

THE DISABILITY DISCRIMINATION ACT 1995

PROPERTY ISSUES – SOME FREQUENTLY ASKED QUESTIONS

**Katharine Holland
Landmark Chambers**

Introduction

Some questions which frequently arise are as follows;-

- A In what contexts is discrimination unlawful?
- B Who is generally affected by the statutory duties imposed by the Act?
- C What is discrimination?
- D When will treatment be justified?
- E What positive duties does the Act impose?
- F What is the extent of the duty imposed by the Act for the changing of physical features to buildings?
- G What constitutes “reasonable steps” in relation to changes to physical features of buildings?
- H Does the duty to make reasonable adjustments also apply when the premises are rented and alterations are not permitted under the terms of the letting?
- I Is there any exemption for new buildings?
- J Are there likely to be further changes made to the legislation?

The answers to each of those three questions are principally to be found in Sections 19, 20 and 21 of the Act respectively.

A. In what contexts is discrimination unlawful? – The answer provided by Section 19

There are four main contexts in which discrimination is unlawful and these are set out in Section 19(1). They are as follows:-

(a) The refusal or deliberate non-provision of services – Section 19(1) (a)

It is unlawful for a provider of services to discriminate against a disabled person

“(a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public;”

(b) The failure to make adjustments under Section 21 - Section 19(1) (b)

It is unlawful for a provider of services to discriminate against a disabled person

“(b) in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service;”

(c) Discrimination in service standards/manner of provision - Section 19(1) (c)

It is unlawful for a provider of services to discriminate against a disabled person

“(c) in the standard of service which he provides to the disabled person or the manner in which he provides it to him”

(d) Discrimination in the terms on which service is provided – Section 19(1) (d)

It is unlawful for a provider of services to discriminate against a disabled person

“(d) in the terms on which he provides a service to the disabled person”

**B. Who will generally be affected by the statutory duties imposed by the Act?
– The answer provided by Section 19(2)**

A person is a “provider of services” if he is concerned with the provision, in the United Kingdom, of services to the public or to a section of the public. The provision of services includes the provision of any goods or facilities. Whether or not such services are provided for payment is irrelevant. The fundamental theme is that everyone should be able to benefit from the services provided at the site in question – the theme is not whether any particular wheelchair will or will not go through a particular door.

Section 19(3) of the Act is a rare example of an Act actually providing examples of the types of services to which the provisions apply. In relation to properties, these specific examples include “*access to and use of any place which members of the public are permitted to enter*” and (d) “*accommodation in a hotel, boarding house or other similar establishment*”.

C. What is discrimination? – The answer provided by Section 20

There are the following two types of discrimination.

(a) Less favourable treatment

A service provider discriminates against a disabled person if

- “(a) *for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and*
- (b) *he cannot show that the treatment in question is justified*”

(b) Failure to comply with the Section 21 duty to make adjustments

A service provider discriminates against a disabled person if

- “(a) *he fails to comply with a section 21 duty imposed on him in relation to the disabled person; and*
- (b) *he cannot show that his failure to comply with that duty is justified.*”

D. When will treatment be justified?

Treatment is justified only if

- “(a) in the opinion of the provider of services, one or more of [certain specified] conditions ... are satisfied; and*
- (b) it is reasonable, in all the circumstances of the case for him to hold that opinion”*

The relevant conditions are;-

(a) When the treatment is necessary not to endanger health or safety

This applies where

- “(a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include the disabled person)”*

(b) When the treatment is necessary because the disabled person is unable to understand the nature of the agreement or give an informed consent

This applies where

- “(b) in any case, the disabled person is incapable of entering into enforceable agreements”*

(c) When the treatment is necessary to enable services to be provided at all

This applies where

- “(c) in a case falling within section 19(1) (a), the treatment is necessary because the provider of services would otherwise be unable to provide the service to members of the public”*

(d) Where the treatment in relation to standards or terms is necessary to enable the service to be provided

This applies where

- “(d) in a case falling within section 19(1) (c) or (d), the treatment is necessary in order for the provider of services to be able to provide the service to the disabled person or to other members of the public”*

(e) When treatment in the form of the greater cost of providing services is necessary in order to provide the service

This applies where

“(e) in a case falling within section 19(1)(d), the difference in the terms on which the services is provided to the disabled person and those on which it is provided to other members of the public reflects the greater cost to the provider of services in providing the service to the disabled person”

For the purposes of this sub-section, any increase in the cost of providing the service resulting from having to comply with the duty to make adjustments under Section 21 is to be disregarded.

E. What positive duties does the Act impose? – The answer provided by Section 21

There are three forms of duty imposed under the Act. These are as follows;-

- (a) A duty to change practices, policies and procedures¹**
- (b) A duty to change physical features**
- (c) A duty to provide an auxiliary aid or service².**

It is in relation to the second of these duties that from 1st October 2004, service providers will be under a new³ positive duty, which is capable of requiring the outlay of

¹ This duty which has been imposed since 1st October 1999 applies in the following circumstances;-

“(1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that is no longer has that effect.”

² This duty has been in existence since 1st October 1999 and applies in the following circumstances;-

“(4) Where an auxiliary aid or service (for example, the provision of information on audio tape or of a sign language interpreter) would –

(a) enable disabled persons to make use of a service which a provider of services provides, or is prepared to provide, to members of the public

(b) facilitate the use by a disabled person of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provide that auxiliary aid or service.”

considerable expenditure against their commercial interests. However, it is important to note that Section 21(6) specifically provides that nothing in the section requires a provider of services to take any steps which would fundamentally alter the nature of the service in question or the nature of his trade, business or profession.

F. What is the extent of the duty imposed by the Act to change the physical features of a building? – The answer provided by Section 21 and Chapter 4 of the Code of Practice

The duty applies in the following circumstances;-

“(2) Where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises), makes it impossible or unreasonably difficult for the disabled person to make use of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case for him to have to take in order to –

- (a) remove that feature:*
- (b) alter it so that it no longer has that effect:*
- (c) provide a reasonable means of avoiding the feature: or*
- (d) provide a reasonable alternative method of making the service in question available to disabled persons”*

G. What constitutes “reasonable steps” in relation to changes to physical features to a building? – The answer provided by the Code of Practice

Section 21 merely refers to a service provider being under a duty to take such steps as it is reasonable, in all the circumstances of the case, for it to have taken. The Code of Practice goes further than this and states that it will vary according to

- the type of service being provided;
- the nature of the service provider and its size and resources;
- the effect of the disability on the individual disabled person.

It also provides a non-exhaustive list of factors to be taken in to account. These are;-

- whether taking any particular steps would be effective in overcoming the difficulty that disabled people face in accessing the services in question;
- the extent to which it is practicable for the service provider to take the steps;

³ Save for the duty under Section 21(2)(d) which relates to the provision of services by reasonable alternative means

- 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 any resources already spent on making adjustments;
- the availability of financial or other assistance.

Most helpfully of all, however, the Code of Practice goes on provide in Chapter 5 a number of examples in relation to the four types of adjustment listed in Section 21(2), of what might or might not constitute reasonable adjustments. A selection of these are as follows:-

Removal of features

A Code of Practice example is as follows;

“A countryside visitor centre includes, as an attraction, a lakeside walk. However, a stile prevents access to the lakeside walk for those with mobility difficulties. The park authority which runs the centre removes the stile and replaces it with an accessible gate. This is likely to be reasonable steps...”

Alteration of features

A Code of Practice example is as follows;

“A local religious group holds prayer meetings in a building entered by steps. The room in which the prayer meetings are held has a narrow entrance door... [It] installs a permanent ramp at the entrance of the building. [It] also widens the door to the room. These are likely to be reasonable steps ...”

Providing a reasonable means of avoiding the physical feature

A Code of Practice example is as follows;

“A firm of solicitors is located in a building whose front entrance is only accessible by climbing a flight of stairs. At ground level, there is a bell and a sign saying “Please ring for disabled access”. However, the bell is not answered promptly, even in bad weather, so that a disabled person often has to wait for an unreasonable time before gaining access to the building. This is unlikely to be a reasonable means of avoiding the feature”

Providing a reasonable alternative method of making services available

A Code of Practice example is as follows;

“A small self-service pharmacist’s shop has goods displayed on high shelving separated by narrow aisles. It is not practicable to alter this arrangement. The goods are not easily accessible by many disabled people. The shop decides to provide a customer assistance service. On request, a member of staff locates goods and brings them to the cash till for a disabled customer. This is the provision of a service by an alternative method ... This is likely to be a reasonable step...”

H. Does the duty to make reasonable adjustments also apply when the premises are rented and alterations are not permitted under the terms of the letting? – The answer provided by Section 27

The basic theme is that if an alteration would otherwise be prohibited under the terms of the relevant lease, the Act now has the effect that a written application for consent may be made which the landlord will not be entitled to withhold unreasonably - but consent may be granted subject to reasonable conditions⁴. If the landlord unreasonably withholds consent or grants it subject to unreasonable conditions, then an application may be made to the county court for a declaration to this effect and authorizing the tenant or sub-tenant to make the alteration concerned⁵.

The question of whether an alteration is prohibited by a lease is irrelevant in determining the question of whether there has been compliance with Section 21 unless the tenant or sub-tenant has actually made an application in writing for consent for the alteration⁶. However, on any application to the Court for enforcement of the Act under Section 25, the landlord may be joined to the proceedings and the court may again determine whether there has been an unreasonable refusal to the grant of consent for alterations or whether unreasonable conditions have been imposed in relation to the grant of such consent⁷.

⁴More specifically, if an alteration would otherwise be prohibited under the terms of a lease of the premises (including a situation in which conditions apply to the alteration of premises or conditions may be attached to the grant of consent for alterations), the lease is now to be read as if it provided;-

- (a) for the occupier to be entitled to make the alteration with the written consent of the lessor;
- (b) for the occupier to have to make a written application to the lessor for consent if he wishes to make the alteration;
- (c) if such an application is made, for the lessor not to withhold his consent unreasonably; and
- (d) for the lessor to be entitled to make his consent subject to reasonable conditions”

⁵ Part II of Schedule 4 para 6

⁶ Part II of Schedule 4 para 5

⁷ Part II of Schedule 4 para 7

I. Is there any exemption for new buildings? – The answer provided by the Disability Discrimination (Provider of Services) (Adjustment of Premises) Regulations

A building in England or Wales that complies with Part M of the Building Regulations 1992, 1999 and 2004⁸ should already make reasonable provision for disabled people to gain access to and use the building. Generally speaking, a building complies with Part M if its physical features accord with those detailed in the Approved Document M and these will make it “*reasonable safe and convenient*” for disabled people to gain access to and within a building to use it.

As a result of this, Regulations⁹ will also come in to force on 1st October 2004 which provide for an exemption in relation to such premises. This exemption means that a service provider who provides services from a building will not have to make alterations or adjustments to physical features which accord with Approved Document M if 10 years or less have passed since their construction or installation¹⁰. The service provider may still however be required to provide a reasonable means of avoiding the feature or a reasonable alternative method of making services available.

J. Are there likely to be further changes made to the legislation – The answer provided by the regulatory provisions in Section 20 and 21

The answer to this question is that it is very likely indeed that changes to this part of the legislation may lie ahead. This is because Sections 20 and 21 contain a considerable number of references to the ability to make regulations to supplement the provisions of the Act.

With respect to Section 20, these are as follows;-

- Section 20(6) allows for regulations to be made to make provision as to the circumstances in which it is reasonable or not for a service provider to hold the opinion that treatment has been justified.
- Section 20(7) makes provision for regulations for powers of attorney etc.
- Section 20(8) makes provision for regulations to be made as to circumstances other than those already specified in the Act when treatment may be taken to be justified.

⁸ Which came in to force on 1st May 2004 and is more detailed than its predecessors, aiming to achieve a greater degree of accessibility for the disabled than its predecessors.

⁹ Disability Discrimination (Providers of Services) (Adjustment of Premises) Regulations 2004 and the Disability Discrimination (Providers of Services) (Adjustment of Premises) (Amendment) Regulations 2004

¹⁰ Regulation 3 and the Schedule to the 2001 Regulations

With respect to Section 21, they are as follows:-

- Section 21(3) makes provision for regulations to be made (a) to prescribe the matters which are to be taken in to account in determining whether any provision for avoiding a physical feature or providing a reasonably alternative method of making the service available, is reasonable and (b) to prescribe categories of service providers to whom the duty to make adjustments to physical features will not apply.
- Section 21(5) makes very broad provision indeed for regulations to be made in relation to the following:-
 - “(a) as to circumstances in which it is reasonable for a provider of services to have to take steps of a prescribed description;*
 - (b) as to circumstances in which it is not reasonable for a provider of services to have to take steps of a prescribed description*
 - (c) as to what is to be included within the meaning of “practice, policy or procedure”*
 - (d) as to what is not to be included within the meaning of that expression*
 - (e) as to things which are to be treated as physical features*
 - (f) as to things which are not to be treated as such features*
 - (g) as to things which are to be treated as auxiliary aids or services*
 - (h) as to things which are not to be treated as auxiliary aids or services”*
- Section 21(8) provides for regulations to be made in relation to a prescribed maximum expenditure for a service provider to have to incur in order to comply with the Act.
- Section 21(9) provides for regulations to be made in relation to this maximum expenditure provision, for expenditure incurred by one person to be treated as incurred by another.

Accordingly, the breadth of the ability to make Regulations under the provisions of the Act will mean that this new piece of legislation can be treated very much as a “working” piece of legislation which is capable of being refined and worked through by reference to its development in practice.

**KATHARINE HOLLAND©
Landmark Chambers**