

**Disability Discrimination Act 1995**

**Revised Code of Practice:  
Trade Organisations,  
Qualifications Bodies and  
General Qualifications Bodies**

# Disability Discrimination Act 1995 Revised Code of Practice: Trade Organisations, Qualifications Bodies and General Qualifications Bodies

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# 1. Introduction

## Purpose of Part 2 and Chapter 2A of Part 4 of the Act

**1.1** The Disability Discrimination Act 1995 (the Act) brought in measures to prevent discrimination against disabled people. Part 2 of the Act is based on the principle that disabled people should not be discriminated against in employment or when seeking employment. Part 4 of the Act (as amended by the Special Education Needs and Disability Act 2002 and the Disability Discrimination Act 2005 and regulations made under both Acts) is based on similar principles that disabled people should not be discriminated against in accessing education opportunities or discriminated against during the course of their education in schools, colleges and universities. A person's prospects of gaining employment, or of progressing in or retaining employment, may be affected by his ability to become a member of a trade organisation or to take advantage of its membership services. A person's employment prospects may also be affected by his ability to obtain a general, professional or trade qualification.

**1.2** It is for this reason that, in addition to imposing duties on employers which are intended to prevent discrimination against disabled people, Part 2 sets out a number of duties with which trade organisations and bodies which confer professional or trade qualifications must comply for the same purpose, and new provisions under Chapter 2A of Part 4 of the Act set out similar duties in respect of general qualifications bodies. The extension of Part 2 to cover qualifications bodies as from 1 October 2004, and the extension of Part 4 to cover general qualification bodies as from September 2007, represents a change in the law.

## Purpose of the Code

**1.3** This Code of Practice (the Code) gives practical guidance on how to prevent discrimination against disabled people by trade organisations, qualifications bodies and general qualifications bodies. It describes the duties on such organisations and bodies in this regard. The Code helps disabled people to understand the law and what they can do if they feel that they have been discriminated against. By encouraging good practice, the Code assists trade organisations, qualifications bodies and general qualifications bodies to avoid complaints being made against them and to work towards the elimination of discrimination against disabled people.

**1.4** The Code also gives guidance on the law which is intended to help lawyers when advising their clients, and to assist courts and tribunals when interpreting new legal concepts. The Code explains the operation and effect of technical statutory provisions – some of which only came into force on 1 October 2004 (for qualifications bodies) and September 2007 (for general qualifications bodies), and many of which have a complex legal effect. Because of this, the Code is necessarily comprehensive and detailed.

**1.5 [s 14 Equality Act 2006]** The Commission for Equality and Human Rights has prepared and issued this revised Code under the Equality Act 2006 on the basis of a request by the Lord Privy Seal. It applies to England, Wales and Scotland. A similar but separate Code applies to Northern Ireland.

**1.6** As employers themselves, trade organisations, qualifications bodies and general qualifications bodies have duties under Part 2 in respect of disabled people whom they employ, or who apply to them for employment. However, these matters are not considered in the Code – which is

concerned only with the duties of trade organisations, qualifications bodies and general qualifications bodies acting in their capacity as such. Guidance on the application of the Act to employers is given in a separate code of practice issued by the Disability Rights Commission (DRC) (see Appendix B for details). It is possible that a number of individuals, organisations and bodies may be involved at different stages in matters concerning the legal duties described within this Code, particularly in respect of general qualifications bodies, and the Code attempts to explain each party's responsibilities under these duties.

## Status of the Code

**1.7 [s 15(4) Equality Act 2006]** The Code does not impose legal obligations. Nor is it an authoritative statement of the law – that is a matter for the courts and tribunals. However, the Code can be used in evidence in legal proceedings under the Act. Courts and employment tribunals must take into account any part of the Code that appears to them relevant to any question arising in those proceedings. If trade organisations, qualifications bodies and general qualifications bodies follow the guidance in the Code, it may help to avoid an adverse decision by a court or tribunal in such proceedings.

## How to use the Code

**1.8** This chapter gives an introduction to the Code. Chapter 2 sets out some general guidance on how to avoid discrimination. Chapter 3 contains an overview of the relevant provisions of the Act, and those provisions are examined in more detail in subsequent chapters.

**1.9** Chapter 4 details what is meant by discrimination and harassment, and Chapter 5 explains the duty to make reasonable adjustments for disabled people. Chapter 6 examines the relevance of justification under Part 2 and Chapter 2A of Part 4. Chapters 7, 8 and 9 focus on particular issues relating

to discrimination by trade organisations, qualifications bodies and general qualifications bodies respectively. Chapters 8 and 9 provide further information about competence standards.

**1.10** Chapter 10 looks at issues concerning adjustments to premises, and Chapter 11 deals with various other points and explains what happens if discrimination is alleged.

**1.11** Appendix A gives more information on what is meant by 'disability' and by 'disabled person'. Separate statutory guidance relating to the definition of disability has been issued under the Act (see paragraph 3.6). Appendix B lists other sources of relevant information about matters referred to in the Code.

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

## Examples in the Code

**1.13** Examples of good practice and how the Act is likely to work are given in boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples should not be treated as complete or authoritative statements of the law.

**1.14** While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. They can often be used to test how the law might apply in similar circumstances involving different disabilities or situations. The examples attempt to use as many different varieties of disabilities and situations as possible to demonstrate the breadth and scope of the Act. Examples relating to men or women are given for realism and could, of course, apply to people of either gender.

## References in the Code

**1.15** References to the Act are shown in the margins. For example, s 1(1) means section 1(1) of the Act and Sch means Schedule to the Act. References to Part 2, 3 or 4 refer to the relevant Part of the Act. Where reference is made to regulations, the appropriate Statutory Instrument (SI) number is shown in the margin.

## Changes to the legislation

**1.16** The Code refers to the Disability Discrimination Act as of 1 October 2004 and as amended to September 2007. There may be changes to the Act or to other legislation, for example to the range of people who are considered to be disabled under the Act, which may have an effect on the duties explained in the Code. You will need to ensure that you keep up to date with any developments that affect the Act's provisions.

## Further information

**1.17** Copies of the Act and regulations made under it can be purchased from The Stationery Office (see Appendix B for contact details). Separate codes covering other aspects of the Act, and guidance relating to the definition of disability are also available from The Stationery Office.



## 2. How can discrimination be avoided?

### Introduction

**2.1** There are various actions which trade organisations, qualifications bodies and general qualifications bodies can take in order to avoid discriminating against disabled people. By doing so, organisations and bodies are not only likely to minimise the incidence of expensive and time-consuming litigation, but will also improve their general performance and the quality of the services they provide.

**2.2** In addition, these actions will assist organisations and bodies who are public authorities (including any organisation certain of whose functions are functions of a public nature) to comply with the disability equality duty. The duty requires all such public authorities when carrying out their functions to have due regard to the need to:

- promote equality of opportunity between disabled persons and other persons;
- eliminate discrimination that is unlawful under the Act;
- eliminate harassment of disabled persons that is related to their disabilities;
- promote positive attitudes towards disabled persons;
- encourage participation by disabled persons in public life; and
- take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.

**2.3** To assist certain public authorities (including statutory regulators responsible for professional, trade and general qualifications in complying with the above duty – known as the general duty), regulations lay down certain steps which these authorities must take. These are

known as the 'specific duties'. They include the obligation to produce a Disability Equality Scheme which, amongst other things, requires public authorities to set out the steps which they will take (the action plan) to comply with the general duty. The general and specific duties do not create any individual rights for disabled people, but the Equality and Human Rights Commission can enforce both the general and the specific duties, and a failure to comply with the general duties may result in actions in the High Court (in England and Wales) or the Court of Session (in Scotland) by way of judicial review proceedings.

**2.4** This chapter sets out some guidance on ways to help ensure that disabled people are not discriminated against. It also addresses only some of the aspects of the disability equality duty. Organisations and bodies should refer to the **Statutory Codes of Practice: The Duty to Promote Disability Equality** (England and Wales) and (Scotland) for full details of the obligations which they must comply with in relation to the duty.

### Understanding the social dimension of disability

**2.5** The concept of discrimination in the Act reflects an understanding that functional limitations arising from disabled people's impairments do not inevitably restrict their ability to participate fully in society. Rather than the limitations of an impairment it is often environmental factors (such as the structure of a building, or an organisation's practices) which unnecessarily lead to these social restrictions. This principle underpins the duty to make reasonable adjustments described in Chapter 5. Understanding this will assist trade organisations, qualifications bodies and general qualifications bodies to avoid discrimination. It is as

important to consider which aspects of an organisation or body's activities create difficulties for a disabled person as it is to understand the particular nature of an individual's disability.

## Recognising the diverse nature of disability

**2.6** There are more than eight million disabled adults in our society. The nature and extent of their disabilities vary widely, as do their requirements for overcoming any difficulties they may face. If trade organisations, qualifications bodies and general qualifications bodies are to avoid discriminating, they need to understand this, and to be aware of the effects their decisions and actions – and those of their agents and employees – may have on disabled people. The evidence shows that many of the steps that can be taken to avoid discrimination cost little or nothing and are easy to implement.

## Avoiding making assumptions

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

- Do not assume that because a person does not look disabled, he is not disabled.
- Do not assume that most disabled people use wheelchairs.
- Do not assume that all blind people read Braille or have guide dogs.
- Do not assume that all deaf people use sign language.
- Do not assume that disabled people have lesser abilities and career aspirations than non-disabled people.

- Do not assume that people with certain types of disability (such as mental health problems or epilepsy) present a health and safety risk.
- Do not assume that because you are unaware of any disabled members of an organisation there are none.
- Do not assume that because you are unaware of any disabled people who are engaged in a particular profession or trade there are none.

## Finding out about disabled people's needs

**2.8** As explained later in the Code (see paragraphs 5.14 and 8.22 for example), the Act requires trade organisations, qualifications bodies and general qualification bodies to think about ways of complying with their legal duties. Listening carefully to disabled people and finding out what they want will help organisations and bodies to meet their obligations by identifying the best way of meeting disabled people's needs. There is a better chance of reaching the best outcome if discussions are held with disabled people at an early stage.

**2.9** Often, discussing with disabled people what is required to meet their needs will reassure a trade organisation, qualifications body or general qualifications body that suitable adjustments can be carried out cheaply and with very little inconvenience.

**2.10** There are various ways in which the views of disabled people can be obtained. Many trade unions and professional bodies and general qualifications bodies may have established formal structures for seeking and representing the views of disabled people. These may take the form of an advisory committee, perhaps a sub-committee of the equal opportunities committee or national governing body. Some organisations have a standing national forum for disabled members as well as arranging periodic conferences. In addition, the specific duties regulations

require prescribed public authorities to involve disabled people in the development of the Disability Equality Scheme.

## Seeking expert advice

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

## Planning ahead

**2.12** The duties which the Act places on trade organisations, qualifications bodies and general qualifications bodies are owed to the individual disabled people with whom those organisations and bodies have dealings. There is no duty owed to disabled people in general. Nevertheless, it is likely to be cost effective for trade organisations and qualifications bodies to plan ahead. Considering the needs of a range of disabled people when planning for change (such as when planning a building refurbishment, a new IT system, or the design of a website) is likely to make it easier to implement adjustments for individuals when the need arises. In addition, the disability equality duty requires organisations and bodies that are public authorities to have due regard to the need to promote equality of opportunity – including the need to eliminate discrimination. This requirement may require public

authorities to adopt a proactive approach, anticipating the needs of disabled people.

**2.13** It is good practice for trade organisations, qualifications bodies and general qualifications bodies to check whether access audits have been carried out to identify any improvements which can be made to a building to make it more accessible. Access audits should be carried out by suitably qualified people, such as those listed in the National Register of Access Consultants (see Appendix B for details). Websites and intranet sites can also be reviewed to see how accessible they are to disabled people using access software.

A trade organisation is re-fitting its premises including its facilities for members. The architects are asked to comply with British Standard 8300 to ensure that facilities such as the entrance, reception, meeting rooms, lecture theatre and toilets are accessible to a wide range of disabled visitors. BS8300 is a code of practice on the design of buildings and their approaches to meet the needs of disabled people (see Appendix B for details).

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

As part of the approval process for centres to deliver examinations and assessments for general qualifications, a general qualifications body asks a prospective centre to give details of the accessibility of its premises. Where there are concerns with the accessibility of the premises, the prospective centre is advised of the need to identify and make any improvements. The general qualifications body provides

a leaflet with further information for centres on where to get advice and assistance in relation to access audits.

## Implementing anti-discriminatory policies and practices

**2.14** Trade organisations, qualifications bodies and general qualifications bodies are more likely to comply with their duties under the Act, and to avoid the risk of legal action being taken against them, if they implement anti-discriminatory policies and practices. These are often referred to as equality policies or diversity policies. Additionally, in the event that legal action is taken, trade organisations, qualifications bodies and general qualifications bodies may be asked to demonstrate to an employment tribunal or county/sheriff court that they have effective policies and procedures in place to minimise the risk of discrimination.

As part of the approval process for centres to deliver general qualifications, a general qualifications body advises centres that learners with disabilities should be accommodated in examination rooms that are appropriate to their needs. For example, a candidate with learning difficulties, who relies on the use of a prompter, is best accommodated in a room with few distractions, away from other candidates.

An inspector working on behalf of the general qualifications bodies visits a centre to ensure that the examinations are being carried out in accordance with relevant requirements. His checklist includes a check that any candidate with a disability has access to suitable accommodation. He reports to the general qualifications bodies any circumstances where unsuitable accommodation has been provided and they take up this issue with the centre.

## Recommended steps for all trade organisations, qualifications bodies and general qualifications bodies

**2.15** Anti-discriminatory policies and practices will vary depending on the nature of the organisation (for example, on whether it is a trade organisation, qualifications body or general qualifications body and on the size and nature of its membership). However, it is advisable for all trade organisations, qualifications bodies and general qualifications bodies to take the following steps:

- Establish a policy which aims to prevent discrimination against disabled people and which is communicated to all employees and agents of the organisation or body.
- Provide disability awareness and equality training to all employees. In addition, train employees and agents so that they understand the organisation or body's policy on disability, their obligations under the Act and the practice of reasonable adjustments.
- Ensure that members and potential members of the organisation (or, in the case of a qualifications body and general qualifications body, people who wish to have a qualification conferred on them and people who already hold a qualification) are informed about the organisation or body's disability policy.
- Ensure that people within the organisation or body who have responsibility for liaising with members or applicants have more in-depth training about the organisation's duties under the Act.
- Inform all employees and agents that conduct which breaches the anti-discrimination policy will not be tolerated, and respond quickly and effectively to any such breaches.
- Monitor the implementation and effectiveness of such a policy.

- Address acts of disability discrimination by employees as part of disciplinary rules and procedures.
- Have complaints and grievance procedures which are easy for disabled people to use and which are designed to resolve issues effectively.
- Regularly review the effectiveness of reasonable adjustments made for disabled people in accordance with the Act, and act on the findings of those reviews.
- Keep clear records of decisions taken in respect of each of these matters.

## Additional recommended steps for trade unions

**2.16** Trade unions are a particular kind of trade organisation. In addition to taking the general steps outlined in paragraph 2.15, it is advisable for trade unions to:

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

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

**2.17** Trade unions should not enter into collective agreements containing terms which discriminate against disabled people (see paragraphs 11.14 to 11.16). In addition, European law encourages trade unions to enter into collective agreements at national and local level in respect of anti-discriminatory policies and practices. It is advisable for trade unions to monitor the effectiveness of any such agreements.

## Additional recommended steps for qualifications bodies

**2.18** The general steps outlined in paragraph 2.15 are recommended for trade organisations and qualifications bodies alike. However, there are additional steps which it is advisable for qualifications bodies to take. These are to:

- Ensure that there are effective systems in place for disabled people to request reasonable adjustments for examinations or practical tests, so that qualifications bodies are in a position to respond quickly and effectively to individual requests for specific adjustments. This may involve establishing procedures with educational institutions to ensure that institutions request relevant information from their students and then pass this on to the qualifications bodies (see paragraph 8.23).
- Regularly review any competence standards which relate to particular professional or trade qualifications to ensure that they are framed in a way which does not unnecessarily exclude disabled people from being able to meet them. This will involve carefully scrutinising each competence standard to check that it is not discriminatory. Consideration should be given to whether each standard can be objectively justified. Disabled people who work in the relevant profession or trade could be consulted to learn from their experiences, and factors such

as changes in technology, which can enable people to do jobs in different ways, should be taken into account.

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

## Additional recommended steps for general qualifications bodies

**2.19** The context within which general qualifications bodies operate is summarised in paragraph 3.30 and set out in more detail in Chapter 9. The general steps outlined in paragraph 2.15 are also recommended for general qualifications bodies. However, there are also additional steps specifically recommended for general qualifications bodies to take. These are to:

- Regularly review with their regulators the requirements for relevant general qualifications to ensure that they are framed in a way which does not unnecessarily exclude disabled people from being able to meet them. This will involve carefully scrutinising each requirement to check that it is not discriminatory. Consideration should be given to whether each requirement is objectively reasonable or, in the case of competence standards, legitimate and proportionate.
- Ensure that there are effective systems in place for disabled people to request reasonable adjustments for examinations or practical tests, so that general qualifications bodies are in a position to respond quickly and effectively to individual requests for specific adjustments. This may well involve establishing procedures for direct contact between disabled people, general qualifications bodies and educational institutions to ensure that all relevant information reaches the general qualifications bodies. In practice, most requests for adjustments may be received through educational institutions.

- Ensure that disabled people have effective recourse to the general qualifications bodies appeal procedures in respect of examinations and assessment results.

Further advice about how to avoid discrimination in relation to competence standards is given at paragraphs 9.57 to 9.82.

## Auditing policies and procedures

**2.20** Although there is no duty under Part 2 (and Part 4 in respect of general qualifications bodies) to anticipate the needs of disabled people in general, it is a good idea for trade organisations and qualifications bodies to keep all their policies under review, and to consider the needs of such disabled people as part of this process. It is advisable for organisations and bodies to do this in addition to having a specific policy to prevent discrimination. In addition, the disability equality duty requires organisations and bodies that are public authorities to have due regard to the need to promote equality of opportunity – including the need to eliminate discrimination. This requirement may require public authorities to adopt a proactive approach, anticipating the needs of disabled people. Trade organisations and qualifications bodies are likely to have policies about matters such as:

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

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

The website editor is given additional training in accessible website design.

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

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

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

**2.21** Much of what is stated about auditing policies and procedures in paragraph 2.20 also applies to general qualifications bodies, apart from the fact that the relevant provisions of Chapter 2A of Part 4, and not Part 2, apply to general qualifications bodies. General qualifications bodies are particularly likely to have policies about matters such as:

- testing, assessment and examination arrangements
- adjustments to the testing, assessment and examination process
- standards for qualifications
- their relationship with those who are responsible for conducting examinations, testing and assessments (e.g. schools and colleges).

A general qualifications body is updating its exam timetable. It ensures that the guidance to centres on timetabling refers to the flexibility

available to candidates who may require adjustments to the timetable for a reason related to their impairment.

## Monitoring

**2.22** Monitoring of members or, in the case of qualifications bodies and general qualifications bodies, people applying for a qualification or people who hold qualifications, is an important way of determining whether anti-discrimination measures taken by an organisation or body are effective, and ensuring that disability equality is a reality. Information must be gathered sensitively, with appropriately worded questions, and confidentiality must be ensured. Knowing the proportion of disabled people and their status in respect of an organisation or body can help it determine where practices and policies need to be improved.

**2.23** In addition, where applicable, the disability equality specific duties require public authorities to set out the following in their Disability Equality Schemes:

- arrangements for gathering information on the extent to which the services it provides and those other functions it performs take account of the needs of disabled persons.

**2.24** It is important to understand that information gathering is not an end in itself but that the information obtained must be analysed and used as the basis for preparing disability action plans, and reviewing the effectiveness of those actions taken. The information gathered is in fact evidence of an authority's progress in relation to disability equality. For this reason the Disability Equality Scheme is also required to include a statement of the public authority's arrangements for making use of the information gathered in these ways and in particular its arrangements for reviewing on a regular basis the effectiveness of the action plan and preparing subsequent Disability Equality Schemes.

**2.25** Information must be gathered sensitively, with appropriately worded questions, and confidentiality must be ensured.

**2.26** Monitoring will be more effective if disabled people feel comfortable about disclosing information about their disabilities. This is more likely to be the case if the trade organisation, qualifications body or general qualifications body explains the purpose of the monitoring and if members and applicants believe that it genuinely supports equality for disabled people and is using the information gathered to create positive change.

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

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

A general qualifications body monitors the numbers of disabled people who take their qualifications. The general qualifications body finds that disabled people are less likely to choose certain courses. It uses the information to involve disabled people to consider and review the accessibility of the syllabuses/specifications and the nature of the assessment of the qualifications in question.

**2.27** Some organisations choose to monitor by broad type of disability to understand the barriers faced by people with different types of impairment.

A general qualifications body decides to monitor the numbers of issues raised by disabled people and groups representing disabled people. It finds that most of these issues relate to a particular examination paper which included materials that created an unnecessary barrier to assessment and one which was not required. It reviews the results of the candidates affected and then requires the subject team to check questions as they are written so that the problem can be avoided in future.

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

**2.28** Public authorities are required to put into effect arrangements for gathering information and making use of it. In their annual reporting on the disability equality duty, they must set out the results of the information gathering which they have carried out, detailing the evidence which has been obtained and the use to which it has been put – such as the actions which will be taken to address the issues raised by the evidence.

**2.29** Gathering information on students is a different process to gathering information from individual disabled students about their reasonable adjustments requirements. The processes should be separate and it should be clear to students and applicants why the information is being collected.



## Promoting equality

**2.30** Organisations or bodies not subject to the disability equality duty may nevertheless have an important part to play in promoting equality of opportunity (and they may also find that they are required to do so in relation to contractual arrangements with public authorities). In order to enhance disabled people's opportunities for gaining, retaining and progressing in employment, trade organisations, qualifications bodies and general qualifications bodies need to consider equality of opportunity for disabled people from two perspectives. First, such organisations and bodies should ensure that disabled people have equal access to membership, and to the benefits of membership, or (as the case may be) to opportunities for gaining and retaining a general, professional or trade qualification. Secondly, it is good practice for a trade organisation, qualifications body or general qualifications body to seek to promote equality for disabled people within the trade, profession or employment/ education sector in which it operates.

A general qualifications body advises schools and colleges which can enter candidates for its qualifications about the variety of ways in which it delivers the course and its assessment in ways which meet the particular needs of disabled people with a variety of impairments.

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

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

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

**2.31** Organisations and bodies should be ensuring that any marketing activity, such as advertising a course, which features students or prospective students positively represents disabled students within that. As well as contributing to the overall goal of equality of opportunity, promoting such attitudes will ensure that organisations and bodies demonstrate that they are aware of the needs of disabled people. This will, in turn, generate broader representation of disabled people in terms of the activities of organisations and bodies, and will also encourage participation of disabled people in their monitoring activities in particular. For organisations and bodies that are public authorities, one of the aspects of the disability equality duty, as outlined above, is the need to promote positive attitudes towards disabled people.

## Resolving disputes

**2.32** Although the Act does not require trade organisations, qualifications bodies or general qualifications bodies to resolve disputes within the organisation or body, it is in the interests of such an organisation or body wherever possible to resolve problems as they arise. This should be done in a non-discriminatory way to comply with the requirements of the Act.

**2.33** Grievance procedures can provide an open and fair way for concerns to be made known. Such procedures may be particularly appropriate for use by members of trade organisations, and can enable grievances to be resolved quickly before they become major problems. Use of the procedures may highlight areas in which the duty to make reasonable adjustments has not been observed, and can prevent misunderstandings leading to complaints to tribunals and courts.

**2.34** Chapter 11 contains further information about grievance procedures and about resolving disputes under the Act.

# 3. Discrimination by trade organisations, qualifications bodies and general qualifications bodies – an overview

## Introduction

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

## Who has rights under the Act?

### Disabled people

**3.2 [ss 1 and 2 and Sch 1 and 2]** The Act gives protection from discrimination to a ‘disabled’ person within the meaning of the Act. A disabled person is someone who has a physical or mental impairment which has an effect on his or her ability to carry out normal day-to-day activities. That effect must be:

- substantial (that is, more than minor or trivial), and
- adverse, and
- long term (that is, it has lasted or is likely to last for at least a year or for the rest of the life of the person affected).

**3.3** Physical or mental impairment includes sensory impairment. Hidden impairments are also covered (for example, mental illness or mental health problems, learning disabilities, dyslexia, diabetes and epilepsy).

**3.4** The definition of disability used in the Act is not the same as other definitions of disabled persons in other legislation that applies to education in schools and colleges

– for example in relation to the special educational needs framework in England and Wales, or the Additional Support for Learning in Scotland. It is possible that some people may be covered by more than one definition, and others may be covered by only one of these definitions. In considering its duties under the Act, a trade organisation, qualifications body and general qualifications body should not use any definition of ‘disabled person’ which is narrower than that in the Act. If such an organisation or body is asked to make a disability-related adjustment, it may ask the person requesting it for evidence that the impairment is one which meets the definition of disability in the Act. It may be appropriate to do so where the disability is not obvious. However, it is not appropriate to ask for more information about the impairment than is necessary for this purpose. Nor should evidence of disability be asked for where it ought to be obvious that the Act will apply.

### People who have had a disability in the past

**3.5** People who have had a disability within the meaning of the Act (as set out in Appendix A) in the past are protected from discrimination even if they no longer have the disability.

### More information about the meaning of disability

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

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

## People who have been victimised

**3.7** The Act also gives rights to people who have been victimised, whether or not they have a disability or have had one in the past (see paragraphs 4.31 to 4.34).

## Who has obligations under the Act?

### Trade organisations

**3.8 [s 13(4)]** The Act defines a trade organisation as an organisation of workers or of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists. Bodies like trade unions, employers' associations and chartered professional institutions are all trade organisations because they exist for the purposes of the profession or trade which their members carry on. Examples of trade organisations include the Law Society, the Royal College of Nursing, the Swimming Teachers' Association, the Society of Floristry, the British Computer Society, and the Institute of Carpenters. The Act applies to all trade organisations, no matter how many (or how few) members they may have.

### Qualifications bodies

**3.9 [s 14A(5)]** The Act defines a qualifications body as an authority or body which can confer, renew or extend a professional or trade qualification. For this purpose a professional or trade qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or which facilitates engagement in, a particular profession or trade. What this means in practice is considered in paragraphs 8.5 to 8.7.

Qualifications bodies include examination boards, the General Medical Council, the Nursing and Midwifery Council, and the Driving Standards Agency. Other examples are City and Guilds, the Institute of the Motor Industry, the Hospitality Awarding Body and the Guild of Cleaners and Launderers.

**3.10 [s 14A(5)]** Nevertheless, certain bodies are not regarded as qualifications bodies for the purposes of Part 2, even though they may perform some of the functions mentioned in paragraph 3.9. These are listed in the Act. Broadly speaking, they comprise local education authorities in England and Wales, education authorities in Scotland, and other bodies having responsibility for schools and colleges. This is because discrimination by such bodies is the concern of Part 4 of the Act, which relates to discrimination in the provision of education. The DRC has issued two separate codes of practice giving guidance on the operation of Part 4 (see Appendix B for details).

**3.11** Clearly, certain trade organisations (such as the Law Society) also confer professional or trade qualifications. Consequently, the same organisation or body can be both a trade organisation and a qualifications body. Where this is the case, the application of the Act's provisions depends upon the capacity in which the organisation or body is acting at the time in question. For example, if an alleged act of discrimination relates to conferring, renewing or extending a professional or trade qualification, the relevant provisions are those relating to discrimination by qualifications bodies – the fact that the body is also a trade organisation is irrelevant in this context.

### General qualifications bodies

**3.12 [s 31AA(4) and (6) and Reg 2 and Sch of SI/2007/1764]** The Act defines a general qualifications body as an authority or body which can confer, renew or extend

a relevant qualification, or authenticate a relevant qualification awarded by another person. For this purpose a relevant qualification is an authorisation, qualification, approval or certification which is listed in the regulations, and is one of the following qualifications:

- GCEs (General Certificate of Education) Advanced level (A and AS levels)
- VCEs (Vocational Certificate of Education)
- AEAs (Advanced Extension Awards)
- GCSEs (General Certificate of Secondary Education)
- Free standing Maths Qualifications
- Entry level qualifications
- Key Skills
- Certificates in Adult Literacy and Numeracy Entry Levels, Level 1, 2 and 3
- GNVQs (General National Vocational Qualifications)
- The National Qualifications framework in Scotland
- The Welsh Baccalaureate Qualification
- The International Baccalaureate.

[s 31AA(6) (i–iv)] In line with paragraph 3.10, under the Act certain bodies are deemed not to be general qualifications bodies. These include responsible bodies within the meaning of Chapters 1 and 2 of Part 4 of the Act (responsible bodies of schools and further and higher education institutions), local education authorities in England and Wales and education authorities in Scotland. [s 31AA(5)] A relevant general qualification cannot be a professional and trade qualification within the meaning given by s 14A(5) of the Act.

## Employers and others to whom Part 2 applies

**3.13** The primary focus of Part 2 is, of course, on the duties of employers to disabled people. As mentioned at paragraph 1.6, however, that is not the

subject of this Code. Guidance on the application of the Act to employers (as well as its application to people and bodies concerned with certain occupations and to persons such as the trustees or managers of occupational pension schemes and the providers of group insurance services) is given in a separate code of practice issued by the DRC (see Appendix B for details). It has already been noted that, as employers themselves, trade organisations, qualifications bodies and general qualifications bodies have duties under Part 2 in respect of disabled people whom they employ, or who apply to them for employment. Those duties are governed by the employment provisions of the Act.

## Education institutions to whom Chapter 2A of Part 4 applies

**3.14** Part 4 of the Act is largely concerned with the duties of education providers ('responsible bodies'). However, this is also not the subject of this Code. Guidance on the application of the Act to education providers is given in two separate codes of practice issued by the DRC (see Appendix B for details).

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

### Effect of the Act

**3.15** The Act makes it unlawful for a trade organisation to **discriminate** against a disabled person in relation to membership of the organisation or access to membership benefits. The Act also makes it unlawful for a qualifications body and a general qualifications body to **discriminate** against a disabled person in relation to conferring professional or trade qualifications and relevant general qualifications respectively.

**3.16** However, the Act does not prevent organisations or bodies from treating disabled people more favourably than those who are not disabled.

## Forms of discrimination

**3.17** The four forms of discrimination which are unlawful under Part 2 (and unlawful under Part 4 in relation to general qualifications bodies) are:

- direct discrimination (the meaning of which is explained at paragraphs 4.4 to 4.21)
- failure to comply with a duty to make reasonable adjustments (explained in Chapter 5)
- ‘disability-related discrimination’ (see paragraphs 4.25 to 4.30), and
- victimisation of a person (whether or not he is disabled) – what the Act says about victimisation is explained at paragraphs 4.31 to 4.34.

## Discrimination by trade organisations

**3.18 [s 13(1)]** The Act says that it is unlawful for a trade organisation to discriminate against a disabled person:

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

**3.19 [s 13(2)]** The Act also says that it is unlawful for a trade organisation to discriminate against a disabled member:

- in the way it affords the member access to any benefits or by refusing or deliberately omitting to afford access to them, or

- by depriving the member of membership, or varying the terms of his membership, or
- by subjecting the member to any other detriment.

What this means in practice is explained in Chapter 7.

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

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

## Discrimination by qualifications bodies

**3.21 [s 14A(1)]** In relation to conferring, renewing, or extending professional or trade qualifications (abbreviated to ‘conferring’), the Act says that it is unlawful for a qualifications body to discriminate against a disabled person:

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

What this means in practice is explained in Chapter 8.

## Discrimination by general qualifications bodies

**3.22 [s 31AA(1)]** In relation to conferring, renewing, or extending a general qualification (collectively referred to in this code as ‘conferring’), the Act says that it is unlawful for a general qualifications body to discriminate against a disabled person:

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

What this means in practice is explained in Chapter 9.

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

### Harassment

**3.23 [s 13(3) and s 14A(2) and s 31AA(2)]** In addition to what it says about discrimination, Part 2 (and Part 4) makes it unlawful for a trade organisation, qualifications body or general qualifications body to subject a disabled person to **harassment** for a reason which relates to his disability. What the Act says about harassment is explained in more detail at paragraphs 4.36 and 4.37. The Act treats disability-related harassment as a separate concept, and this is not one of the forms of discrimination.

### Instructions and pressure to discriminate

**3.24 [s 16C and s 17B(1)]** It is also unlawful for a person who has authority

or influence over another to instruct him, or put pressure on him, to act unlawfully under the provisions of Part 2 – this provision **does not** apply to general qualifications bodies. Where these duties apply they cover pressure to discriminate, whether applied directly to the person concerned, or indirectly but in a way in which he is likely to hear of it. However, the Act does not give individual disabled people the right to take legal action in respect of unlawful instructions or pressure to discriminate. Such action may only be taken by the Equality and Human Rights Commission (see paragraphs 11.26 to 11.28).

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

### Discriminatory advertisements

**3.25 [s 16B]** The Act does not prevent advertisements for membership of trade organisations, or for general, professional or trade qualifications from saying that applications from disabled people are welcome. However, in respect of trade organisations and qualifications bodies (but **not** in respect of general qualifications bodies) it does say that it is unlawful for those seeking members for an organisation (or seeking candidates for professional and trade qualifications) to publish an advertisement (or cause it to be published) which indicates, or might reasonably be understood to indicate:

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

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

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

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

**3.27** It is good practice to consider carefully what information should be included in advertisements and where they should be placed.

**3.28 [s 17B(1)]** The Act does not give individual applicants for membership of trade organisations or applicants for professional or trade qualifications the right to take legal action in respect of discriminatory advertisements. Such action may only be taken by the Equality and Human Rights Commission (see paragraphs 11.26 to 11.28).

## Who is liable for unlawful acts?

### Responsibility for the acts of others

**3.29 [s 58]** Trade organisations, qualifications bodies and general qualifications bodies who act through agents are liable for the actions of their agents done with the express or implied authority of the organisation or body in question – this can include the actions of unpaid union representatives in the workplace or education institutions (and/or their employees) in respect of exams and testing.

**3.30** General qualifications bodies may directly provide, or contract with third parties to organise and to provide, examination and assessment facilities, and to undertake examinations and assessments that may result in conferring relevant general qualifications. In addition, statutory regulators may set criteria which general qualifications bodies use to determine examination and assessment objectives. Chapter 9 provides further information about the context in which general qualifications bodies operate and the duties that they have under the DDA.

A person employed by an examination centre to invigilate an examination for a GCSE qualification refuses to allow a candidate with a severe disfigurement into the examination hall as he believes this candidate's disability would be off-putting for other candidates. This is likely to constitute unlawful direct disability discrimination. The invigilator in question is acting on behalf of the examination centre in relation to delivery of the examination and, therefore, he is likely to be acting as an agent of the general qualifications body who ultimately confer the GCSE qualification. The general qualifications body would be liable under the Act for the unlawful actions of the invigilator, who, together with the examination centre, would also be individually liable.



**3.31** The Act also says that trade organisations, qualifications bodies and general qualifications bodies are responsible for the actions of their employees in the course of their employment. For example, a trade union is responsible for the actions of its salaried officials in the course of their employment.

**3.32** However, in legal proceedings against a trade organisation, qualifications body or general qualifications body, based on the actions of an employee, it is a defence that the organisation or body took 'such steps as were reasonably practicable' to prevent such actions. It is not a defence simply to show that the action took place without the knowledge or approval of the organisation or body. Chapter 2 gives guidance on the steps which it might be appropriate to take for this purpose.

A trade union has a disability policy which states that it will pay for sign language interpreters to interpret at branch meetings, should the need arise, from a central union fund. This policy, and the arrangements available for paying for sign language interpreters (and for other adjustments), is explained to all branch representatives and new members. In addition all branch representatives are required to undergo basic training in the policy. A deaf union member requests a sign language interpreter for a branch meeting, but the branch representative who has undergone this training says that this is not possible as there are insufficient funds in the branch to pay for this adjustment. In this case the union could demonstrate that it had taken 'such steps as were reasonably practicable' to prevent such actions and it is likely that it has not acted unlawfully. The branch representative, however, is likely to be acting unlawfully (see paragraphs 3.29 and 3.30).

An Examiner working for a Scottish general qualifications body refuses to allow a pupil with a severe speech

impediment to have extra time to answer in a French Speaking Test. The Examiner is employed by the general qualifications body so the body will be liable for the potentially discriminatory actions of the Examiner (in failing to make a reasonable adjustment), unless it could demonstrate that it had taken such steps as were reasonably practicable to prevent such actions (see paragraphs 3.29 and 3.30).

### Aiding an unlawful act

**3.33 [s 57]** A person who knowingly helps another to do something made unlawful by the Act will be treated as having done the same kind of unlawful act. This means that, where a trade organisation, qualifications body or general qualifications body is liable for an unlawful act of its employee or agent, that employee or agent will be liable for aiding the unlawful act of the organisation or body.

**3.34** Where an employee of a trade organisation, qualifications body or general qualifications body discriminates against or harasses a disabled person, it is the employing organisation or body which will be liable for that unlawful act – unless it can show that it took such steps as were reasonable to prevent the unlawful act in question. But the employee who committed the discrimination or harassment will be liable for aiding the unlawful act – and this will be the case even if the trade organisation, qualifications body or general qualifications body is able to show that it took reasonable steps to prevent the act.

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

## **Enforcing rights under Part 2 of the Act**

**3.35** [s 17A] Enforcement of rights under Part 2 takes place in the employment tribunals. More information about enforcement is given in Chapter 11.

## **Enforcing rights under Part 4 of the Act (in respect of general qualifications bodies)**

**3.36** [s 31ADA(4) and (5) and Reg 3 of SI/2007/2405] Enforcement of rights under Part 4 in respect of general qualifications bodies takes place in the County Courts in England and Wales (or in the Sheriff Courts in Scotland). More information about enforcement is given in Chapter 11.

# 4. What is discrimination and harassment?

## Introduction

**4.1** The forms of discrimination by trade organisations, qualifications bodies and general qualifications bodies which the Act makes unlawful are:

- direct discrimination
- failure to comply with a duty to make reasonable adjustments
- disability-related discrimination, and victimisation.

**4.2** This chapter describes these four forms of discrimination in more detail, and explains the differences between them. It explores, in particular, the distinction between direct discrimination and disability-related discrimination (see paragraphs 4.25 to 4.30, and 4.35). These two forms of discrimination both depend on the way in which the disabled person concerned is treated – both require the disabled person to have been treated less favourably than other people are (or would be) treated. However, whether such treatment amounts to one of these forms of discrimination or the other (and, indeed, whether the treatment is unlawful in the first place) depends on the circumstances in which it arose.

**4.3** The chapter examines the four forms of discrimination in the order in which they are listed in paragraph 4.1. This is because less favourable treatment which does not amount to direct discrimination can sometimes be justified. (In contrast, neither direct discrimination nor a failure to comply with a duty to make a reasonable adjustment is justifiable. Victimisation cannot be justified either.) In deciding whether the treatment is justified, and therefore whether there has been disability-related discrimination, the Act requires the question of reasonable

adjustments to be taken into account (see paragraphs 6.5 and 6.6 where this is explained in more detail). Consequently, although the chapter describes direct discrimination first, it touches on the subject of reasonable adjustments before moving on to disability-related discrimination. This chapter also explains what the Act means by ‘harassment’.

## What does the Act mean by ‘direct discrimination’?

### What does the Act say?

**4.4 [s 3A(5) and 31AB(8)]** The Act says that treatment of a disabled person by a trade organisation, qualifications body or general qualifications body amounts to direct discrimination if:

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

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

## When is direct discrimination likely to occur?

**4.6** Treatment of a disabled person is ‘on the ground of’ his disability if it is caused by the fact that he is disabled or has the disability in question. In general, this means that treatment is on the ground of disability if a disabled person would not have received it but for his disability. However, disability does not have to be the only (or even the main) cause of the treatment complained of – provided that it is an effective cause, determined objectively from all the circumstances.

**4.7** Consequently, if the less favourable treatment occurs because of generalised, or stereotypical, assumptions about the disability or its effects, it is likely to be direct discrimination. This is because a trade organisation, qualifications body or general qualifications body would not normally make such assumptions about a non-disabled person, but would instead consider his individual abilities.

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

A general qualifications body has a blanket policy not to allow candidates with epilepsy to take practical chemistry examinations. A candidate with epilepsy is refused the opportunity to take practical chemistry examinations. This is based on an assumption that all people with epilepsy present an unacceptable health and safety risk in this context. This amounts to direct discrimination.

A general qualifications body has a practice of not allowing wheelchair users to undertake a GCSE qualification in Dance, because it has assumed all wheelchair users are not capable of undertaking this qualification, and it has operated this policy without considering the individual circumstances of each person. This amounts to direct discrimination.

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

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

A person with a severe visible disfigurement is not allowed to undertake a GNVQ in leisure and tourism because the body conferring this qualification believes this disability will prevent the person from gaining employment in this sector. This amounts to direct discrimination.

A general qualifications body tells an applicant for a GCSE in biology that she should not take the course because she has HIV. This refusal arises from prejudice about the applicant’s disability. This amounts to direct discrimination.

**4.9** In some cases, an apparently neutral reason for less favourable treatment of a disabled person may,

on investigation, turn out to be a pretext for direct discrimination.

A disabled member of a professional body wishes to represent the body publicly by giving a television interview but is told that only people who have been members for at least three years are permitted to do this. However, she discovers that another member, who is not disabled, has given a public presentation on behalf of the professional body even though he had only been a member for two years at the time. Although the reason given to the disabled member (that she had not been a member of the body for long enough to represent it publicly) appeared to be a neutral one, it would seem that the reason was actually a pretext for direct discrimination, and is therefore unlawful.

**4.10** Direct discrimination will often occur where the trade organisation, qualifications body or general qualifications body is aware that the disabled person has a disability, and this is the reason for its treatment of him. Direct discrimination need not be conscious – people may hold prejudices that they do not admit, even to themselves. Thus, a person may behave in a discriminatory way while believing that he would never do so. Moreover, direct discrimination may sometimes occur even though the trade organisation, qualifications body or general qualifications body is unaware of a person's disability.

**4.11** In situations such as those described in the above examples, it will often be readily apparent that the disabled person concerned has been treated less favourably on the ground of his disability. In other cases, however, this may be less obvious. Whether or not the basis for the treatment in question appears to be clear, a useful way of telling whether or not it is discriminatory (and of establishing what kind of discrimination it is), is to focus on the person with whom the disabled person should be compared. That person may be real or hypothetical (see paragraph 4.17).

## Identifying comparators in respect of direct discrimination

**4.12** In determining whether a disabled person has been treated less favourably in the context of direct discrimination, his treatment must be compared with that of an appropriate comparator. This must be someone who does not have the same disability. It could be a non-disabled person or a person with other disabilities.

**4.13** It follows that, in the great majority of cases, some difference will exist between the circumstances (including the abilities) of the comparator and those of the disabled person – there is no need to find a comparator whose circumstances are the same as those of the disabled person in every respect. What matters is that the comparator's **relevant** circumstances (including his abilities) must be the same as, or not materially different from, those of the disabled person.

**4.14** Once an appropriate comparator is identified, it is clear that the situations described in the examples at paragraph 4.7 amounts to direct discrimination:

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

In the example about the general qualifications body with a blanket policy not allowing candidates with epilepsy to take practical chemistry examinations, there is direct discrimination because the candidate was treated less favourably on the ground of her disability than an appropriate comparator (that is, a

person who does not have epilepsy but whose relevant circumstances (including abilities) are otherwise the same): such a person would not have been prevented from taking the assessment.

In the example about the general qualifications body with a blanket policy that does not allow wheelchair users to undertake a GCSE qualification in Dance, there is direct discrimination because a candidate who does not use a wheelchair with the same abilities as the candidate using a wheelchair would have been treated more favourably: such a person would have been allowed on to the course.

**4.15** The examples of direct discrimination in paragraph 4.8 also become clearer when the appropriate comparator is identified:

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

In the example about the person with a severe visible disfigurement not being allowed to undertake a GNVQ in leisure and tourism, there is direct discrimination because the applicant with the severe disfigurement is treated less favourably than someone with the same abilities who does not have a severe disfigurement: such a person would have been allowed to undertake this course.

In the example about the applicant for a GCSE in biology who is told she

should not take the course because she has HIV, there is direct discrimination because the applicant was treated less favourably on the ground of her disability. An appropriate comparator would be a person who does not have the same disability, but whose relevant abilities in respect of the qualification are the same, and who was not treated in the same way.

**4.16** The comparator used in relation to direct discrimination under the Act is the same as it is for other types of direct discrimination – such as direct sex discrimination. It is, however, made explicit in the Act that the comparator must have the same relevant abilities as the disabled person.

**4.17** It may not be possible to identify an actual comparator whose relevant circumstances are the same as (or not materially different from) those of the disabled person in question. In such cases a hypothetical comparator may be used. Evidence which helps to establish how a hypothetical comparator would have been treated is likely to include details of how other people (not satisfying the statutory comparison test) were treated in circumstances which were broadly similar.

In the example at paragraph 4.9, there is nobody who has represented the professional body in television interviews with whom the disabled person can be compared. Nevertheless, the treatment of the member who had only two years' membership but was able to give a public presentation on behalf of the body might be evidence of discrimination: it might be used as evidence that a hypothetical non-disabled member who wanted to participate in a television interview would not have been treated in the same way as the disabled member was treated.

**4.18** It should be noted that the type of comparator described in the preceding paragraphs is only relevant to disability discrimination when assessing whether

there has been **direct** discrimination. A different comparison falls to be made when assessing whether there has been a failure to comply with a duty to make reasonable adjustments (see paragraphs 5.2 and 5.3) or when considering disability-related discrimination (see paragraph 4.29).

### Focusing on relevant circumstances

**4.19** As stated in paragraph 4.13, direct discrimination only occurs where the **relevant** circumstances of the comparator, including his abilities, are the same as, or not materially different from, those of the disabled person himself. It is therefore important to focus on those circumstances which are, in fact, relevant to the matter to which the less favourable treatment relates. Although, in some cases, the effects of the disability may be relevant, the fact of the disability itself is not a relevant circumstance for these purposes. This is because the comparison must be with a person **not** having that particular disability.

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

A pupil who has arthrogryposis (a muscular-skeletal condition) is credited with very high marks for a practical demonstration of swimming abilities. The general qualifications body queries the mark believing that there must have been an error. The correct comparator in a claim for direct discrimination would be a person who does not have this impairment, but whose abilities in

respect of the swimming assessment are the same, or not materially different, from the person with arthrogryposis.

### Relevance of reasonable adjustments to comparison

**4.20** In making the comparison in respect of a claim of direct discrimination, the disabled person's abilities must be considered **as they in fact are**. In some cases, there will be particular reasonable adjustments which a trade organisation, qualifications body or general qualifications body was required by the Act to make, but in fact failed to make. It may be that those adjustments would have had an effect on the disabled person's relevant abilities. But in making the comparison, the disabled person's abilities should be considered as they **in fact** were, and not as they would or might have been had those adjustments been made. On the other hand, if adjustments have **in fact** been made which have had the effect of enhancing the disabled person's abilities, then it is those enhanced abilities which should be considered. The disabled person's abilities are being considered as they in fact are (and not as they might have been if the adjustments had not been made).

A disabled person has to sit an examination in order to obtain a relevant general qualification. Because of her disability she has difficulty writing, and asks to be allowed to type her answers or given extra time to complete the examination. The general qualifications body does not permit this (even though it would have been reasonable for it to do so) and, as a result, the woman is unable to complete the examination in time. This is not direct discrimination, as the comparator for the purposes of this claim is a non-disabled person who also fails to complete the examination in time. (But the woman would be likely to have good claims in respect of two other forms of discrimination – failure to make reasonable

## Can direct discrimination be justified?

**4.21 [s 3A(4) and s 31AB(7)]** Treatment of a disabled person which amounts to direct discrimination under the Act is unlawful. It can never be justified.

## Failure to make reasonable adjustments – relationship to discrimination

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

**4.23 [s 3A(2) and s 31AB(2)]** Irrespective of its relevance to disability-related discrimination, however, a failure to comply with a duty to make a reasonable adjustment in respect of a disabled person amounts to discrimination in its own right. Such a failure is therefore unlawful. Chapter 5 explains the circumstances in which a trade organisation, qualifications body or general qualifications body has such a duty, and gives guidance as to what they need to do when the duty arises. Chapters 7, 8 and 9 also give further guidance on when an adjustment might be considered reasonable in relation to trade organisations, qualifications and general qualifications bodies respectively.

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

## What is disability-related discrimination?

### What does the Act say?

**4.25 [s 3A(1) and s 31AB(1)]** The Act says that treatment of a disabled person by a trade organisation, qualifications body or general qualifications body amounts to discrimination if:

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

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

- is unlawful because each of the conditions listed in paragraph 4.25 is satisfied, but
- does **not** amount to direct discrimination under the Act.

**4.27** In general, direct discrimination occurs when the reason for the less favourable treatment in question is the disability, while disability-related discrimination occurs when the reason relates to the disability but is not the disability itself. The expression ‘disability-related discrimination’ therefore distinguishes less favourable treatment which amounts to direct discrimination from a wider class of less favourable treatment which, although not amounting to direct discrimination, is nevertheless unlawful.



## When does disability-related discrimination occur?

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

A trade union refuses to allow a disabled person, who has a severe back condition and has been unable to carry out branch activities for the past couple of months due to her disability, to go on a training course. The union says that anyone who had not been carrying out their branch activities for this amount of time would have been refused training. The disability-related reason for the less favourable treatment is the fact that the woman has not been carrying out branch activities, and the correct comparator is a person to whom that reason does not apply – that is, someone who had been carrying out branch activities. Consequently, unless the trade union can show that the treatment is justified, it will amount to disability-related discrimination because the comparator would not have been refused the opportunity to go on the training course. However, the reason for the treatment is not the disability itself (it is only a matter related thereto, namely not carrying out branch activities). So there is no direct discrimination.

A general qualifications body has set a start time of 9am for pupils/students undertaking an examination and refuses to allow anyone to take this examination other than at this time. A disabled

pupil who requires regular medical treatment (dialysis) at this time in the morning cannot attend the examination. Refusing to allow him to attend at a different time would constitute less favourable treatment for disability-related reasons and would amount to disability-related discrimination unless the general qualifications body could justify the treatment. The reason for the treatment is not the disability itself, so there is no direct discrimination.

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

In the first example at paragraph 4.28, the trade union did not know that the reason why the woman had not been carrying out branch activities was disability-related. Nevertheless, its refusal to allow her to attend the training course is less favourable treatment for a disability-related reason, and would be unlawful unless it can be justified.

In the second example at paragraph 4.28, the general qualifications body did not know why (and didn't make any appropriate enquiries) as to why the pupil could not attend the examination at 9am and that the reason was disability-related. Nevertheless, the refusal to allow the pupil to take the examination at another time is disability-related less favourable treatment and would be unlawful unless it can be justified.

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

## What does the Act say about victimisation?

**4.31 [s 55(1) and (2)]** Victimisation is a special form of discrimination which is made unlawful by the Act. It is unlawful for one person to treat another ('the victim') less favourably than he treats or would treat other people in the same circumstances because the victim has:

- brought, or given evidence or information in connection with, proceedings under the Act (whether or not proceedings are later withdrawn)
- done anything else under the Act, or
- alleged someone has contravened the Act (whether or not the allegation is later dropped),

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

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

A non-disabled pupil at a school supports his disabled colleague in respect of a complaint of disability discrimination made against a general qualifications body. Thereafter, because the general qualifications body in question has taken exception to this, they refuse

to re-mark an examination paper that the non-disabled pupil has completed. This amounts to victimisation.

**4.32 [s 55(4)]** It is not victimisation to treat a person less favourably because that person has made an allegation which was false and not made in good faith.

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

**4.34 [s 55(5)]** Unlike the other forms of discrimination which are made unlawful by the Act, victimisation may be claimed by people who are not disabled as well as by those who are.

## How do the different forms of discrimination compare in practice?

**4.35** The way in which the different forms of discrimination which are unlawful under the Act may operate in practice can be demonstrated by the following series of examples.

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

In the situation described above, the woman states on the booking form that she will have to miss one day of the conference in order to have hospital treatment in relation to her disability. Because full attendance is required of all conference participants, she is refused a place. This is not direct discrimination,

as the reason for the refusal of a place was not the woman's disability, but the fact that she would not be able to attend the conference in full.

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

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

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

A disabled sixth form student is studying for an A level. Before the disabled student began studying, staff at the college met with him to discuss the reasonable adjustments that he would require in order to study there. However, the general qualifications body wrongly assumes that the student's disability will prevent his full participation in the A level course and it does not accept his entry onto the examination. This is likely to be direct discrimination.

In the situation above the student mentions to the college that he will need a more flexible course programme,

because his health condition means that he has to make regular hospital visits and he will not, therefore, be able to attend all lessons and hand all course work in on time. The college makes a request for varying the deadline (for the disabled student to hand in his coursework) to the general qualifications body conferring this qualification. The general qualifications body decides not to allow the student to have this flexibility because they require all coursework deadlines to be strictly adhered to and they subsequently refuse to confer the qualification because this student's coursework has been submitted after the deadline.

The duty on the general qualifications body to make reasonable adjustments means that in order to prevent the disabled student from being substantially disadvantaged by this policy it may be reasonable to waive the requirement that all coursework deadlines must be strictly adhered to. If the general qualifications body refuses to make the possible reasonable adjustments that could be made, it will be unlawfully discriminating.

Although there is no direct discrimination because the requirement to meet coursework deadlines applies equally to everyone, the general qualifications body has still treated him less favourably for a reason relating to his disability. This is because the refusal to confer the qualification is due to the fact that the disabled student could not hand his coursework in on time due to regular hospital appointments and this, in turn, is for reasons related to his disability. This will constitute unlawful disability-related discrimination, unless the general qualifications body can show that the treatment is justified. If it would be reasonable to allow flexibility in the deadlines for the submission of coursework, it would not be able to show that this requirement was justified.

Because of the way in which he has been treated, the student makes a claim of disability discrimination against the general qualifications body. A few years

later, an application is made on his behalf to enter for a GCSE qualification that is administered by the same general qualifications body. His entry is denied because he has previously made a disability discrimination claim in good faith against the general qualifications body. This is victimisation.

## What does the Act say about harassment?

**4.36 [s 3B(1) and s 31AC(1)]** The Act says that harassment occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct which has the purpose or effect of:

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

**4.37 [s 3B(2) and s 31AC(2)]** If the conduct in question was engaged in with the intention that it should have either of these effects, then it amounts to harassment irrespective of its actual effect on the disabled person. In the absence of such intention, however, the conduct will only amount to harassment if it should reasonably be considered as having either of these effects. Regard must be had to all the circumstances in order to determine whether this is the case. Those circumstances include, in particular, the perception of the disabled person.

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

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

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

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

During the course of an examination a teacher invigilating the examination – who is acting as an agent of the general qualifications body – makes a disabled candidate who is incontinent explain, in front of his colleagues and peers, why he needs to use the toilet. This is likely to amount to harassment.

A general qualifications body offers resources and guidance for exam officers on exam administration. The materials suggest that candidates with dyslexia may be more likely

to cheat and abuse the reasonable adjustments that they are offered. This is harassment, whether or not the disabled person was present when the written comments were made, because they were made with the intention of humiliating people with dyslexia.

## What does the Act say about statutory obligations?

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

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

**4.39** A person who brings a claim for unlawful discrimination or harassment must show that discrimination or harassment has occurred. He must prove this on the balance of probabilities in order to succeed with a claim.

**4.40 [s 17A(1C), s 31ADA(2) and Reg 3 of SI/2007/2405]** However, in relation to trade organisations, qualifications bodies and general qualifications bodies, the Act says that, when such a claim is heard by a tribunal or court, the tribunal or court must uphold the claim if:

- the claimant/pursuer proves facts from which the tribunal or court could conclude in the absence of an adequate explanation that the person against whom the claim is made (the respondent or defendant/defender) has acted unlawfully, and

- the respondent/defendant/defender fails to prove that he did not act in that way.

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

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

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

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

**4.42 [s 56]** The Act provides a means by which a disabled person can seek evidence about whether he has been discriminated against, or subjected to harassment, under Part 2. However, no equivalent procedure exists in relation to Part 4 in respect of general qualifications bodies. Where such an opportunity to seek evidence arises under the Act, a person may do this by using a questionnaire to obtain further information from a person he thinks has acted unlawfully in relation to him (see paragraph 11.5). If there has been a failure to provide a satisfactory response to questions asked by the disabled person in this way, inferences may be drawn from that failure.

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

# 5. What is the duty to make reasonable adjustments?

## Introduction

**5.1** One of the ways in which discrimination occurs under Part 2 or Part 4 of the Act is when a trade organisation, qualifications body or a general qualifications body fails to comply with a duty imposed on it to make 'reasonable adjustments' in relation to the disabled person. This chapter examines the circumstances in which a duty to make reasonable adjustments arises and outlines what a trade organisation, qualifications body or general qualifications body needs to do in order to discharge such a duty.

## When does the duty to make reasonable adjustments arise?

**5.2 [s 14(1), s 14B(1), s 31AD(1) and (3)]**  
Subject to what is said in paragraph 5.7 about competence standards, the duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of a trade organisation, qualifications body or general qualifications body, or any physical feature of premises which it occupies, places a disabled person at a substantial disadvantage compared with people who are not disabled. The trade organisation, qualifications body or general qualifications body has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words it has to make a 'reasonable adjustment'. Where the duty arises, an organisation or body cannot justify a failure to make a reasonable adjustment.

A trade organisation for hairdressers arranges a one-day training course in colouring techniques for its members.

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

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

A qualifications body holds an awards ceremony at its headquarters. A newly qualified woman who uses a wheelchair wants to attend the ceremony but is at a substantial disadvantage because the stage where the awards are presented is only accessible by stairs. The qualifications body provides a ramp up to the stage. This is likely to be a reasonable adjustment for the qualifications body to make.

A disabled woman who is unable to use public transport wishes to attend a trade fair in central London, organised by a trade organisation of which she is a member. There is very little parking in the area and the information brochure suggests that 'visitors to the trade fair are advised to come by public transport'. The woman asks the trade organisation if it can arrange a

parking space and it does so. This is likely to be a reasonable adjustment for the trade organisation to make.

A candidate for a general qualification with a visual impairment requests a range of reasonable adjustments to take a written test. In preparation for a test, the exams officer at the centre discusses with the candidate his requirements for the test in advance and then discusses these requirements with the general qualifications body. When he sits the paper, he is provided with a large print paper, additional time, a desk lamp and a rest break. These are likely to be reasonable adjustments.

A general qualifications body allows a person with Chronic Fatigue Syndrome who, due to effects of her impairment, is unable to travel to an examination venue to take the examination (which is properly invigilated by a teacher from her college) at her home. She is also granted extra time to undertake the examination. These are likely to be reasonable adjustments for the general qualifications body to make.

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

## Which disabled people does the duty protect?

**5.4** In order to avoid discrimination, it is prudent not to attempt to make a fine judgement as to whether a particular individual falls within the statutory definition of disability, but

to focus instead on meeting the needs of each individual with whom a trade organisation, qualifications body or general qualifications body has dealings. However, the Act says that the duties are owed to the following people:

- **[s 14(2)]** disabled people who are members of trade organisations, or who are applicants, or potential applicants, for membership of such organisations, and
- **[s 14B(2)]** disabled people who are holders of professional or trade qualifications, or who are applicants, or potential applicants, for such qualifications.
- **[s 31AD(2) and (3)]** disabled people who are holders of general qualifications, or who are applicants, or potential applicants, for such qualifications.

**5.5** The extent of the duty to make reasonable adjustments depends on the circumstances of the disabled person in question. For example, more extensive duties are owed to members of trade organisations and holders of professional or trade qualifications than to people who are merely thinking about applying. However, for general qualifications bodies more extensive duties are owed to people seeking to enter for relevant general qualifications and candidates taking examinations and assessments potentially leading to such qualifications, than to people who already hold such qualifications. More extensive duties are also owed to current members and qualification holders than to past members or to people who no longer hold a qualification. The extent to which trade organisations, qualifications bodies and general qualifications bodies have knowledge of relevant circumstances is also a factor. These issues are explained in more detail in Chapters 7, 8 and 9.



## What are ‘provisions, criteria and practices’?

### 5.6 [s 18D(2) and s 31AD(5)]

Provisions, criteria and practices include arrangements, for example for determining who to accept as a member of a trade organisation, or upon whom to confer a general, professional or trade qualification, as well as the rules of membership of an organisation. The duty to make reasonable adjustments applies, for example, to selection and interview procedures for trade organisations and to examination and assessment procedures used by qualifications bodies and general qualifications bodies. In addition, the duty applies to premises used for such procedures.

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

A general qualifications body receives an application from a centre wishing to enter disabled candidates for an examination which, if successfully undertaken, will lead to a relevant general qualification. A candidate with a physical impairment affecting her ability to write cannot complete the written examination papers. The general qualifications body allows the centre to provide a scribe for this individual. This is likely to be a reasonable adjustment for the general qualifications body to make.

A general qualifications body regularly publishes a list of the approved access arrangements. In the light of comments from candidates, centres and organisations representing disabled people, it regularly reviews these arrangements to ensure that the criteria set out are fit for purpose. It also ensures that there are arrangements in place for requests for reasonable adjustments that are not covered in the guidance on access arrangements.

### 5.7 [s 14B(1) and s 31AD(1) and (2) and s 31AB(9)]

It should be noted that, in relation to both qualifications bodies and general qualifications bodies, there is no duty to make any adjustment to a provision, criterion or practice of a kind which the Act defines as a ‘competence standard’. What the Act says about competence standards is considered in more detail in respect of qualifications bodies in paragraphs 8.27 to 8.41 and in respect of general qualifications bodies in paragraphs 9.57 to 9.82.

## What is a ‘physical feature’?

### 5.8 [s 18D(2) and Reg 4 of SI/2007/1764]

The Act says that the following are to be treated as a physical feature:

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

All these features are covered, whether temporary or permanent. Considerations which need to be taken into account when making adjustments to premises are explained in Chapter 10.

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

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

## What disadvantages give rise to the duty?

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

## Is knowledge of the disability a factor?

**5.11 [s 14(3) and s 14B(3) and s 31AD(4)]** Although (as explained in paragraphs 4.10 and 4.29) less favourable treatment can occur even if a trade organisation, qualifications body or general qualifications body does not know that the person is

disabled, the organisation or body only has a duty to make an adjustment if it knows, or could reasonably be expected to know, that the person has a disability and is likely to be placed at a substantial disadvantage. A trade organisation, qualifications body or general qualifications body must, however, do all it can reasonably be expected to do to find out whether this is the case. More information is given in Chapters 7, 8 and 9 about the relationship between the knowledge of a trade organisation, qualifications body or general qualifications body and its duties under the Act.

## What adjustments might have to be made?

**5.12 [s 18B(2)]** Part 2 of the Act gives a number of examples of adjustments, or 'steps', which trade organisations and qualifications bodies may have to take, if it is reasonable for them to have to do so (see paragraphs 5.14 to 5.25). Many of these examples may also be relevant to general qualifications bodies and indicative of the type of adjustments that they may have to think about, even though no equivalent examples are listed in Chapter 2A of Part 4 of the Act. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary to make more than one adjustment. It is advisable for the appropriate body to agree any proposed adjustments with the disabled person in question before they are made. The Act does not give an exhaustive list of the steps which may have to be taken to discharge the duty. Not all of the steps listed in the Act are likely to be relevant to trade organisations and qualifications bodies. By the same token, steps other than those listed, or a combination of steps, will sometimes have to be taken. However, the steps in the Act which it is likely to be reasonable for trade organisations or qualifications bodies to have to take are:

- making adjustments to premises which they occupy

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

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

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

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

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

- acquiring or modifying equipment

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

- modifying instructions or reference manuals

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

- modifying procedures for testing or assessment

This could involve ensuring that particular testing methods do not adversely affect particular disabled people. For example, a person with restricted manual dexterity might be disadvantaged by a hand written test and would need to have an alternative arrangement such as an oral test or to be permitted to use a computer with voice recognition software. More information about how the Act affects testing and examinations is set out in Chapters 8 and 9.

- providing a reader or interpreter

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

- providing supervision or other support

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

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

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

Further examples of the way in which reasonable adjustments work in practice are given in Chapters 7, 8 and 9.

## **When is it ‘reasonable’ for a trade organisation, qualifications body or general qualifications body to have to make adjustments?**

**5.14** Whether it is reasonable for a trade organisation, qualifications body or general qualifications body to make any particular adjustment will depend on a

number of things, such as its cost and effectiveness. However, if an adjustment is one which it is reasonable to make, then the organisation or body must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice of the organisation or body, or by a physical feature of the premises it occupies, the organisation or body must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made but, where the disabled person does so, the organisation or body must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable.

**5.15** Nevertheless, an organisation or body may not know enough about the disabled person to determine what adjustments are appropriate. It is therefore good practice to ask a disabled person whether he requires any adjustments to be made. It is also a good idea for a disabled person to make suggestions about adjustments which would be helpful. Schools and colleges may request information about the needs of disabled candidates and should seek their permission to pass this information on to the general qualifications body.

**5.16** Effective and practicable adjustments for disabled people often involve little or no cost or disruption and are therefore very likely to be reasonable for a trade organisation, qualifications body or general qualifications body to have to make. Many adjustments do not involve making physical changes to premises. However, where such changes do need to be made, trade organisations, qualifications bodies and general qualifications bodies may need to take account of the considerations explained in Chapter 10, which deals with issues about making alterations to premises.

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

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

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

**5.17 [SI 1999/3242]** If making a particular adjustment would increase the risks to the health and safety of any person (including the disabled person in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments, such as those carried out for the purposes of the Management of Health and Safety at Work Regulations 1999, should be used to help determine whether such risks are likely to arise.

**5.18 [s 18B(1)]** Part 2 of the Act lists a number of factors which may, in particular, have a bearing on whether it will be reasonable to have to make a particular adjustment. These factors make a useful checklist, particularly when considering more substantial adjustments. Many of these factors may also be relevant to general qualifications bodies when they consider reasonableness of adjustments, even though no equivalent factors are

listed in Chapter 2A of Part 4 of the Act. The effectiveness and practicability of a particular adjustment might be considered first. If it is practicable and effective, the financial aspects might be looked at as a whole – the cost of the adjustment and resources available to fund it. Other factors might also have a bearing. The factors in the Act include the following:

### The effectiveness of the step in preventing the disadvantage

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

A candidate for a general qualification, who has a condition that causes fatigue (ME), makes enquiries with the exams centre as to what adjustments are available for her during examinations. One of the adjustments she needs is ensuring that non-fluorescent lighting is used in the exams hall. However, there is little benefit in having this or additional time on its own, but if these adjustments are provided together with a reader, the measures taken as a whole could be suitable to overcome the particular disadvantages that she experiences during examinations.

### The practicability of the step

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

A trade organisation is asked by a woman with a severe allergy to many commonly found substances (such as latex) to ensure that a venue for a lecture is free of all these substances. This is

likely to be an impractical step to take. However, it may instead be reasonable for the trade organisation to provide the woman with a video of the lecture.

A candidate for a GCSE qualification with a practical element requires treatment at a hospital during the exam period and asks to take the examination at the hospital. It would be impracticable to do this though, and it would also be impracticable to rearrange the timetabling of the exams, so the general qualifications body arranges for the candidate to sit the exams at a different centre nearer to the hospital.

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

**5.21** If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as practicability or effectiveness) made it unreasonable. It may, of course, be reasonable to have to make more expensive adjustments in some circumstances. The costs to be taken into account include those for staff and other resources. The significance of the cost of a step may depend in part on what the trade organisation, qualifications body or general qualifications body might otherwise spend in the circumstances. In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account.

## **The extent of the financial or other resources available to the trade organisation, qualifications body or general qualifications body**

**5.22** It is more likely to be reasonable for a trade organisation, qualifications body or general qualifications body with substantial financial resources to have to make an adjustment with a significant cost, than for one with fewer resources.

The resources in practice available to the organisation or body as a whole should be taken into account as well as other calls on those resources. It is good practice for organisations and bodies to have a specific budget for reasonable adjustments – but limitations on the size of any such budget will not affect the existence of the duties owed to disabled people. The reasonableness of an adjustment will depend not only on the resources in practice available for the adjustment but also on all other relevant factors (such as effectiveness and practicability).

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

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

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

**5.23** The availability of outside help may well be a relevant factor. This help may be financial or practical. Disability organisations may be able to provide further information or assistance.

**5.24** A disabled person is not required to contribute to the cost of a reasonable adjustment. However, if a disabled person has a particular piece of special or

adapted equipment which he is prepared to use, this might make it reasonable for a trade organisation, qualifications body or general qualifications body to have to take some other step (as well as allowing the use of the equipment).

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

portable couch on which she can lie down during the conference proceedings. This is likely to be a reasonable adjustment for the trade union to make. It involves no cost and little disruption for the union. Nevertheless, the union does not allow this as it says 'nobody has ever needed this adjustment before and there may be health and safety implications'. The trade union will be acting unlawfully.

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

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

## Can failure to make a reasonable adjustment ever be justified?

**5.26** [s 3A(2) and s 31AB(5)] The Act does not permit a trade organisation, qualifications body or general qualifications body to justify a failure to comply with a duty to make a reasonable adjustment. For trade organisations this is a change in the law.

**5.27** Clearly, however, an organisation or body will only breach such a duty if the adjustment in question is one which it is reasonable for it to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made.

A woman with severe back pain wishes to attend a trade union conference. The only adjustment she needs is for a space to be made available for her to set up a

# 6. Justification

## Introduction

**6.1** Most conduct which is potentially unlawful under Part 2 of the Act and Part 4 of the Act (in respect of most post-16 education and general qualifications bodies) cannot be justified. Conduct which amounts to:

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

is unlawful irrespective of the reason or motive for it.

## When does the Act permit justification?

**6.2** Paragraph 4.25 explains that one of the forms of discrimination which is unlawful under Part 2 and Chapter 2A of Part 4 is disability-related discrimination. However, the conduct of a trade organisation, qualifications body or a general qualifications body towards a disabled person does not amount to disability-related discrimination if it can be justified. This chapter explains the limited circumstances in which this may happen.

**6.3 [s 3A(3) and (4), s 31AB(3) and (7)]** Where less favourable treatment of a disabled person is capable of being justified (that is, where it is not direct discrimination), the Act says that it will, in fact, be justified if, but only if, the reason for the treatment is both material to the circumstances of the particular case **and** substantial. This is an objective test. 'Material' means that there must be a

reasonably strong connection between the reason given for the treatment and the circumstances of the particular case. 'Substantial' means, in the context of justification, that the reason must carry real weight and be of substance.

## Competence standards

**6.4 [s 14A(3) and s 31AB(4) and s 31AB(9)]** This general principle is subject to one exception – which relates to the application of a 'competence standard' to a disabled person by a qualifications body and general qualifications body. The Act says that less favourable treatment of a disabled person in this regard will be justified only if the qualifications body or general qualifications body can show that the standard is (or would be) applied equally to people who do not have the disabled person's disability, and that its application is a proportionate means of achieving a legitimate aim. What the Act says about competence standards is considered in more detail in paragraphs 8.27 to 8.41 and paragraphs 9.57 to 9.82.

## Justification and reasonable adjustments

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

**6.6 [s 3A(6) and s 31AB(5)]** In those circumstances, it is necessary to consider not only whether there is a material and substantial reason for the less favourable treatment, but also whether the treatment would still have been justified even if the organisation or body had complied with its



duty to make reasonable adjustments. In effect, it is necessary to ask the question ‘would a reasonable adjustment have made any difference?’ If a reasonable adjustment would have made a difference to the reason that is being used to justify the treatment, then the less favourable treatment cannot be justified.

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

- The disabled person proves facts from which it could be inferred in the absence of an adequate explanation that:
  - a. for a reason related to his disability, he has been treated less favourably than a person to whom that reason does not apply has been, or would be, treated, and
  - b. a duty to make a reasonable adjustment has arisen in respect of him and the organisation or body has failed to comply with it.
- The trade organisation, qualifications body or general qualifications body will be found to have discriminated unless it proves that:
  - a. the reason for the treatment is both material to the circumstances of the particular case and substantial, and
  - b. the reason would still have applied if the reasonable adjustment had been made.

## Can health and safety concerns justify less favourable treatment?

**6.8** Stereotypical assumptions about the health and safety implications of disability should be avoided, both in general terms and in relation to

particular types of disability. Indeed, less favourable treatment which is based on such assumptions may itself amount to direct discrimination – which is incapable of justification (see paragraph 4.4). The fact that a person has a disability does not necessarily mean that he represents an additional risk to health and safety.

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

A young person with cerebral palsy is undertaking a Scottish Higher general qualification in chemistry. The general qualifications body refuses his application for entry for the general qualification because they assume that his cerebral palsy would present a health and safety risk, without making any attempt to find out whether there are, in fact, any health and safety risks. This is likely to be direct discrimination and, therefore, likely to be unlawful.

**6.9** Genuine concerns about the health and safety of anybody (including a disabled person) may be relevant when seeking to establish that disability-related less favourable treatment of a disabled person is justified. However, it is important to remember that health and safety legislation does not require the removal of all conceivable risk but that risk is properly appreciated, understood and managed. Further information can be obtained from the Health and Safety Executive (see Appendix B for details).

**6.10** Paragraphs 6.11 to 6.15 examine the circumstances in which concerns about health and safety may justify less favourable treatment of a disabled person, and this is followed by a consideration of the relevance of medical information in this context. As noted in paragraph 6.4, however, the basis upon which a qualifications body may justify less favourable treatment of a disabled person in the application of a competence standard differs from that which usually applies under the Act. The following principles do not have the same relevance to justification in those circumstances, but regard should instead be had to paragraphs 8.35 to 8.40 (in respect of qualifications bodies) and paragraphs 9.67 to 9.73 (in respect of general qualifications bodies).

**6.11** It is the trade organisation, qualifications body or general qualifications body which must decide what action to take, or to decide what advice to give an examination centre, in response to concerns about health and safety in relation to the examination. However, leaving aside the question of competence standards, it is prudent for a trade organisation, qualifications body or general qualifications body to have, or arrange for, a risk assessment to be carried out by a suitably qualified person in circumstances where it has reason to think that the effects of a person's disability may give rise to an issue about health and safety. This is because:

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

A qualifications body refuses to issue a certificate to operate heavy machinery to a man with epilepsy. No attempt is made to find out the actual circumstances of the individual through a risk assessment.

The qualifications body merely makes an assumption that it would be a health and safety risk to let someone with epilepsy operate heavy machinery. This is likely to be direct discrimination and therefore to be unlawful.

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

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

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

**6.13** A risk assessment must be suitable and sufficient. It should identify the risks associated with a particular activity, taking account of any reasonable adjustments put in place for the disabled person, and should be specific for the individual carrying out a particular task. It is therefore unlikely that a trade organisation, qualifications body or general qualifications body which has a **general** policy of treating people with certain disabilities (such as epilepsy, diabetes or mental health problems) less favourably than other people will be able to justify doing so – even if that

policy is in accordance with the advice of an occupational health adviser.

**6.14** A 'blanket' policy of this nature will usually be unlawful. This is because it is likely to amount to direct discrimination (which cannot ever be justified) or to disability-related less favourable treatment which is not justifiable in the circumstances – i.e. disability-related discrimination.

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

A general qualifications body issues guidance that states that the qualification in ICT which they offer will be unsuitable to any candidate with a visual impairment and that people with visual impairments should not apply for the course. The general qualifications body is applying a blanket policy, which is likely to amount to direct discrimination.

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

## Can medical information justify less favourable treatment?

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

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

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

# 7. Discrimination by trade organisations

## Introduction

**7.1** Chapter 3 explains what the Act means by ‘trade organisation’, and that the Act makes it unlawful for a trade organisation to discriminate against a disabled person who is a member of the organisation or an applicant for membership. Chapter 3 also explains that the Act says it is unlawful for a trade organisation to subject such a person to harassment, or to victimise any person – whether disabled or not.

**7.2** This chapter looks at discrimination by trade organisations in more detail. In order to do so (and after considering an important point about the relationship of trade organisations to qualifications bodies), it is necessary to look at the different aspects of a trade organisation’s functions, from those which relate to becoming a member of the organisation to those which concern the benefits of membership once achieved. It is also necessary to consider issues relating to the variation and withdrawal of membership.

## Trade organisations as qualifications bodies

**7.3** It has already been noted (at paragraph 3.11) that some trade organisations confer professional or trade qualifications and that, as a consequence, such organisations can be subject to the Act’s provisions about trade organisations or, depending upon the context, to those about qualifications bodies.

**7.4** However, it should also be noted that membership of certain trade organisations (for example, the Institute of Linguists or the Chartered Institute of Personnel and Development) itself amounts to a professional or trade qualification for the reasons explained at paragraph 8.6. Where this is the case, decisions about granting, varying or withdrawing membership

of the trade organisation will also be subject to the rules about conferring professional or trade qualifications. This fact is likely to be of particular significance where such decisions result from the application of a ‘competence standard’ (see paragraphs 8.27 to 8.41).

## Becoming a member

### What does the Act say?

**7.5 [s 13(1)]** The Act says that it is unlawful for a trade organisation to discriminate against a disabled person:

- in the arrangements it makes for the purpose of determining who should be offered membership of the organisation

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

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

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

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

A nursing organisation refuses to admit a woman with a history of mental health problems – without further enquiry. This is likely to be unlawful.

**7.6 [s 16B]** As explained at paragraphs 3.22 to 3.25, the Act also makes it unlawful in certain circumstances to publish a discriminatory advertisement for membership of a trade organisation.

### What amounts to direct discrimination?

**7.7 [s 3A(5)]** A trade organisation may wish to differentiate between individuals when dealing with applications for membership of the organisation. However, in doing so, it should avoid discriminating against disabled applicants or potential applicants. As explained in Chapter 4, treating a disabled person in a different way from the way in which other people are (or would be) treated amounts to discrimination in certain circumstances. In particular, such treatment is unlawful if it amounts to direct discrimination under Part 2. As explained at paragraph 4.4, treatment of a disabled person amounts to direct discrimination if:

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

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

qualifications and experience) are the same as those of other candidates who do not have schizophrenia.

### What amounts to disability-related discrimination?

**7.8 [s 3A(1)]** Less favourable treatment of a disabled person may be unlawful under the Act even if it does not amount to direct discrimination. This will be the case if it amounts to disability-related discrimination instead. As explained at paragraph 4.25, this is less favourable treatment which is for a reason related to the person's disability. However, unlike treatment which amounts to direct discrimination (and which is therefore incapable of justification), a trade organisation's treatment of a disabled person does not amount to disability-related discrimination if the organisation can show that it is justified. The circumstances in which this may be possible are explained in Chapter 6.

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

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

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

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

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

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

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

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

A man with a speech impairment applies for membership of a professional association. The association normally conducts a short interview for its potential members. Because the man has difficulty with verbal communication

he asks if he can have the interview in the form of written questions and answers. This is likely to be a reasonable adjustment to the organisation’s membership arrangements.

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

## Membership benefits

### What does the Act say?

**7.15 [s 13(2)]** The Act says that it is unlawful for a trade organisation to discriminate against a disabled person who is a member of the organisation:

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

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

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

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

**7.17 [s 3A]** A trade organisation needs to take care if it differentiates between members in relation to the provision of membership benefits. For example, if the organisation's treatment of a disabled member in this regard amounts to direct discrimination under the Act (see paragraph 7.7) it will be unlawful.

**7.18** Even where it is not directly discriminatory, treatment of a disabled person will be unlawful if it amounts to disability-related discrimination (see paragraph 4.25).

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

**7.19 [s 14]** A trade organisation has a duty to make reasonable adjustments in respect of the way it makes benefits available to its members. It owes this duty to a disabled member of the organisation if it has knowledge of the fact that he has a disability and is likely to be placed at a substantial disadvantage in comparison with people who are not disabled. The duty is likely to apply, for example, in respect of the provision of the benefits mentioned in paragraph 7.16. Where the duty does apply, the trade organisation must take such steps as are reasonable to prevent the provision, criterion or practice, or the physical feature (as the case may be) from placing the disabled member at a substantial disadvantage.

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

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

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

**7.20** For many members, the manner in which a trade organisation makes information available to them is likely to be an important issue. If this information is not provided in forms accessible to disabled people they are likely to be placed at a substantial disadvantage. However, recent technological developments have meant that it is increasingly practicable to produce material in alternative formats quickly and cheaply. Disability organisations and bodies like the Equality and Human Rights Commission are able to advise trade organisations about practicable methods of providing information in an accessible way. What is reasonable will depend on the individual circumstances of the case.

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

**7.21** In some cases a reasonable adjustment will not work without the co-operation of other members of the organisation. Members may therefore have an important role in helping to ensure that a reasonable adjustment is carried out in



practice. Subject to considerations about confidentiality (explained at paragraphs 7.34 to 7.36), trade organisations must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act that members were obstructive or unhelpful when the trade organisation tried to make reasonable adjustments. A trade organisation would at least need to be able to show that it took such behaviour seriously and dealt with it appropriately. Trade organisations will be more likely to be able to do this if they establish and implement the type of policies and practices described at paragraph 2.15 (and, in the case of trade unions, 2.16).

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

## Variation and withdrawal of membership

### What does the Act say?

**7.22 [s 13(2)]** The Act says that it is unlawful for a trade organisation to discriminate against a disabled person who is a member of the organisation:

- by depriving him of membership, or varying the terms on which he is a member, or

- by subjecting him to any other detriment.

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

**7.23 [s 16A]** The Act also says that, where a disabled person's membership of a trade organisation has come to an end, it is still unlawful for the trade organisation:

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

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

**7.24 [s 55]** It is also unlawful to victimise a person (whether or not he is disabled) after he has ceased to be a member of a trade organisation (see paragraphs 4.31 to 4.34).

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

**7.25 [s 3A]** If a trade organisation varies the terms on which a disabled person is a member of the organisation, or withdraws his membership, it may be treating him less favourably than it treats other members. Depending upon the circumstances, the organisation may be discriminating against the disabled person by treating him in this way. For example, if the organisation's treatment of a disabled member amounts to direct discrimination under the Act (see paragraph 7.7) it will be unlawful.

**7.26** Even where it does not amount to direct discrimination, treatment of a disabled person will be unlawful if it amounts to disability-related discrimination (see paragraph 4.25).

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

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

**7.27 [s 14]** The duty of a trade organisation to make reasonable adjustments for a member who it knows to have a disability extends to the way in which it operates grievance and disciplinary procedures, or procedures for the variation or withdrawal of membership. Where a provision, criterion or practice, or a physical feature, places a disabled member at a substantial disadvantage in this regard, the trade organisation must take such steps as are reasonable to prevent this.

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

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

**7.28 [s 16A(4)-(6)]** A trade organisation's duty to make reasonable adjustments may also apply in respect of a former member who is a disabled person. This will be the case where:

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

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

**7.29** The former members with whom the position of the disabled person should be compared must be people who are not disabled, but who are former members of the same organisation. If it is not possible

to identify an actual comparator for this purpose, then a hypothetical comparator may be used (see paragraph 4.17).

## Knowledge of disability

**7.30 [s 14(3)]** The point has been made a number of times in this chapter that a trade organisation only has a duty to make a reasonable adjustment if it knows, or could reasonably be expected to know, that a person is, or may be, an applicant for membership or has a disability and is likely to be placed at a substantial disadvantage in comparison with people who are not disabled. However, a trade organisation will be deemed to have that knowledge in certain circumstances.

### Obtaining information

**7.31** It is good practice for a trade organisation to invite its members to tell it about their disability-related needs. In any event, where information which should alert a trade organisation to the circumstances mentioned in paragraph 7.30 is available to it, or would be if it were reasonably alert, the organisation cannot simply ignore it. It is therefore in the interests of a trade organisation to be aware of the possibility that people it is dealing with may have a disability and to make reasonable enquiries if circumstances suggest this may be the case. It also means that it is a good idea for disabled people, if they wish to take full advantage of the provisions of the Act, to let trade organisations know of their disability and of substantial disadvantages at which they are likely to be placed. The earlier a trade organisation is told about a disability and its effects, the more likely it is to be able to make effective adjustments.

A trade union has questions on its membership application form asking if the applicant is disabled or needs information in an accessible format (such as large print, Braille, tape or email). It also asks if the applicant has any additional disability-related needs.

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

**7.32** If a trade organisation's agent or employee (such as a trade union representative) knows, in that capacity, of a member's disability, the organisation will not usually be able to claim that it does not know of the disability. The same applies in respect of actual or potential applicants for membership of the organisation. Trade organisations therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential – for bringing the information together, to make it easier for the organisation to fulfil its duties under the Act.

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

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

A trade organisation member uses a counselling Helpline which is independent of the organisation but which is provided as a benefit of membership. During his conversation with the counsellor the member discusses his worries

about his worsening sight problem. The trade organisation itself should not be assumed to know about his need for the organisation's magazine to be in an accessible format, on the basis of this conversation.

## Confidential information

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

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

**7.35** However, as noted at paragraph 7.21, sometimes a reasonable adjustment will not work without the co-operation of other members. In order to secure such co-operation, it may be necessary for a trade organisation to tell one or more of a disabled person's fellow members (in confidence) about a disability which is not obvious. Who it might be appropriate to tell will depend on the nature of the

disability and the reason they need to know about it. In any event, a trade organisation must not disclose confidential details about a member without his consent. A disabled person's refusal to give such consent may impact upon the effectiveness of the adjustments which the trade organisation is able to make or its ability to make adjustments at all.

**7.36** The Act does not prevent a disabled person keeping a disability confidential from a trade organisation. But this is likely to mean that unless the organisation could reasonably be expected to know about the person's disability anyway, it will not be under a duty to make a reasonable adjustment. If a disabled person expects a trade organisation to make a reasonable adjustment, he will need to provide the organisation – or someone acting on its behalf – with sufficient information to carry out that adjustment.

## The role of trade unions

**7.37** Trade unions are obvious examples of what the Act means by trade organisations. Representing the interests of their members in the workplace is one of the most important functions of trade unions, and so union representatives need to be familiar with the Act's provisions on employment and occupation. They need to be able to recognise potential claims under the Act and to know how to respond appropriately. Union representatives should also understand the need to make reasonable adjustments at branch meetings, for example, and that the reasonableness of the cost of making an adjustment should be assessed having regard to the union's overall resources, and to any access funds which may be available (see paragraphs 2.15 and 2.16).

**7.38** It is important for trade unions to ensure that union representatives receive proper training on the Act and that they are aware of the DRC's code of practice on the Act's provisions on employment and occupation (see Appendix B). It is

also advisable for trade unions to have arrangements in place so that appropriate cases are referred to the union's solicitors.

# 8. Discrimination by qualifications bodies

## Introduction

**8.1** Chapter 3 describes the meaning of ‘qualifications body’, and explains that it is unlawful for such a body to discriminate against a disabled person in relation to conferring professional or trade qualifications, or to subject him to harassment, or to victimise any person – whether disabled or not. This chapter does not concern the duties in respect of those bodies conferring of relevant general qualifications – these duties are considered further in Chapter 9.

**8.2** This chapter looks at the provisions about qualifications bodies in more detail. It explains what the definition of ‘professional or trade qualification’ covers in practice. It considers when less favourable treatment of a disabled person by a qualifications body is unlawful, and when the duty to make reasonable adjustments arises. Finally, it examines the meaning and significance of ‘competence standards’.

**8.3 [s 17A(1A)]** It should be noted that a disabled person is not permitted to bring a claim in an employment tribunal about alleged discrimination or harassment by a qualifications body if a statutory appeal is available in respect of the matter in question. For example, the Medical Act 1983 sets out specific mechanisms for appealing decisions of the General Medical Council or its committees regarding the registration of medical practitioners. A complaint to which these appeal mechanisms applied could not, therefore, be brought instead in an employment tribunal.

**8.4** It should also be noted that the provisions of the Act which relate specifically to qualifications bodies’ focus only on the functions of conferring professional or trade qualifications. The performance of other functions by

such bodies may be subject to other provisions of the Act. For example, where a qualifications body is also a trade organisation, regard must also be had to what the Act says about trade organisations – and to Chapter 7 of the Code in particular.

## What is a professional or trade qualification?

**8.5 [s 14A(5)]** As noted at paragraph 3.9, the key feature of a qualifications body is that it confers professional or trade qualifications. The Act says that such a qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or which facilitates engagement in, a particular profession or trade. Clearly, therefore, the expression includes those qualifications etc, which are conferred solely in anticipation of furthering a particular career. However, it is also capable of including more general qualifications if attaining them facilitates engagement in a particular profession or trade and if these general qualifications are not relevant general qualifications (see chapter 9 for further details). In order to decide whether a particular qualification is a professional or trade qualification for the purposes of the Act, it is necessary to address the following three questions:

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

**8.6** The word ‘qualification’ should not be interpreted narrowly – attaining a professional or trade qualification need

not involve passing formal examinations or tests. In some cases, simply being a member of an organisation or body may amount to such a qualification if membership itself facilitates engagement in a particular profession or trade.

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

- Registration with the Nursing and Midwifery Council
- A certificate to practise as a solicitor issued by the Law Society
- Registration with the Council for Registered Gas Installers (CORGI)
- NVQs
- BTECs
- City and Guilds
- Scottish Vocational Qualifications
- HGV driving licences
- Membership, registration or fellowship of trade or professional bodies (e.g. Fellow of the Institute of Linguists).

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

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

## What amounts to direct discrimination?

**8.9 [s 14A(1)]** It is obvious that a qualifications body will differentiate between individuals when conferring, renewing or extending professional or trade qualifications. However, in doing so, it should avoid discriminating against disabled people – it is unlawful for a qualifications body to discriminate against a disabled person in respect of a number of matters which are specified in the Act (and listed in paragraph 3.19).

**8.10 [s 3A(5)]** As explained in Chapter 4, treating a disabled person in a different way from the way in which other people are (or would be) treated amounts to discrimination in certain circumstances. In particular, such treatment is unlawful if it amounts to direct discrimination under Part 2. As explained at paragraph 4.4, treatment of a disabled person amounts to direct discrimination if:

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

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

## What amounts to disability-related discrimination?

**8.11 [s 3A(1)]** Less favourable treatment of a disabled person may be unlawful under the Act even if it does not amount to direct discrimination. This will be the case if it amounts to disability-related discrimination instead. As explained at paragraph 4.25, this is less favourable treatment which is for a reason related to the person's disability. However, unlike treatment which amounts to direct discrimination (and which is therefore incapable of justification), a qualifications body's treatment of a disabled person does not amount to disability-related discrimination if the body can show that it is justified. The general circumstances in which this may be possible are explained in Chapter 6. However, special rules apply in respect of justification of less favourable treatment in the application of a competence standard (see paragraphs 8.35 to 8.40).

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

- the arrangements for determining upon whom to confer a professional or trade qualification
- the terms upon which a qualifications body confers, renews or extends such a qualification
- a refusal or deliberate omission by such a body to grant his application for a qualification, or
- the withdrawal of a qualification from him or a variation of the terms on which he holds it.

A professional association which maintains a register of approved acupuncturists withdraws registration from a woman who, because of treatment for cancer, has not been able to work for a year. The association has a policy of withdrawing registration from anyone

who has not practised for this length of time. The treatment of the woman is for a disability-related reason (her lack of recent practice is due to her disability). The treatment is less favourable than the way in which someone who had practised recently would have been treated. It would therefore amount to disability-related discrimination unless the association (acting as a qualifications body) can justify it.

**8.13 [s 16A]** The Act also says that, where a disabled person ceases to hold a professional or trade qualification, it is still unlawful for the qualifications body which conferred it:

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

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

**8.14** It is also unlawful to victimise a person (whether or not he is disabled) after he has ceased to hold such a qualification (see paragraphs 4.31 to 4.34).

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

### In respect of which disabled people is the duty owed?

**8.15 [s 14B(1)]** A qualifications body has a duty to make reasonable adjustments to the way it confers, renews or extends professional or trade qualifications (except in respect of competence standards). It owes this duty to a disabled person who holds a qualification conferred by it and to a disabled applicant or potential applicant for such a qualification.



**8.16 [s 14B(2)]** The duty extends to holders of a qualification conferred by the body and to applicants for such a qualification. However, in the case of a provision, criterion or practice for determining on whom a qualification is to be conferred, the duty only applies to a disabled person who has either applied for the qualification or has notified the body that he may apply.

**8.17 [s 14B(3)]** The duty only applies if the qualifications body knows, or could reasonably be expected to know, that the disabled person concerned is, or may be, an applicant for a professional or trade qualification. Likewise, the duty only applies if the body knows or should know that the person has a disability and is likely to be placed at a substantial disadvantage compared with people who are not disabled.

**8.18 [s 16A(4)-(6)]** The duty of a qualifications body to make reasonable adjustments may also extend to a disabled person who formerly held a professional or trade qualification. This is the case where a provision, practice or criterion, or a physical feature of premises occupied by the qualifications body, places the disabled person at a substantial disadvantage compared with others in the same position. The duty only applies, however, if the qualifications body knows, or could reasonably be expected to know, that the person concerned has a disability and is likely to be affected in this way.

**8.19** The people with whom the position of the disabled person should be compared must be people who are not disabled, but who also formerly held the same professional or trade qualification conferred by the qualifications body in question. If it is not possible to identify an actual comparator for this purpose, then a hypothetical comparator may be used (see paragraph 4.17).

## What is the effect of the duty?

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

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

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

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

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

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

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

## What are the practical implications of the duty?

**8.21** Although there is no duty on a qualifications body to make a reasonable adjustment if it does not have the requisite knowledge (see paragraph 8.17), it will be deemed to have that knowledge in certain circumstances.

**8.22** Where information is available which should alert a qualifications body to the circumstances mentioned in paragraph 8.17, or would be if it were reasonably alert, the body cannot simply ignore it. It is thus a good idea for disabled people, if they wish to take full advantage of the provisions of

the Act, to let educational institutions and qualifications bodies know of their disability and of substantial disadvantages that are likely to arise. The earlier a qualifications body is told about a disability and its effects, the more likely it is to be able to make effective adjustments.

**8.23** As mentioned at paragraph 2.15, it is also advisable for qualifications bodies to set up systems for working with educational institutions and other bodies with whom they work to ensure that qualifications bodies obtain the information they need to make adjustments for disabled students who are taking examinations or other assessments in order to obtain a professional or trade qualification. For example, such a system could comprise the following steps:

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

A body which confers qualifications in accountancy asks a college for information about students who may require reasonable adjustments. The college seeks this information from its students. A student with cerebral palsy has difficulty writing, and therefore asks

to be allowed to take the examinations using a computer. The colleges relays this request to the qualifications body, which gives its consent and liaises with the college to ensure that the college can provide him with appropriate facilities to take the examinations.

**8.24** Educational institutions or other bodies often provide education, training or other services (such as facilities for taking examinations or assessments) which lead to the attainment of a professional or trade qualification, even though they do not themselves confer the qualification. Such institutions or bodies are likely to have separate duties under Part 3 or Part 4 in respect of the education, training or other services they provide. To ensure full compliance with the Act, it is advisable for such institutions or bodies to inform qualifications bodies at an early stage about an applicant's disability and its relevant implications – subject, of course, to obtaining the applicant's consent first.

**8.25** In practice, the needs of a disabled person who is taking an examination, test or assessment can only be met fully if the educational institution or body and the qualifications body concerned work together to achieve an appropriate outcome.

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

A partially sighted man on another course has always had course information provided to him in large print by the college as a reasonable adjustment (under Chapter 1 or 2 of Part 4 of the Act), and has used a desk light when taking internal tests as part of his course. With the man's consent, the college informs the qualifications body that the man needs

an examination paper in large print for examinations set by the qualifications body. The college provides him with a desk light for such examinations.

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

## What does the Act say about competence standards?

### What is a competence standard?

**8.27 [s 14A(5)]** The Act says that a competence standard is an academic, medical, or other standard applied by or on behalf of a qualifications body for the purpose of determining whether or not a person has a particular level of competence or ability. So, for example, having a certain standard of eyesight is a competence standard required for a pilot's qualification. Having a certain level of knowledge of the UK taxation system is a competence standard for an accountancy qualification.

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

activity within a set period of time, would probably be a competence standard.

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

- a requirement that a candidate must have at least ten years continuous experience (a person who has two periods of experience which total ten years may have equivalent ability and experience)
- a requirement that a candidate must complete twelve qualifying sessions (for qualification as a barrister)
- a requirement that a candidate must be currently professionally employed in a particular field.

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

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

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

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

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

## What is the significance of this distinction?

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

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

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

A woman taking a written test for a qualification in office administration asks the relevant qualifications body for extra time for the test because she has dyslexia. This is likely to be a reasonable adjustment for the qualifications body to make. She also asks if she can leave out the questions asking her to write a business letter and to précis a document, because she feels these questions would substantially disadvantage her because of her dyslexia. The qualifications body would not have to make this adjustment because these questions are there to determine her competence at writing and précising, so are part of the competence standard being tested.

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

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

**8.35 [s 3A(4) applied by s 14A(4)]** Less favourable treatment of a disabled person can never be justified if it amounts to direct discrimination under Part 2 (see paragraph 8.10) – as where the treatment is based on generalised, or stereotypical, assumptions about the disability or its effects. This principle applies to the way that a disabled person is treated

in the application of a competence standard in the same way that it applies to treatment of him in other respects.

**8.36 [s 14A(3)]** To the extent that it does **not** amount to direct discrimination, the Act says that, where the application of a competence standard to a disabled person amounts to less favourable treatment of him for a reason which relates to his disability, that treatment is justified if, but only if, the qualifications body can show that:

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

A qualifications body refuses to grant a qualification to a man who fails a fitness test. This does not amount to direct discrimination because anyone, disabled or non-disabled, failing the fitness test would be treated in the same way. But it is less favourable treatment for a reason related to the man's disability. The treatment could be justified if the fitness test was applied equally to all candidates **and** the fitness test was a proportionate way of showing that the person was fit enough to carry out the essential requirements of the job to which the qualification relates.

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

**8.37** The effect of these provisions is that, in the limited circumstances in which justification may be possible,

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

**8.38** These special rules about justification are only relevant to the actual application of a competence standard. If a qualifications body applies a competence standard incorrectly, then it is not, in fact, applying the standard and these rules do not operate. Instead, the more usual test of justification operates (assuming, of course, that the incorrect application of the standard is not directly discriminatory, but that it is disability-related less favourable treatment).

**8.39** The application of a competence standard concerning a medical requirement may, depending on the circumstances, result in less favourable treatment of a disabled person. Medical requirements which are based on stereotypical assumptions about the health and safety implications of disability generally, or about particular types of disability, are likely to be directly discriminatory – less favourable treatment of a disabled person resulting from the application of such a requirement will therefore be unlawful.

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

**8.40** Nevertheless, genuine concerns about health and safety may be relevant to

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

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

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

- identifying the specific purpose of each competence standard which is applied, and examining the manner in which the standard achieves that purpose
- considering the impact which each competence standard may have on disabled people and, in the case of a standard which may have an adverse impact, asking whether the application of the standard is absolutely necessary

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

# 9. Discrimination by general qualifications bodies

## Introduction

**9.1** This chapter looks in more detail at the provisions about general qualifications bodies under Chapter 2A of Part 4 of the Act and associated regulations. It explains the context in which general qualifications bodies operate and what the definition of ‘relevant general qualifications’ covers in practice. It considers when less favourable treatment of a disabled person by a general qualifications body is unlawful, and when the duty to make reasonable adjustments arises. Finally, it examines the meaning and significance of ‘competence standards’.

## What is a general qualifications body?

**9.2 [s 31AA(4) and (6)(a)]** The Act defines a general qualifications body as a body that confers a relevant general qualification. The Act says that conferring such a qualification also includes renewal, extension, authentication, authorisation, qualification, approval or certification.

**9.3 [Reg 2 and Sch of SI/2007/1764]** The following list sets out exhaustively (but subject to future amendment by the government) the qualifications which regulations made under the Act deem to be relevant general qualifications:

- GCEs (General Certificate of Education) Advanced level (A and AS levels)
- VCEs (Vocational Certificate of Education)
- AEA (Advanced Extension Awards)
- GCSEs (General Certificate of Secondary Education)
- Free standing Maths Qualifications
- Entry level qualifications
- Key Skills

- Literacy and Numeracy Entry Levels, Level 1, 2 and 3
- GNVQs (General National Vocational Qualifications)
- The National Qualifications framework in Scotland
- The Welsh Baccalaureate Qualification
- The International Baccalaureate.

**9.4** The following list (which is not intended to be exhaustive) gives examples of bodies likely to be conferring relevant general qualifications:

- Assessment and Qualifications Alliance (AQA)
- Edexcel
- Scottish Qualifications Authority (SQA)
- University of Cambridge Local Examination Syndicate (UCLES, including OCR)
- Welsh Joint Education Committee (WJEC).

**9.5 [s 31AA(5) and 14A(5)]** A relevant general qualification **cannot** also be a professional and trade qualification (and vice-versa). This is the case even if the underlying purpose for an individual undertaking a relevant general qualification is to enter into a particular profession or trade, and having this qualification facilitates entry into a particular profession or trade.

**9.6 [s 31AA(6)(a) (i) to (iv)]** The Act also states that, for the purposes of these provisions, responsible bodies (as defined under Chapter 1 or 2 of Part 4 of the Act), local education authorities (in England and Wales) and education authorities (in Scotland) **are not** general qualifications bodies.



**9.7** Some educational institutions or other bodies may run their own courses and confer qualifications. They will not have duties under these provisions because they do not confer **relevant** general qualifications. They may have separate duties as qualifications bodies, service providers or responsible bodies under Parts 2, 3 or 4 of the Act respectively.

## General qualifications bodies and regulators

**9.8** As explained in paragraph 3.30, relevant general qualifications are regulated by public authorities who set criteria and accredit relevant general qualifications. This includes setting criteria and objectives for examination, testing and assessment in respect of relevant general qualifications.

**9.9** The task of conferring a relevant general qualification and determining who should receive such qualifications are carried out by general qualifications bodies.

**9.10 [s 57]** It is possible that the relevant regulators of relevant general qualifications (hereafter referred to as “regulators”), in addition to general qualifications bodies themselves, may be jointly liable for unlawful disability discrimination under these duties. Paragraphs 3.29 to 3.34 further explain the provisions of the Act in relation to responsibility for the acts of others and aiding an unlawful act.

## General qualifications bodies and examination centres

**9.11** Many general qualifications bodies contract with third parties to organise, supervise and generally undertake delivery of examinations, testing and assessments, with the results of these determining eligibility to receive relevant general qualifications and the grades upon which these are awarded. Some general qualifications bodies may directly employ invigilators for exams, with the exams

being delivered at facilities/premises occupied and controlled by third parties. These third parties are commonly called examination centres. Many of these examination centres are also schools and colleges where candidates study and it is often these schools and colleges, rather than general qualifications bodies, who inform and steer pupils and students towards studying and trying to secure particular general qualifications.

**9.12** Furthermore, communication between the general qualifications body, examination centre and disabled candidate is usually facilitated through the examination centre. Consequently, general qualifications bodies often rely upon examination centres to identify and meet the requirements of disabled candidates for adjustments to examinations, with guidance and input from general qualifications bodies where required.

**9.13** Nevertheless, the Act imposes direct duties upon general qualifications bodies to avoid unlawful discrimination against disabled candidates and such duties cannot always be completely avoided or always completely discharged simply through delegation of such responsibilities to examination centres. As mentioned in Chapter 2, it is very important that both centres and general qualifications bodies work effectively with each other to ensure that the requirements of disabled candidates or disabled potential candidates are met and that unlawful discrimination is avoided. A failure to do so may mean that either or both are liable for unlawful disability discrimination under the Act.

**9.14** All schools and most colleges themselves have separate duties, for example as education providers under Chapters 1 and 2, respectively, of Part 4 of the Act. Consequently, it is possible that schools and colleges could themselves be individually or jointly liable (with the general qualifications body) for unlawful disability discrimination occurring in the context of delivering examinations, tests

and assessments for relevant general qualifications. Paragraphs 3.29 to 3.34 further explain the provisions of the Act in relation to responsibility for the acts of others and aiding an unlawful act. Examination centres which are not covered by Part 4 of the Act may have separate legal responsibilities as service providers under Part 3 of the Act.

## Summary of duties

**9.15** In short it is unlawful for such a body to discriminate against a disabled person in relation to conferring relevant general qualifications by:

- treating him less favourably on the grounds of his disability; and/or
- failing to discharge (where it arises) the section 31AD duty to make reasonable adjustments; and/or
- treating him less favourably without justification for a reason relating to his disability; and/or
- subjecting him to disability-related harassment.

In addition, it is also unlawful for such a body to:

- victimise any person – whether disabled or not.

## Scope of duties

**9.16 [s 31AA(1)]** In the context of conferring relevant general qualifications it is unlawful for bodies conferring relevant general qualifications to discriminate in respect of:

- the arrangements for determining upon whom to confer a relevant general qualification
- the terms upon which a qualifications body confers, renews or extends such a qualification
- a refusal or deliberate omission by such a body to grant a disabled person's application for a qualification, or

- the withdrawal of a qualification from a disabled person or a variation of the terms on which the disabled person holds it.

**9.17** It should be noted that the provisions of the Act which relate specifically to general qualifications bodies focus only on the functions of conferring relevant general qualifications. The performance of other functions by such bodies may be subject to other provisions of the Act.

**9.18** For example, where a general qualifications body is also an employer or service provider, regard must also be had to what the Act says about employers and service providers – and in particular to the Employment and Occupation and Goods, Facilities and Services codes of practice. General qualifications bodies may also have direct or indirect responsibilities in relation to the duties set out in sections 49A-F of the Act (known as the Disability Equality Duties), and indirectly in relation to the duties set out in sections 21B-E of the Act (discrimination by public authorities) which apply to public authorities regulating general qualifications.

## Liability for the actions of others

**9.19 [s 57 and s 58]** It should be noted that the Act treats the discriminatory actions or omissions of agents of a general qualifications body as being done by the body itself. Furthermore agents could also be individually or personally liable for aiding unlawful discrimination (see paragraphs 3.29 to 3.34).

## What amounts to direct discrimination?

**9.20** When determining who should receive a relevant general qualification, a general qualifications body will have to differentiate between individuals. The Act does not prevent a body from doing this, but, in doing so, it should

avoid unlawfully discriminating against disabled people in respect of a number of matters which are specified in the Act (and listed in paragraph 9.16 above).

**9.21 [s 31AB(8)]** As explained in Chapter 4, treating a disabled person in a different way from the way in which other people are (or would be) treated amounts to discrimination in certain circumstances. In particular, such treatment is unlawful if it amounts to direct discrimination under the provisions concerning general qualifications bodies under Chapter 2A of Part 4 of the Act. Direct discrimination cannot be justified. As explained at paragraph 4.4, treatment of a disabled person amounts to direct discrimination if:

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

**9.22** It should be obvious that direct discrimination can arise from actions and omissions – for which general qualifications bodies are responsible – based on prejudice regarding disability. It also arises where less favourable treatment of a disabled person results from generalised assumptions and stereotypes.

A general qualifications body refuses to allow a candidate who has schizophrenia to take a GCSE examination at the same time as other candidates, on the incorrect assumption – without any further investigation – that the condition presents a health and safety risk to those present at the examination centre. This is likely to amount to direct discrimination.

**9.23** Direct discrimination does not require knowledge of disability on

the part of the alleged discriminator to be demonstrated; discrimination, including direct discrimination, can often be unconscious. Furthermore, direct discrimination does not have to be the only cause of the less favourable treatment.

**9.24** In the above example at 9.22, direct discrimination has occurred because a like-for-like comparison would establish that such health and safety risk assumptions would not have impeded a non-disabled examination candidate, who would have been allowed to attend the examination at the same time as other candidates.

**9.25** Therefore, it follows that in order to prove he has been treated less favourably on the grounds of his disability, a disabled person would need to show that a comparator not having his disability (an actual or hypothetical person) has, or would have, been treated more favourably than him in the same, or not materially different, relevant circumstances (including abilities).

**9.26** The effects of a disabled person's disability may be relevant to the comparison for the purposes of direct discrimination, but the fact of the disability, itself, will not be relevant. It is important to correctly identify the relevant circumstances before establishing the correct comparator, and then use the comparison to decide if direct discrimination has occurred; by doing this one should arrive at the right conclusion.

A wheelchair user complains that he has been directly discriminated against by not being awarded a qualification in GCSE Maths because he failed the examination, despite being able to access the examination with provision of appropriate adjustments, whereas a non-disabled person received the qualification after passing the examination in the same subject. Someone who does not have the same disability, but who shares the same relevant abilities as the person using a wheelchair in

respect of the GCSE Maths qualification, would also have failed. Therefore, in these relevant circumstances, there has been no direct discrimination.

**9.27** It does not constitute direct discrimination for a general qualifications body to treat a disabled person more favourably than another disabled person (for example, by discharging the duty to make a reasonable adjustment) where the relevant circumstances between the two are not the same and are materially different.

A deaf candidate taking an examination for a relevant general qualification is allowed to have an oral communicator for the part of an examination that he cannot access due to his impairment. Someone with diabetes, who does not share the same difficulties in accessing the examination, is not granted the same facility. The person with diabetes is not being treated less favourably on the grounds of his disability than the deaf candidate, because the relevant circumstances (i.e. ability to access the examination) for the comparison between the two are materially different.

A visually impaired candidate taking an exam for a relevant general qualification is allowed to use speech synthesised computer software to access the examination paper and record her responses to the questions, which she cannot do using the standard, or adapted, paper-based format. A person with a different impairment, who does not have these difficulties, is not granted the same facility. This person is not being treated less favourably on the grounds of his disability than the visually impaired candidate, because the relevant circumstances (i.e. ability to access the examination) for the comparison between the two are materially different.

**9.28** It should be noted that the same comparison is not to be used to determine claims of discrimination by way of a failure to make reasonable adjustments, or for disability-related discrimination (see paragraphs 5.2 and 5.3 in relation to reasonable adjustments claims, or when considering disability-related discrimination see paragraph 4.28).

## What amounts to disability-related discrimination?

**9.29 [s 31AB(1)]** Less favourable treatment of a disabled person may be unlawful under the Act even if it does not amount to direct discrimination. This will be the case if it amounts to disability-related discrimination instead.

**9.30** As explained at paragraph 4.25, this is treatment of a disabled person by a general qualifications body which amounts to unlawful discrimination if:

- it is for a reason related to the person's disability
- the treatment is less favourable than the way in which the general qualifications body treats (or would treat) others to whom that reason does not (or would not) apply, and
- the body cannot show that the treatment is justified.

**9.31** Disability-related discrimination covers a wider class of less favourable treatment beyond direct discrimination, because the causal connection between disability and the less favourable treatment can be much less direct for the former claim in comparison to the latter. In essence, disability-related discrimination can often occur where the reason for less favourable treatment relates to disability, but is not the disability itself.

**9.32** Hence, unlike direct discrimination, the key comparison for disability-related discrimination is with someone to whom the disability-related reason does not apply.

A candidate for an A level examination has a physical impairment affecting his manual dexterity and, in particular his ability to write. The general qualifications body has a requirement that all exam answers must be handwritten and that all answers in untidy handwriting will not be marked. The examination centre queries this requirement but the general qualifications body insists that it is a requirement of the examination, although for the purposes of these duties this will not be a competence standard. During the course of a lengthy examination the disabled candidate struggles to write his answers, but manages to complete the exam. However, his examination answers are not accepted because the quality of his writing is deemed to be untidy. The treatment of the disabled candidate is for a disability-related reason (his inability to write to a standard deemed to be tidy is due to his disability). The treatment is less favourable than the way in which someone who had written tidily would have been treated. It would therefore amount to disability-related discrimination unless the general qualifications body can justify it. Quality of handwriting is not usually a competence standard, so the ordinary material and substantial justification test would apply.

**9.33 [s 31AB(1)(b)]** Unlike treatment which amounts to direct discrimination (which is incapable of justification), a general qualifications body's treatment of a disabled person does not amount to disability-related discrimination if the body can show that it is objectively justified.

**9.34 [s 31AB(3)]** The general circumstances in which this may be possible are explained in Chapter 6. In summary, where disability-related discrimination occurs (and this is not due to the application of a competence standard), such treatment can be justified only if the reason for the treatment is material to the circumstances of a particular case and substantial.

**9.35 [s 31AB(5)]** A failure to discharge the duty to make reasonable adjustments may have a significant impact upon a general qualifications body's ability to justify disability-related less favourable treatment. Where a general qualifications body fails to discharge the duty to make reasonable adjustments, where this duty arises, and this leads to less favourable treatment for disability-related reasons (when such treatment otherwise would not have occurred had the duty been discharged) the body then cannot justify disability-related discrimination.

**9.36 [s 31AB(4)]** However, special rules apply in respect of justification of less favourable treatment in the application of a competence standard (see paragraphs 9.57 onwards for further details). A different justification test applies where the application of a competence standard results in disability-related less favourable treatment. Where this is the case, justification can only be made out where:

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

## Harassment and victimisation

**9.37** It is also unlawful for a general qualifications body to harass (see paragraphs 4.36 and 4.37 for further details) a disabled person for disability-related reasons and to victimise a person (whether or not he is disabled – see paragraphs 4.31 to 4.34 for further details).

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

### Who is the duty owed to?

**9.38 [s 31AB(2) and s 31AD]** A general qualifications body owes the duty to make reasonable adjustments to a disabled applicant or potential applicant for a relevant general qualification and to a disabled person who holds a relevant general qualification conferred by it.

### How does the duty arise?

**9.39 [s 31AD(1)]** Under the Act, the duty upon general qualifications bodies to make reasonable adjustments arises in three distinct ways. Firstly, it arises where a provision, criterion or practice, applied by or on behalf of a general qualifications body, in relation to determining on whom a relevant qualification is to be conferred, places a disabled person (who has notified the body that he is, or may be, an applicant for conferment of that qualification) at a substantial disadvantage (i.e. a disadvantage that is more than minor or trivial) in comparison with persons who are not disabled.

**9.40 [s 31AD(2)]** Secondly, the duty arises where a provision, criterion or practice which is applied by or on behalf of a general qualifications body, other than one for determining on whom a relevant qualification is to be conferred, places a disabled person – who applies for, or holds, a relevant general qualification – at a substantial disadvantage in comparison to non-disabled persons.

**9.41 [s 31AD(3)]** Thirdly, the duty arises where any physical feature of premises occupied by a general qualifications body places a disabled person, who holds or applies for a relevant qualification conferred by the body, at a substantial disadvantage

in comparison to non-disabled persons – Chapter 10 provides further information on the legal aspects of the physical features aspect of the duty.

### Reasonable adjustments and competence standards

**9.42** It should be noted that the duty to make reasonable adjustments **does not apply at all** to competence standards. However, in respect of relevant general qualifications, the process of assessing the competence standard is in most cases subject to the duty where the process is not part of the knowledge, skills and understanding being tested (see paragraphs 9.57 onwards for further information about competence standards).

The method of assessing whether candidates have achieved the various grades for A level History involve scrutiny of essays written by candidates in an examination setting. The means by which essays are written are not competence standards. Instead, any provisions, criteria and practices concerning the means by which essays are written, which the body applies, are subject to the duty to make reasonable adjustments if they result in substantially disadvantaging a disabled candidate due to his/her disability.

Certain elements of a relevant general qualification can be assessed either orally or in writing. Some of these elements may be competence standards which are not subject to the duty to make reasonable adjustments. However, the process of assessment itself may not be a competence standard and is, therefore, likely to be subject to the reasonable adjustments duty. This duty could arise where one assessment method, in contrast to another method, places a disabled candidate at a substantial disadvantage.

## Reasonable adjustments and exemptions from examination components

**9.43 [Regs 1 and 3 of SI/2007/1764]** The duty to make reasonable adjustments arises because a disabled candidate experiences substantial disadvantage, for example, in relation to the arrangements that a general qualifications body has for determining upon whom a relevant general qualification is conferred. The regulations say that where the duty arises it is always a reasonable adjustment to exempt a disabled candidate from one or more inaccessible examination and assessment components where the substantial disadvantage in question cannot be eliminated by any other reasonable adjustment. The regulations define a 'component' in this context as a discrete, assessable element of a qualification that is not separately certificated.

**9.44** The regulations makes it explicitly clear that such an exemption is an adjustment of last resort in that it is only to be considered where no other reasonable adjustment can be made. It would not, therefore, be reasonable to grant a component exemption where another adjustment could have been made to discharge the duty where it arises that would have allowed a disabled person to access the component(s) in question. The first consideration must be whether the duty to make reasonable adjustment arises and then what reasonable adjustments, other than component exemptions, can be made to discharge the duty, before even considering component exemptions.

**9.45 [s 31AD(1)(a) and s 31AD(2)(a)]** Since the duty to make reasonable adjustments does not apply to competence standards, there is no duty under the reasonable adjustment duties to exempt a disabled candidate from competence standards.

**9.46 [s 31AB(4)]** However, the fact that the duty to make reasonable adjustments does not apply to competence standards

must not lead to the assumption that general qualifications bodies are under no duty to amend competence standards. The application of a competence standard could, in certain circumstances, constitute disability-related discrimination, and where it does, a general qualifications body is required (together with, where applicable, the regulator) to consider whether such a competence standard is a proportionate means of achieving a legitimate aim in order to be in a position to justify such discrimination (see paragraphs 9.57 onwards for further information about competence standards and justification). In practice, this may require consideration of granting component exemptions where no other appropriate alternative exists. Otherwise, unlawful disability-related discrimination may occur in the application of competence standards.

## Knowledge of disability and reasonable adjustments

**9.47 [s 31AD(4)]** The duty to make reasonable adjustments only applies if the general qualifications body knows, or could reasonably be expected to know, that the disabled person concerned is, or may be, an applicant for a relevant general qualification. Likewise, the duty only applies if the body knows or should know that the person has a disability and is likely to be placed at a substantial disadvantage compared with people who are not disabled.

**9.48** Although there is no duty on a general qualifications body to make a reasonable adjustment if it does not have the requisite knowledge, it will be deemed to have that knowledge in certain circumstances.

**9.49** Where information is available which should alert a general qualifications body to the circumstances mentioned in paragraph 9.47, or would be if it were reasonably alert, the body cannot simply ignore it. It is important for disabled people, if they wish to take

full advantage of the provisions of the Act, to let educational institutions and general qualifications bodies know of their disability and of substantial disadvantages that are likely to arise. The earlier an examination centre, educational institution and/or a general qualifications body is told about a disability and its effects, the more likely it is to be able to make effective adjustments.

**9.50** The Act does not prevent a disabled person keeping a disability confidential from a general qualifications body (although other obligations may require its disclosure). But this is likely to mean that unless the general qualifications body could reasonably be expected to know about the person's disability anyway, it will not be under a duty to make a reasonable adjustment. If a disabled person expects a general qualifications body to make a reasonable adjustment, he will need to provide it with sufficient information to carry out that adjustment.

### **What is the practical effect of the duty for general qualifications bodies?**

**9.51** Where it applies in relation to general qualifications bodies, the duty to make reasonable adjustments is most likely to affect arrangements in relation to, for example, taking tests and examinations, and other methods of assessment (see also paragraph 9.60). In order to discharge the duty, where it arises, it is advisable that bodies undertake a proper assessment of reasonable steps that could be taken in any given case.

**9.52** Where the duty does apply, the general qualifications body must take such steps as are reasonable to prevent the provision, criterion or practice, or the physical feature (as the case may be) from placing the disabled person in question at a substantial disadvantage – Chapter 5 also provides further information in this regard.

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

A man who lip-reads because of his hearing impairment is due to have a practical test as part of his chemistry A level course. The general qualifications body instructs an examination centre to provide a staff member to work with the candidate on a one-to-one basis in a separate room to issue the instructions during the assessment. This is likely to be a reasonable adjustment to make.

A craft, design and technology relevant general qualification incorporates a lengthy carpentry test consisting of a three hour practical examination. A woman with arthritis undertaking this examination wishes to take this test as two sessions of one and a half hours on two consecutive days because of the disadvantage which taking it over three hours would put her at. The general qualifications body awarding the qualification allows the test to be taken in this way. This could constitute a reasonable adjustment.

A candidate for a written examination for a relevant general qualification has a visual impairment. The general qualifications body conferring this qualification allows this candidate the option of accessing and taking the examination using specially adapted suitable computer software, with extra



time to sit the examination if required, or permits the candidate to use a reader and a scribe. Subject to the individual requirements of this visually impaired candidate, any of these measures may be a reasonable adjustment.

A general qualifications body allows a candidate with a mobility impairment who uses a wheelchair to undertake a Key Skills assessment at home with an approved invigilator or examiner in circumstances where the assessment venue is inaccessible for wheelchair users and suitable alternative locations are not available. This is likely to be a reasonable step for the body to take.

## What advance steps should general qualifications bodies take?

**9.53** As mentioned in Chapter 2, it is also necessary for general qualifications bodies to set up effective systems for working with educational institutions, and other bodies with whom they work, to ensure that general qualifications bodies obtain the information they need to make adjustments for disabled students who are taking examinations or other assessments in order to obtain a relevant general qualification. For example, such a system could comprise the following steps:

- In accordance with suitable guidance from the general qualifications body, information is sought by educational institutions, well in advance of the examination or assessment in question, from candidates seeking relevant general qualifications about whether they have disabilities and if reasonable adjustments are required in respect of exams, testing or assessments.
- After gathering such information and obtaining consent from each individual for it to be disclosed to the general qualifications body (explaining to individuals why disclosure is necessary), the education institution then promptly passes this on to

the general qualifications body.

- In order to deal with these matters efficiently and effectively, the general qualifications body could provide a single point of contact within their organisation for examination centres/educational institutions or disabled candidates as appropriate, for individual students and pupils who may need to discuss their particular requirements further directly with the general qualifications body.
- The general qualifications body uses the full information it obtains to consider the range of steps it can take and the reasonableness of each step. It can then decide what reasonable adjustments should be made and, thereafter, notify educational institutions of what adjustments it can allow and how such adjustments will be effectively implemented.

A body which confers A level general qualifications asks a college for information about students who may require reasonable adjustments. The college seeks this information from its students. A student with cerebral palsy has difficulty writing, and therefore asks to be allowed to take the examinations using a computer. The college relays this request to the general qualifications body, which gives its consent to this adjustment being made and the college ensures that it can provide him with appropriate facilities to take the examinations. These are likely to be reasonable steps for the general qualifications body and for the college to have to take.

**9.54** Educational institutions or other bodies often provide education, training or other services (such as facilities for taking examinations or assessments) which lead to the attainment of a relevant general qualification, even though they do not themselves confer the qualification. Such institutions or bodies are likely to have separate duties under Part 3 or Part 4

in respect of the education, training or other services they provide. To ensure full compliance with the Act, it is advisable for such institutions or bodies to inform general qualifications bodies at an early stage about a candidate's disability and its relevant implications – subject, of course, to obtaining the candidates consent first.

**9.55** In practice, the needs of a disabled person who is taking an examination, test or assessment can only be met fully if the educational institution or body and the general qualifications body concerned work together to achieve an appropriate outcome.

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

A general qualifications body provides written guidance to schools and colleges on the range of adjustments to exams and assessments that it can authorise. Within this guidance, it makes it clear that applications for reasonable adjustments will be considered on an individual basis, according to the needs of the candidate. In addition, it highlights that further advice can be sought from its dedicated enquiry line and recommends that schools and colleges appoint an appropriately trained person to liaise between the candidate and the general qualifications body in respect of adjustments.

**9.56** Whilst in general there is a requirement for candidates to communicate directly with examination centres rather than general qualifications bodies (particularly in relation to reasonable adjustments), on occasion direct communication may, for example, be required between candidates and general qualifications bodies, particularly in relation to challenges by candidates against decisions made by general

qualifications bodies, and requests by candidates to such bodies to amend discriminatory competence standards. General qualifications bodies should ensure that disabled candidates have the means to effectively communicate their difficulties, concerns and requirements in this regard by providing and advertising an appropriate contact person.

## What does the Act say about competence standards?

### What is a competence standard?

**9.57 [s 31AB(9)]** The Act says that a competence standard is an academic, medical, or other standard applied by or on behalf of a general qualifications body for the purpose of determining whether or not a person has a particular level of competence or ability.

**9.58** General qualifications bodies are likely to impose various requirements and conditions upon the conferment of a relevant general qualification.

**9.59** However, any such requirement or condition only amounts to a competence standard if its purpose is to demonstrate a particular level of competence or ability. A requirement that a person has a particular level of knowledge of a subject is, most obviously, a competence standard for relevant general qualifications.

**9.60** On the other hand, a condition that a person can, for example, do something within a certain period of time will not be a competence standard if it does not determine a particular level of competence or ability. The following are examples of requirements which are therefore unlikely to amount to competence standards and are, therefore, likely to be subject to the duty to make reasonable adjustments:

- a requirement that a candidate must physically attend an examination at a particular location
- a requirement that a candidate attend

a course over a certain period of time

- a requirement that a candidate attend a course full-time and not part-time
- a requirement that a candidate for a written exam must 'write neatly'
- a requirement to hear spoken words
- a requirement to decipher text.

**9.61** In respect of relevant general qualifications, there is usually a difference between a competence standard and the process by which attainment of the standard is determined. For example, the conferment of many relevant general qualifications is dependent upon passing an academic examination. The examination itself may not involve a competence standard – because the mechanical process of sitting the examination is unlikely to be relevant to the determination of a relevant competence or ability, particularly in respect of relevant general qualifications.

Candidates for a GCSE English qualification are expected to demonstrate a defined level of knowledge and understanding of the language as a whole. Simply reading written English text does not demonstrate the level of knowledge and understanding required to secure the qualification. As such, the requirement to read English text on paper does not, of itself, amount to the application of a competence standard. The ability to read such text, therefore, is likely to be subject to the duty to make reasonable adjustments.

**9.62** In a limited number of circumstances, the process of assessing whether a competence standard has been achieved for relevant general qualifications is part of the standard itself (as already explained in paragraph 9.35). The ability to carry out a particular task or activity may be a competence standard where the conferment of a relevant general qualification is necessarily conditional upon having a practical skill or ability which must be demonstrated by completing a practical test. Therefore,

the ability to take the test may itself amount to a competence standard.

## What is the significance of this distinction?

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

- there is no duty to make reasonable adjustments in respect of the application of a competence standard, and
- in the limited circumstances in which less favourable treatment of a disabled person in the application of such a standard may be justified, justification is assessed by reference to a special statutory test (see paragraph 9.68).

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

A woman has Chronic Fatigue Syndrome and is studying for a relevant general qualification. She has missed a whole section of her course due to disability-related ill health. However, the general qualifications body has the option, which it exercises in this case, of allowing the disabled person a reasonable amount of more time to complete the course over a longer period, so as to facilitate completion of the section of the course that has been missed. Allowing more time to complete the course does not affect a competence standard and this may, therefore, constitute a reasonable adjustment.

**9.65** As noted in paragraphs 9.53 to 9.56, it is advisable for general qualifications bodies and, where relevant, educational institutions to ensure that they have adequate information to assess their responsibilities to disabled people. Even though a general qualifications body has no duty to make reasonable adjustments to a competence standard, it needs to obtain enough information about a person's disability to decide whether a reasonable adjustment should be made to some other aspect of the process by which it confers the relevant general qualification in question.

**9.66** Therefore, a general qualifications body **must** ascertain whether a person's disability impacts upon a competence standard in the first place. By doing this the body can establish what it can do to assist a disabled person to demonstrate that they can meet the required competence standard by making reasonable adjustments to provisions, criteria and practices (other than competence standards) that put a disabled candidate at a substantial disadvantage in comparison to non-disabled candidates.

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

**9.67** Less favourable treatment of a disabled person can never be justified if it amounts to direct discrimination under Part 2 or Chapter 2A of Part 4 (see paragraph 9.21) – for example, where the treatment is based on generalised, or stereotypical, assumptions about the disability or its effects. This principle applies to the way that a disabled person is treated in the application of a competence standard in the same way that it applies to treatment of him in other respects.

**9.68 [s 31AB(4)]** To the extent that it does **not** amount to direct discrimination, the Act says that, where the application of a competence standard to a disabled person amounts to less favourable

treatment of him for a reason which relates to his disability, that treatment is justified if, but only if, the general qualifications body can show that:

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

A general qualifications body refuses to grant a Physical Education (PE) GCSE qualification to a candidate who fails a physical fitness test during this course. This does not amount to direct discrimination because anyone, disabled or non-disabled, failing the fitness test would be treated in the same way. However, this may constitute less favourable treatment for a reason related to the candidate's disability. The treatment could be justified if the fitness test was a competence standard applied equally to all candidates **and** the fitness test was a proportionate way of showing that the person was fit enough to meet the legitimate aims of the relevant general qualification. Alternatively, where the fitness standard is not a competence standard, the treatment could be justified for a material and substantial reason.

In the above situation the general qualifications body together with, where relevant, the regulator had not reviewed the physical fitness standards to see if they were justifiable. If it had done so, the body would have found that the fitness standard demanded was much higher than was necessary to demonstrate the candidate's ability in PE. The general qualifications body and the regulator would, therefore, be unlikely to be able to justify this competence standard.

**9.69** The effect of these provisions is that, in the limited circumstances, less favourable treatment which is disability-related and which arises from the application of a competence standard can be objectively justified. Justification

does not depend on an individual assessment of the disabled person's circumstances, but depends instead on an assessment of the purpose and effect of the competence standard itself.

**9.70** For a competence standard to be objectively justifiable, the general qualifications body would have to show that the standard is appropriate and necessary, in that it is a proportionate means of achieving a legitimate aim. To rely on this justification defence, a general qualifications body will have to show that applying the standard in the form it has chosen to do so, or as required by the regulator, is sufficiently important to override the right not to be discriminated against. In order to demonstrate this, it is expected that general qualifications bodies, and, where relevant, the regulator will have:

- demonstrated, through cogent and persuasive evidence, that there is a pressing need supporting the aim which the treatment is designed to achieve and thus amounts to a 'legitimate' aim; and
- that the application of the standard in its chosen form is causally related to achieving that aim; and
- that it has understood the adverse effects of competence standards on disabled people as a whole and the particular adverse impact these standards have on certain groups of disabled people; and
- that it has thoroughly considered ways of meeting standards that have a less detrimental impact on disabled people; and
- that there was no other way to achieve the legitimate aim that had a less detrimental impact on the rights of disabled people.

**9.71** These special rules about justification are only relevant to the actual application of a competence standard; they do not apply to the non-application of such a standard in any given instance. If a general

qualifications body applies a competence standard incorrectly, then it is not, in fact, applying the standard and these rules do not operate. Instead, the more usual material and substantial test of justification operates (assuming, of course, that the incorrect application of the standard does not amount to direct discrimination, but would constitute disability-related less favourable treatment).

**9.72** The application of a competence standard concerning a medical requirement may, depending on the circumstances, result in less favourable treatment of a disabled person. Medical requirements which are based on stereotypical assumptions about the health and safety implications of disability generally, or about particular types of disability, are likely to be directly discriminatory – less favourable treatment of a disabled person resulting from the application of such a requirement will therefore be unlawful.

A person wishing to undertake a relevant general qualification in performing arts has a physical impairment and uses a wheelchair. The relevant general qualifications body refuses to accept this person's assessment entry because of their medical standards. It does this without considering the particular circumstances of the disabled person, without consulting with the examination centre, or asking them to undertake an assessment, which would include an assessment of health and safety risks. This is likely to constitute direct discrimination.

**9.73** Nevertheless, genuine concerns about health and safety may be relevant to the justification of a competence standard concerning a medical requirement. However, it is far less likely that competence standards based on medical requirements apply in respect of relevant general qualifications in comparison, for example, with professional and trade qualifications. The application

of medical requirements in relation to relevant general qualifications, are unlikely to be legitimate competence standards and these requirements may amount to direct discrimination. Assuming that it does not amount to direct discrimination, the application of such a requirement, in rare circumstances, to a disabled person will be justified only if the body can show that the requirement applies (or would apply) equally to people who do not have that disability. It would also be necessary to show that the requirement serves a legitimate purpose and is a proportionate means of achieving that purpose. The general qualifications body would have to provide cogent evidence that the medical standard is genuinely fundamental to the requirements of the relevant general qualification and its wider purpose.

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

**9.74** If unlawful discrimination is to be avoided when the application of a competence standard results in less favourable treatment of a disabled person, the general qualifications body concerned will have to show two things. First, it will have to show that the application of the standard does not amount to direct discrimination. Second, it will be necessary to show that the standard can be objectively justified.

**9.75** This is more likely to be possible where the regulator(s) (if relevant) and the general qualifications body have both considered the nature and effects of its competence standards in advance of an issue arising in practice.

**9.76 [s 49A]** In addition to their duties under Part 4 of the Act, general qualifications bodies should also be aware of the impact that the disability equality duties are likely to have upon discriminatory competence standards for relevant general qualifications. Whilst it is not clear, at the point in time at

which this Code is written, if the general disability equality duties (section 49A) apply to general qualifications bodies, it is recommended such bodies act as though these duties do apply to them. This is suggested, firstly, in order to ensure that these duties are discharged if they do indeed apply to general qualifications bodies, and thereby avoid the risk of non-compliance and the consequences this entails. Secondly, this is suggested because the disability equality duties (perhaps as a whole) do in fact apply to regulators, who in properly discharging these duties will need to delegate necessary requirements of these duties to general qualifications bodies. Therefore, in any event, the proper discharge of these duties is bound to have an impact upon the way in which general qualifications bodies carry out their functions.

**9.77** The ultimate aim of what is known as the general disability equality duty (see Chapter 2 for further details) is to ensure that disability equality becomes integral to the functions of public authorities and that authorities, in carrying out their functions, have due regard for the need to, amongst other things, promote disability equality and eliminate unlawful discrimination. These duties apply to public authorities whose functions explicitly concern reviewing and developing standards and requirements for relevant general qualifications.

**9.78** There are also specific duties imposed upon certain bodies listed in the relevant disability equality duty regulations, including (where specified) relevant regulators. These require the production of a Disability Equality Scheme, including an action plan, and disabled people must be involved in the development of the scheme. The general and specific duties should have a positive impact on:

- reducing and eliminating discriminatory competence standards
- improving access to the general qualifications framework

- increasing relevant general qualification attainment levels of disabled people.

**9.79** In relation to competence standards, the specific duties will require information to be collected concerning, in particular, the adverse impact of competence standards for general qualifications upon disabled people and/or certain groups of disabled people.

**9.80** More information concerning the disability equality duties can be found in publications listed in Appendix B of this Code.

**9.81** Consequently, when taking into account the requirements imposed on them under Part 4 and considering the impact of the disability equality duties upon them, it would be advisable for general qualifications bodies – together with (where appropriate) the relevant regulators – to carry out a process of identifying, evaluating and amending discriminatory competence standards.

**9.82** The following steps are deemed to be (non-exhaustive) necessary steps general qualifications bodies should already be carrying out in order to discharge their duties under the Act in relation to competence standards:

- identify the specific purpose of each competence standard which is applied, and examine the manner in which the standard achieves that purpose
- consider the impact which each competence standard may have on disabled people and, in the case of a standard which may have an adverse impact, asking whether the application of the standard is absolutely necessary
- review the purpose and effect of each competence standard in the light of changing circumstances – such as developments in technology, or improved understanding of the difficulties faced by, and the needs of, disabled people.

- examine whether the purpose for which any competence standard is applied could be achieved in a way which does not have an adverse impact on disabled people, and
- document the manner in which these issues have been addressed, the conclusions which have been arrived at, and the reasons for those conclusions.

# 10. Making reasonable adjustments to premises – legal considerations

## Introduction

**10.1** In Chapter 5 it was explained that one of the situations in which there is a duty to make reasonable adjustments arises where a physical feature of premises occupied by a trade organisation, qualifications body or general qualifications body places a disabled person at a substantial disadvantage compared with people who are not disabled. In such circumstances the organisation or body must consider whether any reasonable steps can be taken to overcome that disadvantage. Making adjustments to premises may be a reasonable step to have to take. This chapter addresses the issues of how leases, building regulations and other statutory requirements affect the duty to make reasonable adjustments to premises.

**10.2** The issues dealt with in this chapter largely concern the need to obtain consent to the making of reasonable adjustments where a trade organisation, qualifications body or general qualifications body occupies premises under a lease or other binding obligation. However, such organisations and bodies should remember that even where consent is not given for altering a physical feature, they still have a duty to consider taking other steps to overcome the disadvantage which the feature causes in respect of the disabled person.

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

**10.3** [s 59] A trade organisation, qualifications body or general qualifications body might have to obtain statutory consent before making adjustments involving changes to premises. Such

consents include planning permission, building regulations approval or a building warrant in Scotland, listed building consent, scheduled monument consent and fire regulations approval. The Act does not override the need to obtain such consents.

**10.4** Organisations and bodies should plan for and anticipate the need to obtain consent to make a particular adjustment. It might take time to obtain such consent, but it could be reasonable to make an interim or other adjustment – one that does not require consent – in the meantime.

A trade organisation occupies premises with steps up to the main entrance. These premises have facilities for members, such as a conference room and a library. The trade organisation is not aware of any members who have a mobility impairment and does not do anything to make its premises more accessible. When a new member notifies the organisation that she walks with crutches and wishes to use the premises, the organisation tries to obtain statutory consent to install a ramp with a handrail. It takes several months to obtain such permission. Because it cannot make this adjustment in time, it decides to make a temporary adjustment – making an existing side entrance, without steps, available for the disabled member to use. If the trade organisation had anticipated that this need was very likely to arise (through carrying out an access audit, for example), it would have been able to make this adjustment sooner.

**10.5** Where consent has been refused, there is likely to be a means of appeal. Whether or not the duty to take such



steps as it is reasonable to take includes pursuing an appeal will depend on the circumstances of the case.

## Building Regulations and building design

**10.6 [SI 2000/2531]** The design and construction of a new building, or the material alteration of an existing one, must comply with Building Regulations. For buildings in England or Wales, Part M of the Building Regulations (access to and use of buildings) is intended to ensure that reasonable provision is made for people to gain access to and use buildings. A similar provision applies in Scotland under the Technical Standards for compliance with the Building Standards (Scotland) Regulations 1990 and, from May 2005, under the Building (Scotland) Regulations 2004 and relevant functional standards and guidance in the associated Technical Handbooks.

**10.7** Nevertheless, the fact that the design and construction of a building (or a physical feature of a building) which a trade organisation, qualifications body or general qualifications body occupies meets the requirements of the Building Regulations does not diminish its duty to make reasonable adjustments in respect of the building's physical features. In particular, it should be noted that the partial exemption from the duty to remove or alter physical features which applies to service providers under Part 3 of the Act does not apply to trade organisations, qualifications bodies under Part 2 of the Act or general qualifications bodies under Part 4 of the Act.

**10.8** The Building Regulations building standards provide only a baseline standard of accessibility, which is not intended to address the specific needs of individual disabled people. It is therefore good practice for trade organisations, qualifications bodies and general qualifications bodies to carry out an assessment of the access needs

of each disabled person with whom it has dealings, and to consider what alterations can be made to the features of its buildings in order to meet those needs. It is also good practice to anticipate the needs of disabled people when planning building or refurbishment works.

**10.9** When assessing the access requirements of disabled people, it is likely to be helpful to refer to British Standard 8300:2001, **Design of buildings and their approaches to meet the needs of disabled people – Code of Practice**. Indeed, it is unlikely to be reasonable for a trade organisation, qualifications body or general qualifications body to have to make an adjustment to a physical feature of a building which it occupies if the design and construction of the physical features of the building is in accordance with BS8300. Further information about BS8300 can be found in Appendix B.

**10.10** In addition, although less comprehensive than BS8300, guidance accompanying the Building Regulations (known as 'Approved Document M') sets out a number of 'provisions' as suggested ways in which the requirements of the Regulations might be met. It is unlikely to be reasonable for a trade organisation, qualifications body or general qualifications body to have to make an adjustment to a physical feature of a building which it occupies if that feature accords with the relevant provisions of the most up to date version of Approved Document M.

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

**10.11 [s 18B(3) and Sch 4, Part 4, para 12]** A trade organisation or qualifications body may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage, charge or restrictive covenant or, in Scotland, a real burden) under which it cannot alter the premises without

someone else's consent. In these circumstances, the Part 2 of the Act provides that it is always reasonable for the organisation or body to have to request that consent, but that it is never reasonable for it to have to make an alteration before having obtained that consent. Under Chapter 2A of Part 4 of the Act, it may also be necessary for general qualifications bodies to obtain consent pursuant to a binding obligation and the Act does not override the need to obtain such consent.

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

### 10.12 [s 18A(2) and s 31ADB(2)]

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

**10.13 [Sch 4, Part I, para 1 and Sch 4, Part 4, para 15]** If a trade organisation, qualifications body or general qualifications body fails to make a written application to the lessor for consent to the alteration, it will not be able to rely upon the fact that the lease has a term preventing it from making alterations to the premises to defend its failure to make an alteration. In these circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the organisation or body to have made the alteration.

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

**10.14** The lessor may itself hold a lease the terms of which prevent it from consenting to the alteration without the consent of its landlord ('the superior lessor'). In such circumstances the effect of the superior lease is modified so as to require the lessee of that lease to apply in writing to its lessor (the 'superior lessor' in this context) if it wishes to consent to the alteration. As with the lessor of the trade organisation, qualifications body or general qualifications body, the superior lessor must not withhold such consent unreasonably but may attach reasonable conditions to the consent.

**10.15** Where a superior lessor receives an application from its lessee, the provisions described in paragraphs 10.16 to 10.30 apply as if its lessee were the trade organisation, qualifications body or general qualifications body.

## How do arrangements for gaining consent work?

### 10.16 [SI/2004/153 and SI/2007/2405]

Regulations made under the Act concerning trade organisations, qualifications bodies and general qualifications bodies govern the procedure for obtaining consent. These Regulations (the Disability Discrimination (Employment Field) (Leasehold Premises) Regulations 2004) and Disability Discrimination Act 1995 (Amendment etc) (General Qualifications Bodies) (Alternation of Premises and Enforcement) Regulations 2007 are commonly referred to in this chapter as the 'Leasehold Premises Regulations'. For the sake of clarity, references below to particular provisions in these regulations refer to the 2004 regulations and then the 2007 regulations.

**10.17 [Reg 4 and Reg 9]** In relation to trade organisations and qualifications bodies, the Leasehold Premises Regulations

say that, once the application has been made, the lessor has 21 days, beginning with the day on which it receives the application, to reply in writing to the trade organisation, qualifications body (or the person who made the application on its behalf). If it fails to do so it is taken to have unreasonably withheld its consent to the alteration. However, where it is reasonable to do so, the lessor is permitted to take more than 21 days to reply to the request. Under the different duties applicable to general qualifications bodies, a lessor has 42 days to reply to an application for the lessor's consent made by a general qualifications body, beginning with the day on which it receives the application. However, the lessor has 21 days to make a written request for any plans and specifications that it is reasonable for him to require and which were not included within the general qualifications body's application.

**10.18** If the lessor replies to a trade organisation or qualifications body's request by consenting to the application subject to obtaining the consent of another person (required under a superior lease or because of a binding obligation), but fails to seek the consent of the other person within 21 days of receiving the application (or such longer period as may be reasonable), it will also be taken to have withheld its consent. For general qualifications bodies, the relevant period for the lessor to seek the consent of another person is 42 days, and not 21 days, and the distinct duties applying to general qualifications bodies make no allowance for extending the period either for such longer period as may be reasonable, or at all.

**10.19** The Leasehold Premises Regulations provide that a lessor will be treated as not having sought the consent of another person unless the lessor has applied in writing to the other person indicating that the occupier has asked for consent for an alteration in order to comply with a duty to make reasonable adjustments, and that the lessor has given its consent conditionally

upon obtaining the other person's consent.

**10.20 [Reg 6 and Reg 11]** If the lessor replies refusing consent to the alteration, the trade organisation, qualifications body or general qualifications body must inform the disabled person of this, but has no further obligation to make the alteration (but see paragraph 10.2).

## When is it unreasonable for a lessor to withhold consent?

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

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

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

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

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

**10.23 [Reg 5 and Reg 10]** The Leasehold Premises Regulations say that, provided the consent has been sought in the way required by the lease, it is unreasonable for a lessor to withhold consent in circumstances where the lease says that consent will be given to alterations of the kind for which consent has been sought.

**10.24 [Reg 6]** The Leasehold Premises Regulations concerning trade organisations and qualifications bodies only specifically provide that withholding consent will be reasonable where:

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

It will also be reasonable for a lessor to withhold consent where it is bound by an agreement under which it would have to make a payment in order to give the consent, but which prevents it from recovering the cost from the trade organisation, qualifications body. **[Reg 11]** This particular requirement does not apply to an application for the lessor's consent made by a general qualifications body. In this specific context, a lessor may reasonably withhold consent where it does not know, and could not reasonably know, that the alteration is one that the general qualifications body proposes to make in order to comply with the duty to make reasonable adjustments.

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

**10.25** The Leasehold Premises Regulations set out some conditions which it is reasonable for a lessor to make. Depending on the circumstances of the case there may be other conditions which it would also be reasonable for a lessor to require a trade organisation, qualifications body or general qualifications body to make. Where a lessor imposes other conditions, their reasonableness may be challenged in the course of subsequent employment tribunal proceedings (where trade organisations and qualifications bodies are concerned) or county/sheriff court proceedings (where general qualifications bodies are concerned) – see paragraph 10.27.

**10.26 [Reg 7 and Reg 12]** The conditions set out in the Leasehold Premises Regulations as ones which a lessor may reasonably require a trade organisation, qualifications body or general qualifications body to meet are that it:

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

In the case of general qualifications bodies only, there is a further condition that the consent of another person required under a superior lease or binding obligation must be obtained. In addition, in a case where it would be reasonable for the lessor to withhold consent, the lessor may give such consent subject to a condition that the premises are reinstated

to their original condition at the end of the lease. This condition does not apply to general qualifications bodies.

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

**10.27 [Sch 4, Part 1, para 2 and Sch 4, Part 4, para 17]** Where a disabled person brings legal proceedings against a trade organisation, qualifications body or general qualifications body under Part 2 or Part 4 – and those proceedings involve a failure to make an alteration to premises – he may ask the employment tribunal or County/Sheriff Court hearing the case to bring in the lessor as an additional party to the proceedings. The organisation or body may also make such a request. The tribunal or court will grant that request if it is made before the hearing of the case begins – save where the court can refuse the request if the court considers that another lessor should be brought into the proceedings. It may refuse the request if it is made after the hearing of the claim begins. The request will not be granted if it is made after the tribunal or court has determined the claim.

### Reference to court

**10.28 [Sch 4, Part 4, para 16]** If a general qualifications body has written to the lessor for consent to make an alteration and the lessor has refused consent or has attached conditions to his consent, the general qualifications body or a disabled person who has an interest in the proposed alteration may refer the matter to a County Court or, in Scotland, the Sheriff Court. The court will decide whether the lessor's refusal or any of the conditions are unreasonable. If it decides that they are, it may make an appropriate declaration or authorise the general qualifications body to make the alteration under a court order (which may impose conditions on the general qualifications body). Where the general

qualifications body occupies premises under a sub-lease or sub-tenancy, these provisions are modified to apply also to the general qualifications body's landlord.

**10.29** Where the lessor has been made a party to the proceedings, the employment tribunal or County/Sheriff Court may determine whether the lessor has unreasonably refused consent to the alteration or has consented subject to unreasonable conditions. In either case, the tribunal or court can:

- make an appropriate declaration
- make an order authorising the organisation or body to make a specified alteration
- order the lessor to pay compensation to the disabled person.

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

## Comparison with the procedure for obtaining consent under Part 3

**10.31** There are similar provisions which govern the procedure by which a service provider may obtain consent to an alteration which it proposes to make in order to comply with a duty of reasonable adjustment under Part 3 of the Act. These procedures are broadly similar to procedures under Part 4 of the Act that apply to general qualifications bodies. However, it should be noted that the procedures for obtaining consent under Parts 2 and 3 respectively differ in certain ways. In particular:

- the periods within which the lessor must respond to an application for consent are not the same – under Part 3 (and in relation to Part 4 duties concerning general qualifications

bodies) the relevant period is 42 days beginning with the day on which the application is received

- Under Part 3 (and in relation to Part 4 duties concerning general qualifications bodies) the lessor may require plans and specifications to be submitted **before** it decides whether to give consent
- Under Part 3 (and in relation to Part 4 duties concerning general qualifications bodies) it is possible to make a free-standing reference to the court if the lessor has either refused consent or attached conditions to it. Under Part 2, the question of consent to alterations can only be considered by an employment tribunal in the course of a complaint of discrimination.

# 11. Other relevant provisions

**11.1** Additional provisions of the Act (and provisions of other legislation) are relevant to understanding the protection from discrimination afforded to disabled people in relation to trade organisations, qualifications bodies and general qualifications bodies. This chapter describes those provisions, and focuses in particular on the way in which disputes under the Act should be resolved. It should be noted at the outset that the duties imposed on trade organisations and qualifications bodies are contained in Part 2 of the Act (and are enforceable through employment tribunals), whereas the duties imposed on general qualifications bodies are contained in Chapter 2A of Part 4 of the Act (and are enforceable through the county courts in England and Wales and the sheriff courts in Scotland).

## Resolving disputes under Part 2 of the Act

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

**11.3 [s 17A(1) and s 55 and Sch 3, para 3]** The Act says that a person who believes that someone has unlawfully discriminated against him (which includes victimising him or failing to make a reasonable

adjustment) or has subjected him to harassment, may make an application to an employment tribunal. Such an application must normally be made within three months of the date when the incident complained about occurred.

**11.4 [s 17A(1A)]** This is subject to one proviso. In cases of alleged discrimination or harassment by a qualifications body, the Act says that no application may be made to an employment tribunal if a statutory appeal is available in respect of the matter in question.

**11.5** Before making an application to an employment tribunal (or within 28 days of lodging it), a disabled person can request information relevant to his claim from the person against whom the claim is made. This is known as the 'questionnaire procedure'. There is a standard form of questionnaire (DL56) and accompanying booklet which explains how the procedure works (see Appendix B for details).

**11.6** When an application to an employment tribunal has been made, a conciliation officer from the Advisory, Conciliation and Arbitration Service (ACAS) will try to promote settlement of the dispute without a tribunal hearing. However, if a hearing becomes necessary – and if the application is upheld – the tribunal may:

- [s 17A(2)] declare the rights of the disabled person (the applicant), and the other person (the respondent) in relation to the application
- order the respondent to pay the applicant compensation, and
- recommend that, within a specified time, the respondent takes reasonable action to prevent or reduce the adverse effect in question.

**11.7 [s 17A(4)]** The Act allows compensation for injury to feelings to be awarded whether or not other compensation is awarded.

**11.8 [s 17A(5)]** The Act also says that if a respondent fails, without reasonable justification, to comply with an employment tribunal's recommendation, the tribunal may:

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

**11.9** Sources of information about how to make an application to an employment tribunal are listed in Appendix B.

## Other provisions for Part 2 of the Act

### Anti-avoidance provisions

**11.10 [Sch 3A, Part 1]** Generally speaking, a disabled person cannot waive his rights (or the duties of a trade organisation or qualifications body) under the Act. The Act says that any term of a contract is 'void' (i.e. not valid) where:

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

**11.11** Trade organisations and qualifications bodies should not include in an agreement any provision intended to avoid obligations under the Act, or to prevent someone from fulfilling obligations. An agreement should not, therefore, be used to try to justify less favourable treatment or deem an adjustment unreasonable. Even parts

of agreements which unintentionally have such an effect are unenforceable if they would restrict the working of Part 2. However, as explained in Chapter 10, special arrangements cover leases and other agreements which might restrict the making of adjustments to premises.

### Compromise agreements

**11.12 [Sch 3A, Part 1]** The effect of the Act's provisions is also to make a contract term unenforceable if it would prevent anyone from making an application to an employment tribunal under Part 2, or a claim to a county/sheriff Court under Chapter 2A of Part 4, or would force them to discontinue such an application or claim (see paragraphs 11.3 and 11.24). There is a limited exception to this principle relating to settlement agreements concerning Part 2 claims which have either been brokered by an ACAS conciliation officer, or which are made in circumstances where the following conditions are satisfied:

- the disabled person has received advice from a relevant independent adviser about the terms and effects of the agreement, particularly its effect on his ability to apply to a tribunal
- the adviser has a contract of insurance or an indemnity provided for members of a profession or professional body, and
- the agreement is in writing, relates to the application, identifies the adviser and says that these conditions are satisfied.

**[Sch 3A, Part 1]** In this regard the Act defines the circumstances in which a person is a 'relevant independent adviser' for this purpose.

### Variation of contracts

**11.13 [Sch 3A, para 3]** A disabled person interested in a contract which contains a term of the kind mentioned in paragraph 11.10 may apply to a county court or, in Scotland, a sheriff court, for an order removing or modifying that term.



## Collective agreements and rules of undertakings

**11.14 [Sch 3A, Part 2]** There are also anti-avoidance provisions in the Act relating to the terms of collective agreements, and to rules made by trade organisations or qualifications bodies which apply to all or any of an organisation's members or prospective members, or (as the case may be), to all or any of the people on whom a body has conferred qualifications, or who are seeking qualifications from it.

**11.15** The Act says that any such term or rule is void where:

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

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

## Resolving disputes under Chapter 2A of Part 4 of the Act

### Introduction

**11.17** This part of the chapter explains what happens if someone makes a complaint against a general qualifications body, and what routes of redress exist.

It also explains what action may be taken to put right any discrimination that is found to have taken place.

### Resolving disputes

**11.18** It is good practice (and a legal requirement under the Civil Procedure Rules in England and Wales) to attempt to resolve disputes without resorting to legal proceedings. Complainants may, therefore, want to raise complaints directly with general qualifications bodies before resorting to legal proceedings. Many general qualifications bodies will have complaints procedures which aid the speedy resolution of disputes.

**11.19** General qualifications bodies must make reasonable adjustments to any internal complaints procedures to prevent a disabled person from being placed at a substantial disadvantage in comparison with people who are not disabled. Failure to do so will itself amount to a breach of the Act.

**11.20** So, for example, it is likely to be a reasonable adjustment for a general qualifications body to allow a disabled person who has communication difficulties some assistance to make a written statement of a complaint he wishes to make (such as by providing him with assistance via a neutral party). Depending on the circumstances, it may be reasonable to allow a disabled person with learning disabilities to be accompanied to a meeting by a family member or friend, or to send written communications to a blind or visually impaired person in a format which is accessible to him.

**11.21** Although, as stated above, it is good practice to try to resolve disputes internally wherever possible, there may be exceptional occasions where this will not be practical or appropriate.

## Conciliation

### Equality Act 2006

**11.22** The Equality and Human Rights Commission is empowered by the Act to set up an independent conciliation service for disputes arising under Part 4 of the Act to promote the settlement of disputes without recourse to the courts, and has done so. Conciliation is made available locally around the country, and disputes may be referred to conciliation by the Equality and Human Rights Commission if both the complainant and the general qualifications body agree to this. The Equality and Human Rights Commission has no power to impose a settlement on either party.

**11.23** Agreeing to participate in 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 three months if the conciliation process has been started within six months of a discriminatory act. No information disclosed to a conciliator during the conciliation process may be used in any subsequent court case without the permission of the person who disclosed it.

### Making a claim under Chapter 2A of Part 4 of the Act

**11.24** [s 31ADA and SI/2007/2405] The Act says that a person who believes that a general qualifications body has discriminated against him or has subjected him to harassment, may bring civil proceedings. Those proceedings take place in a County Court (in England and Wales) or the Sheriff Court (in Scotland). Similar proceedings may also be brought against a person who has aided someone else to commit an unlawful act. A claim must be lodged within six months of the alleged discrimination. Where there has been a continuing process of discrimination which takes place over a period of time,

the six months begins at the date of the last discriminatory act. A court has the discretion to allow claims made outside of the six-month time limitation period to proceed, where they decide that it is just and equitable to do so.

**11.25** If a complaint cannot be resolved and it is heard and determined by a court, the court may:

- declare the rights of the disabled person (the claimant in England and Wales and the pursuer in Scotland) and the other person (the defendant in England and Wales or the defender in Scotland) in relation to the claim (i.e. make a declaration of discrimination)
- order the defendant/defender to pay the claimant/pursuer compensation, including compensation for injury to feelings; and
- impose an injunction (in England and Wales) or specific implement or interdict (in Scotland) requiring a general qualifications body to take positive action or to prevent the general qualifications body from repeating any discriminatory act in the future.

Sources of information about how to make a claim to the courts are listed in Appendix B.

### Enforcement of certain provisions under Part 2 of the Act

**11.26** In addition, the Equality and Human Rights Commission has a direct involvement in the enforcement of the provisions of Part 2 relating to:

- instructing or pressurising other people to act unlawfully (see paragraph 3.24), and
- discriminatory advertisements (see paragraphs 3.25 and 3.28).

**11.27** [s 25(2) Equality Act 2006] Only the Equality and Human Rights Commission

may bring proceedings in respect of these matters. Where it does so, the Equality and Human Rights Commission may seek:

- a declaration from an employment tribunal as to whether a contravention has occurred, and
- an injunction from a County Court (or, in Scotland, an order from a Sheriff Court) restraining further contraventions.

**11.28** The Equality and Human Rights Commission may only apply for an injunction or order if it has first obtained a declaration from an employment tribunal that an unlawful act has occurred, and then only if it appears to the Equality and Human Rights Commission that a further unlawful act is likely to occur unless the person concerned is restrained.

# Appendix A: The meaning of disability

This appendix is included to aid understanding about who is covered by the Act. A Government publication, 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', is also available.

## When is a person disabled?

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

## What about people who no longer have a disability?

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

## What does 'impairment' cover?

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

## Are all mental impairments covered?

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

## What is a 'substantial' adverse effect?

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general

understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

## What is a 'long-term' effect?

A long-term effect of an impairment is one:

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

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

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

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

## What are 'normal day-to-day activities'?

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

impairment affects normal day-to-day activities is whether it affects one of the broad categories of capacity listed in Schedule 1 to the Act. They are:

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

## **What about treatment?**

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

## **Does this include people who wear spectacles?**

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

## **Are people who have disfigurements covered?**

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

## **Are there any other people who are automatically treated as disabled under the Act?**

Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. In addition, people who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist are automatically treated under the Act as being disabled. People who are not registered or certified as blind or partially sighted will be covered by the Act if they can establish that they meet the Act's definition of disability.

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

Progressive conditions are conditions which are likely to change and develop over time. Examples given in the Act are cancer, multiple sclerosis, muscular dystrophy and HIV infection. Where a person has a progressive condition he will be covered by the Act from the moment of diagnosis in respect of cancer, HIV and multiple sclerosis. Otherwise, a progressive condition is covered if 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, and if that impairment is likely eventually to have a substantial adverse effect on such ability.

## **What about people who are blind or partially sighted?**

[SI2003/712] People who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist are automatically treated under the Act as being disabled. People who are

not registered or certified as blind or partially sighted will be covered by the Act if they can establish that they meet the Act's definition of disability.

## **Are people with genetic conditions covered?**

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

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

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

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

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

# Appendix B: Further information

## Codes of practice, copies of the Disability Discrimination Act and regulations

Codes of practice and accompanying guidance for Part 2 (this Code as well as the **Code of Practice on Employment and Occupation**), Part 3 (**Code of Practice – Rights of Access: services to the public, public authority functions, private clubs and premises**), Part 4 (this Code and **Code of Practice: Post-16**) and Part 5A (**The Duty to Promote Disability Equality: Statutory Code of Practice**) are available from The Stationery Office:

Telephone: **0870 600 5522**  
Fax: **0870 600 5533**  
Email: **customer.services@tso.co.uk**  
Website: **www.tso.co.uk**

(The **Code of Practice for Schools** is available from the Equality and Human Rights Commission – see back cover for contact details.)

## Guidance about making a claim

Employment tribunal application forms can be obtained from Jobcentre Plus offices and from Citizens' Advice Bureaux. The Court Service also produces information about commencing claims in the county courts in England and Wales which can be accessed online at:

**www.hmcourts-service.gov.uk**

In Scotland, information about commencing claims in the sheriff courts can be found online at:

**www.scotcourts.gov.uk/sheriff/index.asp**

## Guidance on building design

Copies of BS8300 'Designing Buildings and their approaches to meet the access needs of disabled people' can be obtained from the British Standards Institute:

Telephone: **020 8996 9002**  
Fax: **020 8996 7001**  
Website: **www.bsi-global.com**

## Access audits

The National Register of Access Consultants provides a database of registered access auditors.

Telephone: **020 7234 0434**  
Fax: **020 7357 8183**  
Minicom: **020 7357 8182**  
Email: **info@nrac.org.uk**  
Website: **www.nrac.org.uk**

## Making websites accessible

Disabled people use a wide range of specialist hardware and software to access computers. It is important that websites are designed to be compatible with this. Websites can also have 'access features' built into their design, such as a choice of font sizes or colour schemes.

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

Telephone: **020 7391 2178**  
Email: **webaccess@rnib.org.uk**  
Website: **www.rnib.org.uk**

## Health and safety

The Health and Safety Commission (HSC) and the Health and Safety Executive (HSE) are responsible for the regulation of almost all the risks to health and safety arising from work activity in Britain.

Telephone: **0870 154 5500**  
Fax: **0292 085 9260**  
Minicom: **0292 080 8537**  
Email: **[hseinformationservices@natbrit.com](mailto:hseinformationservices@natbrit.com)**  
Website: **[www.hse.gov.uk](http://www.hse.gov.uk)**

## Other sources of information

ACAS, the Advisory, Conciliation and Arbitration Service can help employers and individuals with information on legislation and on industrial relations practices and procedures. ACAS has a Helpline service which can be contacted on:

Telephone: **08457 474 747**  
Textphone: **08456 061 600**  
Website: **[www.acas.org.uk](http://www.acas.org.uk)**

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

Telephone: **01625 545 745**  
Fax: **01625 524 510**  
Email: **[mail@ico.gsi.gov.uk](mailto:mail@ico.gsi.gov.uk)**  
Website: **[www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)**



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## **Equality and Human Rights Commission**

You can find out more about us or get in touch with us via our website at:

**[www.equalityhumanrights.com](http://www.equalityhumanrights.com)**

or by contacting one of our helplines below.

### **Equality and Human Rights Commission helpline — England**

Telephone: 08456 046 610

Textphone: 08456 046 620

Fax: 08456 046 630

9am–5pm, Monday to Friday, except Wednesday 9am–8pm

### **Equality and Human Rights Commission helpline — Scotland**

Telephone: 08456 045 510

Textphone: 08456 045 520

Fax: 08456 045 530

9am–5pm, Monday to Friday, except Wednesday 9am–8pm

### **Equality and Human Rights Commission helpline — Wales**

Telephone: 08456 048 810

Textphone: 08456 048 820

Fax: 08456 048 830

9am–5pm, Monday to Friday, except Wednesday 9am–8pm