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The *Disability Discrimination Bill [HL]*

Bill 71 of 2004-05

The Bill will amend the *1995 Disability Discrimination Act* (DDA) and will deliver the remainder of the Government's response to the recommendations of the Disability Rights Task Force. It introduces new rights in the areas of transport and the functions carried out by public authorities. It will also strengthen and extend the DDA by introducing or extending provisions on letting premises, private clubs and local councillors. The definition of disability in the DDA will be extended to bring more people within its coverage. The Bill has been welcomed by disability groups although some 'shortcomings' have been highlighted.

The Bill extends to Great Britain except for clause 9 (the blue badge parking provisions) and clause 16 (improvements to let dwelling houses), both of which extend only to England and Wales. The Bill does not extend to Northern Ireland.

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Summary of main points

In its 1997 Election Manifesto the Labour Party committed itself to 'comprehensive and enforceable civil rights for disabled people.' In December 1999 the Disability Rights Task Force published *From Exclusion to Inclusion* in which it concluded that the *1995 Disability Discrimination Act* (DDA) 'offers significant rights but its gaps and weaknesses leave disabled people without comprehensive and enforceable civil rights.' Many of the 'gaps and weaknesses' identified by the Task Force have already been tackled (see section **I.B** of this paper), the aim of the current Bill is to deliver the remainder of the Government's response to the Task Force's recommendations. The Bill was first published as a draft *Disability Discrimination Bill* in December 2003, this draft Bill was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. Some, but not all, of the Committee's recommendations were accepted by the Government and have found their way into the current Bill. The Bill has been welcomed by disability groups although some remaining 'shortcomings' have been highlighted.

Clause 1 will bring councillors and members of the Greater London Authority within the scope of the DDA.

Clause 2 will ensure, with some exceptions, that the functions of public authorities not already covered by the DDA are brought within its scope – it will be unlawful for a public authority, without justification, to discriminate against a disabled person when exercising its functions.

Clause 3 will place a new duty on public authorities requiring them, when exercising their functions, to have due regard to the need to eliminate harassment of and unlawful discrimination against disabled persons, to promote positive attitudes towards disabled persons, to encourage participation by disabled persons in public life, and to promote equality of opportunity between disabled person and others. The duties in connection with the promotion of equality of opportunity fall partly within the remit of the Scottish Parliament. In line with the Sewel Convention, the Scottish Parliament has assented to Westminster legislation on this; the appropriate motion was passed on 24 February 2005.

Clause 4 will amend section 64A of the DDA to clarify who the correct defendant is in the case of a claim of discrimination being made against a police officer under Part 3 of the DDA.

Clauses 5 to 9 cover transport topics and include provisions that did not appear in the draft Bill, in particular clauses 6 to 8 (rail vehicles) and clause 9 (disabled persons' parking badges).

Clause 5 makes it clear that the current exemption from sections 19 to 21 of DDA 1995 for transport services extends only to transport *vehicles* and not to any infrastructure or service features. It also extends the legislation to aviation, shipping, car hire and private hire vehicles, breakdown services and leisure and tourism transport services.

Clauses 6 to 8 amend the *Rail Vehicle Accessibility Regulations1998* (RVAR). **Clause 6** ensures all rail vehicles meet the standards set in the regulations by 2020 although there may be exemptions. Any exemption order will have to be made under the affirmative procedure unless regulations have been approved by Parliament that provide for circumstances in which the negative procedure would be more appropriate.

Clause 10 will amend the DDA's new provision on discriminatory advertisements to impose a liability on a third party who publishes a discriminatory advertisement, as well as the person placing the advertisement.

Clause 11 will amend the DDA in respect of group insurance arrangements.

Clause 12 will bring private clubs with 25 or more members within in the scope of Part 3 of the DDA (Part 3 governs access to goods, facilities and services).

Clause 13 will impose a duty to provide reasonable adjustments on landlords and others who manage rented properties. This clause will not require landlords or managers to make any alterations to the physical features of premises.

Clause 14 will confer a power to modify or end the current small dwellings exemption in section 23 and new sections 24B and 24H of the DDA.

Clause 15 will make it unlawful for general qualifications bodies to discriminate against disabled persons in relation to the award of prescribed qualifications.

Clause 16 (added at Third Reading in the Lords) will make provision for cases where a disabled tenant seeks consent to make an improvement to a let dwelling house to facilitate their enjoyment of the premises. Where a lease allows alterations to be made to residential premises with the landlord's consent the clause will provide that this consent should not be unreasonably refused where a tenant wants to make a disability-related alteration. It also provides for the DRC to issue codes of practice on consent to improvements and to provide a conciliation service.

Clause 17 will extend section 56 of the DDA to provide a procedure for questions and replies to cover claims under Part 3 of the DDA.

Clause 18 will amend the definition of disability in respect of people with mental illnesses. The definition will be extended to cover people with HIV infection, multiple sclerosis or cancer, although some cancers will be excluded. The clause will clarify that there is no implied limitation to the scope of the regulation-making power which enables people to be deemed to be disabled.

The Bill extends to Great Britain except for clause 9 and the related 'blue badge' parking provisions and clause 16 (improvements to let dwelling houses), both of which extend only to England and Wales. The Bill does not extend to Northern Ireland.

CONTENTS

I Background

A. *The 1995 Disability Discrimination Act* (DDA): an overview

The DDA replaced a quota scheme for the employment of disabled people with a new right to non-discrimination in employment; made it unlawful for a service provider to discriminate against a disabled person in the provision of goods, facilities and services; and set up an advisory National Disability Council. It also permitted the Secretary of State to make regulations setting standards for taxis, trains and buses so that they were accessible to disabled passengers, including wheelchair users.

1. The definition of disability

The general definition of disability for the purposes of the Act is set out in section 1, which is subject to the provisions of Schedule 1:

> "...a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

Regulations[1] and guidance[2] have been issued under the Act to supplement the definition of disability.

The definition of disability was one of the aspects of the Act that disabled lobbyists were particularly concerned about on the grounds that it draws quite heavily on the 'medical model' of disability. Disabled groups feared that the definition of disability would exclude many people who experience discrimination, such as people who have mental health problems or who are HIV positive.

2. Employment

In employment, Part II of the Act replaced the quota system which had existed since World War II under the *Disabled Persons (Employment) Act 1944*, section 9. Most employers with 20 or more workers had a legal duty to employ a specified quota (usually 3 per cent of total workforce) of registered disabled persons. The power to prosecute for breach was hardly ever exercised, although it continued to exist until December 1997.

The main employment related provisions of the 1995 Act make it unlawful for an employer to treat a disabled person less favourably than others unless he can show that the treatment in question is justified.[3] Job applicants and self-employed people who

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1 *Disability Discrimination (Meaning of Disability) Regulations 1996* SI 1996/1455

2 *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, http://www.drc-gb.org/uploaded_files/documents/2008_229_guidance.doc

3 Sections 4 & 5

contract personally to provide services are covered, as well as those who come within the usual definition of employee. There is also a duty on employers to make reasonable adjustments to working conditions and the workplace so that a disabled person is not placed at a disadvantage.[4] Employment tribunals are given jurisdiction to determine complaints. The main emphasis in tribunal claims has been on dismissals rather than job applications.

3. Access to goods, facilities and services

Part III of the DDA places duties on those providing goods, facilities or services to the public and those selling, letting or managing premises in the UK. The Act makes it unlawful for service providers, landlords and other persons to discriminate against disabled people in certain circumstances. The duties on service providers were introduced in three stages:

- Since December 1996 it has been unlawful for service providers to treat disabled people less favourably for a reason related to their disability;
- Since October 1 1999 service providers have had to make 'reasonable adjustments' for disabled people, such as providing extra help or making changes to the way they provide their services;[5] and
- Since 1 October 2004, service providers have had to take reasonable steps to remove, alter or provide a reasonable means of avoiding a physical feature which makes it impossible or reasonably difficult for disabled people to use a service.[6]

Part III originally excluded from its provisions education funded or secured by certain bodies but the *Special Educational Needs and Disability Act 2001* has removed this exemption.[7] The use of any means of transport is excluded from Part III[8] but Part V of the Act allows the Government to make regulations setting access standards for public transport vehicles.

Unlawful discrimination under Part III can occur in two ways. First, a service provider discriminates against a disabled person if:

- for a reason which relates to the person's disability, it treats that person less favourably than it treats (or would treat) others to whom that reason does not (or would not) apply, and
- it cannot show that the treatment in question is justified.[9]

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4 Section 6
5 This does not place a duty on landlords to make 'reasonable adjustments' to their properties.
6 The *Disability Discrimination (Providers of Services) (Adjustment of Premises) Regulations 2001*
7 See section **I.B.4** of this paper
8 Section 19(5)(b)
9 Section 20(1)

Second, a service provider discriminates if:

- it fails to comply with the duty to make a reasonable adjustment, and
- it cannot show that the failure to comply with that duty is justified.[10]

The Disability Rights Commission (DRC) has published a statutory Code of Practice on Part III of the DDA, the purpose of which is to give practical guidance on how to prevent discrimination against disabled people in accessing services or premises.[11] The Code is not legally binding but courts must take it into account where relevant.

A person who believes that a service provider (or person selling, letting or managing premises) has unlawfully discriminated against him or her may bring civil proceedings in the county court in England and Wales (the sheriff court in Scotland). The DRC can provide advice to disabled people who believe they have suffered as a result of a breach of Part III of the Act.

4. The National Disability Council

Part VI and Schedule 3 to the DDA established a National Disability Council (NDC) whose principal role was to inform and advise the Government on issues relating to discrimination. Specifically, it was the duty of the NDC to draw up codes of practice and review them when requested to do so by the Government. The NDC was subsequently replaced by the Disability Rights Commission.[12]

B. Developments since 1997

1. Disability Rights Task Force & the Disability Rights Commission

In its 1997 Election Manifesto the Labour Party committed itself to 'comprehensive and enforceable civil rights for disabled people.' In October 1997, Andrew Smith, then Equal Opportunities Minister at the Department for Education and Employment, announced a three point strategy on disability rights. He said:

> This Government is determined that disabled people have the opportunity to play their full part in a modern Britain. We will:
>
> - establish a Ministerial Task Force to undertake a wide consultation on how to implement comprehensive and enforceable civil rights for disabled people;
> - move to establish a Disability Rights Commission; and

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10 Section 20(2)

11 The current Code is available online at: http://www.drc-gb.org/uploaded_files/documents/4008_223_Code%20of%20PracticePart3.pdf

12 See section **I.B.1** of this paper

- go ahead with implementing the later rights of access to goods and services in the Disability Discrimination Act (DDA). Flawed though it is, there are practical benefits to disabled people which will come about as a result.

The Government is committed to proceeding in partnership with representatives of disabled people, business, local government and others."[13]

In December 1997 the Government announced the remit of the Disability Rights Task Force. The Task Force was to:

- consider how best to secure comprehensive, enforceable civil rights for disabled people;
- make recommendations on the role and functions of a Disability Rights Commission by March 1998 and provide a full report on wider issues no later than July 1999;
- take full account of all the costs as well as the benefits of any proposals.[14]

In July 1998 the Government published a White Paper setting out its proposals on the role and functions of the Disability Rights Commission (DRC). This was based largely on the recommendations of the Disability Rights Task Force. The Government introduced the *Disability Rights Commission Bill* in the House of Lords on 3 December 1998 and in the House of Commons on 24 March 1999. The Bill received Royal Assent in July 1999.[15] The DRC has been operational since April 2000; its main duties are to:

- work towards the elimination of discrimination against disabled people;
- promote equalisation of opportunities for disabled people;
- take appropriate steps with a view to encouraging good practice in the treatment of disabled persons; and
- advise the Government on the operation of the *Disability Discrimination Act 1995* and the *Disability Rights Commission Act 1999.*

One of the main criticisms of the DDA focused on the weakness of the National Disability Council. The 1999 Act tackled this by setting up the DRC with greater powers, including powers of investigation and enforcement, thereby bringing it more in line with the Equal Opportunities Commission (in the field of sex discrimination) and the Commission for Racial Equality (in the field of racial discrimination).

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13 DfEE Press Notice, 1 October 1997
14 DfEE Press Notice, 3 December 1997
15 For more information see Library Research Paper 99/43, http://www.parliament.uk/commons/lib/research/rp99/rp99-043.pdf

2. From Exclusion to Inclusion

In December 1999 the Disability Rights Task Force published *From Exclusion to Inclusion*[16] in which it concluded that the DDA 'offers significant rights but its gaps and weaknesses leave disabled people without comprehensive and enforceable civil rights.'[17] The report made a number of key recommendations in the areas of:

- Major extensions to the DDA;
- Public sector leadership in promoting equal opportunities;
- Refinements to the detail of the DDA;
- Use of non-legislative measures; and
- Further work.

The full list of the Task Force's recommendations can be found in Annex E of the report. On publication the Government immediately announced its intention to implement the recommendations on civil rights in education (see section **4** below).

3. Towards Inclusion

In March 2000 the Government published an interim response to the recommendations for non-legislative action contained in *From Exclusion to Inclusion.* The Government's final response, *Towards Inclusion – civil rights for disabled people,* was published in March 2001. This paper set out how the Government intended to take forward the outstanding issues raised by the Task Force and also asked for the views of disabled people, disabled organisations, employers and service providers on its specific legislative and non-legislative proposals. Many of the issues raised by the Task Force will be tackled by the current *Disability Discrimination Bill.*

4. Education

The *Special Educational Needs and Disability Act 2001* (SENDA) strengthened the rights of children to inclusive education in mainstream schools, and extended the DDA to education.[18] The principle behind the legislation is that wherever possible disabled people should have the same opportunities as non-disabled people in their access to education. Part 2 of SENDA amended Part 4 of the DDA to cover all maintained and independent schools, further and higher education institutions, and Local Education Authorities (LEAs) and education authorities in respect of adult education and youth services maintained by them. Specific duties are placed on these bodies in England, Wales and Scotland:

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16 Disability Rights Taskforce, *From Exclusion to Inclusion,* 1999, available online at: http://194.202.202.185/drtf/full_report/

17 Chapter 2, para 1

18 SENDA 2001 and the Explanatory Notes on it are available on the HMSO website:www.hmso.gov.uk

- not to treat disabled pupils or students less favourably, without justification, for a reason which relates to their disability; and

- to make reasonable adjustments to ensure that disabled pupils or students are not put at a substantial disadvantage to pupils or students who are not disabled (but there is no duty for schools to remove or alter physical features or provide auxiliary aids and services).

In England and Wales there is also a duty on LEAs and schools to plan strategically to increase access over time. This duty includes planning to increase access to schools' premises, to the curriculum, and providing written material in other formats to ensure accessibility. The Scottish Parliament has legislated separately to introduce a similar duty in Scotland.[19]

The disability provisions in SENDA relating to schools came into force in September 2002, and the provisions relating to further and higher education started to be phased in from September 2002. Post 16 institutions have been required to make reasonable adjustments, including the provision of aids and services, since September 2003; and from September 2005 they will have a duty to make changes to physical features.

The Disability Rights Commission has produced two Codes of Practice on the provisions, one for schools and one for providers of post 16 education and related services. These explain the disability discrimination provisions and how they interact with other legislation and duties.[20]

In February 2004, the Government published a new strategy document *Removing Barriers to Achievement*, which set out its policies on meeting children's special educational needs.[21] The Office for Standards in Education (Ofsted) has reported recently on the progress being made by schools in England in implementing the duties they acquired under SENDA.[22]

5. Employment

a. The European Directive

In November 1999 the European Commission proposed new rules to require Member States to prohibit discrimination in employment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. Two EC directives followed this

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19 The *Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002*

20 http://www.drc-gb.org/thelaw/practice.asp

21 http://www.teachernet.gov.uk/docbank/index.cfm?id=5970

22 Ofsted, *Special Educational Needs and Disability: Towards Inclusive Schools*, 2004 http://www.ofsted.gov.uk/publications/index.cfm?fuseaction=pubs.summary&id=3737

initiative. One of these concerned race discrimination. The other, a Directive establishing a *General Framework for Equal Treatment in Employment and Occupation* led to new regulations which have changed the employment provisions in the 1995 Act. This was formally adopted at a Council Meeting on 27th November 2000. [23]

b. Amendment regulations

The *Disability Discrimination Act 1995 (Amendment) Regulations 2003* were made on 2 July 2003.[24] They came into force on 1 October 2004 at the same time as the *Disability Discrimination Act 1995 (Pensions) Regulations 2003*.[25]

These regulations are designed to implement the EC general framework directive 2000/78/EC. In terms of disability discrimination the EC directive is concerned with equal treatment in employment and occupation. The regulations make a large number of detailed changes to the Act including a new definition of "discrimination" and "harassment" as well as making consequential changes to many other Acts. The regulations also repeal the small employer exemption in section 7 (see below) and bring police officers, fire-fighters, prison officers, barristers and partners in partnerships within the scope of the Act's employment provisions (leaving only armed forces exempt).

c. Pensions

The *Disability Discrimination Act 1995 (Pensions) Regulations* make disability discrimination in relation to occupational pension schemes unlawful by inserting new sections into the employment provisions in Part II of the Act.[26]

d. Small employer exemption

Employers with fewer than 15 employees were previously exempt from the employment provisions of the Act. This threshold was originally 20 employees but in 1998 it was reduced to 15 by the *Disability Discrimination (Exemption for Small Employers) Order 1998*.[27] However, the exemption was abolished in October 2004 under the Amendment Regulations.[28]

e. Codes of practice

Under section 53 of the Act Codes of Practice can be prepared by the Secretary of State. The main code relating to employment is entitled "*For the elimination of discrimination*

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23 EC 2000/78
24 SI 2003/1673
25 SI 2003/2770
26 *ibid*
27 SI 1998/2618
28 SI 2003/1673

in the field of employment against disabled persons or persons who have had a disability" and was issued by the Secretary of State for Education and Employment on 25 July 1996. It came into force on 2 December 1996.

In May 2003 the Disability Rights Commission published a public consultation on two proposed new Codes of Practice on Employment and Occupation and on Trade Organisations and Qualifications Bodies. These replaced the previous codes in October 2004 and take account of the European directive.

6. Transport

The DDA Part V permits the Secretary of State to make regulations setting standards for taxis, trains and buses so that they are accessible to disabled passengers, including wheelchair users. It refers only to land-based transport and does not include aeroplanes or ferries.

Transport infrastructure, including bus and railway stations, airports and sea ports, is covered by Part III of the Act. Disabled access is provided under a *general* right of access, not by any specific technical regulation. Subject to a test of reasonableness, disabled people have the right to expect access to all public places, including transport terminals and interchanges. Section 19(5), however, provides a specific exemption for any service "so far as it consists of the use of a means of transport". This means that operators of transport services are currently exempt from Part 3 of the DDA. Thus there are mandatory requirements for accessible vehicles and related infrastructure but not for the services that go with them.

a. Access to vehicles

Regulations covering buses and railways have been introduced and an "informal discussion paper" has been circulated on taxis.[29]

Taxis

The Government may make regulations under section 32 of the 1995 Act to ensure that disabled people including those in wheelchairs can travel in licensed taxis in reasonable safety and comfort. They cover England and Wales. In Scotland the powers to introduce regulations are contained in section 20 of the *Civic Government (Scotland) Act 1982*, as amended by the 1995 Act.

The Government published draft specifications on taxis on 6 August 1997.[30] The proposals covered features that could be included in regulations and suggested dates for their implementation. An assessment of the economic effects showed that significant costs would

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29 More information on the provisions of the 1995 Act and the regulations made under it can be found in Standard Note SN/BT/601 *Transport and the Disability Discrimination Act 1995*.

30 DETR *Disability Discrimination Act 1995: the government's proposals for taxis,* July 1997

be involved in providing appropriate vehicles to meet the standard applied in the bus and train regulations and the proposals were put in abeyance.

In October 2003 the Government published details of its latest approach.[31] It intends to vary the application of the regulations to target first those areas where it believes accessible taxis would make the biggest impact and where additional cost would not have a major effect. The regulations will be introduced in these areas over a 10-year period from 2010 to 2020 and consultation on the proposals will start in 2005. Licensing authorities outside the first phase will not be subject to the regulations in the first instance. Instead, voluntary guidance will be issued to these authorities on establishing an appropriate mix of vehicles and on the design parameters that they should be considering. This will be monitored and a view will be taken in the future on whether the regulations should be extended to all areas.

Guide dogs

Regulations have been introduced to cover the duty to carry a blind or deaf person's dog (DDA section 37).[32] From 31 March 2001, a driver of a licensed taxi hired by or for a disabled person with their "guide, hearing or prescribed assistance" dog has a duty (a) to carry the disabled passenger's dog and allow it to remain with the passenger; and (b) not to make any additional charge for doing so.

Neil Gerrard introduced a Private Member's Bill, the *Private Hire Vehicles (Carriage of Guide Dogs etc) Bill* early in 2002 to extend the DDA to minicabs. The Bill was passed with all party support and the support of the Government.[33] A duty, similar to that imposed on taxi drivers, to carry the assistance dogs of disabled people was introduced on 31 March 2004.[34]

Buses and coaches

Proposals for regulations were published in December 1997 and August 1999.[35] The detailed analysis of the potential costs to industry showed that a strong case could be made for introducing requirements for large single deck and double deck buses but the analysis also showed that there were economic difficulties for small vehicles and high

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31 HC Deb 28 October 2003 c10WS; DfT *Taxi accessibility regulations – policy proposals*, October 2003 http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_025242-01.hcsp#P20_442

32 The *Disability Discrimination Act 1995 (Taxis) (Carrying of Guide Dogs etc) (England and Wales) Regulations 2000*, SI 2000/2990. They came into force on 1 March 2001 and guidance was issued in February 2001 for licensing authorities, drivers and passengers.

33 The *Private Hire Vehicles (Carriage of Guide Dogs etc) Act 2002* obtained Royal Assent on 7 November 2002

34 The *Disability Discrimination Act 1995 (private hire vehicles) (carriage of guide dogs etc) (England and Wales) regulations 2003*, SI 2003/3122

35 DETR *Disability Discrimination Act 1995: the government's proposals for buses and coaches*, December 1997; DETR *The public service accessibility regulations 1999 (and others) - a statutory consultation*, August 1999

floor coaches. For this reason a later date was set for full wheelchair access to these types of vehicle.[36]

Implementation dates vary according to the type of vehicle. The regulations initially apply only to new vehicles and therefore many services may continue to operate with vehicles that do not comply or with a mixture of vehicles. However, they require all buses and coaches, both old and new, to comply from 2017 for buses and from 2020 for coaches. No regulations were made covering buses with fewer than 22 passengers. The regulations apply only to public service vehicles so a vehicle that is not a public service vehicle (i.e. one that is not operated on a commercial basis for hire and reward) is outside their scope.

Rail vehicles

The consultation on rail access was slightly different to that for other types of transport. The Secretary of State had to consult under statute and publish draft regulations.[37] The *Rail Vehicle Accessibility Regulations 1998* (RVAR) apply to all new trains, trams and other track based systems first brought into use after 1 January 1999.[38] However, the Act does not allow the government to set an 'end' date by which time all rail vehicles would have to comply.

A consultation paper was published in November 2003 proposing amendments to the regulations.[39] The consultation finished on 26 January 2004 and so the provisions were not included in the draft *Disability Discrimination Bill* published in December 2003, but they have been included in the present Bill. The Government originally proposed an end date of 2025 but has since amended this to 2020.[40]

b. Infrastructure and services

Part III of the DDA 1995 places duties on those providing goods, facilities or services to the public and those selling, letting or managing premises. This part is the responsibility of the Department for Work and Pensions (DWP) not the Department for Transport (DfT). The legislation provides in a general sense for access to transport infrastructure and this includes railway stations, bus and coach stations, airports and sea ports. This means that, *subject to a test of reasonableness*, disabled people have the right to expect access to all public places, including transport terminals and interchanges.

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36 The *Public Service Vehicles Accessibility Regulations 2000* came into force on 30 August 2000 and guidelines were published in December 2000, SI 2000/1970

37 DETR *The Rail Vehicle Accessibility Regulations 1998; the Rail Vehicles (Exemption Applications) Regulations 1998 - a statutory consultation*, May 1998

38 *The Rail Vehicle Accessibility Regulations 1998*, SI 1998/2456

39 HC Deb 3 November 2003 c23WS; DfT *Consultation on the government's proposals to amend rail provisions in Part V of DDA*, November 2003
http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_025433.hcsp

40 HL Deb 29 November 2004 c15WS

In practice the speed at which full access can be achieved in transport infrastructure will vary greatly. On systems like the London Underground, a fully accessible network may never be possible, but progress can be made by ensuring that all new and refurbished stations are accessible. The same cost constraints which are a factor of the age of the system also apply to many railway stations and particularly where the only access between platforms is by means of a footbridge or subway. Guidance from the DfT to local authorities places strong emphasis on the need for all bids being put forward under Local Transport Plans to include access provision for disabled people.

An exemption contained in section 19(5), however, means that although there are mandatory requirements for accessible vehicles and related infrastructure, there are none for the services provided with them. One of the key recommendations of the Disability Rights Task Force's (DRTF) report, *From Exclusion to Inclusion*, was that this exemption for the providers of transport services should be removed.[41]

The Government accepted the transport recommendations. Its response, *Towards Inclusion – civil rights for disabled people,* made clear that further detailed consultation would be required, including a review of any financial consequences of the legislation and in November 2002 it published *Consultation on the Government's proposals to lift the exemption for transport services from some of the civil rights duties in Part III of the Disability Discrimination Acts*.[42] In this the Government proposed to extend the Part III provisions of the DDA to include rail vehicles (including trains, trams and light rail), buses and coaches and taxis and to extend them to other transport sectors - private hire vehicles, aviation, shipping and car hire services. The document considered the cost effects for the different sectors.

The Government's response to the consultation was published on 29 November 2004.[43] Responses indicated that the majority of transport service providers were already meeting the spirit of the legislation. It issued a further consultation paper setting out the details of the proposals for lifting the exemption and draft regulations. Clause 5 of the *Disability Discrimination Bill* includes provisions to replace the exemption for providers of transport services in Part 3 of the DDA 1995 (see section **II.C.1** of this paper).

c. Codes of practice

Some individual transport industries, including those not currently covered by the DDA, have their own codes to cover the disabled. Aviation and shipping were omitted from the

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41 DRTF *From Exclusion to Inclusion*, 1999

42 DfT *Consultation on the Government's proposals to lift the exemption for transport services from some of the civil rights duties in Part III of the Disability Discrimination Acts*, November 2002 http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_507584.pdf

43 DfT *DDA 1995: consultation on the removal of the Part 3 exemption for providers of transport services*, 29 November 2004 http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_033050.hcsp

DDA on the grounds that, as they are fundamentally international modes of transport, it would be more appropriate to develop good practice and standards at international level. However both industries have voluntary codes and the Government has said that although it will take reserve powers in the *Disability Discrimination Bill*, it will only use them if these standards are not being met.

Aviation

Since the DDA 1995 was introduced both the European Civil Aviation Conference and the International Civil Aviation Organisation have produced recommended practices and guidance for the industry. Defined minimum standards of care for disabled people (referred to in a European context as People with Reduced Mobility – PRMs) are included in the *European Voluntary Commitments on Air Passenger Rights*, which came into effect in February 2002. The rights of PRMs are also addressed in the European Commission's June 2002 consultation paper on airlines' contracts with passengers.[44]

The Government published a code of practice, *Access to air travel for disabled people – code of practice*, in March 2003 to improve the accessibility of air travel to the disabled.[45] The code applies only to UK registered aircraft and to UK airports. The Disabled Persons Transport Advisory Committee (DPTAC) published a separate guide, *Access to air travel*, at the same time.[46]

Shipping

In 1997 the International Maritime Organisation (IMO) published its *Recommendation on the design and operation of passenger ships to respond to elderly and disabled persons' needs*. This document gave basic advice on how the needs of disabled people should be met, including provision of information in appropriate formats and training for crews. Following this, DPTAC published a code of practice on meeting the needs of disabled people on large passenger ships, particularly ferries, in November 2000.[47] This covers such areas as travel information, booking arrangements, assistance at ports and on-board ship and the need for staff training in disability awareness.

II The Bill

The Government published a draft *Disability Discrimination Bill* in December 2003 which was subject to pre-legislative scrutiny by a Joint Committee of the House of Commons and House of Lords. Some, but not all, of the Committee's recommendations were accepted by the Government and have found their way into the current Bill. The

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44 *Airlines Contracts with Passengers*, Consultation paper of Directorate-General for Energy and Transport, with Directorate-General for Health and Consumer Protection, European Commission

45 DfT *Access to air travel for disabled people – code of practice*, March 2003 http://www.mobility-unit.dft.gov.uk/airaccess/index.htm

46 DPTAC *Access to air travel*, 2003 http://www.dptac.gov.uk/pubs/aviation/access/index.htm

47 DPTAC *Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People*, 2000 http://www.dptac.gov.uk/pubs/guideship/index.htm

aim of this Bill is to deliver the remainder of the Government's response to the recommendations of the Disability Rights Task Force. The Government has said that the Bill will widen, strengthen and deepen the DDA and make its coverage much more comprehensive.[48] The Bill has been welcomed by disability groups although some 'shortcomings' have been highlighted.

This section of the paper outlines the purpose of each clause and the main issues raised by the Joint Committee on the *draft Disability Discrimination Bill* and during the current Bill's progress through the House of Lords.

A. Public authorities

1. Councillors & Greater London Authority Members

Clause 1 of the Bill applies disability discrimination legislation to local councillors by inserting new sections 15A, 15B and 15C into Part 2 of the *Disability Discrimination Act 1995* (DDA) as amended by the Amendment Regulations.[49] This makes it unlawful for locally elected authorities to discriminate against councillors in the carrying out of 'official business.' Official business is defined in the Explanatory Notes as being where a member of a relevant authority does anything in his capacity as: a member of his own authority; a member of any body to which he is appointed by his own authority or a group of authorities that includes his own authority; or a member of any other public body.[50] The provisions apply to all local authorities in England, Wales and Scotland, including parish councils, community councils, unitary authorities and the Greater London Authority.

The measure has been included in the Bill following pressure from disability rights campaigners. The Disability Rights Taskforce recommended in its 1999 report, *From Exclusion to Inclusion*,[51] that local authorities should be placed under a duty not to discriminate against disabled councillors. This would include a duty to make reasonable adjustments (recommendation 5.18). In the Government response to the Taskforce report the Government accepted this recommendation and stated that "When legislative time allows, we will ensure that the following are protected from disability discrimination: members of county, district and London borough councils".[52]

Currently under the DDA a local authority has no legal obligations in relation to disabled councillors, although it does have obligations in relation to disabled members of staff. The Disability Rights Commission, when listing the reasons why changes to the DDA are

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48 *The Government's Response to the Report of the Joint Committee on the Disability Discrimination Bill*, Cm 6276, p3, available at http://www.disability.gov.uk/legislation/ddb/response.asp

49 The *Disability Discrimination Act 1995 (Amendment) Regulations 2003*, SI 2003/1673

50 *Disability Discrimination Bill 2004/05*

51 DfEE, 1999

52 *Towards Inclusion-Civil Rights for Disabled People*, March 2001, p44

needed, cites the case of a town councillor with a hearing impairment who found that, after renovations to the council chambers, he could not hear discussions properly. Currently the council has no legal obligations to the councillor under the DDA.[53]

The subject was raised during the passage of the *Local Government Bill 2002/03* (enacted in 2003) by Baroness Hamwee. In particular she highlighted the following issues:

> I am surprised to learn from the Disability Rights Commission, which supports this proposal, that over 13 per cent of local councillors in England and Wales have a disability. It must be a given that we want to encourage the involvement in the public services of all who have a contribution to make and that, by failing to ensure that those with a disability can overcome that disability through facilities and services, society itself risks losing out by putting barriers in the way of tapping all available talents. It is also a given that discrimination is wrong.[54]

Lord Bassam, on behalf of the Government, responded "We accept the points that have been made and we intend to deal with them in the forthcoming Disability Rights Bill."[55]

The measure was not included in the draft *Disability Discrimination Bill* when it was published on 3 December 2003. However, the Secretary of State for Work and Pensions, Andrew Smith, announced at the time that the Government intended to publish a further clause which would protect disabled local councillors from discrimination by the local authority of which they are a member.[56] A draft clause for the Bill was accordingly published on 27 February 2004 and it became clause 15 in the draft Bill. The draft Bill was then considered by a Joint Committee of both Houses.[57]

There was concern from some of those who gave evidence to the Joint Committee on the draft Bill that although coverage was being extended to councillors, other statutory elected or appointed office-holders – including MPs, peers, school governors, lay magistrates and some NHS appointments – were excluded. The Committee recommended that the Government should re-examine the clause to ensure that no statutory elected and appointed office-holders were excluded from coverage.[58] In its response to the Committee the Government did not agree with the recommendation on the grounds that measures coming into force in October 2004 (under the phasing in of Part III of the DDA), together with the measures in the draft Bill, would significantly extend protection for both statutory and non-statutory office and post-holders, and ensure that the DDA would offer protection at least as comprehensive as any other domestic anti-

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53 See http://www.drc-gb.org/publicationsandreports/campaigndetails.asp?section=oth&id=335
54 HL Deb 10 September 2003 c365
55 *ibid*, c366
56 HC Deb 3 December 2003 c62-4WS
57 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, available at http://www.publications.parliament.uk/pa/jt200304/jtselect/jtdisab/82/8202.htm
58 *ibid*, para 262

discrimination legislation.[59] Amendments *were* made to clause 2 (discrimination by public authorities) at Third Reading that will extend the protection offered to public office- holders (see section **II.A.2** below[60]).

Other areas considered by the Joint Committee included the definition of 'official business.' The Committee (prompted by evidence from the Local Government Association) considered there to be a number of grey areas and recommended that guidance should identify those activities undertaken by councillors for which reasonable adjustments should be provided. The Government response indicated that this would be the responsibility of the DRC.[61] The Committee also expressed concern that the provisions in the draft Bill did not protect councillors from being discriminated against in appointment to an office or authority, appointment to a committee or sub-committee, or appointment or nomination to a body exercising any power of authority.[62] Again, the Government rejected the amendment on the grounds that "We do not accept that legal oversight is necessary in relation to such appointments within a democratically elected body."[63]

The subject was raised in Grand Committee in the House of Lords on 13 January 2005.[64] An amendment by Lord Carter sought to extend the protection of the Bill to public appointees who do not receive any remuneration for their work, including public appointments made by regional and local authorities such as school governors.[65] At present, disabled people who serve on public bodies such as health authorities are protected against discrimination if they are appointed by Ministers and are paid for their services. If they are not paid, or the post-holder is appointed by a public body such as a local authority, they are not covered. Baroness Hollis of Heigham, Parliamentary Under-Secretary of State at the Department for Work and Pensions, explained why the Government did not feel this was necessary:

> The purpose of this clause, as its heading suggests, is to ensure protection against discrimination for disabled people involved in public representation. That is the very thing the DDA already does and the Bill would complete. Once our package of reforms is in place, the DDA will protect office holders as comprehensively as any other equality legislation.
>
> The 2003 regulations covered many offices and posts for the first time—as Committee Members will know because most of us were present at those

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59 *The Government's Response to the Report of the Joint Committee on the Disability Discrimination Bill*, Cm 6276, available at http://www.disability.gov.uk/legislation/ddb/response.asp

60 Pages 26-27

61 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, para 271

62 *ibid*, para 263

63 *The Government's Response to the Report of the Joint Committee on the Disability Discrimination Bill*, Cm 6276, recommendation 45

64 HL Deb 13 January 2005 cc57-122GC

65 HL Deb 13 January 2005 cc57-8GC

> discussions—and gave greater protection to offices and posts that had previously been covered. For example, police officers gained protection for the first time and people appointed by Ministers gained much wider protection than had previously existed under the DDA. This clause covers councillors, fulfilling a promise made by the Government towards inclusion.[66]

As noted above, amendments were made to clause 2 (discrimination by public authorities) at Third Reading that will extend the protection offered to public office-holders (see section **II.A.2** below[67]).

a. Members of Parliament

In Grand Committee in the House of Lords, Lord Skelmersdale moved an amendment which sought to extend the protection of the Bill to Members of Parliament and Members of the Scottish Parliament, not included in the clause as originally introduced.[68] Baroness Hollis of Heigham explained the Government's rejection of this amendment and of previous recommendations from the Disability Rights Task Force:

> The Disability Rights Task Force in its 1999 report, *From Exclusion to Inclusion* looked at whether the Disability Discrimination Act should be extended to cover elected members including councillors, MPs, MSPs and Members of the Welsh Assembly. The task force was unequivocal in its recommendations. While it sought the protection of the law for local councillors, which my noble friend Lord Carter has just pressed me on and which we are delighted to see in the framework of the Bill, the task force recommended that internal procedures of Assemblies or Parliaments should be used to secure reasonable adjustments for their Members. The Government agree with that conclusion. The inclusion of Members of Parliament within Clause 1 would undermine an important principle. That principle is that Parliament should have sole control over its own affairs and procedures; it is the principle of "exclusive cognisance".
>
> Contrary to this principle, the imposition of non-discrimination duties in relation to MPs would mean that issues surrounding the conduct of their official business could be determined by employment tribunals and, on appeal, the courts. The same argument applies to the exemptions for Parliament from the new duties applied to public authorities. These very limited exemptions follow the pattern of the exemptions from equivalent provisions in the *Race Relations (Amendment) Act 2000*.
>
> If the DDA were extended to functions such as these, MPs here in Westminster who had been disciplined by the Speaker might expect to be able to challenge such sanctions in courts or tribunals. This would allow the courts to exercise

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66 HL Deb 13 January 2005 c60GC
67 Pages 26-27
68 HL Deb 13 January 2005 c63GC

> control over parliamentary procedures in breach of the principle of "exclusive cognisance"
>
> Members of the Committee will wish to note that the Joint Committee which scrutinised the draft Bill considered this exemption and invited the Clerks to the Parliament to give written evidence. The Joint Committee did not, however, recommend that these exemptions should be removed from the Bill. So there has been no support from either the task force or the Joint Committee.[69]

The Minister's contention – that extending the measure to Members of Parliament would undermine the principle that Parliament should have sole control over its own affairs and procedures – reflects comments made by the Joint Committee on Parliamentary Privilege in its report of 1999. The Joint Committee considered whether the "precincts of parliament" should be a "statute free zone" and therefore whether the extension of such rights to Members of Parliament would break the principle that Parliament should control its own affairs. The Joint Committee referred to the *A P Herbert* case in 1934, where Lord Chief Justice Hewart "decided the courts would not hear a complaint regarding sales of alcohol in the precincts of Parliament without the necessary licence because the House of Commons was acting collectively in a manner which fell within the area of the internal affairs of the House."

The Joint Committee considered that "This decision, which has not escaped criticism, has spawned difficulties and anomalies, mainly but not solely in the field of employment" and continued:

> Many [such] Acts have been applied voluntarily, but the criticism remains that the law-makers are exempt from the laws they make for everyone else. This criticism is forceful, because these Acts cover activities far removed from core activities of Parliament. Parliamentary privilege exists to enable members to discharge their duties to the public. It cannot be right that this privilege should have the effect that Parliament itself, within the place it meets, is not required to comply with its own laws on matters such as health and safety, employment, or the sale of alcohol.
>
> 251. Whether the decision in the *A P Herbert* case was in accordance with earlier cases is not a matter we need pursue. The decision has never been considered in a higher court. For the purposes of this review, it is the practical consequences that matter. We consider the practical consequences of this decision are not satisfactory. We recommend the enactment of a provision to the effect that the privilege of each House to administer its own internal affairs in its precincts applies only to activities directly and closely related to proceedings in Parliament. We recommend, further, there should be legislation clarifying that, as to activities which are not so related, there should be a principle of statutory interpretation that in the absence of a contrary expression of intention Acts of Parliament bind

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[69] HL Deb 13 January 2005 cc64-65GC

> both Houses. The legislation could usefully include some examples of internal affairs on each side of the line. We envisage this provision would operate for the future, because a sweeping retrospective change applying to all existing legislation would have unforeseeable practical repercussions. For the future, whenever Parliament is to be exempt, a reasoned case should be made out and debated as the legislation proceeds through Parliament.[70]

In response to Lord Skelmersdale in Grand Committee, the Minister nonetheless accepted that "Parliament should still choose to behave as if the exempted functions relating to Parliament were within the scope of the DDA in the same way as it voluntarily applies the provisions of other Acts".[71]

No amendments were made to the clause either in Grand Committee, on Report or at Third reading.

2. Discrimination by public authorities

Under the existing provisions of the *1995 Disability Discrimination Act* (DDA) it is unlawful for public and private sector bodies to discriminate against disabled people in employment (Part 2), in providing services (Part 3) and in education (Part 4). It has been accepted that there are some significant types of activities carried out by public authorities that do not constitute 'services' and thus are not covered by the DDA, for example the administration of the prison service and law enforcement by the police.

Clause 2 of the Bill will insert into Part 3 of the DDA a section which makes it unlawful for public authorities to discriminate in the carrying out of any of their 'functions' not already covered by the DDA. Public authorities will also be placed under a duty to make 'reasonable adjustments' where a function is carried out 'and for a reason related to the disabled person's disability, the outcome of the carrying-out of the function is very much less favourable for him than it is or would be for others to whom the reason does or would not apply.' Certain public authorities will be excluded from the duties arising under clause 2, such as both Houses of Parliament and the security services. A regulation-making power will provide for other public authorities or functions to be excluded in the future.

The Joint Committee on the draft Bill raised the question of the 'grey area' between services provided by, and functions of, public authorities. The Committee called for an amendment to make clause 2 'more accurately and explicitly reflect the trigger found in Part 3 of the DDA.'[72] Baroness Darcy de Knayth pursued this issue in Grand Committee:

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70 Report of the Joint Committee on Parliamentary Privilege, HL 43-I / HC 214-I, 1998-99, para 250: http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm

71 HL Deb 13 January 2005 c65GC

72 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 187

> Several questions arise on the functions and services divide. Are the functions of planning and granting of planning permission by local authorities covered under Clause 2 as functions or as services? The process of planning a car park could be a function, whereas operating one is presumably a service. Pedestrianising an area could be held to be a function. Could its continuing existence be deemed a service? What about, for instance, congestion charging, park-and-ride schemes, establishing home zones, setting out nature trails, and any other activities involving highways, roads, footpaths and pavements? Are they covered as functions or as services?[73]

Baroness Hollis of Heigham, for the Government, responded to this point by stating that all the functions of public authorities will be covered unless explicitly excluded on the face of the Act:

> For example, planning and planning permissions are a function; operating a car park is a service; highways and pedestrianisation et cetera depend on the facts of the case, but Clause 2 ensures that all activities of public authorities are covered.[74]

Another area of concern in relation to clause 2 is the circumstances in which a public authority might be justified in discriminating against a disabled person. The Bill provides for a possible justification where the public authority can show that the treatment, or failure to comply with the relevant duty, is a proportionate means of achieving a legitimate aim. There are fears that this, and other possible justifications, such as the cost involved and the need to protect the rights and freedoms of others 'might provide a loophole for some public authorities to do very little.'[75]

Baroness Hollis rejected the idea that the concept of proportionality would be used as a means of overriding the rights of minorities:

> There seems to be a general belief here regarding "proportionate" being considered in some Benthamite sense as regards 500 versus 50, and the 50 always losing out. The example given by the noble Baroness concerned pedestrianisation. She asked whether the provision would always mean that minority rights would be overridden because you can claim that "proportionate" means that the majority will must always prevail. I had hoped that we had had a go at that at Second Reading, but clearly we did not do so sufficiently. No other body that I am aware of has raised this concern. "Proportionate" is a good term here. It does not relate to a balance of numbers but to whether there are proportionate means of achieving the aim of public policy. A pedestrianisation scheme, for example, would not be judged on the numbers affected—500 for, 50 against, or whatever—but on whether it achieved that public aim, taking into account the effect on the rights of disabled people and whether the way of going

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73 HL Deb 13 January 2005 c78GC
74 HL Deb 13 January 2005 c83GC
75 HL Deb 13 January 2005 c79GC

> about it had the least detrimental effect on disabled people. That is the intent. There may very well be clashes of policy, of which I shall give examples. A clash may arise between the pressure exerted by the provisions of the DDA and another consideration, for example, the environment.
>
> …However, one has to adopt a proportionate response. That proportionate response ensures that the needs of disabled people are not overlooked as opposed to the argument being advanced that they would be outvoted. The concept of proportionality comprises ensuring that those rights are considered and are protected when pursuing a different goal, for example, as I say, an environmental goal or the repair and rehabilitation of major listed buildings. That is the push behind the concept of proportionality.
>
> …I hope that I have allayed some of the fears about the concept of proportionality. As I say, it is used in the Employment Equality (Sexual Orientation) Regulations 2003, and is a well known principle of EU law and ECHR law, carefully designed to enable a court to assess the legality of government action.
>
> Let me give another example, as opposed to the pedestrianisation one that we have explored fairly thoroughly this afternoon. It might be necessary for a law enforcement agency such as HM Revenue and Customs to stop a higher proportion of wheelchair users than other travellers coming through customs, if it had information suggesting that particular passengers were likely to be concealing illegal drugs in the frames of wheelchairs on a certain day. On the other hand, it would clearly not be proportionate for a wheelchair user to find that the local police stopped him or her every time that he or she visited a local shopping centre.
>
> I shall give another example. A blind juror might not be selected for a case if it was necessary to see the evidence. That would be less favourable treatment for a reason related to disability, but the overriding importance of administering justice fairly means that the less favourable treatment would be proportionate in that case.[76]

On Report Baroness Hollis confirmed that the Disability Rights Commission will have power to issue guidance on all the provisions in Parts 2 to 5A of the Act, inlcuding the 'justification' provisions in clause 2.[77]

Clause 2 was amended during Third Reading in the Lords. Baroness Hollis moved a Government amendment to ensure that the clause covers not only the function of appointing a public officer-holder, but also the treatment of an office-holder once in post

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[76] HL Deb 13 January 2005 cc82-83GC
[77] HL Deb 3 February 2005 c388

and arrangements by a public authority for holding elections for some office-holders, such as parent governors of schools.[78]

3. Duties of public authorities

Although the DDA currently makes it unlawful for public authorities to discriminate against disabled people by treating them less favourably in employment, in the provision of their services and also in certain aspects of education, there is no positive duty on them to promote equality of opportunity.

Clause 3 will insert a new Part 5A into the DDA which will impose similar duties on public authorities to those under section 71 of the *Race Relations Act 1976* (as substituted by the *Race Relations (Amendment) Act 2000*, section 2). The new provisions will require public bodies, when making decisions or when developing or implementing a new policy, to consider the needs of disabled people with a view to eliminating discrimination and harassment and to improving opportunities for, and promoting positive attitudes towards, disabled people. The Government published its proposals in relation to these provisions in July 2004.[79]

As originally drafted clause 3 did not place a duty on public authorities to have regard to the 'need to promote positive attitudes towards disabled persons' nor did it include a duty to have regard to 'the need to encourage participation by disabled persons in public life.' These amendments to clause 3 were moved by Baroness Hollis on Report in response to arguments made in Grand Committee by Lord Carter and Lord Rix.[80] The DRC has started to consult on a draft code of practice on the duty to promote equality.

The Joint Committee on the draft Bill recommended that the definition of a public authority in the Bill be replaced by the insertion of a list of authorities to which the clause 3 duties would apply.[81] On Report Lord Skelmersdale moved an amendment which would have had this effect and explained why he thought such a change was necessary:

> My Lords, the Bill as currently drafted defines a public authority as,
>
> "any person certain of whose functions are functions of a public nature".
>
> That definition is the same as that used in the Human Rights Act 1998.

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78 HL Deb 28 February 2005 c49

79 DWP, *Delivering Equality for Disabled People*, Cm 6255, July 2004, available at: http://www.dwp.gov.uk/publications/dwp/2004/equality/main_doc.pdf

80 HL Deb 3 February 2005 cc389-90

81 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 220

> There appears to be a problem here. The Joint Committee on Human Rights, in its recent document, *The Meaning of "Public Authority" under the Human Rights Act*—that is the seventh report of the Session 2003-04—highlighted that this definition has been applied by the courts in an inconsistent and restrictive manner. This has left those providing important public services from the state and private sectors uncertain of their responsibilities. While pure public authorities may be clear about their obligations, hybrid organisations, such as voluntary sector service providers about which we will speak a little later, funded by statutory services and registered social landlords may not.
>
> It has therefore been suggested to me that public authorities be defined in the Bill by the provision of a list. We consider that there is an imperative need for certainty as to who is and who is not subject to the new positive duties. This would enable public authorities and the public, in particular disabled people, to know with absolute certainty which authorities are subject to the statutory duty. The provision of a list would also make the Bill's duty on public authorities consistent with other discrimination legislation such as the Race Relations Act, which also provides a list of public authorities.[82]

Baroness Hollis resisted the adoption of a 'list approach' and gave the following reasons for the Government's position:

> These amendments seek to replace the generic definition of "public authority" with an approach based around a prescriptive list of bodies. It has been argued that only by having a list can bodies be sure who is covered and only by having a list can people outside have confidence that they are covered.
>
> I disagree. The Government have thought about this very carefully and have tried to sort out whether we should go down one path or the other. We believe that the best approach is to set out a clear statement of principle that bodies which carry out functions of a public nature are subject to the duty in the new Section 49A unless the law expressly excludes a body from the coverage of the duty. This approach is similar to that adopted in the Human Rights Act. The Joint Committee on Human Rights—and this is important—did not believe that generic definitions should be replaced by a list, but instead be backed up by guidance. Therefore, there is a discrepancy between the Joint Committee on Human Rights and my noble friend's committee.
>
> However, the DRC can issue guidance, so we are consistent with the approach. That approach is similar to that adopted in the Human Rights Act and others in which a generic definition of "public authority" is used; for example, the Companies (Audit, Investigations and Community Enterprise) Act 2004.
>
> Let me explain why we believe it to be the case. First, last year the Joint Committee on Human Rights considered in some detail the meaning of "public

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[82] HL Deb 3 February 2005 cc392-3

> authority" in the Human Rights Act. It considered whether it was appropriate to recommend a list-based approach as an alternative, but dismissed the idea as it did not feel that it would be advantageous to do so. It felt that a generic definition avoided the risk of a list becoming restrictive in its application, and that even with a list there was still room for judicial interpretation. It was talking about the term "public authority" in relation to the Human Rights Act, but we think it has relevance here.
>
> Secondly, I think it is clear to those people working in public bodies that they are carrying out functions of a public nature. The police know that; the NHS knows that; teachers working in schools know that; as do people working in government departments and local councils. I do not believe that anyone would argue that these key bodies are not public authorities, so there is no advantage in listing them.
>
> That leads me to my third point, which I think is well illustrated by the list of bodies created by the amendment. The amendment proposes a list of bodies and a mechanism for amending it by regulation. That list, in the view of the Government, does not go far enough. While impressive in coverage, it fails, for example, to take account of the full range of bodies disabled people would expect to be covered. For example, important parts of the NHS, such as strategic health authorities, would not find themselves subject to the duty with the list as it currently stands in the amendment. I suspect that if we were to scratch away we would find others which had not been included.
>
> For the list to cover the public sector properly, the list would need amending regularly as the public sector changes in a way that is unnecessary if a generic description or a definition of "public authority" based on what bodies are, and what they do, is applied.
>
> Therefore, we believe that a generic definition is stronger and more helpful. We believe that the presumption that the duty applies across the public sector is a strength. It is a principle that the public sector understands and it is a principle which ensures that the duty continues to apply and cannot be allowed to become out of date, for example, by a government failing to amend a list promptly.
>
> These amendments would undo all of that and, therefore, the Government are opposed to them. Perhaps I may say that the Disability Rights Commission prefers the Government's approach—the generic approach—and is right.[83]

Baroness Hollis confirmed that the duties imposed by clause 3 will apply equally to schools and other educational bodies.[84]

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[83] HL Deb 3 February 2005 cc394-5
[84] HL Deb 3 February 2005 c409

The Joint Committee on the draft Bill recommended that the full Bill should make clear that a public authority is responsible for compliance with the clause 3 duties (then clause 8), regardless of whether its functions are contracted out to a private body. In its response the Government agreed that these bodies should 'give due regard' to their clause 3 duties whether they deliver their functions directly or contract certain of them out to private or voluntary bodies. The Government said that the drafting of clause 3 would achieve this.[85]

The duties imposed by clause 3 in connection with the promotion of equality of opportunity fall partly within the remit of the Scottish Parliament. In line with the Sewel Convention, the Scottish Parliament has assented to Westminster legislation on this; the appropriate motion was passed on 24 February 2005.

B. Police

Regulation 25 of the *Disability Discrimination Act Amendment Regulations 2003* brought the police within the scope of the *Disability Discrimination Act*, and gave chief officers of police vicarious liability for discriminatory actions under its employment provisions.

Clause 4 would extend this liability to include actions under part 3 of the DDA, which covers services. This would cover situations where, for example, a police officer is alleged to have discriminated against a disabled person when carrying out his duties. The clause is almost identical to clause 11 of the draft *Disability Discrimination Bill*, which the Joint Committee found uncontentious,[86] and was agreed to without debate in the Lords Grand Committee.[87]

C. Transport

As well as pre-legislative scrutiny of the draft Bill by the Joint Committee of the House of Commons and House of Lords, the subject was considered by the House of Commons Transport Committee in November 2003.[88] It published a later report *Disabled People's Access to Transport: A year's worth of improvements?* on 4 March 2005.[89]

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85 *The Government's Response to the Report of the Joint Committee on the Disability Discrimination Bill*, Cm 6276, recommendation 38

86 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 351

87 HL Deb 13 January 2005 c109GC

88 Transport Committee *Disabled people's access to transport*, 6th report 2003-04, 10 March 2004 HC 439 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmtran/439/43907.htm#a10
The Government's response, May 2004, Cm 6184: http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/pdf/dft_mobility_pdf_028886.pdf

89 Transport Committee *Disabled People's Access to Transport: A year's worth of improvements?* 3rd report 2004-05, 4 March 2005, HC 93 http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmtran/93/9302.htm

Clauses 5 to 9 of the Bill cover transport topics and include provisions that did not appear in the draft Bill, in particular clauses 6 to 8 (rail vehicles) and clause 9 (disabled persons' parking badges). The House of Lords made some major amendments to clause 6.

1. Exemption for transport services

Physical changes to transport vehicles are already covered by the DDA 1995, but an exemption contained in Part III (section 19(5)) means that although there are mandatory requirements for accessible vehicles and related infrastructure, there are none for the services provided with them. This anomaly could lead to discrimination and could reduce the effectiveness of the vehicle design regulations made under Part V of the Act.

Section 19 of DDA 1995 makes it unlawful to discriminate against a disabled person in the provision of goods, facilities and services and section 21 refers to the duty to provide adjustments. The Government consulted on its proposals to remove the exemption for transport services in November 2002[90] and its response to the consultation was published in November 2004.[91] This included a further consultation on the regulations detailing the proposals for lifting the exemption and the dates for doing so.

Clause 5 of the Bill inserts a new section 21ZA that makes it clear that the current exemption from sections 19 to 21 for transport services extends only to transport *vehicles* and not to any infrastructure or service features. It also creates a power to enable the exemption to be lifted for different services at different times. It is the same as clause 3 of the draft Bill.

Clause 5(4) defines "transport service" as any service that involves the transport of people by vehicle and this is specifically defined to include a vehicle without wheels and any form of "guided" transport. Thus in future aviation, shipping, car hire and private hire vehicles will all be covered by the legislation. It will also cover breakdown and leisure and tourism transport services.

When considering the draft Bill, the Transport Committee concluded that it was vital that transport services were brought within the scope of Part III of the *Disability Discrimination Act 1995:* "It is repellent that it is currently permissible for transport providers to discriminate against someone solely because of disability, and this should be changed. We were told that people in wheelchairs could be refused entry to an accessible bus, and that this did happen. It should be clear that this is not permissible. We also support the government's intention to bring aviation and shipping within the scope of

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90 DfT *Consultation on the Government's proposals to lift the exemption for transport services from some of the civil rights duties in Part III of the Disability Discrimination Acts*, November 2002 http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_507584.pdf

91 DfT *DDA 1995: consultation on the removal of the Part 3 exemption for providers of transport services*, 29 November 2004 http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_033050.hcsp

the law if voluntary codes of practice are ineffective in securing disabled people their rights."[92]

The proposal to bring transport services within the scope of Part 3 was universally welcomed by the Joint Committee.[93] Concerns were, however, raised over the use of regulations to lift the exemption on transport services involving the provision or use of a vehicle, the timing of the regulations and their content. The Committee commented that the way in which the changes were to be made was rather convoluted.

Some groups, for example members of the Disability Charities Consortium (DCC), called for the immediate lifting of the transport exemption for all forms of transport, arguing that "removing the exemption from all modes of transport would bring greater clarity to this extremely confusing area of law".[94] The majority of other submissions were content with the government's more gradual approach to lifting the exemption. The Law Society and DPTAC agreed that specific modes of transport needed individual consideration and time to learn from the application of Part 3 in other service provision areas.[95] Most called, however, for the Government to set out clearly the timetable for introducing all the regulations, and for this timetable to be as speedy as possible.[96]

Concern was also expressed about the content of the regulations. Proper assessment of the proposals was limited by the fact that the regulations were not available to the committees. However, the minister promised that the regulations would not be detailed technical regulations, as for transport vehicles in Part 5, but would "set out what specific provisions of Part 3 will apply for each transport system".[97]

Draft regulations were published in November 2004 and will make it illegal for transport service providers to:[98]

- discriminate against a disabled person in refusing to provide, or deliberately not providing, a service which is provided to other members of the public, or in providing a service of a lower standard or on less good terms than those available to other members of the public.
- require, where reasonable, changes to any "practice, policy or procedure" which makes it impossible or unreasonably difficult for a disabled person to make use of the service.

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92 Transport Committee 6th report 2003-04, para 13
93 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004
94 Joint Committee, vol II Ev 76, para 5.7
95 Joint Committee, vol II Ev 174, para 6
96 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 131
97 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 133; vol II Q 654 (Tony McNulty MP)
98 DfT *DDA 1995: consultation on the removal of the Part 3 exemption*

- require, where reasonable, the provision of an auxiliary aid or service which would enable a disabled person to make use of a service available to other members of the public.

Subject to the progress of the Bill through Parliament, the Government proposes to bring in the provisions for all transport services except aviation and shipping in December 2006.

The cost to transport providers of these provisions is set out in detail in the regulatory impact assessments (RIAs) to the Bill and the draft regulations.[99] The main part of the cost is likely to be the training of staff. The RIA estimates the quantifiable annual costs for each sector as:

- bus and coach industry £3.6 million;
- taxi and private hire trade, where there is an associated loss of earnings for self-employed drivers, £4.5 million;
- car hire business, where there may be costs involved in adapting vehicles, about £1.6-1.9 million; and
- rail industry around £6.75 million. In addition, if staffing levels were increased as a result of lifting the transport exemption for rail services, the recurring costs would be in the region of £45-135 million per annum.

In most cases, there are likely to be additional one off costs.

a. 'Reasonable' adjustments

The adjustments that organisations are required to make to services under Part 3 of the DDA hinge on the concept of reasonableness. The Bill provides for the removal of the exemption for transport services to make "reasonable" adjustments in the provision or use of a vehicle. The concept of what is reasonable could have very significant financial implications for operators. The DRC has already produced an extensive code of practice on Part 3 (as it affects other service providers), which includes examples of "reasonable adjustments in practice" and is currently working on a code but with examples specific to the transport industry.[100] The Transport Committee reported this should be ready by December 2005.[101]

The DfT's consultation on the Part 3 DDA proposals in 2003 found considerable industry concern about the concept of "reasonableness". Ministers' view is that such concerns will

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[99] DfT *DDA 1995: consultation on the removal of the Part 3 exemption*, pp 11-26

[100] Disability Rights Commission *Disability Discrimination Act 1995 Code of Practice Rights of Access Goods, Facilities, Services and Premises*, 2002 http://www.drc.org.uk/open4all/law/Code%20of%20Practice.pdf

[101] Transport Committee 3rd report 2004-05, para 20

be covered by the DRC's code of practice but that ultimately, it is a matter for the courts to determine 'reasonableness'.

The Law Society argued that a single test should be applied throughout the DDA where a reasonable adjustment is required when a disabled person has been placed at a 'substantial disadvantage' in comparison with non-disabled people.

The Transport Committee was particularly concerned that transport operators should not be faced with the uncertainty and contradictions inherent in the concept of reasonableness currently found in law.[102]

The Joint Committee concluded:

> The Government intend that the DRC will produce a code of practice specific to the transport sector. This code, and its effective dissemination, will be crucial in ensuring that operators are clear about their responsibilities, and disabled people are clear about what it is reasonable for transport operators to do. **The Committee recommends that this code should be very clear about what is reasonable for transport operators in each sector and in different circumstances**. The Committee hopes that a detailed code will reduce the need for the cost and uncertainty of court cases. In recognition of the importance of this code of practice, and in order to allow Parliament to play its part in scrutinising the code, **the Committee endorses the recommendation of the House of Commons Transport Committee that any DRC codes of practice on transport should be made subject to the affirmative procedure rather than the negative procedure.** This would guarantee that the code would have to be debated and specifically approved by each House of Parliament.[103]

The Government commented that:

> 4(g): The DDA employs two triggers for reasonable adjustment. In Part 2 an employer must make an adjustment if a disabled employee would otherwise suffer a 'substantial disadvantage' - but such adjustments need only be made when a disabled employee (or potential employee) presents themselves, and the employer knows that an adjustment would be appropriate. That is, it is a reactive duty of reasonable adjustment. In Part 3, on the other hand, there is a higher trigger for a reasonable adjustment - that it would otherwise be 'impossible or unreasonably difficult' for a disabled person to make use of a service - but service providers must take steps in advance in order to meet the needs of disabled people. That is, it is an anticipatory duty of reasonable adjustment. The Government believes that this arrangement reflects the difference between the close, continuing relationship between employers and employees, and the more

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[102] Transport Committee 6th report 2003-04, para 22-3

[103] *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 141

> ephemeral relationship between service providers and their users, and that there is no evidence to suggest that it does not work well in practice.[104]

b. Training

The Government sets out their schedule of estimated costs of the proposals in the RIA. Apart from the potential cost of removing the 24-hour book-ahead requirement for trains, the greatest costs for the transport sector relate to providing disability equality training to employees. The Government's most recent estimates suggest non-recurring costs of £37.5 million and annual ongoing costs of £15.65-15.85 million per annum.[105] Removal of the 24 hour book-ahead requirement would be very expensive and the Government has not pronounced on this. [106]

Many disability groups stressed the importance of effective disability equality training. The Confederation for Passenger Transport did not consider that extending disability equality training would present their members with great difficulties, but noted that current training "will be totally inconsistent and may well be inadequate because there are not very many laid-down procedures".[107] However, the Federation of Small Businesses, which represents many smaller operators such as taxis and private hire vehicle companies, thought that the requirement for disability equality training would cause financial difficulties for small businesses. They considered that the government should subsidise some of these costs to business "to ensure access, mobility for disabled people, whilst recognising some of the problems of the taxi industry and the private hire industry itself".[108] The Joint Committee concluded:

> The Committee hopes that the DRC and disability organisations will work closely with the transport industry to help phase in disability equality training for existing staff, and to assist with the integration of such training with existing customer service training. We recommend that the Government should review the provision and cost of training for smaller operators, and consider whether there is a need to ease any financial and practical burdens for those operators.[109]

c. Aviation and shipping

The wording of the Bill allows the Government to include other sectors such as aviation and shipping in the future without the need for further primary legislation. The RIA to the draft Bill estimated the cost to air operators to be about £1.5 million but concluded there were unlikely to be additional costs to shipping (mainly ferries) as indications were that they already complied with their voluntary code.

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[104] *ibid*, appendix 4, *Government's response to witnesses' comments*
[105] Transport Committee 3rd report 2004-05, para 51
[106] DfT *DDA 1995: consultation on the removal of the Part 3 exemption*, para 10.1.13
[107] Joint Committee, vol II Q 101
[108] Joint Committee, vol II Q 462
[109] *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 149

The Bill includes the power to regulate aviation and shipping by statutory instrument, but the Government has stated that regulations would be made only if the voluntary approach was ineffective. Baroness Hollis said in the second reading debate that "if the voluntary approach proves ineffective, we will consult to see how much further we can go. However it is an international issue, not just a domestic British issue, which we will have to address."[110]

The Government has confirmed that work is in hand to evaluate the voluntary codes in both the aviation and shipping sectors. For aviation the Transport Research Laboratory is carrying out a benchmarking and measurement exercise.[111] DPTAC is commissioning research on how shipping is meeting the International Maritime Organisation's guidance and DPTAC's own more detailed guidance. The minister did not commit to a date by which statutory regulation would be introduced if the voluntary codes were found not to be working, but has said the evaluation and monitoring will be complete by the end of 2005.[112]

The Joint Committee received a significant amount of evidence that suggested that voluntary compliance was not currently effective. The fact that aviation and shipping companies operate in more than one country does not preclude statutory regulation within the United Kingdom (affecting United Kingdom companies), nor should it prevent the United Kingdom from setting an international standard:

> EVIDENCE
> 152. Members of the DCC called for aviation and shipping to be brought immediately under statutory control along with other forms of public transport.[170] They pointed out that the RIA states that relying on voluntary compliance by the transport sector "would not provide disabled people with confidence in the transport network as a whole. And … it would not deliver against the Government's manifesto and policy commitments".[171] Sir Peter Large agreed that aviation and shipping should be regulated by law and considered that "these various acts [of unnecessary discrimination] could be made illegal on internal, United Kingdom services alone without adversely affecting our services' international competitiveness".[172]
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> 153. The DRC and DPTAC were more cautious. Whilst the DRC thought that ultimately statutory intervention would be required, it stated that: "our view is that the current procedures and the current proposals are acceptable but we do not want any slippage".[173] DPTAC called for the Government to set a date of the end of 2005 to review whether the voluntary approach had been effective.[174] However, when DPTAC was asked for examples of bad practice in the transport industry, all concerned either the aviation or the shipping sectors, including easyJet's refusal to carry a group of deaf people and Brittany Ferries' policy of not

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[110] HL Deb 6 December 2004 c708
[111] Joint Committee, vol II, Ev 280
[112] Joint Committee, vol I, appendix 4

> carrying assistance dogs unless the dog was confined to the car for the entire journey.[175] Another example from the aviation sector came from the Multiple Sclerosis Society which outlined the case of a woman with multiple sclerosis who used the medication beta interferon and who was refused entry to her flight, even though she had a letter giving medical clearance to fly. She had previously been advised by the airline that she would be able to fly as long as she had such a letter.[176] Other submissions referred to a case in June 2003 involving EasyJet and a group of 13 students with a learning disability. EasyJet refused to let the students board the plane saying that they could only fly if they had one carer for every two students. The students had only five carers with them. Eventually the group were allowed to fly when other passengers said that they would act as carers. [177]
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> 154. British Airways, which represented United Kingdom scheduled airlines on the DfT group which drew up the aviation code of practice, strongly supported the current voluntary approach and argued that it "would be placed at significant competitive disadvantage were the United Kingdom Government to regulate United Kingdom airlines and not foreign airlines that we compete with".[178]
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> 155. The Passenger Shipping Association, P&O Ferries and Stena Line all supported the voluntary approach in relation to shipping. Both Stena Line and P&O Ferries emphasized that the shipping code of practice was under review and that any decision before the completion of that review would be premature, adding that the voluntary approach had so far proven successful and that they "welcomed disabled passengers, asking them to identify their disability at the time of booking".[179][113]

The Committee acknowledged that the voluntary codes had been introduced only relatively recently and that research must be undertaken to evaluate their effectiveness. It concluded "if the evaluation indicates that the voluntary approach is not working satisfactorily, the Government [should] consult without delay on the desirability of the statutory approach."

2. Rail vehicle accessibility regulations

The provisions relating to railways in the DDA only apply to new rolling stock and do not allow the Government to set an 'end' date by which all rail vehicles have to comply with the regulations. Clauses 6 to 8 of the Bill amend the *Rail Vehicle Accessibility Regulations 1998* (RVAR). Considerable changes were made to clause 6 by the House of Lords.

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[113] *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, paras 152-5

a. Consultation

A consultation paper was published in November 2003 to consider amendments to the regulations and set out some of the drawbacks to the system: [114]

- The RVAR set out in considerable detail the technical and design requirements with which vehicles to which the regulations apply must comply. However, unlike the regulations made under the DDA for public service vehicles (buses and coaches), the terms of the DDA mean that the RVAR only apply to types of rail vehicle first brought into use after 31 December 1998. The Act does not require rail vehicles outside the scope of the regulations (those first brought into use before 31 December 1998) to be compliant by a given date.
- Section 46 of the DDA 1995 makes it a criminal offence for an operator to use a regulated rail vehicle to provide fare paying passenger services that does not comply with the RVAR unless an exemption order is in force. However, the Act did not specify a prosecuting authority with responsibility for enforcing the regulations.
- The RVAR only apply to rail vehicles used to carry passengers paying separate fares. This means some major mass transit systems are excluded, for example people mover systems at major airports.
- Unlike the legislation for public service vehicles, section 46 does not contain any provisions to allow rail vehicles to be certified as being compliant with the RVAR. Instead, on the request of operators, the Department for Transport issues informal 'letters of comfort'.
- Section 47 of the Act enables the Secretary of State to make orders exempting rail vehicles from all or some of the requirements of the RVAR. By August 2003 over fifty exemption orders had been made. Exemption orders are statutory instruments which require Parliamentary approval under the negative resolution procedure. The Act requires the DfT to consult its statutory advisors, the DPTAC, before making orders. From receipt of an application, it takes a minimum of four months for an order to be made although in practice most applications take significantly longer than this to go through the formal procedures.

In addition the Government proposed to:

- Require rail vehicles being refurbished to be subject to compliance with the RVAR, where this was appropriate. This would be subject to further consultation and provide scope for exemptions.
- Decriminalise the offences for non-compliance with the RVAR and replace them with civil sanctions.

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[114] HC Deb 3 November 2003 c23WS; DfT *Consultation on the government's proposals to amend rail provisions in Part V of DDA*, November 2003. http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_025433.hcsp

- Extend the existing RVAR certification procedure under the interoperability regulations to make it mandatory for all new and upgraded rail vehicles.
- Simplify the exemption process by removing the requirement for orders to be made by statutory instrument. This would bring the exemption regime into line with that for buses. In addition, changes would be made to enable exemptions to be granted for whole railways, for example, heritage railways and upgraded rail vehicles.
- Extend the scope of the RVAR to cover mass transit systems where no fares are charged.

The Government originally proposed introducing an end date of 2025 by which all rail vehicles must comply with the regulations. In November 2004, following the consultation, the government amended the date to 2020.[115]

Although there were no clauses covering these changes in the draft Bill, the Joint Committee did consider them.[116] Its conclusion was:

> 167. **The Committee's analysis of the evidence we have received, together with the Department for Transport's own data, leads us to suggest an end-date of the end of 2017. We conclude that this, together with a limited exemption system which would itself expire in 2025, would be an appropriate compromise between the needs of disabled people and the industry's current replacement programme.**

b. End date

The DDA section 46 gives the Secretary of State the power to make rail vehicle accessibility regulations (RVAR) to ensure that it is possible for disabled persons to get on and off regulated rail vehicles in safety and without unreasonable difficulty, and to be carried in such vehicles in safety and in reasonable comfort. Section 46(6) defines a "rail vehicle" for the purposes of the section as a vehicle "constructed or adapted to carry passengers on any railway, tramway or prescribed system; and first brought into use, or belonging to a class of vehicle first brought into use, after 31st December 1998."

Clause 6(1) obliges the Secretary of State to ensure all rail vehicles conform to the RVAR by 1 January 2020 at the latest although exemption orders will still be allowed. This is the result of amendments introduced at Report stage in the House of Lords. Clause 6(2) amends the definition of 'rail vehicle' by removing the start date from the definition. This enables the rail vehicle accessibility regulations to be applied to all rail vehicles (including light rail and the London underground) and to their refurbishment. The change of definition also enables the Secretary of State to set the date in the RVAR by which time all rail vehicles must comply with the requirements of the regulations.

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[115] HC Deb 29 November 2004 WS 18

The precise date was the subject of discussion in the House of Lords Grand Committee[117] and at Report stage.[118] Originally no date was included in the Bill. The Government spokesman, Lord Davies of Oldham, argued that 2020 was a compromise between the Government's original date of 2025 and the Joint Committee's preferred date of 2017. He gave the Committee updated figures of the numbers and costs involved: if 2017 were chosen, 4,355 rail vehicles would need to be replaced before their normal life expiry at a total additional cost of £353 million. Based on the Government's preferred date of 2020, 2,200 vehicles would be affected at a total cost of £169.7 million. Lord Carter, the Joint Committee's chairman, pointed out that the end date itself, whether 2017 or 2020, was important, but so too was the number of exemptions. "If we are going to accept the Government's argument that it should be 2020 on the grounds of cost—which we might if the argument were persuasive—that would be on the basis only of a really robust exemptions procedure. We do not want to be left in 2020 with a large number of rail vehicles still exempt."

Unsuccessful amendments were put forward by the Opposition at Report stage that would specify the end date in the Bill and not leave it to regulations as was proposed. At Third Reading the Government introduced its own amendment and included the date of 2020 in the Bill.

These proposals will mainly affect the 28 main rail network train operating companies (TOCs), London Underground Limited and BAA Ltd who operate airport people movers. Many of the TOCs are subsidiaries of large groups such as National Express who currently own six operators. For national rail, additional costs will usually be met in the first instance by the three main rail vehicle leasing companies who will recover them via increased leasing charges on the operators. When bidding for franchises, potential operators will take account of leasing charges and this will inform the amount of subsidy required from government. For LUL costs are expected to be incurred up front and factored into the support required from government.[119]

c. Exemption orders

Clause 6 clarifies and extends the power to grant exemptions from the regulations and changes the exemption process. There was considerable concern in the House of Lords about the exemptions and the way they are granted and publicised.

DDA section 47(1) currently allows the Secretary of State to make exemption orders. Clause 6(3) of the Bill continues to allow this but clarifies the law by specifically allowing exemptions from the operational requirements of RVAR as well as construction requirements. It expressly confers power to exempt the use of vehicles of a specified description in specified circumstances. So, for example, all the vehicles used on a

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116 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004
117 Grand Committee, HL Deb 13 and 17 January 2005
118 HL Deb 3 February 2005 cc414-420
119 RIA, November 2004 http://www.disability.gov.uk/legislation/ddb/bill/dd_bill_ria.asp

particular railway, for example a heritage railway, could be exempted from some or all of the requirements of the RVAR.

Section 67 determines how an order will be made. Changes were included in the original Bill so that orders made under section 47 of the DDA would not have to be made by statutory instrument, but could be made by Administrative Order. This was greeted with strong reservations by peers. Lord Hunt of King's Heath, the chairman of the Merits of Statutory Instruments Committee, had already written to the chairman of the Delegated Powers Committee, and they had recommended that exemption orders under section 47 of DDA 1995 should continue to be made by statutory instrument subject to the negative resolution procedure, and not Orders in Council.[120] The Government announced that it had accepted the recommendation of the Committee and would reverse the proposed changes. [121]

The Government spokesman, Lord Davies, recognised that the exemption process caused concern but tried to reassure peers that exemptions were not given lightly. Key stakeholders, including the Disabled Persons Transport Advisory Committee, had been consulted and where exemptions were granted they were generally time limited. He pointed out that the Orders were listed on the DfT website and said that the explanatory memorandum currently sent to the Merits Committee about each Order would in future be available on the website.[122]

Despite his arguments, amendments were put forward (unsuccessfully) at Report stage to limit the time of an exemption. Peers quoted figures from the Disability Charities Consortium, that since 1998 more than 50 per cent of carriages have had some sort of exemption: 64 exemptions have involved 2,328 vehicles.[123] The Public Accounts Committee had found that vehicles were still being built that were non-complaint and needed exemption certificates six years after the legislation came into force.[124] There was

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[120] The Delegated Powers and Regulatory Reform Committee is appointed by the House of Lords in each session to report whether "the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny." Their 4th report published on 16 December 2004 contained the Committee's findings on the regulation making powers in the Disability Discrimination Bill [HL].
http://www.publications.parliament.uk/pa/ld200405/ldselect/lddelreg/19/1903.htm
The government's response was set out in the 6th report. Baroness Hollis of Heigham, wrote to the chairman that the Government accepted the recommendation and would bring forward appropriate Government amendments at Lords Report Stage.
http://www.publications.parliament.uk/pa/ld200405/ldselect/lddelreg/31/3102.htm

[121] Lord Addington, Grand Committee, HL Deb 13 January 2005

[122] 17 January 2005 c127GC. The Orders are listed at the following website. The explanatory notes now available are merely those at the end of each SI.
http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_503302.hcsp

[123] HL Deb 3 February 2005 cc421-2

[124] Public Accounts Committee *Strategic Rail Authority: improving passenger rail services through new trains*, 14 June 2004, HC 408; Lord Carter, GC 125

also concern that retaining a power to create exemptions after 2020 would negate the point of having an end date. [125]

The Government introduced amendments in the House of Lords at Report stage to reverse the changes to the exemption procedure so that orders would continue to come to Parliament under the negative procedure.[126] Further amendments were laid at Third Reading to ensure important exemptions would be subject to the affirmative procedure.[127]

Clause 6(4) of the present Bill amends section 67 of the DDA 1995. It states that the Secretary of State must consult the DPTAC before he decides whether an exemption order under section 47 should be made under the negative or affirmative resolution procedure. The clause allows regulations to be made setting out guidance on which procedure should be adopted in any particular case and these have to be made under the affirmative procedure. Any exemption orders will have to be made under the affirmative procedure unless this guidance has been approved and provides for circumstances in which the negative procedure would be more appropriate.

d. Annual report

A proposal for an annual report to publicise not only the number of exemptions and their length but also the repeat applications was raised by the opposition parties and accepted by the Government at Third Reading. It is included in the present Bill as clause 6(5). The report will be produced for each calendar year, and must contain details of exemption orders made under section 47(1). It must also contain information about the consultation on both applications for exemption orders and the exercise of the discretion as to whether such orders should be subject to the negative or affirmative resolution procedure. The report may also include other information, for example, information about applications for exemption which have been rejected or only granted in part. The report is required to be laid before both Houses of Parliament.

e. Certification scheme

Clause 7 sets up a RVAR certification scheme. It inserts new sections that require prescribed rail vehicles to have a rail vehicle accessibility compliance certificate. It is intended that the requirement to have a certificate will apply to all new rail vehicles and vehicles that are refurbished. According to the minister, Lord Davies, there is no formal signing-off process at the moment and this has led to disputes.[128] The RIA states that the industry strongly favours certification. A similar regime is already in place for certain high speed trains under the High Speed Interoperability directive and to reduce burdens it makes sense to have a single RVAR regime for all vehicles.

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[125] HL Deb 28 February 2005 cc56-72
[126] HL Deb 3 February 2005 cc427-9
[127] HL Deb 28 February 2005 cc56-72
[128] HL Deb 17 January 2005 c132GC

f. Enforcement

Clause 8 removes the provisions relating to criminal offences and replaces it with a civil enforcement regime which involves warnings and fines. No criminal proceedings have ever been taken under the Act. Under the new proposals maximum penalties will be set out in regulations. The maximum amount will be capped: the level of the penalty on the train operator cannot exceed 10 per cent of its turnover. The issues to be taken into account when levying a penalty will be set out in a code of practice and the draft code will be laid before the Parliament for consideration. There was discussion in committee about setting a minimum penalty so that the fine could never be less than the cost of the work.[129] The Government argued that, attractive though the idea was, there was a danger that if a small operator had to both pay a fine and bring the vehicle into compliance, it might go out of business and this would not benefit the traveling public.

3. Blue Badge scheme

The Bill also includes a section on the blue badge scheme. **Clause 9** enables the legal recognition of disabled people's parking badges issued by other countries. This section applies only to England and Wales: Scotland already has similar provisions. The Bill also makes some changes to the language of the *Chronically Sick and Disabled Persons Act 1970*. For example it replaces the word "institution" which many people find offensive with "organisation".[130]

Clause 9 of the Bill is about reciprocity. The current eligibility criteria provide for the issue of a "badge of a prescribed form" by local authorities for motor vehicles driven or used by disabled people. Section 21(2) of the *Chronically Sick and Disabled Persons Act 1970* says the badge may be issued to a disabled person "resident in the area of the issuing authority". If someone is not resident in the area, the local authority cannot issue a badge.

There is at present a system of reciprocal arrangements with some European countries under which disabled visitors from the participating countries can take advantage of the concessions provided in the host country by displaying the badge issued under their own national Scheme. No reciprocal arrangements exist with Australia or New Zealand although both these countries issue temporary badges to visitors.

Clause 9 will change this. It amends the *Chronically Sick and Disabled Persons Act 1970* so as to provide for the recognition in England and Wales of disabled persons' parking badges issued outside Great Britain. In future the holders of foreign disabled persons' badges will be afforded the same concessions as holders of domestic "blue badges" in respect of parking concessions. It will formalise existing (non-statutory) recognition of

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[129] HL Deb 17 January 2005 c141-4GC

[130] The *Disability Discrimination Bill 2004-05* schedule 1 para 39

parking badges issued in the EU or in certain other European countries (for which there is reciprocal recognition), and extends this recognition to badges issued in other countries.

D. Employment

Clause 10 of the Bill amends provisions relating to discriminatory job advertisements that were inserted by the *Disability Discrimination Act 1995 (Amendment) Regulations 2003.*[131] The clause extends liability under these provisions to third parties who publish such advertisements, in addition to those placing them. The clause also provides that third party publishers will escape liability in certain circumstances if:

- in publishing the advertisement he relied on a statement made by the person publishing the advertisement to the effect that it was not unlawful, and
- it was reasonable for him to rely on that statement.

The clause also creates a criminal liability attaching to those who knowingly or recklessly make false or misleading statements about the lawfulness of such an advertisement. The offence carries a fine (not exceeding level 5 on the standard scale – currently £5,000) upon summary conviction.

The Disability Rights Commission has welcomed the provisions in clause 10.[132]

Clause 11 simplifies the group insurance provisions in the DDA. Section 18 of the Act is repealed and replaced by new provisions. Such claims can now be brought on the same basis as general insurance claims within Part III DDA, although cases must be brought in the employment tribunal, as opposed to a civil court (High Court or County Court).

1. Volunteers

Volunteers are not currently protected from discrimination or entitled to reasonable adjustments under the DDA, although there is not always a clear line between "volunteer" and "employee". There have been cases in employment tribunals where people described as volunteers have been found to be employees under a contract of employment. Most volunteers would not be viewed as working under a contract of employment. Individuals who do not have a written contract of employment may, nevertheless, have entered into an oral agreement to perform certain services. For a contract to exist the general rule is that there must be agreement (offer and acceptance), consideration and an intention to enter into a legal relationship. Staff who are not paid a salary have, nevertheless probably agreed to perform certain services (eg opening the mail, answering the phone, manning the office) and the "employer" has probably offered some form of "consideration"

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[131] SI 2003/1673

[132] http://www.drc-gb.org/newsroom/newsdetails.asp?id=602&section=4

agreed to perform certain services (eg opening the mail, answering the phone, manning the office) and the "employer" has probably offered some form of "consideration" (experience, access to the market and perhaps some minor expenses). This may give rise to the necessary elements (such as mutuality of obligation) to establish a contract of employment.

Volunteering is often seen as an important way to help disabled people enter the labour market. The Joint Committee which considered the draft bill recommended that the Government should consult on and produce a code of practice on volunteers. The Committee further recommended that the Bill should include a regulation-making power enabling volunteers to be brought into coverage, should the non-statutory code prove ineffective. They also recommended that the Government review the case for making funding available - either through Access to Work or a new fund - to provide reasonable adjustments for volunteers. The Government's response to these proposals was as follows:

> We have asked the DRC to consider producing a voluntary Code of Practice on disabled volunteers working with the other equality Commissions. We do not believe, however, that it would be right to legislate at this stage. There are likely to be practical difficulties in legislating to cover volunteers as a result of the diversity in the nature of volunteering and in the relationships between volunteers and the organisations that engage them. We would be more certain of how to frame a power once a voluntary approach had been tried and properly assessed.[133]

The question of the position of volunteers was raised on a number of occasions during the passage of the Bill through the Lords.[134] Lord Addington tabled an amendment to put the commitment to a voluntary code of conduct on the face of the Bill. The Government's response was that action was already being taken and so legislation was not needed.[135]

E. Private clubs

In *From Exclusion to Inclusion* the Disability Rights Task Force noted:

> Services not available to the public, such as those provide by private clubs to their members, are not covered by Part III. However, where a club does provide services to the public then the DDA applies to those services. The Race Relations Act does cover both the private and public functions of some private clubs. We considered that there were no good reasons for not covering membership of clubs and the services they offered to members in civil rights legislation. However we recognised that people should have a right to privacy and to associate with

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[133] DWP, *The Government's Response to the Report of the Joint Committee on the Disability Discrimination Bill*, 15 July 2004: http://www.disability.gov.uk/legislation/ddb/response.asp

[134] For example at second reading: HL Deb 6 December 2004, c675

[135] HL Deb 3 February 2005, cc435 - 437

> whomever they choose. We would not want to cover private social arrangements and there should be a suitable exemption for these.[136]

Clause 12 of the Bill will end the exemption in Part 3 of the DDA, which governs access by disabled people to goods, services and facilities, which applies to private clubs (referred to as associations in the Bill) as long as they have 25 or more members. This clause will insert new sections into the DDA which will make it unlawful for these associations to discriminate against disabled members, applicants for membership, associates and guests in certain circumstances.

In order for an association to be covered by the clause, in addition to having 25 or more members, the association will have to have a constitution. This will not have to be a written constitution; as long as there are rules governing issues such as membership this will count. The club must also run its affairs in a way so that its members do not constitute a section of the general public, e.g. it must operate a policy of membership selection genuinely based on personal criteria.

A consultation paper issued by the DWP in December 2004 provides examples of the sort of clubs that will be covered by clause 12:

> A health club is open to the public. Club members pay an annual subscription and are provided with a membership card. Before using the club's fitness equipment, a member must undergo a fitness test. Although members have to satisfy certain requirements in order to use some of the facilities, undergoing a selection procedure for membership based on personal grounds is not a condition of using the club. This club therefore does not fall within the definition of an 'association' as used in the Bill (and is likely to be already covered by the DDA).
>
> A club providing dining and social facilities exclusively to its members requires that applicants for membership provide testimonials from three existing members to their good character before a decision can be made about the membership application. This club is unlikely to be covered by the existing law, but is likely to be covered as a private club once the Bill becomes law.[137]

The Government intends that the duties on private clubs covered by clause 12 will be consistent with those already placed on the providers of goods, facilities and services under Part 3 of the DDA:

> This is based on the proposition that the relationship between a private club and its members and guests is analogous to the relationship between other providers of goods and services and their customers, and that the same levels of protection

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136 Disability Rights Task Force, *From Exclusion to Inclusion, December 1999,* pp120-21

137 DWP, *Disability Discrimination Bill: Consultation on Private Clubs; premises; the definition of disability and the questions procedure*, December 2004, Cm 6402, available at http://www.dwp.gov.uk/consultations/consult/2004/ddb/private_clubs_premises.pdf

> for disabled people is appropriate. This approach also has the benefit that organisations who provide some services only to their members and other services to the general public will face the same duties in respect of all their services.[138]

The duties placed on providers of goods, facilities and services under Part 3 are outlined in section **I.A.3** of this paper.

In the December 2004 consultation paper, *Disability Discrimination Bill: Consultation on Private Clubs; premises; the definition of disability and the questions procedure*, the Government sets out its intention to set the 'trigger point' for the new duty on private clubs 'at the point at which a policy, practice or procedure applied by the service provider, or a physical feature of the premises it occupies, makes it impossible or unreasonably difficult for a disabled person to make use of the service.'[139] It is proposed that the duty on private clubs, as with other service providers, will be anticipatory.[140]

Consultation on how and when the Government should implement the 'reasonable adjustment' duties relating to private clubs is ongoing.[141] It is proposed, subject to the passage of the Bill, that the duty not to treat disabled people less favourably will come into effect in December 2005 and that the duty to make reasonable adjustments should come into effect in December 2006.[142]

The Joint Committee on the draft *Disability Discrimination Bill* noted that it received 'only a small amount of written evidence' from organisations that might be affected by the extension of the duties in Part 3 of the DDA to cover certain private clubs.[143] Particular attention was drawn by the Association of London Clubs (ALC) to the problems faced by clubs situated in listed or historic buildings. The ALC reported that attempts to introduce measures to assist disabled people had been prevented by 'heritage and planning bodies.' The ALC argued for these 'hoops and barriers' to be removed so that the burden of reconciling conflicting legislation would not fall on individual clubs.[144] A written answer in 1999 made it clear that Part 3 of the DDA does not 'override' any other piece of legislation:

> Planning Policy Guidance Note (PPG 15) issued by the Department of the Environment, Transport and the Regions makes it clear that:
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> "it is important in principle that disabled people should have dignified easy access to and within historic buildings", and that with a proper approach:

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138 *ibid*, paragraph 2.13
139 *ibid*, para 2.15
140 *ibid*, para 2.19
141 *ibid*, the consultation period closes on 18 March 2005
142 *ibid*, para 2.37
143 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 279
144 *ibid*, para 292

> "it should normally be possible to plan suitable access for disabled people without compromising a building's special interest".
>
> English Heritage's booklet "Easy Access to Historic Properties" is designed to help those who own, manage, or are professionally concerned with historic properties to strike a balance between conservation and access.
>
> The Disability Discrimination Act, in common with the Sex Discrimination Act 1975 and the Race Relations Act 1976, cannot require anything to be done that would contravene another piece of legislation. Where a service provider must get statutory consent to a particular alteration, including listed building or scheduled monument consent, and that consent is not given, the Disability Discrimination Act will not have been contravened. However, a service provider would still need to take whatever other steps under the Act were reasonable to provide the service.[145]

The Joint Committee concluded that the duties imposed on public authorities in clauses 4 and 8 of the draft Bill (now clauses 2 and 3 of the current Bill) might have a bearing on the attitude of heritage and planning bodies when dealing with requests for disabled adaptations to historic and listed buildings

> The Committee notes that in future all public authorities, including English Heritage, will come under both the duty in clause 4 not to discriminate in the exercise of their functions, and the duty under clause 8 to promote equality of opportunity for disabled people. This should ensure that all heritage and planning authorities respond sympathetically and helpfully to requests for alterations under the DDA.[146]

The Government indicated its agreement with the Committee's analysis of the potential impact of these clauses in its response to the Joint Committee's recommendations.[147]

Clause 12 was not debated in the House of Lords.

F. Letting residential premises

1. Discrimination in relation to letting premises

Sections 22-24 of the *Disability Discrimination Act 1995* prohibit the unjustified less favourable treatment of disabled people by persons managing or disposing of premises. However, these provisions impose no duty on such persons to make reasonable

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145 HC Deb 19 May 1999 c387-8W

146 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 294

147 The Government's response to the Report of the Joint Committee on the Draft Disability Discrimination Bill, DWP. 15 July 2004, Cm 6276, Recommendation 52, available at http://www.disability.gov.uk/legislation/ddb/response.asp

adjustments to policies, procedures or practices, to provide auxiliary aids; or to make adjustments to premises.

Clause 13 of the Bill contains provisions that will require a landlord or manager to take reasonable steps to change a policy, practice or procedure which makes it impossible or unreasonably difficult for a disabled person to take a letting, or to enjoy the premises, or use a benefit or facility conferred with the lease. To illustrate how these provisions might operate the Explanatory Notes to the Bill suggest that a landlord or manager (where it is reasonable to do so) might be obliged to 'allow a tenant who has mobility difficulties to leave his rubbish in another place if he cannot access the designated place.' Alternatively, a landlord or manager might be obliged to 'change or waive a term of the letting which forbade any alterations to the premises, so as to allow a disabled tenant to make alterations needed by reason of his disability with the consent of the landlord.'[148] The provision of an auxiliary aid might arise where the prospective tenant is hearing impaired, for example, necessitating the provision of a clip-on receiver that vibrates when the doorbell rings.

Nothing in the clause will require landlords or managers to make any alterations to the physical features of premises and no duty to take steps under the new provisions will arise unless the landlord/manager is requested to do so by the tenant or prospective tenant. In addition, the provisions will not apply to premises that are, or have been at any time, the principal or only home of the landlord or manager. As with sections 22-24 of the DDA, a victim of discrimination contrary to the new provisions inserted by clause 13 will be able to bring enforcement proceedings in a county or sheriff court under section 25 of the DDA.

The Regulatory Impact Assessment on the Bill notes that private landlords and registered social landlords will face 'some costs' as a result of extending to them the duty of reasonable adjustment. There will be also be costs for commercial landlords 'which are more difficult to quantify.'[149]

2. Obtaining a landlord's consent for adaptations

a. Background

The Joint Committee on the draft *Disability Discrimination Bill* found that the majority of evidence received on what was then clause 6 (now clause 13) 'concentrated on the Government's failure to include specific provision in the draft Bill prohibiting landlords from unreasonably withholding consent for a disabled person to make physical

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[148] Bill 71-EN, para 148, http://www.publications.parliament.uk/pa/cm200405/cmbills/071/en/05071x--.htm

[149] *Disability Discrimination Bil*l, Regulatory Impact Assessment (Revised following Third Reading in the House of Lords), para 15

adaptations to premises.'[150] The Disability Rights Commission submitted evidence to show that 9% of disabled people (approximately 18,000 people) living in unsuitable accommodation had been refused consent by their landlords to carry out the necessary modifications.[151] The issue of obtaining a landlord's consent for disabled adaptations was also raised during the passage of the *2004 Housing Act* through Parliament.

When the owner of a leasehold flat needs to make adaptations to that property they must first consider the provisions contained in their lease agreement. A lease may contain a covenant against alterations or improvements in an absolute form or, more usually, in a qualified form: namely, 'not to make any alterations to the demised premises without the landlord's consent.' In the case of an absolute covenant no alterations can be made unless the landlord consents, even though the alterations may amount to improvements to the premises. A qualified covenant against alterations means that the landlord's consent must be sought and if the alterations amount to improvements then section 19(2) of the *Landlord and Tenant Act 1927* (LTA) will apply. Section 19(2) provides that a landlord's consent to improvements shall not be unreasonably withheld. The section also provides that the landlord may require a sum of money for any diminution in the value of the premises or of any neighbouring premises belonging to the landlord, or require an undertaking from the tenant to reinstate the premises at the end of the term as a condition for granting consent.

In deciding whether an alteration is an improvement or not and so within the scope of section 19(2), the court must consider the issue from the tenant's point of view. Tenants can apply to the court for a declaration that a landlord's consent has been unreasonably withheld or for a ruling on any sum required by the landlord as security for the alterations.

Where a lease contains an absolute covenant against alterations section 19(2) of the 1927 Act does not apply, landlords are able to withhold consent to alterations without having to establish that there are reasonable grounds for doing so. Furthermore, section 19(2) does not cover proposed improvements/adaptations to parts of premises that are not comprised in the lease, i.e. communal areas such as stairways. These areas do not usually constitute part of the dwelling-house that is leased to them; consequently a leaseholder in this position may not require adaptations to those areas in the absence of the freeholder's consent.

The issue of obtaining a landlord's consent before carrying out adaptations on leasehold properties was considered by the Disability Rights Task Force in *From Exclusion to Inclusion.* The Task Force did not recommend that landlords should be obliged to carry out adaptation works or that they should bear the cost of such works but there was concern over the position of disabled people who 'have to rely on the goodwill of those

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150 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 312
151 *ibid*, para 313

disposing of premises to make reasonable physical adjustments necessary for them to live comfortably.' The Task Force recommended that:

> …landlords and managing agents etc. should not be allowed to withhold consent unreasonably for a disabled tenant to make physical adaptations to premises.[152]

The Task Force also thought that more work should be done 'to determine what would and would not be reasonable in these circumstances and what rights the owner of the premises has to expect the premises to be returned to the state in which they were let.'[153]

Clause 13 provides scope to force a landlord to change an absolute covenant against alterations to a qualified covenant. If this were to occur, then section 19(2) of the 1927 Act (requiring that consent to an improvement should not be unreasonably withheld) *would* apply. However, the provisions in the original Bill did not satisfy those groups who are of the opinion that landlords routinely withhold consent to disabled adaptations and that the existing legal framework does not provide an adequate means of redress. For example, the Disability Rights Commission expressed regret over the Government's decision not to implement the Disability Rights Task Force's recommendation in relation to consent for alterations:

> Our one concern is that the Government has not implemented the Task Force recommendation that landlords should not be allowed to withhold consent unreasonably for a disabled person making changes to the physical features of the premises. The DRC believes that existing legislation does not provide an adequate framework for protecting disabled people's rights and hopes that this issue will receive due attention during the scrutiny process.[154]

The Joint Committee on the draft Bill considered the issue of landlords withholding consent to the making of physical alterations to premises. The Committee's report summarised witnesses' criticisms of relying on the 1927 Act to protect disabled people:

- The LTA is general in application and is not framed in the context of disability anti-discrimination legislation.
- The LTA only covers current lettings and therefore does not provide a right to reasonable adjustments on prospective lettings.
- It only extends to the "demised" premises under the lease and does not cover the common parts of a building or management committees. Alterations to the exterior of a building, such as the installation of a grab rail or a ramp, would not be included.

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[152] Disability Rights Task Force, 1999, recommendation 6.27

[153] *ibid*

[154] *The Draft Disability Discrimination Bill: Initial Briefing by the Disability Rights Commission*, 3 December 2003

- It is currently unclear to landlords and tenants when it would be reasonable to refuse or grant consent to the making of alterations.
- It favours the landlord as the onus is on the tenant to show that the landlord unreasonably withheld consent. The Law Society submitted that in many cases it has proved difficult to get legal evidence of this.
- The DRC does not have any power to issue Codes of Practice under landlord and tenant law.
- The DRC does not have the power to bring cases on behalf of disabled people under landlord and tenant law.
- The LTA does not extend to Scotland.[155]

The Committee concluded that the means of redress for a disabled tenant whose lease contains an absolute covenant against making alterations is 'undoubtedly onerous:'

> First, the tenant would if necessary have to use the draft bill provisions in order to get the absolute covenant declared "unreasonable". The Explanatory Notes to the draft bill suggest that this *may* (not will) be granted. Then, the tenant would, if necessary, proceed under section 19(2) of the LTA.[156]

The Committee recommended that a specific provision prohibiting a landlord from unreasonably withholding consent to the making of appropriate physical alterations in respect of a disabled person should be included in the full Bill.[157]

In its response to the Committee's recommendations the Government rejected the call to include a specific provision prohibiting a landlord from unreasonably withholding consent to the making of appropriate physical alterations in respect of a disabled person on the grounds that this is adequately covered by other legislation:

> All council tenants and Rent Act tenants in England and Wales have the right under the Housing Acts 1980 and 1985 to make improvements to the rented premises with the consent of the landlord – which cannot be withheld unreasonably. So do tenants of local authorities and registered social landlords in Scotland under the Housing (Scotland) Act 2001. Other types of tenants in England and Wales generally have this right too – either because the lease expressly says that the landlord may not withhold consent unreasonably, or by virtue of the Landlord and Tenant Act 1927 (legislation to cover this issue is planned in Scotland). We believe that this offers sufficient protection for disabled people who wish to make alterations to their rented accommodation. [158]

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155 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 314

156 *ibid*, para 317

157 *ibid*, para 321

158 The Government's response to the Report of the Joint Committee on the Draft Disability Discrimination Bill, DWP, 15 July 2004, Cm 6276, recommendation 56 http://www.disability.gov.uk/legislation/ddb/response.asp

b. The Bill

Amendments were moved during the Grand Committee and Report stages of the Bill with a view to placing landlords under a duty not to refuse consent unreasonably if a disabled tenant needs to make an alteration to the physical features of a property s/he rents.[159] At the Report stage Baroness Hollis said that the Government accepted the need to improve the way in which the law works, including the 1927 Act, and said that an amendment would be brought forward at Third Reading. She subsequently moved amendments to the Bill at Third Reading to ensure that, where a lease entitles a tenant to make improvements with a landlord's consent, landlords will not be able to unreasonably refuse consent if a tenant wants to make a disability-related alteration to residential premises.[160] The Minister described the three things that **clause 16** (improvements to dwelling houses) is intended to do:

> First, we are ensuring that the right of a disabled tenant to make adaptations which the landlord may not unreasonably refuse is analogous to the rights that non-disabled tenants currently have. Secondly, we are extending those to the tenants of all landlords, not just socially rented housing and Rent Act tenants—in other words, to assured shorthold tenancies. Thirdly, we are bringing the Disability Rights Commission into play. At the moment, the DRC cannot provide help or guidance to tenants or landlords. We believe this is necessary.
>
> In future, the DRC will be able to provide a conciliation service in relation to disputes about disability-related improvements, whether they arise under new Section 49(g) or in any other context—for example, under existing housing and landlord tenant legislation. They will issue a code of practice. They will assist tenants in any legal proceedings where the issue is whether it was unreasonable for a landlord to withhold consent to a tenant carrying out a disability-related improvement, or similar matters.[161]

Clause 16 extends only to England and Wales and will apply to leases of residential property that are not already covered by the *Housing Acts* of 1980 and 1985[162] or the *1977 Rent Act.*[163]

In deciding whether or not it is reasonable for a landlord to refuse a disabled adaptation the Baroness said that the scale of the landlord's operation will be a relevant factor.[164]

Where a lease contains an absolute prohibition against alterations a tenant who wishes to make a disability-related alteration will still have to invoke the 'reasonable adjustment'

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[159] HL Deb 17 January 2005 c178GC & HL Deb 3 February 2005 c448
[160] HL Deb 28 February 2005 c75
[161] HL Deb 28 February 2005 c76
[162] Secure council tenancies.
[163] Protected or statutory tenancies.
[164] HL Deb 28 February 2005 c76

duties in clause 13 to seek a change in the terms of the letting. Once this is achieved they will then be in a position to make the physical adaptations to the property.[165] Landlords will be able to make conditions about improving the specification for works and reinstatement of the property. Regulations will be brought forward to assist landlords and tenants in using the new provisions:

> The regulations will, for example, set out the circumstances in which it is always reasonable for a landlord to have to modify or waive a term in a lease prohibiting the making of any alterations where that term makes it impossible or unreasonably difficult for a disabled person to enjoy the premises or to make use of an associated benefit.[166]

Baroness Hollis also addressed the issue of what might be considered 'reasonable' in relation to adaptations to rented premises:

> Finally, what counts as reasonableness? This is an objective and not a subjective test. What might be considered reasonable in relation to rented premises? What, for example, would happen if the landlord thought that an improvement might make it more difficult to rent out a property in future? That is the "minor niggle/major consideration" issue that we discussed before.
>
> That would be relevant when deciding the reasonableness of giving consent. But, of course, the landlord would have to be sure and be able to demonstrate that the improvement would genuinely make it more difficult to rent out the property again. Many improvements for disabled people—double-glazing, better lighting, central heating—might actually improve the property and the landlord would have absolutely no ground for refusing consent under those circumstances, I would guess.
>
> A landlord might make it a condition of giving his consent that the tenant has to reinstate the premises when he leaves and the landlord might ask for a security deposit to cover reinstatement costs. But we know that many people using disabled facilities grants to make alterations are elderly and on low incomes. If the tenant is unable to pay a reasonable deposit that the landlord requests, or is unable to provide realistic guarantees that the improvements will be reinstated, where it is legitimate for the landlord to believe that the property has become less attractive for the rental market, then it may not be unreasonable for the landlord to refuse his consent to the improvements. So the reinstatement issue becomes part of the test of reasonableness, which I believe applies across the employment area and the like.
>
> As I said earlier, the DRC will be preparing guidance in a statutory code of practice on reasonableness, which will have to be taken into account in court cases where relevant. The DRC is aware of that and will consult fully. The code

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[165] *ibid*

[166] HC Deb 28 February 2005 c77

> will also have to be approved by the Secretary of State and laid before Parliament.[167]

The Regulatory Impact Assessment on the Bill states that the provisions on landlords not refusing consent unreasonably to tenants making disability-related improvements to certain residential premises 'should result in negligible additional costs.'[168]

3. Adaptations in communal areas

Under current provisions tenants (including long leaseholders) in blocks of flats cannot force their landlord/freeholder to consent to adaptation works in communal areas such as stairways and halls. Witnesses to the Joint Committee on the draft Bill were particularly critical of the *1927 Landlord and Tenant Act's* provisions on the grounds that they do not apply to communal areas. The Minister for Disabled People, in response to questions about extending the Bill's provisions to cover these areas, argued that the Disability Rights Task Force had not proposed such an extension:

> We have considered common parts when drafting this Bill, even though no proposals were made by the DRTF, and therefore coverage of this area was not part of our manifesto commitment or our commitments towards inclusion. We do not believe tenants should be able to make adjustments to areas over which they have very limited rights.[169]

The Committee concluded:

> Despite the position taken by the Government, the Committee considers that provisions allowing reasonable alterations to communal areas are necessary to ensure that disabled people can enjoy the fundamental right of access to their property. As with other alterations under the draft bill, the test of reasonableness would apply to alterations made to communal areas. It is important to note that an alteration that would be reasonable in respect of demised premises would not necessarily be a reasonable one to make for a communal area. Accordingly, **the Committee recommends that the full bill includes a specific provision prohibiting controllers of premises from unreasonably withholding consent to the making of reasonable adjustments to communal areas.** [170]

The Government's response to the Committee's report also rejected the call to include a specific provision prohibiting controllers of premises from unreasonably withholding consent to the making of reasonable adjustments to communal areas:

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[167] *ibid*

[168] *Disability Discrimination Bil*l, Regulatory Impact Assessment (Revised following Third Reading in the House of Lords), para 15

[169] *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 324

[170] *ibid*, para 325

> We are not convinced that tenants should be able to make adjustments to common parts over which they have only limited rights or that a controller of premises should be required to allow a tenant to make changes to common parts.
>
> We believe that seeking to cover common or communal parts of premises in this way would pose quite severe problems on which we have not consulted and which involve complex interactions between a range of people with legal responsibilities and rights in connection with common parts.[171]

Amendments were moved during the Grand Committee and Report stages of the Bill with a view to tackling this issue.[172] At Report stage Baroness Darcy de Knayth moved an amendment that would have given Government a reserve power to make regulations in relation to communal areas following consultation with stakeholders. Responding to this amendment, Baroness Hollis advised that 'there is no way that something as complicated as this can be taken on amendment at this stage in the Bill.' She gave an illustration of the difficulties involved in legislating in this area:

> Let me give the example of a not-untypical mixed-use building of 10 storeys in inner-city London. It highlights the variety of interests involved that must be consulted and taken forward, even for something as straightforward as adaptations to common parts for stair-climbers, which account for over 30 per cent of requests, and storage of wheelchairs or mobility vehicles, which is the second biggest issue. In a real-life example of a 10-storey inner-city building, the basement is used for parking, the ground floor for retail, floors one to five are a room-only hotel, floor six is an office and floors seven to 10 are residential. The residents would include freeholders, long-lease holders, tenants and short-term sub-tenants. All of those would have different legal rights towards any enactment on their property. It is not simple; it is exceedingly complex.[173]

The Baroness went on to explain how the Government intends to take the issue forward:

> However, I am equally persuaded that we cannot just bank our responsibilities, walk away from it, say that it is complicated and hope that somehow something will happen. As a result, since our last discussions in Committee, we are taking it forward. The DRC has already been invited and has agreed to be a member of a review group. The group's chairman has already been appointed. A senior civil servant from the DWP, who is here today listening to this debate, will head that working party to see how to progress this. Referring to the question asked by the noble Lord, Lord Oakeshott, it will involve members from the Office of the Deputy Prime Minister, the Department for Constitutional Affairs, and the Department for Health. I will see whether we should include the Department for

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171 The Government's response to the Report of the Joint Committee on the Draft Disability Discrimination Bill, DWP, 15 July 2004, Cm 6276, Recommendation 57

172 HL Deb 20 January 2005 cc309-312GC & HL Deb 3 February 2005 cc437-8

173 HL Deb 3 February 2005 c442

> Education. Members from the Scottish Executive have already been appointed also.
>
> The group will investigate the need and evidence for change; for example, the number of disabled people affected by inaccessible common parts, the effect on their lives and the nature of alterations needed. It will identify options for change, assess the regulatory costs and benefits of the options identified, and engage with the tangle of hugely complex legal issues surrounding land law. We expect the chairman to report no later than the end of the year with specific recommendations for resolving those issues. If primary legislation is recommended, that report will include recommendations as to possible legislative vehicles.[174]

4. The small dwellings exemption

In common with the *Sex Discrimination Act* and the *Race Relations Act* the *Disability Discrimination Act* does not currently apply to certain small dwellings. Broadly speaking the exemption applies where the landlord or manager shares living accommodation with those not of his own household and either the landlord or manager lets out accommodation in the premises to not more than two other households, or there is not normally residential accommodation on the premises for more than six persons in addition to the landlord or manager and members of his household. The Disability Rights Task Force thought that the limit of up to six other people 'could be unnecessarily high to protect the privacy of landlords and their families' and advised that this provision should be 'kept under review.'[175]

The Bill will retain the small dwellings exemption but **clause 14** will confer on the Secretary of State a power to amend or repeal the provision by order. During consideration in Grand Committee Baroness Hollis said that there was currently no consensus on the best way of changing the exemption and that, as a result, the Government was trying to keep the clause 'as flexible as possible.'[176] Any order to modify or end the exemptions relating to small dwellings will be subject to the affirmative resolution procedure.

5. Accessible housing registers

The Joint Committee on the draft Bill was persuaded by evidence from the National Housing Federation and the British Council of Disabled People that there is a need for an 'accessible housing register' as a way of 'systematising the supply of suitable accommodation to a suitable group of people who would be in need of it.' The Committee recommended that the Government should consider whether the full Bill

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[174] HL Deb 3 February 2005 cc442-3
[175] Disability Rights Task Force, *From Exclusion to Inclusion, December 1999,* Recommendation 6.24
[176] HL Deb 20 January 2005 c335GC

could be used to introduce an accessible housing register.[177] The Government's response rejected this idea on the grounds that local authorities are already encouraged to maintain lists of properties that are suitable for disabled people and that making registers a legislative requirement would place a 'disproportionate burden' on them.[178]

Lord Skelmersdale moved amendments during the Grand Committee and Report stages that would have placed a duty on local authorities to maintain a register of accessible housing.[179] Baroness Hollis resisted the amendment and argued that the voluntary approach was 'working well.' She emphasised that the Local Government Association was 'reluctant' to have the provision made compulsory. She also quoted the Disability Rights Commission's position:

> We are very happy with the progress made. We have a commitment to placing Disability Housing Registers/and equivalent services on a statutory footing but this Bill is not the right vehicle.[180]

Both amendments were withdrawn.

G. General qualifications bodies

1. Introduction

The *Disability Discrimination Act 1995* does not currently apply to bodies that award general qualifications (such as GCSEs and GCE A Levels). However, the report of the Joint Committee on the Draft Disability Discrimination Bill, published in May 2004, recommended that it should.[181] The Government accepted this recommendation.[182] Clause 15 of the *Disability Discrimination Bill* seeks to make it unlawful for general qualifications bodies to discriminate against disabled persons in relation to the award of prescribed qualifications.

2. Background

The *Special Educational Needs and Disability Act 2001* (SENDA) extended the *Disability Discrimination Act 1995* (DDA) to education.[183] Part 4 of the DDA makes it

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177 *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 327

178 The Government's response to the Report of the Joint Committee on the Draft Disability Discrimination Bill, DWP, 15 July 2004, Cm 6276, recommendation 58

179 HL Deb 20 January 2005 c328GC & HL Deb 3 February 2005 c448

180 HL Deb 3 February 2005 c450

181 HC Paper 352-I Vol. 1 Report; HC 352-II Evidence, 27 May 2004 http://www.publications.parliament.uk/pa/jt200304/jtselect/jtdisab/82/8215.htm#a149

182 *The Government's Response to the Report of the Joint Committee on the Draft Disability Discrimination Bill*, Cm 6276, July 2004 http://www.disability.gov.uk/legislation/ddb/response.asp

183 *Special Educational Needs and Disability Act 2001* Chapter 10 http://www.legislation.hmso.gov.uk/acts/acts2001/20010010.htm

unlawful to discriminate against disabled pupils and students seeking access to education.[184] The principle behind the legislation is that wherever possible disabled people should have the same opportunities as non-disabled people in their access to education. The Act contains disability discrimination provisions relating to schools, further education and higher education institutions. The Act's disability discrimination provisions took forward the recommendations made by the Disability Rights Task Force (DRTF) in its report *From Exclusion to Inclusion*, published in December 1999.[185]

Examination arrangements that are under the control of schools, colleges and universities come within the provisions of the DDA; however, the general examining bodies are not covered by the disability discrimination legislation. At present the Joint Council for Qualifications (JCQ)[186] and the Scottish Qualifications Authority (SQA) have a non-statutory framework relating to candidates who are eligible for adjustments (special arrangements) in examinations.[187]

Professional and trade qualifications were brought within the DDA by the *Disability Discrimination Act 1995 (Amendment) Regulations 2003*.[188] However, these regulations do not apply to examination bodies awarding general academic qualifications, nor to standard setting bodies which do not confer a professional or trade qualification.

Commentators have pointed out that it is confusing to have some qualifications covered by the DDA and not others, and that the current voluntary arrangements for adjustments are inadequate to safeguard the rights of disabled students. A great deal of evidence was submitted to the Joint Committee on the Draft Disability Discrimination Bill putting the case for general examining bodies and standard setting agencies to be covered by the DDA. The report of the Joint Committee noted that the National Union of Teachers (NUT) described this as "essential to achieving equality for disabled students in educational attainment and contribution to school and college life."[189]

SKILL - the National Bureau for Students with Disabilities - gave evidence of instances where examination bodies had refused to make adjustments. It thought that further confusion would be created by the introduction of vocational GCSEs and the Scottish Credit and Qualifications Framework, which may come under the existing provisions, and that the differential treatment of general qualifications could lead to a judicial review challenge. The Centre for Inclusive Education argued that the current voluntary

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184 Section IB4 of this paper provides additional background information on SENDA.

185 http://www.disability.gov.uk/drtf/full_report/index.html

186 which consists of the major qualification awarding bodies: AQC, CCEA, City & Guilds, Edexcel, OCR, SQA, and WJEC

187 http://www.jcgq.org.uk/index2.asp; http://www.sqa.org.uk/sqa/sqa_nu_display.jsp?pContentID=4585&p_applic=CCC&p_service=Content.show&

188 SI 2003 No. 1673, http://www.legislation.hmso.gov.uk/si/si2003/20031673.htm

189 HC Paper 352-I, paragraph 381

arrangements for adjustments were inadequate for safeguarding the rights of disabled students.

The Joint Committee on the Draft Disability Discrimination Bill also noted that the Disability Rights Commission had reminded the Committee that it had been a recommendation of the DRTF that assessment and examination arrangements be included in the 'provision of education' in the new rights for disabled people.[190]

In its evidence to the Joint Committee, the JCQ emphasised that it was 'committed to making appropriate special arrangements for candidates with disabilities to enable them to access all qualifications wherever possible,' and pointed out that little evidence of difficulties had been presented to the awarding bodies themselves. The JCQ said that statutory control would reduce flexibility and increase bureaucracy, without delivering benefits for disabled students.[191]

The Joint Committee concluded:

> 386. It seems anomalous for some qualification giving bodies to be covered by the DDA and not others. It also seems anomalous that schools, colleges and education authorities are required to make reasonable adjustments in the context of examinations but that the awarding body is not. And although examination bodies seem already to have made considerable efforts to make reasonable adjustments, there seems nothing unique about their situation which would require an exemption from a duty not to discriminate. The fact that examination bodies have already made significant strides should make the transition to statutory control much easier, with fewer financial implications, for this sector than for many others. **The Committee therefore recommends that all examination bodies and standard setting agencies are brought within the provisions of the DDA.**[192]

In July 2004, the Government responded to the Joint Committee's report, and accepted the recommendation to cover awarding bodies in the Bill:

> R69: Awarding bodies (also known as examination boards) are not covered by Part 4 of the DDA. In addition, the scope of the DDA was not extended to them in relation to non-vocational qualifications when the DDA was amended to allow for the transposition of the EU Directive 2000/78/EC because the Directive required the UK Government to cover only qualifications that gave access to a particular profession or job.
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> In relation to non-vocational qualifications, special arrangements can often be made for candidates with special assessment needs, but we accept that disabled

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[190] *ibid*, paragraph 381 and 382
[191] *ibid*, paragraph 383 and 384
[192] *ibid*, paragraph 386

> people would benefit from an extension of the existing legislation. We will therefore be covering awarding bodies in the Bill in respect of general qualifications (such as GCSEs and the Scottish Standard Grade). We will be considering the implications of including other types of non-vocational qualifications.
>
> Although some standard-setting bodies are also not covered by the DDA, where they are not involved in conferring a relevant qualification, from October there will be a route of redress for disabled people against qualifications bodies or employers should they apply a discriminatory standard. In view of this, therefore, we feel that there should be sufficient protection for disabled people and that there is currently no clear need to accept the committee's recommendation. Nevertheless, we are looking further into the issue and in the light of further evidence being provided we would consider whether the current provisions would in fact be fully effective.[193]

3. Clause 15

Clause 15 of the Bill inserts a new Chapter 2A (sections 31AA to 31AF) into Part 4 of the DDA. The provisions seek to make it unlawful for general qualifications bodies to discriminate against disabled persons in relation to the award of prescribed qualifications. As noted above, these are new provisions which did not appear in the draft Bill.

The provisions mirror, to a large extent, the prohibitions on qualification bodies which award trade or professional qualifications, which were inserted into the DDA by regulations (see above). Clause 15 introduces a regulatory making power to impose new duties on general qualifications bodies to protect disabled people from discrimination in relation to those qualifications. The prescribed qualifications will be specified in regulations made by the Secretary of State under new section 31AA(4). The Explanatory Notes on the Bill state that it is intended that this power will be used to prescribe qualifications such as A levels, GCSEs and other non-vocational qualifications and their equivalents in Scotland and Wales.[194]

New sections 31AB and 31AC define what is meant by unlawful discrimination in this context and what is meant by unlawful harassment. New section 31AD requires general qualifications bodies in certain circumstances to make reasonable adjustments where disabled persons suffer substantial disadvantage in comparison with others. The Explanatory Notes explain that there is no duty to make reasonable adjustments in relation to competence standards, but the duty is imposed where general qualifications bodies apply provisions, criteria or practices to disabled persons. It also applies in relation to the physical features of premises occupied by general qualifications bodies. This would mean, for example, that a general qualifications body would need to modify

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193 *The Government's Response to the Report of the Joint Committee on the Draft Disability Discrimination Bill*, Cm 6276, July 2004 http://www.disability.gov.uk/legislation/ddb/response.asp

194 Bill 71-EN, paragraph 164

arrangements for disabled persons when they sit examinations in premises provided by the body, for example by ensuring there is appropriate ramp access for candidates who use wheelchairs.[195]

New section 31AD(6) enables the Secretary of State to make regulations to further define, clarify and elaborate on the scope of the duty to make reasonable adjustments, by, for example, specifying what is meant by a provision, criterion, practice or physical feature, or specifying when any of those things is (or is not) to be taken to have a particular effect.

New section 31AE(2) and (7) provide power to make provision in regulations about the cases where leasehold premises are occupied by qualifications bodies and how the reasonable adjustment duty impacts in this context. New section 31AE(3) aims to prevent any contract or agreement from seeking to oust, limit or contravene the substance of Chapter 2A.

Powers to make provision with respect to enforcement matters are contained in new section 31AE. There is power to make provision about enforcing claims of unlawful discrimination under new chapter 2A. For example, regulations can make provision regarding the mechanism of enforcement: which tribunal/court applies; the remedies available; and procedural matters that apply.

The House of Lords Delegated Powers and Regulatory Reform Committee said that it was unsatisfactory for the Bill (as originally presented in the Lords) to give no indication of the remedies that would be afforded to a successful applicant. It therefore recommended that, unless the Bill was amended to include such provision, the affirmative procedure should apply to any regulations making provision as to remedies, not just the first time the regulation-making powers were exercised.[196] The Government accepted this recommendation.[197] The Bill was amended at Lords report stage to ensure that the affirmative procedure applies to any regulations made in relation to remedies (see below).

Before making regulations (under new chapter 2A) the Secretary of State must consult the Scottish Ministers, the National Assembly for Wales and such other persons as appear to him to be appropriate (new section 31AF).

The legislation will have financial consequences for qualifications bodies, particularly as the legislation opens a new avenue of litigation. The Regulatory Impact Assessment makes it clear that the Government intends to consult about the extent of the regulation-making power, the general qualifications bodies it will cover, the way in which any

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[195] *ibid*, paragraph 167

[196] House of Lords Delegated Powers and Regulatory Reform Committee, 4th report of Session 2004-05, HL Paper 19, paragraph 10

[197] House of Lords Delegated Powers and Regulatory Reform Committee, *Disability Discrimination Bill [HL] - Government Response*, HL Paper 31, published 20 January 2005, Annex 4

standards relating to the qualifications are applied, enforcement and costs. On the anticipated costs, the Regulatory Impact Assessment states:

> 12.2 Cost/benefit to business: It is expected that costs will fall on two main categories of providers - general qualifications bodies (and the big awarding bodies are charities, not profit making businesses) and examination centres. The awarding bodies who are included within the Joint Council for Qualifications (JCQ) already administer arrangements for candidates for general examinations with particular requirements, therefore it is expected that additional compliance costs will be relatively marginal. However, any additional qualifications body costs are likely to be passed onto examination centres in increased fees. Similarly, examination centres which use the JCQ members' examination specifications already comply with JCQ's regulations and guidance relating to candidates with particular requirements and only minimal additional administrative costs will apply. The Government will consult with other qualifications bodies, in preparation for the regulations, on additional administrative costs they might incur if they are included within the scope of the new regulations and this will be reflected in the RIA that will accompany those regulations. The main cost to providers will be as a result of enforcement action. It is not possible to make an assessment of the number of cases that are likely to challenge awarding bodies' compliance with the regulations. However, it is estimated that court or tribunal costs for awarding bodies will average £2,000 per case.
>
> 12.3 Cost/benefit to individuals: Costs to individuals will only be incurred if they wish to obtain legal redress. The DRC will be able to support some individual disabled people with complaints.
>
> 12.4 Cost/benefit to Government: The DRC will incur costs when producing a Code of Practice and through providing conciliation services. There will also be consultation costs associated with the regulations.[198]

4. Lords consideration of clause 15

During the Second Reading debate in the House of Lords, Peers welcomed the inclusion of clause 15 in the Bill. Lord Skelmersdale said that he was glad that the Government had included general qualifications bodies within the scope of the Bill, but asked for more information about what awarding bodies would be covered; he thought that a list would be helpful.[199] Baroness Darcy de Knayth, who is President of SKILL, which had campaigned on the issue, welcomed clause 15 though she expressed concern that some examining bodies and standard setting bodies would not be covered.[200]

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[198] *Disability Discrimination Bill, Regulatory Impact Assessment*, as revised following Third Reading in the House of Lords

[199] HL Deb 6 December 2004 c675

[200] HL Deb 6 December 2004 cc698-9

In Grand Committee in the Lords, Lord Skelmersdale raised a number of questions including whether a Sewel Motion was necessary; whether halls hired for examination purposes would be covered by the legislation; and, whether enforcement regulations would be subject to the affirmative procedure:

> Amendment No. 69 gives me the opportunity to ask the noble Baroness what progress there is on the Sewel Motion in the Scottish Parliament. Like her, I cannot envisage any problem, but it is necessary for a Sewel Motion to be passed before the Westminster Parliament can legislate for any matter that the Scotland Act 1998 makes the normal province of the Scots.
>
> Again, I am not sure why Amendment No. 70 is grouped. It is about the meaning of "harassment", which the Bill describes, at least as far as general qualification bodies are concerned, as happening when,
> "the body engages in unwanted conduct which has the purpose or effect of—
> (a) violating the disabled person's dignity; or
> (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him".
> The curious thing is that it is not general; it happens only when the behaviour is unwanted. Surely it does not matter whether the behaviour is wanted or not. It should constitute harassment all the time, not only when it is unwanted.
>
> I tabled Amendment No. 71 to elucidate the position of a hall hired by a general qualification body for the purposes of holding exams. I mentioned the matter very briefly at Second Reading. For example, the Royal Horticultural Society, just up the road, has exhibition halls that it hires out for examinations for various professional and educational bodies. I would expect it to be covered by the new subsection. Is it?
>
> Amendment No. 72 is rather different. In its typically exhaustive examination of the order-making powers in the Bill, your Lordships' Select Committee on Delegated Powers and Regulatory Reform said that new Section 31AE concerned enforcement matters which for discrimination under the 1995 Act in other contexts are contained within the Act itself. The departments have explained to us that, in respect of new Section 31AE, that approach is not possible because:
>
> "There are unresolved issues concerning the most appropriate enforcement mechanism . . . In our view it is unsatisfactory for the bill to give no indication of the remedies that will be afforded to a successful applicant".
>
> They thus concluded that, unless the Bill is amended to include such provision, the affirmative procedure should apply to any regulations making provision as to remedies, not just the first ones, as currently provided for in the Bill. I tabled Amendment No. 72, therefore, to tempt the noble Baroness into agreeing with the Committee—something that I have never heard her resist. I beg to move.[201]

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[201] HL Deb 20 January 2005 c338GC

Baroness Hollis of Heigham replied for the Government:

> I shall deal in turn with the four amendments that seek to amend Clause 15. Amendment No. 69 seeks to amend a relatively technical part of the Bill and would not have a significant impact, but it would create an anomaly—the noble Lord picked that up in mentioning the Sewel amendment—by placing duties upon Scottish education authorities but not their English or Welsh equivalents.
> Scottish education authorities along with English and Welsh ones are specifically excluded from Clause 15. The reason is that any duties to be imposed on education authorities are made under Chapters 1 and 2 of Part 4 of the Disability Discrimination Act 1995, not new Chapter 2A. In any case, LEAs and Scottish education authorities do not in general compare qualifications—certainly not general academic qualifications, which are done by joint boards—of the type that the clause is intended to cover. Existing duties under the DDA cover any responsibilities that education authorities have concerning, for example, the administration of examination assessment arrangements.
>
> In the context of this amendment the noble Lord asked about the Sewel Motion. A Sewel Motion is not needed for this clause but one is needed for the earlier clause on the public sector. So the noble Lord was on the bull's eye but perhaps the wrong target. Progress is being made in that respect to ensure that the Motion is passed.
>
> Amendment No. 70 would put the definition of "harassment" in Clause 15 out of line with that used in relation to vocational qualifications. This definition and the other provisions in this clause are modelled on the sections of the DDA that cover vocational qualifications. It is important that the definitions are uniform and consistent, since some awarding bodies offer both general and vocational qualifications and some candidates may take both. I remember vividly, perhaps 18 months ago, the noble Baroness, Lady Darcy de Knayth, having a go at me about the need to deal with general qualifications and not just vocational ones, so she should be coming here to cheer us on for meeting the very concerns that she was pressing me on.
>
> The word "unwanted" is an important part of the definition. It sounds redundant, and I agree that there will be few circumstances in which conduct, as defined under the clause, could be desired by a disabled person. However, there will be cases where the overall judgment about whether conduct constitutes harassment under the 1995 Act needs to include consideration of whether the disabled person had in fact requested the conduct complained of or given any reason to believe that such conduct was wanted or acceptable.
>
> Perhaps I may give an example to clarify the point. Again, I do not think that it is very likely, but it should be considered all the same. Let us consider a scenario where a candidate taking an oral exam requests at the outset that the exam administrator expressly mention that he has a speech impediment, so that it will be clearly understood by the examiners. I guess that it might apply if somebody with cerebral palsy was taking a *viva voce* as part of a French or German exam, and the examiner taking the *viva* could not necessarily be expected to know that

> the candidate had a speech impediment. If the exam administrator followed that request but the disabled person subsequently felt embarrassed or humiliated, it would surely be pertinent to a judgment on whether the action constituted harassment that the disabled person had in fact requested it. The administrator would have had no way of knowing that that would be the reaction of the candidate after the event. So the word "unwanted" in the definition may make a difference only in limited circumstances in practice, but we think that it is necessary none the less.
>
> We understand why Amendment No. 71 was tabled. We do not want qualification bodies to seek to avoid these duties, and they will not be able to do so. The term "occupied" is used throughout the DDA without any qualification. It must be given its ordinary, commonsense meaning, and that encompasses leased premises, such as the Royal Horticultural Society hall, or other premises temporarily occupied.
>
> Amendment No. 72 seeks to make any regulations made under subsections (1),(2) or (4) of Section 31AE, which amend the DDA 1995 itself, subject to the affirmative resolution procedure. I hope that the noble Lord will agree that we have done our best to answer his amendments.[202]

The Bill was amended at Report Stage in the Lords to ensure that the affirmative procedure applies to any regulations made in relation to remedies for discrimination by general qualification bodies and not just the first time the regulation-making power is used.[203]

H. Disputes under Part 3 of the DDA 1995

The DDA provides a procedure under which a person who believes they have been discriminated against in contravention of its employment and occupation provisions can put questions to the alleged discriminator. These provisions are set out in Part 2 of the Act; the procedure is known as the 'questions procedure.' The aim of the procedure is to 'help a person find out more about the reasons for an alleged unlawful act' and to enable a dispute to be resolved without the need for legal action.[204] **Clause 17** restates and extends the procedure so that it will apply to discrimination experienced in the following areas:

- Access to goods, facilities and services (sections 19-21 of the DDA);
- By public authorities (clause 2: new sections 21B to 21E), with some exceptions, e.g. if answering questions would prejudice a decision to institute criminal proceedings;

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[202] HL Deb 20 January 2005 cc339-340GC

[203] HL Deb 8 February 2005 c692

[204] DWP, *Consultation on Private clubs; premises; the definition of disability and the questions procedure*, December 2004, Cm 6402, p43

- By private clubs (clause 12: new sections 21F to 21J);
- By those who sell, rent or manage premises (sections 22-24); and
- By those who control rented premises (clause 13: new sections 24A to 24L).

Clause 17 was not debated in the Lords.

I. Definition of disability

The definition of disability under the DDA is one of the aspects of the Act that disabled lobbyists are particularly concerned about on the grounds that it draws quite heavily on the 'medical model' of disability. When the original Act was proceeding through Parliament disabled groups feared that the definition of disability would exclude many people who experience discrimination, such as people who have previous histories of mental health problems or who are HIV positive. The Joint Committee on the draft Bill concluded that the focus of disability anti-discrimination legislation ought to be on the act of discrimination (the 'social model') and not on the exact nature and extent of a person's impairment (the 'medical model'). However, the Committee accepted that the existing legislation was based on the medical model and, given the work that developing the social model into a workable legislative form would involve, it recommended that the DRC should 'examine and consult on how the law could be amended in the future to provide protection against discrimination regardless of level or type of impairment.'[205]

Clause 18 of the Bill will amend the definition of disability in the DDA in respect of people with mental illnesses and will deem people with HIV infection, multiple sclerosis, or cancer to be disabled (but see section **II.I.2** below). The extension of the definition of disability has been welcomed but there are remaining concerns with some aspects; these concerns are outlined in the sections below.

According to the Regulatory Impact Assessment on the Bill widening the definition of disability to include more people with HIV, cancer and multiple sclerosis will bring an additional 175,000 people (2%) within the scope of the DDA. Enabling more people with depression to be treated as meeting the 'long-term' requirement will bring a further 142,500 to 285,000 people of working age into the Act's coverage. In the Government's opinion this extension 'is unlikely to result in more than a marginal increase in recruitment or workplace adjustment costs because the newly covered people would not generally require adjustments.'[206]

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[205] *Joint Committee on the Draft Disability Discrimination Bill*, HC 352 2003/04, May 2004, para 50

[206] *Disability Discrimination Bil*l, Regulatory Impact Assessment (Revised following Third Reading in the House of Lords), para 14

1. Mental illness

The Government accepted a recommendation of the Joint Committee to remove the requirement that mental illnesses be 'clinically well recognised' in order to qualify as a disability under the DDA but people with mental illnesses will continue to need to demonstrate that their impairment has a 'substantial and long-term adverse impact on their ability to carry out normal day-to-day activities.' In Grand Committee Lord Carter moved an amendment that had been recommended by the Joint Committee (but rejected by the Government) which would have meant that people experiencing separate periods of depression totaling six months over a two-year period would be considered to meet the 'long-term' requirement.[207] He explained why the amendment was thought to be necessary:

> To qualify as disabled for the purposes of the DDA, the claimant must have an impairment with a long-term adverse effect on normal day-to-day activities. "Long term" is defined to last for a past period of at least 12 months or there must be a likelihood that the period will be 12 months.
>
> Recurrent conditions are also covered if the "substantial adverse effect" of an impairment has not lasted for 12 months but is likely to recur. The aim of this provision was to cover impairments whose effect on day-to-day activities fluctuates. However, case law has shown that the provision is not effective in the case of depression. There are differences of view within the medical profession as to whether, and when, episodes of depression are manifestations of an underlying condition and when they are discrete episodes. As a result, experts often disagree in court on the issues.
>
> …The requirement that a mental impairment has a substantial long-term effect on day-to-day activities can exclude some severe episodes of depression where the impairment is profound for short, and typically recurrent, episodes over a two to three-year period and the stigma resulting from those episodes can lead to major discrimination in the workplace. Typically, an individual who suffers an episode of hypomania or psychotic depression—the whole lasting for about four to six months—is then held back unreasonably in his or her career for many years after recovery and has no recourse to the protection of the law in dealing with an employer's unreasonable treatment.
>
> Interestingly, before effective antidepressant drugs became available in the 1940s, episodes of severe depression lasted some two to three years and then the sufferer usually spontaneously recovered. Now, medication does not so much cure the underlying episode as lift the symptoms, enabling the patient to return to normal life, although still in a rather vulnerable state, after about four to six months. That is why so many depressions appear to go away and then return in further bouts over the course of some two to three years. Reducing the qualifying period to six months would recognise these clinical realities and would do no more than reflect

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[207] HC Deb 20 January 2005 c344GC

> the continuing vulnerability of the person who has experienced this kind of illness.
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> There is a real problem here. I hope that the Minister will be able to say that, in some way, depression is caught by the existing situation as it is clearly a recurrent condition. But, from the wording of the Bill, it appears not to be covered. I think that this is an important area where it was wrong of the Government not to accept the recommendation of the Joint Committee. I hope that I shall hear some helpful words from the Minister. I beg to move.[208]

Baroness Hollis argued in response that conditions with effects that occur only sporadically or for short periods *will* qualify for DDA protection where they are part of the same underlying impairment and where that the effects are likely to be substantial and to recur beyond 12 months after the first occurrence.[209] Lord Skelmersdale returned to the issue on Report and Baroness Hollis once again defended the Government's approach:

> At any point in time, about 10 per cent of adults suffer depression. One in 10 new mothers suffers postnatal depression. One in two of those who marry is likely to divorce, which is likely to generate a period of grief or depression. Almost all of us are likely to lose our parents. That produces grief and depression for many of us. Very many of us—indeed, most women—will lose a spouse, often after a period of draining medical care. We should also bear in mind redundancy, bankruptcy and homelessness. All of these events can give rise to periods of quite severe depression. It would be unnatural for a woman who lost both parents within three weeks and a husband a few years thereafter not to grieve and to suffer from depression. But such events would be discrete episodes that could be dealt with by a rest, a good diet, supportive friends or medical support. In no sense would they be indicative of an underlying condition. They would be discrete episodes.
>
> That is why I think that our approach is better. Let us say that someone—perfectly legitimately—suffers from depression as a result of losing a parent, for whatever reason, and then, five years later, loses his job in difficult circumstances and suffers from another period of depression, in the sense that he goes to the doctor saying that he is depressed and so on. Those are discrete, unconnected life events which have hit that individual hard, but they do not suggest that, in terms of the DDA, he has a "long-term impairment" for which he needs its protection.
>
> We are trying to make a distinction between those separate life events, which we do not think should come within the protection of the DDA, and other episodes that belong to an underlying condition, where we believe the general practitioner is best qualified to guide and steer that person through. It does not matter whether those episodes are one, five or 10 years apart. They belong to the underlying condition and the sufferer will continue to receive protection—and rightly so.

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[208] HL Deb 20 January 2005 c345-6GC
[209] HL Deb 20 January 2005 c347GC

> What I am happy to do—and I will seek the noble Baroness's advice on this—is to see whether we need to do anything further to ensure that general practitioners in particular are well aware of the need to draw this distinction as appropriate so that they can give the necessary help. I will talk to the DRC. I am very happy to ask my honourable friend the Minister for Disabled People to talk to the Department of Health to see whether we can do anything further to promote understanding on the issue. But I would hope that your Lordships would agree that the Government's approach is appropriate.[210]

Lord Skelmersdale's amendment was carried on a division of the House so that clause 18 of the Bill now makes specific provision for mental impairment consisting of, or resulting from, depression:

> "( ) Without prejudice to the operation of sub-paragraph (2), the mental impairment consisting of or resulting from depression that has ceased to have a substantial adverse effect on a person's ability to carry out normal day to day activities shall always be treated as if that effect is likely to recur if the person has had within the last 5 years a previous episode of such impairment which had a substantial adverse effect on the person's ability to carry out normal day to day activities for a period of 6 months or more."[211]

Attempts were also made in Grand Committee and on Report to improve the coverage of mental health conditions within the definition of disability by including capacities that are most likely to be severely affected for people with disorders such as eating disorders, depression, anxiety and schizophrenia, such as the ability to care for oneself and to communicate and interact with others. Baroness Hollis conceded that the DDA's definition of disability 'does not adequately cover people who have certain mental and developmental impairments' but argued that the list of capacities in paragraph 4 of Schedule 1 to the Act *would* capture the specific conditions referred to.[212] She accepted that the statutory guidance on matters to be taken into account in determining questions relating to the definition of disability could be improved and said that that would be remedied.[213]

On Report Lord Skelmersdale focused on the list of day-to-day activities in paragraph 4 of Schedule 1 and claimed that employment tribunals and courts 'are reading the list of activities in Schedule 1 as being finite.' He moved an amendment to 'toughen up' the definition of disability in the Act so that it better reflects the difficulties experienced by people who are mentally impaired.[214] Baroness Hollis responded again by stating that any concerns should be addressed by clarifying the statutory guidance:

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[210] HL Deb 8 February 2005 cc670-1
[211] Clause 18(3)(2A)
[212] HL Deb 20 January 2005 c350GC
[213] HL Deb 20 January 2005 c351GC
[214] HL Deb 8 February 2005 c674-5

> We will consult all those who have expressed an interest in this issue when we draw up revised guidance. The guidance will also be presented in draft to Parliament for it to consider before it is issued. The Disability Rights Commission agrees that this is the right approach. On this, as on other amendments, it does not wish to see the Bill delayed. In the light of these explanations and assurances I ask the noble Lords, Lord Skelmersdale and Lord Higgins, to withdraw their amendment.[215]

2. Cancer

Although the Bill will extend the definition of disability to include cancer from the point of diagnosis, the Government will retain a power to exclude certain types of cancer from the DDA's coverage. The Joint Committee recommended that this power should not be taken and the issue was subsequently raised in Grand Committee and on Report. The Government's position is that quick and effective treatment is available for a range of 'minor' cancers that would not normally be considered as disabilities, therefore it would be inappropriate to offer coverage of the DDA. Five types of cancers have been identified for exclusion to date: basal cell carcinomas; Bowen's disease; most squamous cell carcinomas of the skin; in-situ skin cancers that do not affect the full skin thickness; and in-situ cancer of the cervix.[216] Consultation on the regulation making power to exclude certain cancers from the scope of the extended definition of disability is ongoing.[217] On Report Baroness Hollis said that the Government would consider carefully the evidence received in response to the consultation exercise and gave an under-taking that the regulation-making power would not be used to exclude any cancer from the extended definition until 'we have reviewed what evidence may be available about discriminatory behaviour towards people with those cancers.'[218]

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[215] HL Deb 8 February 2005 c676

[216] HL Deb 20 January 2005 c358GC

[217] DWP, *Consultation on Private clubs; premises; the definition of disability and the questions procedure*, December 2004, Cm 6402. Consultation closes on 18 March 2005.

[218] HL Deb 8 February 2005 cc688-9

III Glossary

ALC	Association of London Clubs
AQC	Assessment and Qualifications Alliance
CCEA	Council for the Curriculum, Examinations and Assessment
DCC	Disability Charities Consortium
DDA	Disability Discrimination Act 1995
DfT	Department for Transport
DPTAC	Disabled Persons transport Advisory Committee
DRC	Disability Rights Commission
DRTF	Disability Rights Task Force
DWP	Department for Work and Pensions
GCE A Level	General Certificate of Education Advanced Level
GCSE	General Certificate of Secondary Education
IMO	International Maritime Organisation
JCQ	Joint Council for Qualifications
LEAs	Local Education Authorities
LTA	Landlord and Tenant Act
NDC	National Disability Council
NUT	National Union of Teachers
OCR	Oxford Cambridge and RSA Examinations
Ofsted	Office for Standards in Education
PRM	People with Reduced Mobility
RVAR	Rail Vehicle Accessibility regulations

SENDA	Special Educational Needs and Disability Act 2001
SKILL	National Bureau for Students with Disabilities
SQA	Scottish Qualifications Authority
TOC	Train Operating Company
WJEC	Welsh Joint Education Committee