



PainSmith Solicitors Legal Update

24 October 2006

Provisions of the Disability Discrimination Act 2005

Throughout this fact sheet, the earlier Act is referred to as the 'DDA', the later Act as the 'DDA 2005' and both jointly as the 'Acts'. The Disability Discrimination (Premises) Regulations 2006 are referred to as the 'DD(P)R 2006'. The Disability Rights Commission is referred to throughout this fact sheet as the 'DRC' and their Code of Practice is referred to as 'the DRC Code'.

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1. INTRODUCTION

The Disability Discrimination Act 2005 builds on and extends earlier disability discrimination legislation, principally the Disability Discrimination Act 1995. The Acts aim to end discrimination against disabled people in a range of circumstances, including in employment, education and the provision of goods and services. For instance, if a student with a personality disorder was refused entry to college on the grounds that her disability may make her disruptive, then this may amount to unlawful disability discrimination, unless it can be justified.

The DDA gives disabled people rights in the areas of:

- Employment;
- Education;
- Public transport;
- Access to goods, facilities and services; and
- Buying or renting land or property.

In April 2005 the DDA 2005 was passed by Parliament, which amended and extended existing provisions in Part 3 of the DDA.

Both Acts apply to all employers and, generally, everyone providing a service to the public, although there are some exceptions, such as Parliament and the Armed Forces. The Acts are designed to cover all businesses and service providers, however they are flexible enough to meet the needs of small to medium sized businesses because they consider individual circumstances.

The DRC is an independent body established to stop discrimination and promote equality of opportunity for disabled people. It was set up by the government to help secure civil rights for disabled people and produces guidance and further information on which aspects of life are covered by anti-discrimination law for disabled people.

The DRC Code does not impose legal obligations. Nor is it an authoritative statement of the law - that is a matter for the courts. It is, however, a 'statutory' code. This means that it has been approved by Parliament and it is admissible as evidence in legal proceedings under the Act.

Courts (or employment tribunals in respect of employment services and group insurance services provided to employees) must take into account any part of the DRC Code that appears to them to be relevant to any question arising in those proceedings. If those with obligations under Parts 3 and 5B of the DDA (and other relevant legislation) follow the guidance in the DRC Code, it may help to avoid an adverse judgement by a court in any proceedings.

Persons selling or managing premises - as well as those offering premises to let - are most likely to be included within the definition of service providers and should therefore not neglect the provisions of the Acts relating to the obligations of service

providers. Please refer to Chapters 5, 6, 7 and 10 of the DRC Code for further information on these obligations.

The Acts are considered to be comprehensive in dealing with issues of discrimination that disabled people may encounter throughout their lives. However, this fact sheet only details issues relating in particular to the renting of property and the obligations of landlords and managing agents which are due to come into force on 4 December 2006.

2. THE DEFINITION OF DISABILITY

Currently the DDA defines a person as having a disability for the purposes of the DDA where they 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”.

The DDA also allows this basic definition to be modified for people who have mental impairments and progressive conditions, so that it sets out when people are to be treated as disabled, and covers people who have had a disability in the past.

The DDA does not provide a list of impairments that are covered, but instead considers the effects of an impairment on a person. For example, someone with a mild form of depression with only minor effects may not be covered, while someone with severe depression with substantial effects on their daily life is likely to be considered as disabled under the DDA.

Many people with a mental health impairment do not think of themselves as 'disabled' - but they have rights supported by the DDA. There are many different types of mental impairment which can lead to a disability, including:

- Dementia;
- Depression;
- Learning disabilities;
- Manic depression;
- Obsessive compulsive disorder;
- Schizophrenia; and
- Self-harm.

This is not an exhaustive list and there are varying degrees of severity. The charity Mind has a list of types of mental impairment.

The DDA 2005 extended the coverage of the DDA from 5 December 2005 in the following ways:

- a) It removes the requirement in the DDA that a mental illness must be 'clinically well recognised' before it can count as an impairment for the purposes of the DDA. The Government has decided that this stipulation is no longer required.

People with a mental illness will still need to show that their impairment has a long term and substantial adverse effect on their ability to carry out normal day-to-day activities. By removing the 'clinically well-recognised' requirement, the Government has also brought DDA coverage for people with mental illnesses into line with coverage for all other mental and physical impairments.

- b) People with some forms of cancer, HIV, cancer and multiple sclerosis (MS) will be deemed to be covered by the DDA effectively from the point of diagnosis, rather than from the point when the condition has some adverse effect on their ability to carry out normal day-to-day activities.

Extending the coverage of the DDA in this way will mean that the protection of the DDA will be afforded to another 250,000 disabled consumers.

NB. The government did not accept the case for giving people with depression greater protection by including them within the definition of who has a disability under the DDA.

These provisions mean, for example, that it will be unlawful for an employer to discriminate against a job applicant or employee who has one of these conditions. As under the existing employment duties, employers will have to consider what reasonable adjustments to their employment conditions and recruitment policies and procedures they may need to make for people who they know, or could be reasonably expected to know, have one of these conditions.

In employment, a reasonable adjustment may be flexible working, part-time hours or a gradual build-up to full time hours after a period of illness. In education, a reasonable adjustment may be providing additional help, like help with written work for someone with a learning disability or allowing a disabled student to use additional aids and equipment, like computers in lessons.

It will be unlawful for service providers to refuse to serve, or to provide service on worse terms to, a person who has one of these conditions, or to fail to make a reasonable adjustment for such a person if they have one of these conditions.

3. THE DISABILITY DISCRIMINATION ACT 2005 AND THE DISABILITY DISCRIMINATION (PREMISES) REGULATIONS 2006

Currently there is no protection for disabled people from landlords who unreasonably refuse to let them make changes to their own accommodation in order to make it more accessible or to communal areas that are inaccessible.

The DDA makes it unlawful to treat a disabled person less favourably than others for a disability-related reason in relation to the disposal or management of residential, commercial and other premises, unless that treatment can be justified under the DDA. This contrasts with protection afforded in the provision of goods, facilities and services, and in employment, where disabled people may have a right to have reasonable adjustments made for them.

The DDA 2005 addresses the limitations of the current legislation by extending disabled people's rights in respect of premises that are let or to be let, and commonhold premises. From 4 December 2006, the DDA 2005 introduces much wider obligations on landlords and (under s22(6) DDA 2005) managing agents who have disabled tenants.

It must be noted that such obligations apply, in relation to existing or proposed lettings, to discrimination against a 'relevant disabled person'. This would mean a lawful occupier of the premises, i.e. a spouse or child of the legal tenant and not just the tenant themselves (s24E(3) and s24J(6) DDA 2005).

Examples

Under the coming legislation:

1. If a Landlord asks a deaf person for a non-refundable deposit because they believe they will be less reliable, an assumption based purely on the fact of their disability, then this would be discriminatory and unlawful.
2. A housing association which has a policy of requiring all new tenants with a history of mental health problems to take only a short-term tenancy in the first instance in order for the association to assess whether the tenant would be suitable could be considered to be discriminating and this is therefore likely to be unlawful.
3. A landlord who refuses to let office space to a disabled self-employed woman because they have evidence the proposed tenant is bankrupt would not be discriminating because the reason for refusing to let is not related to the proposed tenant's disability.

From 4 December 2006 the duties imposed on Landlords and managers of let premises and premises that are to let will be extended under the DDA 2005 so that not only will they not be able to treat a disabled person less favorably (s24(1) DDA 2005) but they will also be required to make reasonable adjustments for disabled people (s24A(2) and s24G(2) DDA 2005).

Under s 58(1) of the DDA 2005, premises providers (like service providers) are legally responsible for the actions of their employees in the course of their employment. Employees who discriminate against a disabled person will usually be regarded as acting in the course of their employment even if the premises provider has issued express instructions not to discriminate.

Further, in legal proceedings against a premises provider based on the actions of an employee, it is a defence that the premises provider took such steps as were 'reasonably practicable' to prevent such actions. A policy on disability which is communicated to employees is likely to be central to such a defence. It is not a defence simply to show that the action took place without the knowledge or approval of the premises provider. Please refer to s58(1) and s58(5) of the DDA 2005 and chapter 13.20 onwards of the DRC Code for more details.

Under the new duties, provided certain conditions are met (for example, that a request has been made), landlords and managers of premises which are to let, or of premises which have already been let (s24A(4)), must make reasonable adjustments, and a failure to do so will be unlawful unless it can be justified. They might need to:

- Provide auxiliary aids or services (s24C DDA 2005);
- Alter their policies, practices or procedures (s24D DDA 2005); or
- Change the terms of a letting (but only in respect of premises that have already been let) (s24D DDA 2005).

For example a landlord may have to, where reasonable,

- Use the Typetalk service when communicating with a profoundly deaf person where they would usually telephone other tenants; or
- Put correspondence in large print for a visually impaired tenant; or
- Allow a disabled tenant to use their balcony to dry clothes where they cannot access the drying area of their block of flats because of their disability.

It follows, under s24D(D), that Landlords and letting agents will be required to provide blind and partially sighted people with contracts in a format they can read, such as large print, audio tape or Braille, or at least to read out contracts.

It is the responsibility of Landlords and Managing Agents to make reasonable adjustments (s24A(3) and s24G(3) DDA 2005) - they will not have to remove or alter physical features of the premises (s24E(1) and s24J(5) DDA 2005). The DD(P)R 2006 sets out things which are, and things which are not, to be treated as a physical feature. For example, features arising from the design or construction of the premises are to be treated as a physical feature. However, things like furniture and furnishings are not to be treated as a physical feature.

In addition certain things such as the replacement of taps and door handles are not to be treated as an alteration of a physical feature, and in certain circumstances these things may need to be provided by the landlord or manager as an auxiliary aid or service. For example, a landlord would not be required to replace a door for a disabled tenant, if the tenant had difficulty opening it, however, it might be

reasonable for the landlord to replace the door handle with a more usable one if that would mean the tenant could open the door.

However, under s22 and s23 DDA 2005 these new duties of reasonable adjustment will not apply to:

- Prospective lettings where landlords let their only or principal home and do not use the services of an estate agent to arrange the letting; or
- A letting where the landlord lets their only or principal home and does not use a professional management agent to manage the letting; or
- Certain small dwellings, for example, where a landlord or manager lives on the premises and there is not normally residential accommodation on the premises for more than six persons.

BUT, s22(b) of the DDA 2005 states if the owner-occupier publishes, or arranges to be published, an advertisement or notice (whether to the public or not) for the purposes of disposing of the premises, that amounts to a disposal of the premises to which the DDA 2005 applies.

There is no discrimination where a landlord's failure to comply with the duty can be justified. The DDA 2005 sets out five possible conditions which could apply, but for ease of explanation the DRC Code deals with them under four headings:

- Health or safety (s24(3)(a) and s24K(2)(a));
- Incapacity to contract (s24(3)(b) and s24K(2)(b));
- Treatment necessary in order for the disabled person or other occupiers to use a benefit or facility (s24(3)(c) and s24(3)(d)); and
- Treatment to recover extra costs (s24(3)(e)).

These conditions do not apply to all forms of discrimination in relation to premises. For instance, the conditions of health and safety and incapacity to contract may be applied to all discrimination relating to premises.

In a case of alleged discrimination by a person managing premises, condition 3 may be applicable. For instance, if a disabled person is required to park their vehicle in the car park provided at the back of a block of flats where they live rather than at the front entrance, and no reasonable provisions can be made to avoid this, then this is likely to be considered as reasonable justification. However, a resident with learning difficulties who is prevented from using washing facilities provided at their residence because they do not understand the instructions and continually break the machines could be assisted by a caretaker and this would otherwise be considered as unlawful discrimination.

Treatment to recover extra costs can be justified where costs are incurred by a premises provider who incurs additional costs as a result of a person's disability. This is specifically relevant when considering the issue of deposits. With reference to reg 3(2) DD(P)R 2006, less favourable treatment of a disabled person may be justified where all of the following conditions are satisfied:

- The person with power to dispose of the premises has granted the disabled person a right to occupy the premises (whether under a formal tenancy or otherwise);
- The disabled person is required to provide a deposit;
- The deposit is refundable at the end of the occupation of the premises and if the contents are undamaged;
- Damage has occurred to the premises or its contents for a reason which relates to the disabled person's disability;
- The person with the power to dispose of the premises refuses some or all of the deposit;
- That refusal is because the damage is above the level at which he or she would normally refund the deposit in full or in part; and
- The refusal is reasonable in all the circumstances of the case.

An illustrative example of this would be if a landlord refused to refund all or part of a deposit which a disabled tenant who uses a wheelchair had paid at the beginning of their tenancy in a carpeted premises because the use of the tenant's wheelchair on the carpet in the premises had meant excessive wear on the carpet over the term of the tenancy. In all the circumstances, this would most likely be justified.

Of course, it would not be reasonable (and would contravene s22(1)(a) DDA 2006) for a landlord to demand a higher deposit from a disabled proposed tenant than from an able-bodied tenant purely as a method of pre-empting excessive wear and tear on a premises because of an existing disability.

The duty of less favourable treatment and reasonable adjustment will also apply to commonhold. This is a new system of freehold ownership for blocks of flats, shops, offices and other multiple occupation premises in England and Wales. A commonhold is made up of individual freehold properties which are known as commonhold units.

Protected tenants, statutory tenants and secure tenants (for example, tenants of local authorities and Rent Act tenants) already have existing rights concerning landlords' consent to make improvements to rented premises. The DDA 2005 provides for circumstances other than the above where a tenant seeks to make a disability-related improvement to let residential premises in a case where a lease provides the right to make improvements subject to the landlord's consent (s49G).

From 4 December 2006 landlords and managers of let residential premises will not be able to refuse consent unreasonably if the tenant seeks permission to make a disability-related improvement at the tenant's expense. For example, a landlord will not be able to refuse consent unreasonably if a tenant seeks permission to widen, at his own expense, an internal door or to install a wet-room shower so that a wheelchair user can get around more easily.

However, landlords will be able to refuse consent when it is reasonable to do so. For example, if the improvement would damage the structural integrity of the premises, or alternatively, under s49G(4) DDA 2005, it may be possible to impose reasonable conditions when giving consent, such as that the improvements are carried out to a certain standard, and that the premises be restored to their original condition when the tenant leaves.

The landlord is not able to pass on to the tenant any reasonable costs incurred in giving consent, even if there is a clause in the agreement expressly stating so. Where a term of a letting specifically prohibits a tenant from making any alteration or improvement to the premises, under the DD(P)R 2006, the tenant may be able to get that term changed as a reasonable adjustment so as to allow them to make the alteration or improvement subject to the imposition of reasonable conditions by the landlord.

The recent case of *Williams v Richmond Court (Swansea) Limited [No 2]* illustrates these principles being implemented. In this case, the defendant freeholders of a block of flats in which the claimant lived declined to give their consent to the claimant's proposal to install a stairlift at the communal entrance to the block. HHJ Wyn Williams QC ruled that the refusal constituted discrimination contrary to s22(3) of the DDA. The defendants withdrew a pleaded claim of 'justification' and on 5 April 2006 the judge ordered consent be given for the stairlift installation, subject to agreed conditions, and the defendants pay damages of £5,000 (not to be recouped by way of any service charge) and costs.

The provisions about reasonable adjustments extend to Great Britain only. However, in Scotland, social tenants have rights under the Housing (Scotland) Act 2001 enabling them to apply to their landlords for consent to carry out work on their home, and landlords cannot withhold consent for the work unreasonably. Tenants in privately rented accommodation will have similar rights from 4 December 2006 by virtue of the Housing (Scotland) Act 2006.

The government has agreed to set up a working group, chaired by a senior civil servant to look at how the issue around communal areas can be tackled. They have also agreed that the current legal protection under the 1927 Landlord and Tenant Act is not clear, and needs to be updated so that the Disability Rights Commission can issue Codes of Practice on standards expected of landlords and also help individual disabled people take cases if they feel they have been discriminated against.

4. FURTHER INFORMATION

The 'Disabled People' section of the Government website, Directgov, contains a variety of information for those with an interest in disability issues. From this site you can read more about the DDA and the DDA 2005, including some more information about the definition of disability, and there are links to the full texts of the DDA and the DDA 2005.

www.direct.gov.uk/disability

The Government published statutory guidance in 1996, primarily to assist adjudicating bodies like courts and tribunals in deciding whether a person is a disabled person for the purposes of the DDA. This guidance has been updated to take account of the provisions described in this leaflet.

A draft of the revised "Guidance on matters to be taken into account in determining questions relating to the definition of disability" was laid before Parliament on 7 February 2006 and was formally issued by the Secretary of State for Work and Pensions on 29 March 2006. It came into force on 1 May 2006. You can read the 1996 guidance, the revised guidance, and the DRC's Code at:

<http://www.drc-gb.org>

The DRC provides advice to disabled people about their rights under the Acts. The DRC helpline contact details are:

Telephone: 08457 622 633

Textphone: 08457 622 644

Fax: 08457 778 878

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