Disability and the Equality Act 2010

1. The Equality Act 2010 (the Act) has made significant changes to disability discrimination law – in fact, disability out of all the protected characteristics will be most profoundly affected by its provisions. This paper examines those changes and the likely impact.

2. The Equality and Human Rights Commission are producing final versions of statutory Codes of Practice on employment and occupation and services, functions and private clubs.

Definition of disability

3. What are now called "the protected characteristics" (the grounds on which discrimination is prohibited) are contained in Part 2 chapter 1; they are all set out in section 4, whilst sections 5 – 12 define them. Disability is contained in section 6, which states as follows:

Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

4. Section 212 now specifies that "substantial" in the Act means "more than minor or trivial". Previously this interpretation was only contained in Guidance and Statutory Codes and in case law. This definition will apply wherever substantial is used in the Act.

5. Schedule 1 to the Act replicates, though with slightly different wording, Schedule 1 to the Disability Discrimination Act 1995, save for one difference. The list of capacities which must be affected in order for an impairment to affect the ability of the person concerned to carry out normal day to day activities, presently contained in Paragraph 4 to Schedule 1 of the DDA, has been removed. The government explained its reasoning for this in the green paper "Discrimination Law Review: Framework for a Fairer Future", July 2007, when it stated:

> *"8.5…This requirement was included in the Disability Discrimination Act in 1995 as there were concerns that, without such a qualification, the protection of the Act would be too wide-reaching. In practice, this concern has proved unfounded.*
>
> *8.6 There is also evidence of confusion about the purpose of the list of "capacities" and it has often incorrectly been described as a list of normal day-to-day activities. Furthermore, it has sometimes proved difficult for some people, particularly those with a mental impairment, to show how their impairment affects one of the "capacities". In order to put this right, we propose to remove the list of "capacities" from the definition of disability."*

6. It is doubtful as to how much difference this will make as tribunals will undoubtedly look to the former capacities for some framework for normal day to day activities.

7. The Government has issued for consultation revised guidance under the Act: "Guidance on matters to be taken into account in determining questions relating to the definition of disability" (see www.odi.gov.uk/equalityact).

8. This guidance is little changed from the current, expansive, guidance issued in May 2006. It does, however, reflect the meaning of "likely" as determined in *Boyle v SCA Packaging* [2009] UKHL 37 by stating that "likely should be interpreted as meaning that it could well happen rather than it is more probable than not that it will happen" (para C3).

9. Whilst obviously the guidance does not refer to the capacities, it does under “Adverse effects on the ability to carry out normal day to day activities” provide guidance on what effects impairments might have using what are, in effect, the previously listed capacities – such as walking (D18); manual dexterity (D19); ability to co-ordinate (D20); continence (D21); ability to lift or carry (D22); ability to speak, hear and see (D23 – D27); ability to learn concentrate or understand (D28); and ability to understand risk of physical danger (D30). The Appendix replicates the present guidance by setting out examples of what it would be reasonable to regard as having a substantial adverse effect on normal day to day activities.

10. The changes may, however, make it easier for those with mental health issues to bring themselves within the definition as they have been poorly served by this list of capacities.

11. The regulation making powers have been retained in the Act – and the Government has laid regulations – the Equality Act 2010 (Disability) regulations (SI 2010 No. 2128). These replicate the present regulations, as well as including what is currently the subject of the Disability Discrimination (Blind and Partially Sighted) Regulations 2003 SI 2003/712, so that if you are certified blind, partially sighted, severely visually impaired or visually impaired you are deemed to be disabled**.**

12. The Act preserves the position with regard to those who were registered as disabled under the Disabled Persons (Employment) Act 1944 so that they are treated as having had a past disability. The Act, as with the DDA, applies to a person who has previously had a disability (s.6(4) and Sched 1, para 9), other than in relation to the provisions in Part 12 (transport) and section 190 (improvements to let dwelling houses).

Direct discrimination

13. Direct discrimination already extends to disability in the employment context by virtue of section 3A(5) of the DDA. The Act extends this concept to services, public authority functions, premises education, associations etc – and it is defined in section 13.

14. As a result of the decision in *Coleman v Attridge Law & Stephen Law - C-303/06* (where the ECJ held that the direct discrimination and harassment provisions of the Employment Framework Directive 2000/78/EC covered those less favourably treated as a result of their association with a disabled person) the formulation for direct discrimination ("because of") is intended to include those who are less favourably treated because of association with a protected characteristic or because they are perceived to have a protected characteristic. The Explanatory Notes to the Act, at paragraph 63, state that the formulation is "*designed to provide a more uniform approach by removing the former specific requirement for the victim of the discrimination to have one of the protected characteristics of age, disability, gender reassignment and sex. Accordingly, it brings the position in relation to these protected characteristics into line with that for race, sexual orientation and religion or belief in the previous legislation*"

15. At paragraph 59 of the Explanatory Notes, it states:

"*Direct discrimination occurs where the reason for being treated less favourably than another is a protected characteristic listed in section 4. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example is disabled) or because the victim is wrongly thought to have it (for example, a particular religious belief).*

16. In the context of service provision, for example, this means that where a non-disabled person accompanies a disabled person and both are refused service, they will now both be able to bring a claim of direct discrimination under the Act.

17. Whilst “associative” discrimination is likely to be relatively straightforward, perception is more difficult.

18. The courts so far (the EAT specifically) have been disinclined to accept arguments as to treatment on the basis of “perceived” disability being covered by the DDA in order to comply with the EC Directive (see *Aitken v Commissioner of Police for the Metropolis* [2010] UKEAT 0226_09_2106 and *J v DLA Piper* (UKEAT/0263/09/RN)).

19. It, therefore, remains to be seen how “perceived” disability will work in practice. Will a person bringing a claim have to show that an employer perceived them to have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities? This would be extremely tortuous and practically unworkable. If tribunals take a more “common sense” approach, then it is likely that those who would not meet the definition but who have been less favourably treated because of their impairment will claim direct discrimination on the basis of perception; this may be a means of avoiding the sometimes stringent requirements of the definition of “disability”. It is more likely to be an issue in employment than in service provision.

20. Section 13 also contains specific provision (s.13(3)) providing that, in relation to disability, it is not discrimination to treat a disabled person more favourably than a person who is not disabled. This means that it will continue to be lawful for employers and others to treat disabled people more favourably than others.

Direct discrimination – comparators:

21. Section 23 sets out the provision on comparators as follows:

Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability;
(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.

22. This in effect replicates the present provisions in the DDA. Whilst there is no specific caselaw on the meaning to be attributed to "include a person's abilities", it must refer to the consideration of the abilities of a disabled person even where these abilities are a result of the disability itself.

23. The Court of Appeal considered the comparator for the purposes of direct discrimination under the DDA in employment in the case of *Aylott v Stockton on Tees Borough* [2010] EWCA Civ 910. The local authority had employed Mr Aylott, who has bipolar affective disorder, in one department but then moved him to another after difficulties with colleagues. On starting work in the new department, Mr Aylott was given strict deadlines and told that his performance was being closely monitored. Shortly afterwards he went on sick leave with stress. After returning to work he argued with his line manager; the local authority found that his conduct was a disciplinary matter as he had been certified fit for work, and he was suspended. The suspension was withdrawn as Mr Aylott went into hospital, and he remained off work sick. Five months later he was dismissed. Mr Aylott lodged an appeal against the dismissal, which had not been resolved before his employment was terminated. The tribunal found that Mr Aylott's dismissal was both on the grounds of his disability and disability-related. It also found that Mr Aylott's dismissal was both substantively and procedurally unfair. The

tribunal awarded him £30,686.54 for discrimination and £1670 for unfair dismissal.

24. The EAT upheld Stockton's appeal, holding in particular that, in considering whether a disabled employee who had spent considerable time off work sick had been discriminated against, the ET had erred because it had failed to select a hypothetical comparator who, in addition to a similar sickness record, had other characteristics relevant to the acts of which complaint was made. In particular, it had erred in using the comparator described in *Clark v TDG Ltd (t/a Novacold Ltd)* (1999) 2 All ER 977, as that case had been overruled in *Malcolm v Lewisham LBC* (2008) UKHL 43, (2008) 1 AC 1399. Mr Aylott appealed the decision to the Court of Appeal.

25. The Court of Appeal upheld the appeal. On the issue of direct discrimination and the comparator, Mummery LJ stated that, in this case, the issue of less favourable treatment of the claimant, as compared with the treatment of the hypothetical comparator, added little to the process of determining the direct discrimination issue. There were dangers in attaching too much importance to the construction of the comparator and to less favourable treatment as separate issues, if the Tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground. The ET's choice of hypothetical comparator (ie, a person who did not have the claimant's particular disability, but had a similar sickness absence record) was a comparator choice reasonably open to the ET. The ET could not be criticised for leaving the claimant's particular disability out of the circumstances of the hypothetical comparator given that section 3A(5) of the DDA stipulates that the comparator does not have the disability. The CA went on to find that there was no error in the ET also leaving out of those circumstances the particular results caused by the claimant's disability: the move to another post and the behavioural and

performance difficulties resulting from the particular disability would not be relevant circumstances of a hypothetical comparator who did not have that particular disability.

26. The CA appear to be saying that certain results caused by a disability should be imported into the comparative circumstances (eg, long-term sickness absence) but other results or consequences of a disability can be left out. This is somewhat confusing. However it may be that the Court was in effect reflecting the fact that some results of a disability would not be experienced by someone who does not have a disability, and so any comparative exercise with those results would be pointless. It is arguable, for example, that anyone who exhibited some of Mr Aylott's behaviour would have to have a disability – and thus removing them from any comparison would be inappropriate[1].

27. In practice, however, it is likely that many such claims will in future be brought under section 15 of the Act (ie, discrimination arising

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1. [1] Of additional importance in *Aylott* is the Court's observations on stereotyping in the context of disability. The CA held that the ET's reference to the Council's "stereotypical view of mental illness" was not too vague to support the finding of direct discrimination. Direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics: see *R (European Roma Rights) v. Prague Immigration Officer* [2005] 2 AC 1.

2. The CA observed that an ET can err in law if they conclude that liability for direct discrimination has been established simply by relying on an unproven assertion of stereotyping persons with that particular disability. Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the ET could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss. The ET made detailed findings of fact about the Council's treatment of the claimant in relation to the circumstances of the dismissal, to the events leading up to it and to the reasons for it. Those findings were more than sufficient to take the case out of that kind of case in which there is only the fact of disability and the fact of dismissal, which could not alone properly support an inference of discrimination.

from disability) where there is no comparator required (although, of course, section 15 discrimination is open to a justification defence whilst a section 13 direct discrimination claim is not).

Discrimination arising from disability – solution to the *Malcolm* outcome?

28. The case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43 has had major ramifications in the field of disability discrimination law. It overruled *Clark v Novacold* [1999] ICR 951 so that discrimination for a reason relating to disability – currently section 3A(1) of the DDA – equates essentially to direct discrimination. Both the Court of Appeal in relation to education (see *R (on the application of N) v London Borough of Barking and Dagenham Independent Appeal Panel*, [2009] EWCA Civ 108) and the Employment Appeal Tribunal in relation to employment (see e.g. *Child Support Agency (Dudley) v Truman* UKEAT/0293/08/CEA) have held that *Malcolm* applies not only to the premises provisions but also to other areas of the DDA. The latter approach was affirmed by the Court of Appeal in *Aylott.*

29. The government announced its intention to remedy the effects of *Malcolm* in its consultation document "Improving Protection from Disability Discrimination" (November 2008). It proposed using indirect discrimination to ensure that situations which would, prior to *Malcolm*, have been covered by the DDA could once again form the subject of a complaint.

30. The overwhelming reaction to the consultation was that indirect discrimination would not have the same effect as disability related discrimination – in particular, there was concern regarding the pool for comparison, and, regardless of *British Airways plc v Starmer* [2005] IRLR 862 EAT, the ability of indirect discrimination to cover the vast range of "one off" occurrences which were the subject of disability related discrimination claims.

31. Section 15 of the Equality Act, which was amended during the passage of the Act, introduces the concept of discrimination arising from disability. The section states as follows::

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

32. It is clear that the drafters were trying to distance the section from any comparator, hence no "less favourable treatment", but rather being treated "unfavourably". It preserves the breadth of disability related discrimination pre-*Malcolm*, covering as it does any treatment which is "because of something arising in consequence" of the disability.

33. What is something "arising in consequence" – and, in particular, how far removed something must be from the disability – is likely to be the subject of considerable litigation – if not in the employment field, then certainly in the field of goods and services provisions.

34. The same questions arose in disability related discrimination pre-*Malcolm* - the broad scope is illustrated by the case of *Murphy v (1) Slough Borough Council and (2) Governing Body of Langley Wood School* EAT/1157/02 (26 May 2004). Ms Murphy had been advised not to have children because of her disability and had a child by a surrogate mother. She asked for paid leave following the birth of the child and this was refused. She brought a claim of disability related discrimination, post *Novacold* but pre-*Malcolm.*

35. The question for the EAT was whether the withholding of paid leave was “for a reason which relates to the disabled person’s disability” (what was at that time s.5(1)(a) of the 1995 Act).

36. The EAT overturned the ET’s decision that the refusal of paid leave was not less favourable treatment for a reason related to disability. It stated that the appellant had been treated less favourably than others who have given birth in the conventional way to their own children; “the reason” for the treatment according to the appellant related to her disability, namely her inability to have children. For those reasons, they considered that the minority was correct and that the decision not to give the appellant paid leave was “for a reason which related to the disabled person’s disability”, but concluded the treatment was justified because of the financial position of the school. An important feature in the case was whether the school or the LEA was the proper respondent, as this would impact on the question of justification. The EAT concluded it was the school.

37. The provisions make knowledge of disability – but not knowledge of the *effects* of a disability – a requirement underpinning a finding of discrimination arising from disability. This is, therefore, a less stringent knowledge requirement than that applicable to the duty to make reasonable adjustments. It will be for the alleged discriminator to prove that s/he did not know and could not reasonably be expected to know that the claimant was disabled. This is likely to require some inquiry on the part of the employer/service provider etc.

38. Finally, the provisions are subject to the justification applicable to indirect discrimination. This should set a higher threshold than the current justification (a “material and substantial” reason in respect of employment cases). It is likely to require an employer or a service provider to be very clear when, for example, dismissing an

employee for disability related absence as to the legitimate aim that is being pursued; and that there are no less discriminatory means, of achieving that aim.

39. There is no longer, however, an explicit tie between justification and the duty to make reasonable adjustments (as per s.3A(6) of the DDA – the employment provisions - which provides that treatment cannot be justified if a reasonable adjustment which should have been made would impact on the justification). Nevertheless, in practice if there has been a failure to make reasonable adjustments in relation to the treatment then it will be difficult to show that the treatment was proportionate, whatever the legitimate aim.

Indirect discrimination

40. The Act extends indirect discrimination to disability for the first time (section 19). Whilst there is undoubtedly some overlap between discrimination arising from disability, the duty to make reasonable adjustments, and indirect discrimination, the latter may address certain anticipatory situations which will affect a group of disabled people – for example, where an employer is proposing to introduce a software system that is inaccessible to those with visual impairments; or where an employer proposes to introduce a redundancy procedure which uses sickness absence as a selection criterion.

41. Unlike the position in relation to discrimination arising from disability (s.15) and reasonable adjustments (s.20) in employment, knowledge of an individual's protected characteristic is not a requirement in order for a finding of indirect discrimination to be made. It may, therefore, be of most use to a claimant where an employer does not have knowledge of his/her disability.

42. However, section 23 (the comparator) does apply to an indirect discrimination claim whereas it does not apply in a section 15 claim (discrimination arising from disability). In an indirect discrimination

claim, section 23(2) does not require a disabled person's "abilities" to be imported into the comparison exercise (unlike a direct discrimination claim). It must, therefore, be the case that, to give section 19 any meaningful application, the comparison cannot include by way of material circumstances any of the manifestations or characteristics of the disabled person which cause the particular disadvantage. This will surely be the subject of litigation.

Duty to make reasonable adjustments

Overarching duty

43. The Act sets out one overarching duty to make reasonable adjustments (section 20), provides that a failure to comply with the duty is discrimination (section 21) and deals with the application of the duties in the different areas covered by the Act in a variety of schedules.

44. The duty itself is divided into 3 parts (or requirements, as they are referred to in the Act). The relevant provisions are as follows;

Section 20

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

45. The Act expands on what is meant by avoiding the disadvantage in relation to physical features at s.20(9) (removing, altering or providing a reasonable means of avoiding); and in relation to the first and third requirement, where this relates to the provision of information, the Act specifies that the reasonable steps include providing the information in an accessible format (s.20(6)).

46. The Act specifically provides that the cost of making a reasonable adjustment cannot be passed on to a disabled person. Section 20(7) states as follows:

A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

47. Cost under the DDA is addressed only in relation to service provision and premises – under Part 3, a service provider cannot claim in a defence against a claim based on less favourable terms (i.e. that more is being charged for a service) that it represents the cost of making an adjustment (see s.20(5).

48. There has never been an equivalent provision in relation to employment. Whilst an employer is unlikely to charge an employee for adjustments, it does raise the question as to whether an employer might try to argue that, for example, providing part-time work as a reasonable adjustment would not be reasonable because it would be unable to offer such employment unpaid because that would, in effect, be passing on the "cost" of the adjustment to the employee.

49. It seems unlikely, however, that such an interpretation would be afforded to this provision: rather, cost is more likely to be

interpreted as an actual charge to the employee. If any employer were to be allowed to rely on s.20(7) to argue that an otherwise reasonable adjustment was not reasonable because it would result in a lower income for the employee, it would significantly undermine the scope of the reasonable adjustment provisions.

Employment and occupation

50. Part 5 of the Act deals with work. Schedule 8 sets out the application of the duty to employers, trade organisations etc. The Schedule is very confusing, and has led to considerable misinterpretation of the scope of the obligation to make reasonable adjustments in relation to potential applicants and applicants for employment.

Extent of the duty

51. The Draft Employment Code (para 3.117) stated that the duty to make reasonable adjustments in relation to physical features only applies to disabled employees. If that represented the position, it would be regressive as the DDA clearly covers disabled applicants as well (section 4A(1)(b) and (2)(b)).

52. However, paragraph 2(4) of Schedule 8 to the Act with the table in paragraph 5(1) appears to state that the employer's duty under the second requirement (ie, physical features) extends to applicants and employees. This is in contrast to the duty in relation to the first requirement (ie, a PCP situation) and the third requirement (ie, auxiliary aids) where the duty extends also to *potential* applicants.

53. The upshot appears to be that the obligations during some of the recruitment process are more limited than those which apply at the

point of selection or than the obligations towards employees. This reflects the current position under the DDA.

Auxiliary aids and services

54. The obligation to provide auxiliary aids/services may appear a new one in the context of employment, but in reality that has always been encompassed in the duty to make reasonable adjustments under the DDA: the specific examples given of adjustments (s.18B of the DDA) – which do not appear on the face of the Equality Act – include auxiliary aids/services, such as giving or arranging for training to be provided.

Duty to make reasonable adjustments – requirement for "knowledge":

55. The knowledge provisions are slightly differently framed, however, to those in the DDA.

56. The relevant DDA provisions read as follows (section 4A):

Employers: duty to make adjustments

(1) ……

(2) ……

3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the employment; or

(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1).]

57. The Equality Act provisions (Sched 8 para 20) read as follows:

Lack of knowledge of disability etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any <u>other</u> case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

58. Thus it appears from this drafting that the requirement in relation to applicants is simply that the employer knows that the person is an applicant. Whether this means that – because of the reference to an interested disabled person – the employer must know that the applicant is disabled is unclear: but there is clearly no requirement for an employer to know that a particular PCP, for example, will affect them in a particular way. In all likelihood, this interpretative outcome must be due to a drafting error as employers will need to know of an applicant's disability in order to make an adjustment, But, as presently drafted, it does not convey this.

Duty to make reasonable adjustments – outside employment

Services

59. Part 3 of the Act deals with services, and schedule 2 sets out how the reasonable adjustment duty applies to services. The most significant change here is that whereas the DDA duty arises in relation to policies procedures and practices, or aspects of physical features which make it "impossible or unreasonably difficult" for disabled persons to use a service, or where an auxiliary aid or service would "facilitate" the use of a service, the Equality Act requires reasonable adjustments where disabled persons would otherwise be placed at "substantial disadvantage" (Schedule 2 paragraph 2). In practice, since caselaw had given a broad meaning to the phrase "impossible or unreasonably difficult" (see *Roads v Central* Trains) the change may not be significant. However, as "substantial" means "more than minor or trivial"

it does emphasise the low threshold which must be reached in order for the duty to be triggered.

60. Schedule 2 para 2(2) ensures that the duty to make reasonable adjustments remains an anticipatory one by stating that the reference in sections 20(3)(4) or (5) to a disabled person is to disabled persons generally.

61. In addition, Schedule 2 para 2(3) provides that in subsection 20(4), "avoid the disadvantage" has in its place "to avoid the disadvantage or to adopt a reasonable alternative method of providing the service or exercising the function". This reflects the approach of the DDA to the duty in relation to physical features.

62. The duty in relation to functions remains slightly differently worded to reflect the nature of functions as opposed to services. Sched 2 para (5) provides that being placed at a substantial disadvantage in relation to the exercise of a function means (a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit; or (b) if a person is or may be subjected to a detriment in the exercise of the function suffering an unreasonably adverse experience when being subjected to the detriment.

Premises

63. The duty to make reasonable adjustments applies in relation to premises in broadly the same way as at present, although obviously the threshold has changed to "substantial" as opposed to "impossible/unreasonably difficult".

64. The most significant change relates to common parts. Schedule 4 paragraph 5 of the Act sets out the duty in relation to common parts. Broadly, it follows the recommendations of the Review Group. The person responsible for common parts must, in the circumstances set

out, make alterations to the common parts of premises, but this can be at the expense of the disabled person. This is being covered in the session on premises, and so no more detail is given here.

Education

65. There is a very significant change in relation to the reasonable adjustment duty as it applies to schools.

66. The duty to make reasonable adjustments in relation to schools contained in the DDA did not extend to the duty to provide auxiliary aids or services – these were in fact specifically excluded on the basis that special education needs provision catered for such requirements[2]. Following the publication of the Lamb inquiry report,[3] however, which recommended the removal of the exclusion of auxiliary aids and services from the duty to make reasonable adjustments. The government accepted the recommendation that this exclusion should be lifted and an amendment was laid to this effect.[4] There is a regulation making power in relation to the duty to make reasonable adjustments (s.22(1) and (2)) – it is unclear at the time of writing as to whether this will be used to circumscribe the scope of the auxiliary aids provisions in relation to schools.

67. The government is still, however, considering how to implement this provision. More discussion will take place in relation to this in the session on education.

Harassment

68. Present legislation prohibits unwanted conduct in some cases "on grounds of" a particular protected characteristic e.g. race, or for a reason relating to e.g. disability. Caselaw (see *Sanderson Blinds*) has

[2] See discussion of this in the Code of Practice: Schools, Disability Rights Commission, 2002, para 3.18
[3] See the Lamb Inquiry: SEN and Parental Confidence, 19 Dec 2009, recommendation 51
[4] The amendment was laid by Baroness Royal – see Hansard HL Col 881, 19/01/2010

in any event favoured the latter as being a correct implementation of the directive.

69. The Equality Act provides a uniform definition of harassment in s.26. There are 3 types of harassment – related to a protected characteristic; sexual harassment; and less favourable treatment because of a person's reaction to harassment (where that harassment is related to gender reassignment or sex, or harassment of a sexual nature; and the person is treated less favourably either because of having rejected the conduct or having submitted to it).

70. It is clear that it is intended that prohibition of associative and perceptive discrimination applies equally to harassment across all strands and areas where it did not previously apply.

71. For the first time, harassment will be prohibited in relation to disability outside the employment context.

72. The relevant provision reads as follows:

(*1) A person (A) harasses another (B) if—*
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Pre-employment inquiries

73. Section 60 is undoubtedly the most important new provision in relation to disability. It provides that employers must not ask about the health – which is said to include whether or not a person has a disability – of an applicant for work before offering work to that applicant or, where a pool of potential employees is being created,

before including the applicant in such a pool. Section 60 does not, however, apply to questions which are "necessary for the purposes of":

- establishing whether the job applicant will be able to comply with a requirement to undergo an assessment (such as a selection test) and whether a duty to make reasonable adjustments will arise in relation to such an assessment

- establishing whether the job applicant will be able to carry out a function that is intrinsic to the work concerned.

  NB: note the qualification to this exception in section 60(7) which only permits questions to be asked about functions which would be intrinsic to the work concerned once any reasonable adjustments had been made.

- monitoring diversity

- taking positive action to advantage people with a particular disability in compliance with s. 158

- establishing whether the applicant has a particular disability where this is an occupational requirement which is a proportionate means of achieving a legitimate aim

74. Work has a wide meaning, including contract work, pupillage, partnership or appointment to a public or private office.

75. The EHRC has power to enforce this provision (s.60(2)).

76. Whilst a breach of s.60 cannot give rise to an individual claim of discrimination, the Act does state that where an employer has asked such a question, a tribunal may conclude that an employer has committed a discriminatory act, and thus in these circumstances the burden of proof will shift to the employer to show that no discrimination took place (s.60(5)).

77. Clearly the impact of this provision, which was originally proposed by the Disability Rights Taskforce in 1999, will depend on the breadth given to the exception which permits questions in relation to intrinsic functions of the job. But what it will undoubtedly require is for employers to think early on about what a particular role entails in terms of its intrinsic functions.

78. The Explanatory Notes provide the following examples as to how the provisions might apply – or not apply (paragraph 202):

> *Applicants are asked on an application form whether they have a disability that requires the employer to make a reasonable adjustment to the recruitment process. This is to allow, for example, people with a speech impairment more time for interview. This enquiry would be permitted.*
>
> *An applicant applies for a job in a warehouse, which requires the manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer is permitted to ask the applicant questions about his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job.*

79. There was no guidance in the Draft Code about pre-employment enquiries although, given that this provision was introduced late on during the passage of the Bill (and the Code was being drafted concurrently with the Bill), it is expected that the Draft Code will have now been amended to include reference to section 60 of the Act.

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