

# DISABILITY DISCRIMINATION ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Section 2: Discrimination by public authorities*

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

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

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

46. New section 21D(7)(a) provides a regulation-making power to amend, or remove, a condition of justification listed in new section 21D(4), or to make provision for a justification not to apply in specified circumstances. New section 21D(7)(b) is mentioned in the note on new section 21D(5) above. New section 21D(7)(c) gives a regulation-making power to add new justifications to those already existing in new section 21D(3) to (5).