

DISABILITY DISCRIMINATION ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 2: Discrimination by public authorities

26. This section inserts new sections 21B to 21E into the DDA and thereby extends its scope to cover almost all the functions of public authorities. This brings the DDA into line with section 19B of the Race Relations Act 1976 (“RRA”) (as inserted by the Race Relations (Amendment) Act 2000, section 1).
27. In general terms, the effect of the insertion of new sections 21B to 21E into the DDA will be to prohibit discrimination, where not already covered elsewhere in the DDA, in the exercise of all public functions other than (in broad terms) those of legislation, prosecution, judicial acts, and state security. This new prohibition of discrimination will therefore cover decisions by Ministers, local authorities, the police and other governmental organisations. The definition of discrimination is more extensive than its equivalent in the RRA as discrimination can include not making a reasonable adjustment to the way the function is carried out. This might mean that a public authority would have to exercise a function in a different way for a disabled person where it would be reasonable to do so (for example, visiting a person at home rather than requiring them to attend a Government building), or to supplement the exercise of a function with an additional act, where it would be reasonable to do so (such as the provision of an interpreter for a deaf person). An act that would otherwise amount to discrimination can however be justified in certain circumstances under new section 21D(3) to (5).
28. A victim of unlawful discrimination contrary to the new provisions could bring enforcement proceedings in the county court (or, in Scotland, in the sheriff court) under section 25 of the DDA.

New section 21B: Discrimination by public authorities

29. New section 21B(1) makes it unlawful for a public authority to discriminate against a disabled person in carrying out its functions. It should be noted, however, that section 21B(1) is subject to section 59 of the DDA. This means that section 21B(1) will not apply where a public authority is exercising a statutory power and has no discretion as to whether or how to exercise that power, or no discretion as to how to perform its duties.
30. Section 21B(2) defines “public authority” for the purposes of sections 21B, 21D and 21E. The definition is the same as that used in section 19B(2) of the RRA. It is also the same as the definition used in section 6(3)(b) of the Human Rights Act 1998. The definition is subject to the exceptions in new section 21B(3). It is also subject to the proviso in new section 21B(4), which specifies that a body will not be a public authority if the nature of the act being carried out is private. For example, the BBC would not be considered to be a public authority when carrying out its commercial activities.
31. Section 21B(5) provides a regulation-making power that will allow for specified public authorities to be exempted from the prohibition of discrimination in section 21B(1).

32. Section 21B(7) sets the boundaries between the new public authority duty in section 21B(1) and the other provisions of the DDA. The intention is, in broad terms, that where something is unlawful under another provision of the DDA, that other provision, and not section 21B(1), will apply. This principle applies in the same way where something would be unlawful but for the operation of any other provision of the DDA or regulations made under it (for example, a proviso or an exception). So where, for example, a public authority is an employer or a service provider, its acts as an employer or as a service provider will be governed by the existing DDA provisions relevant to that sphere of activity (Part 2 in the case of employment, sections 19 to 21 in the case of the provision of services). It will not also be liable, as a public authority, for the same acts under section 21B(1).
33. Section 21B(8) creates an exception, for the case of office holders, to the general principle set out by section 21B(7). Under certain conditions and where sections 4C to 4E do not apply to appointment to the office or post in question, section 21B(1) will apply both to the function of appointing and to other functions of the public authority vis-à-vis the holder of the office. An example might be the function of a local education authority when appointing a school governor, which is an office not covered by the terms of section 4C.
34. Section 21B(9) creates, under certain conditions, a further exception to the general principle created by section 21B(7) for the case of certain elected office or post holders. Under certain conditions and where sections 4C to 4E do not apply to appointment to the office or post in question, section 21B(1) will apply to functions of a public authority in relation to a candidate or prospective candidate for certain public offices or posts and to functions of the authority vis-à-vis the elected office holder once he holds office. This means, for example, that functions of a local education authority in organising an election of parent school governors would be covered by section 21B(1). The election itself is not a function of a public authority and is not covered by section 21B(1). The functions of the public authority in relation to the parent governor, once elected, would also be covered by section 21B(1).

New section 21C: Exceptions from section 21B(1)

35. New section 21C sets out a number of functions to which section 21B(1) will not apply. New section 21C(1), (2) and (3) provide exemptions from section 21B(1) for judicial and legislative acts. There is also an exemption in new section 21C(4) concerning the institution of criminal proceedings.
36. There is a regulation-making power in new section 21C(5) which will allow other functions to be exempted from the effect of the prohibition of discrimination in new section 21B(1).

New section 21D: Meaning of “discrimination”

37. New section 21D defines the meaning of discrimination for the purposes of section 21B(1). The definition of discrimination mirrors, insofar as it is possible to do so, the definition of discrimination used for service providers in section 20 of the DDA.
38. There are two forms of discrimination. The first form is set out in new section 21D(1) and is the less favourable treatment of a disabled person for a reason related to his disability, where the public authority cannot show that the treatment in question is justified under section 21D(3), (5) or (7)(c).
39. The second form of discrimination is set out in new section 21D(2). In order for this sort of discrimination to be proved, an individual must show that, to his or her detriment, the public authority has failed to comply with a duty imposed by new section 21E, and the authority must be unable to show that its failure is justified under new section 21D(3), (5) or (7)(c).

New section 21D(3) to (5): Justification

40. New section 21D(3) to (5) deal with the way in which a public authority may justify treatment or a failure to comply with the section 21E duty that indicates a prima facie breach of section 21D(1) or 21D(2).
41. New section 21D(5) sets out one possible justification: the public authority concerned must show that the treatment, or failure to comply with the section 21E duty, is a proportionate means of achieving a legitimate aim. It is envisaged that a public authority will be able to rely on this justification only in relation to matters of public interest (for example, the detection of crime) that, subject to an assessment of proportionality, can be said to be sufficiently important to override the right conferred by new section 21B(1). There is a regulation-making power in new section 21D(7)(b) to provide that this justification should not apply in certain circumstances and to amend or remove the justification. In connection with this power, see also the new section 67(3A) inserted by paragraph 33(4) of Schedule 1.
42. New section 21D(4) sets out further conditions of justification. A public authority has to satisfy the requirements of new section 21D(3) in order to justify the discriminatory treatment or failure.
43. A public authority must first show that it holds the opinion that one or more of the conditions set out in section 21D(4) is satisfied. These conditions concern: health and safety (new section 21D(4)(a)); incapacity to give consent (new section 21D(4)(b)); and protecting the rights and freedoms of others (new section 21D(4)(d)). There is also a justification relating to extra costs (new section 21D(4)(c)) that is available only in relation to less favourable treatment discrimination, as defined in section 21D(1).
44. Once a public authority proves that it holds the opinion that one of these conditions is satisfied, it must then show – on the basis of new section 21D(3)(b) – that it is reasonable, in all the circumstances of the case, for it to hold that opinion. If both of the steps in new section 21D(3) are satisfied, then the public authority can justify the less favourable treatment or failure to comply with the section 21E duty.
45. New section 21D(6) contains a regulation-making power in relation to the public authority's assessment of justification for its acts. This power would allow the Secretary of State to stipulate the circumstances in which it is or is not reasonable for the public authority to hold the opinion mentioned in subsection (3)(a). The regulation-making power will apply in relation to a public authority's ability to justify less favourable treatment or a failure to comply with the reasonable adjustment duty: the power will allow circumstances to be stipulated in which it is, and is not, reasonable for a public authority to hold the opinion that a condition of justification applies.
46. New section 21D(7)(a) provides a regulation-making power to amend, or remove, a condition of justification listed in new section 21D(4), or to make provision for a justification not to apply in specified circumstances. New section 21D(7)(b) is mentioned in the note on new section 21D(5) above. New section 21D(7)(c) gives a regulation-making power to add new justifications to those already existing in new section 21D(3) to (5).

New section 21E: Making of adjustments by public authorities

47. New section 21E imposes, on public authorities carrying out functions, duties equivalent to those imposed on service providers by section 21 of the DDA. In broad terms, new section 21E puts public authorities under a duty to make reasonable adjustments for disabled persons (such as adjustments to procedures, alterations to the physical features of buildings or the provision of an auxiliary service such as a BSL interpreter), where such persons are – by reason of their disability – disadvantaged in some way by, or in relation to, the carrying-out of the function. The duty requires public

*These notes refer to the Disability Discrimination Act
2005 (c.13) which received Royal Assent on 7 April 2005*

authorities to anticipate the requirements of disabled persons and the adjustments that may need to be made for them.

48. For the purposes of this section, two different aspects of public functions are considered separately:
- First, the possibility that the exercise of a function may confer benefits on people affected by the exercise of the function. For example, that would be the case where a local authority is making grants to members of the public. In these cases, the provisions require public authorities to make reasonable adjustments when failing to make such an adjustment would make it ‘impossible or unreasonably difficult’ for a disabled person to receive such a benefit.
 - Second, the possibility that the exercise of a function may subject people affected by its exercise to a detriment. For example, that would be the case where a law enforcement agency exercises a power to arrest or detain members of the public. In these cases, the provisions require public authorities to make reasonable adjustments in order to avoid making it ‘unreasonably adverse’ for disabled people to experience being subjected to the detriment.
49. The so-called trigger for the duty to make a reasonable adjustment will therefore depend on whether the carrying-out of the function is capable of conferring a benefit or subjecting a person to a detriment.
50. When the relevant trigger is met, new section 21E(1) and (2) places a duty on a public body to take reasonable steps to change policies, practices or procedures (such as waiving a requirement in certain circumstances to fill out a form in writing). This duty is analogous to section 21(1) of the DDA.
51. When the relevant trigger is met, new section 21E(3) and (4) places a duty on a public body to take reasonable steps to deal with a physical feature (for example, installing a ramp as an alternative to steps). This duty is analogous to section 21(2) of the DDA.
52. New section 21E(5)(a) allows regulations to prescribe matters that can be taken into account when deciding whether the means of avoiding a physical feature (new section 21E(4)(c)) or an alternative method of carrying out the function (new section 21E(4)(d)) is reasonable. New section 21E(5)(b) gives a regulation-making power to allow categories of public bodies to be specified to which the duty to make reasonable adjustments to physical features in section 21E(4) does not apply.
53. When the relevant trigger is met, new section 21E(6) and (7) places a duty on public authorities to take reasonable steps to provide auxiliary aids or services (such as notification of a decision on audio tape). This duty is intended to be analogous to section 21(4) of the DDA.
54. New section 21E(10) makes it clear that a breach of a duty imposed by section 21E is not actionable as such. Rather the duties are for the purposes of determining whether a public body has discriminated against a disabled person for the purposes of section 21B(1).