

Equality Commission

FOR NORTHERN IRELAND

Disability Code of Practice

Trade Organisations and Qualifications Bodies

The Disability Discrimination Act 1995

(as modified by Schedule 8 thereof for application in Northern Ireland)

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**This document is available in
other formats upon request**

Laid in draft before the Northern Ireland Assembly by the Office of the First Minister and deputy First Minister under Article 54A(4) of the Disability Discrimination Act 1995 (as modified by Schedule 8 thereof for application in Northern Ireland).

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The Code of Practice and information about the Disability Discrimination Act are available from the Equality Commission in other formats, including large print, Braille and audiotape. The Code can also be downloaded from the Equality Commission's website.

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The Code of Practice shall come into effect on such day as the Office of the First Minister and Deputy First Minister may by order appoint. Please contact the Equality Commission for further details.

The Code of Practice applies to Northern Ireland.

This Code of Practice deals with the duties of trade organisations and qualifications bodies that are placed on them by Part 2 (referred to in the legislation as 'Part II') of the Disability Discrimination Act 1995, which is based on the principle that disabled people should not be discriminated against in employment or when seeking employment. A person's prospects of gaining employment, or of progressing in or retaining employment, may be affected by their ability to become a member of a trade organisation or to take advantage of its membership services. A person's employment prospects may also be affected by his or her ability to obtain a professional or trade qualification. It is for these reasons that, in addition to imposing duties on employers which are intended to prevent discrimination against disabled people, Part 2 of the Act sets out a number of duties with which trade organisations and bodies which confer professional or trade qualifications must comply for the same purpose.

The extension of Part 2 to cover qualifications bodies represents a change in the law, which took effect on 1 October 2004.

This Code replaces the original Code, which was issued in 1999. It takes account of changes to the Disability Discrimination Act that reflect the requirements of the European Union's Employment Framework Directive (Council Directive 2000/78/EC of 27 November 2000), which established an anti-discrimination principle of equal treatment in relation to disability (as well as a number of other grounds) across all Member States.

Foreword

Codes of Practice and associated guidance published by the Equality Commission are important in explaining the complexities of the law, and in helping trade organisations and qualifications bodies comply with it. This Code is one of two that we have prepared to interpret the requirements of Part 2 of the Disability Discrimination Act 1995. This Code of Practice explains how disabled people are protected by that Act from discrimination by trade organisations and qualifications bodies. The other Code relates to discrimination in employment and occupation.

Although discrimination by trade organisations has been outlawed since the Disability Discrimination Act came into force, the scope of Part 2 of the Act has only recently been extended to cover qualifications bodies. The law has also continued to evolve generally. Not only have the original provisions of the Act been subject to judicial interpretation, but major changes have been made to the legislation itself. From 1 October 2004 the Act's coverage was extended significantly to take account of the requirements of an EU Council Directive (2000/78/EC), which establishes a general framework for equal treatment in employment and occupation.

This Code has been prepared with particular regard to the needs of legal advisers when advising their clients, and to assisting courts and industrial tribunals when interpreting the new concepts. It is necessarily comprehensive and detailed and therefore the Equality Commission has also produced a range of other information to help disabled people, trade organisations and qualifications bodies to understand their rights and responsibilities. How to find this information is explained in Appendix C to this Code.

This Code, and associated guidance, is intended to be a resource for trade organisations and qualifications bodies who seek to understand their duties and responsibilities under the Act and for disabled people who need to know and understand their rights under the disability legislation. The Commission hopes these publications will be widely used and helpful.

Dame Joan Harbison

Chief Commissioner, Equality Commission

Contents

	Page
1. Introduction	7
Purpose of Part 2 of the Act	7
Purpose of the Code	8
Status of the Code	9
How to use the Code	10
Examples in the Code	11
References in the Code	12
Changes to the legislation	12
Further information	13
Public Authorities	14
2. How can discrimination be avoided?	17
Introduction	17
Understanding the social dimension of disability	17
Recognising the diverse nature of disability	18
Avoiding making assumptions	18
Seeking expert advice	19
Planning ahead	20
Implementing anti-discriminatory policies and practices	21
Auditing policies and procedures	26
Monitoring and Review	28
Promoting equality	33
Resolving disputes	34
3. Discrimination by trade organisations and qualifications bodies – an overview	37
Introduction	37
Who has rights under the Act?	37

Who has obligations under the Act?	39
What does the Act say about discrimination by trade organisations and qualifications bodies?	42
What else is unlawful under the relevant provisions of the Act?	45
Who is liable for unlawful acts?	48
4. What is discrimination and harassment?	51
Introduction	51
What does the Act mean by 'direct discrimination'?	53
Failure to make reasonable adjustments - relationship to discrimination	62
What is disability-related discrimination?	63
What does the Act say about victimisation?	66
How do the different forms of discrimination compare in practice?	68
What does the Act say about harassment?	70
What does the Act say about statutory obligations?	72
What evidence is needed to prove that discrimination or harassment has occurred?	73
5. What is the duty to make reasonable adjustments?	77
Introduction	77
When does the duty to make reasonable adjustments arise?	77
Which disabled people does the duty protect?	79
What are 'provisions, criteria and practices'?	80
What is a 'physical feature'?	81
What disadvantages give rise to the duty?	83
Is knowledge of the disability a factor?	83

What adjustments might have to be made?	84
When is it 'reasonable' for a trade organisation or qualifications body to have to make adjustments?	88
Can failure to make a reasonable adjustment ever be justified?	95
6. Justification	97
Introduction	97
When does the Act permit justification?	97
Can health and safety concerns justify less favourable treatment?	100
Can medical information justify less favourable treatment?	104
7. Discrimination by trade organisations	107
Introduction	107
Trade organisations as qualifications bodies	107
Becoming a member	108
Membership benefits	114
Variation and withdrawal of membership	118
Knowledge of disability	123
The role of trade unions	128
8. Discrimination by qualifications bodies	129
Introduction	129
What is a professional or trade qualification?	130
What amounts to direct discrimination?	132
What amounts to disability-related discrimination?	134
How does the duty to make reasonable adjustments apply to qualifications bodies?	136
What does the Act say about competence standards?	143

9. Making reasonable adjustments to premises – legal considerations	153
Introduction	153
What about the need to obtain statutory consent for some building changes?	154
Building Regulations and building design	155
What if a binding obligation other than a lease prevents a building being altered?	157
What happens if a lease says that certain changes to premises cannot be made?	158
What happens if the lessor has a ‘superior’ lessor?	159
How do arrangements for gaining consent work?	159
When is it unreasonable for a lessor to withhold consent?	161
What conditions would it be reasonable for a lessor to make when giving consent?	163
What happens if the lessor refuses consent or attaches conditions to consent?	164
Comparison with the procedure for obtaining consent under Part 3	165
10. Other relevant provisions	167
Resolving disputes under the Act	167
Other provisions	169
The Equality Commission for Northern Ireland	172
Appendix A: Changes to the Act	176
Appendix B: The Meaning of Disability	178
Appendix C: Further information	185
Index	193

Purpose of Part 2 of the Act

- 1.1 The Disability Discrimination Act 1995 (the Act) brought in measures to prevent discrimination against disabled people. **Part 2** (referred to in the legislation as 'Part II') of the Act is based on the principle that disabled people should not be discriminated against in employment or when seeking employment. A person's prospects of gaining employment, or of progressing in or retaining employment, may be affected by his or her ability to become a member of a trade organisation or to take advantage of its membership services. A person's employment prospects may also be affected by his or her ability to obtain a professional or trade qualification.

- 1.2 It is for this reason that, in addition to imposing duties on employers which are intended to prevent discrimination against disabled people, Part 2 sets out a number of duties with which trade organisations and bodies which confer professional or trade qualifications must comply for the same purpose. The extension of Part 2 to cover qualifications bodies as from 1 October 2004 represents a change in the law. Other major changes in the law which took effect on that date are summarised in Appendix A.

Purpose of the Code

- 1.3 This Code of Practice (the Code) gives practical guidance on how to prevent discrimination against disabled people by trade organisations and qualifications bodies. It describes the duties on such organisations and bodies in this regard. The Code helps disabled people to understand the law and what they can do if they feel that they have been discriminated against. By encouraging good practice, the Code assists trade organisations and qualifications bodies to avoid complaints being made against them and to work towards the elimination of discrimination against disabled people.
- 1.4 The Code also gives guidance on the law which is intended to help lawyers when advising their clients, and to assist courts and industrial tribunals when interpreting new legal concepts. The Code explains the operation and effect of technical statutory provisions – some of which only came into force on 1 October 2004, and many of which have a complex legal effect. As a consequence of this, the Code is necessarily comprehensive and detailed. However, the Equality Commission also produces a range of other publications about the Act, and about the rights of disabled people under it, which are intended to be of use to a range of audiences and for a variety of purposes. Details of how to obtain these publications are included in Appendix C.
- 1.5 The Equality Commission has prepared and issued this Code under the Act. It applies to Northern Ireland. A similar but separate Code applies to England, Scotland

and Wales. This Code replaces the ‘Code of Practice on the duties of trade organisations to their disabled members and applicants’, issued by the Department of Economic Development in 1999.

- 1.6 As employers themselves, trade organisations and qualifications bodies have duties under Part 2 in respect of disabled people whom they employ, or who apply to them for employment. However, these matters are not considered in the Code – which is concerned only with the duties of trade organisations and qualifications bodies acting in their capacity as such. Guidance on the application of the Act to employers is given in a separate code of practice issued by the Equality Commission (see Appendix C for details).

Status of the Code

- 1.7 The Code does not impose legal obligations. In addition, it is not an authoritative statement of the law – that is a matter for the courts and industrial tribunals. However, the Code can be used in evidence in legal proceedings under the Act. Courts and industrial tribunals must take into account any part of the Code that appears to them relevant to any question arising in those proceedings. If trade organisations and qualifications bodies follow the guidance in the Code, it may help to avoid an adverse decision by a court or industrial tribunal in such proceedings.

s 54A(8)

How to use the Code

- 1.8 This chapter gives an introduction to the Code. **Chapter 2** sets out some general guidance on how to avoid discrimination. **Chapter 3** contains an overview of the relevant provisions of the Act, and those provisions are examined in more detail in subsequent chapters.
- 1.9 **Chapter 4** details what is meant by discrimination and harassment, and **Chapter 5** explains the duty to make reasonable adjustments for disabled people. **Chapter 6** examines the relevance of justification under Part 2. **Chapters 7 and 8** focus on particular issues relating to discrimination by trade organisations and qualifications bodies respectively.
- 1.10 **Chapter 9** looks at issues concerning adjustments to premises, and **Chapter 10** deals with various other points and explains what happens if discrimination is alleged.
- 1.11 **Appendix A** summarises some recent changes in the Act's provisions on trade organisations and qualifications bodies. **Appendix B** gives more information on what is meant by 'disability' and by 'disabled person'. Separate statutory guidance relating to the definition of disability has been issued under the Act (see paragraph 3.6). **Appendix C** lists other sources of relevant information about matters referred to in the Code.
- 1.12 Each chapter of the Code should be viewed as part of an overall explanation of the relevant provisions of the

Act and the Regulations made under them. In order to understand the law properly it is necessary to read the Code as a whole. The Code should not be read too narrowly or literally. It is intended to explain the principles of the law, to illustrate how the Act might operate in certain situations and to provide general guidance on good practice. There are some questions which the Code cannot resolve and which must await the authoritative interpretation of the courts and industrial tribunals. The Code is not intended to be a substitute for taking appropriate advice on the legal consequences of particular situations.

Examples in the Code

- 1.13 Examples of good practice and how the Act is likely to work are given in boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples should not be treated as complete or authoritative statements of the law.
- 1.14 While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. They can often be used to test how the law might apply in similar circumstances involving different disabilities or situations. The examples attempt to use as many different varieties of disabilities and situations as possible to demonstrate the breadth and scope of the Act. Examples relating to men or women are given for realism and could, of

course, apply to people of either gender. For ease of reference, it should be assumed, where appropriate, that the persons referred to in the examples meet the definition of disability under the Act.

References in the Code

- 1.15 References to the Act are shown in the margins. For example, s 1(1) means section 1(1) of the Act and Sch 1 means Schedule 1 to the Act. References to Part 2 or 3 refer to the relevant Part of the Act. Where reference is made to regulations, the appropriate Statutory Rule (SR) number is shown in the margin.

Changes to the legislation

- 1.16 The Code refers to the Disability Discrimination Act 1995, as amended, as of 1 October 2004. There may be changes to the Act or to other legislation, for example, to the range of people who are considered to be disabled under the Act, which may have an effect on the duties explained in the Code. You will need to ensure that you keep up to date with any developments that affect the Act's provisions. You can get relevant information from the Equality Commission (see paragraph 1.18 for contact details).

Further information

- 1.17 Copies of the Act and Regulations made under it can be obtained from The Stationery Office (TSO) – details can be obtained from the Equality Commission, or by visiting TSO’s website: www.tso.co.uk. Guidance relating to the definition of disability is also available from TSO.

Further copies of this Code of Practice can be obtained directly from the Equality Commission or downloaded from the Equality Commission’s website: www.equalityni.org. Separate Codes dealing with the duties of employers to their disabled employees and job applicants and the goods, facilities, services and premises provisions of the Act are also available from the Equality Commission.

- 1.18 Free information about the Act can be obtained by contacting the Equality Commission:

The Equality Commission for Northern Ireland
Equality House
7-9, Shaftesbury Square
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Textphone: 028 90 500 589
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The Code and information about the Act are also available in other formats, including large print, Braille and audiotape. The Code can also be downloaded from the Equality Commission's website. If you require further assistance, please contact the Equality Commission.

Public Authorities

1.19 In addition to the duties imposed on employers by the Act, those designated as public authorities in Northern Ireland, which includes government departments and local councils, are required by section 75 of the Northern Ireland Act 1998, when carrying out their functions, to have due regard to the need to promote equality of opportunity:

- between persons with a disability and persons without;
- between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally; and
- between persons with dependants and persons without.

Public authorities must also have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

1.20 More detailed advice on these duties and information on preparing and implementing an equality scheme to comply with the legislation can be obtained from the Equality Commission's Statutory Duty Unit:

Telephone: 028 90 500 600

Textphone: 028 90 500 589

Fax: 028 90 315 993

E-mail: info.statduty@equalityni.org

2 How can discrimination be avoided?

2

Introduction

- 2.1 There are various actions which trade organisations and qualifications bodies can take in order to avoid discriminating against disabled people. By doing so, organisations and bodies are not only likely to minimise the incidence of expensive and time-consuming litigation, but will also improve their general performance and the quality of the services they provide. This chapter sets out some guidance on ways to help ensure that disabled people are not discriminated against.

Understanding the social dimension of disability

- 2.2 The concept of discrimination in the Act reflects an understanding that it is often environmental factors (such as the structure of a building) or an employer's working practices, rather than limitations arising out of a person's disability, which unnecessarily restrict a disabled person's ability to participate fully in society. This principle underpins the duty to make reasonable adjustments described in Chapter 5. Understanding this will assist employers and others to avoid discrimination. It is as important to consider which aspects of employment and occupation create difficulties for a disabled person as it is to understand the particular nature of an individual's disability.

Recognising the diverse nature of disability

2.3 Around one in five people in Northern Ireland have a disability (approximately 340,000¹). The nature and extent of their disabilities vary widely, as do their requirements for overcoming any difficulties they may face. If trade organisations and qualifications bodies are to avoid discriminating, they need to understand this, and to be aware of the effects their decisions and actions – and those of their agents and employees – may have on disabled people. The evidence shows that many of the steps that can be taken to avoid discrimination cost little or nothing and are easy to implement.

Avoiding making assumptions

2.4 It is advisable to avoid making assumptions about disabled people. Disabilities will often affect different people in different ways and their needs may be different as well. The following suggestions may help to avoid discrimination:

- Do not assume that because a person's disability cannot be seen, that the person is not disabled. Many disabilities are not obvious.
- Do not assume that most disabled people use wheelchairs.
- Do not assume that all blind people read Braille or have guide dogs.

¹ This figure is obtained from the Census 2001. It should be noted that the term 'disability' was defined in this Census as 'any long-term illness, health problem or disability which limits daily activities or work'.

- Do not assume that all deaf people use sign language.
- Do not assume that disabled people have lesser career aspirations than non-disabled people.
- Do not assume that people with certain types of disability (such as mental ill health or epilepsy) present a health and safety risk.
- Do not assume that because you are unaware of any disabled members of an organisation there are none.
- Do not assume that because you are unaware of any disabled people who are engaged in a particular profession or trade there are none.

Seeking expert advice

2.5 It may be possible to avoid discrimination by using personal or in-house knowledge and expertise – particularly if information or views are obtained from the disabled person concerned. However, although the Act does not specifically require anyone to obtain expert advice about meeting the needs of disabled people, in practice it may sometimes be necessary to do so in order to comply with the principal duties set out in the Act. Expert advice might be especially useful if a person is newly disabled or if the effects of a person’s disability become more marked. Local and national disability

organisations in particular may be able to give useful advice about the needs of disabled people and steps that can be taken to meet those needs. Appendix C gives information about getting advice or help.

Planning ahead

- 2.6 The duties which the Act places on trade organisations and qualifications bodies are owed to the individual disabled people with whom those organisations and bodies have dealings. There is no duty owed to disabled people in general. Nevertheless, it is likely to be cost effective for trade organisations and qualifications bodies to plan ahead. Considering the needs of a range of disabled people when planning for change (such as when planning a building refurbishment, a new IT system, or the design of a website) is likely to make it easier to implement adjustments for individuals when the need arises.
- 2.7 It is good practice for trade organisations and qualifications bodies to have access audits carried out to identify any improvements which can be made to a building to make it more accessible. Access audits should be carried out by suitably qualified people. Websites and intranet sites can also be reviewed to see how accessible they are to disabled people using access software.

A trade organisation is re-fitting its premises including its facilities for members. The architects are asked to comply with British Standard 8300 to ensure that facilities such as the entrance, reception, meeting rooms, lecture theatre and toilets are accessible to a wide range of disabled visitors. BS 8300 is a code of practice on the design of buildings and their approaches to meet the needs of disabled people (see Appendix C for details). The architects make them aware that any work carried out to their premises which may be a “structural alteration” will also have to meet the requirements of the Building Regulations (see paragraph 9.6).

A qualifications body is re-designing its website. In doing so it ensures that the new website is easy to read for people with a variety of access software; has the website checked for accessibility; and invites disabled readers of the website to let the qualifications body know if they find any part of it inaccessible.

Implementing anti-discriminatory policies and practices

- 2.8 Trade organisations and qualifications bodies are more likely to comply with their duties under the Act, and to minimise the risk of legal action being taken against

them, if they implement anti-discriminatory policies and practices. These are often referred to as equality policies or diversity policies. Additionally, in the event that legal action is taken, trade organisations and qualifications bodies may be asked to demonstrate to an industrial tribunal that they have effective policies and procedures in place to minimise the risk of discrimination.

Recommended steps for all trade organisations and qualifications bodies

- 2.9 Anti-discriminatory policies and practices will vary depending on the nature of the organisation (for example, on whether it is a trade organisation or qualifications body and on the size and nature of its membership). However, it is advisable for all trade organisations and qualifications bodies to take the following steps:
- Establish a policy which aims to prevent discrimination against disabled people and which is communicated to all employees and agents of the organisation or body.
 - Provide disability awareness and equality training to all employees. In addition, train employees and agents so that they understand the organisation or body's policy on disability, their obligations under the Act and the practice of reasonable adjustments.
 - Ensure that members and potential members of the organisation (or, in the case of a qualifications body,

people who wish to have a qualification conferred on them and people who already hold a qualification) are informed about the organisation or body's disability policy.

- Ensure that people within the organisation or body who have responsibility for liaising with members or applicants have more in-depth training about the organisation's duties under the Act.
- Inform all employees and agents that conduct which breaches the anti-discrimination policy will not be tolerated, and respond quickly and effectively to any such breaches.
- Monitor the implementation and effectiveness of such a policy.
- Address acts of disability discrimination by employees as part of disciplinary rules and procedures.
- Have complaints and grievance procedures which are easy for disabled people to use and which are designed to resolve issues effectively.
- Regularly review the effectiveness of reasonable adjustments made for disabled people in accordance with the Act, and act on the findings of those reviews.
- Keep clear records of decisions taken in respect of each of these matters.

In their capacity as employers, trade organisations and qualifications bodies should refer to the good practice recommendations set out in a separate code of practice on employment and occupation issued by the Equality Commission (see Appendix C for details)

Additional recommended steps for trade unions

2.10 Trade unions are a particular kind of trade organisation. In addition to taking the general steps outlined in paragraph 2.9, it is advisable for trade unions to:

- Have (and inform local branches about) a central budget or 'access fund' to pay for adjustments for disabled members in circumstances where it would be too expensive for the adjustments to be funded by local branches.
- Ensure that union representatives understand the Act's provisions on employment and occupation so that they are able to support union members who encounter disability discrimination at work.
- Ensure that health and safety representatives have a proper understanding of the principles of risk assessment and reasonable adjustments, so that health and safety issues are not used to discriminate against disabled people in the workplace or when participating in union activities.

The above considerations apply just as much to unpaid union representatives in the workplace as to salaried employees of a union.

- 2.11 Trade unions should not enter into collective agreements containing terms which discriminate against disabled people (see paragraphs 10.14 to 10.16). In addition, European law encourages trade unions to enter into collective agreements at national and local level in respect of anti-discriminatory policies and practices. It is advisable for trade unions to monitor the effectiveness of any such agreements.

Additional recommended steps for qualifications bodies

- 2.12 The general steps outlined in paragraph 2.9 are recommended for trade organisations and qualifications bodies alike. However, there are additional steps which it is advisable for qualifications bodies to take. These are to:

- Ensure that there are effective systems in place for disabled people to request reasonable adjustments for examinations or practical tests, so that qualifications bodies are in a position to respond quickly and effectively to individual requests for specific adjustments. This may involve establishing procedures with educational institutions to ensure that institutions request relevant information from their students and then pass this on to the qualifications bodies (see paragraph 8.23).

- Regularly review any competence standards which relate to particular professional or trade qualifications to ensure that they are framed in a way which does not unnecessarily exclude disabled people from being able to meet them. This will involve carefully scrutinising each competence standard to check that it is not discriminatory. Consideration should be given to whether each standard can be objectively justified. Disabled people who work in the relevant profession or trade could be consulted to learn from their experiences, and factors such as changes in technology, which can enable people to do jobs in different ways, should be taken into account.

Further advice about how to avoid discrimination in relation to competence standards is given at paragraph 8.41.

Auditing policies and procedures

- 2.13 Although there is no duty under Part 2 to anticipate the requirements of disabled people in general, it is recommended that trade organisations and qualifications bodies monitor and review their policies, practices and procedures to ensure that they are not unlawfully discriminating under the Act. They should also consider the requirements of disabled people as part of this process. It is advisable for organisations and bodies to do this in addition to having a specific policy to prevent discrimination. Trade organisations and qualifications bodies are likely to have policies about matters such as:

- emergency evacuation procedures;
- procurement of equipment, IT systems and websites;
- information provision; or
- service standards for members.

A trade organisation has a policy to ensure that all members are kept informed about the organisation's activities through a website. The policy states that the website should be accessible to disabled people, including those who use access software (such as speech synthesis). The website editor is given additional training in accessible website design.

A trade organisation has a policy outlining the level of service that all members and potential members should receive. It includes standards of service for disabled members and potential members, such as the provision of application forms in accessible formats.

A new procurement policy requires a number of factors to be taken into account in procuring equipment and IT systems. These factors include cost and energy efficiency. It is good practice for such factors to include accessibility for disabled people as well.

A trade union reviews its procedures for organising conferences to ensure that access for disabled members is taken into account at all stages.

Monitoring and Review

- 2.14 It is recommended that trade organisations and qualifications bodies also monitor and review the implementation of their equal opportunities policies and procedures. Monitoring of members and applicants for membership (or, in the case of qualifications bodies, people applying for a qualification or people who hold qualifications) is an important way of determining whether anti-discrimination measures taken by an organisation are effective, and of ensuring that disability equality is achieved within that organisation.

There are various ways in which trade organisations and qualifications bodies can monitor in the area of disability. Quantitative and qualitative monitoring techniques, as well as additional monitoring methods, are outlined below.

- 2.15 However, it is important to stress at the outset, that monitoring will be more effective if disabled people feel comfortable about disclosing information about their disabilities. Organisations or bodies, who implement the recommended monitoring measures outlined below, should therefore take steps to reassure disabled people why the information is required and how it will be used.

- 2.16 Disabled people should also be reassured that any information given will be treated, subject to statutory requirements, in the strictest confidence. Organisations and bodies should ensure that appropriate safeguards are put in place in order to achieve such confidentiality. They should also ensure that all monitoring forms are accessible as regards their format, content and implementation. Remember that all monitoring methods used should comply with the human rights and data protection legislation.

Quantitative Monitoring

- 2.17 It is recommended that trade organisations carry out quantitative monitoring in relation to their members and applicants for membership. Qualifications bodies should monitor people who apply for a qualification or people who hold qualifications. Quantitative monitoring is concerned with the systematic collection of statistical data. It involves collecting data in order to calculate or estimate numbers or percentages.
- 2.18 By issuing members and applicants with a monitoring questionnaire, organisations and bodies can, for example, obtain information on the number of disabled members or applicants, the type of disabilities covered and the type of reasonable adjustment(s) which the disabled member or applicant requires.

By monitoring of its membership, a professional association becomes aware that disabled people are under-represented at fellowship level. The association uses this information to review its criteria for awarding fellowships, and carries out research into the barriers facing disabled people at senior levels of the profession.

A trade union becomes aware, through monitoring, that disabled people are under-represented as conference delegates. It uses this information to find out from disabled members how arrangements for conferences can be improved to enable fuller participation.

- 2.19 Some organisations choose to monitor by broad type of disability in order to understand the barriers faced by people with different types of impairment.

Through monitoring of people applying for and achieving registration, a qualifications body becomes aware that people with certain disabilities are significantly under-represented as applicants for, and holders of, a particular qualification. The qualifications body uses this information to review its competence standards to ensure that they do not present unnecessary barriers to disabled people.

- 2.20 Monitoring can also give a trade organisation or qualification body an opportunity to ask disabled members and applicants what, if any, reasonable adjustments they require. In addition to seeking this information, trade organisations and qualification bodies should also regularly review the effectiveness of any reasonable adjustments made and act on the findings of those reviews.

Qualitative Monitoring

- 2.21 It is also recommended that trade organisations and qualifications bodies carry out qualitative monitoring techniques in the area of disability, in addition to quantitative monitoring techniques. Qualitative monitoring involves directly consulting with disabled people or their representatives in order to obtain in depth their views, attitudes or opinions and to identify concerns or issues.
- 2.22 Listening carefully to disabled people and finding out what they want will help organisations and bodies to meet their obligations by identifying the best way of meeting disabled people's requirements. There is a better chance of reaching the best outcome if discussions are held with disabled people at an early stage.
- 2.23 Often, discussing with disabled people what is needed to meet their requirements will reassure a trade organisation or qualifications body that suitable

adjustments can be carried out cheaply and with very little inconvenience.

- 2.24 There are various ways in which the views of disabled people can be obtained. Many trade unions and professional bodies have established formal structures for seeking and representing the views of disabled people. These may take the form of an advisory committee, perhaps a sub-committee of the equal opportunities committee or national governing body. Some organisations have a standing national forum for disabled members as well as arranging periodic conferences.
- 2.25 Qualitative monitoring allows disabled people the opportunity to provide feedback to a trade organisation or qualification body on the impact of their policies, practices and procedures and the effectiveness of any reasonable adjustments made.

Monitoring Complaints

- 2.26 There is an additional measure which it is recommended that trade organisations and qualifications bodies take in order to monitor and review the extent to which they are affording equality of opportunity in the area of disability.
- 2.27 As regards grievances or complaints of disability discrimination, the organisation or body should monitor the number of complaints made, how they were resolved, what the outcomes were and how long each

took to be resolved. Where appropriate, they should also consider whether there are a greater number of complaints or grievances in certain areas or branches. The organisation or body should take appropriate remedial action, if the findings of such a review dictate this.

Promoting equality

2.28 In order to enhance disabled people's opportunities for gaining, retaining and progressing in employment, trade organisations and qualifications bodies need to consider equality of opportunity for disabled people from two perspectives. First, such organisations and bodies should ensure that disabled people have equal access to membership, and to the benefits of membership, or (as the case may be) to opportunities for gaining and retaining a professional or trade qualification. Secondly, it is good practice for a trade organisation or qualifications body to seek to promote equality for disabled people within the trade, profession or employment sector in which it operates.

A trade organisation in the tourism sector holds a conference, in association with employers in that sector and disability organisations, to promote opportunities for disabled people within the tourism industry.

A trade union representing people in the broadcasting trades ensures that its promotional literature and its website show positive images of disabled people carrying out a variety of jobs within this industry.

A qualifications body in the health sector promotes a scheme through which disabled people are encouraged to apply to train as health professionals.

Resolving disputes

- 2.29 Although the Act does not require trade organisations or qualifications bodies to resolve disputes within the organisation or body, it is in the interests of such an organisation or body wherever possible to resolve problems as they arise. This should be done in a non-discriminatory way to comply with the requirements of the Act.
- 2.30 Grievance procedures can provide an open and fair way for concerns to be made known. Such procedures may be particularly appropriate for use by members of trade organisations, and can enable grievances to be resolved quickly before they become major problems. Use of the procedures may highlight areas in which the duty to make reasonable adjustments has not been observed,

and can prevent misunderstandings leading to complaints to industrial tribunals.

2.31 Chapter 10 contains further information about grievance procedures and about resolving disputes under the Act.

3 Discrimination by trade organisations and qualifications bodies – an overview

Introduction

- 3.1 This chapter gives an overview of those provisions of the Act which are relevant to trade organisations and qualifications bodies. It explains who has rights and duties under those provisions and outlines what is made unlawful by them. Later chapters explain the provisions in greater detail.

Who has rights under the Act?

Disabled people

- 3.2 The Act gives protection from discrimination to a ‘disabled’ person within the meaning of the Act. A disabled person is someone who has a physical or mental impairment which has an effect on his or her ability to carry out normal day-to-day activities. That effect must be:
- substantial (that is, more than minor or trivial); and
 - adverse; and
 - long term (that is, it has lasted or is likely to last for at least a year or for the rest of the life of the person affected).

- 3.3 Physical or mental impairment includes sensory impairment. Hidden impairments are also covered (for example, mental illness or mental health problems, learning disabilities, dyslexia, diabetes and epilepsy).
- 3.4 In considering its duties under the Act, a trade organisation or a qualifications body should not use any definition of 'disabled person' which is narrower than that in the Act. If such an organisation or body is asked to make a disability-related adjustment, it may ask the person requesting it for evidence that the impairment is one which meets the definition of disability in the Act. It may be appropriate to do so where the disability is not obvious. However, it is not appropriate to ask for more information about the impairment than is necessary for this purpose. In addition, evidence of disability should not be asked for where it ought to be obvious that the Act will apply.

People who have had a disability in the past

- 3.5 People who have had a disability within the meaning of the Act in the past are protected from discrimination even if they no longer have the disability.

More information about the meaning of disability

- 3.6 For a fuller understanding of the concept of disability under the Act, reference should be made to Appendix B. A Government publication, 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', provides additional help in

understanding the concept of disability and in identifying who is a disabled person. Where relevant, the Guidance must be taken into account in any legal proceedings.

People who have been victimised

- 3.7 The Act also gives rights to people who have been victimised, whether or not they have a disability or have had one in the past. (see paragraphs 4.32 to 4.35).

Who has obligations under the Act?

Trade organisations

- 3.8 The Act defines a trade organisation as an organisation of workers or of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists. Bodies like trade unions, employers' associations, chartered professional institutions are all trade organisations because they exist for the purposes of the profession or trade which their members carry on. Examples of trade organisations include the Law Society of Northern Ireland, the Royal College of Nursing, Amalgamated Transport and General Workers Union (ATGWU), Northern Ireland Public Service Alliance (NIPSA), Northern Ireland Chamber of Commerce and Industry and the Confederation of British Industry (CBI). The Act applies to all trade organisations, no matter how many (or how few) members they may have.

Qualifications bodies

s 14A(5)

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3.9 The Act defines a qualifications body as an authority or body which can confer, renew or extend a professional or trade qualification. For this purpose a professional or trade qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or which facilitates engagement in, a particular profession or trade. What this means in practice is considered in paragraphs 8.5 to 8.7. Qualifications bodies include the General Medical Council, the Nursing and Midwifery Council, and the Driver and Vehicle Testing Agency. Other examples are City and Guilds, the Institute of the Motor Industry, the Hospitality Awarding Body and the Guild of Cleaners and Launderers.

s 14A(5)

3.10 Nevertheless, certain bodies are not regarded as qualifications bodies for the purposes of Part 2, even though they may perform some of the functions mentioned in paragraph 3.9. These are listed in the Act. Generally they comprise Education and Library Boards and other bodies having responsibility for schools and colleges. This is because discrimination by such bodies is currently exempt under the Act.

3.11 Clearly, certain trade organisations (such as the Law Society of Northern Ireland) also confer professional or trade qualifications. Consequently, the same organisation or body can be both a trade organisation and a qualifications body. Where this is the case, the

application of the Act's provisions depends upon the capacity in which the organisation or body is acting at the time in question. For example, if an alleged act of discrimination relates to conferring, renewing or extending a professional or trade qualification, the relevant provisions are those relating to discrimination by qualifications bodies – the fact that the body is also a trade organisation is irrelevant in this context.

Employers and others to whom Part 2 applies

- 3.12 The primary focus of Part 2 is, of course, on the duties of employers to disabled people. As mentioned at paragraph 1.6, however, that is not the subject of this Code. Guidance on the application of the Act to employers (as well as its application to people and bodies concerned with certain occupations and to persons such as the trustees or managers of occupational pension schemes and the providers of group insurance services) is given in a separate code of practice issued by the Equality Commission (see Appendix C for details). It has already been noted that, as employers themselves, trade organisations and qualifications bodies have duties under Part 2 in respect of disabled people whom they employ, or who apply to them for employment. Those duties are governed by the employment provisions of the Act.

What does the Act say about discrimination by trade organisations and qualifications bodies?

Effect of the Act

- 3.13 The Act makes it unlawful for a trade organisation to **discriminate** against a disabled person in relation to membership of the organisation or access to membership benefits. The Act also makes it unlawful for a qualifications body to **discriminate** against a disabled person in relation to conferring professional or trade qualifications.
- 3.14 However, the Act does not prevent organisations or bodies from treating disabled people more favourably than those who are not disabled.

Forms of discrimination

- 3.15 The four forms of discrimination which are unlawful under Part 2 are:
- **direct discrimination** (the meaning of which is explained at paragraphs 4.5 to 4.22);
 - **failure to comply with a duty to make reasonable adjustments** (explained in Chapter 5);
 - **‘disability-related discrimination’** (see paragraphs 4.26 to 4.31); and
 - **victimisation** of a person (whether or not s/he is disabled) – what the Act says about victimisation is explained at paragraphs 4.32 to 4.35.

Discrimination by trade organisations

3.16 The Act says that it is unlawful for a trade organisation to discriminate against a disabled person:

s 13(1)

- in the arrangements it makes for the purpose of determining who should be offered membership of the organisation; or
- in the terms on which it is prepared to admit him or her to membership; or
- by refusing to accept, or deliberately not accepting, his or her application for membership.

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3.17 The Act also says that it is unlawful for a trade organisation to discriminate against a disabled member:

s 13(2)

- in the way it affords the member access to any benefits or by refusing or deliberately omitting to afford access to them; or
- by depriving the member of membership, or varying the terms of his or her membership; or
- by subjecting the member to any other detriment.

What this means in practice is explained in Chapter 7.

3.18 It should be noted that the Act does not protect corporate members of trade organisations, even if a disabled person is a representative of a corporate member.

A trade organisation in the building industry has both individual and corporate members. A disabled employee of a company which is a member of this trade organisation would not have protection from discrimination by the trade organisation under Part 2 of the Act, whereas an individual member of the organisation would have such protection.

Discrimination by qualifications bodies

s 14A(1)

3.19 In relation to conferring, renewing, or extending professional or trade qualifications (abbreviated to ‘conferring’), the Act says that it is unlawful for a qualifications body to discriminate against a disabled person:

- in the arrangements which it makes for the purpose of determining upon whom to confer a professional or trade qualification, or
- in the terms on which it is prepared to confer such a qualification, or
- by refusing or deliberately omitting to grant any application by him or her for a professional or trade qualification, or
- by withdrawing such a qualification from him or her or varying the terms on which s/he holds it.

What this means in practice is explained in Chapter 8.

What else is unlawful under the relevant provisions of the Act?

Harassment

- 3.20 In addition to what it says about discrimination, Part 2 of the Act makes it unlawful for either a trade organisation or a qualifications body to subject a disabled person to harassment for a reason which relates to his or her disability. What the Act says about harassment is explained in more detail at paragraphs 4.37 and 4.38.

Instructions and pressure to discriminate

- 3.21 It is also unlawful for a person who has authority or influence over another to instruct him or her, or put pressure on him or her, to act unlawfully under the provisions of Part 2. This covers pressure to discriminate, whether applied directly to the person concerned, or indirectly but in a way in which s/he is likely to hear of it. However, the Act does not give individual disabled people the right to take legal action in respect of unlawful instructions or pressure to discriminate. Such action may only be taken by the Equality Commission (see paragraphs 10.18 to 10.20).

A trade union is holding a conference. The conference organiser, who is a paid employee of the union working in the events department, instructs the branch representatives not to send any wheelchair users to the conference as the venue is not wheelchair accessible. This is likely to be unlawful as it is an instruction to discriminate.

s 13(3)
& s 14A(2)

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s 16C

s 17B(1)

Discriminatory advertisements

s 16B

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3.22 The Act does not prevent advertisements for membership of trade organisations or for professional or trade qualifications from saying that applications from disabled people are welcome. However, it does say that it is unlawful for those seeking members for an organisation (or seeking candidates for qualifications) to publish an advertisement (or cause it to be published) which indicates, or might reasonably be understood to indicate:

- that the success of a person's application may depend to any extent on his or her not having any disability or any particular disability; or
- that the person determining the application is reluctant to make reasonable adjustments.

3.23 This applies to every form of advertisement or notice, whether to the public or not. However, an advertisement may still be lawful even if it does indicate that having a particular disability will adversely affect an applicant's prospects of success. This will be the case where, for example, the particular circumstances are such that the trade organisation or qualifications body is entitled to take the effects of the disability into account when assessing the suitability of applicants.

A qualifications body in the tourism industry advertises in a trade publication, inviting readers to apply to take a course leading to a qualification accredited by that body. The advertisement says that candidates 'must have excellent written and spoken English'. This would exclude people who use sign language as their first language, or people who have dyslexia, and may be unlawful.

However a qualifications body advertising a course in tree surgery, would not be discriminating by stipulating that candidates 'must not be afraid of heights', even if this would exclude people who had vertigo as a result of their disability.

- 3.24 It is good practice to consider carefully what information should be included in advertisements and where they should be placed.
- 3.25 The Act does not give individual applicants for membership of trade organisations or applicants for professional or trade qualifications the right to take legal action in respect of discriminatory advertisements. Such action may only be taken by the Equality Commission (see paragraphs 10.18 to 10.20).

s 17B(1)

Who is liable for unlawful acts?

Responsibility for the acts of others

s 58

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- 3.26 Trade organisations and qualifications bodies who act through agents are liable for the actions of their agents done with the express or implied authority of the organisation or body in question – this can include the actions of unpaid union representatives in the workplace. The Act also says that trade organisations and qualifications bodies are responsible for the actions of their employees in the course of their employment. For example, a trade union is responsible for the actions of its salaried officials in the course of their employment.
- 3.27 However, in legal proceedings against a trade organisation or qualifications body based on the actions of an employee, it is a defence that the organisation or body took ‘such steps as were reasonably practicable’ to prevent such actions. It is not a defence simply to show that the action took place without the knowledge or approval of the organisation or body. Chapter 2 gives guidance on the steps which it might be appropriate to take for this purpose.

A trade union has a disability policy which states that it will pay for sign language interpreters to interpret at branch meetings, should the need arise, from a central union fund. This policy, and the arrangements available for paying for sign language interpreters (and for other adjustments),

is explained to all branch representatives and new members. In addition all branch representatives are required to undergo basic training in the policy. A deaf union member requests a sign language interpreter for a branch meeting, but the branch representative who has undergone this training says that this is not possible as there are insufficient funds in the branch to pay for this adjustment. In this case the union could demonstrate that it had taken 'such steps as were reasonably practicable' to prevent such actions and it is likely that it has not acted unlawfully. The branch representative, however, is likely to be acting unlawfully (see paragraphs 3.28 and 3.29).

Aiding an unlawful act

- 3.28 A person who knowingly aids another to do something made unlawful by the Act will be treated as having done the same kind of unlawful act. This means that, where a trade organisation or qualifications body is liable for an unlawful act of its employee or agent, that employee or agent will be liable for aiding the unlawful act of the organisation or body.
- 3.29 Where an employee of a trade organisation or qualifications body discriminates against or harasses a disabled person, it is the employing organisation or body which will be liable for that unlawful act – unless it can show that it took such steps as were reasonably

s 57

practicable to prevent the unlawful act in question. However the employee who committed the discrimination or harassment will be liable for aiding the unlawful act – and this will be the case even if the trade organisation or qualifications body is able to show that it took reasonably practicable steps to prevent the act.

In the previous example, where the union has taken steps to ensure that disabled members can participate in branch meetings, it is likely that the branch representative would be acting unlawfully in aiding an unlawful act by the union, even though the union itself has avoided liability by taking reasonably practicable steps.

Enforcing rights under Part 2

- s 17A 3.30 Enforcement of rights under Part 2 takes place in the industrial tribunals. More information about enforcement is given in Chapter 10.

4 What is discrimination and harassment?

Introduction

- 4.1 As noted at paragraph 3.15, the forms of discrimination by trade organisations and qualifications bodies which the Act makes unlawful are:
- **direct discrimination;**
 - **failure to comply with a duty to make reasonable adjustments;**
 - **disability-related discrimination; and**
 - **victimisation.**
- 4.2 This chapter describes these four forms of discrimination in more detail, and explains the differences between them. It explores, in particular, the distinction between direct discrimination and disability-related discrimination (see paragraphs 4.27 to 4.30). These two forms of discrimination both depend on the way in which the disabled person concerned is treated – both require the disabled person to have been treated less favourably than other people are (or would be) treated. However, whether such treatment amounts to one of these forms of discrimination or the other (and, indeed, whether the treatment is unlawful in the first place) depends on the circumstances in which it arose.

- 4.3 The chapter examines the four forms of discrimination in the order in which they are listed in paragraph 4.1. This is because less favourable treatment which does not amount to direct discrimination can sometimes be justified. (In contrast, neither direct discrimination nor a failure to comply with a duty to make a reasonable adjustment is justifiable. Victimisation cannot be justified either.) In deciding whether the treatment is justified, and therefore whether there has been disability-related discrimination, the Act requires the question of reasonable adjustments to be taken into account (see paragraphs 6.5 and 6.6 where this is explained in more detail). Consequently, although the chapter describes direct discrimination first, it touches on the subject of reasonable adjustments before moving on to disability-related discrimination.
- 4.4 This chapter also explains what the Act means by 'harassment'. The concepts of discrimination and harassment (and those relating to reasonable adjustments as explained in Chapter 5) are also relevant to the application of the Act's provisions on employment and occupation more generally. As explained at paragraph 1.6, the Code focuses only on the duties of trade organisations and qualifications bodies acting in their capacity as such. However, in their capacity as employers, trade organisations and qualifications bodies also have duties under the Act's provisions on employment, which are the subject of a separate code of practice issued by the Equality Commission (see Appendix C for details).

What does the Act mean by 'direct discrimination'?

What does the Act say?

4.5 The Act says that treatment of a disabled person by a trade organisation or qualifications body amounts to direct discrimination if:

- it is on the ground of his or her disability;
- the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated; and
- the relevant circumstances, including the abilities, of the person with whom the comparison is made are the same as, or not materially different from, those of the disabled person.

4.6 It follows that direct discrimination depends on treatment of a disabled person by a trade organisation or qualifications body being on the ground of his or her disability. It also depends on a comparison of that treatment with the way in which the organisation or body treats (or would treat) an appropriate comparator. If, on the ground of his or her disability, the disabled person is treated less favourably than the comparator is (or would be) treated, the treatment amounts to direct discrimination.

s 3A(5)

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When is direct discrimination likely to occur?

- 4.7 Treatment of a disabled person is ‘on the ground of’ his or her disability if it is caused by the fact that s/he is disabled or has the disability in question. In general, this means that treatment is on the ground of disability if a disabled person would not have received it but for his or her disability. Disability does not have to be the only (or even the main) cause of the treatment complained of. However, the effective cause of the less favourable treatment must be related to a person’s disability and needs to be determined objectively from all the circumstances.
- 4.8 Consequently, if the less favourable treatment occurs because of generalised, or stereotypical, assumptions about the disability or its effects, it is likely to be direct discrimination. This is because a trade organisation or qualifications body would not normally make such assumptions about a non-disabled person, but would instead consider his or her individual abilities.

A trade union member who has mental ill health – which her branch secretary is aware of – is refused admission to a meeting because the branch secretary wrongly assumes that she would be incapable of participating effectively in the meeting because of her disability. The branch secretary has treated her less favourably than other members by refusing her entry to the meeting. The treatment was on the ground of the woman’s disability (because assumptions would not have been made about a non-disabled person).

- 4.9 In addition, less favourable treatment which is disability-specific, or which arises out of prejudice about disability (or about a particular type of disability), is also likely to amount to direct discrimination.

An applicant for a professional qualification is told that he would not be suitable for the qualification because he has a disability and thus the qualifications body refuses to confer the qualification upon him. This refusal is unrelated to any competence standard which is applied by the body when conferring the qualification, but arises instead from prejudice about the applicant's disability. This amounts to direct discrimination.

- 4.10 In some cases, an apparently neutral reason for less favourable treatment of a disabled person may, on investigation, turn out to be a pretext for direct discrimination.

A disabled member of a professional body wishes to represent the body publicly by giving a television interview but is told that only people who have been members for at least three years are permitted to do this. However, she discovers that another member, who is not disabled, has given a public presentation on behalf of the professional body even though he had only been a member for

two years at the time. Although the reason given to the disabled member (that she had not been a member of the body for long enough to represent it publicly) appeared to be a neutral one, it would seem that the reason was actually a pretext for direct discrimination, and is therefore likely to be unlawful.

- 4.11 Direct discrimination will often occur where the trade organisation or qualifications body is aware that the disabled person has a disability, and this is the reason for its treatment of him or her. Direct discrimination need not be conscious – people may hold prejudices that they do not admit, even to themselves. Thus, a person may behave in a discriminatory way while believing that s/he would never do so. Moreover, direct discrimination may sometimes occur even though the trade organisation or qualifications body is unaware of a person's disability.
- 4.12 In situations such as those described in the above examples, it will often be readily apparent that the disabled person concerned has been treated less favourably on the ground of his or her disability. In other cases, however, this may be less obvious. Whether or not the basis for the treatment in question appears to be clear, a useful way of telling whether or not it is discriminatory, (and of establishing what kind of discrimination it is), is to focus on the person with whom the disabled person should be compared. That person may be real or hypothetical (see paragraph 4.18).

Identifying comparators in respect of direct discrimination

- 4.13 In determining whether a disabled person has been treated less favourably in the context of direct discrimination, his or her treatment must be compared with that of an appropriate comparator. This must be someone who does not have the same disability. It could be a non-disabled person or a person with other disabilities.
- 4.14 It follows that, in the great majority of cases, some difference will exist between the circumstances (including the abilities) of the comparator and those of the disabled person – there is no need to find a comparator whose circumstances are the same as those of the disabled person in every respect. What matters is that the comparator's **relevant** circumstances (including his or her abilities) must be the same as, or not materially different from, those of the disabled person.
- 4.15 Once an appropriate comparator is identified, it is clear that the situation described in the example at paragraph 4.8 amounts to direct discrimination:

In the example about the trade union member who is refused admission to a meeting because she has mental ill health, there is direct discrimination because the woman was treated less favourably on the ground of her disability than an appropriate comparator (that is, a person who does not have mental ill health but whose relevant circumstances (including abilities) are otherwise the same): such a person would not have been refused admission to the meeting in the same circumstances.

- 4.16 The example of direct discrimination in paragraph 4.9 also becomes clearer when the appropriate comparator is identified:

In the example about the applicant for a professional qualification who is told that he would not be suitable for the qualification because he has a disability, there is direct discrimination because the man was treated less favourably on the ground of his disability than an appropriate comparator (that is, a person who does not have the same disability, but whose relevant abilities in respect of the qualification are the same): such a person would not have been treated in this way.

- 4.17 The comparator used in relation to direct discrimination under the Act is the same as it is for other types of direct discrimination – such as direct sex discrimination. It is, however, made explicit in the Act that the comparator must have the same relevant abilities as the disabled person.
- 4.18 It may not be possible to identify an actual comparator whose relevant circumstances are the same as (or not materially different from) those of the disabled person in question. In such cases a hypothetical comparator may be used. Evidence which helps to establish how a hypothetical comparator would have been treated is likely

to include details of how other people (not satisfying the statutory comparison test) were treated in circumstances which were broadly similar.

In the example at paragraph 4.10, there is nobody who has represented the professional body in television interviews with whom the disabled person can be compared. Nevertheless, the treatment of the member who had only two years' membership but was able to give a public presentation on behalf of the body might be evidence of discrimination: it might be used as evidence that a hypothetical non-disabled member who wanted to participate in a television interview would not have been treated in the same way as the disabled member was treated.

4.19 It should be noted that the type of comparator described in the preceding paragraphs is only relevant to disability discrimination when assessing whether there has been **direct** discrimination. A different comparison is used when assessing whether there has been a failure to comply with a duty to make reasonable adjustments (see paragraphs 5.2 and 5.3) or when considering disability-related discrimination (see paragraph 4.29).

4.20 **Focusing on relevant circumstances**

As stated in paragraph 4.14, direct discrimination only occurs where the **relevant** circumstances of the

comparator, including his or her abilities, are the same as, or not materially different from, those of the disabled person. It is therefore important to focus on those circumstances which are, in fact, relevant to the matter to which the less favourable treatment relates. Although, in some cases, the effects of the disability may be relevant, the fact of the disability itself is not a relevant circumstance for these purposes. This is because the comparison must be with a person **not** having that particular disability.

A woman who has a severe facial disfigurement applies for membership of a professional association in the tourism industry. Despite meeting the formal requirements for membership, she is told that her disability would not create a good impression and her application is rejected. The correct comparator in a claim for direct discrimination would be a person who does not have a facial disfigurement but who meets the formal requirements for membership of the professional association.

Relevance of reasonable adjustments to comparison

- 4.21 In making the comparison in respect of a claim of direct discrimination, the disabled person's abilities must be considered **as they in fact are**. In some cases, there will be particular reasonable adjustments which a trade organisation or qualifications body was required by the Act to make, but in fact failed to make. It may be that

those adjustments would have had an effect on the disabled person's relevant abilities. In making the comparison, the disabled person's abilities should be considered as they **in fact** were, and not as they would or might have been had those adjustments been made. On the other hand, if adjustments have **in fact** been made which have had the effect of enhancing the disabled person's abilities, then it is those enhanced abilities which should be considered. The disabled person's abilities are being considered as they in fact are (and not as they might have been if the adjustments had not been made).

A disabled person has to sit an examination in order to obtain a professional or trade qualification. She has difficulty writing because of her disability and asks to be allowed to type her answers. The qualifications body does not permit this (even though it would have been reasonable for it to do so) and, as a result, the woman is unable to complete the examination in time. This is not direct discrimination, as the comparator is a non-disabled person who fails to complete the examination in time. (The woman would be likely to have good claims in respect of two other forms of discrimination - failure to make reasonable adjustments and disability-related discrimination - see paragraph 4.36.)

Can direct discrimination be justified?

s 3A(4)

4.22 Treatment of a disabled person which amounts to direct discrimination under Part 2 of the Act is unlawful. It can never be justified.

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Failure to make reasonable adjustments – relationship to discrimination

4.23 For the reason given in paragraph 4.3, it may be necessary to consider whether a trade organisation or qualifications body has failed to comply with a duty to make a reasonable adjustment in order to determine whether disability-related discrimination has occurred.

s 3A(2)

4.24 Irrespective of its relevance to disability-related discrimination, however, a failure to comply with a duty to make a reasonable adjustment in respect of a disabled person amounts to discrimination in its own right. Such a failure is therefore unlawful. Chapter 5 explains the circumstances in which a trade organisation or qualifications body has such a duty, and gives guidance as to what they need to do when the duty arises.

4.25 As with direct discrimination, the Act does not permit an organisation or body to justify a failure to comply with a duty to make a reasonable adjustment (see paragraphs 5.26 and 5.27).

What is disability-related discrimination?

What does the Act say?

4.26 The Act says that treatment of a disabled person by a trade organisation or qualifications body amounts to discrimination if:

- it is for a reason related to his or her disability;
- the treatment is less favourable than the way in which the trade organisation or qualifications body treats (or would treat) others to whom that reason does not (or would not) apply; and
- the organisation or body cannot show that the treatment is justified.

4.27 Although the Act itself does not use the term 'disability-related discrimination', this expression is used in the Code when referring to treatment of a disabled person which:

- is unlawful because each of the conditions listed in paragraph 4.26 is satisfied; but
- does **not** amount to direct discrimination under the Act.

4.28 In general, direct discrimination occurs when the reason for the less favourable treatment in question is the disability, while disability-related discrimination occurs

s 3A(1)

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when the reason **relates to** the disability but **is not** the disability itself. The expression 'disability-related discrimination' therefore distinguishes less favourable treatment which amounts to direct discrimination from a wider class of less favourable treatment which, although not amounting to direct discrimination, is nevertheless unlawful.

When does disability-related discrimination occur?

- 4.29 In determining whether disability-related discrimination has occurred, the treatment of the disabled person must be compared with that of a person **to whom the disability-related reason does not apply**. This contrasts with direct discrimination, which requires a comparison to be made with a person without the disability in question but whose relevant circumstances are the same. The comparator may be non-disabled or disabled – but the key point is that the disability-related reason for the less favourable treatment must not apply to him or her.

A trade union refuses to allow a disabled person, who has a severe back condition and has been unable to carry out branch activities for the past couple of months due to her disability, to go on a training course. The union says that anyone who had not been carrying out their branch activities for this amount of time would have been refused training. The disability-related reason for the less favourable treatment is the fact that the woman

has not been carrying out branch activities, and the correct comparator is a person to whom that reason does not apply – that is, someone who had been carrying out branch activities. Consequently, unless the trade union can show that the treatment is justified, it will amount to disability-related discrimination because the comparator would **not** have been refused the opportunity to go on the training course. However, the reason for the treatment is not the disability itself (it is only a matter related thereto, namely not carrying out branch activities). So there is no direct discrimination.

- 4.30 The relationship between a disabled person's disability and the treatment of him or her by the organisation or body in question must be judged objectively. The reason for any less favourable treatment may well relate to the disability even if the organisation or body does not have knowledge of the disability as such, or of whether its salient features are such that it meets the definition of disability in the Act. Less favourable treatment which is not itself direct discrimination will still be unlawful (subject to justification) if, in fact, the reason for it relates to the person's disability.

In the example at paragraph 4.29, the trade union did not know that the reason why the woman had not been carrying out branch activities was disability-related. Nevertheless, its refusal to allow her to attend the training course is less favourable treatment for a disability-related reason, and would be unlawful unless it can be justified.

- 4.31 The circumstances in which justification may be possible are explained in Chapter 6. However, it is worth noting that the possibility of justifying potential discrimination only arises at all when the form of discrimination being considered is disability-related discrimination, rather than direct discrimination or failure to make reasonable adjustments.

What does the Act say about victimisation?

- 4.32 Victimisation is a particular form of discrimination which is made unlawful by the Act. It is unlawful for one person to treat another ('the victim') less favourably than s/he treats or would treat other people in the same circumstances because the victim has:
- brought, or given evidence or information in connection with, proceedings under the Act (whether or not proceedings are later withdrawn);
 - done anything else under or by reference to the Act;
 - or

- alleged someone has contravened the Act (whether or not the allegation is later withdrawn);

or because the person believes or suspects that the victim has done or intends to do any of these things.

A member of a trade organisation brings a claim of discrimination against the organisation. He is accompanied to the hearing of the claim by a friend who is also a member of the organisation. This person is subsequently refused a place on a course run by the organisation because he accompanied the claimant to the hearing. This amounts to victimisation.

4.33 It is not victimisation to treat a person less favourably because that person has made an allegation which was false and not made in good faith.

4.34 However, the fact that a person has given evidence on behalf of an applicant in a claim which was unsuccessful does not, of itself, prove that his or her evidence was false or that it was not given in good faith.

4.35 Unlike the other forms of discrimination which are made unlawful by the Act, victimisation may be claimed by people who are not disabled as well as by those who are.

How do the different forms of discrimination compare in practice?

- 4.36 The way in which the different forms of discrimination which are unlawful under Part 2 may operate in practice can be demonstrated by the following series of examples.

4

A disabled person who has multiple sclerosis applies to go to a union conference which lasts for one week. She mentions her disability on the booking form, but says that it would not affect her ability to attend. Nevertheless, the conference organiser wrongly assumes that the woman's disability will prevent her from participating at the conference and she is refused a place. This is **direct discrimination**.

In the situation described above, the woman states on the booking form that she will have to miss one day of the conference in order to have hospital treatment in relation to her disability. She is refused a place because full attendance is required of all conference participants. This is not direct discrimination, as the reason for the refusal of a place was not the woman's disability, but the fact that she would not be able to attend the conference in full.

However, the trade union has a **duty to make reasonable adjustments**. In order to prevent the disabled woman being substantially disadvantaged by the union's policy of only allowing people to attend the conference if they can attend it in full, it may be a reasonable adjustment for the union to waive this requirement. If so, the union will be unlawfully discriminating against the woman by refusing to do this.

Although there is no direct discrimination, the union has still treated the woman less favourably for a reason relating to her disability (namely, the fact that she cannot attend the conference in full). This will be **disability-related discrimination** unless the union can show that it is justified – and the union will be unable to show this if it would have been reasonable for it to have waived the requirement for full attendance.

The woman makes a claim against the trade union under Part 2 of the Act because of the way in which she has been treated. Some time later, however, she asks for union representation in relation to a grievance at work. Her request is rejected because she has previously made a claim against the union. This is **victimisation**.

What does the Act say about harassment?

s 3B(1)

4.37 The Act says that harassment occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct which has the purpose or effect of:

- violating the disabled person's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

s 3B(2)

4.38 If the conduct in question was engaged in with the intention that it should have either of these effects, then it amounts to harassment irrespective of its actual effect on the disabled person. In the absence of such intention, however, the conduct will only amount to harassment if it should reasonably be considered as having either of these effects. Regard must be had to all the circumstances in order to determine whether this is the case. Those circumstances include, in particular, the perception of the disabled person.

An assessor from a motor mechanics qualifications body is judging a number of practical tasks performed in the workplace by a trainee motor mechanic who has a speech impairment. The assessor imitates the mechanic's manner of speech and makes offensive remarks about the mechanic to the trainee's line manager. This is harassment, whether or not the disabled trainee was present when the comments were made, because they were made with the intention of humiliating the trainee.

At an awards ceremony of a trade organisation, a member of the organisation makes a speech including derogatory remarks about people with schizophrenia. A woman with schizophrenia who is a member of the trade organisation and who is present in the audience complains about the speech but is told that the comments were made as a joke and that the speaker did not have any intention of causing offence. Nevertheless the experience of the woman is likely to amount to harassment because the comments made by the speaker could reasonably be considered as having either of the effects mentioned above.

A trade union member with symptomatic HIV uses another member's mug at a union meeting. The other member then makes a point of being seen washing the mug with bleach, which is not something she would do if anyone else used her mug. She also makes offensive comments about having her mug used by someone with HIV. This is likely to amount to harassment.

A trade union branch representative circulates a joke about people with autism by email to branch members. A member with autism receives the email and finds the joke offensive. This is likely to amount to harassment.

What does the Act say about statutory obligations?

- s 59 4.39 Nothing is made unlawful by the Act if it is required by an express statutory obligation. However, it is only in cases where a statutory obligation is specific in its requirements, leaving a trade organisation or qualifications body with no choice other than to act in a particular way that the provisions of the Act may be overridden. The provision, in relation to statutory obligations, has a narrow application, and it is likely to permit disability discrimination only in rare circumstances.

What evidence is needed to prove that discrimination or harassment has occurred?

- 4.40 As stated in paragraph 3.30, enforcement of rights under Part 2 of the Act takes place in the industrial tribunals. A person who brings a claim for unlawful discrimination or harassment must show that discrimination has occurred. S/he must prove this on the balance of probabilities in order to succeed with a claim in an industrial tribunal.
- 4.41 However, the Act says that, when such a claim is heard by an industrial tribunal, the tribunal must uphold the claim if:
- the claimant proves facts from which the tribunal could conclude in the absence of an adequate explanation that the person against whom the claim is made (the respondent) has acted unlawfully; and
 - the respondent fails to prove that s/he did not act in that way.

A disabled person with autism is the only trade union branch member in the workplace not to be sent an email with an invitation to stand for election as a branch representative. Unless the union demonstrates a non-discriminatory reason for this omission, unlawful discrimination will be inferred in these circumstances.

4.42 Consequently, where a disabled person is able to prove on the balance of probabilities facts from which an inference of unlawful discrimination or harassment could be drawn, the burden of proof shifts to the respondent, who must then show that it is more likely than not that its conduct was not unlawful. This principle applies to allegations in respect of all forms of discrimination, including victimisation, and to harassment. Its practical effect in relation to the three principal forms of disability discrimination can be summarised as follows:

- To prove an allegation of **direct discrimination**, a claimant must prove facts from which it could be inferred in the absence of an adequate explanation that s/he has been treated less favourably on the ground of his or her disability than an appropriate comparator has been, or would be, treated. If the claimant does this, the claim will succeed unless the respondent can show that disability was not any part of the reason for the treatment in question.
- To prove an allegation that there has been a **failure to comply with a duty to make reasonable adjustments**, a claimant must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty has arisen, and that it has been breached. If the claimant does this, the claim will succeed unless the respondent can show that it did not fail to comply with its duty in this regard.

- To prove an allegation of **disability-related discrimination**, a claimant must prove facts from which it could be inferred in the absence of an adequate explanation that, for a reason relating to his or her disability, s/he has been treated less favourably than a person to whom that reason does not apply has been, or would be, treated. If the claimant does this, the burden of proof shifts, and it is for the respondent to show that the claimant has not received less favourable treatment for a disability-related reason. Even if the respondent cannot show this, however, the claim will not succeed if the respondent shows that the treatment was justified.

4.43 The Act provides a means by which a disabled person can seek evidence about whether s/he has been discriminated against, or subjected to harassment, under Part 2 of the Act. S/he may do this by using a questionnaire to obtain further information from a person s/he thinks has acted unlawfully in relation to him or her (see paragraph 10.5). If there has been a failure to provide a satisfactory response to questions asked by the disabled person in this way, inferences may be drawn from that failure.

4.44 In addition, the fact that there has been a failure to comply with a relevant provision of the Code must be taken into account by a court or tribunal, where it considers it relevant, in determining whether there has been discrimination or harassment (see paragraph 1.7).

5 What is the duty to make reasonable adjustments?

Introduction

- 5.1 In Chapter 4 it was noted that one of the ways in which discrimination occurs under Part 2 of the Act is when a trade organisation or a qualifications body fails to comply with a duty imposed on it to make ‘reasonable adjustments’ in relation to the disabled person. This chapter examines the circumstances in which a duty to make reasonable adjustments arises and outlines what a trade organisation or qualifications body needs to do in order to discharge such a duty.

When does the duty to make reasonable adjustments arise?

- 5.2 Subject to what is said in paragraph 5.7, the duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of a trade organisation or a qualifications body, or any physical feature of premises which it occupies, places a disabled person at a substantial disadvantage compared with people who are not disabled. The trade organisation or qualifications body has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words it has to make a ‘reasonable adjustment’. Where the duty arises, an organisation or body cannot justify a failure to make a reasonable adjustment.

s 14(1) &
s 14B(1)

A trade organisation for hairdressers arranges a one-day training course in colouring techniques for its members. A disabled member wishes to attend this course, but the programme for the day does not allow him sufficient rest breaks. He would therefore be at a substantial disadvantage because of his disability. The trade organisation rearranges the programme for the day to include more breaks. This is likely to be a reasonable adjustment for it to make.

A trade organisation for carpenters has an application form with several paragraphs in small print. A partially sighted carpenter cannot read the whole form and is therefore at a substantial disadvantage because the form cannot be filled in correctly. The trade organisation provides the disabled carpenter with an application form in large print. This is likely to be a reasonable adjustment for it to make.

A qualifications body holds an awards ceremony at its headquarters. A newly qualified woman who uses a wheelchair wants to attend the ceremony but is at a substantial disadvantage because the stage where the awards are presented is only accessible by stairs. A reasonable adjustment would be for the qualifications body to provide a ramp up to the stage or move the event to another venue which is accessible.

A disabled woman who is unable to use public transport wishes to attend a trade fair in the centre of Belfast, organised by a trade organisation of which she is a member. There is very little parking in the area and the information brochure suggests that 'visitors to the trade fair are advised to come by public transport'. The woman asks the trade organisation if it can arrange a parking space and it does so. This is likely to be a reasonable adjustment for the trade organisation to make.

- 5.3 It does not matter if a disabled person cannot point to an actual non-disabled person compared with whom s/he is at a substantial disadvantage. The fact that a non-disabled person, or even another disabled person, would not be substantially disadvantaged by the provision, criterion or practice or by the physical feature in question is irrelevant. The duty is owed specifically to the individual disabled person.

Which disabled people does the duty protect?

- 5.4 In order to avoid discrimination, it is prudent not to attempt to make a fine judgement as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the requirements of each individual with whom a trade organisation or qualifications body has dealings. However, the Act says that the duties are owed to the following people:

s 14(2)

- disabled people who are members of trade organisations, or who are applicants, or potential applicants, for membership of such organisations; and

s 14B(2)

- disabled people who are holders of professional or trade qualifications, or who are applicants, or potential applicants, for such qualifications.

5.5 The extent of the duty to make reasonable adjustments depends on the circumstances of the disabled person in question. For example, more extensive duties are owed to members of trade organisations and holders of professional or trade qualifications than to people who are merely thinking about applying. More extensive duties are also owed to current members and qualification holders than to past members or to people who no longer hold a qualification. The extent to which trade organisations and qualifications bodies have knowledge of relevant circumstances is also a factor. These issues are explained in more detail in Chapters 7 and 8.

What are ‘provisions, criteria and practices’?

s 18D(2)

5.6 ‘Provisions, criteria and practices’ include arrangements, for example, for determining who to accept as a member of a trade organisation, or upon whom to confer a professional or trade qualification, as well as the rules of membership of an organisation. The duty to make reasonable adjustments applies, for example, to selection and interview procedures for trade organisations and to examination and assessment

procedures used by qualifications bodies. In addition, the duty applies to premises used for such procedures.

A trade union requires its members to be either employed or seeking employment in a specific sector. A woman with a spinal injury as a result of an accident is not in work or looking for work, because she is adjusting to her newly acquired disability, but nevertheless would like to remain a member of the union, as it would help her to maintain contact with the sector in which she worked prior to her accident. The union agrees that she can retain her membership. This is likely to be a reasonable adjustment for the trade union to make to a criterion (in this case a membership criterion).

- 5.7 It should be noted that, in relation to qualifications bodies, there is no duty to make any adjustment to a provision, criterion or practice of a kind which the Act defines as a ‘competence standard’. What the Act says about competence standards is considered in more detail in paragraphs 8.27 to 8.41.

What is a ‘physical feature’?

- 5.8 The Act says that the following are to be treated as a physical feature:
- any feature arising from the design or construction of a building on the premises occupied by the trade organisation or qualifications body;

- any feature on the premises of any approach to, exit from, or access to such a building;
- any fixtures, fittings, furnishings, furniture, equipment or materials in or on the premises; and
- any other physical element or quality of any land comprised in the premises occupied by the trade organisation or qualifications body.

All these features are covered, whether temporary or permanent. Considerations which need to be taken into account when making adjustments to premises are explained in Chapter 9.

The design of a professional association's training facility makes it difficult for a person with a visual impairment to find his way around, as there are glass doors, glass panels and reflecting surfaces. That is a substantial disadvantage caused by the physical features of the professional association's premises.

- 5.9 Physical features will include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items. This is not an exhaustive list.

What disadvantages give rise to the duty?

5.10 The Act says that only substantial disadvantages give rise to the duty. Substantial disadvantages are those which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact. What matters is not that a provision, criterion or practice or a physical feature is capable of causing a substantial disadvantage to the disabled person in question, but that it actually has (or would have) this effect on him or her.

Is knowledge of the disability a factor?

5.11 Although (as explained in paragraphs 4.11 and 4.30) less favourable treatment can occur even if a trade organisation or qualifications body does not know that the person is disabled, the organisation or body only has a duty to make an adjustment if it knows, or could reasonably be expected to know, that the person has a disability and is likely to be placed at a substantial disadvantage. A trade organisation or qualifications body must, however, do all it can reasonably be expected to do to find out whether this is the case. More information is given in Chapters 7 and 8 about the relationship between the knowledge of a trade organisation or qualifications body and its duties under the Act.

s 14(3)
s 14B(3)

What adjustments might have to be made?

s 18B(2)

5.12 The Act gives a number of examples of adjustments, or 'steps', which persons who are subject to the duty may have to take, if it is reasonable for them to have to do so (see paragraphs 5.14 to 5.25). Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled person in question before they are made. The Act does not give an exhaustive list of the steps which may have to be taken to discharge the duty. Not all of the steps listed in the Act are likely to be relevant to trade organisations and qualifications bodies. By the same token, steps other than those listed, or a combination of steps, will sometimes have to be taken. However, the steps in the Act which it is likely to be reasonable for trade organisations and qualifications bodies to have to take are:

- making adjustments to premises;

A trade organisation or qualifications body might have to make structural or other physical changes such as: widening a doorway, providing a ramp or moving furniture for a wheelchair user; relocating light switches, door handles or shelves for someone who has difficulty in reaching; providing appropriate contrast in décor to help the safe mobility of a visually impaired person.

- giving, or arranging for, training or mentoring (whether for the disabled person or any other person);

This could be training in the use of particular pieces of equipment which the disabled person uses while participating in activities as a benefit of his or her membership of the trade organisation, or training which any member can take part in but which needs altering for the disabled person because of his or her disability. For example, all members might have the opportunity to be trained to use the trade organisation's library computer system but the trade organisation might have to provide longer or different training for a disabled person.

A trade union provides training for a branch in conducting meetings in a way that enables a deaf branch member to participate.

A disabled member of a professional association wishes to become a fellow of the organisation but has concerns about the requirement to pass an assessment – an oral presentation to fellows of the association with questions and answers – as she has a speech impairment. The professional association arranges for her to see a mentor (in this case a disabled fellow of the same organisation) to support her in achieving fellowship status.

- acquiring or modifying equipment;

A trade organisation or qualifications body might have to provide special equipment for a disabled person to enable him or her to take part in activities or benefit from services provided by the organisation or body. There is no requirement to provide or modify equipment for personal purposes unconnected with the person's dealings with the trade organisation or qualifications body, for example to provide a wheelchair if a person needs one in any event but does not have one.

- modifying instructions or reference manuals;

The way instructions are normally given might need to be revised when telling a disabled person how to do a task. The format of instructions or reference manuals may need to be modified (e.g. produced in Braille or on audio tape) and instructions for people with learning disabilities may need to be conveyed orally with individual demonstration.

- modifying procedures for testing or assessment;

This could involve ensuring that particular testing methods do not adversely affect particular disabled people. For example, a person with restricted manual dexterity might be disadvantaged by a hand written test and would need to have an alternative arrangement such as an oral test or to be permitted to use a computer with voice recognition software. More information about how the Act affects testing and examinations is set out in Chapter 8.

- providing a reader or interpreter;

This could involve the provision of a sign language interpreter for meetings, talks or training; or could involve provision of a reader for a visually impaired person.

- providing supervision or other support.

This could involve the provision of a support worker to enable a disabled person to participate in a conference, meeting, training session, interview, examination, assessment or social event; or extra support for a disabled trade union representative to enable that person to fulfil their role on an on-going basis.

5.13 As mentioned above, it may be reasonable for a trade organisation or qualifications body to take steps which are not given as examples in the Act. Such steps might include:

- conducting a proper assessment of what reasonable adjustments may be required;
- modifying the arrangements for meetings; and
- making adjustments to the way in which information is provided.

Further examples of the way in which reasonable adjustments work in practice are given in Chapters 7 and 8.

When is it 'reasonable' for a trade organisation or qualifications body to have to make adjustments?

5.14 Whether it is reasonable for a trade organisation or qualifications body to make any particular adjustment will depend on a number of things, such as its cost and effectiveness. However, if an adjustment is one which it is reasonable to make, then the organisation or body must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice of the organisation or body, or by a physical feature of the premises it occupies, the organisation or body must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no

onus on the disabled person to suggest what adjustments should be made but, where the disabled person does so, the organisation or body must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable.

- 5.15 Nevertheless, an organisation or body may not know enough about the disabled person to determine what adjustments are appropriate. It is therefore good practice to ask a disabled person whether s/he requires any adjustments to be made. It is also a good idea for a disabled person to make suggestions about adjustments which would be helpful.
- 5.16 Effective and practicable adjustments for disabled people often involve little or no cost or disruption and are therefore very likely to be reasonable for a trade organisation or qualifications body to have to make. Many adjustments do not involve making physical changes to premises. However, where such changes do need to be made, trade organisations and qualifications bodies may need to take account of the considerations explained in Chapter 9, which deals with issues about making alterations to premises.

A qualifications body allows a student to have extra time to take a written test because the student has dyslexia. This adjustment only involves the cost of paying an invigilator for the extra time in question, and is likely to be a reasonable one to make.

A trade union member with a hearing impairment requests a seat at the front of the conference hall, so that she can lip read. This is likely to be a reasonable adjustment for the trade union to make and would involve no additional cost and no disruption to the union.

A member of a professional association attending a meeting at that association asks for a mug half full of tea, rather than a china tea cup and saucer, because she has a hand tremor due to a neurological condition. This would involve very little cost or disruption to the professional association and is likely to be a reasonable adjustment to make.

**S.R. 2000
No.388**

- 5.17 If making a particular adjustment would increase the risks to the health and safety of any person (including the disabled person in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments, such as those carried out for the purposes of the Management of Health and Safety at Work Regulations (NI) 2000, should be used to help determine whether such risks are likely to arise. Further information can be obtained from the Health and Safety Executive for Northern Ireland (see Appendix C for details).

5.18 The Act lists a number of factors which may, in particular, have a bearing on whether it will be reasonable to have to make a particular adjustment. These factors make a useful checklist, particularly when considering more substantial adjustments. The effectiveness and practicability of a particular adjustment might be considered first. If it is practicable and effective, the financial aspects might be looked at as a whole – cost of the adjustment and resources available to fund it. Other factors might also have a bearing. The factors in the Act include the following:

- **the effectiveness of the step in preventing the disadvantage;**
- **the practicability of the step;**
- **the financial and other costs of the adjustment and the extent of any disruption caused;**
- **the extent of the financial or other resources available to the trade organisation or qualifications body;**
- **the availability of financial or other assistance to help make an adjustment;**
- **the nature of the activities of the organisation or body, and the size of its undertaking.**

The effectiveness of the step in preventing the disadvantage

- 5.19 It is unlikely to be reasonable to have to make an adjustment involving little benefit to the disabled person. However, such an adjustment may be one of several adjustments which, when looked at together, would be effective and, in that case, it is likely to be reasonable to have to make it.

The practicability of the step

- 5.20 It is more likely to be reasonable to have to take a step which is easy to take than one which is difficult. In some circumstances it may be reasonable to have to take a step, even though it is difficult.

A trade organisation is asked by a woman with a severe allergy to many commonly found substances (such as latex) to ensure that a venue for a lecture is free of all these substances. This is likely to be an impractical step to take. However, it may instead be reasonable for the trade organisation to provide the woman with a video of the lecture.

The financial and other costs of the adjustment and the extent of any disruption caused

- 5.21 If an adjustment costs little or nothing and is not disruptive, it would be reasonable to make unless some

other factor (such as practicability or effectiveness) made it unreasonable. It may, of course, be reasonable to have to make more expensive adjustments in some circumstances. The costs to be taken into account include those for staff and other resources. The significance of the cost of a step may depend in part on what the trade organisation or qualifications body might otherwise spend in the circumstances. In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account.

The extent of the financial or other resources available to the trade organisation or qualifications body

- 5.22 It is more likely to be reasonable for a trade organisation or qualifications body with substantial financial resources to have to make an adjustment with a significant cost, than for one with fewer resources. The resources in practice available to the organisation or body as a whole should be taken into account as well as other calls on those resources. It is good practice for organisations and bodies to have a specific budget for reasonable adjustments – but limitations on the size of any such budget does not mean that a trade organisation or qualifications body does not have duties towards disabled people. The reasonableness of an adjustment will depend not only on the resources in practice available for the adjustment but also on all other relevant factors (such as effectiveness and practicability).

A large professional association with 300,000 members and considerable funds would be expected to make more substantial changes to its premises, in order to make them accessible for a member, than would a small trade organisation with only fifty members and very limited funds.

A union branch is sending a disabled representative to a regional 3-day conference. The disabled person, who has cerebral palsy, requires a support worker to accompany her to the conference. Although the cost of providing this support would be relatively high compared to the resources available to the branch, the cost is unlikely to be seen as unreasonably high when assessed against the overall funds of the union.

The availability of financial or other assistance to help make an adjustment

- 5.23 The availability of outside help may well be a relevant factor. This help may be financial or practical. Disability organisations and bodies like the Equality Commission may be able to provide further information or help.
- 5.24 A disabled person is not required to contribute to the cost of a reasonable adjustment. However, if a disabled person has a particular piece of special or adapted equipment which s/he is prepared to use, this might make it reasonable for a trade organisation or qualifications body to have to take some other step (as well as allowing the use of the equipment).

A blind person wishes to go to an event organised by a trade organisation of which she is a member. She wishes to take notes at this event using a laptop computer. The trade organisation provides her with a table to put the computer on while she takes notes. This is likely to be a reasonable adjustment for the organisation to make.

The nature of the activities of the organisation or body, and the size of its undertaking

- 5.25 The size of an organisation or body's undertaking and the nature of its activities may be relevant in determining the reasonableness of a particular step.

Can failure to make a reasonable adjustment ever be justified?

- 5.26 The Act does not permit a trade organisation or qualifications body to justify a failure to comply with a duty to make a reasonable adjustment.
- 5.27 Clearly, however, an organisation or body will only breach such a duty if the adjustment in question is one which it is reasonable for it to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made.

A woman with severe back pain wishes to attend a trade union conference. The only adjustment she needs is for a space to be made available for her to set up a portable couch on which she can lie down during the conference proceedings. This is likely to be a reasonable adjustment for the trade union to make. It involves no cost and little disruption for the union. Nevertheless the union does not allow this as it says 'nobody has ever needed this adjustment before' and there 'may be health and safety implications'. The trade union will be acting unlawfully.

6 Justification

Introduction

6.1 Most conduct which is potentially unlawful under Part 2 of the Act cannot be justified. Conduct which amounts to:

- direct discrimination;
- failure to comply with a duty to make a reasonable adjustment;
- victimisation;
- harassment;
- instructions or pressure to discriminate; or
- aiding an unlawful act;

cannot be justified. It is unlawful irrespective of the reason or motive for it.

When does the Act permit justification?

6.2 Paragraph 4.26 explains that one of the forms of discrimination which is unlawful under Part 2 is disability-related discrimination. However, the conduct of a trade organisation or qualifications body towards a disabled person does not amount to disability-related discrimination if it can be justified. This chapter explains the limited circumstances in which this may happen.

6.3 Where less favourable treatment of a disabled person is capable of being justified (that is, where it is **not** direct discrimination), the Act says that it will, in fact, be justified if, but only if, the reason for the treatment is both **material** to the circumstances of the particular case **and** **substantial**. This is an objective test. ‘Material’ means that there must be a reasonably strong connection between the reason given for the treatment and the circumstances of the particular case. ‘Substantial’ means, in the context of justification, that the reason must carry real weight and be of substance.

6.4 This general principle is subject to one exception – which relates to the application of a ‘competence standard’ to a disabled person by a qualifications body. The Act says that less favourable treatment of a disabled person in this regard will be justified only if the qualifications body can show that the standard is (or would be) applied equally to people who do not have the disabled person’s disability, and that its application is a proportionate means of achieving a legitimate aim. What the Act says about competence standards is considered in more detail in paragraphs 8.27 to 8.41.

6.5 In certain circumstances, the existence of a material and substantial reason for less favourable treatment is not enough to justify that treatment. This is the case where a trade organisation or qualifications body is also under a duty to make reasonable adjustments in relation to the disabled person but fails to comply with that duty.

6.6 In those circumstances, it is necessary to consider not only whether there is a material and substantial reason

for the less favourable treatment, but also whether the treatment would still have been justified even if the organisation or body had complied with its duty to make reasonable adjustments. In effect, it is necessary to ask the question 'would a reasonable adjustment have made any difference?' If a reasonable adjustment would have made a difference to the reason that is being used to justify the treatment, then the less favourable treatment cannot be justified.

In other words, the reasonable adjustment would not have made any difference.

6.7 In relation to disability-related discrimination, the fact that a trade organisation or qualifications body has failed to comply with a duty to make a reasonable adjustment means that the sequence of events for justifying disability -related less favourable treatment is as follows:

- The disabled person proves facts from which it could be inferred in the absence of an adequate explanation that:
 - a. for a reason related to his or her disability, s/he has been treated less favourably than a person to whom that reason does not apply, has been, or would be, treated; and
 - b. a duty to make a reasonable adjustment has arisen in respect of him or her and the organisation or body has failed to comply with it.
- The trade organisation or qualifications body will be found to have discriminated unless it proves that:

- a. the reason for the treatment is both material to the circumstances of the particular case and substantial; and
- b. the reason would still have applied if the reasonable adjustment had been made.

Can health and safety concerns justify less favourable treatment?

- 6.8 Stereotypical assumptions about the health and safety implications of disability should be avoided, both in general terms and in relation to particular types of disability. Indeed, less favourable treatment which is based on such assumptions may itself amount to direct discrimination – which is incapable of justification (see paragraph 4.5). The fact that a person has a disability does not necessarily mean that s/he represents an additional risk to health and safety.

A person with bi-polar affective disorder (manic depression) applies for registration as a health professional with a professional association. The association refuses to register her, simply on the basis that she has mentioned her disability on a health questionnaire. The association makes an assumption that her disability would present a health and safety risk, without making any attempt to find out whether or how it would present such a risk, or indeed whether she had made a recovery. This is likely to be direct discrimination and therefore to be unlawful.

- 6.9 Genuine concerns about the health and safety of anybody (including a disabled person) may be relevant when seeking to establish that disability-related less favourable treatment of a disabled person is justified. However, it is important to remember that health and safety legislation does not require the removal of all conceivable risk but that risk is properly appreciated, understood and managed. Further information can be obtained from the Health and Safety Executive for Northern Ireland (see Appendix C for details).
- 6.10 Paragraphs 6.11 to 6.15 examine the circumstances in which concerns about health and safety may justify less favourable treatment of a disabled person, and this is followed by a consideration of the relevance of medical information in this context. As noted in paragraph 6.4, however, the basis upon which a qualifications body may justify less favourable treatment of a disabled person in the application of a competence standard differs from that which usually applies under the Act. The following principles do not have the same relevance to justification in those circumstances, but regard should instead be had to paragraphs 8.35 to 8.41.
- 6.11 It is the trade organisation or qualifications body which must decide what action to take in response to concerns about health and safety. However, leaving aside the question of competence standards, it is prudent for a trade organisation or qualifications body to have a risk assessment carried out by a suitably qualified person in circumstances where it has reason to think that the

effects of a person's disability may give rise to an issue about health and safety. This is because:

- If a trade organisation or qualifications body treats a disabled person less favourably merely on the basis of generalised assumptions about the health and safety implications of having a disability, such treatment may itself amount to direct discrimination – which is incapable of justification.

A qualifications body refuses to issue a certificate to operate heavy machinery to a person with epilepsy. No attempt is made to find out the actual circumstances of the individual through a risk assessment. The qualifications body merely makes an assumption that it would be a health and safety risk to let someone with epilepsy operate heavy machinery. This is likely to be direct discrimination and therefore to be unlawful.

- Even where there is no direct discrimination, an organisation or body which treats a disabled person less favourably without having a suitable and sufficient risk assessment carried out is unlikely to be able to show that its concerns about health and safety justify the less favourable treatment.

6.12 Nevertheless, a trade organisation or qualifications body should not subject a disabled person to a risk assessment if this is not merited by the particular circumstances of the case.

A man who has diabetes applies to go on a residential training course provided by a professional association of which he is a member. The man's condition is stable and he has successfully managed it for many years. Nevertheless, the association says that it has health and safety concerns; that it wants to undertake a risk assessment; and that it needs further medical evidence from the man's doctor. This is likely to be unlawful, as the circumstances of the case do not indicate that there would be any health and safety risk.

- 6.13 A risk assessment must be suitable and sufficient. It should identify the risks associated with a particular activity, taking account of any reasonable adjustments put in place for the disabled person, and should be specific for the individual carrying out a particular task. It is therefore unlikely that a trade organisation or qualifications body which has a **general** policy of treating people with certain disabilities (such as epilepsy, diabetes or mental ill health) less favourably than other people will be able to justify doing so – even if that policy is in accordance with the advice of an occupational health adviser.
- 6.14 A 'blanket' policy of this nature will usually be unlawful. This is because it is likely to amount to direct discrimination (which cannot ever be justified) or to disability-related less favourable treatment which is not

justifiable in the circumstances - i.e., disability-related discrimination.

A qualifications body for social care professionals has a policy of asking applicants for registration to fill out a health questionnaire. Applicants who state that they have had treatment for mental ill health are refused registration without any investigation into their individual circumstances. The qualifications body is applying a blanket policy, which is likely to amount to direct discrimination.

6

- 6.15 Reasonable adjustments made by a trade organisation or qualifications body may remove or reduce health and safety risks related to a person's disability. A suitable and sufficient assessment of such risks therefore needs to take account of the impact which making any reasonable adjustments would have. If a risk assessment is not conducted on this basis, then an organisation or body is unlikely to be able to show that its concerns about health and safety justify less favourable treatment of the disabled person.

Can medical information justify less favourable treatment?

- 6.16 Consideration of medical information (such as a doctor's report or the answers to a medical questionnaire) is likely to form part of an assessment of health and safety risks.

In most cases, however, having a disability does not adversely affect a person's general health. In other cases, its effect on a person's health may fluctuate. Although medical information about a disability may justify an adverse decision, it will not do so if there is no effect on the person's relevant skills and abilities (or if any effect is less than substantial), no matter how great the effects of the disability are in other ways. Indeed, less favourable treatment of a disabled person in a case where his or her disability has no effect on his or her relevant skills and abilities may well amount to direct discrimination – which is incapable of being justified.

- 6.17 In addition, where medical information is available, trade organisations and qualifications bodies must weigh it up in the context of the relevant circumstances, and the capabilities of the individual. An organisation or body should also consider whether reasonable adjustments could be made in order to overcome any problems which may have been identified as a result of the medical information. It should not be taken for granted that the person who provides the medical information will be aware that trade organisations and qualifications bodies have a duty to make reasonable adjustments, or what these adjustments might be. It is good practice, therefore, to ensure that medical advisers are made aware of these matters. Information provided by a medical adviser should only be relied on if the adviser has the appropriate knowledge and expertise.

6.18 In any event, although medical evidence may generally be considered as an ‘expert contribution’, it should not ordinarily be the sole factor influencing a decision by a trade organisation or qualifications body. The views of the disabled person (about his or her own capabilities and possible adjustments) should also be sought. It may also be possible to seek help from disability organisations. Ultimately, it is for the trade organisation or qualifications body – and not the medical adviser – to take decisions.

7 Discrimination by trade organisations

Introduction

- 7.1 Chapter 3 explains what the Act means by ‘trade organisation’, and that the Act makes it unlawful for a trade organisation to discriminate against a disabled person who is a member of the organisation or an applicant for membership. Chapter 3 also explains that the Act says it is unlawful for a trade organisation to subject such a person to harassment, or to victimise any person – whether disabled or not.
- 7.2 This chapter looks at discrimination by trade organisations in more detail. In order to do so, (and after considering an important point about the relationship of trade organisations to qualifications bodies), it is necessary to look at the different aspects of a trade organisation’s functions, from those which relate to becoming a member of the organisation to those which concern the benefits of membership once achieved. It is also necessary to consider issues relating to the variation and withdrawal of membership.

Trade organisations as qualifications bodies

- 7.3 It has already been noted (at paragraph 3.11) that some trade organisations confer professional or trade qualifications and that, as a consequence, such organisations can be subject to the Act’s provisions

about trade organisations or, depending upon the context, to those about qualifications bodies.

- 7.4 However, it should also be noted that membership of certain trade organisations (for example, the Institute of Linguists or the Chartered Institute of Personnel and Development) itself amounts to a professional or trade qualification for the reasons explained at paragraph 8.6. Where this is the case, decisions about granting, varying or withdrawing membership of the trade organisation will also be subject to the rules about conferring professional or trade qualifications. This fact is likely to be of particular significance where such decisions result from the application of a ‘competence standard’ (see paragraphs 8.27 to 8.41).

Becoming a member

What does the Act say?

s 13(1)

- 7.5 The Act says that it is unlawful for a trade organisation to discriminate against a disabled person:
- in the arrangements it makes for the purpose of determining who should be offered membership of the organisation;

A trade organisation asks a woman with a learning disability to take an additional test before allowing her membership, even though she already meets the entry criteria for that organisation. This is likely to be unlawful.

- in the terms on which it is prepared to admit him or her to membership;

A trade organisation for journalists asks a partially sighted person to pay an extra fee for membership because of the cost of putting information onto audio tape. This is likely to be unlawful.

- by refusing to accept, or deliberately not accepting, his or her application for membership.

A nursing organisation refuses to admit a person with a history of mental ill health, without further enquiry. This is likely to be unlawful.

- 7.6 As explained at paragraphs 3.22 to 3.25, the Act also makes it unlawful in certain circumstances to publish a discriminatory advertisement for membership of a trade organisation.

What amounts to direct discrimination?

- 7.7 A trade organisation may wish to differentiate between individuals when dealing with applications for membership of the organisation. However, in doing so, it should avoid discriminating against disabled applicants or potential applicants. As explained in Chapter 4, treating a disabled person in a different way from the way in which other people are (or would be) treated amounts to discrimination in certain circumstances. In particular, such treatment is unlawful if it amounts to

direct discrimination under Part 2 of the Act. As explained at paragraph 4.5, treatment of a disabled person amounts to direct discrimination if:

- it is on the ground of his or her disability;
- the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated; and
- the relevant circumstances, including the abilities, of the person with whom the comparison is made are the same as, or not materially different from, those of the disabled person.

7

A trade organisation refuses to let a woman who has schizophrenia become a member, even though the woman has shown that she has sufficient qualifications and experience to gain membership. This is likely to amount to direct discrimination, because she is being treated less favourably on the ground of her disability. The treatment is less favourable than the way in which someone who does not have schizophrenia would be treated; the relevant circumstances of the woman (in this case her qualifications and experience) are the same as those of other candidates who do not have schizophrenia.

What amounts to disability-related discrimination?

7.8 Less favourable treatment of a disabled person may be unlawful under the Act even if it does not amount to direct discrimination. This will be the case if it amounts to disability-related discrimination instead. As explained at paragraph 4.26, this is less favourable treatment which is for a reason related to the person's disability. However, unlike treatment which amounts to direct discrimination (and which is therefore incapable of justification), a trade organisation's treatment of a disabled person does not amount to disability-related discrimination if the organisation can show that it is justified. The circumstances in which this may be possible are explained in Chapter 6.

7.9 In summary, less favourable treatment of a disabled person will be unlawful if it amounts either to direct discrimination or to disability-related discrimination, and involves:

- a trade organisation's arrangements for selecting new members;
- the terms on which membership is offered; or
- the rejection or non-acceptance of an application for membership.

s 3A(1)

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When does the duty to make reasonable adjustments apply to applicants and potential applicants for membership?

- s 14 7.10 The duty of a trade organisation to make reasonable adjustments obviously applies in respect of its disabled members. However, the duty also applies in respect of any disabled person who is, or has notified the organisation that s/he may be, an applicant for membership.

A disabled man, who is unable to write because of his disability, requests an electronic application form from a trade organisation so that he can fill it in on his computer. The organisation may have a duty to make this reasonable adjustment because it knows that this man is a potential applicant for membership.

- s 14(3) 7.11 The duty only applies in respect of a disabled person if the trade organisation knows that the person is, or may be, an applicant for membership. 'Knowledge', in this context, means that the organisation knows, or could reasonably be expected to know, about this. Likewise, the duty applies only if the organisation knows that the person has a disability which is likely to place him or her at a substantial disadvantage in comparison with people who are not disabled.

7.12 Where a trade organisation has knowledge that a person **may be** an applicant for membership, the duty to make reasonable adjustments applies to provisions, criteria or practices for determining to whom membership should be offered. However, reasonable adjustments to premises are only required in respect of existing members and **actual** applicants for membership of whom the organisation has knowledge.

7.13 Where it applies, the duty to make reasonable adjustments is likely to affect arrangements in relation to, for example, advertisements, application forms and interviews for membership of the organisation. This is not a complete list of everything which could be covered by the duty (and which would be relevant in connection with becoming a member of a trade organisation), but it is intended as an indication of the likely relevant areas.

A man with a speech impairment applies for membership of a professional association. The association normally conducts a short interview for its potential members. He asks if he can have the interview in the form of written questions and answers because he has difficulty with verbal communication. This is likely to be a reasonable adjustment to the organisation's membership arrangements.

7.14 As explained in paragraphs 5.26 and 5.27, a trade organisation is never able to justify a failure to comply with a duty to make a reasonable adjustment under the Act.

Membership benefits

What does the Act say?

s 13(2)

7.15 The Act says that it is unlawful for a trade organisation to discriminate against a disabled person who is a member of the organisation:

- in the way it affords him or her access to any benefits or by refusing or deliberately omitting to afford him or her access to them; or
- by subjecting him or her to any other detriment.

An employee of a trade organisation deliberately fails to invite a member with schizophrenia to an annual dinner, because she thinks that other members may be offended by this person's behaviour, even though she has never met the member and knows nothing about his behaviour. This is likely to be unlawful.

7.16 The Act does not define what a benefit is (although it does say that benefits include facilities and services). Whether something is a benefit will depend on all the relevant circumstances, including an organisation's rules and practices. However, the following are likely to amount to benefits: training facilities, welfare or insurance services, participation at meetings and other events and invitations to attend those events, information about the

organisation's activities, and assistance to members in employers' disciplinary or dismissal procedures.

When does less favourable treatment in relation to membership benefits amount to discrimination?

- 7.17 A trade organisation needs to take care if it differentiates between members in relation to the provision of membership benefits. For example, if the organisation's treatment of a disabled member in this regard amounts to direct discrimination under the Act (see paragraph 7.7) it will be unlawful.
- 7.18 Even where it is not directly discriminatory, treatment of a disabled person will be unlawful if it amounts to disability-related discrimination (see paragraph 4.26).

When does the duty to make reasonable adjustments apply in respect of membership benefits?

- 7.19 A trade organisation has a duty to make reasonable adjustments in respect of the way it makes benefits available to its members. It owes this duty to a disabled member of the organisation if it has knowledge of the fact that s/he has a disability and is likely to be placed at a substantial disadvantage in comparison with people who are not disabled. The duty is likely to apply, for example, in respect of the provision of the benefits mentioned in paragraph 7.16. Where the duty does apply, the trade organisation must take such steps as are reasonable to prevent the provision, criterion or practice, or the physical feature, (as the case may be) from placing the disabled member at a substantial disadvantage.

s 3A

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s 14

A trade union has a website through which it informs members about its services. A member with a learning disability requests that a summary of the information on the website is provided in a format that is easy for her to understand (Easy Read). This is likely to be a reasonable adjustment for the union to make.

A trade organisation organises a trade fair. A blind member requests assistance at the trade fair to find his way around. This is likely to be a reasonable adjustment for the trade organisation to make.

A deaf woman, who is a union member, has a problem at work which she wants to discuss in depth with a trade union representative. The trade union pays for and arranges a sign language interpreter for the meeting. This is likely to be a reasonable adjustment for the union to make.

7.20 For many members, the manner in which a trade organisation makes information available to them is likely to be an important issue. If this information is not provided in forms accessible to disabled people they are likely to be placed at a substantial disadvantage. However, recent technological developments have meant that it is increasingly practicable to produce material in alternative formats quickly and cheaply. Disability

organisations and bodies like the Equality Commission are able to advise trade organisations about practicable methods of providing information in an accessible way. What is reasonable will depend on the individual circumstances of the case.

A trade organisation provides a magazine for its members. A blind member of the organisation asks for the magazine to be sent to him electronically as an email attachment so that he can read it using access software on his home computer. This is likely to be a reasonable adjustment for the trade organisation to make.

- 7.21 In some cases a reasonable adjustment will not work without the co-operation of other members of the organisation. Members may therefore have an important role in helping to ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality (explained at paragraphs 7.34 to 7.36), trade organisations must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act that members were obstructive or unhelpful when the trade organisation tried to make reasonable adjustments. A trade organisation would at least need to be able to show that it took such behaviour seriously and dealt with it appropriately. Trade organisations will be more likely to be able to do this if they establish and implement the type of policies and practices described at paragraph 2.9 (and, in the case of trade unions, 2.10).

A professional association organises a question and answer session with a panel of experts, to which it invites members. The event is organised at a venue with an induction loop to enable a deaf member who uses a hearing aid to participate. The Chair of the event reminds all contributors to speak in turn, and only when they are holding the microphone to enable everyone present to follow the proceedings. When a member persistently speaks out of turn, without the microphone, she is reminded that the organisation has a disability policy and that contributions will not be taken from her if she continues to ignore the rules laid down for the session which were designed to enable disabled people to participate.

Variation and withdrawal of membership

What does the Act say?

- s 13(2) 7.22 The Act says that it is unlawful for a trade organisation to discriminate against a disabled person who is a member of the organisation:
- by depriving him or her of membership, or varying the terms on which s/he is a member; or
 - by subjecting him or her to any other detriment.

A man who is a member of a trade organisation becomes disabled after a spinal injury. His membership is withdrawn without any consideration or consultation with him about whether or how he can still meet the membership requirements. This is likely to be direct discrimination and therefore to be unlawful.

7.23 The Act also says that, where a disabled person's membership of a trade organisation has come to an end, it is still unlawful for the trade organisation:

- to discriminate against him or her by subjecting him or her to a detriment; or
- to subject him or her to harassment;

if the discrimination or harassment arises out of his or her former membership of the organisation and is closely connected to it.

7.24 It is also unlawful to victimise a person (whether or not s/he is disabled) after s/he has ceased to be a member of a trade organisation (see paragraphs 4.32 to 4.35).

When does less favourable treatment in relation to variation or withdrawal of membership amount to discrimination?

7.25 If a trade organisation varies the terms on which a disabled person is a member of the organisation, or

s 16A

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s 55

s 3A

withdraws his or her membership, it may be treating him or her less favourably than it treats other members. Depending upon the circumstances, the organisation may be discriminating against the disabled person by treating him or her in this way. For example, if the organisation's treatment of a disabled member amounts to direct discrimination under the Act (see paragraph 7.7) it will be unlawful.

- 7.26 Even where it does not amount to direct discrimination, treatment of a disabled person will be unlawful if it amounts to disability-related discrimination (see paragraph 4.26).

A member of a trade union complains about another member who has Asperger's syndrome (a form of autism) after a conference, saying that the fellow member behaved in an inappropriate way whilst at the conference hotel. The man's behaviour was related to his disability but she was not aware of this at the time. The trade union disciplines the disabled man and his membership is withdrawn, even though the union knows about his disability. This is likely to be less favourable treatment for a disability-related reason and is therefore likely to be unlawful, unless the trade union can show that the treatment was justified.

When does the duty to make reasonable adjustments apply in respect of the variation or withdrawal of membership?

- 7.27 The duty of a trade organisation to make reasonable adjustments for a member who it knows to have a disability extends to the way in which it operates grievance and disciplinary procedures, or procedures for the variation or withdrawal of membership. Where a provision, criterion or practice, or a physical feature, places a disabled member at a substantial disadvantage in this regard, the trade organisation must take such steps as are reasonable to prevent this.

A disabled member has a meeting to discuss his continued membership of a professional association. The venue is changed to one that is accessible to the member, who has a mobility impairment. This is likely to be a reasonable adjustment for the association to make.

A disabled woman has a grievance hearing at the offices of a trade union. She is provided with a car parking space at the venue because her disability makes it impossible for her to use public transport. This is likely to be a reasonable adjustment for the union to make, whether or not the grievance was related to her disability.

7.28 A trade organisation's duty to make reasonable adjustments may also apply in respect of a former member who is a disabled person. This will be the case where:

- the disabled person is placed at a substantial disadvantage in comparison with other former members:
 - a. by a provision, practice or criterion applied by the trade organisation to the disabled person in relation to any matter arising out of his or her former membership; or
 - b. by a physical feature of premises occupied by the organisation; and
- the organisation either knows, or could reasonably be expected to know, that the former member in question has a disability and is likely to be affected in this way.

A newly disabled person wishes to attend a conference of a trade organisation of which he is a former member. This conference is open to former members. He explains to the conference organisers that he is now partially sighted. They arrange for a guide to accompany him at the conference and produce conference papers in large print. These are likely to be reasonable adjustments for the trade organisation to make.

7.29 The former members with whom the position of the disabled person should be compared must be people who are not disabled, but who are former members of the same organisation. If it is not possible to identify an actual comparator for this purpose, then a hypothetical comparator may be used (see paragraph 4.18).

Knowledge of disability

7.30 The point has been made a number of times in this chapter that a trade organisation only has a duty to make a reasonable adjustment if it knows, or could reasonably be expected to know, that a person is, or may be, an applicant for membership and has a disability and is likely to be placed at a substantial disadvantage in comparison with people who are not disabled. However, a trade organisation will be deemed to have that knowledge in certain circumstances.

Obtaining information

7.31 It is good practice as part of its monitoring procedures, for a trade organisation to invite applicants and members to tell it about any reasonable adjustments they may require (see Chapter 2). In any event, where information which should alert a trade organisation to the circumstances mentioned in paragraph 7.30 is available to it, or would be if it were reasonably alert, the organisation cannot simply ignore it. It is therefore in the interests of a trade organisation to be aware of the possibility that people it is dealing with may have a disability and to make reasonable enquiries if

s 14(3)

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circumstances suggest this may be the case. It also means that it is advisable for disabled people, if they wish to take full advantage of the provisions of the Act, to let trade organisations know of their disability and of substantial disadvantages at which they are likely to be placed. The earlier a trade organisation is told about a disability and its effects, the more likely it is to be able to make effective adjustments.

A trade union has questions on its membership application form asking if the applicant is disabled or needs information in an accessible format (such as large print, Braille, tape or email). It also asks if the applicant requires any reasonable adjustments to be made.

A professional association sends its members invitations to a conference. The invitation contains general details about access for disabled people, and the booking form asks about access requirements – such as whether delegate information is required in an accessible format, and whether delegates have any specific dietary requirements.

- 7.32 If a trade organisation's agent or employee (such as a trade union representative) knows, in that capacity, of a member's disability, the organisation will not usually be

able to claim that it does not know of the disability. The same applies in respect of actual or potential applicants for membership of the organisation. Trade organisations therefore need to ensure that where information about disabled people may come through different channels, there is a means - suitably confidential - for bringing the information together, to make it easier for the organisation to fulfil its duties under the Act.

A trade union member tells her branch secretary that she is unable to climb stairs due to her mobility impairment. The branch secretary arranges for the member to go on a training course organised by the union's education department. When the member arrives at the training session, she is unable to gain access to the building because of a flight of stairs. The union would be unable to claim that it did not know about the member's disability.

- 7.33 Information will not be imputed to a trade organisation if it is gained by a person providing services to members independently of the organisation. This is the case even if the organisation has arranged for those services to be provided.

A trade organisation member uses a counselling Helpline which is independent of the organisation but which is provided as a benefit of membership. During his conversation with the counsellor the member discusses his worries about his deteriorating sight. The trade organisation itself should not be assumed to know about his need for the organisation's magazine to be in an accessible format, on the basis of this conversation.

Confidential information

- 7.34 The extent to which a trade organisation is entitled to let other members know about a fellow member's disability will depend partly on the terms of membership. An organisation could be discriminating against the disabled member by revealing such information if it would not reveal similar information about another person for an equally legitimate purpose; or if the organisation revealed such information without consulting the individual, instead of adopting the usual practice of talking to a member before revealing personal information about him or her. Trade organisations also need to be aware that they have obligations under the data protection legislation in respect of personal data.

A member of a trade union wishes to go on a residential weekend conference, travelling there on a coach arranged by the union. The union member has to take dialysis equipment with her because she has had kidney failure. Another member needs to be informed, in order to help her load and unload the equipment. The disabled member gives her permission for another union member to be told that she is taking medical equipment with her, so that she can be helped with the equipment.

- 7.35 However, as noted at paragraph 7.21, sometimes a reasonable adjustment will not work without the co-operation of other members. In order to secure such co-operation, it may be necessary for a trade organisation to tell one or more of a disabled person's fellow members (in confidence) about a disability which is not obvious. Who it might be appropriate to tell will depend on the nature of the disability and the reason they need to know about it. In any event, a trade organisation must not disclose confidential details about a member without his or her consent. A disabled person's refusal to give such consent may impact upon the effectiveness of the adjustments which the trade organisation is able to make or its ability to make adjustments at all.
- 7.36 The Act does not prevent a disabled person keeping a disability confidential from a trade organisation. However this is likely to mean that unless the organisation could reasonably be expected to know about the person's

disability anyway, it will not be under a duty to make a reasonable adjustment. If a disabled person expects a trade organisation to make a reasonable adjustment, s/he will need to provide the organisation – or someone acting on its behalf – with sufficient information to carry out that adjustment.

The role of trade unions

- 7.37 Trade unions are obvious examples of what the Act means by trade organisations. Representing the interests of their members in the workplace is one of the most important functions of trade unions, and so union representatives need to be familiar with the Act's provisions on employment and occupation. They need to be able to recognise potential claims under the Act and to know how to respond appropriately. Union representatives should also understand the need to make reasonable adjustments at branch meetings, for example, and that the reasonableness of the cost of making an adjustment should be assessed having regard to the union's overall resources, to any access funds which may be available, and all other relevant factors (see paragraph 2.10).
- 7.38 It is important for trade unions to ensure that union representatives receive proper training on the Act and that they are aware of the Equality Commission's code of practice on employment and occupation (see Appendix C). It is also advisable for trade unions to have arrangements in place so that appropriate cases are referred to the union's solicitors.

8 Discrimination by qualifications bodies

Introduction

- 8.1 Chapter 3 describes the meaning of ‘qualifications body’, and explains that it is unlawful for such a body to discriminate against a disabled person in relation to conferring professional or trade qualifications, or to subject him or her to harassment, or to victimise any person – whether disabled or not.
- 8.2 This chapter looks at the provisions about qualifications bodies in more detail. It explains what the definition of ‘professional or trade qualification’ covers in practice. It considers when less favourable treatment of a disabled person by a qualifications body is unlawful, and when the duty to make reasonable adjustments arises. Finally, it examines the meaning and significance of ‘competence standards’.
- 8.3 It should be noted that a disabled person is not permitted to bring a claim in an industrial tribunal about alleged discrimination or harassment by a qualifications body if a statutory appeal is available in respect of the matter in question. For example, the Medical Act 1983 sets out specific mechanisms for appealing decisions of the General Medical Council or its committees regarding the registration of medical practitioners. A complaint to which these appeal mechanisms applied could not, therefore, be brought instead in an industrial tribunal.

s 17A(1A)

8.4 It should also be noted that the provisions of the Act which relate specifically to qualifications bodies focus only on the functions of conferring professional or trade qualifications. The performance of other functions by such bodies may be subject to other provisions of the Act. For example, where a qualifications body is also a trade organisation, regard must also be had to what the Act says about trade organisations – and to Chapter 7 of the Code in particular.

What is a professional or trade qualification?

8.5 As noted at paragraph 3.9, the key feature of a qualifications body is that it confers professional or trade qualifications. The Act says that such a qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or which facilitates engagement in, a particular profession or trade. Clearly, therefore, the expression includes those qualifications etc., which are conferred solely in anticipation of furthering a particular career. However, it is also capable of including more general qualifications if attaining them facilitates engagement in a particular profession or trade. In order to decide whether a particular qualification is a professional or trade qualification for the purposes of the Act, it is necessary to address the following three questions:

- what is the profession or trade?
- what is the qualification?

- does possession of that particular qualification make it easier to work in that particular profession or trade (rather than merely assisting general advancement in that or any other career)?

8.6 The word ‘qualification’ should not be interpreted narrowly – attaining a professional or trade qualification need not involve passing formal examinations or tests. In some cases, simply being a member of an organisation or body may amount to such a qualification if that membership itself facilitates engagement in a particular profession or trade.

8.7 The following list (which is not intended to be exhaustive) gives examples of qualifications which would or could count as professional or trade qualifications under the Act provided that the criteria set out in paragraph 8.5 are met:

- Registration with the Nursing and Midwifery Council;
- A certificate to practise as a solicitor issued by the Law Society of Northern Ireland;
- Registration with the Council for Registered Gas Installers (CORGI);
- NVQs;
- BTECs;
- City and Guilds;

- HGV driving licences;
- Membership, registration or fellowship of trade or professional bodies (e.g. Fellow of the Institute of Linguists).

8.8 In relation to certain professions or trades, educational institutions or other bodies may devise, run and examine their own courses, although approval for entry into the profession or trade is controlled by an external body. Due to the wide definition of 'professional or trade qualification', such external bodies are likely to be qualifications bodies if they perform any of the following functions:

- maintaining a register of people who are qualified to practice in the profession or trade;
- conducting additional tests for people who have qualified, or who wish to qualify, into the profession or trade, such as basic skills tests or medical checks; or
- giving approval for a person's qualification to his or her course provider.

What amounts to direct discrimination?

s 14A(1)

8.9 It is obvious that a qualifications body will differentiate between individuals when conferring, renewing or extending professional or trade qualifications. However, in doing so, it should avoid discriminating against disabled people – it is unlawful for a qualifications body

to discriminate against a disabled person in respect of a number of matters which are specified in the Act (and listed in paragraph 3.19).

8.10 As explained in Chapter 4, treating a disabled person in a different way from the way in which other people are (or would be) treated amounts to discrimination in certain circumstances. In particular, such treatment is unlawful if it amounts to direct discrimination under Part 2 of the Act. As explained at paragraph 4.5, treatment of a disabled person amounts to direct discrimination if:

- it is on the ground of his or her disability;
- the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated; and
- the relevant circumstances, including the abilities, of the person with whom the comparison is made are the same as, or not materially different from, those of the disabled person.

A qualifications body recommends to a college of higher education that a man with a mobility impairment should not be allowed on to a social work course, as they wrongly assume that he may have difficulty visiting the homes of clients. This is likely to amount to direct discrimination.

What amounts to disability-related discrimination?

s 3A(1)

8.11 Less favourable treatment of a disabled person may be unlawful under the Act even if it does not amount to direct discrimination. This will be the case if it amounts to disability-related discrimination instead. As explained at paragraph 4.26, this is less favourable treatment which is for a reason related to the person's disability. However, unlike treatment which amounts to direct discrimination (and which is therefore incapable of justification), a qualifications body's treatment of a disabled person does not amount to disability-related discrimination if the body can show that it is justified. The general circumstances in which this may be possible are explained in Chapter 6. However, special rules apply in respect of justification of less favourable treatment in the application of a competence standard (see paragraphs 8.35 to 8.41).

8.12 In summary, less favourable treatment of a disabled person will be unlawful if it amounts to either direct discrimination or disability-related discrimination, and involves:

- the arrangements for determining upon whom to confer a professional or trade qualification;
- the terms upon which a qualifications body confers, renews or extends such a qualification;

- a refusal or deliberate omission by such a body to grant his or her application for a qualification; or
- the withdrawal of a qualification from him or her or a variation of the terms on which s/he holds it.

A professional association which maintains a register of approved acupuncturists withdraws registration from a person who, because of treatment for cancer, has not been able to work for a year. The association has a policy of withdrawing registration from anyone who has not practised for this length of time. The treatment of the disabled person is for a disability-related reason (the disabled person's lack of recent practice is due to the disability). The treatment is less favourable than the way in which someone who had practised recently would have been treated. It would therefore amount to disability-related discrimination unless the association (acting as a qualifications body) can justify it.

8.13 The Act also says that, where a disabled person ceases to hold a professional or trade qualification, it is still unlawful for the qualifications body which conferred it:

- to discriminate against him or her by subjecting him or her to a detriment; or
- to subject him or her to harassment;

if the discrimination or harassment arises out of his or her having formerly held the qualification and is closely connected to it.

- 8.14 It is also unlawful to victimise a person (whether or not s/he is disabled) after s/he has ceased to hold such a qualification (see paragraphs 4.32 to 4.35).

How does the duty to make reasonable adjustments apply to qualifications bodies?

In respect of which disabled people is the duty owed?

s 14B(1)

- 8.15 A qualifications body has a duty to make reasonable adjustments to the way it confers, renews or extends professional or trade qualifications (except in respect of competence standards). It owes this duty to a disabled person who holds a qualification conferred by it and to a disabled applicant or potential applicant for such a qualification.

s 14B(2)

- 8.16 The duty extends to holders of a qualification conferred by the body and to applicants for such a qualification. However, in the case of a provision, criterion or practice for determining on whom a qualification is to be conferred, the duty only applies to a disabled person who has either applied for the qualification or has notified the body that s/he may apply.

s 14B(3)

- 8.17 The duty only applies if the qualifications body knows, or could reasonably be expected to know, that the disabled

person concerned is, or may be, an applicant for a professional or trade qualification. Likewise, the duty only applies if the body knows or could reasonably be expected to know that the person has a disability and is likely to be placed at a substantial disadvantage compared with people who are not disabled.

8.18 The duty of a qualifications body to make reasonable adjustments may also extend to a disabled person who formerly held a professional or trade qualification. This is the case where a provision, practice or criterion, or a physical feature of premises occupied by the qualifications body, places the disabled person at a substantial disadvantage compared with others in the same position. The duty only applies, however, if the qualifications body knows, or could reasonably be expected to know, that the person concerned has a disability and is likely to be affected in this way.

8.19 The people with whom the position of the disabled person should be compared must be people who are not disabled, but who also formerly held the same professional or trade qualification conferred by the qualifications body in question. If it is not possible to identify an actual comparator for this purpose, then a hypothetical comparator may be used (see paragraph 4.18).

What is the effect of the duty?

8.20 Where it applies, the duty to make reasonable adjustments is likely to affect arrangements in relation to, for example, taking tests and examinations, and

s 16A(4) - (6)

renewing qualifications where it is necessary to do so. However, there is no duty to make adjustments to competence standards applied to a disabled person by a qualifications body. Where the duty does apply, however, the qualifications body must take such steps as are reasonable to prevent the provision, criterion or practice, or the physical feature, (as the case may be) from placing the disabled person in question at a substantial disadvantage.

8

A woman with mental ill health is informed that an oral examination for a diploma has been arranged for 8:30 am. The timing of the examination would substantially disadvantage the woman, because a side effect of her medication is extreme drowsiness for several hours after taking her morning dose – which prevents her from concentrating well. The qualifications body agrees to her request to take the examination later in the day.

A man who lip-reads because of his hearing impairment is due to have a practical test as part of his course. The qualifications body instructs an assessor working on its behalf to face the man when giving instructions during the assessment and to talk clearly.

An advanced craft test for carpentry consists of a seven hour practical examination. A person with arthritis who is only able to work part-time as a result of the disability, wishes to take this test as two sessions of three and a half hours on two consecutive days. The qualifications body awarding the qualification allows the test to be taken in this way.

A candidate for a written examination as part of a jewellery-making course has dyslexia. The qualifications body allows the disabled candidate extra time to sit the examination, and also permits the use of a reader and an amanuensis (someone to write on the candidate's behalf) as the candidate is not able to read and write well because of the dyslexia.

A woman with a learning disability is allowed extra time by a qualifications body to take a written examination. This is likely to be a reasonable adjustment for the qualifications body to make, because the trade which the woman wants to enter would not require written work to be done in a short amount of time, so the ability to write quickly is not a competence standard.

A disabled man asks for twice as much time for a test in shorthand because his disability makes it impossible for him to write quickly. This is unlikely to be a reasonable adjustment for the qualifications body to make, because speed is an essential element of the shorthand qualification – in other words, it is likely to be a competence standard, and thus the duty to make reasonable adjustments does not apply.

What are the practical implications of the duty?

- 8.21 Although there is no duty on a qualifications body to make a reasonable adjustment if it does not have the requisite knowledge (see paragraph 8.17), it will be deemed to have that knowledge in certain circumstances.
- 8.22 Where information is available which should alert a qualifications body to the circumstances mentioned in paragraph 8.17, or would be if it were reasonably alert, the body cannot simply ignore it. It is thus advisable for disabled people, if they wish to take full advantage of the provisions of the Act, to let educational institutions and qualifications bodies know of their disability and of substantial disadvantages that are likely to arise. The earlier a qualifications body is told about a disability and its effects, the more likely it is to be able to make effective adjustments.

8.23 As mentioned at paragraph 2.12, it is also advisable for qualifications bodies to set up systems for working with educational institutions and other bodies with whom they work to ensure that qualifications bodies obtain the information they need to make adjustments for disabled students who are taking examinations or other assessments in order to obtain a professional or trade qualification. For example, such a system could comprise the steps outlined below:

- Well in advance of the examination or assessment in question, the qualifications body asks educational institutions to seek information from candidates about whether they have disabilities which make reasonable adjustments necessary.
- Each educational institution requests this information from its students, together with their individual consent to inform the qualifications body. The information is then passed on to the qualifications body.
- Students may be given a contact at the qualifications body with whom they can discuss their requirements further.
- The qualifications body uses the information it obtains to decide what adjustments should be made. It then notifies educational institutions of its decision, and discusses with them how such adjustments will be implemented.

A body which confers qualifications in accountancy asks a college for information about students who may require reasonable adjustments. The college seeks this information from its students. A student with cerebral palsy has difficulty writing, and therefore asks to be allowed to take the examinations using a computer. The college relays this request to the qualifications body, which gives its consent and liaises with the college to ensure that the college can provide him with appropriate facilities to take the examinations.

- 8.24 Educational institutions or other bodies often provide education, training or other services (such as facilities for taking examinations or assessments) which lead to the attainment of a professional or trade qualification, even though they do not themselves confer the qualification. To ensure full compliance with the Act, it is advisable for such institutions or bodies to inform qualifications bodies at an early stage about an applicant's disability and its relevant implications – subject, of course, to obtaining the applicant's consent first.
- 8.25 In practice, the requirements of a disabled person who is taking an examination, test or assessment can only be met fully if the educational institution or body and the qualifications body concerned work together to achieve an appropriate outcome.

A partially sighted man requests a test paper in large print and a desk light. The qualifications body provides a large print test paper and liaises with the college where the man is sitting the test to ensure that it provides a desk light.

- 8.26 The Act does not prevent a disabled person keeping a disability confidential from a qualifications body (although other legislation may require its disclosure – in relation to an application for a driving licence, for example). However this is likely to mean that unless the qualifications body could reasonably be expected to know about the person's disability anyway, it will not be under a duty to make a reasonable adjustment. If a disabled person expects a qualifications body to make a reasonable adjustment, s/he will need to provide it with sufficient information to carry out that adjustment.

What does the Act say about competence standards?

What is a competence standard?

- 8.27 The Act says that a competence standard is an academic, medical, or other standard applied by or on behalf of a qualifications body for the purpose of determining whether or not a person has a particular level of competence or ability. So, for example, having a certain standard of eyesight is a competence standard

s 14A(5)

required for a pilot's qualification. Having a certain level of knowledge of the UK taxation system is a competence standard for an accountancy qualification.

8.28 Qualifications bodies are likely to impose various requirements and conditions upon the conferment of a professional or trade qualification. However, any such requirement or condition only amounts to a competence standard if its purpose is to demonstrate a particular level of competence or ability. A requirement that a person has a particular level of knowledge of a subject, for example, or has the strength or ability to carry out a particular task or activity within a set period of time, would probably be a competence standard.

8.29 On the other hand, a condition that a person has, for example, a certain length of experience of doing something will not be a competence standard if it does not determine a particular level of competence or ability. The following are examples of requirements which are therefore unlikely to amount to competence standards:

- a requirement that a candidate must have at least ten years continuous experience (a person who has two periods of experience which total ten years may have equivalent ability and experience);
- a requirement that a candidate must be currently professionally employed in a particular field.

8.30 Generally, there is a difference between a competence standard and the process by which attainment of the

standard is determined. For example, the conferment of many qualifications is dependent upon passing an academic examination. Having the requisite level of knowledge to pass the examination is a competence standard. However, the examination itself (as opposed to performance in it) may not involve a competence standard – because the mechanical process of sitting the examination is unlikely to be relevant to the determination of a relevant competence or ability.

- 8.31 Sometimes, of course, the process of assessing whether a competence standard has been achieved is inextricably linked to the standard itself. The conferment of some qualifications is conditional upon having a practical skill or ability which must be demonstrated by completing a practical test. The ability to take the test may itself amount to a competence standard.

An oral examination for a person training to be a Russian interpreter cannot be done in an alternative way, e.g. as a written examination, because the examination is to ascertain whether someone can speak Russian.

A driving test for a heavy goods vehicle licence cannot be done solely as a written test because the purpose of the test is to ascertain whether someone can actually drive a heavy goods vehicle.

A practical test in tree surgery cannot be taken on the ground because the test is to ascertain whether someone can actually cut the branches of trees, including the high branches.

What is the significance of this distinction?

8.32 Special rules apply in relation to the application of a competence standard to a disabled person by or on behalf of a qualifications body. The effect of the Act is that:

- there is no duty to make reasonable adjustments in respect of the application of a competence standard; and
- in the limited circumstances in which less favourable treatment of a disabled person in the application of such a standard may be justified, justification is assessed by reference to a special statutory test (see paragraph 8.36).

8.33 It follows that it is very important to ascertain whether a particular provision, criterion or practice of a qualifications body is a competence standard and, if so, whether the matter at issue concerns the application of that standard to the disabled person concerned. Although there is no duty to make reasonable adjustments in respect of the application of a competence standard, such a duty is likely to apply in respect of the process by which competence is assessed.

A person with dyslexia taking a written test for a qualification in office administration asks the relevant qualifications body for extra time for the test because of the disability. This is likely to be a reasonable adjustment for the qualifications body to make. The person also seeks permission to leave out the questions which ask candidates to write a business letter and to précis a document. The disabled person feels substantially disadvantaged by these questions because of the dyslexia. The qualifications body would not have to make this adjustment because these questions are there to determine the disabled person's competence at writing and précising, so are part of the competence standard being tested.

- 8.34 As noted in paragraphs 8.23 and 8.24, it is advisable for qualifications bodies and, where relevant, educational institutions to ensure that they have adequate information to assess their responsibilities to disabled people. Even though a qualifications body has no duty to alter a competence standard, it needs to obtain enough information about a person's disability to decide whether a reasonable adjustment should be made to some other aspect of the process by which it confers the qualification in question. A qualifications body must ascertain whether a person's disability impacts upon a competence standard in the first place. However, as noted at paragraph 8.31, there may be an overlap between a competence standard and any process by which an individual is assessed against that standard.

When can less favourable treatment be justified in relation to competence standards?

s 3A(4)
applied by
s 14A(4)

8.35 Less favourable treatment of a disabled person can never be justified if it amounts to direct discrimination under Part 2 of the Act (see paragraph 8.10). This principle applies to the way that a disabled person is treated in the application of a competence standard in the same way that it applies to treatment of him or her in other respects.

s 14A(3)

8.36 To the extent that it does **not** amount to direct discrimination, the Act says that, where the application of a competence standard to a disabled person amounts to less favourable treatment of him or her for a reason which relates to his or her disability, that treatment is justified if, but only if, the qualifications body can show that:

- the standard is (or would be) applied equally to people who do not have his or her particular disability; and
- its application is a proportionate means of achieving a legitimate aim.

A qualifications body refuses to grant a qualification to a man who fails a fitness test. This does not amount to direct discrimination because anyone, disabled or non-disabled, failing the fitness test would be treated in the same way.

However it is less favourable treatment for a reason related to the man's disability. The treatment could be justified if the fitness test was applied equally to all candidates and the fitness test was a proportionate way of showing that the person was fit enough to carry out the essential requirements of the job to which the qualification relates.

In the above situation the qualifications body had not reviewed the fitness standards to see if they were proportionate to the requirements of the job. If it had done so, it would have found that the fitness standard demanded was much higher than many people actually working in that job could now achieve (even though these people achieved that standard at the time of qualification). The qualifications body would therefore be unlikely to be able to justify this competence standard.

- 8.37 The effect of these provisions is that, in the limited circumstances in which justification may be possible, less favourable treatment which is disability-related and which arises from the application of a competence standard is capable of justification on an objective basis. Justification does not depend on an individual assessment of the disabled person's circumstances, but depends instead on an assessment of the purpose and effect of the competence standard itself.

- 8.38 These special rules about justification are only relevant to the actual application of a competence standard. If a qualifications body applies a competence standard incorrectly, then it is not, in fact, applying the standard and these rules do not operate. Instead, the more usual test of justification operates (assuming, of course, that the incorrect application of the standard is not directly discriminatory, but that it is disability-related less favourable treatment).
- 8.39 The application of a competence standard concerning a medical requirement may, depending on the circumstances, result in less favourable treatment of a disabled person. Medical requirements which are based on stereotypical assumptions about the health and safety implications of disability generally, or about particular types of disability, are likely to be directly discriminatory – less favourable treatment of a disabled person resulting from the application of such a requirement will therefore be unlawful.

A man studying to become a social care professional has epilepsy. His condition is controlled by medication and he has not had a seizure for two years. Nevertheless the relevant qualifications body prevents him from carrying on with his training for the qualification on health and safety grounds. It does this without first undertaking a risk assessment. This is likely to be unlawful.

8.40 Nevertheless, genuine concerns about health and safety may be relevant to the justification of a competence standard concerning a medical requirement. Assuming that it does not amount to direct discrimination, the application of such a requirement to a disabled person will be justified only if the body can show that the requirement applies (or would apply) equally to people who do not have that disability. It would also be necessary to show that the requirement serves a valid purpose and is a legitimate means of achieving that purpose. The qualifications body would have to provide cogent evidence that the standard is genuinely fundamental to the needs of the profession or trade in order to ensure the competence of practitioners.

How can qualifications bodies avoid discrimination in relation to competence standards?

8.41 If unlawful discrimination is to be avoided when the application of a competence standard results in less favourable treatment of a disabled person, the qualifications body concerned will have to show two things. First, it will have to show that the application of the standard does not amount to direct discrimination. Second, it will be necessary to show that the standard can be objectively justified. This is more likely to be possible where a qualifications body has considered the nature and effects of its competence standards in advance of an issue arising in practice. It would be advisable for qualifications bodies to review and evaluate competence standards. This process might involve:

- identifying the specific purpose of each competence standard which is applied, and examining the manner in which the standard achieves that purpose;
- considering the impact which each competence standard may have on disabled people and, in the case of a standard which may have an adverse impact, asking whether the application of the standard is absolutely necessary;
- reviewing the purpose and effect of each competence standard in the light of changing circumstances – such as developments in technology;
- examining whether the purpose for which any competence standard is applied could be achieved in a way which does not have an adverse impact on disabled people; and
- documenting the manner in which these issues have been addressed, the conclusions which have been arrived at, and the reasons for those conclusions.

9 Making reasonable adjustments to premises – legal considerations

Introduction

- 9.1 In Chapter 5 it was explained that one of the situations in which there is a duty to make reasonable adjustments arises where a physical feature of premises occupied by a trade organisation or a qualifications body places a disabled person at a substantial disadvantage compared with people who are not disabled. In such circumstances the organisation or body must consider whether any reasonable steps can be taken to overcome that disadvantage. Making adjustments to premises may be a reasonable step to have to take. This chapter addresses the issues of how leases, building regulations and other statutory requirements affect the duty to make reasonable adjustments to premises.
- 9.2 The issues dealt with in this chapter largely concern the need to obtain consent to the making of reasonable adjustments where a trade organisation or qualifications body occupies premises under a lease or other binding obligation. However, such organisations and bodies should remember that even where consent is not given for altering a physical feature, they still have a duty to consider taking other steps to overcome the disadvantage which the feature causes in respect of the disabled person.

What about the need to obtain statutory consent for some building changes?

s 59

- 9.3 A trade organisation or qualifications body might have to obtain statutory consent before making adjustments involving changes to premises. Such consents include planning permission, building regulations approval, listed building consent, scheduled monument consent and fire regulations approval. The Act does not override the need to obtain such consents.
- 9.4 Organisations and bodies should plan for and anticipate the need to obtain consent to make a particular adjustment. It might take time to obtain such consent, but it could be reasonable to make an interim or other adjustment – one that does not require consent – in the meantime.

A trade organisation occupies premises with steps up to the main entrance. These premises have facilities for members, such as a conference room and a library. The trade organisation is not aware of any members who have a mobility impairment and does not do anything to make its premises more accessible. When a new member notifies the organisation that she walks with crutches and wishes to use the premises, the organisation tries to obtain statutory consent to install a ramp with a handrail. It takes several months to obtain such permission. As it cannot make this adjustment in time, it decides to make a temporary adjustment – making an existing side entrance, without steps,

available for the disabled member to use. If the trade organisation had anticipated that this need was very likely to arise (through carrying out an access audit, for example), it would have been able to make this adjustment sooner.

- 9.5 Where consent has been refused, there is likely to be a means of appeal. Whether or not the duty to take such steps as it is reasonable to take includes pursuing an appeal will depend on the circumstances of the case.

Building Regulations and building design

- 9.6 In general, the design and construction of a new building, and the extension and/or alteration of existing buildings, must comply with Building Regulations (currently the Building Regulations (Northern Ireland) 2000 ('the Building Regulations')). Part R of these Regulations ensures that reasonable provision is made for people to gain access to and use buildings. The Building Regulations require a reasonable standard of accessibility to be provided and are not intended to address the specific needs of individual disabled people.
- 9.7 Technical Booklet R sets out the methods and standards by which Part R of the Building Regulations is deemed to be satisfied. The scope of Technical Booklet R however, does not extend to certain access features (for example, the density of doors, door handles, lighting, colour contrasting, etc).

**S.R.2000
No.389**

9

**Technical
Booklet R**

- 9.8 It should be noted that under the Disability Discrimination (Providers of Services) (Adjustment of Premises) Regulations (Northern Ireland) 2003, there is a partial exemption from the duty to remove or alter an existing physical feature i.e. where the physical feature satisfies “the relevant design standard” which is where it (the physical feature) accords with the relevant provisions of Technical Booklet R: 1994 or Technical Booklet R: 2000. This exemption however only applies to service providers under Part 3 of the Act. It does not apply to trade organisations or qualifications bodies under Part 2 of the Act.
- 9.9 The fact that the design and construction of a building (or a physical feature of a building) which a trade organisation or qualifications body occupies meets the requirements of the Building Regulations does not diminish its duty to make reasonable adjustments in respect of the building’s physical features. In the context of determining what is reasonable for a trade organisation or qualifications body to have to do, it is unlikely to be reasonable for a trade organisation or qualifications body to have to make an adjustment to a physical feature of a building which it occupies if that feature accords with the relevant provisions of Technical Booklet R.
- 9.10 It is good practice for trade organisations and qualifications bodies to carry out an assessment of the access needs of each disabled person with whom it has dealings, and to consider what alterations can be made to the features of its buildings in order to meet those

needs. It is also good practice to anticipate the needs of disabled people when planning building or refurbishment works.

- 9.11 When assessing the access requirements of disabled people, it is likely to be helpful to refer to British Standard 8300:2001, 'Design of buildings and their approaches to meet the needs of disabled people – Code of Practice'. Indeed, in the context of determining what is reasonable for a trade organisation or qualifications body to have to do, it is unlikely to be reasonable for a trade organisation or qualifications body to have to make an adjustment to a physical feature of a building which it occupies if the design and construction of the physical feature of the building is in accordance with BS8300. Further information about BS8300 can be found in Appendix C.
- 9.12 Any work carried out which may be a “structural alteration” will also have to meet the requirements of the Building Regulations (see paragraph 9.6).

What if a binding obligation other than a lease prevents a building being altered?

- 9.13 A trade organisation or qualifications body may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage, charge or restrictive covenant) under which it cannot alter the premises without someone else's consent. In these circumstances, the Act provides that it is always reasonable for the organisation or body to have to request that consent, but

that it is never reasonable for it to have to make an alteration before having obtained that consent.

What happens if a lease says that certain changes to premises cannot be made?

s 18A(2)

9.14 Special provisions apply where a trade organisation or qualifications body occupies premises under a lease, the terms of which prevent it from making an alteration to the premises. In such circumstances, if the alteration is one which the organisation or body proposes to make in order to comply with a duty to make reasonable adjustments, the Act overrides the terms of the lease so as to entitle it to make the alteration with the consent of its landlord ('the lessor'). In such a case the organisation or body must first write to the lessor asking for consent to make the alteration. The lessor cannot unreasonably withhold consent but may attach reasonable conditions to the consent.

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Part 1,
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9.15 If a trade organisation or qualifications body fails to make a written application to the lessor for consent to the alteration, it will not be able to rely upon the fact that the lease has a term preventing it from making alterations to the premises to defend its failure to make an alteration. In these circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the organisation or body to have made the alteration.

What happens if the lessor has a 'superior' lessor?

- 9.16 The lessor may itself hold a lease the terms of which prevent it from consenting to the alteration without the consent of its landlord ('the superior lessor'). In such circumstances the effect of the superior lease is modified so as to require the lessee of that lease to apply in writing to its lessor (the 'superior lessor' in this context) if it wishes to consent to the alteration. As with the lessor of the trade organisation or qualifications body, the superior lessor must not withhold such consent unreasonably but may attach reasonable conditions to the consent.
- 9.17 Where a superior lessor receives an application from its lessee, the provisions described in paragraphs 9.18 to 9.31 apply as if its lessee were the trade organisation or qualifications body.

How do arrangements for gaining consent work?

- 9.18 Regulations made under the Act govern the procedure for obtaining consent. These Regulations (the Disability Discrimination (Employment Field) (Leasehold Premises) (Northern Ireland) Regulations 2004) are referred to in this Chapter as the 'Leasehold Premises Regulations'.
- 9.19 The Leasehold Premises Regulations say that, once the application has been made, the lessor has 21 days, beginning with the day on which it receives the

application, to reply in writing to the trade organisation or qualifications body (or the person who made the application on its behalf). If it fails to do so it is taken to have unreasonably withheld its consent to the alteration. However, where it is reasonable to do so, the lessor is permitted to take more than 21 days to reply to the request.

- 9.20 If the lessor replies consenting to the application subject to obtaining the consent of another person (required under a superior lease or because of a binding obligation), but fails to seek the consent of the other person within 21 days of receiving the application (or such longer period as may be reasonable), it will also be taken to have withheld its consent.
- 9.21 The Leasehold Premises Regulations provide that a lessor will be treated as not having sought the consent of another person unless the lessor has applied in writing to the other person indicating that the occupier has asked for consent for an alteration in order to comply with a duty to make reasonable adjustments, and that the lessor has given its consent conditionally upon obtaining the other person's consent.
- 9.22 If the lessor replies refusing consent to the alteration, it is recommended that the trade organisation or qualifications body inform the disabled person of this.

When is it unreasonable for a lessor to withhold consent?

9.23 Whether withholding consent will be reasonable or not will depend on the specific circumstances. For example, if a particular adjustment is likely to result in a substantial permanent reduction in the value of the lessor's interest in the premises, the lessor is likely to be acting reasonably in withholding consent. The lessor is also likely to be acting reasonably if it withholds consent because an adjustment would cause significant disruption or inconvenience to other tenants (for example, where the premises consist of multiple adjoining units).

A particular adjustment helps make a public building more accessible generally and is therefore likely to benefit the landlord. It is likely to be unreasonable for consent to be withheld in these circumstances.

A particular adjustment is likely to result in a substantial permanent reduction in the value of the landlord's interest in the premises. The landlord is likely to be acting reasonably in withholding consent.

A particular adjustment would cause significant disruption or major inconvenience to other tenants (for example, where the premises consist of multiple adjoining units). The landlord is likely to be acting reasonably in withholding consent.

reg 5

9.24 A trivial or arbitrary reason would almost certainly be unreasonable. Many reasonable adjustments to premises will not harm the lessor's interests and so it would generally be unreasonable to withhold consent for them.

9.25 The Leasehold Premises Regulations say that, provided the consent has been sought in the way required by the lease, it is unreasonable for a lessor to withhold consent in circumstances where the lease says that consent will be given to alterations of the kind for which consent has been sought.

reg 6

9.26 The Leasehold Premises Regulations provide that withholding consent will be reasonable where:

- there is a binding obligation requiring the consent of any person to the alteration;
- the lessor has taken steps to seek consent; and
- consent has not been given or has been given subject to a condition making it reasonable for the lessor to withhold its consent.

It will also be reasonable for a lessor to withhold consent where it is bound by an agreement under which it would have to make a payment in order to give the consent, but which prevents it from recovering the cost from the trade organisation or qualifications body.

What conditions would it be reasonable for a lessor to make when giving consent?

9.27 The Leasehold Premises Regulations set out some conditions which it is reasonable for a lessor to make. Depending on the circumstances of the case there may be other conditions which it would also be reasonable for a lessor to require a trade organisation or qualifications body to meet. Where a lessor imposes other conditions, their reasonableness may be challenged in the course of subsequent industrial tribunal proceedings (see paragraph 9.29).

9.28 The conditions set out in the Leasehold Premises Regulations as ones which a lessor may reasonably require a trade organisation or qualifications body to meet are that it:

- obtains any necessary planning permission and other statutory consents;
- submits plans and specifications for the lessor's approval (provided that such approval will not be unreasonably withheld) and thereafter carries out the work in accordance with them;
- allows the lessor a reasonable opportunity to inspect the work after it is completed; or
- reimburses the lessor's reasonable costs incurred in connection with the giving of consent.

reg 7

In addition, in a case where it would be reasonable for the lessor to withhold consent, the lessor may give such consent subject to a condition that the premises are reinstated to their original condition at the end of the lease.

What happens if the lessor refuses consent or attaches conditions to consent?

- 9.29 Where a disabled person brings legal proceedings against a trade organisation or qualifications body under Part 2 of the Act – and those proceedings involve a failure to make an alteration to premises – s/he may ask the industrial tribunal hearing the case to bring in the lessor as an additional party to the proceedings. The organisation or body may also make such a request. The tribunal will grant that request if it is made before the hearing of the case begins. It may refuse the request if it is made after the hearing of the claim begins. The request will not be granted if it is made after the tribunal has determined the claim.
- 9.30 Where the lessor has been made a party to the proceedings, the industrial tribunal may determine whether the lessor has unreasonably refused consent to the alteration or has consented subject to unreasonable conditions. In either case, the tribunal can:
- make an appropriate declaration;
 - make an order authorising the organisation or body to make a specified alteration;

- order the lessor to pay compensation to the disabled person.

9.31 The tribunal may require the organisation or body to comply with any conditions specified in the order. If the tribunal orders the lessor to pay compensation, it cannot also order the organisation or body to do so.

Comparison with the procedure for obtaining consent under Part 3

9.32 There are similar provisions which govern the procedure by which a service provider may obtain consent to an alteration which it proposes to make in order to comply with a duty to make reasonable adjustments under Part 3 of the Act. However, it should be noted that the procedures for obtaining consent under Parts 2 and 3 respectively differ in certain ways. In particular:

- The periods within which the lessor must respond to an application for consent are not the same – under Part 3 the relevant period is 42 days beginning with the day on which the application is received.
- Under Part 3 the lessor may require plans and specifications to be submitted **before** it decides whether to give consent.
- Under Part 3 it is possible to make a free-standing reference to the court if the lessor has either refused consent or attached conditions to it. Under Part 2, the

question of consent to alterations can only be considered by an industrial tribunal in the course of a complaint of discrimination.

10 Other relevant provisions

10.1 Additional provisions of the Act (and provisions of other legislation) are relevant to understanding the protection from discrimination afforded to disabled people in relation to trade organisations and qualifications bodies. This chapter describes those provisions, and focuses in particular on the way in which disputes under the Act should be resolved.

Resolving disputes under the Act

10.2 Chapter 2 explained that, broadly speaking, the Act does not require the internal resolution of disputes by trade organisations and qualifications bodies, but that it is desirable for grievance procedures to be used where possible. Where grievance or disciplinary procedures exist, they must not discriminate against disabled people. Trade organisations and qualifications bodies may have to make reasonable adjustments to enable disabled people to use such procedures effectively, or to ensure that they do not place disabled people at a substantial disadvantage compared with others.

10.3 The Act says that a person who believes that someone has unlawfully discriminated against him or her (which includes victimising him or her or failing to make a reasonable adjustment) or has subjected him or her to harassment, may make an application to an industrial tribunal. Such an application must normally be made within **three** months of the date when the incident complained about occurred.

s 17A(1)
s 55

Sch 3,
para 3

- 10.4 This is subject to one proviso. In cases of alleged discrimination or harassment by a qualifications body, the Act says that no application may be made to an industrial tribunal if a statutory appeal is available in respect of the matter in question.
- 10.5 Before making an application to an industrial tribunal (or within 28 days of lodging it), a disabled person can request information relevant to his or her claim from the person against whom the claim is made. This is known as the 'questionnaire procedure'. There is a standard form of questionnaire and accompanying booklet which explains how the procedure works (see Appendix C for details).
- 10.6 When an application to an industrial tribunal has been made, the Labour Relations Agency (LRA) will try to promote settlement of the dispute without a tribunal hearing. However, if a hearing becomes necessary – and if the application is upheld – the tribunal may:

- declare the rights of the disabled person (the applicant), and the other person (the respondent) in relation to the application;
- order the respondent to pay the applicant compensation; and
- recommend that, within a specified time, the respondent takes reasonable action to prevent or reduce the adverse effect in question.

10.7 The Act allows compensation for injury to feelings to be awarded whether or not other compensation is awarded.

s 17A(4)

10.8 The Act also says that if a respondent fails, without reasonable justification, to comply with an industrial tribunal's recommendation, the tribunal may:

s 17A(5)

- increase the amount of compensation to be paid; or
- order the respondent to pay compensation if it did not make such an order earlier.

10.9 Sources of information about how to make an application to an industrial tribunal are listed in Appendix C.

Other provisions

Anti-avoidance provisions

10.10 Generally speaking, a disabled person cannot waive his or her rights (or the duties of a trade organisation or qualifications body) under the Act. The Act says that any term of a contract is 'void' (i.e. not valid) where:

Sch 3A,
Part 1

- making the contract is unlawful under Part 2 because of the inclusion of the term;
- the term is included in furtherance of an act which is itself unlawful under Part 2; or
- the term provides for the doing of an act which is unlawful under Part 2.

10

10.11 Trade organisations and qualifications bodies should not include in an agreement any provision intended to avoid obligations under the Act, or to prevent someone from fulfilling obligations. An agreement should not, therefore, be used to try to justify less favourable treatment or deem an adjustment unreasonable. Even parts of agreements which unintentionally have such an effect are unenforceable if they would restrict the working of Part 2. However, as explained in Chapter 9, special arrangements cover leases and other agreements which might restrict the making of adjustments to premises.

Compromise agreements

10.12 The effect of the Act's provisions is also to make a contract term unenforceable if it would prevent anyone from making an application to an industrial tribunal under Part 2, or would force them to discontinue an application (see paragraph 10.3). There is a limited exception to this principle relating to settlement agreements which have either been brokered by the LRA, or which are made in circumstances where the following conditions are satisfied:

- the disabled person has received advice from a relevant independent adviser about the terms and effects of the agreement, particularly its effect on his or her ability to apply to a tribunal;
- the adviser has a contract of insurance or an indemnity provided for members of a profession or professional body; and

- the agreement is in writing, relates to the application, identifies the adviser and says that these conditions are satisfied.

The Act defines the circumstances in which a person is a 'relevant independent adviser' for this purpose.

Sch 3A,
Part 1

Variation of contracts

- 10.13 A disabled person interested in a contract which contains a term of the kind mentioned in paragraph 10.10 may apply to a county court for an order removing or modifying that term.

Sch 3A,
para 3

Collective agreements and rules of undertakings

- 10.14 There are also anti-avoidance provisions in the Act relating to the terms of collective agreements, and to rules made by trade organisations or qualifications bodies which apply to all or any of an organisation's members or prospective members, or (as the case may be), to all or any of the people on whom a body has conferred qualifications, or who are seeking qualifications from it.

Sch 3A,
Part 2

- 10.15 The Act says that any such term or rule is void where:

- making the collective agreement is unlawful under Part 2 of the Act because of the inclusion of the term;
- the term or rule is included in furtherance of an act which is itself unlawful under Part 2; or

- the term or rule provides for the doing of an act which is unlawful under Part 2.

10.16 It does not matter whether the collective agreement was entered into, or the rule was made, before or after these provisions became law – the term or rule in question can still be challenged under the Act. In addition, where these provisions apply, certain disabled people may ask an industrial tribunal to make a declaration that a discriminatory term or rule is void if they believe that it may affect them in the future. The Act specifies which disabled people may make such an application.

The Equality Commission for Northern Ireland

General functions

10.17 The Equality Commission has statutory powers to work towards the elimination of discrimination and to promote the equalisation of opportunity for disabled people. In particular, the Equality Commission:

- keeps the Act under review;
- supplies assistance and support to disabled litigants under the Act;
- provides information and advice to anyone with rights or obligations under the Act;
- carries out formal investigations;

- prepares new or revised Codes of Practice; and
- has various powers and duties in relation to the statutory equality duty under section 75 of the Northern Ireland Act 1998.

Enforcement of certain provisions under Part 2

10.18 In addition, the Equality Commission has a direct involvement in the enforcement of the provisions of Part 2 relating to:

- instructing or pressurising other people to act unlawfully (see paragraph 3.21); and
- discriminatory advertisements (see paragraphs 3.22 and 3.23).

10.19 Only the Equality Commission may bring proceedings in respect of these matters. Where it does so, the Equality Commission may seek:

- a declaration from an industrial tribunal as to whether a contravention has occurred; and
- an injunction from a county court restraining further contraventions.

10.20 The Equality Commission may only apply for an injunction or order if it has first obtained a declaration from an industrial tribunal that an unlawful act has occurred, and then only if it appears to the Equality

s 17B

10

Commission that a further unlawful act is likely to occur unless the person concerned is restrained.

Further information

10.21 The Equality Commission may be contacted at:

The Equality Commission for Northern Ireland
Equality House
7-9, Shaftesbury Square
Belfast
BT2 7DP

Telephone: 028 90 500 600

Textphone: 028 90 500 589

Fax: 028 90 248 687

E-mail: information@equalityni.org

or, where appropriate,

info.statduty@equalityni.org

Website: www.equalityni.org

Typetalk

10

175

A Appendix A: Changes to the Act

The table below summarises the main changes to the Act's provisions on trade organisations and qualifications bodies which took effect on 1 October 2004. It does not include all the changes occurring on that date, and is not a full explanation of the law.

	Position before 1 October 2004
Scope	<ul style="list-style-type: none"> The Act covered trade organisations
Types of Discrimination	Three kinds of discrimination: <ul style="list-style-type: none"> Less favourable treatment. Failure to make reasonable adjustments. Victimisation.
When is Justification relevant?	Justification was of relevance in cases about: <ul style="list-style-type: none"> Less favourable treatment. Failure to make reasonable adjustments.
Harassment	Covered, but no separate provisions on this.
Reasonable adjustments to physical features of premises	No requirement to make reasonable adjustments to physical features, simply to prevent the feature causing substantial disadvantage.

Position after 1 October 2004	
	<ul style="list-style-type: none"> The Act covers trade organisations and qualifications bodies
	<p>Four kinds of discrimination:</p> <ul style="list-style-type: none"> Direct discrimination Failure to make reasonable adjustments. 'Disability-related discrimination'. Victimisation.
	<p>Justification is NOT relevant in cases about:</p> <ul style="list-style-type: none"> Direct discrimination. Failure to make reasonable adjustments. <p>Justification is relevant in cases about:</p> <ul style="list-style-type: none"> Disability-related discrimination. Competence standards – where a different test of justification is used.
	<p>New provisions on harassment.</p>
	<p>Reasonable adjustments include adjustments to physical features. Note (The partial exemption from the duty to remove or alter physical features which applies to service providers under Part 3 does not apply to trade organisations or qualifications bodies)</p>

B Appendix B: The Meaning of Disability

This appendix is included to aid understanding about who is covered by the Act and should provide sufficient information on the definition of disability to cover the large majority of cases. The definition of disability in the Act is designed to cover only people who would generally be considered to be disabled. A Government publication ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’, is also available.

When is a person disabled?

A person has a disability if s/he has a physical or mental impairment, which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

What about people who have recovered from a disability?

People who have had a disability within the definition are protected from discrimination even if they have since recovered.

What does ‘impairment’ cover?

It covers physical or mental impairments; this includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities. The Act says that a mental illness must be a clinically well-recognised illness in order to amount to a mental impairment. A clinically well-recognised illness is one that is recognised by a respected body of medical opinion.

What is a 'substantial' adverse effect?

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

What is a 'long-term' effect?

A long-term effect of an impairment is one:

- which has lasted at least 12 months; or
- where the total period for which it lasts is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected.

Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months and the effects of temporary infections, from which a person would be likely to recover within 12 months.

What if the effects come and go over a period of time?

If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is if it is more probable than not that the effect will recur.

What are ‘normal day-to-day activities’?

They are activities which are carried out by most people on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport, to a professional standard or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition. The test of whether an impairment affects normal day-to-day activities is whether it affects one of the broad categories of capacity listed in Schedule 1 to the Act. They are:

- mobility;
- manual dexterity;

- physical co-ordination;
- continence;
- ability to lift, carry or otherwise move everyday objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn or understand;
or
- perception of the risk of physical danger.

What about treatment?

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (i.e. the impairment has been cured).

Does this include people who wear spectacles?

No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

What about people who know their condition is going to get worse over time?

Progressive conditions are conditions which are likely to change and develop over time. Examples given in the Act are cancer, multiple sclerosis, muscular dystrophy and HIV infection. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment is likely eventually to have a substantial adverse effect on such ability.

What about people who are registered disabled?

Those registered as disabled under the Disabled Persons (Employment) Act (Northern Ireland) 1945 both on 12 January 1995 and 2 December 1996 were treated as being disabled under the Disability Discrimination Act 1995 for three years from the latter date. At all times from 2 December 1996 onwards they are covered by the Act as people who have had a disability. This does not preclude them from being covered as having a current disability any time after the three year period has finished. Whether they are or not will depend on whether they, like anyone else, meet the definition of disability in the Act.

Are people with genetic conditions covered?

If a genetic condition has no effect on ability to carry out normal day-to-day activities, the person is not covered.

Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.

Are any conditions specifically excluded from the coverage of the Act?

Yes. Certain conditions are to be regarded as not amounting to impairments for the purposes of the Act. These are:

- addiction to or dependency on alcohol, nicotine, or any other substance (other than as a result of the substance being medically prescribed);
- seasonal allergic rhinitis (e.g. hayfever), except where it aggravates the effect of another condition;
- tendency to set fires;
- tendency to steal;
- tendency to physical or sexual abuse of other persons;
- exhibitionism;
- voyeurism.

Also, disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing, are to be treated as not having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

C Appendix C: Further information

Leaflets about the Disability Discrimination Act 1995 (“the Act”)

A range of leaflets about the Act is available from the Equality Commission

The Equality Commission for Northern Ireland
Equality House
7-9, Shaftesbury Square
Belfast
BT2 7DP

Telephone: 028 90 500 600

Textphone: 028 90 500 589

Fax: 028 90 248 687

E-mail: information@equalityni.org

Typetalk

On-line information

Information about the Act, including practical guidance about employment policies and procedures is also available on the Equality Commission’s website: www.equalityni.org.

Codes of Practice

Codes of Practice and accompanying guidance for Part 2 (this Code as well as the Disability Code of Practice on Employment and Occupation), and Part 3 (the Code of Practice: Rights of Access - Goods, Facilities, Services and Premises) are available from the Equality Commission using the contact information given above or through the Equality Commission's website.

Making a complaint

Information about making a complaint of disability discrimination to an industrial tribunal or using the Questionnaire Procedure is available from the Equality Commission or from the Office of the Industrial Tribunals and Fair Employment Tribunal (see below for contact details). A form and accompanying guidance can also be obtained from the Equality Commission, as well as JobCentres and Jobs and Benefits Offices and Citizens Advice Bureaux.

Practical guidance

In addition to the Equality Commission, there is a wide range of practical help and advice to assist employers in the recruitment and employment of disabled people available from the Disablement Advisory Service through JobCentres and Jobs and Benefits Offices. Addresses and telephone numbers of JobCentres and Jobs and Benefits Offices can be found in local telephone directories or through the Department for Employment and Learning website: www.delni.gov.uk.

Access to Work

The Disablement Advisory Service through its Disablement Employment Advisers, based in JobCentres and Jobs and Benefits Offices, provides information and advice to disabled people in work or looking for work. They are also the contact point for people wishing to get help from the Access to Work scheme. For further information on the Access to Work scheme, disabled people should contact their local Disablement Employment Adviser or see the Department for Employment and Learning website: www.delni.gov.uk.

Access to Work may be able to offer advice and help on the following:

Adaptations to premises and equipment

Modification of an employer's premises or equipment, to enable them to employ or retain a disabled employee. Employers will be expected to contribute if adaptations bring general benefits to the business, firm, other employees or customers.

Communication support at interview

Help with the costs of employing an interpreter or communicator to accompany a hearing impaired person, where there might be communication difficulties at a job interview with an employer.

Miscellaneous assistance

Provision under this element is largely 'one off' items of support that do not fit elsewhere, such as a grant towards the costs of deaf awareness training for close colleagues of a deaf person.

Special aids and equipment

Provision of aids and equipment to a disabled person which a non-disabled person doing the same job would not need. Leasing equipment can also be considered when it offers the most cost-effective solution.

Employers will be expected to contribute if aids bring general benefits to the business, firm, other employees or customers.

Support workers

Help with the costs of employing personal support for a person with a disability either at work or getting to and from work. (This includes personal reader support for a person with a visual impairment)

Travel to work

Support when a disabled person incurs extra costs in travelling to and from work because of their disability. Beneficiaries are expected to contribute the usual costs of travelling to work.

Other sources of information

Labour Relations Agency

The Labour Relations Agency (LRA) can help employers and individuals with information on legislation and on industrial relations practices and procedures. The LRA's contact details are:

Head Office: 4-8, Gordon Street
Belfast
BT1 2LG

Telephone: 028 9032 1442

Fax: 028 9033 0827

Email: info@lra.org.uk

Regional Office: 1-3, Guildhall Street
Londonderry
BT48 6BJ

Telephone: 028 7126 9639

Fax: 028 7126 7729

Email: info@lra.org.uk

Website: www.lra.org.uk

Office of the Industrial Tribunals and Fair Employment Tribunal

Longbridge House
20 – 24 Waring Street
Belfast
BT1 2EB

Tel: 028 9032 7666

Fax: 028 9023 0184

Website: www.industrialfairemploymenttribunalsni.gov.uk

Guidance on building design

Copies of British Standard 8300:2001 ‘Design of buildings and their approaches to meet the needs of disabled people – Code of Practice’ can be obtained from the British Standards Institute:

Tel: 020 8996 9002

Fax: 020 8996 7001

Website: www.bsi-global.com

Making websites accessible

Disabled people use a wide range of specialist hardware and software to access computers. It is important that websites are designed to be compatible with this.

Websites can also have ‘access features’ built into their design, such as a choice of font sizes or colour schemes.

RNIB's online Web Access Centre can provide more information on designing and evaluating websites.

Email: webaccess@rnib.org.uk

Website: www.rnib.org.uk

Health and Safety Executive for Northern Ireland

The Health and Safety Executive for Northern Ireland is the regional authority for health and safety at work in Northern Ireland and, along with the District Councils, is responsible for the regulation of the risks to health and safety arising from work activity in Northern Ireland.

Telephone: 0800 0320121 (Free phone Helpline)

Fax: 028 9023 5383

Textphone: 028 9054 6896

Email: hseini@detini.gov.uk

Website: www.hseini.gov.uk

Other sources of information

The Information Commissioner's Office provides information and guidance about the Data Protection Act and the Codes of Practice which relate to it.

Telephone: 01625 545 745

Fax: 01625 524510

Email: mail@ico.gsi.gov.uk

Website: www.informationcommissioner.gov.uk

| Index

- access audits 2.7
- advertisements 3.22–3.25
 - legal action in respect of discriminatory advertisements 3.25, 10.18
- aiding an unlawful act 3.28–3.29, 6.1
- anti-avoidance provisions 10.10–10.11
 - collective agreements 10.14–10.16
 - rules of undertakings 10.14–10.16
 - variation of contracts 10.13
- anti-discriminatory policies and practices, implementation 2.8–2.12
- assumptions about disabled people, avoiding 2.4, 4.8, 6.8, 6.11, 8.39
- auditing policies and procedures 2.13
- avoiding discrimination – action to take 2.1–2.31

- BS8300 2.7, 9.11, see Appendix C
- building design, guidance, see Appendix C
- Building Regulations 9.6–9.12
 - Technical Booklet R 9.7, 9.8, 9.9

- Complaint, making see Appendix C
- collective agreements 2.11, 10.14–10.16
- competence standards 2.12, 2.19, 5.7, 6.4, 6.11 8.2, 8.15, 8.20, 8.27–8.41, see Appendix A
 - avoiding discrimination 8.41
 - definition 8.27–8.33
 - health and safety issues 8.39–8.40
 - justification of less favourable treatment 8.35–8.40

- medical requirements 8.39–8.40
- complaints procedure 2.9
 - monitoring complaints 2.26–2.27
- compromise agreements 10.12
- conditions excluded from Act, see Appendix B
- confidentiality 7.21, 7.34–7.36
- consultation with disabled members 2.21–2.25, 7.22
- corporate members of trade organisations 3.18

- Data Protection Act 7.34, see Appendix C
- direct discrimination 3.15, 4.1, 4.2, 4.3, 4.5–4.22, 4.29, 4.36, 6.1, 6.8, 6.11, 6.14, 6.16, 7.7, 7.9, 7.17, 7.22, 7.25, 8.9–8.10, 8.12, 8.35, see Appendix A
 - by qualifications bodies 8.9–8.10
 - comparators 4.13–4.21
 - compared to disability-related discrimination 4.28
 - definition 4.5–4.6
 - evidence required to prove 4.42
 - justification 4.22
- disability, meaning of, Appendix B, 3.6
- disability awareness training 2.9, 2.12
- disability in the past 3.5
- disability-related discrimination 3.15, 4.2, 4.26–4.31
 - qualifications bodies 8.11–8.14
 - compared to direct discrimination 4.28
 - definition 4.26–4.28
 - evidence required to prove 4.42
 - trade organisations 7.8–7.9, 7.18, 7.26
- disabled person, definition Appendix B, 3.2–3.4
- disciplinary procedures 2.9, 7.16, 7.27, 10.2
- disfigurement Appendix B
- dispute resolution 2.29–2.31, 10.2–10.16
- diversity policies, see anti-discriminatory policies and practices

educational institutions 2.12, 8.8, 8.22, 8.23, 8.24, 8.25, 8.34
emergency evacuation policies 2.13
enforcement of rights under the Act 3.30
Equality Commission for Northern Ireland 1.18, 10.17–10.21
 contact details 1.18
 enforcement of certain provisions of Part 2
 3.25, 10.18–10.20
 functions 10.17
equality policies see anti-discriminatory policies and
 practices
equality, promoting 2.28
equipment owned by disabled person, use of 5.24
evidence required to prove discrimination or
 harassment 4.40–4.44
examinations 2.12, 8.6, 8.20, 8.23–8.25, 8.30, 8.31
expert advice 2.5

grievance procedures 2.9, 2.30, 10.2

harassment 3.20, 3.29, 4.4, 4.37–4.38
 definition 4.37
 evidence required to prove 4.40–4.44
 examples 4.38
health and safety issues 2.10, 5.17, 6.8–6.15
 competence standards 8.39, 8.40
 risk assessment 6.8–6.15

industrial tribunals 3.30, 10.3–10.9
 compensation 10.6–10.8
 lessor party to proceedings 9.29–9.31
 procedure 10.3–10.9
 questionnaire procedure 10.5
 statutory appeals procedures for qualifications bodies 8.3

- time limit 10.3
- use of LRA 10.6
- information, accessibility to members 7.20
- Information Commissioner's Office, contacting, see Appendix C
- instructions and pressure to discriminate 3.21, 6.1

- justification for discrimination 4.3, 6.1–6.18
 - conduct which cannot be justified 6.1
 - health and safety concerns 6.8–6.15
 - medical information 6.16–6.18
 - when permitted 4.31, 6.2–6.7

- knowledge of disability 5.11, 7.30–7.36, 8.21–8.26
 - qualification bodies 8.21–8.26
 - trade organisations 7.11–7.12, 7.30–7.36

- Leasehold Premises Regulations 9.18–9.28
- leasehold property, see reasonable adjustments to premises, lease prevents building being altered without consent

- medical information, consideration of 6.16–6.18
- membership of trade organisation 3.16, 7.4–7.29
 - accessibility of information 7.20
 - becoming a member 7.5–7.14
 - benefits of membership 7.15–7.21
 - former members 7.28–7.29
 - variation 7.22–7.29
 - withdrawal 7.22–7.29
- monitoring 2.14–2.27, 7.31
 - complaints 2.26–2.27

quantitative 2.17–2.20

qualitative 2.21–2.25

needs of disabled people, ascertaining 2.21–2.25

overview of Act's provisions 3.1–3.30

persons with rights under the Act 3.2–3.7

physical features of premises, definition 5.8–5.9

planning permission 9.3, 9.28

positive discrimination 3.14

practical tests 2.12, 8.20, 8.23–8.25

premises, reasonable adjustments see reasonable
adjustments to premises

procurement policy 2.13

professional qualification, definition 8.5–8.8

progressive conditions, see Appendix B

public authorities 1.19–1.20

purpose of Part 2 of Act 1.1–1.2

qualification, definition 8.5–8.8

qualifications bodies 3.9, 3.13, 3.19, 8.1–8.41

competence standards, see separate entry

definition 3.9, 8.8

direct discrimination 8.9–8.10

disability-related discrimination 8.11–8.14

duty to make reasonable adjustments 8.15–8.26

industrial tribunals 8.3, 10.1–10.4

obligations under Act 3.9–3.11

provisions in Act 3.13–3.15, 3.19

statutory appeals 8.3

trade organisations as 7.3–7.4

reasonable adjustments

disadvantages giving rise to reasonable adjustment

duty 5.10

duty to make 5.1–5.27

effectiveness of step 5.19

examples of adjustments (steps) 5.12–5.13

extent of reasonable adjustment duty 5.5

failure to make 3.15, 4.23–4.25, 4.42, 5.26–5.27

financial considerations 2.10, 5.18, 5.21–5.24, 7.37

health and safety concerns 5.17, 6.15

knowledge of disability 5.11

nature of activities 5.25

‘physical features’ 5.8–5.9

practicability of adjustment 5.20

‘provisions, criteria and practices’ 5.6–5.7

qualifications bodies 8.15–8.26

size of undertaking 5.25

when reasonable adjustment duty arises 5.2–5.10

when ‘reasonable’ for trade organisation or
qualifications body to have to make adjustments
5.14–5.25

reasonable adjustments to premises 9.1–9.30, 9.32

binding obligation prevents building being altered
9.13

Building Regulations 9.6–9.12

lease prevents building being altered without consent
9.13–9.31

statutory consent 9.3–9.5

references in Code 1.15

responsibility for the acts of others 3.26–3.27

rules of undertakings 10.14–10.16

size of undertaking, and consideration of
reasonableness 5.25

statutory obligations 4.39

trade organisations 3.13–3.18, 7.1–7.38

access to benefits 3.17, 7.15–7.21

as qualifications bodies 7.3–7.4

corporate members 3.18

definition 3.8

direct discrimination 7.7, 7.9, 7.17, 7.25

disability-related discrimination 7.8, 7.9, 7.18, 7.26

duty to make reasonable adjustments 7.10–7.14,
7.19–7.21, 7.27–7.28

knowledge of disability 7.30–7.36

obligations under Act 3.8, 3.11

membership, see membership of trade organisation

provisions in Act 3.13–3.18

trade qualification, description 8.5–8.8

trade unions, role 7.37–7.38

training for employees, disability awareness 2.9

unlawful act, aiding 3.28–3.29

variation of contracts, anti-avoidance provisions 10.13

victimisation 3.7, 3.15, 4.1, 4.3, 4.32–4.35, 4.36, 4.42, 6.1

website design, see Appendix C, 2.6–2.7, 2.13, 7.19

Equality Commission

FOR NORTHERN IRELAND

How can we help?

The Equality Commission for Northern Ireland can give advice and information on the Disability Discrimination Act 1995 through training, telephone and textphone advice, booklets and leaflets or we can meet with you.

For further information, please contact us at:

Promotion and Education Department
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