

The Disability Discrimination Act 1995 - An essential guide for solicitors



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By

The Disability Law Service
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First Edition (1996) by Ian Bynoe, Solicitor
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Contents	Page
1. Introduction	3 - 6
2. Overview of the Disability Discrimination Act	7 - 8
3. Definition of disability	9 - 14
4. Service providers' duties under the Disability Discrimination Act	15 - 24
5. Solicitors as service providers: guidance on practice	25 - 26
6. Employers' duties under the Disability Discrimination Act	27 - 40
7. Solicitors as employers: guidance on practice	41 - 45
8. Statutory regulations, codes of practice and guidance	46 - 47
9. Contacts	48 - 50
10. Index	51 - 53

1. Introduction

The Purpose and scope of this Guide

The scope of Disability Discrimination Act

The Law Society and the DDA

The purpose and scope of this Guide

- 1.01 The Guide is intended to provide all practitioners, solicitors' firms and legal advice agencies with an understanding of their duties as employers and service providers under the Disability Discrimination Act 1995 (DDA). Most solicitors need to comply with the duties under the DDA affecting providers of services to the public. Solicitors' firms and organisations employing solicitors will also have duties as employers.
- 1.02 The Guide is not written for the discrimination law specialist needing to advise clients on the DDA but a number of useful publications explaining the DDA are already available and are listed in Chapter 10.
- 1.03 Although great care has been taken in the compilation and preparation of this work to ensure accuracy, the Disability Law Service or the Law Society cannot accept responsibility for any errors or omissions. All information provided is for education/informative purposes and is not a substitute for professional advice. Any organisations, telephone numbers and links to external web-sites have been carefully selected but are provided without any endorsement of the content of those sites.

The Scope of the DDA

- 1.04 The DDA prohibits employers and service providers from treating disabled people less favourably for a reason relating to their disability, unless there is some legal justification for doing so. The DDA imposes on employers a duty to take reasonable steps to remove significant barriers to work for disabled applicants and employees.

Since October 1999, service providers acquired a duty, where practicable, to change practices, policies or procedures which made it impossible or unreasonably difficult for disabled people to use a service. Where necessary the service provider must provide auxiliary aids to services for disabled people.

In 2004 service providers¹ acquired a new duty to take reasonable steps to remove, alter or provide reasonable means of avoiding physical features that make it impossible or unreasonably difficult for disabled people to use a service.

¹ This includes solicitors who by the very nature of their work provide a service to clients

The Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673) (DDAR) came into effect on 1 October 2004 and introduced notable legislative developments. The main developments were:

- a) Removal of protection for employers employing less than 15 employees;
- b) Disability protection to all employees including certain previously excluded groups²;
- c) Introduction of an additional form of direct discrimination that has no legal justification;
- d) Legal challenge to discriminatory adverts;
- e) Mechanism to challenge those that put pressure upon employers and/or instruct employers to discriminate;
- f) Legislative reversal of the burden of proof making it less onerous for complainants to argue their case;
- g) Legislative prohibition on disability related harassment;
- h) Legislative recognition of constructive dismissal as a form of dismissal in disability cases; and
- i) Legislative recognition that an employer can be held responsible for acts of discrimination after the employment relationship has ended.

1.05 Interpretation of the DDA has been clarified in part by Employment Tribunals (ETs), Employment Appeal Tribunals (EATs), the County Courts and the Court of Appeal, and reference has been made to the key judgements throughout the Guide. However, there remain untested areas and indeed the Court of Appeal has referred to the DDA as:

“an unusually complex piece of legislation which poses novel questions of interpretation.”

Summary of solicitors' duties as service providers

- 1.06 As service providers, solicitors have 2 duties to disabled people:
- duty not to refuse a service to disabled people; and
 - duty to make reasonable adjustments to policies, practices and procedures which may include a duty to provide auxiliary aids and/or alternative ways of enabling disabled people to access their service.

² Armed forces are still excluded

Summary of solicitors' duties as employers

- 1.07 Employers have a duty not to treat disabled people less favourably (without justification) in the following ways:
- Recruitment: The selection arrangements, terms of employment or refusal of offer of employment.
 - Retention of staff: The terms of employment, opportunities for promotion, transfer of training, refusal to offer such an opportunity, dismissal (including constructive dismissal) or any other detriment.
 - Post-employment: For example through the provision of references.

Relaxion Group plc v. Rhys-Harper; D'Souza v. London Borough of Lambeth; Jones v. 3M Healthcare Limited [2003] IRLR 484

The House of Lords held that a court had jurisdiction to apply the DDA to post-employment acts where this is a substantive connection between the discriminatory conduct and the employment relationship. The aim of DDA was to protect against discrimination by the employer at every stage in the relationship. The relationship between employer and employee did not necessarily come to an end when the employment came to an end.

- 1.08 Employers also have a duty to make reasonable adjustments to prevent the person's disability putting them at a substantial disadvantage compared with a non-disabled person.

Law Society measures to combat disability discrimination

- 1.09 The Law Society is committed to seeing a range of measures introduced within the profession to counter unfair discrimination, including disability discrimination. In July 1995 a new Practice Rule (The Solicitors' Anti-Discrimination Rule 1995) was brought into force. This prohibits, inter alia, unfair and unreasonable discrimination by solicitors on grounds of disability "in their professional dealings with clients, staff, other solicitors, barristers or other persons". All principals in private practice are required to operate an anti-discrimination policy, and employed solicitors "must use their reasonable endeavours" to ensure that such a policy is used. The Solicitors Anti-Discrimination Rule 1995 has recently been revised to take into account new legislation and the 2004 Solicitors Anti-Discrimination Rule came into force on 1 September 2004.

- 1.10 The Law Society has published a model anti-discrimination policy which sets out minimum standards of practice in the treatment of employees, partners, clients and barristers. If principals have not developed their own such policy then they "...will be deemed to have adopted the model policy for the time being promoted for such purposes by the Law Society".
- 1.11 As a trade organisation, the Law Society has duties under the DDA. The Society is prohibited from discriminating against members, or those seeking membership, on grounds of disability in relation to admission policies, examinations, membership benefits, facilities etc. It also has a duty to make reasonable adjustments to remove barriers to membership.
- 1.12 There are an estimated 9.8 million disabled people in the UK, many of whom still face total exclusion from, or unreasonable difficulty in obtaining, the employment opportunities and services enjoyed by the rest of the population. The DDA goes some way to redress this imbalance.
- 1.13 The DDA presents both challenges and opportunities for the legal profession. The profession has duties under the DDA requiring adaptations and adjustments to be made to ensure that disabled employees, and potential employees, are treated fairly, and that disabled clients are afforded equal access to the services of the profession.
- 1.14 The DDA creates opportunities for the profession by opening up access to its services to disabled clients. Further, it creates new duties for solicitors' clients who are employers and service providers themselves, and who will require advice in interpreting their own duties under the DDA.

2. An overview of the Disability Discrimination Act

Summary of DDA protection to employees and service users

Secondary legislation and other mechanisms giving effect to the DDA

How does the DDA compare with other anti-discrimination legislation?

Summary of DDA protection to employees and service users

1.15 Where someone is defined as a disabled person (Part I and Schedules 1 and 2), the DDA creates the right for them not to be subjected to discrimination:

- in relation to employment, partnerships and work experience, unless the employer is exempt (sections 4- 2, 14 and 16–18)
- in relation to the benefits of membership of a trade organisation such as the Law Society (sections 13-15)
- in acquiring or accessing goods, facilities and services, unless the service provider is exempt (sections 19–21)
- in acquiring or accessing property or accommodation (sections 22–24)

1.16 Unlawful discrimination may arise where an employer or service provider refuses to make the adjustments needed to remove physical or organisational barriers which reduce or deny a disabled person access to the workplace or to obtaining a particular service.

1.17 A complaint for disability discrimination may be made to the Employment Tribunal for discrimination by an employer or trade organisation (section 8 and Schedule 3 Part I) and to a County Court with a claim of discrimination in other areas (section 25 and Schedule 3 Part II)

Secondary legislation and other mechanisms giving effect to DDA -

2.04 DDA is supplemented by regulations and extensive Ministerial guidance. On 1 October 2004 the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673) (DDAR) came into force. This provided important changes to the current disability discrimination legislation (see paragraph 1.07).

2.05 Guidance has also been published dealing with the definition of disability, and separate Codes of Practice have been issued covering, respectively, employment and the provision of services. Full details of the regulations and statutory guidance are given in Chapter 8.

- 2.06 The statutory guidance does not have binding legal effect but will be important in practice, particularly in assessing whether or not discriminatory treatment of a disabled person is reasonably justified. The DDA provides that, when deciding such questions, an Employment Tribunal or County Court must have regard to relevant current guidance.
- 2.07 DDAR amends the DDA with the effect that disability rights are more accessible to disabled persons. The mechanism for enforcing the additional provisions in the DDAR are the same as enforcement for DDA provisions save for discriminatory adverts.

The Disability Rights Commission

- 2.08 The Disability Rights Commission (DRC) is an independent body established in April 2000 by an Act of Parliament to stop discrimination and promote equality of opportunity for disabled people. Their role is to promote and enforce the DDA in order to secure rights and equality of opportunity for disabled people.
- 2.09 The DRC does this through the provision of information, advice and legal support to disabled people, by working with those who have duties under the legislation, by influencing law and policy affecting disabled people and by communicating the message that equality for disabled people benefits everyone.
- 2.10 Contact details for the DRC can be found in Chapter 9.

The DDA compared with other anti-discrimination legislation

- 2.11 In relation to sex and race discrimination, the emphasis is on treating all people the same. In disability discrimination the opposite can be true, the person's individual circumstances must be considered to avoid discrimination.
- 2.12 The term "indirect discrimination" is not found in the DDA, but the requirement to make reasonable adjustments resembles indirect discrimination.

3. Definition of disability

*How does the DDA define disability?
Who is excluded from this definition?*

The core definition

- 3.01 Only disabled people who fall within the DDA's core definition are covered by the DDA. The DDA's core definition is unique and therefore the fact that someone is classified as "a disabled person" by, for example, the Department for Works and Pension, a local authority or even their own GP, will not automatically mean that he or she falls within the DDA core definition.
- 3.02 For the purposes of the DDA, a person is disabled if he or she has a:
- "physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities" (s 1)
- This definition has been further clarified by regulations, statutory guidance and case law on the meaning of disability.
- 3.03 The guidance on matters to be taken into account in defining questions relating to the definition of disability ("the Guidance") should be used when considering whether an employee meets the DDA's core definition. The further explanations of the definition set out below are examples set out in the Guidance.
- 3.04 People who have previously had a disability due to an impairment which had a substantial and long term adverse effect on their ability to carry out normal day to day activities are covered by the definition, even though they may no longer have that impairment.

Definition of "impairment"

- 3.05 A "physical impairment" is not defined in the DDA but includes sensory impairments such as those affecting sight or hearing.
- 3.06 "Mental impairment" covers a wide range of impairments relating to mental functioning, including learning difficulties and impairments resulting from or consisting of a mental illness. However, impairments resulting from or consisting of a mental illness will only fall under the DDA definition if the illness is "clinically well recognised". The Guidance states that a "clinically well recognised" illness is one that is recognised by a respected body of medical opinion and is likely to be mentioned in publications such as the

World Health Organisation's International Classification of Diseases. Please note that this will change when the draft Disability Discrimination Bill comes into effect. The Bill removes the requirement that people with mental illness must have a "clinically well-recognised" condition. There is no confirmed date for the Disability Bill to become law, but it is expected to happen in 2006.

3.07 Tribunals have also considered the following conditions to constitute impairments: agoraphobia, asthma, bulimia, depression, difficulty in writing, dyslexia, ME (Chronic Fatigue Syndrome), stress and anxiety, and pain from kidney stones.

Definition of "substantial ... adverse effect"

3.08 "Substantial ... adverse effect" is used in the DDA to distinguish an impairment which is neither minor nor trivial, and which is more limiting than the normal differences that exist between people. The following factors should be taken into account when considering whether an impairment has a substantial adverse effect:

- the *time* taken to carry out an activity;
- the *way* in which an activity is carried out;
- the *cumulative effects* of an impairment which may combine to render its total effect "substantial";
- the extent to which a person is able to lessen the effects of an impairment by modifying their behaviour;
- the impact of the environment and the extent to which the effects of an impairment may vary with temperature, humidity, time of day etc.

3.09 If an impairment is controlled or corrected by medication, a prosthesis or an aid, it is still considered to be an impairment having a substantial adverse effect on a person's ability to carry out normal day to day activities if it would have that effect were it not controlled or corrected. This does not apply to a visual impairment corrected by glasses or contact lenses.

3.10 People with progressive conditions (such as cancer, multiple sclerosis, muscular dystrophy and HIV infection) are covered by the DDA definition even if the impairment does not yet have a substantial adverse effect, as long as the impairment has *some* effect on their ability to carry out normal day to day activities, and is expected to have a substantial effect in the future. This will change when the draft Disability Discrimination Bill comes into force. Section 12 of the Disability Bill states that a person who is

diagnosed with cancer, HIV or multiple sclerosis is deemed to have a disability from the point of diagnosis. This will change if the Government's draft Disability Discrimination Bill becomes law.

- 3.11 A severe disfigurement (for example, a birth mark, skin disease or scar) is to be treated as an impairment having a substantial adverse effect, whatever its actual effect may be. The term "severe disfigurement" is not further defined in the DDA and it will be a question of fact whether or not a person is severely disfigured. However, regulations exclude from the definition certain deliberately acquired disfigurements such as tattoos and body piercing (Meaning of Disability Regulations).

Goodwin v Patent Office [1999] IRLR 4

Mr Goodwin suffered from paranoid schizophrenia, which affected his behaviour and his ability to carry out normal conversations at work. The ET had found that he was not disabled because the effects of his impairment were not "substantial". The EAT reversed the decision, and gave the following guidelines in determining whether an applicant is disabled:

The starting point is what the parties stated in the pleadings;
Tribunals should take a purposive approach to the construction of the DDA and refer to the relevant provisions of the Guidance and Code of Practice;

Where a mental illness is doubted to be an impairment, the Tribunal should ascertain whether the illness is referred to in the WHO's³ International Classification of Disease;

Regarding the "adverse effect", if the person completes the day to day activity with difficulty there may still be an impairment. Tribunals should also remember that disabled people are likely to play down the effect the disability has on their daily life; and

Where the applicant takes medication for their disability, the Tribunal should consider how the applicant is affected whilst on medication and how the applicant's abilities would be affected without the medication

Definition of "long term"

- 3.12 A "long term effect" is one which has lasted at least twelve months or one which can reasonably be expected to last at least twelve months or which is likely to last for the rest of the person's life. Clearly some impairments fluctuate and their effects may vacillate between being substantial and not substantial. However, if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it will be

³ World Health Organisation

treated as though it continues to have a substantial adverse effect if it is more likely than not that the effect will recur. This will not apply if the person can reasonably be expected to take steps to prevent the effect recurring, for example avoiding substances which cause allergic reactions.

Greenwood v British Airways Plc [1999] ICR 969, EAT

This case clarified the issues of whether a substantial adverse effect is likely to recur, and the relevant dates to be taken into account when considering whether or not someone is disabled.

Mr Greenwood had suffered from nervous tension for a number of years, causing him to have time off work. His condition then improved as a result of two weeks off work for counselling and medication. Shortly afterwards he was turned down for promotion and told that his sickness was one of the reasons he had not been successful. He was then off work with depression until the time of his ET. The ET found that he was not a disabled person at the date of alleged discrimination because, although his impairment was a clinically well recognised condition, it had ceased to have a substantial adverse effect on his ability to carry out normal day to day activities. The ET also found that it was not a condition that was likely to recur. The EAT allowed Mr Greenwood's appeal. The ET was wrong to decide that events which happen after the date of discrimination were irrelevant in determining whether a person had a disability. The ET should have taken into account Mr Greenwood's medical condition up to and including the date of the Tribunal hearing.

Definition of "normal day to day activities"

3.13 A person can only be regarded as "disabled" if their "normal day to day activities" are affected by their impairment. The DDA lists these as activities involving:

- *mobility* (e.g. moving, changing position, getting about unaided, using normal modes of transport, walking short distances, climbing stairs, sitting, standing, reaching or getting about in unfamiliar places);
- *manual dexterity* (e.g. precision in using hands and fingers, ability to pick things up and move small objects, using equipment manually);
- *physical co-ordination* (e.g. balance, effective body movements, hand and eye coordination);
- *continence* (i.e. control of bladder and bowels);

- *ability to lift, carry or otherwise move everyday objects* (e.g. books, a kettle of water, bags of shopping, a briefcase, an overnight bag, a chair and other light furniture);
- *speech, hearing or eyesight* (e.g. face to face, telephone or written communication);
- *memory or ability to concentrate, learn or understand* (e.g. ability to remember, organise thoughts, plan action and then carry it out, understand new knowledge, comprehend spoken or written instructions);
- *perception of the risk of physical danger* (e.g. underestimation or overestimation of physical danger).

3.14 The examples given are not intended as an exhaustive list of day to day activities, but are merely illustrative. Normal day to day activities are not to be interpreted as activities that are normal only to a particular group of people, or those related to work or leisure activities. In *Goodwin v Patent Office* [1999] ICR 302 Morrison J stated that:

“What is a day to day activity is best left unspecified: easily recognised, but defined with difficulty”.

3.15 Clearly one is expected to assess what a day to day activity is with reference to the above, the particular circumstances and a large dose of common sense. It was also stressed that a Tribunal, when assessing whether an impairment has an adverse effect on day to day activities, must concentrate not on the fact that a person can carry out an activity, but rather on what an applicant either cannot do, or can do only with difficulty.

Vicary v British Telecommunications plc [1999] IRLR 680

Mrs Vicary suffered from an upper arm impairment. The ET accepted that this affected her ability to carry out a number of tasks, including DIY, filing nails, tonging hair, ironing, shaking quilts, grooming animals, polishing furniture, knitting, sewing and cutting with scissors. However, it also decided that she was not disabled because these did not amount to normal day to day activities.

The EAT allowed Mrs Vicary’s appeal and held that the tasks listed above were normal day to day activities; the list of activities in the guidance is not exhaustive. The guidance should only be used in marginal cases. It is for the ET to assess what is, or is not, a normal day to day activity, and to determine as a matter of fact whether or not the impairments found are substantial.

Exclusions

- 3.16 Addictions to and dependencies on certain substances, such as alcohol, nicotine and un-prescribed substances, are not classed as impairments. Nevertheless a medical condition arising as the result of addiction is not excluded and therefore someone suffering from alcohol induced liver disease could fall within the DDA definition if the disease (impairment) has a substantial long term and adverse effect on their ability to carry out normal day to day activities.
- 3.17 Hay fever is specifically excluded from the DDA as an impairment, as are pyromania, the tendency to physically or sexually abuse others, exhibitionism and voyeurism.
- 3.18 At present, people who have HIV and other progressive conditions which are not yet symptomatic (but see paragraph 3.08 as this will change when the draft Disability Bill comes into force).
- 3.19 People with genetic predisposition to illness or impairment do not fall within the DDA definition if their impairment has not *yet* had a substantial adverse effect on their ability to carry out normal day to day activities.
- 3.20 People who are wrongly reputed to have an illness or impairment, perhaps because of ignorance or social stereotyping, are yet to be established as having the protection of the DDA, even though there is no doubt that such people experience discrimination.

4. Service providers' duties under the Disability Discrimination Act

What is the DDA trying to achieve?

What constitutes discrimination in service provision?

How to identify possible reasonable adjustments?

The aim of the DDA

- 1.18 Part III of the DDA places various duties on service providers to ensure that the goods, facilities and services they offer are accessible to disabled people. Solicitors' firms are professional service providers offering services to the public and *must* comply with the DDA Part III duties. Part III of the DDA seeks to eliminate disability discrimination as far as possible. All service providers, however small, will have Part III duties.
- 1.19 The Code of Practice on Rights of Access to Goods, Facilities, Services and Premises (the "Access Code of Practice")(revised May 2002) provides detailed guidance on how to comply with Part III, and gives examples of good practice for service providers.

What constitutes discrimination in service provision?

- 1.20 The basic approach to defining discrimination is a familiar one. It involves a comparison between the treatment given to a disabled person and the treatment which has been or would be given to someone not disabled in the same way. Thus, a service provider discriminates against a disabled person if, for a reason which relates to that person's disability, the service provider treats him or her less favourably than others would be treated to whom that reason does not or would not apply. The discrimination is unlawful if the service provider cannot show that the treatment in question is justified. Three conditions must be fulfilled before unlawful discrimination is established:
- A service provider treats a disabled person less favourably than they treat or would treat other members of the public. Further, the failure to comply with duties to make reasonable adjustments is regarded as less favourable treatment.
 - The less favourable treatment is for a reason which relates to the person's disability.
 - The service provider cannot show that the less favourable treatment is justified.

- 1.21 Must a provider know that a person is disabled?

The DDA is not clear on this and the courts have broadly avoided answering this directly. Instead the courts only focus on whether the disability was the reason for less favourable treatment.

Example 1

A new client is unsuccessfully negotiating the entrance to the solicitor's premises. He calls out to the security staff stationed within. They assist him but thereafter escort him off the premises because they assume he is drunk. However, the client has cerebral palsy which affects his speech and balance. The ejection is for a reason which relates to the disabled person's disability.

- 1.22 The Part III duties are owed to all disabled people covered by the DDA. It is therefore important for service providers to take the initiative when planning their services. It will not be sufficient for a firm of solicitors to make reasonable adjustments only for one existing disabled client. For example, a firm which makes reasonable adjustments for a visually impaired client who regularly instructs the firm (eg recording letters and documents on to cassettes), but refuses to consider instructions from a person with a learning disability, on the assumption that this would take up too much time, is likely to be in breach of its Part III duties.
- 1.23 DDA defines the situations in which such discrimination will be unlawful in s19(1):
- A refusal to provide a service or services.

Example 2

A solicitor pretends that he is too busy to see a mentally ill person needing advice within his field of expertise. He would not treat someone without mental illness in the same way.

- A failure to comply with the duty to make reasonable adjustments making it impossible or unreasonably difficult for the disabled person to make use of the service.

Example 3

A firm may be in breach of its duty if it fails to make its telephone system accessible to a person who is deaf, and to ensure that a British Sign Language interpreter is available for a crucial interview.

- The standard or manner in which a service is provided is worse than that provided to a non-disabled person.

Example 4

A solicitor stipulates that a client of his with a speech impairment may only telephone once a week on a certain day, when all other clients may phone at any time.

- Where the terms on which a service is provided are discriminatory.

Example 5

A disabled person is charged more for the service provided to her, or she is required to provide payment on account of costs, when other clients are not.

- Where a firm refuses to make reasonable adjustments to physical barriers which impede a disabled person's access to its services. This duty came into force on 1 October 2004 (see paragraph 4.14 below).

Case law

- 4.07 Until October 1999 the only Part III duty in force was the basic duty not to treat disabled people less favourably. The basic duty to serve has led to a number of cases against pubs, restaurants, shops and other such service providers.

Blankley and others v Lydon

Ten adults with learning difficulties succeeded in their complaint of discrimination by a pub landlady who had refused them access to a pre-booked party at her pub. She had said that they would constitute a breach of the fire regulations and cause discomfort to her regulars.

- 4.08 Exceptions to this basic duty are provided in section 20(4), and these are the only circumstances in which discrimination can be held to be justified (see further the section on *Justification* at paragraphs 4.21-4.23 below).

Damon Rose v Raymond Bouchet, Newington Guest House [1999] IRLR 463

Mr Rose, who is blind, complained of discrimination by a landlord who refused to rent a property to him for the Edinburgh festival. The landlord's reasons for refusing were that the steps up to the property would be dangerous for a blind person as there was no proper handrail, that access to the flat was unsafe and that the bathroom was too small. The court found that the landlord's less favourable treatment was justified because, in the landlord's opinion, the refusal was necessary for health and safety reasons and the landlord's opinion was reasonable in the circumstances.

From 1 October 2004 service providers will have to make a strong case

in order to use the justification of health and safety where physical adjustments were not undertaken.

- 4.09 The Disability Rights Commission (DRC) website (see Chapter 9 for details) contains a useful summary of legal cases in which the DRC has been involved.

Victimisation and aiding unlawful actions

- 4.10 The DDA renders unlawful the victimisation of anyone, whether disabled or not, for bringing proceedings under it, giving evidence in proceedings, doing anything else under the DDA or simply alleging that the law has been broken. Aiding anyone to discriminate is itself unlawful unless the person is relying on a statement that the action will be allowed under the DDA.

Liability of employers for employees' actions

- 4.11 Where an employee, in the course of their work, breaches an obligation relating to service provision under the DDA then their employer may also be held responsible, whether or not the employer knew or approved of the breach. However, the employer may have a defence if they can prove they took such steps as were reasonably practicable to prevent that employee or employees in general from discriminating by, for example, providing clear policies, procedures and training.

Liability of principal for agents' actions

- 4.12 A principal may also be held responsible for the unlawful actions of an agent but only if the agent was acting with the express or implied authority of the principal.

Reasonable adjustments

- 4.13 Service providers are under a duty to make reasonable adjustments for disabled people. From 1 October 2004 making a reasonable adjustment may mean that a service provider has to:
- *change a practice, policy or procedure* which makes it impossible or unreasonably difficult for disabled people to make use of its services;
 - *provide a reasonable alternative method* of making services available to disabled people;
 - *remove or alter a physical feature which makes it impossible or unreasonably difficult* for a disabled person to access the service;

- *provide a reasonable means of avoiding the feature;*
- *provide an auxiliary aid or service* if it would make it easier, or possible, for a disabled person to use the service.

4.14 The Disability Discrimination (Services & Premises) Regulations 1999 describe physical features as any temporary or permanent:

- feature arising from the design or construction of a building structure/erection on the premises occupied by the service provider;
- feature on those premises or any approach to, exit from or access to such a building;
- fixtures, fittings, furnishings, furniture, equipment or materials in or on such premises;
- fixtures, fittings, furnishings, furniture, equipment or materials brought onto premises by or on behalf of the service provider in the course of providing services to the public;
- other physical element or quality of the land.

Reasonableness

4.15 What is reasonable for individual service providers will vary according to the type of service being provided, the nature of the service provider (its size and resources) and the effect of the disability on the individual disabled person.

4.16 The Access Code of Practice gives a non-exhaustive list of factors to be taken into account when considering whether a step is reasonable:

- whether taking the steps will be effective in overcoming the difficulty experienced by the disabled person;
- the extent to which it is practicable for the service provider to take the steps;
- the financial and other costs of making the adjustment;
- the extent of any disruption which taking the steps would cause;
- the extent of the service provider's financial and other resources;
- the amount of resources already spent on making adjustments;

- the availability of financial or other assistance.
- 4.17 The Disability Discrimination (Providers of Services) Adjustment of Premises Regulations 2001 contain special provisions for providers of services relating to:
- consents of third parties for removal or alterations of physical features;
 - physical features which satisfy the relevant design standard. (Approved Document M of Schedule 1 of the Building Regulations);
 - partial exemption depending on the age of the feature;
 - users with impaired mobility, sight or hearing.

Example from the Access Code of Practice of Practice 2002

The dimensions of the risers and trends of steps to a cinema built in 1996 comply with the applicable Approved Document M, 1992 edition and will be exempt until 2006. However, the service provider will still have to consider improving accessibility of the steps by e.g. improving lighting or fitting of a non-slip surface from 1 October 2004.

Adjustments to practices, policies and procedures

- 4.18 Firms must take such steps as are reasonable in the circumstances to change practices, policies and procedures that are discriminatory. The terms overlap to some extent, but a policy is what a firm intends to do, a procedure is how it intends to do it and a practice is how it is actually done.

Example 6

A firm has a “house style” which requires the use of font size 12 on all letters to clients. The firm should adopt a procedure to ensure that letters to visually impaired clients will be printed with a larger font size.

Example 7

A criminal defence advocate routinely takes instructions from clients in the public areas of courts. A client who is hard of hearing needs the advocate to speak more loudly and is therefore uncomfortable that others can hear the advocate’s questions. This practice should change to allow for a more suitable, quieter area to be used.

Providing alternative services

- 4.19 If it is impossible or unreasonably difficult for disabled people to access a service, reasonable steps must be taken by the service provider to make the service available by an alternative method.

Example 8

A firm providing clients with a free legal advice telephone service cannot be accessed by a hearing impaired client whose only means of communication is via e-mail. A reasonable step would be for the firm to offer the service via e-mail to that client and to others who could not use the telephone service for a disability-related reason.

Providing auxiliary aids or services

- 4.20 Where the provision of an auxiliary aid or service would enable or facilitate access to or use of a service, then the provider has a duty to take reasonable steps to provide that auxiliary aid or service.

Example 9

An auxiliary aid or service might be a piece of equipment such as a hearing induction loop for hearing impaired people, an information video for people who find it difficult to read English, or a portable ramp. Alternatively it might be the provision of publications in Braille or on cassette, or the services of a trained member of staff to assist disabled clients around the office.

Justification

- 4.21 There are only five possible grounds for any discrimination in the provision of goods and services to be justified. The Access Code of Practice of Practice warns service providers that instead of looking for excuses to justify less favourable treatment, they should look positively and creatively at making reasonable adjustments.
- 4.22 To establish a justification for less favourable treatment, a provider must show that, at the time the discrimination occurred, in their opinion one of the following reasons existed and it was reasonable in all the circumstances of the case for the provider to hold that opinion:
- The less favourable treatment is *necessary in order not to endanger the health or safety of any person*, including the disabled person.

Example 10

A client's mental illness caused him to make distressing and traumatic

telephone calls to certain staff in a solicitor's office. The firm restricted the staff that the client was allowed to speak with in order to preserve the emotional health of particular staff. This is probably lawful.

However, spurious health and safety excuses will not suffice and fire regulations must not be used unnecessarily to exclude disabled people from using a service.

- The disabled person is *incapable of entering into an enforceable agreement or of giving informed consent* and there is no one authorised to act on their behalf, eg under an Enduring Power of Attorney.

Example 11

A solicitor declines to accept instructions from someone with severe Alzheimer's disease in connection with a claim against his neighbour. Common law already states that a solicitor cannot be retained by a client incapable of giving instructions and the DDA does not alter this rule. If the solicitor has reasonable grounds for holding the opinion that the person lacks sufficient capacity, this will justify the refusal.

- Where a service is refused, this is necessary because *the service provider would otherwise be unable to provide the service to other members of the public.*

Example 12

A deaf person visits a solicitor's office with an interpreter in the hope of seeing a solicitor. She has not made an appointment but the solicitor often sees people who "pop in", particularly if they are distressed or anxious. The person's need for interpretation renders interviews much longer than for other clients. The solicitor refuses to see the person without an appointment, explaining that she has to see other clients who have booked appointments. However, if the client had not been deaf, the solicitor would certainly have seen the person albeit briefly. This would be construed as less favourable treatment.

- Where a service is of a lower standard this is "*necessary*" to enable the service provider to serve the disabled person or other members of the public.

Example 13

A firm restricts a deaf client to coming to appointments in the afternoons because its regular British Sign Language interpreter is only available in the afternoons and it is not reasonable to employ a different interpreter for the mornings, given the firm's resources. This is likely to be lawful.

- Where the terms of a service are discriminatory, this may be justified as *reflecting the greater cost of providing the service*, excluding any increased costs due to making reasonable adjustments.

Example 14

A firm incurs extra costs when acting on behalf of a client with learning difficulties whose attorneys under an Enduring Power are a relative in the Channel Islands and an accountant in Scotland. The extra costs in communicating with these people are over and above the costs that the firm would reasonably be expected to meet in accordance with its DDA reasonable adjustment duty. This is probably lawful.

Example 15

Where a client is visually impaired and requires letters and documents to be recorded onto cassette, it is not justifiable to charge him more to meet the cost of the cassettes, as provision of information on cassette is likely to be a reasonable adjustment. The firm would therefore be expected to meet the cost of the cassettes.

- 4.23 The above justifications are only available once the service provider has complied with their reasonable adjustment duties or it is reasonable for the service provider to believe that even if reasonable adjustments had been made, the justification would still exist.

Enforcement

- 4.24 A claim of unlawful discrimination (other than in employment cases) is to be the subject of civil proceedings in the same way as any other claim in tort. Damages may include compensation for injury to feelings but the maximum may be fixed by regulation. At the moment, there is no prescribed Questionnaire for disabled users as there is for disabled employees (see 7.15 below) but there are proposals for introducing one in 2006. Proceedings are heard in the County Court with appeals going to the Court of Appeal. The remedies available in proceedings are the same as those available in the High Court. Injunctive relief could therefore be granted ordering changes to be made to the manner in which a service is provided. There is a six-month limitation period commencing with the date of the discriminatory act or omission, during which time proceedings must be started. However, the court may allow an out of time claim to proceed if it decides it would be just and equitable to do so.

Promoting settlement of disputes

- 4.25 The DDA specifically provides that the six-month limitation period for commencing County Court proceedings can only be extended where assistance has been sought. Such assistance is currently being provided only by the Disability Rights Commission (see Chapter 9 for contact details). This is a free service available to disability organisations and advice agencies and businesses, including solicitors as well as to disabled people.
- 4.26 The DRC also has a contract arrangement with an independent conciliation service, contactable through the DRC Helpline. This conciliation service is free and voluntary to both parties of the dispute, service providers and disabled people. It aims to settle Part III disputes without the need for court action. If a resolution is not achieved, or if the service provider is unwilling to participate, the case can still be taken to the County Court. An additional two months are allowed to the statutory time limit for bringing a case for anyone referred to the DRC's Conciliation Service.

5. Solicitors as service providers: guidance on practice

How can solicitors be more astute to DDA issues?

What steps could be taken to aid compliance with the DDA?

Awareness of discrimination

5.01 Discrimination in the field of service provision can take many forms and may be unintentional, caused by a lack of awareness of disability. Examples could include:

- A solicitor spends much of his working day dictating letters but it has never occurred to him to send his blind client a tape recording.
- Ignorance of disability may cause another solicitor falsely to assume that her client is unable to understand her advice. This causes her to treat the client's relative as the client and ignore the person she should be advising personally.
- A third solicitor may know that his client (who uses a wheelchair) needs to travel by car but fails to ensure a space is kept in the partners' car park for when she arrives.

Practical advice

5.02 All firms would be wise to obtain (and read!) a copy of the Access Code of Practice on Rights of Access to Goods, Facilities and Services (revised 2002). The Access Code of Practice is detailed, easy to read and full of examples about all aspects of Part III duties.

5.03 Firms may find the following practical points of assistance. In some respects they echo the types of changes solicitors will have to adjust to as employers.

- *Carry out an audit of present arrangements* for providing clients with the service and the premises in which these are offered. Identify features which may make it difficult or impossible for disabled people to use the service. Ask a range of disabled clients, or local organisations for help with this. The Centre for Accessible Environments, for example, conducts audits and has details of persons suitably trained to conduct such audits. Please see chapter 9 which has a non-exhaustive list of useful contacts.
- *Plan a strategy for removing identified barriers.* This should take account of the Anti-discrimination Rule and the existing and future duties to make

reasonable adjustments. Are there straightforward changes which will make the service more accessible? Are there physical alterations which should be planned and budgeted for? Should the service be provided in an alternative way to avoid the impact of barriers?

- Having regard to the strategy and its planned implementation, *establish a clear and comprehensive policy towards disabled clients*. Ensure that this policy is communicated to all staff together with the clear message that it is unlawful to discriminate against disabled people. Ensure that health and safety procedures and practice and fire evacuation procedures take full account of the possible presence in the premises of disabled clients.
- *Provide staff with training* on their legal responsibilities together with awareness of disability in order to enable them to apply the law effectively, intelligently and sensitively.
- *Gather and make available within the firm relevant information* needed by any staff to comply with their responsibilities under the DDA, particularly practical details about communicating with people who are hearing impaired, visually impaired or learning disabled.
- *Ensure that all clients are aware of the firm's complaints procedure*. The procedure itself must be accessible to people with communication difficulties due to disability, and should be monitored for complaints which reveal practices or conduct suggesting a possible breach of the DDA.

6. Employers' duties under the Disability Discrimination Act

Which employers are affected by the DDA?

How significant is the employer's knowledge?

What constitutes discrimination in employment?

Reasonable adjustments

Which employers are affected by the DDA?

- 6.01 Except where an occupation is exempted (only in the armed forces), the DDA applies to *all* employers.
- 6.02 Partnership matters (such as the formation, sustaining and termination of a partnership) are now covered by the DDA, and are subject to the Anti-discrimination Practice Rule.
- 6.03 The DDA specifically prohibits employees from "contracting out" of the right to bring proceedings under the DDA. However where there has been a complaint of discrimination and that matter is being settled, it is possible to contract out of future claims arising from the same facts. This is achieved through compromise agreement and the essential requirements of this agreement are stated in the Employment Rights Act 1996.

Employer's knowledge

- 6.04 Recent developments in case law have confirmed that even if an employer does not know of a particular employee's disability, the employee may still bring a successful claim for less favourable treatment. However where an employer fails to make reasonable adjustments, the employer's knowledge of the employee's disability is fundamental to establishing that claim.
- 6.05 Employers should appreciate the concept of constructive notice of a disability. This is deemed to occur where there is sufficient evidence for a reasonable employer to have realised on the facts that the employee may be disabled and therefore an appropriate line of enquiry should follow.

A legal secretary repeatedly complains of neck pain and shooting pains down her arms to the extent that she has to have an extended period of absence which was certificated as neck and arm pain.

Arguably the employer in this situation should be aware that keyboard operators are more susceptible to Upper Limb Related disorders such as RSI. Therefore the nature of her medical certificates may be sufficient to put the employer on notice that this employee may have an underlying condition that could result from a disability.

Therefore if six months later the employee complains that this employer discriminated against her, that employer would have considerable difficulty making an argument that he was not aware that she might be disabled. A similar argument could be made for serious depressive conditions arising from work related stress.

H J Heinz Co Ltd v Kenrick (2000) IRLR 144

Mr Kenrick suffered from chronic fatigue syndrome (“CFS”) and was dismissed by his employer after nearly 1 year’s sick leave. Mr Kenrick was not diagnosed with CFS until after his dismissal, but he had made his employer’s medical adviser aware of his symptoms. The EAT held that where an employer has sufficient knowledge of the symptoms of the employee’s disability at the time of the less favourable treatment, they can still be liable for disability discrimination.

What constitutes discrimination in employment?

- 6.06 Part II of the DDA sets out employers’ duties. These provisions are supplemented by the Disability Discrimination Regulations and the Code of Practice on Employment and Occupation (“the Code of Practice”) (see Chapter 8).
- 6.07 The following forms of discrimination are unlawful under the DDA:
- Direct discrimination
 - Disability related discrimination
 - Failure to comply with a duty to put in place reasonable adjustments
 - Victimisation
 - Harassment

Direct discrimination

- 6.08 From 1 October 2004 there is the introduction of a new definition of “direct discrimination”. Section 3A(5) of the DDA states that it is unlawful direct discrimination where an employer:

“treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.”

- 6.09 This type of discrimination cannot be justified.
- 6.10 In the case of this new definition of direct disability discrimination a like for like comparison will be necessary.

- 6.11 Consider two employees that do similar work and both with previously good sickness record. One employee is disabled with MS and absent with a disability related condition, while his non-disabled colleague is absent with chickenpox. If both have been away from work with three weeks sick leave, then direct discrimination would be made out if only the person with the MS related absence was dismissed or disciplined for poor attendance.

Clark v TDG Ltd (t/a Novacold) [1999] IRLR 318, CA

The applicant had been dismissed following a period of sickness absence. The Court of Appeal held that it was not necessary for him to show that another employee, absent for a similar period but for a non disability related reason, would not have been dismissed. The correct comparator was someone who had not been absent from work.

Cosgrove v Caesar & Howie (2001) IRLR 653

The applicant, a legal secretary, was dismissed after she had been absent from work for a year due to depression. The EAT found that the reason for the applicant's dismissal was her long-term absence and that this related to her disability.

The EAT decided that the correct comparison should be made between the disabled employee and any other employee who had not been absent from work. In that situation there would be no reason to dismiss the employee who was attending work. The applicant had therefore suffered less favourable treatment.

Disability related discrimination

- 6.12 Section 5(1) of the DDA states that less favourable treatment takes place where an employer unjustifiably treats a disabled person less favourably, than he would treat a non-disabled person, and this treatment is for a reason related to the disabled person's disability . This has been re-named as "disability related discrimination".
- 6.13 This type of discrimination can be justified.
- 6.14 Unlike direct discrimination no comparator is necessary with disability related discrimination.
- 6.15 It is difficult to distinguish between direct and disability related discrimination. The differences can be summarised as follows:

- Direct discrimination occurs when the reason for less favourable treatment is the disability.
- Disability related discrimination takes place when the reason relates to the disability, rather than the disability itself, for example a dismissal following disability related sick leave.

Code of Practice: paragraph 4.37

A woman declares on the application form that her arthritis does affect her ability to type. She is called for an interview and is told that a typing test forms part of the selection process. She tells the employer that she will need to use an adapted keyboard in order to take the test, but this is not provided on the day of the interview, and the woman fails the test as a result. As a consequence of failing the test, she is turned down for the job. This is not direct discrimination, as the reason for the employer's rejection of the woman was not her disability, but was the fact that she failed the typing test.

However, in such circumstances the employer has a duty to make reasonable adjustments to its selection arrangements. Depending on the circumstances, it may be a reasonable adjustment for the employer to provide the adapted keyboard or allow the woman to use her own keyboard in order that she is not placed at a substantial disadvantage by the test. If this is the case, then the employer will be unlawfully discriminating against her by failing to make the adjustment.

Although there is no direct discrimination, the employer has still treated the woman less favourably for a reason relating to her disability (namely the fact that she failed the typing test). This will be disability-related discrimination unless the employer can show that it is justified – and the employer will be unable to show this if it would have been reasonable for it to provide her with an adapted keyboard or allow her to use her own in order to take the typing test.

- 6.16 Disability related discrimination can be justified only if the reason for the treatment is both material to the circumstances of the particular case and substantial (more than trivial or minor).

Jones v Post Office 2001 (IRLR 384)

The Court of Appeal held that the word 'material' referred to the quality of the connection between the employer's reason for discriminating against the employee and the circumstances of the case. With regard to the word 'substantial', the Court of Appeal thought that this meant that the employer's reason must carry real weight.

Code of Practice: paragraph 6.3

A man who has severe back pain and is unable to bend is rejected for a job as a carpet fitter as he cannot carry out the essential requirement of the job, which is to fit carpets. This would be lawful as the reason he is rejected is a substantial one and is clearly material to the circumstances.

- 6.17 If an employer is also under a duty to make reasonable adjustments in relation to the disabled person but fails to comply with that duty, it is necessary to consider not only whether there is a material and substantial reason for the less favourable treatment, but also whether the employer had complied with its duty to make reasonable adjustments. If a reasonable adjustment would have made a difference to the reason that is being used to justify the treatment, then the less favourable treatment cannot be justified.

Code of Practice: paragraph 6.5

An applicant for an administrative job appears not to be the best for the job, but only because her typing speed is too slow as a result of arthritis in her hands. If a reasonable adjustment, perhaps an adapted keyboard, would overcome this, her typing speed would not in itself be a substantial reason for not employing her. Therefore, the employer would be unlawfully discriminating if, on account of her typing speed, he did not employ her or provide that adjustment.

- 6.18 When assessing whether a reason for justification is material and substantial, a balance must be struck between the interests of the employer and the employee.

Baynton v Saurus General Engineers Ltd [1999] IRLR 604

Baynton had been off work for almost a year with a work-related injury. Shortly before he was due to see his consultant about a possible return to work, he received a letter dismissing him, without prior warning. The ET agreed with the employer that there was no suitable alternative work that he could have been offered, and held that he had not been treated less favourably than a non-disabled employee in similar circumstances. Baynton appealed. The EAT found that the ET had erred in solely considering the employer's business requirements in determining whether the dismissal was justified, as they should also have taken into account the employer's failure to warn Baynton that he was at risk of dismissal or to inquire into the progress of his medical condition. The ET had failed to carry out the balancing exercise required between the interests and circumstances of the employee, and those of his employer.

Reasonable adjustments

- 6.19 As well as making less favourable treatment for a disability related reason unlawful, the DDA imposes a duty on employers to make reasonable adjustments to alter or adapt the disabled person's work environment or the way it is organised to reduce or remove the cause of any "substantial disadvantage" they face or will face if no changes are made.
- 6.20 Where any "provision, criterion or practice" made by the employer or any "physical feature" of their premises place a disabled person at a substantial disadvantage in comparison with people who are not disabled, it is the duty of the employer to take reasonable steps to prevent the arrangements or feature having that effect.
- *Provision, criterion or practice* include arrangements, for example for determining to whom employment should be offered, and terms, conditions or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.
 - *Physical features* have been further defined in regulations to include features arising from the design and construction of the building, from the means of access to or exit from it, and the fixtures, furnishings and equipment within the building (Disability Discrimination (Employment) Regulations 1996).

What is meant by reasonable adjustments is illustrated in considerable detail in the Code of Practice. It has also been refined by case law.

Morse v Wiltshire County Council [1998] IRLR 352, EAT

The EAT established three distinct steps for ETs to follow when considering an employer's reasonable adjustment duty:

1. Does the duty apply in the particular circumstances?
2. If so, has the employer taken steps that were reasonable in the circumstances, taking into account the factors listed in the DDA?
3. If, but only if, the ET finds that the employer has failed in this duty, the ET should decide whether the failure was justified.

Please note the final step is now incompatible with the DDAR.

- 6.21 The duty only applies to employers who know or should reasonably have known that an employee or potential employee requires reasonable adjustments.

Ridout v T C Group [1998] IRLR 628

Ms Ridout stated on her application form that she suffered from “photosensitive epilepsy controlled by epilim”. She expressed some concern at the fluorescent lighting in the interview room but did not specifically ask for adjustments. Nor did the employer ask her if she required reasonable adjustments. At the ET she complained that the employer failed to make reasonable adjustments at her interview. The EAT agreed with the ET’s conclusion that no reasonable employer would be expected to know that the interview arrangements might disadvantage Ms Ridout without her having explicitly told them so.

- 6.22 Only a provision, criterion, or practice or physical features which put disabled people at a substantial disadvantage give rise to a duty to make reasonable adjustments. “Substantial” means more than minor or trivial. So an employer is unlikely to have to widen a door way for an employee using a wheelchair if there is another convenient route available for that employee which is fully wheelchair accessible.
- 6.23 If an employer is under a duty to stop the disabled person being put at a substantial disadvantage, then it must do so as there is no justification defence.
- 6.24 The DDA gives examples of the steps which employers may have to take to make reasonable adjustments. The list is not exhaustive and often a combination of steps will be required. However employers are only under a duty to take those steps that are reasonable in the particular circumstances. The steps in the DDA are:
- *Making adjustments to premises* such as widening doorways, moving furniture, providing ramps, relocating light switches or repositioning shelves.
 - *Allocating some of the disabled person’s duties to another person.* For example, if a job involves going to the bank every two weeks and the bank is inaccessible to a wheelchair user, then it would be reasonable to allocate another employee for that particular task.
 - *Transferring the person to fill an existing vacancy.* This may be reasonable if an employee became disabled and unable to carry out his current job, and there were no possible reasonable adjustments to enable him to do so.
 - *Altering the person’s working or training hours,* eg to allow them to work when they were least fatigued. Also it may be reasonable to allow

someone who takes a long time to get ready in the mornings because of their impairment to come in an hour later and finish work an hour later.

- *Assigning the person to a different place of work or training* so that they are in an accessible work environment.
- *Allowing absences for rehabilitation, assessment or treatment.* Employers may be under a duty to allow disabled staff to take more time off for treatment etc than non-disabled staff.
- *Giving or arranging training or mentoring* for a disabled employee, eg in the use of specialist equipment that they may require to enable them to carry out their job.
- *Acquiring or modifying equipment* to enable the person to carry out their job, such as a minicom telephone for a deaf employee or an adapted computer keyboard for a visually impaired employee.
- *Modifying instructions or reference manuals.*
- *Modifying procedures for testing or assessment*, eg setting an oral rather than a written test for someone with an impairment affecting manual dexterity.
- *Providing a reader or interpreter* for people with visual and hearing impairments.
- *Providing supervision or other support* such as a support worker or extra help from a colleague for a person whose impairment means that they are lacking in confidence.

6.25 The method used to determine whether an adjustment is “reasonable” often worries employers. For guidance on this it is important to refer to the DDA which lists the factors that should be taken into account in this respect and the Code of Practice which provides further enlightenment and practical examples. The factors listed in the DDA are:

- The *effectiveness* of the step. It is unlikely that a step which has little benefit to the disabled employer would be reasonable.
- The *practicability* of the step. It is more likely to be reasonable for an employer to take a step which is easy and practicable than one which is difficult.
- The *financial and other costs* of the adjustment and the amount of disruption that it may cause. As the Code of Practice clarifies:

“It would be reasonable for an employer to have to spend at least as much on an adjustment to enable the retention of a disabled person - including any retraining - as might be spent on recruiting and training a replacement.”

Further, it is more likely to be reasonable to make an adjustment requiring significant costs for an employee who is likely to be in the job for a long time, rather than a temporary employee.

- The *extent of the employer’s financial and other resources*. Larger and wealthier employers may be expected to make more expensive adjustments.
- The *availability to the employer of outside help*. It may not be reasonable for an employer to finance an adjustment alone, but with financial assistance from a government scheme and a contribution from the employer, that adjustment may be reasonable.
- The *nature of the employer’s activities and the size of his undertaking*. Although the DDA now applies to all employers (except for the Armed Forces), irrespective of their size, the nature of the employer’s activities and size of its undertaking may be relevant in determining the reasonableness of a particular step.

Archibald-v-Fife Council [2004] UKHL 32

The House of Lords confirmed that the duty to make reasonable adjustment is in fact a positive duty to remove the disadvantage that is attributable to the disability.

The duty is triggered where an employee becomes so disabled that the disability affects the employee’s ability to meet the requirements in the current job description. This duty requires the employer to consider transferring a disabled person from the post that he/she is no longer able to do, to a post that he/she can do (even if this means the disabled employee does not have to undergo a competitive interview). A reasonable adjustment may also include transferring the disabled employee to a higher grade.

The extensive nature of this duty has significant implications for larger firms who are likely to have difficulty demonstrating there were no suitable alternative vacancies.

Adjustments to premises

6.26 Situations will arise where an employer is under a duty to make reasonable adjustments to the physical features of the office but can only do so with the landlord, or lessor's, consent. Statutory regulations and the Code of Practice set out the respective duties of the employer/occupier in these circumstances. Consent must not be unreasonably withheld. If it is, landlords or lessors can be joined to proceedings.

Access to Work

6.27 Local Job Centres provide advice and financial assistance to disabled people and their employers to help overcome disability related work problems through the Access to Work ("ATW") scheme.

6.28 Applications for ATW must be from the employee. It is not the responsibility of the employer.

6.29 ATW may help by providing, for example, a support worker, special aids and equipment, and adaptations to premises.

Victimisation and discrimination by other employees

6.30 Employers must not treat an employee less favourably:

- in recruitment, selection, the terms of employment offered, the opportunity afforded for promotion or training or other benefits; and
- subject the employee to any other detriment, including harassment or any detriment after the employee has left employment.

on the basis that the employee did a protected act.

6.31 A protected act can be that the employee either brought DDA proceedings, gave evidence or information in connection with DDA proceedings, suggested the employer or someone connected with the employer has committed an act of disability Discrimination or did something in connection with the DDA.

6.32 Employers should ensure that good practice relating to employment and disabled people is promoted throughout their workforce. Otherwise they could be liable for disability discrimination by their employees in the course of their employment. It is a defence for employers if they can prove that they took such steps as were reasonably practicable to prevent disability discrimination by other employees.

Harassment

6.33 From 1 October 2004, a new definition of harassment was introduced under the DDA. The DDA states harassment occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct which has the purpose or effect of:

- violating the disabled person's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for him

Code of Practice: paragraph 4.39

An employee with HIV uses a colleague's mug. The colleague then makes a point of being seen washing the mug with bleach, which is not something she would do if anyone else used her mug. She also makes offensive comments about having her mug used by someone with HIV. This is likely to amount to harassment.

6.34 A person may harass, even if it is not his intention to do so. As long as it is reasonable for the disabled person to feel harassed, then this may count as harassment.

Code of Practice: paragraph 4.39

A woman with depression considers that she is being harassed by her manager who constantly asks her if she is feeling all right, despite the fact that she has asked him not to do so in front of the rest of the team. This could amount to harassment.

Contract workers and principals

- 6.35 The DDA makes specific provision for individuals employed by an agency or employment business who are hired, often on a temporary basis or for a short period, and imposes duties on the hiring firm (“the principal”) to ensure that such contract workers are protected from disability discrimination. Principals must not:
- set discriminatory terms of work;
 - prevent a disabled contract worker from working or continuing to work;
 - discriminate in the way benefits are offered; or
 - subject disabled contract workers to any other detriment.
- 6.36 The duty to make reasonable adjustments applies to principals in the same way as to an employer.
- 6.37 The DDA has a definition of employee that is more generous than that provided for in the Employment Rights Act 1996, consequently certain relationships may be caught by the DDA.
- 6.38 Where the person concerned is meant to provide services personally then it is more likely than not that the extended definition of ‘employee’ may apply. So, for example, outdoor clerks may be included or possibly where an individual is engaged as an auditor or accountant and that person provides the service personally and is unable to delegate the function.

MHC Consulting Services Ltd v Tansell and others [2000] IRLR 387

Mr Tansell, a disabled computer consultant, offered his services through a company, Intelligents Ltd, of which he was the sole shareholder. He was placed with Abbey Life by MHC, an employment agency, under a contract between Intelligents and MHC. Tansell alleged that his services were later rejected by Abbey Life because of his disability and he brought a claim for discrimination against both Abbey Life and MHC.

The Court of Appeal held (1) That an individual, employed by his own company, who supplied services to an assurance company through an employment agency was a ‘contract worker’ for the Abbey Life and that Abbey Life was his ‘principal’ for the purposes of s.12(6) DDA; (2) The language of s.12 was also reasonably capable of applying to the less common case in which an extra contract was inserted, so that there

was no direct contract between the person making the work available and the employer of the individual who was supplied to do the work; and (3) The definition in s.12 did not require the contract with the principal to be made by the employer who supplied the individual.

Performance related pay

- 6.39 The issue of performance related pay raises the question whether it is justifiable to pay a disabled employee less if he or she is not producing as much as a non-disabled employee. Although not prohibited by the DDA, employers must ensure that performance related pay applies to all employees of the relevant class and not just to those who are disabled. When considering reasonable adjustments the Code of Practice says there is no duty to make a reasonable adjustment to performance related pay arrangements to ensure, for example, that an employee's pay is topped up if their impairment has led to lower performance. Nevertheless there is still a duty to make reasonable adjustments "to any aspect of the premises or work arrangements if that would prevent the impairment reducing the employee's performance".

Occupational pension schemes and insurance services

- 6.40 The DDA inserts a "non-discrimination rule" into every occupational pension scheme preventing scheme trustees and managers from treating disabled members or non members less favourably. There is no duty to make reasonable adjustments to occupational health schemes, and trustees and managers can justify less favourable treatment if there are sound actuarial reasons for doing so.
- 6.41 Insurers must not discriminate against disabled employees in the provision of services to employees of a particular firm.

Sick pay and ill health

- 6.42 Following a decision under the Working Time Regulations 1998, employees on long term sick leave can claim holiday pay whilst they are absent from work.
- 6.43 Sick pay and ill health procedures may need to be modified to ensure that they comply with the DDA. For example, employers should consider whether they may be under a duty to allow disabled staff longer periods off work before pay is deducted. Whilst the DDA does not entitle disabled staff to indefinite periods of time off sick, allowing a disabled employee to receive full pay throughout any length of sickness absence, even if this is not the firm's sickness policy, may be considered to be a reasonable adjustment. Firms should therefore consider adapting their policies as a reasonable adjustment for an employee.

Nottingham County Council v Meikle (2004) EWCA Civ 859

The CA held that the duty to make reasonable adjustments includes a duty to consider paying an employee for a disability related absence, even if the employer had a discretionary sick pay/statutory sick pay policy. Therefore, an employer who discontinues sick pay of a disabled employee, would be expected to demonstrate a justification that is material and substantial for that action.

Where an employee is absent on sick leave due to the employer's failure to put in place reasonable adjustments, then the employer should continue to pay the employee, even if the employer had a discretionary sick pay/statutory sick pay policy.

7. Solicitors as employers: guidance on practice

How will the DDA affect recruitment procedures?

How will the DDA affect employment practice?

Is there any advice or assistance available to employers?

Awareness of discrimination

7.01 As with service provision, discrimination in the employment field can take many forms and may be unintentional, as illustrated by the following examples.

- Lack of awareness of disability and its effects may mean that a firm is unable to perceive the unfair effect which a non-essential job requirement (eg possession of a driving licence) may have on otherwise qualified disabled applicants.
- Ignorance of disability may cause a firm to assume falsely that a blind job applicant will be unable to find her way around their large office.
- A firm may fail to recognise and plan for the needs of a disabled employee when deciding to relocate to new office accommodation.
- A firm may be unwilling to contemplate the modest changes and expenditure which would enable an employee who becomes disabled to be retained in employment.
- The DDA seeks to challenge the attitudes on which these perceptions are based.

Using the Anti-discrimination policy

7.02 Firms should ensure that they have an anti-discrimination policy and that it is reviewed in the light of the DDA's provisions. Firms should review all policies and procedures for disability bias and training may be required. All members of staff should be fully aware of their obligations under the DDA, particularly when recruiting or managing staff. The firm should gather information about disability and its effects and use this where necessary in the recruitment process and in relation to other personnel decisions.

Job specification

- 7.03 Firms should bear in mind that unnecessary requirements in a job specification may be discriminatory.

Code of Practice: paragraph 7.7

An employer stipulates that employees must be 'good team players', when in fact the job in question does not involve working in a team. This requirement could unjustifiably exclude some people who have difficulty communicating, such as some people with autism.

Advertising

- 7.04 An advertisement will be unlawful if it suggests that only non-disabled candidates will be considered. The phrase "premises not accessible to wheelchair users", for example, in an advertisement may be unlawful.
- 7.05 Firms should be able to provide job information in various formats such as Braille, on cassette or on a floppy disc. This would count as making a reasonable adjustment to the needs of disabled people.
- 7.06 It is not unlawful to ask candidates to complete a section in the application form about whether they are disabled and therefore require any reasonable adjustments. This information will enable firms to make the necessary adjustments for interviewing.

Interviewing and testing

- 7.07 Employers who are aware of an applicant's disability are under a duty to make reasonable adjustments to the interview arrangements, eg moving furniture to enable wheelchair access in the room or allocating a parking space near the office.
- 7.08 Testing at interview is permitted but firms should be alert to the possibility that tests can be discriminatory. Unless the nature and form of the test are absolutely necessary to assess a matter central to the job in question, employers should consider modifying a test or the way results are analysed to take account of a candidate's disability. If a typing speed test is an essential matter for a job and a candidate requires a modified keyboard to perform at their best, the employer should provide the modified keyboard.
- 7.09 Interviews themselves may be discriminatory for candidates who have difficulty in communicating verbally, particularly in a stressful situation. Assuming that communications skills are not a prerequisite for the job, an employer may have to consider whether performance in an interview is

actually of any relevance to the job, eg if someone is to be employed as an office clerk responsible mainly for filing.

Medical screening

7.10 Employers are permitted to require disabled candidates to undergo medical screening, but only if all other candidates are required to do so. Any information obtained from medical screening about a candidate's impairment is irrelevant unless it has an impact on their ability to do the job.

Selection

7.11 There is no requirement that employers positively discriminate in favour of disabled candidates, although the DDA does not prohibit positive discrimination. If a disabled person, with reasonable adjustments, would still not be able to meet performance criteria reasonably regarded as essential to the job, an employer can decline to make such adjustments and reject the person for the post.

Terms of employment and pay

7.12 Terms and conditions may need to be adjusted for disabled employees. For example, a requirement to work standard hours may need to be changed for a disabled employee who finds it difficult to travel in the rush hour.

7.13 Firms might be permitted to pay a disabled employee less if, despite reasonable adjustments, their output is significantly less than that of other employees and if the lower output affects the value of their work to the firm.

Promotion and training

7.14 Employers must not discriminate in assessing an employee's suitability for promotion, transfer or training, and reasonable adjustments may have to be made to enable an employee to benefit from these opportunities.

Disability Questionnaire Procedure

7.15 If an employee believes that they have been discriminated against, they may issue a disability questionnaire to their employer. This is a useful way for the employee to establish whether there is any merit to bringing a DDA claim.

7.16 The employers' replies can be used as evidence if ET proceedings are issued. If a questionnaire is issued, an employer must respond within 8 weeks.

Sources of advice and financial assistance

7.17 There is a wide range of practical help and advice available to employers to assist in the recruitment and employment of disabled people.

- The Disability Rights Commission will publish information on good practice and any new duties that may come into force.
- The Employment Service's Placing, Assessment and Counselling Teams (PACTs) may be able to help firms employ disabled people by providing advice on aids, equipment, readers and other such measures as might constitute a reasonable adjustment. The PACTs will also give information about the Government's "Access to Work" scheme under which financial assistance can be sought to pay for adaptations to the workplace (see paragraph 6.27). Local PACT details can be obtained from Jobcentres.
- The Employers' Forum on Disability has published information for employers and is experienced in advising on DDA duties.
- Some of the larger disability organisations, such as RADAR (Royal Association for Disability and Rehabilitation) can also provide help and information.
- ACAS has responsibilities for conciliating disputes under the DDA. To a limited extent ACAS may also provide employers with information on the DDA and its impact.

See Chapter 9 for contact details.

Cautionary Note

7.18 It is well known that the legal profession makes very high demands from practitioners who are repeatedly working towards tight deadlines and constantly checking that all relevant standards are satisfied. However, it is every practitioner's interest to ensure that adequate steps are taken to avoid breach of disability discrimination legislation. An oversight in this area can be expensive not only in regards to the cost of defending proceedings but also the time taken from regular responsibilities to deal with such claims and the inevitable cost of compensating a successful complainant.

Successful claimants can expect to be compensated for any loss of earnings they incur, anticipated future loss of earnings, injury to feelings and where the employer behaves in a highhanded and oppressive manner such employer can expect the employee to receive further compensation for aggravated damages. An award for personal injury can also be made.

Over the years the 'injury to feelings' element has been very difficult to quantify. However, in the decision of *Vento –v- Chief Constable of West Yorkshire* (2002) EWCA Civ 871, the Court of Appeal indicated the likely bands of compensation with higher awards for those claims found to be more serious acts of discrimination. The bands are as follows:

- £500 - £5,000 for isolated and one off occurrences;
- £5,000 - £15,000 for serious cases which did not merit to be in the highest band;
- £15,000 - £25,000 for the most serious cases; and
- In exceptional cases the award may exceed £25,000.

8. Statutory Regulations, Codes of Practice and Guidance

8.01 Statutory Regulations

The key statutory regulations relevant to the DDA are:-

- The Disability Discrimination (Sub-Leases and Sub-Tenancies) Regulations 1996 (SI No 1333)
- The Disability Discrimination (Meaning of Disability) Regulations 1996 (SI No 1455)
- The Disability Discrimination (Employment) Regulations 1996 (SI No 1465)
- The Education (Disability Statements for Further Education Institutions) Regulations 1996 (SI No 1664)
- The Disability Discrimination (Questions and Replies) Order 1996 (SI No 2793)
- The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI No 2083)
- The Rail Vehicle Accessibility Regulations 1998 (SI No 2456)
- The Rail Vehicle (Exemption Applications) Regulations 1998 (SI No 2457)
- The Disability Discrimination (Exemption for Small Employers) Order 1998 (SI No 2618)
- The Disability Discrimination (Services and Premises) Regulations 1999 (SI No 1191)
- The Disability Discrimination (Provider of Services) (Adjustment to Premises) Regulations 2001/3253
- The Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003 (SI 2003/712)
- The Disability Discrimination Act 1995 (Amendment) Regulation 2003 (SI 2003/1673)

8.02 Codes of Practice and Guidance

Government departments have produced a number of guidance documents and Codes of Practice which are intended to assist employers and service providers in the compliance of their DDA duties. The Codes of Practice and guidance are not legally binding but are used widely by tribunals and courts in deciding whether discrimination has occurred in DDA cases. The primary Codes of Practice and guidance are listed below and are extremely useful, user-friendly publications packed full of practical suggestions and real life examples. All of these publications, and more on the DDA, can be obtained by contacting the DRC Helpline – see Chapter 9.

- Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability
- Code of Practice on Employment and Occupation
- Code of Practice on Rights of Access to Goods, Facilities, Services and Premises 2002

9. Useful Contacts

**Disability Rights Commission
DRC Helpline**
Freepost MID 02164
Stratford Upon Avon CV37 9BR

Website www.drc-gb.org

Phone: 08457 622633
Fax: 08457 778878
Minicom: 08457 622644

Will provide advice and publications on the DDA including codes of practice and guidance.

Disability Law Service
Disability Law Service
39-45 Cavell Street
London E1 2BP

Phone: 020 7791 9800
Fax: 020 7791 9802
Minicom: 020 7791 9801

Email advice@dls.org.uk

A charity offering free, independent legal advice, support and representation to disabled people.

RADAR – The Royal Association of Disability and Rehabilitation
12 City Forum
250 City Road
London EC1V 8AF

Website www.radar.org.uk
Email radar@radar.org.uk

Phone: 020 7250 3222
Fax: 020 7250 0212
Minicom: 020 7250 4119

National disability organisation providing services and information and campaigning for disabled people.

Employers Forum on Disability

Nutmeg House
60 Gainsford Street
London SE1 2NY

Website www.employers-forum.co.uk
Email website.enquiries@employers-forum.co.uk

Phone: 020 7403 3020
Fax: 020 7403 0404
Minicom: 020 7403 0040

National employers' organisation funded by member employer organisations. Their aim is to enable employers to more easily recruit and retain disabled employees and serve disabled customers.

Centre for Accessible Environments

70 South Lambeth Road
London SE8 1RL

Website www.cae.org.uk
Email info@cae.org.uk

Phone/Minicom: 020 7357 8182
Fax: 020 7357 8183

Provides technical information, training and a consultancy resource for the construction industry, service providers, care professionals and disabled people.

BCODP – British Council of Disabled People

Litchurch Plaza
Litchurch Lane
Derby DE24 8AA

Website www.bcodp.org.uk
Email general@bcodp.org.uk

Phone: 01332 295551
Fax: 01332 295580
Minicom: 01332 2955821

National disability organisation controlled by disabled people.

The Disability Discrimination Act 1995 - An essential guide for solicitors



Department of Trade and Industry

DTI Enquiry Unit
1 Victoria Street
London SW1H OET

Website www.dti.gov.uk
Email dti.enquiries@dti.gsi.gov.uk

Phone: 020 7215 5000
Minicom: 020 7215 6740

Group for Solicitors with Disability

The Law Society, 114 Chancery Lane, London. WC 2A 1PL

Website www.gsdnet.org.uk
Email: secretary@gsdnet.org.uk

Telephone: 020 7320 5793

The Group for Solicitors with Disabilities works closely with the Law Society in addressing the issues relating to disabled solicitors including access to and progression within the profession.

Index

Finding your way around the Guide

Absences.....	6.24
Access to Work.....	6.27 – 6.30
Advertisements.....	1.04, 7.04 – 7.06
Agency.....	6.36 – 6.37
Barristers.....	1.08 – 1.09
Comparators.....	4.03, 4.05, 6.10 – 6.11, 6.14
Compensation.....	7.18
Constructive dismissal.....	1.04, 1.07
Contracting out of the DDA.....	6.03
Contracts	
Occupational Health Scheme.....	6.41, 6.42
Other.....	6.24
Pay/Pension.....	6.40, 6.42 – 6.47, 7.12 7.13
Terms of contract.....	1.07, 7.12 – 7.13
Training.....	1.07, 6.24, 7.14
Contract Workers.....	6.36 – 6.39
County Courts.....	1.05, 2.03, 2.06
Detriment.....	1.07, 6.31, 6.37
Developments within DDA.....	1.04
Disability Discrimination Act Questionnaires.....	4.24, 7.15 – 7.16
Definition of disabled person.....	3.01 – 3.04
Disfigurement.....	3.11
Dismissal.....	1.07
Discrimination.....	1.04, 4.03, 4.06, 6.06 – 6.07
Direct discrimination.....	6.08 – 6.11
Disability-related discrimination.....	6.12 – 6.18
Harassment.....	1.04, 6.34 – 6.35
Reasonable adjustments.....	See below
Victimisation.....	4.10, 6.31 – 6.33

The Disability Discrimination Act 1995

- An essential guide for solicitors



Finding your way around the Guide	
Employees/Employers.....	1.01, 1.04, 1.07, 1.09, 1.12, 1.16, 2.01, 2.02, 4.10, 6.01, 6.09, 6.14, 6.16, 6.18, 6.20, 6.21, 6.22, 6.23, 6.24, 6.25, 6.26, 6.27, 6.28, 6.31, 6.35, 6.40
Excluded employers.....	1.04
Employment Tribunal.....	1.05, 2.03, 2.06, 3.07, 3.16
Employment Appeal Tribunal.....	1.05, 1.08
Impairment	
Excluded conditions.....	3.17 – 3.21
Long term.....	3.02, 3.12 – 3.13
Physical.....	3.02, 3.05
Mental.....	3.02, 3.06
Job Specification.....	7.03
Justification.....	4.21 – 4.23, 6.09, 6.13, 6.16 – 6.18, 6.23
Knowledge of disability.....	6.04 - 6.05
Less favourable treatment.....	1.04, 1.07, 4.03, 6.16 6.18 6.19
Medical Screening.....	7.10
Normal day to day activities.....	3.02, 3.16, 3.13, 3.14, 3.15
Past disabilities.....	3.04
Partners/Partnerships.....	1.08, 1.09, 2.01, 6.02
Goods, facilities and services.....	2.01, 4.01, 4.10
Perceived disabilities/discrimination.....	3.20
Practical advice to solicitors.....	5.02, 5.03
Practices, Policies and Procedures.....	1.04, 1.06, 4.13, 4.18, 6.22
Premises.....	see below (refusal in respect of adaptations)
Principals.....	1.15, 6.38, 6.39
Progressive condition	
Multiple Sclerosis, HIV, Muscular dystrophy..	3.10, 3.18
Finding your way around the Guide	
Promotion.....	7.14
Property.....	2.01
Protected Acts.....	6.33, 6.34
Reasonable adjustments.....	5.01 6.16, 6.18, 6.19, 6.20, 6.21, 6.22, 6.24, 6.25
Examples.....	6.26
Physical features.....	6.22, 6.24
Provision criteria or practice.....	6.22, 6.24
Reasonable.....	6.25
Service Providers.....	4.03, 4.13 – 4.16

The Disability Discrimination Act 1995

- An essential guide for solicitors



Refusal in respect of :	
Services.....	4.04
Adaptations.....	1.12, 6.25, 6.26
Sick Pay.....	6.43, 6.44
Service Providers:	
Aiding unlawful acts.....	4.10
Alterations/Adaptations.....	1.12, 4.13, 4.16, 4.19, 6.25, 6.26
Auxillary aids/services.....	4.13, 4.17, 4.20
Duties.....	1.08, 4.01
Discrimination.....	4.03, 4.06
Enforcement.....	4.24
Justification.....	4.03, 4.21 – 4.23
Knowledge.....	4.04, 4.10, 5.01
Liability.....	4.11 – 4.12
Physical barriers/features.....	2.02, 4.04, 4.13, 4.14, 4.17
Victimisation.....	4.10
Substantial adverse effect.....	3.02, 3.08, 3.09
Transfer of employees.....	1.13
Trade Organisations.....	1.10, 2.01
Admission policies.....	1.10
members, membership examination, benefits facilities	
Trustees.....	6.41