

Disability Discrimination Act 1995

Part 4

Code of Practice for providers of Post 16 education and related services

New duties (from September 2002) in the provision of post-16 education and related services for disabled people and students

Foreword

This Code of Practice deals with the duties placed on providers of post-16 education and other related services in Great Britain by the Disability Discrimination Act 1995 as amended by the Special Educational Needs and Disability Act 2001. The Disability Discrimination Act makes it unlawful for bodies responsible for such provision to discriminate against disabled students and other disabled people.

The Government intends to implement the new duties in three stages:

- the main new sections of the Act on **1 September 2002**. These sections make it unlawful to discriminate against disabled people or students by treating them less favourably than others. In addition, they require responsible bodies to provide certain types of reasonable adjustments to provision where disabled students or other disabled people might otherwise be substantially disadvantaged
- the duty on responsible bodies to make adjustments involving the provision of auxiliary aids and services on **1 September 2003**
- the duty on responsible bodies to make adjustments to physical features of premises where these put disabled people or students at a substantial disadvantage on **1 September 2005**.

In general, schools, even when they make provision for pupils over 16, are not covered by this Code but by a separate Code of Practice (Schools).

Wholly privately-funded post-16 providers and providers of work-based training are not covered by this Code but by a Code covering Part 3 of the Disability Discrimination Act on goods, facilities and services (see **Appendix Three**).

Table of Contents

1 Introduction

The purpose of the post-16 sections of the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) (1.1)-(1.2)

Purpose of the Code (1.3)-(1.6)

Status of the Code (1.7)

References in the Code (1.8)-(1.11)

How to use the Code (1.12)-(1.13)

Examples in the Code (1.14)-(1.15)

Changes to the legislation (1.16)-(1.17)

Further information (1.18)-(1.19)

2 What do the post-16 sections of the Act do?

Who has rights under the post-16 sections of the Act? (2.1)-(2.6)

Who has responsibilities under the post-16 sections of the Act? (2.7)-(2.9)

A responsible body's legal liability for the actions of its employees (2.10)-(2.12)

What activities do the post-16 sections of the Act affect? (2.13)-(2.16)

What is discrimination? (2.17)

3 What sort of provision is covered by the post-16 sections of the Act?

Which providers are covered by the duty not to discriminate against disabled people? (3.1)

Which providers are not covered by the post-16 duties? (3.2)-(3.4)

When does a responsible body have responsibility for provision it does not make directly? (3.5)-(3.8)
What activities are covered by the duty not to treat a disabled person less favourably? (3.9)-(3.16)
Admissions and exclusions (3.9)-(3.10)
Services (3.11)-(3.16)
What about students who are not completing an entire course? (3.17)
Who else may have responsibilities towards disabled people under the Act? (3.18)-(3.19)
What about provision covered by Part 3 of the Act? (3.20)

4 The duty not to treat people 'less favourably'

What is unlawful? (4.1)-(4.2)
Less favourable treatment (4.3)-(4.10)
Less favourable treatment in admissions (4.11)-(4.13)
Less favourable treatment in exclusions (4.14)
Less favourable treatment in the provision of Services (4.15)
May a responsible body treat a disabled person more favourably? (4.16)
Must a responsible body know that a person is disabled? (4.17)-(4.21)
Can a responsible body justify less favourable treatment? (4.22)-(4.23)
The general approach to justification (4.24)-(4.25)
The maintenance of academic standards (4.26)-(4.27)

The maintenance of other prescribed standards,
prescribed types of treatment and treatment in
prescribed circumstances (4.28)
Reasons that are material and substantial (4.29)-
(4.31)

5 The duty to make reasonable adjustments

What does the Act say? (5.1)

What does it mean to be placed at a 'substantial
disadvantage'? (5.2)

When do responsible bodies have to comply with
this aspect of the legislation? (5.3)-(5.4)

To whom is the duty to make reasonable
adjustments owed? (5.5)-(5.7)

What adjustments might responsible bodies need to
make? (5.8)

How long does the duty continue? (5.9)

Disclosure and reasonable steps (5.10)-(5.15)

Can a responsible body justify the failure to make a
reasonable adjustment? (5.16)

6 Determining what is reasonable

The concept of reasonableness (6.1)-(6.2)

The need to maintain academic or other prescribed
standards (6.3)-(6.6)

The financial resources available to the responsible
body (6.7)

Grants or loans likely to be available to disabled
students (6.8)-(6.9)

The cost of taking a particular step (6.10)

The extent to which it is practicable to take a
particular step (6.11)

The extent to which the aids or services will

otherwise be provided to disabled people or students (6.12)
Health and safety requirements (6.13)-(6.15)
The relevant interests of other people including other students (6.16)-(6.17)
Confidentiality and reasonable steps (6.18)-(6.20)

7 Reasonable adjustments to leasehold premises

Leases, binding obligations and reasonable adjustments (7.1)-(7.2)
What happens if a lease says that certain changes to premises cannot be made? (7.3)
Obtaining other consents (7.4)-(7.5)
When are landlords deemed to be withholding consent? (7.6)-(7.11)
When is a landlord withholding consent reasonably? (7.12)-(7.16)
Power of landlords to impose conditions on consent (7.17)-(7.18)
What happens if a landlord refuses consent or attaches unreasonable conditions? (7.19)-(7.20)
Bringing landlords into proceedings brought by disabled people (7.21)-(7.25)

8 Other provisions under the Act

Victimisation (8.1)-(8.4)
Liability for employees' and agents' acts (8.5)-(8.7)
Aiding unlawful acts (8.8)-(8.10)
Terms of agreements (8.11)-(8.12)
Statutory authority and national security (8.13)
Disability statements (8.14)

Removal of exemptions (8.15)

9 What happens if there is a dispute under the Act?

Raising a complaint (9.1)

Informal procedures (9.2)

Conciliation (9.3)-(9.4)

What happens if a dispute cannot be resolved?
(9.5)

Complaints that could also be heard under other sections of the Act (9.6)

Where to go for information and advice (9.7)-(9.10)

10 Links to other legislation and responsibilities

General approach (10.1)

The Data Protection Act 1998 (10.2)-(10.3)

The Health and Safety at Work Act 1974 and related regulations (10.4)-(10.5)

The Fire Precautions Act 1971 and related regulations (10.6)

The Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960 (10.7)-(10.8)

The Defective Premises Act 1972 (10.9)

Building regulations, planning permission and other property issues (10.10)

Human Rights Act 1998 (10.11)

The Race Relations Act 1976 and the Race Relations (Amendment) Act 2000 (10.12)-(10.15)

The Sex Discrimination Act 1975 (10.16)-(10.17)

The Welsh Language Act 1993 (10.18)

Common law duties (10.19)-(10.20)

Statutory responsibilities of other bodies (10.21)-
(10.23)

Appendix One: The meaning of disability

When is a person disabled? (A1.1)

What about people who have previously had a disability? (A1.2)

What does 'impairment' cover? (A1.3)

Are all mental impairments covered? (A1.4)

What is a 'substantial' adverse effect? (A1.5)

What is a 'long-term' effect? (A1.6)-(A1.7)

What if the effects come and go over a period of time? (A1.8)

What are 'normal day-to-day' activities? (A1.9)

What about treatment? (A1.10)

Does this include people who wear spectacles?
(A1.11)

Are people who have disfigurements covered?
(A1.12)

What about people who know their condition is going to get worse over time? (A1.13)

Are people with genetic conditions covered?
(A1.14)

Are any conditions specifically excluded from the coverage of the Act (A1.15)-(A1.16)

What about other definitions of disability used in education and training? (A1.17)

Where can I find out more? (A1.18)

Appendix Two: The meaning of 'responsible body'

What is a responsible body? (A2.1)

England and Wales (A2.2)

Scotland (A2.3)

Responsible bodies and institutions designated by
the Secretary of State (A2.4)

Appendix Three: Other publications

Legislation

Other Government publications

Disability Rights Commission publications

Other publications

1 Introduction

The purpose of the post-16 sections of the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001)

- 1.1 The Disability Discrimination Act 1995, which places requirements on employers and service providers not to discriminate against disabled people, did not originally include similar requirements for the provision of education. Part 4 of the Disability Discrimination Act placed a requirement on some post-16 education funding bodies to request disability statements from institutions, but it did not include any duties on institutions not to discriminate against disabled people or students. The Special Educational Needs and Disability Act 2001 amends the Disability Discrimination Act 1995. The new post-16 sections of the Disability Discrimination Act deal specifically with post-16 education and training and with related services such as, in England and Wales, the statutory youth service. From the implementation of this legislation, bodies responsible for the provision of education and other related services are required not to discriminate against disabled students and other disabled people.
- 1.2 The principle behind this legislation is that disabled people should have the same opportunities as non-disabled people to benefit wherever possible from whatever education or other related provision is available.

Purpose of the Code

- 1.3 This Code of Practice (Code) gives practical guidance on how to avoid discrimination against disabled people and students wanting to access education or other related provision. It describes the duties on the bodies responsible for this provision. The Code also helps disabled people to understand the law and what they can do if they feel they have been discriminated against.

- 1.4 The Disability Rights Commission (DRC) has prepared and issued this Code under the new legislation. [s 53A] It applies to the post-16 sections of the legislation, and to England, Wales and Scotland. With the exception of provision in a few specialist residential schools designated by regulations, schools provision, including that for pupils over 16, is not covered in this Code but in a separate Schools Code.

- 1.5 This Code deals only with how to avoid unlawful discrimination against disabled people and students. Those who work with disabled people in education and training or the provision of youth or community services are encouraged to go beyond mere compliance with the law and work towards eliminating discrimination against disabled people in these services altogether. Advice on good practice in some specific aspects of post-16 provision is being produced in relation to this legislation, and further details are available in **Appendix Three: Other publications.**

1.6 Each chapter of the Code should be viewed as part of an overall explanation of the post-16 sections of the legislation and the regulations made under it. In order to understand the law properly it is necessary to read the Code as a whole. The Code should not be read too narrowly or literally. It is intended to explain the principles of the law and to illustrate how the law might operate in certain situations. There are some questions which the Code cannot resolve and which must await the authoritative interpretation of the courts. The Code is not intended to be a substitute for taking appropriate advice on the legal implications of particular situations.

Status of the Code

1.7 The Code does not impose legal obligations. Nor is it an authoritative statement of the law – that is a matter for the courts. However, the Code can be used in evidence in legal proceedings under the Disability Discrimination Act. Courts must take into account any part of the Code that appears to them relevant to any question arising in those proceedings. If bodies responsible for post-16 education or other related provision follow the guidance in the Code, it may help to avoid an adverse judgement by a court in any proceedings.

References in the Code

1.8 The new requirements have been introduced through the Special Educational Needs and Disability Act 2001. As a result of this legislation being passed, the provisions in it have been

incorporated into Part 4 of the Disability Discrimination Act 1995. For convenience, therefore, this Code refers to the provisions of the Disability Discrimination Act 1995 (referred to in this document as ‘the Act’) and the references in the margins are to this Act.

- 1.9 For example, s 28R(1) means section 28R(1) of the Disability Discrimination Act, and Sch 4C means Schedule 4C to the Disability Discrimination Act. Where reference is made to regulations that have already been made under the Act, the Statutory Instrument number is shown in the margins.
- 1.10 For the most part, references made to ‘the Act’ apply to the post-16 sections of Part 4 of the Disability Discrimination Act.
- 1.11 Throughout the Code, references are made to ‘responsible bodies’. These are the bodies responsible for providing education or other related provision, and who are legally responsible under the Act. A definition of responsible bodies is given in **Appendix Two**.

How to use the Code

- 1.12 This chapter gives a general introduction to the Code and to the Act. **Chapter 2** gives a summary of the new post-16 legislation explaining who is protected by it. **Chapter 3** explains what types of provision must comply with the legislation. **Chapter 4** provides details on the duty not to treat people less favourably, and **Chapters 5 and 6** deal with

the requirement to make reasonable adjustments for disabled people. **Chapter 7** covers premises issues. **Chapter 8** covers some other changes introduced by or alongside the new legislation, and **Chapter 9** deals with the process for taking forward a complaint under the Act, including the conciliation service. **Chapter 10** explains some of the links between the Disability Discrimination Act and other legislation.

- 1.13 The first two appendices give more information on some of the definitions in the Act. **Appendix One** gives more information on what is meant by disability and who are disabled persons. **Appendix Two** gives more information on the institutions and organisations that must comply with the post-16 sections of the Act. **Appendix Three** lists other publications related to the Act and where these may be obtained.

Examples in the Code

- 1.14 Examples of how the Act is likely to work are given in boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples should not be treated as complete or authoritative statements of the law. It is not possible to offer generalised solutions. Individual circumstances will always require individual solutions. Changes to specific circumstances in any of the examples given might well change the solution or outcome.

1.15 While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. For this reason they attempt to include a wide range of disabilities and situations to demonstrate the width and scope of the Act. They can often be used to test how the law might apply in similar situations involving different disabilities, or different types of post-16 education or other related provision. References to men or women are given for realism and the examples could, of course, apply to either sex.

Changes to the legislation

1.16 This Code refers to the Disability Discrimination Act as at January 2002. There may be changes to the Act or to other legislation, for example, to the range of people who are considered to have a disability under the law, and these changes may have an effect on the duties explained in this Code.

1.17 You will need to ensure that you keep up to date with any developments that may affect the Act's provisions. You can get information about this from the Disability Rights Commission (see below for contact details).

Further information

1.18 Copies of the Act and regulations made under it can be purchased from The Stationery Office (see **Appendix Three** for contact details). Guidance relating to the definition of disability, codes covering the employment provisions and the goods and

services provisions of the Act, and a further code dealing with the duties of trade organisations to their disabled members and applicants are also available from The Stationery Office.

1.19 Free information about the Act can be obtained by contacting the DRC Helpline:

Telephone	08457 622 633
Textphone	08457 622 644
Fax	08457 778 878
Email	enquiry@drc-gb.org
Post	DRC Helpline FREEPOST MID02164 Stratford upon Avon CV37 9BR

Information about the Act is also available in alternative formats or via the Internet:
<http://www.drc-gb.org>.

2 What do the post-16 sections of the Act do?

This chapter provides a summary of the post-16 sections of the Act and their implications for disabled people and providers of further, higher, adult and community education and the statutory youth service. It explains what is meant by 'discrimination', what type of provision will be covered, and what action responsible bodies need to take to ensure that disabled people are not discriminated against.

Who has rights under the post-16 sections of the Act?

- 2.1 The Act applies to people who are disabled according to the definition of disability in the Disability Discrimination Act 1995. [Sch 1] A disabled person is someone who has a physical or mental impairment, which has an effect on his or her ability to carry out normal day-to-day activities. That effect must be:
- substantial (that is, more than minor or trivial); and
 - long-term (that is, has lasted or is likely to last for at least 12 months or for the rest of the life of the person affected); and
 - adverse.
- 2.2 Physical or mental impairment includes sensory impairments and also hidden impairments (for example, mental illness or mental health problems, learning difficulties, dyslexia and conditions such as diabetes or epilepsy). People

who have had a disability within the terms of the Act in the past continue to be protected from discrimination even if they no longer have the disability. [Sch 2] People with severe disfigurements are also covered.

- 2.3 It may be that some of those who currently receive support or adjustments from education providers because of a disability or learning difficulty are not covered by the Act. In particular, the definition of disability relevant to this Act is not the same as the definition of 'learning difficulty' used in the Further and Higher Education (Scotland) Act 1992 and the Learning and Skills Act 2000. The Disability Discrimination Act definition is based on ability to carry out normal day-to-day activities, whereas the Learning and Skills and Further and Higher Education (Scotland) Acts definition relates to learning. Some people may be covered by both, and others may be covered by only one of these definitions. Education providers should be aware that they may need to make different provision for people covered by the different pieces of legislation.
- 2.4 The examples used in the Code all assume a disability that would come under the definition of disability used by the Act.
- 2.5 For a fuller understanding of the concept of disability under the Act, see **Appendix One**. A publication available from The Stationery Office,

Guidance on matters to be taken into account in determining questions relating to the definition of disability, provides additional help in understanding the concept of disability and in identifying disabled persons. Where relevant, the *Guidance* will be taken into account in any legal proceedings. (**Appendix Three** gives details of where to get copies of publications.)

- 2.6 The Act applies to any disabled people (including those overseas) who are enquiring about or applying to a course, and any disabled students (including those overseas) attending, undertaking or enrolled on a course. It also applies to any disabled people using or intending to use the statutory youth service or education authority-secured recreational or training facilities.

Who has responsibilities under the post-16 sections of the Act?

- 2.7 The post-16 sections of the Act place responsibilities on educational institutions and education authority-secured youth and community services not to discriminate against disabled people. The providers covered by this section of the Act include: [s 28R and 28U, Sch 4C paras 1 and 5]
- institutions in the higher education sector
 - institutions in the further education sector and, in Scotland, colleges of further education

- local education authorities or education authorities securing further education, including adult and community education
- schools providing further education for adults
- local education authorities providing the statutory youth service and, in Scotland, education authorities securing community education (from now on referred to jointly as ‘Youth and Community Services’)

Government regulations list other specific institutions covered by the Act. [s 28R(6)(c) and s 28R(7)(e)] See **Appendix Two** for more details on the provision to be covered by the Act.

2.8 Any institution providing post-16 education that is not covered by the post-16 provisions of Part 4 of the Act is likely to be covered by Part 3 of the Act. [s 19] For more details of what is required under Part 3 see the *Code of Practice on Rights of Access to Goods, Facilities, Services and Premises*.

2.9 The legal responsibility for ensuring that discrimination does not take place lies with the **responsible body** for the provision. [s 28R(5), Sch 4B and Sch 4C] Responsible bodies are defined in **Appendix Two**.

A responsible body’s legal liability for the actions of its employees

2.10 Under the Act, responsible bodies are legally responsible for the actions of their employees in the course of their employment [s 58]. An

employee who discriminates against a disabled person or student will usually be regarded as acting in the course of their employment, even if the responsible body has issued express instructions not to discriminate.

2.11 However, in legal proceedings against a responsible body based on the actions of an employee, it is a defence that the responsible body took 'such steps as were reasonably practicable' to prevent such actions. [s 58(5)] Training for staff on how to work with disabled people is likely to be central to such a defence. It is not a defence for the responsible body simply to show that the action took place without its knowledge or approval.

2.12 In some cases individual employees may also be legally liable for their own actions. [s 57] This is explained further in **Chapter 8**.

What activities do the post-16 sections of the Act affect?

2.13 The Act makes it unlawful for a responsible body to discriminate against a disabled person: [s 28R(1)-(2), Sch 4C paras 1 or 5]

- in admissions or enrolments of students
- in the terms on which admissions or enrolment offers are made
- by refusing or deliberately omitting to accept an application for admission or enrolment
- in the provision of services provided wholly or mainly for students or those enrolled on courses. This includes provision such as courses of education, training, recreation, leisure and catering facilities or accommodation.

2.14 Responsible bodies of institutions have an additional duty not to discriminate against disabled students by excluding them temporarily or permanently from the institution on the grounds of their disability. [s 28R(3)]

2.15 Responsible bodies for Youth and Community Services may not discriminate against disabled people in any of the provision they make. [Sch 4C paras 1 and 5]

2.16 There is more information on the provision affected by the post-16 sections of the Act in **Chapter 3**.

What is discrimination?

2.17 According to the Act, discrimination can occur in two ways:

- When a responsible body treats a disabled person **less favourably**, for a reason relating to the person's disability, than it treats (or would treat) a person to whom that reason does not, or would not, apply and that treatment cannot be **justified**. [s 28S(1), Sch 4C paras 1 or 5]

(There is more information on less favourable treatment and justifications for less favourable treatment in **Chapter 4**.)

- When a responsible body fails to make a **reasonable adjustment** when a disabled student is placed, or likely to be placed, at a **substantial disadvantage** in comparison with a person who is not disabled. [s 28S(2), Sch 4C paras 2 or 6]

(There is more information on reasonable adjustments in **Chapters 5 and 6**.)

3 What sort of provision is covered by the post-16 sections of the Act?

This chapter explains which activities and provision are covered by the post-16 sections of the Act and which are not.

Which providers are covered by the duty not to discriminate against disabled people?

- 3.1 The post-16 sections of the Act apply only to certain types of providers. These are: [s 28U, 28R and Sch 4C paras 1 and 5]
- institutions in the higher education sector
 - institutions in the further education sector and, in Scotland, colleges of further education
 - local education authorities or education authorities securing further education, including adult and community education
 - schools providing further education for adults
 - local education authorities providing the statutory youth service and, in Scotland, education authorities securing community education (from now on referred to jointly as ‘Youth and Community Services’).

Government regulations list other specific institutions covered by the Act. [s 28R(6)(c) and s 28R(7)(e)] See **Appendix Two** for more details on the provision to be covered by the Act.

Which providers are not covered by the post-16 duties?

- 3.2 The post-16 sections of the Act do not apply to other providers of education, even if the provision,

education or qualifications they offer are the same as those offered by organisations that are covered. The key issue is whether the institution or providing body itself is covered. If the provider is not one of those listed above, the provision does not fall under the post-16 sections of the Act.

- 3.3 Non-statutory youth services, such as clubs and activities run by voluntary organisations, the Scouts or church youth clubs, are not covered by the post-16 sections of the Act. They are covered by the Part 3 duties. [s 19]
- 3.4 Private providers of education and work-based training providers are not covered by Part 4 of the Act, but by Part 3. [s 19] For more details of what is required under Part 3 see the *Code of Practice on Rights of Access to Goods, Facilities, Services and Premises* (see **Appendix Three**).

Example 3.4A

A university in the USA offers its students the opportunity to study for a year in Great Britain. The students attend lectures and seminars in a college owned and run by their home institution. This provision is not covered by Part 4 of the Act, but by Part 3.

Example 3.4B

A private college in Scotland offers a course in Typing and Shorthand leading to an examination. The course and the qualification are identical to those offered by a nearby further education college.

However, the private college is not covered by Part 4 of the Act, but by Part 3.

Example 3.4C

A school sixth form provides further education funded by the Learning and Skills Council. However, the institution itself is not a college and the provision is not to adults. The sixth form will be covered by the schools sections of the Act and not the post-16 sections.

Example 3.4D

A voluntary organisation runs a youth club. It receives some funding from the local authority. However, the club is not part of Youth and Community Services and so falls within Part 3 of the Act, not Part 4.

Example 3.4E

A voluntary organisation provides work-based training funded by the National Council for Education and Training for Wales. Although the qualification is the same as that provided by a nearby college, also funded by the National Council, the voluntary organisation itself is not within the further education sector. This provision is likely to fall within Part 3 of the Act, not Part 4.

Example 3.4F

A students' union at a university is independent of the institution. It is not a service provided by the university although it does receive some funding

from it. It is not covered by Part 4 of the Act, but is likely to be covered by Part 3.

When does a responsible body have responsibility for provision it does not make directly?

- 3.5 In some cases, responsible bodies may arrange for a third party to provide education, training or other related services for students on its behalf. This provision remains the responsibility of the responsible body, and so is covered by the Act. For more information on a responsible body's responsibility for the actions of its agents, see **Chapter 8**.

Example 3.5A

Residential accommodation services in a university are contracted out. Although the university is no longer the direct provider of facilities on site, it is responsible under Part 4 of the Act for ensuring disabled students are not discriminated against.

Example 3.5B

As part of a Business Studies course at a college, local business people are invited in to talk about their experiences. The business people are not employees of the college. It is the college's responsibility under Part 4 of the Act to ensure disabled students on the course are not discriminated against during the sessions with the visitors.

Example 3.5C

A university has contracted with a local GP practice for the provision of health services to students. The university is responsible under the Act for ensuring that disabled students are not discriminated against in the provision of these health services.

Example 3.5D

As part of an Art History course at a university in Great Britain, students spend a month in Italy on a programme run by an Italian university. It is the British university's responsibility to ensure that the Italian university can provide access for a disabled student who uses a wheelchair.

Example 3.5E

A medical school delivers much of its teaching through the consultants in its affiliated teaching hospital. Consultants at the hospital are employed by the university as well as by the hospital. The university is responsible for teaching conducted in both the university and hospital settings.

- 3.6 However, to the extent that the provision is not made by, nor made on behalf of, the responsible body, it is not covered.

Example 3.6A

A disabled student undertakes a work placement in a local business. The placement tutor has worked with the student and the manager with whom the student will be working to prepare both parties for the placement, and set up the necessary support. This is part of the institution's duty under the Act.

However, the placement is not provided by the institution, and the local business is not under any contract with the institution. Because the student is not employed by the business he is not covered by Part 2 of the Act (employment). Any treatment that the disabled student receives on the placement is not covered by Part 4 of the Act *because it is not made by or on behalf of the institution.*

Example 3.6B

Part of the independent living course for students with learning difficulties at a college includes going to the shops on the bus. Although this takes place outside the college, the college is responsible under the Act to do what it can to ensure disabled students are not discriminated against. However, any treatment that a student receives from members of the public or others on the bus or at the shops is not covered by Part 4 of the Act *because it is not made by or on behalf of the institution.*

Example 3.6C

A university has a partnership arrangement with a college overseas. The university awards the qualification, but does not provide the teaching or any other services; the overseas college provides these. The university is not responsible for any treatment that the student receives from college staff *because it is not made by or on behalf of the university.*

Example 3.6D

Another university has a partnership arrangement with a college overseas. The university provides the teaching on the course using its own staff. The university is responsible for ensuring that students are not discriminated against in relation to the teaching they receive *because this is provided by the university.*

- 3.7 Even if an initial discriminatory act is not carried out by the responsible body, a responsible body may retain responsibility under the Act for preventing the discrimination continuing or recurring.

Example 3.7A

A disabled student is being harassed by permanent staff members in the office where he is on work placement. The harassment is because of his disability. The placement tutor finds this out when talking to the student as part of his monitoring of the placement. The institution is responsible for preventing the discrimination continuing or recurring. In this case, the tutor might talk to the office manager, who agrees to take appropriate action to make sure this does not happen again.

Example 3.7B

Students on a language course spend two months studying at a partner institution in Europe. Despite the work that the British institution has done with the European institution

to explain the needs of disabled students on the programme, disabled students continue to complain that they have been discriminated against during their stay. The British institution is responsible for preventing the discrimination continuing or recurring. In this case, the British institution might decide to sever its links with that institution, and find an alternative partner.

- 3.8 Some aspects of provision may be the responsibility of bodies other than the responsible body. In particular, entry to some courses may be regulated by a professional body, and many examinations are the responsibility of external examining bodies.

Example 3.8A

A student at a further education college is studying for GCSEs. Modifications to the delivery of the examination have to be agreed by the examination board. The college has responsibility for finding out what modifications the student may need, for requesting these of the examination board and for making any adjustment needed to the administration of the examination in the college. The college is **not** responsible for deciding **whether** modifications are acceptable nor for any changes to the examinations themselves, which are not covered by Part 4 of the Act.

Example 3.8B

A student applies to do a degree in Medicine at a university. Both the course and the examination are accredited by the General Medical Council (GMC). The student needs adaptations made to both the course and the examination because of his disability. The university is responsible for making the adaptations. However, to the extent that the GMC accredits both the course and the examination, the university is **not** responsible for decisions about **whether** adaptations may be made.

Example 3.8C

A high street bank opens a branch on a university campus. Although the bank rents premises from the university, it is not part of the provision made by the university for its student body. The university is not responsible for the behaviour or activities of the bank, although the bank must itself comply with Part 3 of the Act (goods and services).

What activities are covered by the duty not to treat a disabled person less favourably?

Admissions and exclusions

3.9 It is unlawful for a responsible body to discriminate against a disabled person:

- in the arrangements it makes for determining admissions or enrolments to the institution [s 28R(1)(a), Sch 4C paras 1 or 5]

Example 3.9A

A college requires all applicants to fill out an application form by hand. It does not allow disabled students to type or use a helper to fill in the form. This is likely to be unlawful.

Example 3.9B

A university requires selected applicants to attend an interview. One applicant has a speech difficulty which gets worse when he is nervous. This means he needs more time to express himself. The university refuses to allow him any extra time at interview. This is likely to be unlawful.

- in the terms on which it offers to admit or enrol a person [s 28R(1)(b), Sch 4C paras 1 or 5]

Example 3.9C

An adult education centre informs a student with epilepsy that he may not enrol on a course unless he has an assistant with him at all times in case he has a seizure. In the past the student has only had seizures during the night. The centre's demand is likely to be unlawful.

- by refusing or deliberately omitting to accept an application for admission or enrolment. [s 28R(1)(c), Sch 4C paras 1 or 5]

Example 3.9D

A university has many applications for a popular course. In order to cut down the numbers that the

admissions tutor has to look through, the administrator sets to one side all applications from disabled students. These applicants are considered only if places remain after all other applicants have been considered. This is likely to be unlawful.

3.10 It is also unlawful for a body responsible for an educational institution to discriminate against disabled students by excluding them temporarily or permanently from the institution on grounds of their disability. [s 28R(3)]

Example 3.10A

A college learns that a student admitted himself to hospital during the holidays because of an ongoing mental health difficulty. The college excludes the student from the institution because staff fear he may be dangerous. The college has no evidence that the student will be dangerous; staff have simply made an assumption. This is likely to be unlawful.

Services

3.11 It is unlawful for bodies responsible for educational institutions to discriminate against disabled students in the provision of 'student services'. 'Student services' are any services that an institution provides or offers to provide wholly or mainly for students attending or undertaking courses. [s 28R(2) and s 28R(11)]

3.12 Similarly, local education authorities or education authorities may not discriminate in the 'services'

they provide or offer to provide wholly or mainly for people enrolled on courses. [Sch 4C paras 1 or 5]

3.13 For convenience, 'Services' is used throughout the Code to refer to 'services' and 'student services'.

3.14 Services will vary from one provider to another, but might include, for example:

- teaching, including classes, lectures, seminars, practical sessions
- curriculum design
- examinations and assessments
- field trips and outdoor education
- arranging study abroad or work placements
- outings and trips
- research degrees and research facilities
- informal/optional study skills sessions
- short courses
- day or evening adult education courses
- training courses
- distance learning
- independent learning opportunities such as e-learning
- learning facilities such as classrooms, lecture theatres, laboratories, studios, darkrooms, etc
- learning equipment and materials such as laboratory equipment, computer facilities, class handouts, etc
- libraries, learning centres and information centres and their resources
- information and communication technology and resources

- placement finding services
- careers advice and training
- careers libraries
- job references
- job shops and employment finding services
- graduation and certificate ceremonies
- leisure, recreation, entertainment and sports facilities
- the physical environment
- chaplaincies and prayer areas
- health services
- counselling services
- catering facilities
- childcare facilities
- campus or college shops
- car parking
- residential accommodation
- accommodation finding services
- financial advice
- welfare services.

Some of these areas were previously covered by Part 3 of the Act (goods and services) but aspects relating to teaching and learning are covered for the first time.

3.15 Educational institutions in particular often make provision that is wholly or mainly for other groups of people, not students. These are **not** covered by Part 4 of the Act. Examples might include:

- commercial conference facilities (these would be covered by Part 3 of the Act)

- commercial research or consultancy services (these might be covered by Part 3 of the Act)
- services and facilities for staff (these would be covered by Part 2 of the Act).

3.16 Responsible bodies for Youth and Community Services may not discriminate against disabled people in any of the services they provide. These services might include: [Sch 4C paras 1 or 5]

- clubs and activities
- one-to-one counselling or guidance work
- off-site and outreach work
- outings and trips
- facilitated work with groups of people, such as support for a residents' association.

What about students who are not completing an entire course?

3.17A A student does not have to be undertaking a complete course to have rights under the Act. Someone who is enquiring about, applying to, attending or undertaking a course of study at an educational institution, however long or short the study period, is covered. This includes people doing single modules, evening courses or distance learning. Similarly, anyone enquiring about, applying to or enrolled on a course or using recreational or training facilities provided by a local education authority or education authority is protected by the Act.

Example 3.17A

A disabled student from the USA comes to a university in Britain to undertake a year's study for her junior year abroad. The British university has a duty not to discriminate against her during her period of study.

Example 3.17B

A 15-year-old with a disability attends an open day at his local adult education centre. He is covered by the legislation during the open day.

Who else may have responsibilities towards disabled people under the Act?

- 3.18 In some cases, more than one body may have responsibilities towards the same people under the Act. The fact that two bodies have responsibility does not diminish the responsibility of either body.

Example 3.18A

As part of a History course, students at one institution spend a fortnight at another university in Britain which has copies of original historical documents. During that time, the students receive teaching from staff at the second institution and use other facilities there. Both the home institution and the host institution have responsibilities towards disabled students under the Act.

- 3.19 In other cases, disabled people may be protected by a number of different parts of the Disability Discrimination Act. In these cases, the individual might seek redress for discrimination under whichever part of the Act was most appropriate.

Example 3.19A

A disabled adult education tutor is taking an evening class in Shorthand at the centre where she works. While she is teaching, and in her relationship with her employer, she is protected by Part 2 of the Act (employment). While she is attending her Shorthand classes, and in her relationship with the centre as a student, she is protected by Part 4 of the Act. While she is using the canteen, which is open to staff and students, she is protected by both Parts 2 and 4.

Example 3.19B

A college arranges a visit to an open day for prospective students at a university. One of the students is deaf and needs a sign language interpreter. Both the university and the college have responsibilities under Part 4 to ensure the adjustment is made.

Example 3.19C

A student with a mental health problem is studying for an undergraduate degree in Engineering. As part of the course, she has to undertake a sandwich placement in an engineering firm. She works in the engineering firm for a year, and has a contract of employment with them. While she is on the placement the engineering firm has responsibilities towards her under Part 2 of the Act (employment) and the institution where she is studying for her degree has responsibilities towards her under Part 4 of the Act.

Example 3.19D

A group of students with learning difficulties go on a theatre trip as part of the end-of-term celebrations at their college. The college, which has organised the trip, has responsibilities towards the students under Part 4 of the Act to the extent that it is reasonable for them to make appropriate adjustments. The theatre, as a service provider, has responsibilities towards the students under Part 3 of the Act (goods and services).

Example 3.19E

A disabled student is taking a Scottish Vocational Qualification (SVQ) at a college. The college is responsible for the training that the student receives under Part 4 of the Act. The awarding body for the SVQ may be responsible for any reasonable adjustments to the assessment criteria under Part 3 of the Act (goods and services).

What about provision covered by Part 3 of the Act?

3.20 Some of the Services covered by Part 4 of the Act may also be covered by Part 3 of the Act, which relates to goods, facilities and services. Following implementation of Part 4 of the Act, students or those enrolled on courses are protected by Part 4 of the Act in respect of education, training and other related services. Service providers are still responsible under Part 3, however, if they continue to make provision for members of the public other than students or those enrolled on courses.

Example 3.20A

The catering facilities at a college are currently covered by Part 3 of the Act as a service provided to the public. Because the catering facilities in the college are provided wholly or mainly for students, a disabled student using the canteen is protected by Part 4 of the Act.

Example 3.20B

A university has a conference facility. It is not provided wholly or mainly for students. This facility is covered by Part 3 of the Act.

Example 3.20C

A youth club provided by a local education authority puts on a performance for friends and family of the club members. The local education authority is already covered by Part 3 of the Act in its relationship with any disabled people who come to see the performance. From the implementation of the new sections of the Act, the authority has to comply with Part 4 of the Act in its relationship with both the young people and those coming to see the performance.

4 The duty not to treat people ‘less favourably’

This chapter explains what is meant by the duty not to treat people less favourably for a reason relating to their disability. Treating people less favourably is one of the two ways in which discrimination can occur. It explains how not knowing about a person’s disability may affect a responsible body’s responsibilities, and gives examples of when less favourable treatment may be justified.

What is unlawful?

- 4.1 The Act makes it unlawful for a responsible body to discriminate against a disabled person: [s 28R, Sch 4C paras 1 or 5]
- in the arrangements it makes for determining admissions to the institution or enrolments to a course
 - in the terms on which it offers to admit or enrol the person
 - by refusing or deliberately omitting to accept an application for admission or enrolment on grounds of their disability
 - by excluding the person temporarily or permanently from an institution on grounds of their disability
 - in the provision of Services.
- 4.2 One form of discrimination is to fail to make **reasonable adjustments** where existing arrangements or provision of Services place disabled students at a **substantial disadvantage**.

The duty to make reasonable adjustments is considered in **Chapter 5**. Another form of discrimination is for a responsible body to treat a disabled person **less favourably**, for a reason relating to the disability, than it treats (or would treat) a person to whom that reason does not or would not apply without **justification**.

Less favourable treatment

- 4.3 A responsible body discriminates against a disabled person if it treats him or her less favourably, for a reason relating to his or her disability, than it treats, or would treat, someone else to whom that reason does not, or would not, apply. [s 28S(1)] In some cases, less favourable treatment may be justified. Justifications are considered later in this chapter. The reason for the less favourable treatment must relate to the disabled person's disability. The duty not to discriminate against disabled people or students by treating them less favourably is expected to come into force on **1 September 2002**.
- 4.4 For a disabled person to be discriminated against in this way, a responsible body must have treated him or her less favourably **in comparison** with how other people are treated or would be treated. [s 28S(1)(a)] The reason for the less favourable treatment must relate to the disabled person's disability.

Example 4.4A

A dyslexic student applies to do a distance learning degree in English. The university tells her that it does not accept dyslexic students on English degrees. The treatment she receives is less favourable compared to other students, and the reason for the treatment relates to her disability. The university is likely to be acting unlawfully.

Example 4.4B

A student with a hearing impairment applies to do a course in Dentistry. He is turned down because he does not have the right entry qualifications. His rejection is not connected to his disability, and so is not likely to be unlawful.

Example 4.4C

A student with a facial disfigurement is taking an evening class in Tai Chi. The tutor for the class spends time with all the students individually helping them with their technique. The tutor does not spend any time individually with the disabled student because he feels uncomfortable with her. Because no other student has been treated in this way, and because the less favourable treatment is related to her disability, the treatment is likely to be unlawful.

- 4.5 If the treatment is caused by the fact that the person is disabled, then the treatment 'relates to' the disability. This is the case even if other people are also treated unfavourably for a broadly similar

reason. This means that a disabled person will have been treated less favourably if he or she would not have received the treatment but for the disability. Treating a disabled person less favourably cannot be excused on the basis that another student who behaved similarly would be treated in the same way.

Example 4.5A

A student's disability has caused her to take time off and miss three sessions of her course. A college requires all students who miss three lessons to take the course again, and several of the disabled students' classmates are told they must take the course again. However, but for the disability, the student would not have missed any lessons. In this case, therefore, the appropriate comparison is with someone who has not had to take time off.

Removing her from the course because of her absence would probably be less favourable treatment for a reason relating to her disability, and would be likely to be unlawful. It may be the case, however, that the college could justify this treatment because of academic or other standards (see **Chapter 6**).

- 4.6 The Act does not, however, provide a general excuse for disabled people or students to behave in disruptive or antisocial ways.

Example 4.6A

A disabled student has been asked to leave the university's residential accommodation because of the number of noisy parties he has been holding which have been disturbing other students. The reason for asking him to leave is his disruptive behaviour and is not related to his disability, and so is likely to be lawful.

- 4.7 Bad treatment is not necessarily the same as less favourable treatment, although where a responsible body acts unfairly or inflexibly, a court might draw inferences that discrimination has occurred.

Example 4.7A

A student who is a wheelchair user is treated rudely by one of the financial advisers in the student advice centre. The staff member is rude to all students that day; her bad treatment of the disabled student is not related to the student's disability. The disabled student has not been treated less favourably than other students.

- 4.8 The comparison may be between the way one disabled person is treated and the way people with other disabilities are treated.

Example 4.8A

A community education tutor tells a woman who is blind that she cannot join the singing group because she cannot read the sheet music. Other disabled people are allowed to join the group, but the tutor cannot use this fact to claim that

discrimination did not take place. The blind woman has been treated less favourably in comparison both with other people and with other disabled people for a reason relating to her disability. This is likely to be unlawful.

Example 4.8B

A young woman who is deaf and also has a mobility difficulty attends a specialist residential college for deaf people. The college is organising an outing for the students one evening. The young woman has been told that she cannot go on the trip because it 'would not be suitable' for her because of her additional disability. She has been treated less favourably in comparison with the other students because of her mobility difficulties. This is likely to be unlawful.

- 4.9 A disabled person does not have to show that others were treated more favourably than he or she was. He or she needs only to show that others would have been treated better. The comparison might be made on the basis of the usual treatment received by other people, or the responsible body's policies or procedures about how people should be treated.

Example 4.9A

A detached youth worker is arranging activities for young people on an estate. There is only one boy at a loose end but he has learning difficulties, and the youth worker has found it difficult in the past to communicate with him. The youth worker decides to see if other boys turn up with whom he finds it easier to communicate. None does turn up, so in the end he arranges no activities at all that evening. It does not matter that the disabled boy cannot point to any other boy treated better than himself. Had another boy, without his disability, shown up then that boy would have been treated more favourably. The treatment received by the disabled boy is, therefore, likely to be unlawful.

- 4.10 There must be a connection between the less favourable treatment and the person's disability for the treatment to be discriminatory.

Example 4.10A

A student with epilepsy is told she cannot go on a trip to the theatre organised by the college. No other students are prevented from going on the trip. The reason for her exclusion is that she has still not paid the money she owes for the previous theatre trip. The reason for the less favourable treatment is not related to the student's disability and so is unlikely to be unlawful.

Less favourable treatment in admissions

4.11 The post-16 sections of the Act make it unlawful for a responsible body to treat a disabled person less favourably in the arrangements it makes for determining admissions to the institution or enrolments to courses. [s 28R(1)(a), Sch 4C paras 1 or 5]

Example 4.11A

An institution requires dyslexic applicants to a course to take a literacy test as a condition of entry. No other students are required to take the test. This is likely to be unlawful.

4.12 It is also unlawful for a responsible body to treat a disabled person less favourably in the terms on which it offers to admit or enrol him or her. [s 28R(1)(b), Sch 4C paras 1 or 5]

Example 4.12A

A university makes an offer of a place to a student who is a wheelchair user on the condition that she finds her own living accommodation locally. No other students have this condition placed upon them. This is likely to be unlawful.

4.13 Nor may a responsible body treat a disabled person less favourably by refusing or deliberately omitting to accept an application for admission or enrolment. [s 28R(1)(c), Sch 4C paras 1 or 5]

Example 4.13A

An adult education centre has an enrolment evening. The staff member registering students instructs a blind enquirer to wait to be called until someone else can help him with his form, rather than registering him immediately. The enquirer is not called and, by the time he himself approaches the desk, the course he wants to join is full and he is told it is too late to enrol. This is likely to be unlawful.

Less favourable treatment in exclusions

4.14 It is unlawful for the bodies responsible for educational institutions to treat disabled students less favourably in excluding them temporarily or permanently from the institution for a reason relating to their disability. [s 28R(3)]

Example 4.14A

A student with a known history of bi-polar disorder is excluded from college because staff fear he may become disruptive in the future. They have no evidence to substantiate this fear and he has not broken any of the college regulations. This is likely to be unlawful.

Example 4.14B

A wheelchair user is repeatedly rude to other students and staff and, on occasion, has wilfully damaged university property. This behaviour is not related to the person's disability. Other students behaving in this way would be excluded. The university decides to exclude the student. This is likely to be lawful.

Less favourable treatment in the provision of Services

4.15 It is unlawful for bodies responsible for educational institutions to treat disabled students less favourably in the provision of student services to students. [s 28R(2)] Similarly, local education authorities or education authorities may not treat disabled people enrolled on courses less favourably in the provision of services. [Sch 4C paras 1 or 5] Responsible bodies for Youth and Community Services may not discriminate against disabled people in any of the services they provide. [Sch 4C paras 1 or 5]

Example 4.15A

A facilitator, employed by a local education authority as part of the authority's community education provision, laughs and makes jokes about the speaking voice of a deaf man to other people in a tenants' association where she is supporting them in drawing up their constitution. This is likely to be unlawful.

Example 4.15B

A student with an artificial limb is told that she cannot train on the college sports track because of this, although other students are allowed to train there. This is likely to be unlawful.

Example 4.15C

A lecturer writes a job reference for a dyslexic student who has just obtained an upper second class honours degree. In the reference he makes disparaging and inaccurate comments about the student's dyslexia, saying that it is likely to make her unfit for any job which involves significant amounts of written work. This is likely to be unlawful.

May a responsible body treat a disabled person more favourably?

- 4.16 The Act does not prohibit positive action in favour of disabled people (unless this would be unlawful under other legislation). Responsible bodies may offer more favourable treatment to disabled people and students.

Example 4.16A

An adult education centre runs evening classes in Yoga. The course is always oversubscribed. The centre gives preference to applicants with long-term back problems. This would be within the law.

Must a responsible body know that a person is disabled?

- 4.17 For a responsible body to discriminate against someone by treating him or her less favourably because of a disability, it needs to know about the disability. If the responsible body did not know and could not reasonably have known that a person was disabled, then the disabled person has not been treated less favourably for a reason relating to the disability. [s 28S(4)] In order to claim lack of

knowledge about a disability, the responsible body must have taken reasonable steps to find out about the person's disability. The Government has issued guidance on the reasonable action responsible bodies should take to find out about people's disabilities (see **Appendix Three**).

Example 4.17A

A student has a mental health problem and, because of the medication she is on, finds it difficult to get to her first morning class. After several weeks during which she has missed all her morning classes, and without approaching the student to find out why she has not turned up, the college decides to remove her from the course. The institution has not taken reasonable action to find out whether the student's failure to attend is due to a disability, and so is likely to be acting unlawfully.

Example 4.17B

In the same situation the tutor approaches the student and asks her in private if there is any reason preventing her from coming in to her first class. The student denies that there is any particular reason for her non-attendance. The college decides to remove her from the course. This is likely to be lawful.

4.18A responsible body should be proactive in encouraging people to disclose a disability. This might involve asking applicants to courses to declare their disabilities on application and enrolment forms. It may mean publicising the

provision that is made for disabled people, or providing opportunities for students to tell tutors/teachers or other staff in confidence. It might involve asking students when they apply for examinations whether they need any specific arrangements because of a disability. It might mean explaining to students the benefit of disclosure and how this information will be kept confidential. It means ensuring that the atmosphere and culture at the institution or service is open and welcoming so that disabled people feel safe to disclose a disability. If the responsible body might reasonably have been expected to know or find out about a person's disability, then it cannot claim that it did not know.

Example 4.18A

A man with a medical condition that causes fatigue and subsequent loss of speech control applies to a university for a postgraduate degree. The application form does not ask whether he has a disability nor whether he would have any particular needs when attending interview. He attends an interview, during which he is very listless and his speech is very slurred because he is tired from the journey, and the selectors turn him down because of this. He mentioned at the interview that he felt tired but the panel ignored this. The admissions office made no attempts to find out whether the applicant had a disability. Because this information might reasonably have been known, the selectors' treatment of the applicant is likely to be unlawful.

4.19 The action that it is reasonable to take to find out about a person's disability may differ between different types of provision.

Example 4.19A

A drop-in advice centre for young people states that it welcomes disabled young people. However, youth workers do not ask each young person they meet whether they have a disability, because they think this would be intrusive. This is likely to be lawful.

Example 4.19B

A higher education college has a large number of applicants who say they have dyslexia, and also has a number of referrals during each year from staff who suspect that individual students may have dyslexia. The college makes an arrangement with an educational psychologist locally to provide diagnostic assessments. This is likely to be reasonable.

4.20 If a disabled person has told someone within the institution or service about his or her disability, then the responsible body may not be able to claim that it did not know.

Example 4.20A

In the same situation, the student tells her tutor that she is seeing a therapist and has some medication. Although the tutor knows that the student might have a disability under the Act, he does not pass this information on to the head of department who is making the decision about the student's

continuation on the course. The college cannot claim that it did not know about the disability and so is likely to be acting unlawfully if it removes her from the course.

4.21 In some cases, the disabled person may have told someone in confidence about their disability. In this case, the responsible body might argue that it could not reasonably have known.

Example 4.21A

A student visits the counselling service and tells a counsellor that she has recently contracted multiple sclerosis and this is distracting her from her work. Counsellors subscribe to their own code of confidentiality as part of their profession and this is made clear to the student. Because of this, the counsellor does not pass this information on to other staff. The student does not tell anyone else in the institution that she has a disability. The institution could claim that it did not know of the student's disability.

A further example regarding confidentiality can be found at Example 4.31D.

For more information on confidentiality, see **Chapter 6**.

Can a responsible body justify less favourable treatment?

4.22A responsible body should not be looking for reasons or excuses to discriminate against disabled

people or students. It is in the responsible body's own best interests to see that provision is accessible. However, in limited circumstances, the Act does permit responsible bodies to justify treating a disabled person less favourably than other people. [s 28S(1)(b)] If the responsible body can show that the treatment in question is justified, then the treatment is not considered discriminatory in law.

4.23 Less favourable treatment may be justified only if one of the following conditions is fulfilled: [s 28S(6)-(8)]

- it is necessary to maintain academic standards
- it is necessary to maintain other prescribed standards
- it is of a prescribed type
- it occurs in prescribed circumstances
- the reasons are both material to the circumstances of the particular case and substantial.

The general approach to justification

4.24 If a disabled person or student can show that he or she has been treated less favourably than others for a reason relating to his or her disability, it is for the responsible body to show that the action taken was justified. The justification must fall within one of the categories listed in paragraph 4.23.

4.25 The responsible body can only use one of these justifications if the justification would still be valid even after a reasonable adjustment had been

made. [s 28S(9)] For more information on reasonable adjustments, see **Chapters 5 and 6**.

Example 4.25A

A college gives a disabled student a poor mark for his exam. The student experiences fatigue and cannot concentrate for long periods. The college is aware of this. The reason why he has performed badly in his examination is related to his disability and so he has been treated less favourably. The college tries to justify treating the student less favourably by arguing that this is necessary for maintaining academic standards. However, the college failed to make a reasonable adjustment for the student by allowing him short rest breaks. The college cannot use the justification, because they could have made an appropriate reasonable adjustment.

The maintenance of academic standards

4.26 The Act does not require a responsible body to do anything that would undermine the academic standards of a particular course. A responsible body may be able to justify less favourable treatment if it is necessary to maintain these standards. [s 28S(6)(a)]

Example 4.26A

A young man with learning difficulties applies to do a Biology degree. He does not meet the entry requirements for the course. The university talks to the college where the man had previously been studying and concludes that, even if reasonable

steps were taken to eliminate any disadvantage caused by his disability, there would be no prospect of his completing the degree course successfully. Although the lack of entry requirements is related to the man's disability, the institution is likely to be justified in rejecting his application because to accept him would be to undermine the academic standards of the course.

4.27 The academic standards reason should not be used spuriously. Where elements are not central or core to a course, they are unlikely to provide a reason to justify discrimination based on academic standards. Nor can academic standards be used as justification for barring whole groups of disabled people from courses or services. Any justification has to be relevant to the academic standards of a particular course and to the abilities of an individual person.

Example 4.27A

A severely dyslexic student applies to take a course in Journalism. She does not have the literacy necessary to complete the course because of her dyslexia. The college rejects her, using the justification of academic standards. This is likely to be lawful.

Example 4.27B

The college now introduces a policy of rejecting all dyslexic applicants to Journalism. The policy does not allow course selectors to consider different levels of dyslexia, the ability of individual applicants

or the range of possible adjustments. This is likely to be unlawful.

The maintenance of other prescribed standards, prescribed types of treatment and treatment in prescribed circumstances

4.28 The Act allows for future regulations to list any standards, treatments or circumstances that may also provide reasons to justify less favourable treatment. [s 28S(6)(b)-(7)]

Reasons that are material and substantial

4.29 Less favourable treatment may also be justified as long as the reasons for the treatment are both material to the circumstances of the particular case and substantial. [s 28S(8)]

4.30 To be material to the circumstances of the particular case, the reasons have to relate to the individual circumstances.

Example 4.30A

A student with emotional and behavioural difficulties applies for a college course. He has previously been on a link course to the college and staff know that he is extremely disruptive and makes a great deal of noise during classes which prevents other students from learning. During his previous periods in the college, tutors tried to make adjustments for him, but these were not successful. The college approaches the school, which confirms there has been no change in his behaviour. The college decides

that they cannot accept him on to the course. The reasons for the failure to admit him relate to this particular student and his particular behaviour patterns. For this reason, the college is likely to be acting lawfully in rejecting the student.

4.31A reason also has to be substantial and not just minor or trivial.

Example 4.31A

A student with autistic spectrum disorder applies for a course. The student can be disruptive, and sometimes will talk inappropriately during classes. However, her interruptions are not much more than those made by other students, and when she has an assistant with her, her behaviour improves. There is unlikely to be any material and substantial reason to justify not admitting this student.

Example 4.31B

A blind woman applies to do a Forensic Science degree. Although she can undertake some parts of the course, she cannot see enough to undertake the parts of the course which involve visual analysis of materials. This is a core component of the course. The college is likely to have a substantial reason to justify not accepting this student.

Example 4.31C

A deaf student applies to do a college course. She communicates through sign language and would need an interpreter for all her classes. The college approaches the interpreting service which provides support for its other deaf students, but because of high demand that year, the service is unable to support this additional student. The college makes wider enquiries, but is unable to find the services of an interpreter or communicator. Because it is not possible to make the necessary adjustments for her to gain access to the course (see **Chapter 5**), the college does not accept her application. This is likely to be a material and substantial reason for less favourable treatment.

Example 4.31D

A student has decided not to tell his institution that he has dyslexia despite several opportunities to do so. The course tutor notices that his test results are poor, and asks the student whether he might like to consider having a diagnostic assessment to see whether he has dyslexia. The student tells the tutor that he was just feeling tired that day and this appears a satisfactory explanation. While chatting to another member of staff, however, the student tells her in strictest confidence that he is dyslexic and is finding it difficult to write his essays. Because she has been asked to keep the information confidential, the staff member does

not pass this information on. The tutor gives a low mark for the student's test. The institution is likely to have a material and substantial reason to justify the less favourable treatment.

5 The duty to make reasonable adjustments

This chapter looks at the duty to make reasonable adjustments for disabled people or students. This duty requires responsible bodies to take positive steps to make their education and other related services accessible to disabled people or students. This goes beyond simply avoiding treating disabled people or students less favourably than non-disabled people or students. The sort of adjustments that might be made, and issues concerning disclosure and reasonable adjustments, are also considered.

What does the Act say?

5.1 The Act says that:

- The responsible body for educational institutions must take reasonable steps to ensure that, in relation to the arrangements it makes for determining admissions, a disabled person is not placed at a substantial disadvantage in comparison with a person who is not disabled, [s 28T(1)(a)] and in relation to student services a disabled student is not placed at a substantial disadvantage in comparison with someone who is not disabled. [s 28T(1)(b)]
- A local education authority, an education authority, or the responsible body for a school or Youth and Community Services must take reasonable steps to ensure that, in relation to the arrangements it makes for enrolling people on a

course and in relation to services provided or offered by it, a disabled person is not placed at a substantial disadvantage in comparison to someone who is not disabled. [Sch 4C paras 2 or 6]

What does it mean to be placed at a ‘substantial disadvantage’?

- 5.2 When considering whether a disabled person or student is placed at a substantial disadvantage compared to somebody who is not disabled, a responsible body should take account of the time, inconvenience, effort or discomfort entailed in comparison with other people or students. A ‘substantial’ disadvantage is one that is more than minor or trivial.

Example 5.2A

A partially deaf student who lipreads is attending a Business Studies course. One of her lecturers continues to lecture while simultaneously writing on the whiteboard. The student asks him to stop speaking when he turns his back to use the whiteboard so that she can follow what he is saying. The student is likely to be at a substantial disadvantage if this adjustment is not made.

Example 5.2B

A student with restricted growth requests that all university student notice boards are lowered in height so that he can read the information more easily. He is, however, able to read the notices without significant difficulty or discomfort when the

boards are placed at their regular height. The student's disadvantage compared to that of other students is unlikely to be found substantial.

Example 5.2C

A youth club has a policy of not allowing dogs into its premises. A young blind person needs his guide dog to navigate around the premises. The young person is likely to be placed at a substantial disadvantage if a change is not made to the policy.

Example 5.2D

A local education authority has three adult education centres. A wheelchair user wishes to attend a part-time art class at one particular centre which is nearest to his home. That centre does not have an accessible art room. However, another of the centres, only a little further away from his home, runs the same class with the same tutor and does have an accessible art room. The student is unlikely to be placed at a substantial disadvantage by attending the second centre.

Example 5.2E

A student is receiving Disabled Students' Allowances to pay for a sign language interpreter and notetaker. Because of his disability, the student takes longer on his academic work than other students. On top of this, he has to take on the role of employer to his assistants, including arranging for National Insurance, insurance, etc. In this case, and in agreement with the student, the university arranges to process the assistants' wages through

their payroll department. Without this, the student could be placed at a substantial disadvantage in relation to his access to student services.

Example 5.2F

A tutor in Zoology delivers one of his modules through a computer-based learning environment and awards marks for students' participation in online discussion. The system does not work with a visually impaired student's software. The student is likely to be placed at a substantial disadvantage.

When do responsible bodies have to comply with this aspect of the legislation?

- 5.3 The main requirement to make reasonable adjustments is expected to be implemented from **1 September 2002**. There are two exceptions to this, however:
- reasonable adjustments relating to auxiliary aids and services are not expected to be required until **1 September 2003**
 - reasonable adjustments to physical features are not expected to be required until **1 September 2005**.
- 5.4 Although adjustments to physical features are not expected to be a legal requirement until 2005, it makes sense for providers to take any opportunities that arise to alter their premises in advance which will benefit disabled people or students.

To whom is the duty to make reasonable adjustments owed?

- 5.5 A responsible body's duty to make reasonable adjustments is an anticipatory duty owed to disabled people and students at large. [s 28T] It is not simply a duty to individuals.
- 5.6 Responsible bodies should not wait until a disabled person applies to a course or tries to use a Service before thinking about what reasonable adjustments they could make. Instead they should continually be anticipating the requirements of disabled people or students and the adjustments they could be making for them, such as regular staff development and reviews of practice. Failure to anticipate the need for an adjustment may mean it is too late to comply with the duty to make the adjustment when it is required. Lack of notice would not of itself provide a defence to a claim that an adjustment should have been made.

Example 5.6A

All teaching staff in a prison produce all their handouts in electronic form thus ensuring that they can easily be converted into large print or put into other alternative formats. The staff are anticipating reasonable adjustments that might need to be made.

Example 5.6B

A further education college modularises its learning programmes, thus allowing learners with learning difficulties who might be able to access one part of

a programme at a more advanced level but require another part at a more basic level to match provision to their needs. The college is anticipating reasonable adjustments that might need to be made.

Example 5.6C

A youth service requires all of its staff and volunteers to attend disability awareness training and also ensures that its staff training programme includes regular sessions on issues connected with disability. This is anticipating reasonable adjustments that might need to be made.

Example 5.6D

A small college that is unable to employ a large number of specialist staff ensures it has close links with other organisations so that it is able to call on specialist support workers (for example, for learners who are dyslexic) when the need arises. It therefore anticipates reasonable adjustments that it might need to make if it has applications from dyslexic students.

Example 5.6E

A university encourages its lecturers to put lecture notes on the institution intranet. It introduces new procedures to ensure that all notes put on the intranet meet established guidelines to ensure there is no conflict with specialist software or features that students with dyslexia may be using. It therefore anticipates reasonable adjustments that it might need to make for certain disabled students.

Example 5.6F

A college makes its budget allocations to departments at the beginning of the year. Because it knows that the need for reasonable adjustments may arise at any time during the year, it ensures there is sufficient flexibility in the budget to reallocate money between departments during the year if this is necessary. It therefore anticipates that it may need to make reasonable adjustments.

Example 5.6G

A college has had a large number of students over the years needing assistance with taking medication. The college has no current member of staff willing to administer medication. The college recruits a support worker, part of whose duties is to do this. It therefore anticipates reasonable adjustments that it might need to make for some students.

- 5.7 The issue of anticipatory reasonable adjustments is particularly relevant in respect of buildings, whether these are owned, rented, or leased.

Example 5.7A

A university ensures that its Building Works Department is thoroughly briefed on all aspects of physical access. Each time building works are undertaken an assessment is made of how the building can be made more accessible for example, when an area is repainted the department ensures it is using colour contrasts, which will help students with a visual impairment. It also carries out an acoustic audit to ensure it is responding appropriately to deaf students. The university is anticipating reasonable adjustments that might need to be made.

Example 5.7B

An education authority provides most of its adult education classes in rented accommodation. It draws up a list of standards for physical accessibility that it wants its rented accommodation to meet and then looks for accommodation that meets these standards, thus anticipating reasonable adjustments that might be needed.

Example 5.7C

A higher education institution has a partnership arrangement with a housing association to provide residential accommodation for students. It works with the housing association to make some of the rooms accessible for wheelchair users, thus anticipating reasonable adjustments that might need to be made.

What adjustments might responsible bodies need to make?

- 5.8 The Act does not define what ‘reasonable steps’ an institution should take. However, the purpose of taking the steps is to ensure that the disabled person or student is not placed at a substantial disadvantage. Responsible bodies should consider a wide range of adjustments. In some cases there may be financial or other support available from elsewhere to help provide the adjustments.

Example 5.8A

A college insists that all potential students sit a basic English test before being admitted onto a particular programme. The test lasts an hour. A disabled person applies for the course. She has severe back pain when sitting still for long periods and needs to be able to get up and move around. The college arranges for her to sit the test in a separate room so that she can do this. This is likely to be a reasonable adjustment for the college to make.

Example 5.8B

A dyslexic student is accepted on a college course. He is unsure exactly what support he will need. The college arranges for him to have a needs assessment to make appropriate adjustments for him. Such an assessment is likely to be a reasonable initial adjustment for the college to make.

Example 5.8C

A student with a visual impairment is following a distance learning course. She sends in her essays electronically but receives marked essays by post with handwritten comments in the margins that she is unable to read. A likely reasonable adjustment would be for comments to be returned electronically.

Example 5.8D

A student with depression is on a Hair and Beauty training course run by a further education college. She spends part of the week in a hairdressing salon. Work placements are usually arranged on the basis of a full working day. However, because of the effects of her medication she is unable to attend in the mornings. A likely reasonable adjustment would be for the college to arrange for this student's work placement to take place in the afternoons only.

Example 5.8E

As part of an Earth Science course, students are required to undertake a field trip involving an overnight stay in a mountain hut. A student who needs regular dialysis cannot stay overnight in the hut because the hut is not an appropriate environment for her to set up her dialysis equipment. A likely reasonable adjustment would be for the tutor to arrange for her to take part during the days but for someone to return with her to a nearby village at night where she has set up her equipment.

Example 5.8F

A student with learning difficulties is attending a National Vocational Qualification (NVQ) course in Catering. She is managing the practical parts of the course but has difficulty with the basic skills required for the theory. A likely reasonable adjustment would be to provide a basic skills support worker at designated periods each week to give extra help.

Example 5.8G

A young person with cerebral palsy wishes to attend a youth service music workshop which is situated on the second floor of a building with no lift. The local authority which runs the youth service owns the building. She is able to use the stairs but needs hand rails on both sides. It is likely to be reasonable to expect the local authority to fit these.

Example 5.8H

A student who has recently become disabled is accepted on a Business Studies course. He is unable to use public transport and has no transport of his own. Without transport he is unable to get to college and is thus placed at a substantial disadvantage. In this case the college already operates its own transport for students living in particular outlying areas, and agrees to re-route the bus to stop close to the student's home. This is likely to be a reasonable adjustment.

Example 5.8J

A student with mental health problems has to attend a month's work experience placement as part of his college course. The usual college procedure is for students to go independently to their work placement but this student is very anxious about how he will cope. A likely reasonable adjustment would be for his tutor to arrange to accompany him on the first day and then to telephone him at regular intervals.

How long does the duty continue?

- 5.9 The duty to make reasonable adjustments is a continuing duty. Responsible bodies should keep the adjustments constantly under review in the light of their experience with disabled people applying to courses and using Services. In this respect, it is an evolving duty, and not something that needs simply to be considered once and once only, and then forgotten. For example, technological developments may provide new or better solutions to the problems of inaccessible Services.

Disclosure and reasonable steps

- 5.10 If the institution did not know and could not reasonably have known that the student was disabled, then failure to make an adjustment for a disabled person or student is not discrimination. [s 28S(3)(a)]

Example 5.10A

A student with a heart condition goes on a field trip as a compulsory part of her Geography course. The student has not told the college about her condition

although she had been given the opportunity to do so in private on several occasions including when the field trip was announced. Part of the trip involves walking around the town counting shops and residential housing. During the day, it becomes apparent that she cannot complete the assignment although some last minute adjustments are made. Because it could not have known about the disability in advance, the college is unlikely to have been acting unlawfully.

5.11 The failure to make an adjustment and the lack of knowledge must be connected. [s 28S(3)(b)]

Example 5.11A

A man makes a written request to a college and asks for information about courses. He does not tell the college that he has no sight. Although the college produces its prospectus in electronic format, he is sent the print version, which he cannot access. The college's failure to make an adjustment for the enquirer is due to lack of knowledge about his disability. This is likely to be lawful.

5.12 However, in some cases, the knowledge might not be relevant because the responsible body should have made the reasonable adjustment in response to the anticipatory nature of the duty.

Example 5.12A

A man with a visual impairment asks for information about courses at a college. He does not tell the college that he has a visual impairment. He can

read type if it is of a reasonable size. He is sent a prospectus for the college, which is printed in very small type that he cannot read. The college does not produce information in any other format or even in reasonably sized type. The college's failure to make an adjustment for the enquirer with the visual impairment is not related to lack of knowledge about his disability, it is due to the college's failure to make anticipatory adjustments for disabled people. This is likely to be unlawful.

- 5.13 If the disabled person has told someone within the institution or service about his or her disability, then the responsible body may not be able to claim that it did not know.

Example 5.13A

A student declares her disability on her application form. Once she is enrolled on a course she receives none of the support or adaptations that she needs. The tutor claims she does not know that the student is disabled. However, because the student has disclosed her disability, the institution cannot claim it does not know about it. The failure to offer support and adaptations is therefore likely to be unlawful.

- 5.14 If the responsible body might reasonably have known or found out about a person's disability, then it cannot claim that it did not know.

Example 5.14A

An applicant does not declare his disability on his application form. When he calls up to confirm his

attendance at a selection interview he talks to the admissions officer via Typetalk, the telephone service for deaf people. The admissions officer does not ask the applicant if he will need any adaptations to the selection interview and fails to alert the interviewers for the course that the applicant may be deaf. The interviewers do not realise that the applicant is deaf and do not take any steps to ensure that the interview is accessible to him. The responsible body might reasonably have known that the student had a disability. The failure to offer adaptations is, therefore, likely to be unlawful.

5.15A responsible body needs to be proactive to encourage people to disclose a disability. This might involve asking people to declare their disabilities on application and enrolment forms. It may mean publicising the provision that is made for disabled people, and then providing opportunities for people to tell tutors, teachers or other staff in confidence. It might involve asking students when they apply for examinations whether they need any specific arrangements because of a disability. It means ensuring that the atmosphere and culture are open and welcoming so that disabled people feel safe to disclose a disability. The Department for Education and Skills has issued guidance covering the action responsible bodies might take to find out about a person's disability (see **Appendix Three** for details).

Can a responsible body justify the failure to make a reasonable adjustment?

5.16 There may be rare occasions where a reasonable step might be taken, but there is a justification for not taking it. If this is the case, then the failure to take the reasonable step is not considered discriminatory in law. The failure to take a reasonable step can only be justified if the reasons are both material to the circumstances of the particular case and substantial.

Example 5.16A

A college runs an NVQ in plumbing. A wheelchair user with limited upper body movement applies to do the course. The college is aware that it could take reasonable steps to make the course accessible, but that these adjustments would not be possible in the workplace because of the nature of the job. Because of the explicit vocational nature of the qualification the college decides it would not be appropriate to make adjustments which are not replicable in the workplace. This is likely to be a material and substantial justification for not making reasonable adjustments.

Example 5.16B

A man with limited mobility applies to do a degree in Civil Engineering. The course leader meets the student and feels that she would be unable to practice as a civil engineer because of her disability. For this reason he decides that it would be inappropriate to make adjustments to the course and so recommends that her application is rejected.

The degree course is not, however, directly vocational, and not all graduates from the course progress on to become engineers. There are therefore unlikely to be material reasons for failing to make reasonable adjustments.

6 Determining what is reasonable

This chapter looks at criteria that might be taken into account when determining what is reasonable. The relationship between confidentiality and reasonable adjustments is also addressed.

The concept of reasonableness

6.1 What steps are reasonable for a particular responsible body to take depends on all the circumstances of the case. For example, they will vary according to:

- the type of services being provided
- the nature of the institution or service and its size and resources
- the effect of the disability on the individual disabled person or student.

6.2 Under the Act, responsible bodies must have regard to relevant provisions of this Code. [s 28T(2)] Without attempting to be exhaustive, the following are some of the factors that might be taken into account when considering what is reasonable:

- the need to maintain academic and other prescribed standards
- the financial resources available to the responsible body
- grants or loans likely to be available to disabled students (and only disabled students) for the

- purpose of enabling them to receive student services, such as Disabled Students' Allowances
- the cost of taking a particular step
 - the extent to which it is practicable to take a particular step
 - the extent to which aids or services will otherwise be provided to disabled people or students
 - health and safety requirements
 - the relevant interests of other people including other students.

The need to maintain academic or other prescribed standards

- 6.3 The Act does not require a responsible body to do anything that might mean it cannot maintain academic or other prescribed standards in a particular learning programme.

Example 6.3A

A young man with moderate learning difficulties applies to study for an English A level. He has poor literacy skills and the college does not have sufficient evidence that he could sustain the reading and writing necessary to complete the course. It is unlikely to be reasonable to expect the college to adjust its entry requirements to accommodate the student.

Example 6.3B

A student with a speech impairment is on a Hotel and Tourism course. Part of the assessment relates to customer service. The assessment usually considers a number of factors including the verbal

fluency of each candidate, and on grounds of academic standards, the department refuses to make any changes to the assessment practice. However, fluency is not an essential element of customer service, it is simply an aspect that the assessment to this course habitually takes into account. It is likely to be reasonable, therefore, to make an adjustment that allows the student to show his customer service and conversational skills without demonstrating verbal fluency.

- 6.4 Some courses may not have defined academic standards, but they may have other prescribed standards which the responsible body needs to maintain.

Example 6.4A

A student is following a Music degree, which involves both theory and practice. Her specialist instrument is the piano. During the course she develops arthritis and is unable to continue with the practical parts of the course. Although it might be possible for her to continue with the theory it is unlikely to be reasonable for the university to make an adjustment whereby she could receive a degree for the whole course by only completing the theoretical parts.

- 6.5 However, it might be reasonable to allow a student to validate the attainment of academic standards by using means different from those used by other students.

Example 6.5A

A profoundly deaf student is following an art course. Most of the course is practically based. However, students are expected to give an oral presentation of their work. It is likely to be reasonable to allow this student to present her work using British Sign Language.

- 6.6 There could also be instances in which it was appropriate to make reasonable adjustments for a student who needed additional support to attain the standards prescribed by the course.

Example 6.6A

A partially sighted student applies to do Dance. He has excellent physical mobility but requires floor markings to be very clearly accentuated and also requires extra time to be taken through certain movements. These are likely to be reasonable adjustments for the provider to make.

The financial resources available to the responsible body

- 6.7 The extent to which it would be reasonable for a responsible body to make adjustments will depend on the financial resources of the particular responsible body and its other commitments.

Example 6.7A

A wheelchair user applies to do a Metalwork class for two hours a week in a building that is inaccessible to wheelchair users. The local education authority that runs the class is in the process of making its buildings accessible but has not yet begun altering this particular building. Because of the large amount of fixed equipment needed for the class, it is impossible to move its location this academic year. If the Metalwork class is to be made accessible to a wheelchair user this year a lift would need to be installed, which would be very expensive. The local education authority has a large number of statutory and other commitments. Its ability to find additional sums of money at short notice is extremely limited. It is unlikely to be reasonable to expect the local education authority to make an adaptation in this case.

Example 6.7B

A sign language user wishes to use the careers service at a higher education institution. The institution says that funding for an interpreter must come from the careers service but the careers service does not have sufficient in its budget to pay for an interpreter. It transpires that the institution is currently planning a very costly refurbishment of several of its buildings. It is likely to be reasonable to expect the higher education institution to transfer some money to the careers service in order to make its careers service accessible to the student.

Grants or loans likely to be available to disabled students

- 6.8 Some disabled students following higher education courses receive Disabled Students' Allowances, the specific purpose of which is to pay for additional aids or services which students require because of a disability. It would not be reasonable to expect a responsible body to fund aids or services if Disabled Students' Allowances are already being used to provide these same services.

Example 6.8A

A deaf student on a degree course has been assessed as needing a sign language interpreter for all her lectures and seminars. It is unlikely to be reasonable to expect the university to fund an interpreter if the student has the resources for this through her Disabled Students' Allowances.

- 6.9 However, there are instances when disabled students might need reasonable adjustments to be provided by the institution in addition to those resourced through their Disabled Students' Allowances. Institutions should anticipate that this might be the case.

Example 6.9A

A student who has cerebral palsy has received funding through the Disabled Students' Allowances to buy an adapted keyboard to use with his computer. However, it is too cumbersome for him to transport every day from his residence to the

university. It is likely to be reasonable to expect the university to provide him with a similar adaptation for a computer within the computer cluster at the university.

The cost of taking a particular step

6.10 No hard and fast rules can be given as to how much it is reasonable for a responsible body to spend on adjustments. This will depend on several factors including:

- the type of services being provided
- the nature of the responsible body and its size and resources
- the effect of the disability on the individual disabled person or student.

Depending on these circumstances, cost may be a reason for not providing an adjustment.

Example 6.10A

A young deaf person who is a sign language user spends much of each week at a local youth club to which Part 4 applies. Three evenings a week he attends formal sessions run by the youth worker. At other times he is playing pool with his friends, reading and watching television. He can lipread to some extent and can communicate with his friends without the use of an interpreter. The youth club arranges for an interpreter to come to the formal sessions. However, it is unlikely to be reasonable for the local authority to pay a large sum of money for a sign language interpreter to be with the young man whenever he is at the club.

The extent to which it is practicable to take a particular step

- 6.11 There may be some instances when, although an adjustment might be in a person's or student's interests, it will not be practicable for the responsible body to take such a step.

Example 6.11A

A person with severe learning difficulties is taking a weekly Local History class. Although much of the class is practically based, involving visits to local places of interest, the tutor also regularly gives out articles from history journals. While every effort should be made to ensure that the person with learning difficulties understands what the articles say, it might not be practicable for the tutor to try to represent them all in pictorial or symbol form.

Example 6.11B

A young person with dyslexia is a student on a one-year diploma course. His disability makes it difficult for him to read long texts and, ideally, he would like all his books on audiotape. However, his course has a very long reading list which changes every year. Although the college does have a system for putting texts onto tape, this process takes some time and it is unlikely to be practicable for the college to provide him with all his books on tape during the year. It is likely, however, to be reasonable to look for other means of enabling him to access the reading list.

The extent to which the aids or services will otherwise be provided to disabled people or students

- 6.12 There will be some instances when a disabled person or student is provided with support from another agency. In these cases, it would not be reasonable to expect the responsible body to duplicate this support.

Example 6.12A

A man with learning difficulties and also with physical disabilities is enrolled on an adult education course. His disabilities mean that he requires a support worker with him at all times. He is already receiving a package of care funded by his social work department and he has a full-time support worker allocated to him. It is unlikely to be reasonable to expect the education authority to provide an additional support worker.

Health and safety requirements

- 6.13 The Disability Discrimination Act does not override health and safety legislation. There might be instances when, although an adjustment could be made, it would not be reasonable as it would endanger the health and safety either of the disabled person or of other people.

Example 6.13A

A wheelchair user is a student on a Theatre Studies course. One module of the course is on stage lighting. This involves students climbing up scaffolding and sitting on narrow gantry planks

while they alter the lighting. Having taken specialist advice, the lecturer decides that, although an adjustment could be made in order to hoist a wheelchair up to the required height, the gantry planks and scaffolding system are not strong enough to hold a wheelchair. It is unlikely, therefore, to be reasonable for the college to make the adjustment in this instance.

6.14 There might be other instances where responsible bodies could make anticipatory reasonable adjustments in line with health and safety legislation.

Example 6.14A

A student with learning difficulties who also has a physical disability applies to do a trampolining course for students with learning difficulties at an adult education centre. His disability means that he will require staff to lift him on to the trampoline. The adult education provider has drawn up a risk assessment policy for lifting, which states that no member of staff should lift a student unless they have received appropriate recognised training on lifting. Because this course is one that is highly likely to involve staff in lifting, it is likely to be reasonable to expect staff to have received training in lifting in anticipation of applicants who require support.

6.15 Health and safety issues must not be used spuriously to avoid making a reasonable adjustment.

Example 6.15A

A university chaplaincy refuses to provide a temporary ramp into the chapel for a wheelchair user because they say that wheelchair users pose a health and safety hazard by preventing other people reaching the fire exits in an emergency. In fact, the chapel has a very wide set of double doors alongside a smaller door, where the ramp would be placed. There is unlikely to be a valid reason for not making a reasonable adjustment.

Example 6.15B

A student with cerebral palsy who uses a wheelchair wants to take a Photography A level. The entrance to the darkroom is not wide enough for the student to enter. The college is willing to adapt the doorways but the tutors are concerned he should not be allowed to take the course anyway because there would be a health and safety risk when he used the chemicals in the darkroom. The college therefore agrees to make an additional adjustment to deal with the health and safety risk, by ensuring that he has an assistant or technician with him when in the darkroom.

The relevant interests of other people including other students

- 6.16 There might be instances when an adjustment for a disabled person or student results in significant disadvantage for other people or students. In such a case, the responsible body would not be expected to make the adjustment.

Example 6.16A

A student with learning difficulties is attending a Scottish Vocational Qualification (SVQ) course at a further education college. She finds it difficult to follow the more theoretical parts of the course but is very reluctant to have any individual extra support. One option would be for the course tutor to go very slowly over the parts she finds difficult to ensure that she has understood the points being made. However, the slow pace of delivery would prevent the other students on the course finishing their syllabus and the attainment of their qualification would be put at risk. It is likely that this would not be a reasonable adjustment, as it would significantly adversely affect other students on the course. In this case, it is likely to be appropriate to look at alternative adjustments.

6.17 There will, however, be other instances, where there is a duty to make an adjustment despite some inconvenience to others. In deciding what adjustments are reasonable it is important to weigh the level of inconvenience to others against the substantial disadvantage to the disabled person.

Example 6.17A

A deaf student on a Basic Skills class has a sign language interpreter during the class. For the final 15 minutes of each class, the tutor holds a group discussion. Other students complain that the flow of their discussion is impeded because of having to wait while the sign language interpreter translates

for the deaf student. However, the delay does not significantly adversely affect the group's learning. This is unlikely to be considered sufficient reason for not allowing the deaf student to participate in the discussion using a sign language interpreter.

Confidentiality and reasonable steps

6.18A disabled person has a right to request that the existence or nature of his or her disability be treated as confidential. [s 28T(3) and s 28T(5)] In determining whether it is reasonable to make an adjustment the responsible body must have regard to the extent that making the adjustment is consistent with a disabled person's request for confidentiality. [s 28T(4)]

6.19 In some instances this might mean that reasonable adjustments have to be provided in an alternative way in order to ensure confidentiality.

Example 6.19A

A student with a visual impairment can only read clearly if he has text enlarged into 16-point type. He is very embarrassed by his disability and has requested strict confidentiality. Normally his tutors would give a visually impaired student large-print handouts at the beginning of each class. However, because he has requested confidentiality, they agree to give him his handouts in advance so that he can look at them before the lesson but does not have to be seen reading them during the class.

6.20 In some cases a confidentiality request might mean that a less satisfactory reasonable adjustment is provided or that no reasonable adjustment can be provided.

Example 6.20A

A student with AIDS is on a Chemical Engineering course. He does not want other students to know of his condition. His condition means that he sometimes needs to have time off. His tutors have offered to arrange extra time in the laboratory for him after hours to make up for the time he misses. However, he has refused this on grounds of confidentiality. Instead they offer to provide him with extra lecture notes. Although this adjustment is less effective, it is likely to be lawful.

7 Reasonable adjustments to leasehold premises

Chapters 5 and 6 of the Code explain the duty to make reasonable adjustments. These chapters include examples of reasonable adjustments to the physical environment. This chapter addresses issues of how leases or other binding obligations affect the duty to make reasonable adjustments to premises. [s 28W, Sch 4] It deals with the Regulations entitled *The Disability Discrimination (Educational Institutions) (Alteration of Leasehold Premises) Regulations 2002*, which clarify the requirement to alter leasehold premises where consent is required from a landlord.

Leases, binding obligations and reasonable adjustments

- 7.1 Responsible bodies should anticipate the need to obtain consent to make a proposed adjustment and allow sufficient time to obtain this. An application to a landlord may be necessary but there may also be a need to obtain statutory consent from elsewhere for some alterations. [SI XXX 2002, Reg 6(2)(a) and (b)] This might include:
- planning permission
 - building regulations approval
 - listed building consent
 - consent to alter buildings in a conservation area
 - consent to install a ramp onto a public highway.
- The Act does not override the need to obtain such consents. It may be reasonable, therefore, to make an interim adjustment that does not require consent.

Example 7.1A

As part of its planned programme of access improvements, a university is installing a ramped entrance to its library. The university library is a listed building. The university has consulted the local planning authority and was told that consent was likely to be given but would take some weeks. In the meantime, as a temporary measure, the university arranges for disabled students unable to climb the steps to use an entrance at the rear of the building. Although this entrance is accessible, it is very inconvenient, requiring students to negotiate a series of pathways and wait in an unsheltered back yard. While this is not ideal, it is likely to be a reasonable adjustment for a limited period while statutory consent is being obtained.

- 7.2 If a lease requires a tenant to obtain permission from a landlord to alter a building, a responsible body must apply in writing to its landlord for consent to make an alteration. The written application should state that the alteration is to comply with a duty to make reasonable adjustments under Part 4 of the Disability Discrimination Act. The application should also include plans and specifications of the intended works.

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

- 7.3 Where a responsible body occupies premises under a lease the terms of which prevent it from altering the premises, special provisions apply. If the alteration is one the responsible body proposes to make to comply with a duty of reasonable adjustment, the Act overrides the terms of the lease and entitles the responsible body to make the alteration with the consent of its landlord. [s 28W]

Obtaining other consents

- 7.4 A superior landlord and immediate landlord may give their consent but this does not override the responsible body's duty to obtain other appropriate consents. These might be from a statutory body or due to the terms of an agreement or other legally binding obligation, for example a restrictive covenant or a mortgage. It is likely that consent from a landlord or superior landlord would be given subject to such obligations.

Example 7.4A

A local authority holds some of its classes in a building purchased with the assistance of a bank loan. The terms of the loan require the bank's consent for any changes to the building. The local authority is proposing to alter the building to comply with its duty to make reasonable adjustments. It is reasonable for the local authority to have to seek the bank's consent but it is not reasonable for it to

have to make the alteration if this consent is not given.

- 7.5 The Regulations detail the duties and the processes that apply in the relationship between the landlord and any superior landlord. The superior landlord has a duty to the responsible body as if he or she was the immediate landlord. [SI XXX 2002, Reg 7]

When are landlords deemed to be withholding consent?

- 7.6 If the application includes details of the alterations including plans and appropriate specifications, and indicates that the alterations are to comply with a Part 4 duty, the landlord must reply within 42 days of receiving the application. If the landlord fails to reply within this time, the responsible body can assume that consent has been withheld. [SI XXX 2002, Reg 3(2)] In such a case, the responsible body can apply to the court. This procedure is explained in paragraphs 7.19 and 7.20. [s 28W, Sch 4 Part 3]
- 7.7 If the landlord needs to obtain the consent of another person, for example a superior landlord, the immediate landlord must advise the responsible body of this and apply to any superior landlord within the 42-day period. If this is done, consent will not be deemed to have been withheld. If a landlord fails to seek this consent, consent will be deemed to have been withheld. [SI XXX 2002, Reg 3(4)]
- 7.8 A superior landlord or other person whose consent is required also has 42 days from receiving the

application (or from receiving plans and further details – see paragraph 7.10) to provide consent.

7.9 A landlord will also be deemed to have withheld consent if he or she has obtained consent from a superior landlord but has failed to notify the responsible body of this within 14 days. [SI XXX 2002, Reg 3(5)]

7.10A landlord or superior landlord will not be deemed to have withheld consent if the responsible body (or immediate landlord) fails to provide appropriate plans and specifications of the intended works with the application. In this situation, the landlord may request them. The request must be made within 21 days of receipt of the initial application and the 42-day period begins from the date the landlord receives the appropriate details. [SI XXX 2002, Reg 3(3)]

Example 7.10A

On 1 January a local education authority writes a brief letter to the landlord of one of the buildings it rents, requesting permission to refit a pottery room with low benches and wider doorways and aisles. On the 22 January the landlord telephones asking the local education authority to send in detailed floor plans and estimated costs for the proposed changes. The local education authority has been preparing these and sends them to the landlord on 9 February. The landlord then has

until 23 March to notify the authority of the decision.

7.11 While a landlord is seeking consent from a superior landlord or other person, he or she must give consent to the responsible body conditional upon the other person's consent. [SI XXX 2002, Reg 3(7)]
If the responsible body is not advised of this conditional consent, the immediate landlord will be deemed to have withheld consent.

When is a landlord withholding consent reasonably?

7.12 In most cases whether withholding consent will be reasonable or not will depend upon specific circumstances.

7.13 If the lease requires a landlord to give consent to an alteration of the kind in question and the landlord does not do so, the landlord will be deemed to have withheld consent unreasonably. [SI XXX 2002, Reg 4(2)]

7.14 The Regulations provide circumstances in which a landlord can reasonably withhold consent to the making of an alteration. [SI XXX 2002, Reg 5(2)]

For example, where:

- there is a binding obligation requiring the consent of any person to the alteration; and
- the landlord has taken steps to seek that consent; and
- consent has not been given, or is given subject to a condition which makes it reasonable for the

landlord to withhold consent (see paragraph 7.17).

Example 7.14A

A college applies for consent to make a new doorway at ground floor level in the side of a building because the main entrance is up a set of steps. The landlord is willing to consent to the alteration but must obtain the permission of an adjoining landowner who has a restrictive covenant. This prevents the making of any openings in the side of the building. The neighbouring landowner will give consent but only if the landlord pays a substantial sum. Because of the size of the sum requested it is likely to be reasonable for the landlord to refuse consent.

7.15 It is also reasonable to withhold consent where the landlord or superior landlord does not know and could not reasonably be expected to know that the alteration is being proposed to comply with a duty to make reasonable adjustments. [SI XXX 2002, Reg 5(2)(b)]

7.16 If a landlord is withholding consent reasonably it may be necessary to consider an alternative (even if less effective) adjustment.

Power of landlords to impose conditions on consent

7.17 Either the landlord or the superior landlord can give consent subject to the conditions prescribed in the

Regulations. [SI XXX 2002, Reg 6] They may include an obligation:

- to obtain appropriate other consents including planning permissions
- to carry out the works in accordance with the plans and specifications submitted to and approved by the landlord or the superior landlord (such approval may not be unreasonably withheld)
- to allow the landlord or the superior landlord to inspect the work after it has been completed
- to repay to the landlord and the superior landlord any costs reasonably incurred in connection with giving the consent. (These costs might include building surveyors', architects' or legal fees incurred to provide documentary evidence for the consent.)

7.18 The landlord or superior landlord may also impose other conditions so long as these are reasonable.

What happens if the landlord refuses consent or attaches unreasonable conditions?

7.19 If the responsible body has written to the landlord for consent to make an alteration and the landlord:

- has refused consent unreasonably; or
- has failed to respond (which is deemed as a refusal); or
- has attached conditions to his consent

the responsible body or a disabled person who has an interest in the proposed alteration may make a claim against a landlord in a county court or, in Scotland, the Sheriff court. [SI XXX 2002, Reg 7(5)]

7.20 The court will decide whether the landlord's refusal or any conditions imposed are unreasonable. It may make a statement as to whether the landlord has been unreasonable and/or authorise the responsible body to make the alteration under a court order. The court order may impose conditions on the responsible body.

Bringing landlords into proceedings brought by disabled people

7.21 In any legal proceedings under Part 4 of the Act that involve a failure to make an alteration to premises (see **Chapter 9**), the disabled person concerned or the responsible body may make the landlord a party to the proceedings. (In other words, the claim would be made jointly against both the responsible body and the landlord.) [s 28V, Sch 4 Part 3]

Example 7.21A

A college occupies premises under a lease, a term of which says that a staircase cannot be altered. The college wishes to alter the staircase to fit a chair lift for wheelchair users. The lease prevents the making of alterations and the landlord relies on this to refuse consent. The college takes no further action. A disabled student is unable to gain access to his classes on the first floor. The student may take both the college and the landlord to court.

7.22 The responsible body should, therefore, consider whether to make an application for a declaration

that a landlord has been unreasonable at the time the application for consent has been refused. Failure to do so may mean that the responsible body has no defence to a claim by a disabled person.

Example 7.22A

In the situation in 7.21A, the college claims that its failure to make an adjustment was because consent was withheld. The court finds that discrimination has taken place. The landlord's consent is found to have been withheld unreasonably. The fact that the college did not make a claim against the landlord may prevent the college from having a defence.

7.23 The court will grant a request to make a landlord a party to proceedings if the request is made before the hearing of the claim begins. It may refuse the request if it is made after the hearing begins. The request can not be granted if it is made after the court has determined the claim.

7.24 Where the landlord has been made a party to the proceedings, the court may determine whether the landlord has unreasonably refused consent to the alteration or has consented subject to unreasonable conditions. In either case the court can:

- state whether the landlord was reasonable or unreasonable
- authorise the responsible body to make a specified alteration
- order the landlord to pay compensation to the disabled person.

7.25 The court may require the responsible body to comply with any conditions specified in the order. If the court orders the landlord to pay compensation, it cannot also order the responsible body to do so.

8 Other provisions under the Act

This chapter explains a number of other changes that the Act introduces. It outlines how these changes offer additional protection to disabled people in post-16 education and other related services, and explores the implications for responsible bodies.

Victimisation

- 8.1 Victimisation is a special form of discrimination covered by the Act. It applies whether or not the person victimised is a disabled person. [s 28R(4)]
Victimisation is unlawful if it occurs in relation to the provision of post-16 education or other related services covered by Part 4. [s 55]
- 8.2 The Act says that a person discriminates against another person (the victim) if he or she treats the victim less favourably than he or she treats (or would treat) other people in the same circumstances – regardless of disability – because the victim has: [s 55(2)(a)]
- brought proceedings under the Act (whether or not proceedings are later withdrawn); or
 - given evidence or information in connection with such proceedings; or
 - done anything else under the Act; or
 - alleged someone has contravened the Act (whether or not the allegation is later dropped).

Example 8.2A

A non-disabled student acts as a witness in a complaint by a disabled student against a college lecturer. Later, in retaliation, other lecturing staff at the college begin to 'lose' the non-disabled student's work, and hand assignments back later than for other students. This is likely to be victimisation, and therefore unlawful.

8.3 The Act also says that a person discriminates against another person (the victim) if he or she treats the victim less favourably than he or she treats (or would treat) other people in the same circumstances because he or she believes or suspects that the victim had done or intends to do any of the things mentioned in paragraph 8.2. [s 55(2)(b)] Such victimisation is discrimination whether or not the victim is disabled.

8.4 However, it is not victimisation to treat a person less favourably because that person has made an allegation if the allegation was false and not made in good faith. [s 55(4)]

Example 8.4A

A disabled young man makes a series of allegations claiming that a youth worker is discriminating against him. The allegations are without any foundation, and are part of a personal grudge that the young man has against the worker. The co-ordinator decides to bar the man from the club for the rest of the year. Because of the particular circumstances, this is not likely to be victimisation and is likely therefore to be lawful.

Liability for employees' and agents' acts

- 8.5 The Act says that employers are responsible for anything done by their employees in the course of their employment. [s 58(1)] As an employer, a responsible body cannot use the defence that discrimination took place without its knowledge or approval.

Example 8.5A

A security guard employed at a college always takes a long time to open the barrier to the staff car park for a disabled student who has been allocated a space there. He does this because he disapproves of students being allowed into the staff car park even if they have permission. It is likely that this less favourable treatment is unlawful. Although the governing body at the college is not aware that this is happening, the responsible body is likely nevertheless to be liable under the Act.

Example 8.5B

A tutor routinely turns his back on the class when he is teaching although he knows that one of the students has a hearing impairment and needs to lipread. The tutor has been trained in how to work with hearing impaired students, but no one monitors his practice or asks students for feedback on his lectures. The student is being substantially disadvantaged by the failure of the tutor to make a reasonable adjustment. Even though the governing body is not aware that discrimination is occurring, it

is likely that the responsible body is acting unlawfully.

- 8.6 If a claim under the Act is made against a responsible body based on anything done by an employee, it is a defence that the responsible body took such steps as were reasonably practicable to prevent such acts. [s 58(5)] Examples of such steps could be developing policies on disability matters and communicating these to employees and ensuring all staff are aware that it is unlawful to discriminate against disabled people.
- 8.7 Responsible bodies are also liable for anything done by their agents, if done with their authority. [s 58(2)] That authority may be express or implied and may have been given before or after the act in question. [s 58(3)]

Example 8.7A

The cleaning at a university is contracted out to an agency. A blind student has asked the hall warden to ensure that cleaners replace things where they find them in his room and in the kitchen. The hall warden passes on this request to the agency. One of the cleaners continually moves things around which means the student cannot find them. The responsible body is likely to have been acting unlawfully by failing to ensure the reasonable adjustment was made. (The cleaner, and/or the agency employing the cleaner, may also be liable for aiding an unlawful act - see 8.8 below.)

Example 8.7B

A visiting lecturer provides a series of lectures at a university. He is not given any instructions about the reasonable adjustments that need to be made for disabled people on the course. The lecturer fails to make adjustments for these students and some students are substantially disadvantaged as a result. The responsible body is likely to have been acting unlawfully by failing to ensure its agent, the visiting lecturer, made reasonable adjustments. (The lecturer may also be liable for aiding an unlawful act - see 8.8 below.)

Aiding unlawful acts

- 8.8 An agent or employee may also be taken to have aided the responsible body in committing an unlawful act. [s 57] This can be the case even in circumstances where the responsible body has a defence. [s 58(5)] Any person, whether or not they are an employee or agent, who knowingly helps someone else do something which is unlawful under the Act is also acting unlawfully. [s 57(1)]

Example 8.8A

Unknown to the education authority, a community education worker is excluding a deaf woman involved in a local residents' group from discussions that he has been facilitating. The worker has been involved in a training day with other colleagues from the education authority in which the rights of disabled people under the Act were discussed, and where ways of including deaf people had been explained. The education authority regularly

monitors its provision to ensure that its equal opportunities policy is being put into practice and that its guidance on the Act is being followed. The education authority may have a defence under the Act, but the worker is likely to be personally liable because he is aiding an unlawful act.

Example 8.8B

A college provides guidance to its part-time agency teaching staff that they should not agree extra time or other examination arrangements for disabled students taking class exams because of the extra costs involved. When a dyslexic student requests additional time for a class exam the lecturer says this is not available, although she knows that this is likely to be against the law. It is likely that the responsible body (the governing body of the college) is acting unlawfully, and that the agency employing the lecturer is also likely to be liable for aiding the responsible body's unlawful act.

8.9 A person does not knowingly aid someone else to do something unlawful if: [s 57(3)]

- that other person makes a statement to him or her that it would not be unlawful because of any provision of the Act; and
- he or she acts in reliance on that statement; and
- it is reasonable to rely on the statement.

8.10A person who knowingly or recklessly makes such a statement which is false or misleading in a material respect is guilty of a criminal offence and will be

liable on conviction to a fine of up to level 5 on the standard scale (£5,000 at present). [s 57(4)-(5)]

Example 8.10A

A local education officer sends a memo out to all the authority's part-time teachers and lecturers to advise them that the legislation does not apply to part-time or evening class students. The local education officer knows that this is not the case. Acting on this advice, a lecturer who comes in to teach a local history course refuses to provide electronic copies of her overheads for a blind woman taking her class. The local education authority is likely to be acting unlawfully, although not criminally because it had no knowledge of the officer's memo. The lecturer is unlikely to be knowingly aiding an unlawful act because it is likely to be reasonable for her to rely on the memo she was sent. The local education officer, however, is likely to have committed a criminal offence.

Terms of agreements

- 8.11 Any term in an agreement is void (and therefore unenforceable) if its effect is to: [ss 28P and 28X]
- require someone to do something which would be unlawful under the Act;
 - exclude or limit the operation of the Act; or
 - prevent someone making a claim under the Act.

Example 8.11A

A college requires a disabled student travelling on a field trip to sign an agreement stating that he does not hold the college responsible for making any

adjustments to aspects of the trip because of his disability. This agreement is not legally binding.

8.12 An agreement to settle or compromise a claim brought under the Act is not affected by this rule. [s 28X]

Statutory authority and national security

8.13 A responsible body is not required to do anything under the Act that will result in a breach of legal obligations under any other legislation or enactment. Nothing in the Act makes unlawful anything done for safeguarding national security. [s 59] For more information on responsibilities under other legislation, see **Chapter 10**.

Disability statements

8.14 Under previous provisions of the Disability Discrimination Act, the higher education funding councils had a responsibility to require institutions to publish disability statements outlining their provision for disabled students. Local education authorities also were required to publish disability statements. The Learning and Skills Council and the National Council for Education and Training for Wales had a power to require institutions to publish disability statements, but not a statutory duty to do so. These duties and powers are withdrawn by the Special Educational Needs and Disability Act 2001, and no longer exist from 1 September 2002. [Special Educational Needs and Disability Act s 34] It may nevertheless be a reasonable anticipatory adjustment for an institution to provide information

for disabled students about its provision (see **Chapter 5**).

Removal of exemptions

8.15 Under regulations some specific services were exempted from Part 3 of the Disability Discrimination Act which covers goods, facilities and services. These services include:

- social, cultural and recreational activities and facilities for physical education and training designed to promote personal or educational development provided by a voluntary organisation (for example, a local branch of the Scouts or Guides)
- some examination and assessment services closely related to education.

This exemption is expected to be removed on 1 September 2002 and to be covered by Part 3 from that date. [Special Educational Needs and Disability Act Sch 9]

9 What happens if there is a dispute under the Act

This chapter explains what happens if someone makes a complaint against a responsible body, and what routes for redress exist. It also explains what action may be taken to put right any discrimination that is found to have taken place.

Raising a complaint

9.1 A person who believes that a responsible body has discriminated against him or her may bring civil proceedings. Those proceedings take place in a county court in England and Wales or the Sheriff court in Scotland. [s 28V] Similar proceedings may also be brought against a person who has aided someone else to commit an unlawful act. Court action must be brought within six months of the alleged discrimination. Where discrimination takes place over a period of time, the six months begins at the date of the last discriminatory act. [Sch 3 Part 4]

Informal procedures

9.2 Complainants may want to raise complaints directly with responsible bodies. Many responsible bodies will have complaints procedures which aid the speedy resolution of disputes. Complainants may raise an issue with a responsible body either before or after legal proceedings have started.

Conciliation

- 9.3 The Disability Rights Commission is empowered by the Act to set up an independent conciliation service for disputes arising under the post-16 sections of the Act to promote the settlement of disputes without recourse to the courts. [s 31B] Conciliation is made available locally around the country, and disputes may be referred to conciliation if both the complainant and the responsible body agree. The Disability Rights Commission has no power to impose a settlement on either party.
- 9.4 Agreeing to the conciliation process does not prevent a complainant from pursuing a case through the courts. The time limit for bringing an action in court is extended by two months if the conciliation process has been used within six months of a discriminatory act. [Sch 3 Part 4] No information disclosed to a conciliator during the conciliation process may be used in any subsequent court case without the permission the person who disclosed it. [s 31B(7)]

What happens if a dispute cannot be resolved?

- 9.5 If conciliation or agreement cannot resolve a dispute, and the complainant has brought legal proceedings, the matter is decided by a court. If successful, a disabled person could be awarded compensation, including compensation for any financial loss, or injury to feelings. [s 28V(2) and (5)] The disabled person may also seek an injunction (in England and Wales) or an interdict (in Scotland) to prevent the responsible body repeating any

discriminatory act in the future, or an order to require positive action. The court may also make a declaration as to the rights and responsibilities of the parties involved.

Complaints that could also be heard under other sections of the Act

- 9.6 In some circumstances it is possible for a disabled person to be protected by more than one section of the Act at the same time. For example, a disabled employee who is also studying at an institution may be protected by both Part 2 and Part 4 of the Act when he is using the gym which is open to staff and students alike. In such circumstances, should a disabled person decide to pursue a case under Part 4 (or under Part 2), a responsible body may not use the defence that a case should have been pursued under another part of the Act. [s 28V(6)] A responsible body must respond to the substance of the complaint made against it.

Where to go for information and advice

- 9.7 Students or others wanting to make complaints under the Act against a responsible body may get further information and advice about the process from the Disability Rights Commission. Complainants may be eligible for legal aid, and in some circumstances may receive direct assistance from the Disability Rights Commission.
- 9.8 The Disability Rights Commission also provides advice to responsible bodies about their legal responsibilities under the Act.

Telephone 08457 622 633
Text phone 08457 622 644
Fax 08457 778 878
Email enquiry@drc-gb.org

Post DRC Helpline
FREEPOST
MID02164
Stratford upon Avon
CV37 9BR

Website <http://www.drc-gb.org>

9.9 The Court Service has booklets that provide advice on how to bring a case to court in England and Wales. These are available at county courts or from the Court Service website:

www.courtservice.gov.uk

9.10 Information is also available from the Scottish Court Service about the court process and bringing a case to court:

Telephone 0131 229 9200
Fax 0131 221 6895
Email enquiries@scotcourts.gov.uk
Website www.scotcourts.gov.uk

10 Links to other legislation and responsibilities

This chapter sets out the general approach to be taken by responsible bodies when considering the Act and its interaction with other legislation and duties, and explains some of the links which they are most likely to encounter. **It is not an exhaustive list** and responsible bodies need to consider their other responsibilities where relevant.

General approach

10.1 Nothing in the Act takes precedence over any other legislation or any other duties which responsible bodies or other bodies may have. In carrying out their duties under the Act, responsible bodies must ensure that they comply with all other legal requirements upon them. However, the existence of other legislative provisions and responsibilities does not provide an automatic defence in a case under Part 4 of the Disability Discrimination Act. Responsible bodies are expected to take whatever action is necessary to ensure that they fulfil their responsibilities both under the Act and under any other legislation that applies to them.

The Data Protection Act 1998

10.2 The Data Protection Act 1998 restricts the processing of personal data and 'sensitive' personal data about individuals, and particularly how and whether that information can be passed on to others. The use of sensitive personal data is particularly restricted. Information relating to an

individual's disability is classified as sensitive personal data. In ensuring that disabled people and students are not discriminated against, and that reasonable adjustments are made, responsible bodies may need to pass data about disabled students on to members of staff and others including work placement providers. Even if students have not requested confidentiality under the Disability Discrimination Act, the use and transfer of information about them (including through job references) is restricted by the Data Protection Act. Such processing may often require students' explicit informed consent. In order to ensure that they are not in breach of either law, responsible bodies may need to:

- ask students' permission to pass on information necessary for making reasonable adjustments
- alert students to the use that will be made of information when asking them to disclose disability on application, enrolment or examination forms
- ensure appropriate procedures are in place to keep sensitive and other personal information confidential.

10.3 However, should a student request confidentiality under the Disability Discrimination Act, information may not, from that point, be passed on for the purposes of making reasonable adjustments. [s 28T(4)]

The Health and Safety at Work Act 1974 and related regulations

10.4 Health and safety legislation requires employers and persons concerned with premises to undertake risk assessments and produce a health and safety policy. The risk assessment should list any risks to staff or others, including students and users of services, and what control measures the employer will take to reduce those risks. Control measures may include:

- procedures for lifting people and equipment
- guidance on visits to students in their homes
- appropriate training and guidance for staff
- keeping passageways and means of access and egress clear and hazard-free
- minimising the risk posed by any machinery or hazardous substances (including any stored medicines)
- procedures for the safe disposal of waste and safe practices in first aid
- adequate procedures for monitoring and auditing to ensure that health and safety practices are operating properly.

10.5 The Disability Discrimination Act 1995 does not require responsible bodies to place employees or others at inappropriate risk. However, in many cases, changes to procedures, the provision of training or the purchasing of equipment may mitigate any risks that arise in relation to disabled people and students. The risk assessment process carried out to comply with health and safety legislation may provide an opportunity to consider

adjustments required by the Disability Discrimination Act.

The Fire Precautions Act 1971 and related regulations

10.6 Legislation exists to prevent the risk of fire and the risk of injury in fire. In particular there are laws to ensure adequate warning in the case of fire and the safe egress of people from buildings to a place of safety in case of fire. Responsible bodies must ensure that they do not breach fire regulations in their relationship with disabled people. In many cases reasonable anticipatory adjustments can be made which will ensure that warning of fire and access and egress routes can be provided for disabled people. For example:

- fire refuges on stairwells for those with mobility difficulties in case of fire
- flashing light fire alarms or vibrating pagers for deaf users of buildings
- clearly visible and simple to understand signage to indicate escape routes and exits
- increased numbers of exits or wider doors to ensure egress from a large meeting room
- emergency evacuation procedures.

The Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960

10.7 This legislation puts the common law duty of care which occupiers owe to lawful visitors on a statutory footing. The duty is to take such care as is

reasonable in all the circumstances of the case so that people are reasonably safe when using the premises. For the purposes of this legislation a responsible body will be an occupier if it has sufficient control over premises. The responsible body owes this duty towards its students and other people using the premises, and may need to make adjustments to premises to comply with the legislation. The obligation to make reasonable adjustments under the Disability Discrimination Act may well overlap with duties under the Occupiers' Liability Acts.

10.8 Landlords in England and Wales who let premises and thereby part with all control are not 'occupiers' under the 1957 Act, even if they retain repair obligations. However, in Scotland, the Occupiers' Liability (Scotland) Act 1960 places the same duty on landlords responsible for the maintenance or repair of premises as on occupiers and they must take reasonable care to ensure people on the premises do not suffer injury.

The Defective Premises Act 1972

10.9 Some responsible bodies may act in the role of landlord in regard to their premises. As such, they owe a duty to take such care as is reasonable in all the circumstances to see that anyone who might reasonably be affected by defects in the state of the premises is reasonably safe from personal injury or damage caused by the defect. Responsible bodies may need to make adjustments where necessary to ensure their compliance with this legislation, and

again this may impact on their duties towards disabled students. The Defective Premises Act applies in England and Wales only.

Building regulations, planning permission and other property issues

10.10 Matters relating to building regulations and property are dealt with separately in **Chapter 7**.

The Human Rights Act 1998

10.11 The Human Rights Act brings into UK law certain of the rights and freedoms guaranteed under the European Convention on Human Rights, and is binding on 'public authorities', which includes bodies whose functions are of a public nature. Most responsible bodies will be public authorities to the extent that they offer education or other related provision. The Human Rights Act includes a right not to be denied access to education, and a right not to be discriminated against in the enjoyment of that (or other) Convention rights. Some disabled people and students may have rights under both the Disability Discrimination Act 1995 and the Human Rights Act 1998 and may be able to pursue a claim under both Acts together.

The Race Relations Act 1976 and the Race Relations (Amendment) Act 2000

10.12 The Race Relations Act 1976 and the subsequent Race Relations (Amendment) Act 2000 make racial discrimination unlawful in employment, training and related matters, in education and in the provision of goods, facilities and services and in the

management and disposal of premises. The legislation applies to Scotland, England and Wales.

10.13 The Race Relations Act 1976 applies to two forms of discrimination:

- direct discrimination when someone is treated less favourably on racial grounds; and
- indirect discrimination when unjustifiable requirements or conditions are set which apply or would apply to everyone, but in fact discriminate against people on racial grounds.

10.14 The Race Relations Acts give individuals the right of access to civil courts and to employment tribunals. Responsible bodies should be aware that in some cases allegations of discrimination on the grounds of disability may also be related to allegations relating to racial discrimination. Specific reference to the duties of responsible bodies and providers of education are set out in Part III of the Race Relations Act 1976.

10.15 The Race Relations (Amendment) Act places a duty on public bodies to promote equality between different racial groups. Most responsible bodies under Part 4 of the Disability Discrimination Act are also public bodies for the purposes of the Race Relations (Amendment) Act.

The Sex Discrimination Act 1975

10.16 The Sex Discrimination Act 1975, as amended in 1986, makes it unlawful to discriminate on grounds of sex in employment, education, advertising, or

when providing goods, facilities, services and premises. The Sex Discrimination Act applies to two forms of discrimination:

- direct discrimination when someone is treated less favourably because of their sex; and
- indirect discrimination when unjustifiable requirements or conditions are set that apply or would apply to everyone but in fact discriminate against one sex.

10.17 Individuals have the right of access to civil courts and employment tribunals for legal remedies for unlawful discrimination under the Sex Discrimination Act 1975. Responsible bodies should be aware that in some cases allegations of discrimination on the grounds of disability may also be related to allegations relating to sex discrimination. Specific reference to the duties of responsible bodies and providers of education are set out in the Sex Discrimination Act 1975 and related guidance

The Welsh Language Act 1993

10.18 Under the Welsh Language Act 1993, public bodies notified by the Welsh Language Board which provide services to the public in Wales have a duty (so far as is appropriate in the particular circumstances and is reasonably practicable) to treat the Welsh and English languages on a basis of equality. This includes a duty to provide information and services in the Welsh language. Public bodies include most education providers affected by this Code.

Common law duties

10.19 Responsible bodies have a duty to take care that injury or loss is not caused to students in a variety of circumstances. This common law duty may sometimes overlap with the duties imposed by the Disability Discrimination Act 1995. Premises must be kept in proper repair and the responsible body must ensure the safety of students when travelling to the premises of others. Reasonable steps should be taken to protect students from any dangers arising from practical work and responsible bodies should exercise a proper measure of supervision of students.

10.20 In some cases, responsible bodies may face conflicts between their responsibilities to one disabled person and to other disabled or non-disabled people. When such situations arise, responsible bodies still have a duty to make reasonable adjustments to ensure that disabled people and students are not placed at a substantial disadvantage. In other cases, however, it may be that the duty of care towards others means that a reasonable adjustment for a disabled student cannot be made, or that an alternative adjustment must be substituted.

Statutory responsibilities of other bodies

10.21 Other bodies may have statutory duties towards disabled people and students. For example:

- social services or social work departments may have responsibilities to provide personal assistance or other support
- awarding authorities have responsibilities to provide Disabled Students' Allowances or other financial support
- other service providers or employers may have responsibilities to make reasonable adjustments under the Disability Discrimination Act 1995.

10.22 In some cases, the responsibility of another body may overlap with that of the responsible body to make reasonable adjustments. The fact that another body also has a statutory duty does not reduce a responsible body's duty to make a reasonable adjustment where substantial disadvantage exists. Legally, both have duties. In practice, responsible bodies will want to negotiate with those who hold parallel duties to ensure that disabled students and other disabled people receive the support and adjustments they need in the most effective and efficient way.

10.23 Under the Learning and Skills Act 2000, the Learning and Skills Council and the National Council for Education and Training for Wales have a duty to have due regard to the need to promote equality of opportunity between disabled and non-disabled people. These bodies, and the higher education funding councils in England, Wales and Scotland, also have a duty to have regard to the requirements of disabled people when carrying out their functions. These duties are not, however,

responsibilities towards individual disabled students, and these organisations are not responsible bodies under the Act.

Appendix One: The meaning of disability

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

When is a person disabled?

A1.1 A person has a disability if he or she has a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. [Sch 1]

What about people who have previously had a disability?

A1.2 People who have had a disability within the definition are protected from discrimination even if they no longer have a disability. [Sch 2]

What does 'impairment' cover?

A1.3 It covers physical or mental impairments; this includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

A1.4 The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning difficulties. However, the Act states that it

does not include any impairment resulting from or consisting of a mental illness, unless that illness is a clinically well-recognised illness. A clinically well-recognised illness is one that is recognised by a respected body of medical opinion.

What is a ‘substantial’ adverse effect?

A1.5 A substantial adverse effect is something more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

What is a ‘long-term’ effect?

A1.6 A long-term effect of an impairment is one:

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

A1.7 Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months and the effects of temporary infections, from which a person would be likely to recover within 12 months.

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

A1.8 If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as

continuing if it is likely to **recur**; that is, if it is more probable than not that the effect will recur. For example, a person with rheumatoid arthritis may have an impairment that has a substantial adverse effect, but which then ceases to be substantial (i.e. the person has a period of remission). In this case the effects should be treated as if they are continuing, and are likely to continue beyond 12 months, if:

- the impairment remains, and
- at least one recurrence of the substantial effect is likely to take place 12 months or more after the initial occurrence.

This would then be a long-term effect.

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

A1.9 Normal day-to-day activities are those which are carried out by most people on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument or a sport to a professional standard or performing a skilled or specialist task related, for example, to a particular academic discipline, education or training course. However, someone who is affected in such a specialised way but is **also** affected in normal day-to-day activities would be covered by this part of the definition. The test of whether an impairment affects normal day-to-day activities is whether it affects one of the broad categories of capacity listed in Schedule 1 to the Act. They are:

- mobility

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

What about treatment?

A1.10 Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects although not the impairment. In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops, because the individual no longer has a disability.

Does this include people who wear spectacles?

A1.11 No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

A1.12 People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

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

A1.13 Progressive conditions are conditions that are likely to change and develop over time. Examples given in the Act are cancer, multiple sclerosis, muscular dystrophy and HIV infection. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has **some** effect on ability to carry out normal day-to-day activities, even though not a **substantial effect**, if that impairment is likely eventually to have a substantial adverse effect on such ability.

Are people with genetic conditions covered?

A1.14 If a genetic condition has no effect on ability to carry out normal day-to-day activities, the person is not covered. Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.

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

A1.15 Yes. Certain conditions are to be regarded as not amounting to impairments for the purposes of the Act. These are:

- addiction to or dependency on alcohol, nicotine, or any other substance (other than as a result of the substance being medically prescribed)
- seasonal allergic rhinitis (for example hay fever), except where it aggravates the effect of another condition

- tendency to set fires
- tendency to steal
- tendency to physical or sexual abuse of other persons
- exhibitionism
- voyeurism.

A1.16 Disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing, are to be treated as not having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

What about other definitions of disability used in education and training?

A1.17 Some students may have had statements or records of needs while at school. Others may come under the definition of learning difficulty in the Further and Higher Education (Scotland) Act 1992 or the Learning and Skills Act 2000. These students may be eligible for different sorts of support because of this. However, being eligible for additional support in school or college does not automatically mean that an individual is disabled under the Disability Discrimination Act.

Where can I find out more?

A1.18 A publication available from The Stationery Office, *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, provides additional help in understanding the concept of disability and in identifying disabled

persons. See **Appendix Three** for details of where to obtain publications.

Appendix Two: The meaning of ‘responsible body’

What is a responsible body?

A2.1 There will be some post-16 educational institutions, adult education provision and youth services that are not covered by the post-16 sections of the Act. The Act specifies which provision is covered, and also specifies the ‘responsible body’ for each of those organisations. The responsible body is the body that is liable for fulfilling any legal duties under the Act.

England and Wales

A2.2 In England and Wales the responsible bodies that must comply with the post-16 sections of the Act are as follows: [Sch 4B and Sch 4C]

- the governing body of an institution in the further education sector (those conducted by further education corporations and those designated for the purposes of Part 1 of the Further and Higher Education Act 1992)
- the governing body of an institution within the higher education sector (publicly funded universities, institutions conducted by higher education corporations and those designated for the purposes of Part 2 of the Further and Higher Education Act 1992)
- the specified body of any other institution designated by the Secretary of State (see paragraph A2.4)

- the local education authority in respect of any further, higher or community education (including any recreational or training facilities) secured by it
- the governing body of any maintained school in respect of any further education it provides to people other than its pupils
- the local education authority in respect of any statutory youth services secured by it.

Scotland

A2.3 In Scotland the responsible bodies that must comply with the post-16 sections of the Act are as follows: [Sch 4B and Sch 4C]

- the board of management of a college of further education with a board of management within the meaning of section 36 of the Further and Higher Education (Scotland) Act 1992
- the governing body of an institution within the higher education sector within the meaning of section 56(2) of the Further and Higher Education (Scotland) Act 1992
- the governing body of a central institution within the meaning of section 135(1) of the Education (Scotland) Act 1980
- the education authority of any institution maintained by an education authority in the exercise of the further education functions within the meaning of section 1(5)(b)(ii) of the Education (Scotland) Act
- the managers of a school in respect of grants made under section 73(c) or (d) of the Education (Scotland) Act 1980

- the specified body of any other institution designated by the Secretary of State (see paragraph A2.4)
- the education authority in respect of further, higher or community education (including any recreational or training facilities) secured by it.

Responsible bodies and institutions designated by the Secretary of State

A2.4 There is an additional list of responsible bodies and institutions designated by the Secretary of State. This list is available from The Stationery Office (see **Appendix Three**).

Appendix Three: Other publications

Legislation

The Special Educational Needs and Disability Act 2001

The Disability Discrimination Act 1995

The Disability Rights Commission Act 1999

*The Disability Discrimination (Educational Institutions)
(Alteration of Leasehold Premises) Regulations 2002*

*Disability Discrimination (Designation of Educational
Institutions)*

Available from:

The Stationery Office:
PO Box 29
Norwich
NR3 1GN

Telephone orders/general enquiries 0870 600 5522

Fax orders 0870 600 5533

Email bookorders@theso.co.uk

Website www.clicktso.com

Legislation is also available on the Internet:
www.hmso.gov.uk

Other Government publications

Guidance on matters to be taken into account in determining questions relating to the definition of disability

Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability

Code of Practice Rights of Access to Goods, Facilities, Services and Premises

Duties of Trade Organisations to their Disabled Members and Applicants

Available from The Stationery Office (see above)

Providing Work Placements for Disabled Students: A Good Practice Guide for Further and Higher Education Institutions (DfES/0023/2002)

Finding Out About People's Disability: A Good Practice Guide for Further and Higher Education Institutions (DfES/0024/2002)

These two publications are available from the Department for Education and Skills:

DfES Publications
PO Box 5050

Sherwood Park
Annesley
Nottingham
NG15 0DJ

Telephone 0845 602 2260
Textphone 0845 605 5560
Fax 0845 603 3360
Email dfes@prologistics.co.uk

Disability Rights Commission publications

A range of information and guidance on the Disability Discrimination Act 1995 is available from the Disability Rights Commission:

Telephone 08457 622 633
Textphone 08457 622 644
Fax 08457 778 878
Email enquiry@drc-gb.org

Post DRC Helpline
FREEPOST
MID02164
Stratford upon Avon
CV37 9BR

Website <http://www.drc-gb.org>

Disability Rights Commission documents are available in alternative formats and languages. Ethnic language

translation is available on request of documents that have not been published in that language.

Other publications

The Court Service has booklets providing advice on how to bring a case to court in England and Wales. This is available at county courts or from the Court Service website:

www.courtservice.gov.uk

Information is also available from the Scottish Court Service about the court process and bringing a case to court:

Telephone	0131 229 9200
Fax	0131 221 6895
Email	enquiries@scotcourts.gov.uk
Website	www.scotcourts.gov.uk