

Disability Discrimination Bill

Consultation on private clubs;
premises; the definition of disability
and the questions procedure



DEPARTMENT FOR WORK AND PENSIONS

DISABILITY DISCRIMINATION BILL:

**Consultation on private clubs; premises; the
definition of disability and the questions procedure**

*Presented to Parliament by the
Secretary of State for Work and Pensions
By Command of Her Majesty
December 2004*

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CONTENTS

	Page
Foreword Maria Eagle MP, Minister for Disabled People	1
1. Introduction	3
2. Private Clubs	9
3. Rental and Management of Premises	23
4. Definition of disability	37
5. Questions Procedure	43
6. Questionnaire	51
7. Annexes	
i To help you understand this consultation	63
ii Assessment of the possible costs arising from the proposals in this consultation document	64
iii Conduct of this consultation	69

FOREWORD BY MARIA EAGLE MP, MINISTER FOR DISABLED PEOPLE

The Government is committed to providing opportunity and fairness for all. Disabled people face greater barriers than most that often prevent them playing a full and active part in society. We are determined to help them overcome these barriers and to tackle the discrimination that is an everyday experience for too many of our citizens. To do this, we are taking forward a programme of legislative change, which is transforming the civil rights of disabled people.

Some of the most significant and far-reaching reforms introduced over the last decade came into force on 1 October 2004. From this date, there is no longer an exemption for small employers from the scope of the Disability Discrimination Act (DDA) and coverage has been extended to occupations and professions such as the police and prison officers. These changes mean an additional 1 million firms and around 7 million jobs are now covered by the DDA. Also from 1 October, service providers, like shops and banks, must make reasonable adjustments to physical barriers to ensure disabled people can use their services.

These changes will bring major benefits to the estimated 10.7 million disabled people in this country. They will increase employment and career opportunities, and open-up access to a wider range of goods and services. Businesses will also reap major rewards by the creation of a more diverse and experienced workforce, and by paving the way to tap into disabled people's annual spending power of around £80 billion.

Over the next few years the Government plans even more improvements for disabled people. The Disability Discrimination Bill, currently before Parliament, would significantly strengthen the DDA by extending civil rights in areas like:

- Provision of transport services;
- Letting of premises;
- Responsibilities and duties of public authorities;
- Membership of private clubs; and
- Rights of disabled local councillors.

The Bill will also widen the definition of disability to provide protection for a broader range of disabled people.

Foreword

This document seeks views on some of the detail of our plans in respect of premises, private clubs, the definition of disability used in the DDA and the proposed extension of the questions procedure. These proposals will be implemented in regulations to support the duties set out in the Bill.

I want to ensure the new provisions operate properly and coherently, and welcome the views of disabled people, their representatives, businesses and any other individual or organisation affected who wishes to comment on how the proposals should operate. The outcomes of this consultation will also assist the Disability Rights Commission in preparing Codes and other guidance.

I look forward to hearing your views.



Maïna Eagle

1. INTRODUCTION

Civil Rights for Disabled People

1.1 The Disability Discrimination Act 1995 (DDA) gave many long-overdue rights to disabled people. There were, however, significant areas where the law was insufficient, unenforceable or had not even been brought fully into effect. Disabled people and those representing them were disappointed that an opportunity to deliver comprehensive and long-term civil rights had been missed.

1.2 The Government shared those concerns and, on coming to power in December 1997, set up the Disability Rights Task Force. The Task Force brought together groups from all sectors of society to consider how comprehensive and enforceable rights could be brought about. Their final report, *From Exclusion to Inclusion*, made 156 recommendations with implications for all aspects of disabled people's lives.

1.3 Many of these recommendations included proposals for legislative change and have now been acted upon, for example:

- The Disability Rights Commission was established as an independent voice for disabled people in April 2000;
- The Special Educational Needs and Disability Act 2001 extended the DDA to cover the provision of education;
- The Disability Discrimination Act 1995 (Amendment) Regulations 2003 brought over 1 million additional employers, and a further 7 million jobs within the scope of the DDA from 1 October 2004;
- From 1 October 2004 providers of goods, facilities, and services were required to consider removing physical features which act as barriers to disabled people accessing their services; and
- A number of measures have been introduced to improve the accessibility of public transport vehicles.

The Disability Discrimination Bill

1.4 The Disability Discrimination Bill ("the Bill") delivers the remainder of the Government's response to the recommendations of the Disability Rights Task Force. The main clauses in the Bill:

- Extend the DDA to cover the provision of transport vehicles; provide a power to set an "end date" by which time all rail vehicles must be accessible; and enable rail vehicle accessibility regulations to be applied to vehicles which are being refurbished;
- Extend the DDA to cover all the functions of public bodies;
- Introduce a new duty on public bodies to promote equality of opportunity for disabled people;
- Extend rights under the DDA to an additional 175,000 disabled people by ensuring people with HIV, MS and cancer are covered from the point at which the condition is diagnosed;
- Remove from the DDA's definition of disability the requirement that mental illnesses must be "clinically well-recognised";
- Extend the DDA to cover relationships between larger private clubs (i.e. with 25 or more members) and their members;
- Extend protection under the DDA to disabled local councillors;
- Require landlords to make reasonable adjustments to policies practices and procedures, and to provide auxiliary aids and services, to ensure disabled tenants can use and enjoy their property;
- Extend an existing procedure to help disabled people ask questions about alleged discrimination; and
- Amend the "Blue Badge" parking scheme for disabled people by ensuring reciprocity with other European States.

The Purpose of this Consultation

1.5 The Bill contains a number of regulation-making powers that would allow the Government to introduce the detailed measures necessary to implement the main provisions in the Bill. The Government has already consulted on its proposals for using the regulation-making powers in respect of the Bill's public authority duties in the document *Delivering equality for disabled people* (published 23 July 2004, DWP, Cm 6255). This document sets out the Government's proposals for using the regulation-making powers in the Bill in a number of further areas.

1.6 Views are sought on the following issues:

Chapter 2: Private clubs

The Bill brings private clubs within the scope of the DDA.

This chapter seeks views on the detail of the proposed approach, to place duties to make “reasonable adjustments” on private clubs similar to the existing provisions applying to providers of goods, facilities and services more broadly.

Chapter 3: Premises

The Bill adds to the existing duties on landlords and managers of rented premises so that they must make reasonable adjustments to their policies, practices or procedures, change a term of the letting or provide auxiliary aids and services.

This chapter seeks views on proposals for regulations to support these duties.

Chapter 4: The Definition of Disability

The Bill extends the DDA’s definition of disability to cover those people who have cancer, HIV or Multiple Sclerosis from, in effect, the point of diagnosis.

This chapter seeks views on the use of the regulation-making power that allows the Secretary of State to exclude certain types of cancer from this extension.

Chapter 5: The Questions procedure

The DDA provides for a procedure through which a person who believes they have been discriminated against in contravention of its employment and occupation provisions can put questions to the alleged discriminator.

This chapter seeks views on how we extend this existing procedure to discrimination in areas covered by Part 3 of the DDA, such as the provision of goods and services.

Introduction

How to Respond

1.7 The following chapters explain our proposals in more detail and set out specific questions on each issue.

1.8 A questionnaire is provided at the back of this document which can be sent to Chris Manasseh at the Freepost address below.

This should allow you to respond on those issues which concern you or on which you have a view. This does not preclude you from offering views in a different format, but we would ask that when responding you state whether you are doing so as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make it clear who the organisation represents, and where applicable, how the views of members were assembled.

1.9 The consultation period began on Thursday 16 December 2004 and will run until Friday 18 March 2005, please ensure that your response reaches us by that date. If you would like further copies of this consultation document it can be found at www.disability.gov.uk or you can contact Chris Manasseh at the address below.

1.10 A list of the broad categories of organisations which were part of an initial mailing of the consultation document are included at Annex iii. The range of bodies and organisations being consulted will ensure that we offer those with a direct interest in the proposals the opportunity to express their views. A list of those responding to this consultation will be placed on our website www.disability.gov.uk. Unless you specifically request otherwise, responses will be open to public scrutiny.

1.11 The information you send us may need to be passed to colleagues within the Department for Work and Pensions and/or may be used in any published outcomes of the consultation. We will assume that you are content for us to do this, and that if you are replying by e-mail, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system, unless you specifically include a request to the contrary in the main text of your submission to us.

1.12 Please ensure that if you want your name or response to be kept confidential, you state this clearly in your response. (*Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.*)

Consultation on private clubs; premises; the definition of disability and the questions procedure.

1.13 Please send your consultation responses to:

Chris Manasseh
Freepost RLSG - BZTB - GSBA
Disability Rights Division
LONDON WC2N 6HT
Telephone: 020-7962-8799
Fax: 020-7962-8793
E-mail: Consultation-disability@dwp.gsi.gov.uk

1.14 This document is also available in Braille, large print, audiocassette, a British Sign Language BSL tape, an Easy Read guide and Welsh from:

TSO Customer Services
Telephone: 0870 600 5533
Fax: 0870 600 5533

This publication can also be accessed on the internet at www.dwp.gov.uk/publications and also on www.disability.gov.uk.

1.15 A partial Regulatory Impact Assessment on the proposals in this Consultation document is being prepared and will appear on the Department for Work and Pension's disability website www.disability.gov.uk by the end of December 2004.

2. PRIVATE CLUBS

This chapter seeks views about how and when the Government should implement “reasonable adjustment” duties relating to private clubs. The Government said it would consult private clubs about these duties when the Government published the draft Disability Discrimination Bill in January 2003.

Current Law

2.1 Private clubs which offer goods, services or facilities to the general public (such as letting out their premises for banqueting or conferences, or renting out a sports pitch to local football or cricket teams) are covered in respect of these services by the existing provisions of the DDA. However, private clubs which do not offer goods or services to the general public are not covered by the current duties on service providers.

Effect of the Disability Discrimination Bill

Scope and coverage of the new rights

2.2 Clause 12 of the Bill will give disabled people new rights not to be discriminated against by private clubs. The Race Relations Act already provides this kind of protection to minority ethnic and national groups. The definition of a “private club” used in the Bill is modelled on the definition in that Act. This will mean that the DDA will provide seamless protection from disability discrimination across the whole range of goods, services and facilities that disabled people may use. It will not matter whether this is provided as part of provision to the public at large, for example in shops, video rental outlets, supermarkets, restaurants or cinemas, or in the setting of an organisation with a controlled membership, such as private social or sports clubs, some professional societies, and political parties.

2.3 The Bill defines a private club as:

- Any association of 25 or more persons, whether incorporated or unincorporated, and whether run for profit or not.

Private Clubs

2.4 The association must also have a constitution. This can be written down but need not be. As long as it has rules (governing things like membership) this will count.

2.5 The club must also run its affairs in a way so that its members do not constitute a section of the general public (in which case the club is likely to be covered by existing legislation). In practice, this means that it operates a policy of membership selection genuinely based on personal criteria. This might include, for example, undergoing a selection procedure where the applicant's character or other relevant attributes are assessed and the possibility left open that the application could be rejected on these grounds.

Examples

A health club 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, undergoing a selection procedure for membership based on personal grounds is not a condition of using the club. This club therefore does not fall within the definition of an "association" as used in the Bill (and is likely to be already covered by the DDA).

A club providing dining and social facilities exclusively to its members requires that applicants for membership provide testimonials from three existing members to their good character before a decision can be made about the membership application. This club is unlikely to be covered by the existing law, but is likely to be covered as a private club once the Bill becomes law. The new duties described in this consultation document will then apply to it.

2.6 The responsibility for ensuring that disabled people are not discriminated against will fall to the private club. In the normal course of events, the officers of the club and its ruling body will be the people who are responsible for making sure that the new duties are complied with and who, ultimately, may have to justify their actions to a court.

2.7 The following people will have rights under the new legislation:

Disabled people who are:

- Applicants for membership of the private club;
- Existing members of the club;
- Associates (these are people who because they are members of a private club have the right to come into other clubs);
- Guests invited by the club or its members; and
- People eligible to be guests of the club.

2.8 One other group also has rights. These are non-disabled people who support a disabled person who has brought a claim of disability discrimination. If the non-disabled person is “victimised” (i.e. treated less favourably) for giving support to the disabled person, then he or she may have the right to bring an action for disability discrimination against the victimiser.

Duties and responsibilities under the new law

2.9 The Bill will make it unlawful for a private club to discriminate against a disabled person. There are two elements to this:

- A disabled people must not be treated less favourably for a reason relating to their disability compared to a person who is not disabled where there is no justification for doing so; and
- The private club must not fail to make a “reasonable adjustment” without justification, in circumstances where it is under a duty to do so.

2.10 The law also goes on to say in what specific circumstances these principles apply. For example in the case of a member of a club disability discrimination may be unlawful as a result of:

- The way that the club offers access to any benefits, facilities or services, or by the club deliberately refusing to afford them to a member.
- The club depriving a member of their membership or varying the terms of membership to their detriment.

Private Clubs

2.11 Similar circumstances will also apply to associates. They include where the club:

- Deprives an associate of their rights or varies those rights or subjects the associate to any other detriment.

2.12 Applications for membership and the treatment of guests are covered in similar ways.

Proposals on the detail of the new duties

The General Approach

2.13 The Government believes that the new duties should be consistent with those already placed on providers of goods and services more generally under the existing Part 3 of the DDA. This is based on the proposition that the relationship between a private club and its members and guests is analogous to the relationship between other providers of goods and services and their customers, and that the same levels of protection for disabled people is appropriate. This approach also has the benefit that organisations who provide some services only to their members and other services to the general public will face the same duties in respect of all their services.

2.14 The existing duties under Part 3 include the duty to make “reasonable adjustments”. The remainder of this chapter considers these duties in more detail and sets out how the Government intends to apply them to private clubs.

The “trigger point” for the duty to make reasonable adjustments

2.15 Under Part 3 of the DDA, the duty to make reasonable adjustments is currently triggered at the point at which a policy, practice or procedure applied by the service provider, or a physical feature of premises it occupies, makes it impossible or unreasonably difficult for a disabled person to make use of the service.

2.16 The Government believes this approach strikes a fair balance between the rights of disabled people and the providers of goods and services, and therefore proposes that the regulations should set the trigger point when a reasonable adjustment should be made in respect of the services of a private club at the same level.

Example

A private village social club provides its membership application form in very small print on A5 paper. It printed a lot of forms a long time ago and wants to use them up. But the “small print” makes it very difficult for a person with very restricted vision to read the form or complete it. The form may be impossible or unreasonably difficult for them to use. A reasonable adjustment may be required – perhaps by producing the form in larger print.

An “anticipatory” duty

2.17 Part 3 of the DDA provides that the duty to make reasonable adjustments should be “anticipatory”, This means that a service provider should anticipate the needs of a disabled person in accessing their goods or services before they present themselves. It would be of no use, for example, for a disabled person who uses a wheelchair wanting to use a restaurant with steps to the door on a particular evening to be told their request for a ramp could only be met the following week.

2.18 An anticipatory duty also helps to balance the responsibilities of service providers with the needs of disabled people, by ensuring the provider takes reasonable steps to accommodate all disabled people, rather than spending all their effort and resources on meeting the needs of the first disabled person to present themselves. Anticipating need does not necessarily mean making extensive or expensive provisions in advance, but should involve thinking in advance about what the needs of disabled members might be and deciding how they can be reasonably met.

2.19 The Government proposes that private clubs, like other service providers, should be subject to an anticipatory duty.

Example

The local bowls club is planning to refurbish its club house. It looks at the range of services and facilities it offers its members like the changing rooms where it considers shower cubicles with seats to help people to shower in more comfort after a match. This could help some members who have physical disabilities. It looks at its bar and decides to make one part of it lower to assist serving drinks to guests in wheelchairs. Finally it decides to provide improved secure storage for personal bowls equipment so that members can safely store their “woods” in the club house rather than transport these heavy objects to and from their cars each time they come to the club house. Again this helps disabled people with mobility difficulties.

The range of reasonable adjustments

2.20 Part 3 of the DDA sets out three categories for the duty on providers of goods and services to make reasonable adjustments. These are adjustments to:

- Policies, practices and procedures;
- The provision of auxiliary aids; and
- The physical features of premises to alter or remove the feature, enable the feature to be avoided, or to provide a reasonable alternative method of making the service available.

2.21 The Government proposes to apply the same provisions to private clubs.

2.22 The purpose of a reasonable adjustment is to make it possible for a disabled person to use and enjoy the same services or facilities used by other club members. However, the clubs need only take steps which are reasonable given all the specific circumstances of the case, including the cost of the adjustment and the resources available to the club to make the adjustment.

Examples – policies, practices and procedures

A private social club organises its annual dinner for its membership of 30 people upstairs in a small local hotel. The room is not accessible to two disabled members who have severe difficulty in climbing stairs. There is no lift. The members usually decline to attend, but have complained in the past about the arrangements. The restaurant has ground floor facilities of equal quality at a similar price. However, the organisers of the dinner prefer the privacy of the room upstairs. The club would, however, need to consider whether a change in this practice was necessary as a reasonable adjustment to allow access for its disabled members.

Example – auxiliary aids

A club with a regular programme of academic lectures and practical presentations for its members considers what can be done to make the programme more accessible for disabled members – and others – likely to attend. For the lectures this could include a range of things from making copies of the lecturer's notes available in larger print or on audio tape (in advance or after the lecture) or the installation of a hearing loop to sign language interpretation, For the presentations it could additionally include things like brighter and more directed lighting to make sure that display panels were visible and the use of large print on panels to further improve legibility and therefore access to information. This combination of making aids available to ensure the needs of disabled people likely to attend the programme of lectures is likely to be reasonable.

Reasonable adjustments in special situations

2.23 There are a number of special situations, which affect the duty to make reasonable adjustments. These are described below.

Private Clubs

Physical features – leased or rented premises, other binding obligations (e.g. mortgages)

2.24 Part 3 of the DDA does not overrule any obligation that a service provider is under to seek permission from landlords or others with an interest in the property before making changes to physical features. However, the Act does require landlords or others with an interest in the property not to refuse such consent unreasonably.

2.25 Service providers must also comply with other legislation relating to the need to obtain consent for alterations to listed buildings.

2.26 The Government proposes that the same provisions should apply to private clubs.

Private clubs which meet on domestic premises

2.27 The Government recognises that homeowners should not be put under any obligation to agree to permanent changes to their homes and home owners will be under no obligation to agree to such changes.

2.28 This will not, however, absolve the club from seeking alternative solutions, including, if necessary and reasonable, the provision of temporary changes – such as the provision of a portable induction loop - or a change of venue to secure access for disabled members.

Guests

2.29 When considering what a reasonable adjustment for guests might be, the club will be able to factor in considerations like the cost of the adjustment and the frequency of occasions when guests are or could be invited.

Political associations

2.30 Case law suggests¹ that political associations might, depending on their constitution, be covered by section 25 of the Race Relations Act 1976 as private clubs. Since clause 12 of Bill uses the same basic definition of a private club, such associations may also be covered by the DDA in due course.

1 Triesman and Ali and Another [2002] EWCA CIV 93

2.31 The relationship between members of a political association and the association itself is likely to be slightly different from that in other private clubs. People generally form associations to further their individual or common interests, but in a political association, the members associate together primarily to serve the interests of the association or its broader constituency.

2.32 The Government would welcome views on whether the nature of the relationship between members of a political association and the association itself is one that requires the duties to make reasonable adjustments to be modified.

Examples:

A local branch of a political party always holds its AGM in the upstairs room of the local pub because the landlord is a member and offers the room at a preferential rate. This is the meeting at which officers are elected. The atmosphere is smoky and this has a detrimental effect on a member with cystic fibrosis who cannot attend and on a member who is a wheelchair user who finds the venue inaccessible. Both ask for a change to the venue. The association declines for reasons of both tradition and cost.

A blind person who uses Braille is elected to his local party's environment committee and asks to have committee papers prepared in Braille. The party declines because of the expense.

A member of a political party wants to volunteer to canvass locally in the run up to an election and asks for the cost of taxis to be reimbursed as he has difficulties with mobility. The party argues that limited funds are best spent on printing and distributing leaflets or offers to let him canvass by phone.

The Government would welcome your views on how the duty to make adjustments should operate for political associations.

Justifications for not making reasonable adjustments

2.33 Under Part 3 of the DDA, service providers can justify not making a reasonable adjustment if they can show that, in their opinion, their action was justified for one of a limited range of reasons, and that it was reasonable for them to hold that opinion. The Government proposes to allow the same justifications for a failure by a private club to make a reasonable adjustment.

2.34 In brief, the justifications are that:

- The less favourable treatment of the disabled person is necessary in order not to endanger the health or safety of the disabled person or any other person.

Example

A golf club considers that it is not safe to allow a blind person onto the greens to play a round of golf at busy times because they were concerned about his ability to hit the golf ball without causing danger to others. This may well be a reasonably held opinion. But the club will need to bear in mind that there are also a large number of non-disabled golfers who don't play golf well and may also represent a danger. The club would have to show that their opinion about the potential danger caused by the visually impaired golfer was proportionate bearing in mind their approach to non-disabled players. If they could not, this justification may not be acceptable.

- The disabled person is incapable of entering into an enforceable agreement or giving an informed consent.

Example:

A club generally offers its members access to small loans from its own funds at low rates of interest to help with expensive times like Christmas. The loans have simple conditions, but strict repayment terms to ensure that the club's limited funds are not placed at risk. A member with a severe learning disability applies for a loan. The application is declined, after careful consideration, because the club feels that the applicant cannot properly understand the strict commitment he is entering into and there is no one else who otherwise manages his affairs because he normally manages well on his own. This is likely to be a reasonably held opinion.

- The treatment of the disabled person is necessary:
 - To be able to afford members, associates or guests, or the disabled person, access to a benefit, facility or service; or
 - Because the association would otherwise be unable to afford members, associates or guests of the association, access to a benefit facility or service.

2.35 These two justifications, which cover the standard or manner in which a service is provided, would give private clubs the scope not to make a reasonable adjustment for a disabled person where to do so would jeopardise the ability of the club to provide its services to other members, associates or guests or to the disabled person themselves.

- The difference between the terms on which membership is offered to the disabled person and those on which it is offered to other persons reflects the greater cost to the association of affording the disabled person access to a benefit, facility or service.
- The difference between the association's treatment of the disabled person and its treatment of other members reflects the greater cost to the association of affording the disabled person access to a benefit, facility or service.
- The difference between the association's treatment of a disabled person who is a guest or could be invited as a guest compared with a non-disabled guest reflects the greater costs to the association of affording the disabled person access to a benefit, facility or service.

2.36 The above three justifications, which are about the cost of services provided to a disabled person, would give private clubs the scope to charge a disabled person more for the services they provide, so long as the services were "bespoke" to the disabled person. They cannot be used in the case of services that are provided to all members etc of the club – in such cases the costs must be shared across all the service users.

Implementation of the new duties

2.37 Many private clubs are already subject to duties under the DDA either because they are also service providers to the wider community or as employers. The Government believes they should have little difficulty meeting the new duties and proposes that, subject to the passage of the necessary legislation:

Private Clubs

- The duty not to treat disabled people less favourably should come into effect in December 2005;
- The duty to make reasonable adjustments – in relation to policies, practices and procedures, provision of auxiliary aids, and physical features of premises - should come into effect in December 2006 (this allows time for codes of practice to be published to help private clubs understand the duties).

2.38 The Government would welcome views on this timetable and, in particular, on the proposed date for implementing the duties to make reasonable adjustments, including adjustments to physical features of premises.

Regulatory Impact

2.39 When it published the Bill, the Government also published a Regulatory Impact Assessment (RIA) (available on www.disability.gov.uk or direct from the Stationery Office) to illustrate the economic effects of these proposals on private clubs and the wider community. The Government would welcome views, as part of this consultation on the costs and benefits arising from its proposals.

2.40 In particular, the Government would welcome information from private clubs on:

- Adjustments that have already proved successful in meeting the needs of disabled members of clubs; reasons for successful outcome; description and costs involved; benefits hoped for and realised; and
- Adjustments that were not successful in meeting the needs of disabled members; reasons why not successful; description and costs of adjustment; benefits hoped for and not realised.

2.41 The Government accepted a recommendation from the Joint Committee of the House of Lords and House of Commons which carried out pre-legislative scrutiny of the draft Bill to specifically consult the sector on the costs of staff training to achieve compliance with these duties. Accordingly, the Government is now seeking information from the sector and from training providers as to the costs of training associated with compliance with these proposals.

2.42 It might assist clubs if they could draw on their experiences of training staff in other areas of the law involving an understanding of new duties and the continuing training that is necessary as staff are replaced

or their skills and knowledge refreshed and updated. It would be helpful if information could be provided under the following headings:

- Estimated costs of providing staff with information about their new duties; time spent phoning helplines, reading, on courses, coaching or instructing staff; time spent by managers in understanding the duties themselves and the costs involved;
- Ongoing training costs relating to refresher training and training replacement staff; managerial time and costs; and
- Training costs in areas such as the use of specialised equipment - for example there may be fitness equipment installed in a private club as part of a service to members which needs specialised advice on its use to be provided a trained member of staff.

Questions we would like you to consider:

Question 1

Do you agree with the proposal at paras 2.13 to 2.14 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?

If you do not agree, the Government would be interested to know what significant differences need to be reflected in the regulations.

Question 2

The Government would welcome views on its proposal for the trigger point for reasonable adjustment duties – para 2.15 – 2.16.

Question 3

The Government would welcome views on its proposal that the duty to make reasonable adjustments should be anticipatory - para 2.17 – 2.19.

Private Clubs

Question 4

The Government would welcome views on the range of justifications for not making a reasonable adjustment described in para 2.33 – 2.36.

Question 5

The Government would welcome views and evidence on the implementation timetable for the duty to make reasonable adjustments. See paras 2.37 and 2.38 for details.

Question 6

The Government would welcome views on its proposals to treat the special circumstances set out in paragraphs 2.23 to 2.32. In particular, the Government would welcome views on how, if at all, the duty to make adjustments should be modified in relation to political associations.

Question 7

The Government would welcome information on the regulatory impact of its proposals and particularly the information set out in paragraphs 2.39 to 2.42

3. RENTAL AND MANAGEMENT OF PREMISES

Summary;

This chapter seeks views on detailed proposals underpinning the implementation of new duties of reasonable adjustment in relation to rented premises.

Current Law

3.1 Disabled people already have protection against discrimination when they rent or buy property. This is set out in sections 22 to 24 of the DDA.

3.2 It is currently unlawful for those who “dispose” of premises to discriminate against a disabled person:

- In the terms on which they offer to dispose of premises to the disabled person;
- By refusing to dispose of premises to the disabled person; or
- In their treatment of the disabled person in relation to any waiting list for the premises.

3.3 “Dispose” has a wide meaning and includes, for example, the sale, lease or rental of property. There are special rules for disposals by owner occupiers.

3.4 It is also unlawful for those who manage premises to discriminate against a disabled person occupying those premises:

- In the way they permit the disabled person to use any benefits or facilities;
- By refusing or deliberately not permitting the disabled person to use any benefits or facilities; or
- By evicting the disabled person or subjecting them to any other detriment.

Rental and Management of Premises

3.5 Discrimination by anyone whose licence or consent is required for the rental or other disposal of premises to a disabled person is also prohibited.

3.6 Discrimination occurs if, for a disability-related reason, a landlord or manager treats a disabled person less favourably than they treat or would treat others and they cannot show that such treatment is justified.

3.7 Treating a disabled person less favourably can only be justified in certain limited circumstances. These include where the landlord or manager considers that the treatment is necessary to protect someone's health and safety, or that the disabled person is incapable of entering into an enforceable agreement (such as a lease). In either case, it must be reasonable for the landlord or manager to hold that opinion.

3.8 The duties apply to all types of premises, including commercial premises (such as shops) and non-commercial premises (such as dwellings let by private and social landlords). However, certain small dwellings are exempted. Broadly speaking, a small dwelling is one in which the landlord or manager shares living accommodation with those not of his household, and either lets out accommodation in the premises to not more than two other households; or there is not normally residential accommodation on the premises for more than six persons in addition to the landlord or manager and members of his household.

3.9 A disabled person who believes they have been discriminated against can apply to the county court (sheriff court in Scotland). If discrimination has occurred, the court will be able to order payment of compensation. It can also make a declaration as to the rights of the parties involved and issue an injunction (in Scotland, an interdict) to prevent any future repetition of the discrimination.

3.10 The Disability Rights Commission (DRC) has issued a Code of Practice which explains these duties. This can be purchased from The Stationery Office, including in alternative formats. The Code is also available for free on the DRC's website www.drc.org.uk/publicationsandreports.

Effect of the Bill

3.11 The Bill adds to the existing protection for disabled people by requiring a “controller of premises” to make reasonable adjustments for disabled tenants and occupiers. “Controller of premises” means landlords and those who manage rented premises. The new duties are set out in Clause 13 of the Bill, which inserts new sections 24A to 24L into the DDA.

3.12 Subject to the passage of the Bill through Parliament, the Government anticipates bringing these new duties into effect in December 2006. Guidance on the duties will be available in a Code of Practice issued by the Disability Rights Commission.

3.13 As with the existing premises provisions, there are some exemptions. The Bill applies the small dwellings exemption described in paragraph 3.8 to the new duties of reasonable adjustment. Premises which are, or have been, the principal or only home of the person letting them will also be exempted.

3.14 Under these new sections, provided certain conditions are met (for example, that a request has been made), a landlord or manager of premises that are to let, or of premises which have been let, must make reasonable adjustments to their practices, policies and procedures, change a term of the letting or provide auxiliary aids and services for a disabled person. These new duties are explained below.

Practices, policies and procedures

3.15 A landlord or manager of rented premises may have to take reasonable steps to change a practice, policy or procedure. The duty arises where the practice, policy or procedure makes it impossible or unreasonably difficult for a disabled tenant or occupier to enjoy the premises or to use an associated benefit or facility; or for a disabled person who wishes to rent the premises to do so.

3.16 Provided certain conditions are met, the landlord or manager must take reasonable steps to change the practice, policy or procedure concerned so that it no longer makes enjoyment or use (or becoming a tenant) impossible or unreasonably difficult for the disabled person. For example, a landlord might have to allow a disabled tenant with mobility difficulties to leave their rubbish in another place if they cannot access the designated place.

Examples

A landlord has a practice of visiting all of his tenants periodically for a quarter of an hour to check on the state of the premises and that the tenant is happy with everything. One of the landlord's tenants, Gordon, has learning difficulties. When the landlord visits Gordon he always arranges a half an hour appointment for this because Gordon needs more time to understand what the landlord is saying and doing.

Diana, who lives in a block of flats, has mobility problems. She finds it very difficult to use the main route to the tenants' garages because she has to go up a flight of steps. There is an alternative route through the flats' communal garden, which allows level access to the garages. Diana normally uses this route. However, the managing agent has a health and safety policy of closing the gardens in the summer for two hours on Monday mornings while a gardener mows the lawns. The gardener only takes twenty minutes to mow the lawns and uses the rest of the time for general gardening. The gardens are closed when Diana needs to leave for work. She asks if the managing agent will change his policy and shut the gardens for only half an hour while the gardener is actually mowing the lawn. The managing agent discusses this with the gardener and agrees to shut the garden only while he is mowing.

Terms of a letting

3.17 Similarly, a landlord or manager of rented premises may have to take reasonable steps to change a term of the letting, if the term makes enjoyment of the premises or use of an associated benefit or facility impossible or unreasonably difficult for a disabled person.

Example

Kerry's mobility problems have increased and she is unable to get to the upper floor of her rented house. She asks her landlord for permission to install a stair lift.

The landlord is not keen on this and wants to enforce the clause in her lease which forbids alterations being made. He is concerned about the costs of removing the stair lift, if Kerry leaves. He takes advice from his local landlord association. They advise him that it may be a reasonable adjustment for him to change the clause in the lease to one that allows improvements and, if so, under the Landlord and Tenant Act 1927 he would not be able to withhold consent unreasonably to the installation of the stair lift. He could, however, make removing it at the end of the tenancy a condition of his consent.

The landlord allows Kerry to install the stair lift at her own expense and if she agrees to pay for its removal when she moves on.

Auxiliary Aids and Services

3.18 A landlord or manager of rented premises will have to take reasonable steps to provide an auxiliary aid or service if that would enable or facilitate a disabled person's enjoyment of the premises or their use of any associated benefit or facility. Similarly, where premises are to let, reasonable steps must be taken to provide an auxiliary aid or service where that would enable or facilitate a disabled person to take a letting of the premises.

3.19 These duties arise where the effect of not providing an auxiliary aid or service would be to make enjoyment of the premises or use of any benefit or facility unreasonably difficult or impossible for a disabled person. A landlord might, for example, have to put correspondence in 20 point font for a visually impaired tenant, or provide a clip-on receiver which vibrates when the door bell rings for a tenant who is hard of hearing.

3.20 However, the duty does not arise unless the auxiliary aid or service is needed specifically in connection with the use of the premises concerned. Accordingly, a landlord would not have to provide a wheelchair for a tenant who had difficulty in walking, as the tenant would need this for general purposes, and not just for moving around the flat.

Examples

Due to disability, George has started using a wheelchair. He is now trapped inside his rented ground floor flat because he can't get down the two steps at the entrance of the block of flats. His shopping is done by friends and family. To allow him to get down the steps in his wheelchair George needs a portable ramp. He discusses this with his landlord who agrees to buy one. George is now able to do his own shopping again.

Andy rents a furnished flat. His arthritis makes it very difficult for Andy to get out of the chairs because they are too low. He asks his landlord to change one of the chairs to a higher more suitable one. The landlord agrees and finds a chair in another of his flats that Andy can easily get out of.

Physical features

3.21 A landlord or manager of rented premises, or of premises which are to let, will not have to take any steps that would involve the removal or alteration of a physical feature. There are powers in the Bill to prescribe by regulation what is to be treated as a physical feature and as an alteration to a physical feature.

Justification

3.22 A landlord or manager may justify a failure to make a reasonable adjustment only where he believes:

- The treatment is necessary not to endanger someone's health and safety; or
- The disabled person is incapable of entering into an enforceable agreement (such as a lease).

In either case, the landlord or manager must show that it is reasonable to hold that opinion. There are regulatory powers enabling changes to be made to these justifications.

Enforcement

3.23 A disabled person who believes they have been discriminated against will be able to apply to the county court or, in Scotland, the sheriff court. As with the existing duties, if discrimination has occurred the court will be able to order payment of compensation. It can also make a declaration as to the rights of the parties involved, and issue an injunction (in Scotland, an interdict) to prevent any future repetition of the discrimination.

Proposals for regulation

Meaning of terms

Whether to define “physical feature”

3.24 As noted in paragraph 3.21, a controller of premises will not be required to alter or remove a physical feature of premises. The term “physical feature” is not defined in sections 24A to 24L, but there is a power to set out in regulations what is and is not to be treated as a physical feature, and to be treated as an alteration.

3.25 The term “physical feature” is already used in Parts 2 (employment), 3 (goods, facilities and services) and 4 (education) of the DDA. In the first two cases, the term has been defined². It has not been defined for Part 4, however, some guidance as to its meaning is set out in the relevant section³.

3.26 There are advantages to defining what is included in the term. For example, the definition in Part 2 of the DDA reduces the scope for argument about the features of an employer’s premises which can trigger the employer’s duty of reasonable adjustment.

3.27 However, this precedent does not have to be followed. An alternative approach would be simply to rely on the natural everyday meaning of the term physical feature for the new premises duties.

3.28 The Government would welcome views on whether or not to define what is or is not to be treated as a physical feature.

2 Respectively, section 18D(2) and regulation 3 of the Disability Discrimination (Services and Premises) Regulations 1999 (SI 1999/1191).

3 Section 28C.

Rental and Management of Premises

Regulations would:

- Provide certainty for landlords and tenants;
- Be consistent with practice elsewhere in Part 3 of the DDA (the new duties will be in Part 3);
- Mean that the scope of the new duty of reasonable adjustment as it applies to physical features could be focused more precisely.

Not having a definition of what is included might;

- Result in unintended conflicts with the meaning of terms such as “fixtures and fittings” in common usage in the housing and property sector;
- Reduce flexibility at the margins as to what is, or is not, covered by the duty of reasonable adjustment;
- Lead to uncertainty as to the meaning of the term physical feature.

Defining “physical feature”

3.29 If the Government did decide to define what is or is not to be treated as a “physical feature”, it would need to consider the following factors in developing any regulations:

- The need to cover correctly “fixtures and fittings” (i.e. things which are fixed to the fabric of the premises, such as doors and wardrobes screwed to a wall);
- Recognition of the fact that in everyday language the term “physical features” may also include things like furniture and furnishings, and if so its scope may be reduced.
- The need to provide clarity for landlords and managers as to their duties and where they may be held liable for failure to comply;
- That the narrower the definition of terms, the broader the scope of the duty of reasonable adjustment (because landlords and managers of rented premises will not have to remove or alter a physical feature of premises) and the need to strike the right balance in framing the duties.

3.30 The Government's starting point is likely to be the existing Part 2 definition. That definition is:

"physical feature", in relation to any premises, includes any of the following (whether permanent or temporary) –

- (a) any feature arising from the design or construction of a building on the premises,
- (b) any feature on the premises of any approach to, exit from or access to such a building,
- (c) any fixtures, fittings, furnishings, furniture, equipment or material in or on the premises,
- (e) any other physical element or quality of any land comprised in the premises.

3.31 This would produce the right result in most cases. For example, things like cupboards and signs screwed to a wall are fixtures and would be treated as physical features under this definition with the result that the landlord would not have to alter or remove them.

3.32 However, the Government considers that the inclusion of "furnishings, furniture, equipment or material" would make the definition too wide for purposes of the new duty. This is because it would mean, for example, that even where it was reasonable to do so, a landlord would never have to remove a deep-pile freestanding carpet, which made movement around rented premises unreasonably difficult for a wheelchair user.

3.33 The Government would, therefore, welcome views on what should and should not be covered in any definition of physical feature and how the terms might be framed in law.

Tenant's alterations to premises

3.34 The Bill makes it clear that a controller of premises will never have to take steps which would involve removing or altering a physical feature of premises. There may, however, be a risk that the duty to make reasonable adjustments to a practice, policy or procedure may impact on policies concerning tenants' own alterations to the physical features of the premises.

Rental and Management of Premises

3.35 Tenants' improvements are the subject of other existing legislation:

- The Housing Acts 1980 and 1985 (sections 81 and 97 respectively) apply to all Council and Rent Act tenants in England and Wales and provide that it is a term of every tenancy that tenants may not make any improvement to their premises without the consent of the landlord. This consent cannot be withheld unreasonably. Tenants of local authorities and registered social landlords in Scotland have this right under the Housing (Scotland) Act 2001 (section 28).
- Section 19(2) of the Landlord and Tenant Act 1927 applies to all other types of tenancy in England and Wales. Where a lease provides that a tenant may not carry out improvements without the consent of the landlord, it is implied into the lease (regardless of what the lease actually says) that the landlord's consent is not to be unreasonably withheld (similar legislation is planned for Scotland).

3.36 The Government therefore proposes to regulate to make clear that a controller of rented premises will not be required, under the new duty of reasonable adjustment, to consent to a tenant making alterations to premises they rent or propose to rent, or to take steps to change a practice, policy or procedure regarding landlords' consent to tenants' improvements. This will avoid duplication of existing rights.

3.37 However, where the Housing Acts do not apply, there may be circumstances where a lease expressly prohibits a tenant from making any alterations at all. The new duties address this by imposing a duty to take reasonable steps to change such a term of the letting, if the prohibition makes use or enjoyment of the premises impossible or unreasonably difficult for a disabled person. The controller might, for example, change the term to one allowing alterations with his consent. The provisions of the 1927 Act would then apply, so that such consent may not be unreasonably withheld.

Justifying failure to make a reasonable adjustment

3.38 As explained in paragraph 3.22 a controller of premises can justify failing to make a reasonable adjustment only where one of two conditions applies. One of the conditions is that a disabled person is incapable of entering into an enforceable agreement, or of giving informed consent.

3.39 This justification is common to other parts of the DDA. For example, section 20(4)(b) ensures that a service provider is not liable for discrimination against a disabled person for refusing credit for an expensive computer system, if the disabled person does not understand what the transaction involves. However, Regulations (in this example SI 1996/1836 regulation 8) ensure that the justification cannot be relied upon if the disabled person is acting through certain other people: for example a person who has power of attorney.

3.40 The Government proposes to adopt the same approach and regulate to ensure that a controller of premises (and a person disposing of or managing premises) will not be able to use this justification where a disabled person is acting through another person by virtue of:

- A power of attorney;
- Functions conferred by or under part VII of the Mental Health Act 1983; or
- Powers exercisable in Scotland in relation to the disabled person's property or affairs in consequence of the appointment under the law of Scotland of a guardian or judicial factor.

Extending the duties to commonhold premises

3.41 Commonhold is a new system of freehold ownership applicable to blocks of flats, shops, offices and other multiple occupation premises in England and Wales. Where commonhold applies in multiple occupied premises, there is no landlord and tenant relationship. The new system was introduced in September 2004.

3.42 A commonhold development will consist of interdependent freehold properties, referred to as "commonhold units", and common parts (such as entrance halls). Each unit will be owned by the unit-holder; the common parts will be owned and managed by the commonhold association, which is a limited company of which only the unit-holders may be members.

3.43 Unit-holders have direct ownership of the unit they own and, as members of the commonhold association, an interest in the ownership and management of the common parts. The commonhold will be managed by the commonhold association in accordance with rules set out in a commonhold community statement. The statement will include mandatory provisions prescribed by law which cannot be changed, and may contain rules specific to the circumstances of each commonhold which can be changed.

Rental and Management of Premises

3.44 In certain circumstances, the commonhold association could affect a unit-holder's enjoyment of his premises or use of a benefit or facility located in the common parts of the commonhold development.

3.45 Accordingly, to ensure that disabled people who are unit-holders are not discriminated against, the Bill provides (in Schedule 1) for regulation making powers to clarify that, for the purposes of section 22(3) of the DDA (which deals with discrimination by managers of premises), a commonhold association is to be treated as a person managing premises and / or that a unit-holder is to be treated as a person occupying premises. In addition, clause 13, new section 24L(1)(a) and (2) provides powers to make commonhold premises subject to the new duties of reasonable adjustment (set out in new sections 24A to 24L).

3.46 The Government proposes to provide in regulations that where a commonhold association exercises control over a unit-holder (as described above):

- The commonhold association will be treated as though it was a controller of premises, and that commonhold units will be treated as premises to let;
- A unit-holder will have the same rights to reasonable adjustments as a person to whom premises are let; and
- Rules within the commonhold community statement will be treated in the same way as a term of a letting.

Questions we would like you to consider:

Question 8

Bearing in mind the points made in paragraphs 3.24 to 3.28, do you consider that what is to be treated as a "physical feature" should be prescribed for purposes of the new duties of reasonable adjustment applying to controllers of premises?

Question 9

If the Government decides to prescribe what is to be treated as a "physical feature", do you agree with its approach outlined in paragraphs 3.29 to 3.33?

If there are any things that you consider should, or should not, be included in any definition, please say what they are and why.

Question 10

The Government would like to know whether you agree with its proposals to regulate on tenants' alterations to premises in paras 3.24 to 3.37.

If no, please explain why.

Question 11

The Government would like to know whether you agree with its proposals to regulate on justifications in paragraphs 3.38 to 3.40?

If no, please explain why.

Question 12

The Government would like to know whether you agree with its proposals to regulate in respect of commonhold in paragraphs 3.41 to 3.46?

If no, please explain why.

Question 13

Are there any other areas relating to the new duties of reasonable adjustment on which you think the Government should consider regulating?

Please tell us what they are.

4. DEFINITION OF DISABILITY

Summary

This chapter seeks views on the use of the regulation-making power in the Bill to exclude certain cancers from the scope of the extended definition of disability.

Current Law

The General Definition of Disability

4.1 Section 1 of the DDA defines a person as having a disability for the purposes of the Act where he has a physical or mental impairment that has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. These terms are further defined in Schedule 1 to the Act, which:

- Defines the effect of an impairment as long-term if it has lasted 12 months, or it is likely to last 12 months, or it is likely to last for the rest of the life of the person (when a person is terminally ill and is not expected to live for 12 months);
- requires that an impairment is only to be taken to affect the ability of the person concerned to carry out normal day-to-day activities if it affects one of the following capacities: 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.

Definition of Disability

Example

Daphne has rheumatoid arthritis and has had the condition for 12 months. She has been told it is unlikely to improve significantly in the next 12 months. She finds it difficult to hold a pen, use a cup or prepare and eat food because she cannot hold a knife or use a fork properly. She also finds it increasingly difficult to stand upright for any reasonable period of time and to walk. The condition clearly has a substantial adverse effect on her ability to carry out a range of normal day-to-day activities. The capacities affected are manual dexterity and mobility. It is likely that Daphne would be considered to be a disabled person under the DDA.

Treatment of Progressive Conditions

4.2 The definition of disability is modified (by paragraph 8 of Schedule 1) to make special provision for people with progressive conditions – that is those conditions, which are likely to get worse over time. Multiple Sclerosis (MS), HIV infection and cancer are explicitly cited as examples of progressive conditions.

4.3 A person with a progressive condition will be covered by the definition of disability from the point at which their impairment has any (rather than a substantial) adverse effect on their ability to carry out normal day-to-day activities, provided that the condition is likely to give rise to an impairment that will have a substantial adverse effect in the future.

4.4 This means that persons with HIV infection, most forms of cancer or multiple sclerosis will usually be covered by the definition of disability in the DDA from when they first display a symptom associated with the condition.

Example

Edward has been told that he has prostate cancer, which has started to affect his urinary continence. He needs to use one absorbent pad a day to help keep him dry. Although this has some adverse effect on his ability to carry out normal day-to-day activities, these effects are not yet substantial. However the cancer will get worse and with it, the effects of the incontinence. Edward would be treated as a disabled person under the DDA as it currently stands.

Effect of the Bill

4.5 Clause 17 of the Bill deems people with HIV, cancer or MS to be disabled for the purposes of the Act before they experience any effects from their condition. This implements a Disability Rights Task Force recommendation that the definition of disability be extended in the case of HIV infection and cancer from the point of diagnosis.

4.6 There is a regulation-making power which allows the Secretary of State to make regulations excluding persons who have cancer of a prescribed description from this provision. The remainder of this chapter sets out the Government's intended use of this power.

Proposed Exemptions from the new Provision

The General Approach

4.7 The Disability Rights Task Force, in its 1999 Report "From Exclusion to Inclusion", identified HIV and cancer as conditions where people experienced discrimination based on stigma before any effects emerged.

4.8 However, they saw little evidence of discrimination against those people with, for example, some skin cancers requiring minor treatment and recommended that people with such cancers should be deemed to be disabled from the point at which it has a significant consequence on their lives. The Government responded to this recommendation in 'Towards Inclusion' (March 2001, Department for Education and Employment), saying that they would ensure that, in addition to those already covered by the definition in the DDA, people with cancer count as disabled from the time at which the cancer is diagnosed as being a condition that is likely to require substantial treatment.

Definition of Disability

4.9 The Government intends, therefore, to use the regulation-making power in clause 17 to exclude from the provision of that clause those cancers that are not considered to require substantial treatment.

Proposed Exclusions

4.10 The Government intends to exclude the most common cancers which are considered not to normally require substantial treatment and are as follows:

- Basal cell carcinomas (Rodent Ulcers);
- Most squamous cell carcinomas of the skin;
- Bowen's Disease;
- In situ skin cancers (ones which do not affect the full skin thickness and can be treated easily and simply); and
- In situ cancer of the cervix uteri which it is likely can be treated successfully and fully by cone biopsy.

4.11 If a person has any of these conditions, the Government intends that he or she will not be covered by the extended definition under clause 17 (although coverage may be established by one of the other provisions in the DDA). However, if a person has a cancer that is not mentioned in this list, he will be automatically covered by the extended definition of disability provided for in clause 17.

4.12 The Government recognises, however, that it could be unfair to exclude a person with one of these cancers which does not normally require substantial treatment from protection under clause 17, if he or she was, exceptionally, considered to require substantial treatment.

4.13 Therefore, the Government is considering whether to make a further provision that a person with a cancer considered as requiring substantial treatment is covered by clause 17, regardless of whether the cancer is listed as an excluded condition.

4.14 This being the case, the Government would issue revised statutory guidance⁴ on the definition of disability to include guidance to Courts and Tribunals on the meaning of “substantial treatment”. The Government’s view is that “substantial treatment” means:

- Treatment extending beyond one day (including surgery, radiotherapy, chemotherapy) to remove or treat cancers like basal cell carcinoma, squamous cell carcinoma or Bowen’s disease because it has progressed beyond the scope of treatment which is minor or trivial;
- In-patient and out-patient treatment where the patient has to return because the original treatment was not successful, or where further treatment is required⁵, and
- Visits to the hospital or GP for extended check-ups more than four times a year to ensure that no further cancers occur.

4.15 The Government estimates that an additional 145,000 people will gain protection each year from the new clause. About 83,000 people newly diagnosed with cancer each year will not be protected because their type of cancer does not require substantial treatment.

Questions we would like you to Consider

The Government would welcome views on the following questions.

Question 14

The Government would like to know whether you agree with the proposed overall approach to the coverage of cancers.

Question 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.

4 Guidance on matters to be taken into account in determining questions relating to the definition of disability (1996).

5 Towards Inclusion (2001) page 35, paragraph 3.12

Definition of Disability

Question 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.

Question 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 clause 17.

5. THE QUESTIONS PROCEDURE

Summary

This chapter seeks views on the Government's proposals to extend the existing procedure for asking questions about alleged discrimination.

Current law

5.1 The DDA provides a procedure by which a person, who believes they have been discriminated against in contravention of its employment and occupation provisions, can put questions to the alleged discriminator (called the "respondent"). These provisions are set out in Part 2 and section 21A of the Act, and the procedure itself (known as the "questions procedure") is set out in section 56. There are similar questions procedures in other anti-discrimination legislation, for example, the Sex Discrimination Act 1975 and the Race Relations Act 1976.

5.2 Using the questions procedure can help a person find out more about the reasons for an alleged unlawful act, and might enable a dispute to be resolved without the need for legal action. Subject to certain conditions being met, if a person decides to bring a case before an employment tribunal, the tribunal must admit information gathered through the questions procedure as evidence.

5.3 Special forms have been prescribed (in the Disability Discrimination (Questions and Replies) Order 2004 (2004 No.1168)) which people can use to ask and to respond to questions. These can be adapted to cater for individual circumstances, but there are benefits from using the prescribed forms (or ones which have a like effect).

5.4 The forms have also been published by the DRC and are available as a free booklet ("The Questions Procedure", reference number "DL56"), in alternative formats and on its website www.drc-gb.org/publicationsandreports.

5.5 Time limits for the questions procedure and the manner in which the forms must be served (e.g. by post) have also been prescribed in the Order.

The Questions Procedure

5.6 The time limits for submitting a questionnaire are:

Before a complaint has been made to a tribunal:

- within 3 months of the alleged act of discrimination or harassment; or
- where statutory dispute resolution procedures apply, within 6 months of the alleged act of discrimination or harassment.

Where a complaint has already been made to a tribunal:

- within 28 days of the date when the complaint was presented; or
- if the questionnaire was served with the leave of a tribunal, within the period specified by that tribunal.

5.7 There is also a time limit for responding to questions. Where the respondent fails, without reasonable excuse, to reply to questions within 8 weeks, then the tribunal will be able to draw any inference that it considers just and equitable. This may include an inference that the respondent has committed an unlawful act. The tribunal will also be able to draw such an inference from a reply that is evasive or equivocal.

5.8 Full details about how to use the questions procedure are provided in the DRC's booklet DL56.

Effect of the Bill

5.9 Clause 16 of the Bill restates and extends section 56 of the DDA so that it also applies in the areas of Part 3 not already covered, such as the provision of goods and services. This means that the questions procedure will also apply where a person (referred to as "the person aggrieved" in the new section 56) wants to ask questions about alleged discrimination:

- In access to goods, facilities and services (sections 19 to 21);
- By public authorities (clause 2: new sections 21B to 21E), with some exceptions, for example, if answering questions would prejudice a decision to institute criminal proceedings;

Consultation on private clubs; premises; the definition of disability and the questions procedure.

- By private clubs (clause 12: new sections 21E to 21H);
- By those who sell, rent or manage premises (sections 22 to 24);
and
- By those who control rented premises (clause 13: new sections 24A to 24L).

5.10 The Government intends to prescribe appropriate forms for the new areas to be covered. Our proposals for doing so are explained below.

5.11 Cases about the issues covered by the extended questions procedure will be heard in county courts (sheriff courts in Scotland). Issues covered by the existing questions procedure will continue to be heard by employment tribunals. All questions and replies will be admissible as evidence subject to certain conditions and a court or tribunal will be able to draw any inference that it considers just and equitable if a respondent fails, without reasonable excuse, to reply to questions within 8 weeks or replies in an evasive or equivocal way.

5.12 The Secretary of State's powers to prescribe various matters by Order are restated in the new section 56. These are:

- The forms a person can use to question the respondent;
- The forms the respondent can use to reply to any questions;
- The period within which questions must be served in order to be admissible in evidence before a tribunal or court; and
- The manner in which a question, and any reply by the respondent, may be duly served.

5.13 Subject to passage of the Bill through Parliament, the Government anticipates bringing the extended questions procedure into effect in December 2005.

Example

Sunita was not allowed to eat a meal in a local restaurant because the manager objected to her guide dog. When asked to explain his reasons, all he would say was that “dogs are dirty and shouldn’t be allowed where food is served”. Sunita subsequently sent him a questions form using the standard questions to ask him to explain why she had been refused entry. Because the questions form made clear that his replies could be used as evidence, the manager decided to find out about the DDA by calling the DRC’s free Helpline. Having done so, he realised that he had discriminated against Sunita and would lose any court case she brought against him. Accordingly, he replied to her questions explaining that he had not known enough about the DDA, apologised for his behaviour and offered Sunita and her family a free meal and agreed that, in future guide dogs would be admitted to the restaurant. She accepted this offer and did not take legal action.

Proposals for the extended questions procedure

5.14 Because they deal with different kinds of circumstances and slightly different provisions in law, the Government consider that using *exactly* the same forms for the existing and the extended questions procedures could be confusing.

5.15 Accordingly, the Government proposes to retain the existing questions and replies which were introduced in October 2004 for employment and occupational cases. These will also cover the new duties applying to disabled local councillors (inserted into Part 2 of the DDA by clause 1 (new sections 15A to 15C)) when they come into force. This is expected to be in December 2005.

5.16 The Government will prescribe new forms for the other extensions to the procedure, building on the existing model. The Government would welcome comments on its proposals for these new forms, which are set out below.

Questions and replies

5.17 The Government proposes that the form a person aggrieved may use to ask questions about an alleged act of discrimination or other relevant matter will require them to:

- State their name and address, and that of the person to whom the form is addressed;
- Complete a standard statement to the effect that they consider a service provider; a public authority; a private club; a person disposing of, or managing, premises; or a controller of premises has discriminated against them unlawfully;
- Give a factual description of the alleged unlawful discrimination;
- Explain why they think the treatment they received was unlawful discrimination;
- Contain space for the person aggrieved to ask any other questions they wish; and
- Sign and date the questions.

5.18 The form will also set out standard questions asking the respondent whether:

- They agree that the description is accurate and, if they disagree, inviting them to say why or to give their version of events;
- They accept that the treatment was unlawful and, if not, why not and whether they consider it can be justified.

The Questions Procedure

5.19 The form to be used by the respondent in replying to any questions will require them to:

- State their name and address, and that of the person for whom the reply is intended;
- Complete a standard statement acknowledging receipt of the questions form;
- Complete a standard statement EITHER agreeing that the aggrieved person's description of what happened is accurate OR saying that they disagree and setting out their description of the treatment complained of;
- Complete a standard statement EITHER agreeing OR disagreeing that they discriminated unlawfully contrary to Part 3 of the DDA;
- Set out their reasons if they disagree, or say why they consider the treatment was justified; and
- Sign and date the form.

5.20 The form will also:

- Contain space for the respondent to reply to any other questions posed by the person aggrieved; and
- Give the respondent the option of completing a standard response to the effect that they have deleted questions (or parts of questions) posed because they are unable or unwilling to answer them, and the reason for this.

Manner for serving questions and replies

5.21 The Government intends to adopt the same requirements as in the existing questions procedure to prescribe the manner for serving questions and replies. This would ensure that a question or reply was duly served by:

- Delivering it or by sending it by post to the respondent's usual or last known residence, or place of business;
- Delivering it or by sending it by post to the aggrieved person's address for reply as stated in the questions, or where none is stated, at their usual or last known residence;
- Where the person to be served is a body corporate, a trade union or an employers' association, by delivering it to the secretary or clerk at its registered or principal office, or by sending it by post to the secretary or clerk at that office;
- Where the person to be served is acting through a solicitor, by delivering or posting to the solicitor's address.

Period for serving questions

5.22 In the questions procedures, under other anti-discrimination legislation, a person is able to issue a questions form until their right to make an application to a tribunal or court has expired.

5.23 There is a time limit of six months from the act complained of for making an application to a county court (sheriff court in Scotland) about the issues to be covered by the extended questions procedure. However, this time limit is extended by two months where the issue has been referred by the DRC to its independent conciliation service.

5.24 Accordingly, the Government proposes that the time limit for serving questions under the extended questions procedure for them to be admissible as evidence should be:

- Before an application has been made to a court:
- 6 months from the act complained of, or
 - 8 months where the issue has been referred by the DRC to its independent conciliation service;
- Where an application has already been made to a court:
- Only with the leave of the court and within the period specified by it.

The Questions Procedure

Questions we would like you to consider

Question 18

The Government would like to know whether you agree with its detailed proposals in relation to the extension of the questions procedure.

If no, please explain why.

Question 19

If you think there are any other areas to do with the extended questions procedure which should be provided for by Order, please explain why and what these are.

Consultation on private clubs; premises; the definition of disability and the questions procedure.

6. QUESTIONNAIRE

In this consultation exercise, we are asking you to answer a number of questions and respond on issues. Please reply to as many as possible. The Freepost address to return your reply to is:-

Chris Manasseh
 Freepost
 RLSG - BZTB - GSBA
 Disability Rights Division
 London WC2N 6HT

Name _____

Address _____

Are you responding as an individual or on behalf of an organisation?

If an organisation would you describe it as an:
(Please tick as appropriate)

- Employer
- Service provider
- Private club
- Representative body
- Other

If you are a club, how many members do you have?

Would you describe yourself as a private club based on the definition given in **Chapter 2**?

Yes
 No

Questionnaire

If you are a representative body, how many members do you have?

If you are a landlord:-

- Do you operate in the social rented sector or the private rented sector? _____
- How many tenants do you have? _____
- If you are a business, how many employees do you have _____

Unless you specifically request that your reply is treated in confidence, it will be treated as public. Confidential replies will still be included in a statistical summary of numbers or comments received and views expressed. Please ensure that if you want your name or response to be kept confidential, you state this clearly in your response.

Do you wish this reply to be treated as confidential? Yes/No

The following questions appear in the main text of the consultation document:

Private Clubs

Question 1

Do you agree with the proposal at paras 2.13 to 2.14 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?

If you do not agree, the Government would be interested to know what significant differences need to be reflected in the regulations.

Please continue on sheets provided if necessary

Question 2

The Government would welcome views on its proposal for the trigger point for reasonable adjustment duties – para 2.15 – 2.16

Question 3

The Government would welcome views on its proposal that the duty to make reasonable adjustments should be anticipatory - para 2.17 – 2.19.

Question 4

The Government would welcome views on the range of justifications for not making a reasonable adjustment described in para 2.33. – 2.36

Question 5

The Government would welcome views and evidence on the implementation timetable for the duty to make reasonable adjustments. See paras 2.37 and 2.38 for details

Questionnaire

Question 6

The Government would welcome views on its proposals to treat the special circumstances set out in paragraphs 2.23 to 2.32. In particular, the Government would welcome views on how, if at all, the duty to make adjustments should be modified in relation to political associations.

Question 7

The Government would welcome information on the regulatory impact of its proposals and particularly the information set out in paragraphs 2.39 to 2.42.

Questionnaire

Premises

Question 8

Bearing in mind the points made in paragraphs 3.24 to 3.28, do you consider that what is to be treated as a “physical feature” should be prescribed for purposes of the new duties of reasonable adjustment applying to controllers of premises?

Question 9

If the Government decides to prescribe what is to be treated as a “physical feature”, do you agree with its approach outlined in paragraphs 3.29 to 3.33?

If there are any things that you consider should, or should not, be included in any definition, please say what they are and why.

Question 10

The Government would like to know whether you agree with its proposals to regulate on tenants’ alterations to premises in paras 3.24 to 3.37.

If no, please explain why

Cut here

Question 11

The Government would like to know whether you agree with its proposals to regulate on justifications in paragraphs 3.38 to 3.40?

If no, please explain why.

Question 12

The Government would like to know whether you agree with its proposals to regulate in respect of commonhold in paragraphs 3.41 to 3.46?

If no, please explain why.

Question 13

Are there any other areas relating to the new duties of reasonable adjustment on which you think the Government should consider regulating?

Please tell us what they are.

Questionnaire

Definition of Disability

Question 14

The Government would like to know whether you agree with the proposed overall approach to the coverage of cancers.

Question 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.

Question 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.

Question 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 clause 17.

Question 18

The Government would like to know whether you agree with its detailed proposals in relation to the extension of the questions procedure.

If no, please explain why.

Question 19

If you think there are any other areas to do with the extended questions procedure which should be provided for by Order, please explain why and what these are.

Cut here

Consultation on private clubs; premises; the definition of disability and the questions procedure.

Continuation Sheet

Please identify which questions you are responding to:

Continuation Sheet

Please identify which questions you are responding to:

Cut here

7. ANNEXES

i. To help you understand this consultation:-

You will also find a lot of helpful information on the Disability Rights Commission's website www.drc-gb.org and also on the Government website www.disability.gov.uk.

You may also wish to refer to the following:-

- **The Disability Discrimination Bill** This is the Bill that the Government is taking through Parliament now. It comes with Explanatory Notes and a Regulatory Impact Assessment. In this document, it is referred to as "the Bill." You will find it on the web at <http://www.disability.gov.uk/legislation/>
- **The Disability Discrimination Act 1995**, which is known as the DDA. In this document 'section x' refers to section x of the Disability Discrimination Act unless otherwise stated.
- **Regulatory Impact Assessment**, or RIA, which is an assessment of the impact of policy options in terms of the costs, benefits and risks of any proposal.
- The Disability Rights Commission's (DRC) **Code of Practice - Rights of Access Goods, Facilities, Services and Premises**. This deals with the duties placed by Part 3 of the DDA on those providing goods, facilities or services to the public and those selling, letting or managing premises.
- **From Exclusion to Inclusion 1999** The final report of the Disability Rights Task Force
- **'The Questions procedure'** DRC booklet DL56

ii. ASSESSMENT OF POSSIBLE COSTS ARISING FROM THE PROPOSALS IN THIS CONSULTATION DOCUMENT

General

1. The Regulatory Impact Assessment accompanying the Disability Discrimination Bill⁶ provides a detailed analysis of the possible costs and benefits arising as a result of the new duties that will be imposed on private clubs, landlords, service providers and others, and from the provisions in the Bill which extend the definition of disability to cover more people with HIV, cancer and Multiple Sclerosis.

2. In the main, the proposals in this consultation document do not add to or vary the main duties in the Bill. Instead, they provide some clarification of provisions where the underlying principle was already costed in the Disability Discrimination Bill RIA. Therefore, it is not expected that there will be any significant variation in the costs outlined in the Bill RIA as a result of the proposals in this consultation.

3. However, we welcome any comments on the impact of the proposals in this document and will ensure they are taken into account in our final proposals. Views and information on the costs and impact on private clubs, where existing data is less robust and it is possible, for the first time, to explain in detail proposals for reasonable adjustment duties, would be particularly welcome. There is a specific question included in chapter 2. Further information to help you in considering those costs is set out below. A partial Regulatory Impact Assessment on the proposals in this consultation document is being prepared and will appear on the Department for Work and Pension's disability website www.disability.gov.uk by the end of December 2004.

4. In the meantime, and to help respondents understand the likely impact of the Bill's relevant duties, summary information from the Bill RIA is also provided at the end of this Annex. **However, the full Bill RIA should be referred to if more specific detail on costs is required** and this also appears on www.disability.gov.uk. It should be noted that the summary tables which appear at the end of this chapter only include costs where it is possible for them to be quantified. For the duties where calculation of total costs is not possible, the full RIA gives illustrative examples of costs if the duties in the Bill were to apply.

6 Disability Discrimination Bill 2004 Regulatory Impact Assessment.

Regulatory Impact on Private Clubs

5. The activities of private clubs can range from small local interest clubs, such as local archeological and history societies, to certain sports clubs and social clubs. There are also the more traditional working men's clubs and gentlemen's clubs. However, the vast majority of such organisations providing such services will already be covered by the DDA as they will count as providers of goods or service to the general public. Only those organisations that select members on the basis of genuine personal characteristics – and who are not covered by the existing law – will be affected by the proposals set out in this document. While there is no central database on how many private clubs there are, the full RIA concludes that only a minority of clubs will be covered by the DDA for the first time.

6. The proposals in this document are designed to show how the duties of reasonable adjustment should apply to "private clubs". It is likely that in meeting the Bill's duties some clubs will incur costs as a result of such things as ramps, widening of doorways and the installation of accessible toilets.

7. As mentioned earlier, the Government would particularly welcome views or comments on the possible costs which may arise as a result of using the proposed regulation-making powers on private clubs in this consultation document.

Regulatory Impact arising from the Questions Procedure

8. A questions procedure similar to that in Part 2 (employment) of the DDA will be introduced. This will enable a potential complainant (or complainant) to question the potential respondent (or respondent) about possible discrimination in contravention of Part 3 of the Act as it will be amended by the Bill, i.e. access to goods, services and facilities, premises, private clubs and public body functions. It will also provide for the questions and answers to be admissible as evidence within prescribed time limits.

9. The proposals in this consultation document deal with the format of the questions and answers procedure, the method of serving questions and related time limits.

Regulatory Impact on landlords/managers of rented premises

10. At present, landlords and managers of rented premises have no duty to make reasonable adjustments to accommodate the needs of disabled tenants or occupiers of the premises. Some landlords and managers of rented premises are also service providers (service providers are those involved in a business or organisation which provides a service or offers facilities to the public), and hence are already covered in respect of disabled customers, in that capacity, by the provisions of Part 3 of the DDA.

11. The Bill ensures that, where premises are rented or managed and where it is impossible or unreasonably difficult for a disabled person to enjoy the premises or make use of the benefit or facility that they are entitled to a landlord or manager of the premises may need to change their policies, practices and procedures, change a term of the letting, or provide auxiliary aids or services where reasonable.

12. The proposals in this consultation document, which cover the detailed operation of the premises duties in the Bill, are unlikely to have any significant cost implications for landlords or those who manage rented premises beyond those already described in the Bill RIA. However, the Government would welcome any views on the possible costs which may arise as a result of the proposals in this consultation.

Regulatory Impact arising from changes to the Definition of Disability

13. The Bill extends the DDA to people who have asymptomatic HIV, cancer requiring substantial treatment and Multiple Sclerosis. The proposals in this consultation document would remove from the scope of the DDA those people whose cancer requires only minor treatment. This will not affect the figure of 175,000 additional disabled people brought within scope of the DDA as a result of the Bill's provisions on the definition, and the cost of the proposals is therefore expected to be neutral.

Outcome of Focus Groups on the Bill

14. The Department for Work and Pensions considered it was important to assess the likely impact of the new proposals in the Bill on small business, landlords and private clubs. It therefore held a series of Focus Groups in May 2004 comprised of representatives from those interests.

15. The Department has taken note of issues raised by the Focus Groups, which are largely matters for guidance. The Department will have regard to them when drafting revised statutory guidance on the definition of disability. Codes of Practice are a matter for the DRC and the Department will work closely with the Commission during its development of new Codes in relation to the issues identified by the Focus Groups.

Summary of costs in the RIA accompanying the Bill

Quantifiable costs for business and individuals:

Quantifiable Cost	£ one-off ^c	£ recurring	People/households covered^a
Extension to cover more people with HIV/cancer/Multiple Sclerosis		£186,000	175,000
Extend duty to make reasonable adjustments to landlords and managers of domestic premises (other than to physical features/premises).	£ 51,000	£492,000	315,000
Extend duty to make reasonable adjustments to commercial premises (other than to physical features of premises)	£37,000	£70,000	17,000
Introduce a questions procedure into Part 3 of the DDA.	<i>b</i>	<i>b</i>	<i>b</i>
TOTAL	£88,000	£748,000	507,000

a These numbers refer to the total number of people or households covered (ie. the stock of and flow to the population)

b Denotes marginal

c There is likely to be a one-off cost from familiarisation with the new duties, as described in section 12 of the RIA, but the total cost is unquantifiable.

Annexes

Quantifiable costs for Government/Public Bodies:

Quantifiable Cost	£ one-off	£ recurring	People/households covered
Extension to cover more people with HIV/cancer/Multiple Sclerosis	-	£50,000	see above
Extend duty to make reasonable adjustments to landlords and managers of domestic premises (other than to physical features/premises).	£400,000	£100,000	
Extend duty to make reasonable adjustments to commercial premises (other than to physical features of premises)	<i>a</i>	£570,000	see above
Introduce a questions procedure into Part 3 of the DDA.		<i>b</i>	see above
TOTAL	£400,000	£720,000	

- a While local authorities may have one-off costs such as portable wheelchair ramps, it is assumed that these costs are recovered through rent increases, resulting in no cost. It is the flow-on costs to Housing Benefit from rent increases that are captured in this column.
- b Denotes marginal (e.g. administration, opportunity costs etc)

iii. Conduct of this consultation

This consultation is being conducted in line with the Code of Practice on Consultation. The criteria are listed below. The full version can be accessed at

<http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm>.

The six consultation criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about who may be affected, what questions are being asked, and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

Annexes

The consultation document has undergone an initial mailing to over 500 bodies in the following sectors:

- Charities – general
- Charities – disability specific
- Disability Representative Organisations
- Other voluntary sector organisations
- Employers
- Employers Representative Bodies
- Business and/or their representative bodies
- Housing Associations
- Housing Representative Bodies
- Organisations that represent landlords and tenants
- Legal Firms
- Legal Representative Bodies
- Trade unions
- Service providers – across a wide range of sectors

DWP values feedback on how well it consults. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact the DWP Consultation Co-ordinator. In particular, please tell us if you feel that the consultation does not satisfy this criteria. Please contact:-

Geoff Ashton
DWP Consultation Co-ordinator
5th floor, South Trevelyan Square
Leeds LS1 6EB

Tel: 0113-23-27-104

E-mail: Geoff.Ashton@dwp.gsi.gov.uk



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