

# Access all Areas

## Equal treatment for disabled people



### Overview

Part III of the Disability Discrimination Act 1995 (the DDA) imposed legal obligations on those who provide goods, facilities and services to the public. The provisions sought to ensure that disabled people are not treated less favourably than other customers. As of 1st October 2010, most equality legislation (including the DDA) was consolidated into the Equality Act 2010 ('The Act'). Provisions relating to equality in relation to services provision (as it is now described in 'The Act') is contained within Part 3 of 'The Act'.

For more information on disability discrimination in the workplace, see our factsheet '[Disability Discrimination](#)', part of the *Employment Law series*.

### The meaning of disability

'The Act' provides protection for people who have a disability, defined as 'a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities'. But what exactly does this mean for you?

### Four-part definition of 'disability'

**1. Physical or mental impairment** – this is broadly interpreted and includes sensory impairments, Autism, Dyslexia and mental health conditions. The need for a mental impairment to be a clinically recognised illness has been removed since 2005.

**2. A substantial adverse effect** – this requirement is meant to rule out minor or trivial impairments, so simply being under the weather will not be enough. Even if an individual can carry out a normal day to day activity, there may still be a substantial adverse effect on how those activities are carried out (i.e. certain movements cause pain). The Court should consider how the individual would carry out those activities without the impairment.

**3. A long-term effect** – an impairment that has lasted 12 months or is likely to last 12 months, or for the rest of your life. If the impairment's substantial adverse effect ceases, but the effect is likely to recur at some point in the future, then the substantial adverse effect is treated as continuing. The word 'likely' means 'could well happen'.

**4. The ability to carry out normal day-to-day activities** – the DDA included a 'list of capacities' and an individual was required to show that they were impaired in carrying out one of those capacities. Under 'The Act', there is no such list allowing for a greater scope of activities that fall within the definition. Examples of capacities that might be affected could include eating, walking, driving, normal social interaction.

'The Act' also covers progressive conditions such as Multiple Sclerosis. Further, 'The Act' ensures that if you are diagnosed with Cancer or as HIV positive you will automatically be protected by 'The Act', without having to fit the definition of 'disability'.

The meaning of 'disability' is fairly wide and covers a variety of people, some of whom might not traditionally be considered disabled, such as those with Epilepsy or Depression. Legal cases so far emphasise that the effect of the disability is the key, rather than the type of disability. If you suffer from a range of impairments, the focus should be on the overall effect of the impairments on your ability to function, rather than the effect of each impairment separately.

When considering whether you have a disability, the effect of any medication or treatment you receive for your condition must be discounted in considering the impact on your ability to carry out day to day activities. This is crucial. For example, use of medication, a hearing aid or walking stick should be ignored.

### Perceived and Associative Discrimination

'The Act' has also been extended to cover direct discrimination and harassment (see below) suffered because of a disability of a person with whom you are associated, even if you are not yourself disabled. This would protect, for example, carers of disabled persons from detrimental treatment or comments made because of their association with the disabled person. The concept of 'associative discrimination' does not, however, extend to other types of disability discrimination such as the duty to make reasonable adjustments or discrimination arising from disability (see below).

Also, individuals perceived to be disabled even if they are not disabled, should also be covered by 'The Act' against acts of direct discrimination and harassment. In perception cases, it may not be necessary for an individual to fulfil the statutory definition of disability.

### Discrimination in service provision

A disabled person is entitled not to suffer discrimination, harassment or victimisation because of or related to disability at the hands of a person or organisation providing them with goods, facilities or services.

### What are services?

The DDA referred to 'goods, facilities and services'. Whilst 'The Act' only refers to 'services' it intends to cover the same areas as the DDA. Examples of what are likely to be considered as services based on previous equality legislation and case law is as follows:

- Access to and use of any place which members of the public are permitted to enter
- Access to and use of means of communication
- Access to and use of information services
- Accommodation in a hotel, boarding house or other similar establishment
- Facilities by way of banking or insurance or for grants, loans, credit or finance
- Facilities for entertainment, recreation or refreshment
- Facilities provided by employment agencies
- Services of any profession or trade, or any local or public authority.

It is irrelevant whether the service is provided for free or for payment. Further, no distinction is made as to whether the service provider is a private, public or voluntary body. Therefore a whole range of establishments are covered such as restaurants, pubs, supermarkets, hotels, banks and shops etc.

Disability discrimination relating to transport provision is dealt with separately under 'The Act'. 'The Act' applies in relation to specified hire vehicles.

**What is prohibited?** - 'The Act' outlaws direct and indirect discrimination, discrimination arising from disability, victimisation and harassment.

## Discrimination in service provision

**1. Direct discrimination** - It is unlawful to treat a person less favourably because of their disability. In order to bring a claim of direct discrimination, you must show:

- That you have been treated less favourably because of disability
- That you were subject to disadvantage or detriment as a result of that treatment.

'The Act' requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone who does not have your disability, but whose position is the same or not materially different to yours in all other respects. This 'comparator' can be an actual person or hypothetical.

Direct discrimination cannot be justified. For example, if you are subject to stereotypical comments where other customers are not, this could amount to direct discrimination. There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious or that the discriminatory reason was the sole reason for their actions. Further, it does not matter if the discriminator shares the disability of the individual being discriminated against.

In most other cases under 'The Act', protection against direct discrimination applies equally to all persons. For example, women and men are protected against sex discrimination; black and white people are protected against race discrimination. However, there is a requirement that disabled persons should be treated 'more favourably' in order to 'level the playing field'. It is lawful, therefore, to treat a disabled person more favourably than a non-disabled person.

**2. Discrimination arising from disability** - This is a new type of discrimination prohibited by 'The Act'. A disabled person is entitled not to be treated unfavourably because of something arising in consequence of their disability. If they are treated unfavourably, then the discriminating service provider must objectively justify that treatment. There is no need for a comparison of treatments afforded to a disabled and non-disabled persons to succeed in this claim.

There is no need to establish a direct link between the disability and the

unfavourable treatment. The unfavourable treatment should have been caused by something arising from the disability. For example, being treated unfavourably by a service provider because of awkward behaviour arising from a disability, or the need to be accompanied by a guide dog.

A discriminator will struggle to justify unfavourable treatment if they could have made a related reasonable adjustment (see below) but failed to do so.

**3. Indirect discrimination** - This is the first time that indirect disability discrimination has been implemented into law. 'The Act' provides that a person also discriminates if an arrangement or feature (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all users of the services, but:

- Puts people of a particular disability at a particular disadvantage when compared with people without that disability
- Puts the complainant at that disadvantage; and is not a proportionate means of reaching a legitimate aim (in other words the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, if a restaurant does not permit any dogs to enter, a blind customer who has a guide dog could be disadvantaged by that practice. The service provider will need to justify the PCP objectively and consider why this PCP is in place and if there is a more appropriate way to achieve that aim.

**4. The duty to make reasonable adjustments** - Service providers should take positive steps to ensure that disabled persons can access its services. Failure to make reasonable adjustments will amount to discrimination. The duty to make reasonable adjustments is an 'anticipatory duty' requiring service providers to consider adjustments in advance. A service provider cannot pass on the cost of providing a reasonable adjustment to a disabled person, although the cost could be passed on to all customers more generally.

*"For all disability claims under 'The Act' to succeed (save for indirect disability discrimination), the discriminator must know about the disability or be reasonably expected to know of it. Disclosure of a disability is therefore essential for protection under 'The Act'."*



### What is reasonable?

The Code of Practice provides a non-exhaustive list of factors to be considered in determining the reasonableness of an adjustment:

- Whether taking any particular steps would be effective in overcoming difficulties in access faced by disabled people
- The extent to which it is practicable to take the steps
- The financial and other costs of making the adjustment
- The extent of any disruption that taking the steps would cause
- The service provider's financial resources, and resources already spent on making adjustments
- The availability of financial or other assistance.

Reasonable adjustments might need to be made to physical features, for example, wheelchair users may need adjustments to allow access to their local bank building, or adjustments might be necessary to a website to ensure all visually impaired users can access it.

In relation to transport, a service provider who transports people by land, air or water is required to make reasonable adjustments if the relevant mode of transport is specified under 'The Act'.

**5. Victimisation** – The law protects people who seek to enforce their rights under 'The Act', and it is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under 'The Act'. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under 'The Act' or the DDA; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under 'The Act' or the DDA; or
- Doing anything in relation to the discriminator or any other person under or by reference to 'The Act' or the DDA; or
- Making allegations that the discriminator or any other person has committed an act which contravenes 'The Act' or the DDA. This would include raising a grievance of disability discrimination.

So for example, if you have made a complaint about disability discrimination and are later treated unfavourably for doing so, you should be covered by 'The Act'. A protected act must be done in good faith.

**6. Harassment** – Harassment related to disability is a form of discrimination. It is defined as being:

- Unwanted conduct related to disability that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Court will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can also be brought if harassment occurs because of an association with someone of a particular disability, or if someone is perceived to have a particular disability. For example, if a mother takes her disabled child to a beauty salon and suffers harassment from the salon owner related to her disabled child, the mother, as well as the child, could have claims against the salon owner.

### Exceptions

There are certain exceptions to duties owed by service providers. For example, charities are allowed to provide benefits to people who share a particular characteristic if this can be justified or if it prevents or compensates a disadvantage. For example, a charity providing services to those living with HIV can continue to do so if the charity's instrument allows for this and the service can be justified or it prevents/compensates a disadvantage linked to HIV.

Another exception relates to immigration. Any decision to refuse entry clearance, or refuse, cancel, vary leave to enter or remain in the UK relating to disability is excepted under 'The Act'.

### Knowledge of disability

For all disability claims under 'The Act' to succeed (save for indirect disability discrimination), the discriminator must know about the disability or be reasonably expected to know of it. Disclosure of a disability is, therefore, essential for protection under 'The Act'.

*"Harassment is defined as being 'unwanted conduct related to disability that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment' "*



### Questionnaires: getting the facts together

You can serve a questionnaire on the service provider who is the subject of your complaint at any time before lodging a claim at the County Court or within 28 days from the date proceedings were lodged. The questionnaire can be used to ask your employer useful questions relating to the complaint. If the service provider fails to reply to the questionnaire, or makes evasive replies, the Tribunal may draw an inference of unlawful discrimination.

### Time limits and the correct legislation

Claims must be brought in the County Court. The time limit for bringing a claim is six months less one day from the date of the discrimination (or from the date of the last act in a series of acts of discrimination).

The court has discretion to allow a claim that is out of time in some circumstances, but you should not rely on this discretion.

The court can award both financial and non-financial remedies – monetary compensation or an injunction that 'rights the wrong'. Typical awards can range from £500 to £5,000.

If the treatment you complain about happened or began before 1st October 2010, you should bring claims under 'The Act' and the DDA. 'The Act' will apply in all cases where the claim arose after 1st October 2010 in its entirety. You should seek legal advice if you are unsure about which legislation applies to your claims. These provisions are complicated and you should obtain legal advice.

*"The Act' has also been extended to cover direct discrimination and harassment suffered because of a disability of a person with whom you are associated, even if you are not yourself disabled"*



## Contact Us

*Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:*



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