

DISABILITY DISCRIMINATION ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 1

Minor and Consequential Amendments

Part 1

Amendments to the DDA 1995

Paragraph 2

187. The amendments made by sub-paragraphs (2) and (4) ensure that the provisions of the DDA relating to past disabilities (section 2 and Schedule 2) apply to the duties under sections 49A and 49D (inserted by section 3). See also the amendment to Schedule 2 made by paragraph 37.

Paragraph 3

188. *Paragraph 3(2)* inserts a new subsection (A1) into section 3 of the DDA. Section 3 of the DDA, as currently drafted, enables the Secretary of State to issue guidance on two aspects of the definition of disability: whether an impairment is to be considered as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities; and whether an impairment is to be considered as having a long-term effect. New section 3(A1) enables the Secretary of State to issue guidance on all aspects of the definition of disability. For the purposes of new paragraph 6A of Schedule 1, this would enable guidance to be issued, for example, on when a person is to be considered as having HIV infection, cancer or MS or on what constitutes substantial treatment.

Paragraph 5

189. This makes changes to section 4C(2) in order to ensure that new section 21B(8) and (9) do not cause new section 21B(1) to apply in relation to an office or post mentioned in new section 15B(3)(b) inserted by section 1. By reason of the effect of section 4F(1), the amendment does not affect the operation of sections 4D and 4E.

Paragraph 6

190. This replaces subsection (3) of section 14C DDA (practical work experience, which was inserted by regulation 13 of the Amendment Regulations). The new subsection restates with modifications the matters to which sections 14C and 14D do not apply.

Paragraph 7

191. This makes changes to section 16A(2) (meaning of "relevant relationship" in section 16A). Sub-paragraph (a) ensures that the relationships between locally-electable authorities and their members are not covered by section 16A (relationships which

have come to an end) because that section, which was inserted by the Amendment Regulations, relates to the provisions in Part 2 of the DDA governing the employment field and has no application to the relationships governed by new sections 15A to 15C (councillors and members of the Greater London Authority).

192. Sub-paragraph (b) makes changes to section 16A(2)(b) in consequence of the new definition of “employment services”, applying to the whole of the DDA, to be inserted by paragraph 34(2) into section 68(1) of the DDA.

Paragraph 8

193. Sub-paragraph (2) inserts a new subsection (2C) into section 16B (discriminatory advertisements) of the DDA and ensures that section 16B(1) will not apply to advertisements inviting applications from persons in their capacity as members of a locally-electable authority for a relevant appointment or benefit which the authority is intending to make or confer. This is because section 16B, which was inserted into the DDA by the Amendment Regulations, relates to the provisions in Part 2 of the DDA governing the employment field and has no application to the relationships governed by new sections 15A to 15C (councillors and members of the Greater London Authority).

Paragraph 10

194. This amends section 17B (enforcement of section 16B and 16C), and is necessary in consequence of the creation of the new criminal offence in section 16B(2B) (discriminatory advertisements), inserted by section 10(3). Without the amendment the Disability Rights Commission would be the prosecuting authority for such offences, and proceedings would have to be presented to an employment tribunal. Paragraph 38(2) provides for a related amendment to Schedule 3 of the DDA to allow for the bringing of criminal proceedings for offences under section 16B(2B).

Paragraph 11

195. This makes two consequential amendments to section 18D(2). Sub-paragraph (a) ensures that any reference to the “duty to make reasonable adjustments” in Part 2 of the DDA includes a reference to the duty imposed on locally-electable authorities under section 15C. Sub-paragraph (b) ensures that the definition of “physical feature” in section 18D(2) (as inserted by the Amendment Regulations) is without prejudice to the power in new section 15C(4)(e) to make provision as to things which are, and things which are not, to be treated as physical features for the purposes of the duty on locally-electable authorities to make reasonable adjustments.

Paragraph 12

196. This inserts new section 18E into the DDA (premises provided otherwise than in course of a Part 2 relationship). The new section is intended to clarify the boundaries between Part 2 of the DDA (the employment field and members of locally-electable authorities) and Part 3 (discrimination in other areas) with respect to the provision of premises for persons such as employees. The general effect is that, where accommodation is provided in the course of a person’s employment (for example live-in accommodation), any related discrimination or harassment will be governed by Part 2 of the DDA. But where the accommodation is provided on a separate basis, unconnected with a person’s employment (for example, where a council employee is a tenant of the same local authority) then section 18E will ensure that Part 2 does not apply. New section 18E needs to be read with new section 24M (premises provisions not to operate where other provisions apply), discussed below.

Paragraph 13

197. Sub-paragraphs (2) and (3) make minor and consequential amendments to section 19 (goods, facilities and services) in consequence of the new section 21ZA

(transport vehicles) inserted by section 5. Sub-paragraph (4) restates and modifies subsection (5A), which makes provision about the relationship between section 19 and Part 4 (education).

Paragraph 14

198. This replaces section 20(7)(c) in consequence of a non-textual amendment made by paragraph 1 of Schedule 5 to the Adults with Incapacity (Scotland) Act 2000. Section 20(7)(c) allows the Secretary of State to make regulations disapplying section 20(4) (b), which concerns justification by a service provider of less favourable treatment of a disabled person who is incapable of entering into an enforceable agreement. The power will be available where, under the law of Scotland, a guardian, tutor or judicial factor has been appointed to manage the disabled person's affairs.

Paragraph 15

199. This amends section 21A (inserted in the DDA by the Amendment Regulations with effect from 1 October 2004) in consequence of the new definition of "employment services" inserted in section 68(1) by paragraph 34(2) of Schedule 1, which will apply to the whole of the DDA. It also makes a change to section 21A(4) in consequence of new section 21ZA (transport vehicles) inserted by section 5.

Paragraph 16

200. This inserts a new subsection (3A) into section 22 of the DDA. Section 22(3) of the DDA forbids discrimination by a person who manages premises against a disabled person occupying those premises. The new subsection confers a power on the Secretary of State to make provision by regulations for the purposes of section 22(3) as to who is, and who is not, to be treated as being (i) a person who manages premises, or (ii) a person occupying premises.

Paragraph 17

201. This inserts a new section 22A into the DDA. This makes it unlawful for a person (in particular a commonhold association) to discriminate by withholding a licence or consent for the disposal of an interest in a commonhold unit in favour of, or to, a disabled person or by deliberately not being a party to such a disposal. Subsections (1) and (2) contain provisions comparable to those that apply to leasehold premises by virtue of section 22(4). Subsection (3) allows the Secretary of State to make regulations providing for subsections (1) and (2) not to apply, or to apply only, in particular cases.

Paragraph 18

202. This paragraph amends section 23 (but see also the power conferred by section 14 to restrict or repeal section 23). Section 23 provides for an exemption from section 22 of the DDA (discrimination in relation to premises) for small dwellings. The exemption applies where a landlord or manager (referred to as the "relevant occupier") lives on premises which, in addition to accommodation for himself and members of his household, either consist of residential accommodation for not more than six persons or consist of residential accommodation for not more than two other households. Subsection (6) of section 23 defines who the "relevant occupier" is for the purposes of that section. However that subsection omits to spell out who is the "relevant occupier" for the purposes of applying the small dwellings exemption to section 22(3) (discrimination by a manager of premises). The amendment will provide that the "relevant occupier" for the purposes of applying the exemption to section 22(3) is the person managing the premises or a near relative of his.

Paragraph 19

203. Sub-paragraph (2) inserts in section 24 of the DDA a reference to new section 22A (which is itself inserted into the DDA by paragraph 17 of Schedule 1). This ensures that the provisions of section 24 on discrimination and justification apply also to new section 22A.
204. Sub-paragraphs (3) and (4) further amend section 24 of the DDA by inserting new paragraphs (e) and (f) into subsection (3), and new subsections (3A) to (3C). These provide additional circumstances in which treatment which would otherwise be contrary to section 22(1) or (3) can be justified, i.e. where a person letting or proposing to let premises to a disabled person, or managing rented premises occupied by a disabled person, incurs additional costs as a result of the disabled person's disability. But the landlord/manager may not justify charging such additional costs where these are incurred in taking any steps required under new section 24C, 24D or 24J (reasonable adjustments) inserted by section 13. This is broadly consistent with the position which applies under sections 19 to 21 (service providers): see in particular, section 20(4)(e) and (5).
205. Sub-paragraph (5) makes one other minor amendment to section 24 of the DDA by inserting a new subsection (4A). This would allow the Secretary of State to provide by regulations for subsection (3)(b) not to apply in prescribed circumstances. Section 24(3)(b) allows a person disposing of premises, or a manager of premises, to justify less favourable treatment of a disabled person who is incapable of entering into an enforceable agreement. The amendment would bring section 24 into line with section 20, which also contains a power (see subsection (7)) enabling the Secretary of State to disapply the corresponding justification in section 20(4)(b) in certain circumstances.

Paragraph 20

206. This inserts new section 24M of the DDA (premises provisions do not apply where other provisions operate). The new section is designed to deal with potential overlaps between the premises provisions contained in sections 22 to 24 and new sections 24A to 24L (inserted by section 13), and other relevant provisions of the DDA. The general intention is that the premises provisions should not apply to cases where other provisions do so. In particular, new section 24M excludes premises provided to a student or pupil in the Part 4 field (education) (section 24M(1)(c)), and premises provided in the course of a "Part 2 relationship" (such as an employment relationship) (section 24M(1)(b), see also new section 18E). It also excludes from the ambit of sections 22 to 24L cases where a provider of services provides the premises in providing services to the public (for example, the provision of holiday accommodation by a tour operator)(section 24M(1)(a)). The intention is that sections 19 to 21, and not the premises provisions, should apply to such a case. There is a power in section 24M(2) which will allow the Secretary of State to prescribe exemptions from section 24(1)(a) if the need for more precise demarcation arises. The premises provisions also do not apply where the provisions relating to private clubs do so (section 24M(1)(d)).

Paragraph 21

207. This paragraph replaces subsections (7) and (8) of section 25 of the DDA (which were inserted by the Amendment Regulations, regulation 19(2)). The new provisions (which should be read with section 11 of the 2005 Act and section 21A of the DDA) ensure that employment tribunals have jurisdiction to consider complaints arising from discrimination by insurers in the provision of group insurance services contrary to section 19 of the DDA, and discrimination or harassment in the provision of "employment services" contrary to section 19 or section 21A(2). See also the notes above on section 11.

Paragraph 22

208. This substitutes subsection (1A)¹ of section 26 (which renders void certain terms of agreements, for example those which require the commission of unlawful acts of discrimination). The new provision ensures that section 26 does not apply to terms of contracts or other agreements relating to employment services or group insurance arrangements. (Such terms are to be covered by Schedule 3A to the DDA instead: see paragraph 39 below)

Paragraph 23

209. This makes minor and consequential amendments to section 27 (alterations to premises occupied under leases) resulting from the duties imposed on public authorities under new sections 21B to 21E (see commentary on section 2) and on associations under new sections 21F and 21J (see commentary on section 12).

Paragraph 24

210. This paragraph makes a minor amendment to the regulation-making powers in section 28D in Part 4 of the DDA (under which local authorities are required to prepare plans and strategies to make schools accessible for disabled pupils) in order to make clear the meaning of “regulations” for the purposes of that section, and to ensure consistency with the revised definitions of “prescribed” and “regulations” in section 68(1) (as inserted by paragraph 34(5) and (6) below).

Paragraph 25

211. This amends section 31B (conciliation of disputes under Part 4) in consequence of the insertion by section 15 of the 2005 Act of the new Chapter 2A into Part 4 (which concerns general qualifications bodies).

Paragraph 26

212. This amends section 33 (hire car services at designated transport facilities). It provides that functions of the Secretary of State to make regulations under this section, so far as exercisable in relation to transport facilities in Scotland, are exercisable by the Scottish Ministers. It replaces the equivalent provision made by the [Scotland Act 1998 \(Transfer of Functions to the Scottish Ministers etc.\) Order 1999 \(S.I. 1999/1750\)](#), in which the entry relating to section 33 of the DDA is revoked. The amendment preserves the Secretary of State’s existing power to legislate in respect of Scotland under section 2(2) of the European Communities Act 1972. The amendments are being made in the interest of transparency and greater clarity given that, for technical reasons, it is necessary to refer expressly to regulations and orders made under section 33 in amendments to sections 67 and 68 made by the 2005 Act.

Paragraph 27

213. Sub-paragraph (a) removes section 46(3) and (4) of the DDA, which made it a criminal offence to use a regulated rail vehicle for carriage which did not comply with rail vehicle accessibility regulations (“RVAR”). Section 46(3) and (4) are replaced by new sections 47D to 47L (inserted by section 8 of the 2005 Act) which introduce a civil enforcement regime.
214. Sub-paragraph (b) amends the definition of "regulated rail vehicle" in section 46(6) of the DDA to ensure that a vehicle is regulated even when some and not all of the provisions of RVAR apply. This might occur if the Secretary of State were to prescribe that vehicles which are refurbished must comply with certain requirements of the RVAR.

¹ Section 26(1A) is inserted into the DDA by the Amendment Regulations with effect from 1st October 2004.

Paragraph 28

215. This makes amendments to section 53A so as to allow the Disability Rights Commission to issue codes of practice in relation to: discrimination by public authorities, associations and general qualifications bodies (see sections 2, 12 and 15); and the exercise by public authorities of the duties to be imposed by or under new sections 49A and 49D (inserted by section 3). (Note that section 16(2) amends section 53A to provide for the issues of codes of practice in relation to a landlord's consent to the making of improvements by a tenant.) This paragraph also amends section 53A so as to provide for the taking into account of the provisions of a code of practice in relevant proceedings, including proceedings relating to a disability-related improvement to a dwelling house occupied by a disabled person (as to which, see section 16).

Paragraph 29

216. Sub-paragraph (2) amends section 55(1) (victimisation) so as to disapply it from new sections 24A to 24L (which require landlords and managers to provide reasonable adjustments in certain circumstances for disabled people). This is because victimisation of a disabled person in relation to the letting of premises is already provided for by the interaction of sections 22 to 24 with section 55, and by the provisions of new section 24F.
217. Sub-paragraph (3) amends section 55(2)(a)(iii) of the DDA by inserting after "done anything under" the words "or by reference to". This applies and generalises in relation to Parts 2 to 4 of the DDA the provisions of subsection (6) (inserted by the Amendment Regulations) which apply only for the purposes of Part 2. Subsection (6) is consequently repealed.
218. Sub-paragraph (4) ensures that section 55 applies to a non-disabled person who is discriminated against under section 15B (councillors, and members of the GLA) (inserted by section 1).

Paragraph 30

219. This amends section 59(1) (statutory authority). Section 59(1) provides that nothing in the DDA makes unlawful any act done in pursuance of any enactment, or in pursuance of any instrument made by a Minister of the Crown under any enactment, or to comply with any condition or requirement imposed by a Minister of the Crown by virtue of any enactment. The amendment applies section 59(1) to acts done in pursuance of instruments made by, and conditions or requirements imposed by, a member of the Scottish Executive, or the National Assembly for Wales.

Paragraph 31

220. This inserts a new subsection (A1) into section 64 of the DDA so that the new sections 21B to 21E (inserted by section 2) and new Part 5A (inserted by section 3), which concern acts of public authorities, apply to the Crown. Provision is also made for Crown liability in respect of acts of Crown servants within the scope of new sections 21B to 21E and new Part 5A.

Paragraph 32

221. This is a minor consequential amendment to section 65 (application to Parliament). Subsection (5), which relates to proceedings before employment tribunals under Part 2 of the DDA, is amended in consequence of the fact that certain claims under Part 3 (in respect of employment services and group insurance) will also be dealt with before employment tribunals.

Paragraph 33

222. This makes various amendments to section 67 of the DDA. Sub-paragraphs (2) and (3) tidy up section 67(1) and (3)(a), in particular to make provision for cases where the DDA confers regulation-making powers on devolved authorities (see sections 28D, 33 and 49D(3) and (4)).
223. Sub-paragraph (4) inserts new subsections (3A), (3B) and (3C) into section 67 of the DDA. Subsection (3A) provides that if regulations are made under new section 21D(7) (b) which omit new section 21D(5), there is power to make necessary consequential amendments to new section 21D. Subsection (3C) ensures that regulations made under section 49D imposing specific duties on public authorities can amend or repeal provisions in Acts of Parliament, Acts of the Scottish Parliament or subordinate legislation where this is necessary to make the specific duties effective, for example, because of a conflict with an existing duty or obligation.
224. Sub-paragraph (5) substitutes new subsections (4), (4A) to (4D), (5) and (5A) for the existing subsections (4) and (5) of section 67.
225. New subsections (4) and (4A) provide for the use of the affirmative Parliamentary procedure in the following cases:
- the first regulations made under new section 21H(1) (imposition of duty to make adjustments in relation to associations);
 - the first regulations to be made under sections 31AE(1), (2) and (4) (general qualifications bodies) and any regulations made under those provisions which amend the DDA;
 - regulations under section 31AE(1) that make provision as to remedies;
 - regulations made under section 47J(3) (determining the turnover of a rail vehicle operator for the purpose of imposing a penalty);
 - regulations made under 49D(1) or (2) that make consequential amendments to an Act of Parliament or an Act of the Scottish Parliament;
 - regulations made under section 67A(3) (setting out the basis on which the Secretary of State will exercise his discretion as to which of the parliamentary procedures available to him under section 67(5A) (the draft affirmative procedure or the negative resolution procedure) should be used when making an order under section 47(1) (exemptions from rail vehicle accessibility regulations));
 - regulations made under paragraph 6A(2) of Schedule 1 (excluding certain types of cancers from the extended definition of disability in paragraph 6A(1)).
226. New subsections (4B) and (4C) provide for regulations made by the Scottish Ministers under new section 49D, which make consequential amendments to either an Act of Parliament or an Act of the Scottish Parliament, to be made under the affirmative procedure in the Scottish Parliament.
227. New subsection (4D) provides for other types of regulations made by the Scottish Ministers under section 49D or regulations or orders made by them under section 33 to be subject to negative procedure in the Scottish Parliament.
228. New subsection (5) provides for the negative procedure (at the Westminster Parliament) to apply to all other regulations made under the DDA by the Secretary of State, and all orders made by the Secretary of State except for: appointed day orders made under any of sections 3(9), 53A(6)(a) and 70(3); and exemption orders made under section 47(1).
229. New subsection (5A) provides that orders made under section 47(1) (exemption from rail vehicle accessibility regulations) can be made by either the draft affirmative or the negative resolution procedure. The Secretary of State, in determining which of the

parliamentary procedures should be used, must exercise his discretion subject to new section 67A which, in particular, enables him to make regulations setting out the basis on which he will make that decision. Until such regulations are in place, all orders made under section 47(1) will be subject to the draft affirmative resolution procedure.

Paragraph 34

230. This inserts a number of definitions into section 68(1). These include the terms “criminal investigation”, “criminal proceedings” and public investigator functions” for the purposes of new sections 21C and 56, and (by cross-reference to section 21A) the term “employment services” which will apply for the purposes of the DDA as a whole. Some other definitions are slightly amended.

Paragraph 36

231. This replaces the reference to “infection by the human immunodeficiency virus” in paragraph 8 of Schedule 1 to the DDA with a reference to “HIV infection” in recognition of the fact that there is more than one strain of HIV recognised as capable of causing AIDS in human beings.

Paragraph 38

232. This makes amendments to Schedule 3 to the DDA (enforcement and procedure). Sub-paragraph (2) ensures that criminal proceedings may be brought in respect of the new offence in new section 16B(2B) (discriminatory advertisements) inserted by section 10. Sub-paragraph (8) makes a similar amendment in respect of the offence under section 28J(9).
233. The amendments made by sub-paragraphs (3), (4), (6), (7) and (9) to (13) tie in with the amendments (made by paragraph 30) to section 59(1)(b) and (c) of the DDA and are made in view of the 1998 devolution settlements with Scotland and Wales. Amendments are made to paragraphs 4, 8, 9, 11 and 15 of Schedule 3 to the DDA to provide for the Scottish Ministers or the National Assembly for Wales to be able to certify that they have imposed a condition or requirement and that it was in operation at a specified time. The certificate is to be treated by the court or tribunal as conclusive evidence of the matters specified in proceedings brought under sections 17A, 25, 25(8), 28I, 28K, 28L, 28N and 28V of the DDA.
234. Amendments are made by sub-paragraph (5) in consequence of the insertion in Part 3 of the DDA of new section 21B (discrimination by public authorities) (see section 2). The amendments allow for the staying or (in Scotland) sisting of proceedings brought under section 25 of the DDA which might affect a criminal investigation or criminal proceedings. They also provide for the restriction of remedies under a section 21B claim which relates to criminal matters.

Paragraph 39

235. Sub-paragraph (2) inserts a new paragraph 2(3)(d) into Schedule 3A² (validity of contracts) enabling the Secretary of State to prescribe an additional description of persons to be treated as a “relevant independent adviser” for the purposes of making a compromise contract to settle a complaint to which sections 17A(1) or 25(8) apply (that is, complaints about employment or related matters, group insurance and employment services). This reinstates without change a power which existed in the DDA prior to 1 October 2004 that for technical reasons could not be included in the Amendment Regulations.
236. Sub-paragraph (3) replaces paragraph 11 of Schedule 3A with new paragraphs 11 and 12. The new provisions ensure that Schedule 3A (which renders void certain

² Schedule 3A was inserted into the DDA by the Amendment Regulations with effect from 1st October 2004.

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

terms of contracts, for example those which require the commission of unlawful acts of discrimination) will cover terms of contracts or other agreements relating to employment services or group insurance.

Paragraph 40

237. Sub-paragraphs (2), (5) and (6) amend Schedule 4 (failure to obtain consent to an alteration to leased premises) so as to ensure that employment tribunals hear cases under section 25(8) to which section 27 applies (claims of discrimination involving alterations to leased premises occupied by a provider of employment services or group insurance). In particular, new paragraph 7A inserted into Schedule 4 by sub-paragraph (6) enables the tribunal to cause lessors to be joined as parties in certain circumstances.
238. Sub-paragraphs (3) and (4) extend the application of the provisions of Schedule 4 to premises leased by public authorities and associations (see sections 2 and 12 respectively).