be treated as a physical feature in respect of rented premises;
- Clarifying the scope of the duty of reasonable adjustment to avoid the possibility that adjustments could extend to issues around tenants making alterations to rented premises. However, this proposal was made redundant by subsequent changes to the Bill relating to improvements to let dwelling houses;
- Whether the justification for treating a disabled person less favourably or for not making a reasonable adjustment on the grounds of a disabled person's incapacity to enter into an enforceable agreement should apply where the disabled person is acting through certain other people, for example a person who has power of attorney; and
- Whether regulations should ensure that commonhold associations are placed under the same duty of reasonable adjustment as landlords and managers of rented premises.

Definition of disability:

8. One effect of the DDA 2005 is that people with cancer are covered from diagnosis rather than from the later on-set of symptoms. The document sought views on:

- Whether the Government had got the right list of those cancers which it proposed to exclude (i.e. mainly skin cancers) from the scope of the extended definition because they were likely to require "substantial treatment", and how to define "substantial treatment".

Questions procedure:

9. The DDA 2005 extends the existing questions procedure in the DDA 1995 (which applies to employment and occupation) to complaints arising on access to goods, services, facilities, public functions, private clubs and premises. The document sought views on the detail of the forms to be used, the manner of serving questions and replies, and time limits for serving questions for them to be admissible in evidence in court proceedings.

Outcomes of the consultation:

10. **Annex A** is a table of the outcomes of the consultation. Response rates vary and, in many instances, respondents did not provide direct answers to the specific questions posed. However, and other than in respect of two issues, support for the Government's proposals, on those questions where respondents were asked to indicate if they agreed or disagreed, ranged from 53%-94%.

11. There were two questions where response rates were ambiguous:

- (i) The Government's overall approach to the coverage of cancer: where 47% agreed and 47% disagreed. There were two main arguments from those who disagreed with the approach who, in the main, tended to be representatives from groups with some expert knowledge of this area, such as the DRC and the cancer charities.

Firstly, it was argued that fear and stigma associated with the word 'cancer' would lead to discriminatory treatment regardless of the level of treatment, or whether it is successful. Secondly, the approach was too complex to follow and difficult to implement as employers, service providers and patients would not be aware of the different types of cancers or types of treatment.

- (ii) The regulatory impact of the private clubs provisions and in particular the costs of compliance training: where 28% of respondents agreed with the regulatory impact assessment. While no respondent disagreed, 72% (i.e. 13 respondents) expressed views which did not directly answer the questions posed: e.g. 5 said that costs would be difficult to quantify; 3 that many clubs were run by volunteers; 2 that the costs would be too high; and 2 that many adjustments would cost very little. Only one reply expressed any quantified view on costs. No further information was forthcoming on training costs to comply with the proposed new duties

Separate evidence based review of cancer discrimination:

12. The extended definition of disability provided for by the Disability Discrimination Act 2005 includes a regulation-making power to exclude certain types of cancer from the scope of that definition. The Government indicated during pre-legislative scrutiny of the draft Disability Discrimination Bill and during the passage of the Bill itself that this power would be used to exclude cancers (mainly minor skin cancers) which were not likely to require substantial treatment.

13. However, during passage of the Disability Discrimination Bill the Government undertook not to exercise the regulation-making power until it

had conducted a review of the evidence relating to disability discrimination in respect of cancers not likely to require substantial treatment with the Disability Rights Commission and other organisations, including the main cancer charities. This review complemented the public consultation exercise.

14. Twenty-four organisations (i.e. medical bodies – including Royal Colleges and other professional medical organisations, disability organisations, cancer charities – including those focused on black and ethnic minority groups - and bodies representative of employers and employees) were invited to submit evidence to the review. The Disability Rights Commission as well as three cancer charities (Macmillan Cancer Relief, CancerBACUP and Cancer Research UK) participated in a meeting with the Department for Work and Pensions. The Department also examined evidence in employment and employment appeal tribunal cases where cancer was cited as the cause of disability. Information was sought from six countries (Australia, New Zealand, Canada, United States, South Africa and the Republic of Ireland) which have legislation similar to the Disability Discrimination Act 1995 as to their experience of disability discrimination in relation to cancers not likely to require substantial treatment.

15. The review found there was no ‘hard’ evidence that ‘minor’ forms of cancer (mainly skin cancers) attracted stigmatic discrimination. What was clear, and the Government accepts, was the complexity and potential impracticality of the Government’s approach to exclude cancers based on the level of treatment required, given the number of treatments available, patient and consultant choice, location of the cancer on the body, recurrence of the cancer, and the types and amount of follow-up treatment available.

Government response to consultation:

The definition of disability: cancer

16. Responses to the consultation document indicated a split of opinion on whether or not the Government should exercise the regulation-making power to exclude minor types of cancer from the extended definition of disability in the DDA 2005.

17. The Government has concluded, in the light of public consultation and the separate evidence based review, that it is not possible to distinguish effectively between those people whose cancers are likely to require substantial treatment and those whose cancers are not and that, were there an attempt to do so it would introduce uncertainty and complexity into the definition of disability. This would lead to unfair and unequal outcomes for disabled people, and make it difficult for employers and others with responsibilities under the Act to understand and comply with their duties. Treating all people who have cancer as disabled people ensures a straightforward approach, which will provide equity of outcome, while having minimal consequences for employers and service providers.

Therefore, the Government has decided not to exercise the regulation-making power to exclude any types of cancer from the scope of the extended definition of disability.

Private clubs

19. Responses to the consultation document indicated support for the Government's proposals to place broadly similar duties on private clubs with 25 or more members as already apply to other providers of goods, services and facilities under Part 3 of the Disability Discrimination Act.

Therefore, the Government will bring forward implementing regulations on that basis.

Premises

20. The Government sought views on: whether what is to be treated as a physical feature should be prescribed and a proposed approach to this; proposals to regulate on justifications for treating a disabled person less favourably and for not making reasonable adjustments; proposals to regulate in respect of commonhold; and any other areas relating to reasonable adjustment duties on which the Government should consider regulating. Responses indicated majority support for the thrust of all of the proposals, with some specific suggestions for how physical features should be prescribed.

Therefore, the Government will bring forward implementing regulations on that basis.

The questions procedure

21. Views were invited on the forms and procedures to be used in the new Questions Procedure, which will apply in relation to access to goods, services, facilities, public functions, private clubs and premises. Responses indicated clear support for the proposed approach.

Therefore, the Government will bring forward implementing regulations on that basis.

Annex A

Outcomes of consultation on using regulation-making powers under the DDA 2005's duties on private clubs, premises, definition of disability and questions procedure

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS		
			No.	%	No.	%	No.	%	
Private clubs	1	Do you agree that that the duties to make "reasonable adjustments" to be applied to private clubs should be framed in the same way as those for service providers?	33	31	94	2	6	0	0
	2	Do you agree that, for private clubs, the trigger point for the duty to make reasonable adjustments should be the same as for service providers?	27	21	78	4	15	2	7
	3	Do you agree that the duty on private clubs to make reasonable adjustments should be anticipatory, as it is for service providers?	32	26	81	3	9	3	9
	4	Do you agree that justifications for not making reasonable adjustments should be the same as for service providers?	30	19	63	2	7	9	30

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS		
			No.	%	No.	%	No.	%	
	5	Do you agree with the implementation timetable for the duty to make reasonable adjustments? (Dec 2006)	27	16	59	6	22	5	19
	6	Do you agree with the proposed modifications of the reasonable adjustment duty under special circumstances, particularly in respect of political associations?	19	11	58	0	0	8	42
	7	Do you agree with the regulatory impact proposals?	18	5	28	0	0	13	72
Premises	8	Do you consider that what is to be treated as a "physical feature" should be prescribed for the purposes of the new duties of reasonable adjustment applying to controllers of premises?	32	27	84	2	6	3	9
	9	If the Government decides to prescribe what is to be treated as a "physical feature", do you agree with its proposed approach?	33	20	61	8	24	5	15

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS	
			No.	%	No.	%	No.	%
10	The Government would like to know whether you agree with its proposals to regulate on tenant's alterations to premises. [These proposals were made redundant by changes to the Bill relating to improvements to let dwelling houses.]	32	17	53	2	6	13	41
11	The Government would like to know whether you agree with its proposals to regulate on justifications for treating a disabled person less favourably and for not making reasonable adjustments.	30	26	87	0	0	4	13
12	The Government would like to know whether you agree with its proposals to regulate in respect of commonhold.	26	23	88	0	0	3	12
13 *	Are there any other areas relating to the new duties of reasonable adjustment on which you think the Government should consider regulating?	26	7	27	4	15	15	58

		PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS	
				No.	%	No.	%	No.	%
The definition of disability	14	The Government would like to know whether you agree with the proposed overall approach to the coverage of cancers.	36	17	47	17	47	2	6
	15 *	The Government would like to know whether the list of proposed exclusions is comprehensive and includes the most common cancers which are considered not to require substantial treatment or whether there are further conditions that should be included in the list.	16	10	62.5	6	37.5	0	0
	16 *	The Government would welcome views on whether any commonly occurring cancer included in the list should not be there because it does, in fact, generally or regularly require substantial treatment.	15	6	40	0	0	9	60

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS		
			No.	%	No.	%	No.	%	
The questions procedure	17 *	The Government would welcome views on whether a provision is necessary to ensure that individuals with exempted conditions who are considered to require substantial treatment are covered by the DDA.	18	14	78	1	6	3	17
	18	The Government would like to know whether you agree with its detailed proposals in relation to the extension of the questions procedure.	28	26	93	1	3.5	1	3.5
	19 *	Do you think there are any other areas to do with the extended questions procedure which should be provided for by Order? *	16	5	31	9	56	2	13

* None of these questions require explicit "agree"/"disagree" answers. Therefore some interpretation has been required in allocating responses to the relevant headings in the table. On that basis, the breakdown of responses is as follows:
Q13) 7 respondents believed there were areas in which the Government should consider regulating, 4 did not, and 15 made comments outside the scope of the consultation.
Q15) 10 respondents believed the list was comprehensive, 6 did not.
Q16) 6 respondents agreed with the list, 9 disagreed with the overall approach.
Q17) 14 respondents believed that a provision was required, 1 did not, and 3 made comments outside the scope of the consultation.
Q19) 5 respondents believed that there were other areas which should be provided for, 9 did not, and 2 made comments outside the scope of the consultation.

**RESPONDENT
TYPE**

PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS	
		No.	%	No.	%	No.	%

DISABILITY GROUP	12
REPRESENTATIVE BODY - OTHER	11
PUBLIC BODY	7
INDIVIDUAL	6
LANDLORD ASSOCIATION	5
REPRESENTATIVE BODY - PREMISES	4
SERVICE PROVIDER	4
REPRESENTATIVE BODY - CLUBS	3
PRIVATE CLUB	2
SOLICITOR	2
EMPLOYER	1