

**THE (DRAFT) DISABILITY DISCRIMINATION ACT 1995
(AMENDMENT) REGULATIONS 2003**

EXPLANATORY NOTES AND SUPPLEMENTARY QUESTIONS

INTRODUCTION

1. These explanatory notes relate to the draft Disability Discrimination Act 1995 (Amendment) Regulations 2003. They have been prepared by the Department for Work and Pensions in order to assist the reader in understanding the Regulations and to help inform debate and assist with making comments on them.
2. The notes need to be read in conjunction with the Regulations and are not meant to be a comprehensive description of them. So where the whole or part of a regulation does not seem to require any explanation or comment, none is given.
3. The Regulations are published in draft, and the detailed drafting may be subject to alteration.
4. A number of specific questions arise out of the draft Regulations: these have been highlighted and we would be particularly grateful for a response on these issues from interested parties. Feedback on any issues will help with the final drafting of the Regulations which the Government plans to lay before Parliament in Spring 2003. **The address to send comments to is given at the end of these Notes.**
5. Publication of the draft Regulations and these notes is part of a broader consultation exercise led by the Department for Trade and Industry on Government proposals for implementing the requirements on sexual orientation, religion and belief and disability in the Employment Directive and the requirements of the Race Directive brought forward under Article 13 of the Treaty of Rome. More information about the consultation can be found in the document *Equality and Diversity - the way ahead*, which is available by ringing 0870 1502 500 (textphone: 0207 712 2492) and quoting reference 02/1164 (for a version in English).

BACKGROUND

6. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Directive') was adopted by the European Union in November 2000 under Article 13 of the EC Treaty. It requires all 15 EU Member States to introduce legislation to give effect to the "principle of equal treatment", prohibiting direct and indirect discrimination and harassment on the grounds of religion or belief, disability, age and sexual orientation in the fields of employment, self-employment, occupation and vocational training.
7. The Government put forward proposals – in *Towards Inclusion*, published in March 2001 – to give effect to the most significant changes to disability legislation required by the Directive. Further changes required by the Directive were consulted on in the document *Toward Equality and Diversity* which was published in December 2001.
8. These proposed Regulations, to be made on the basis of section 2(2) of the European Communities Act 1972, would amend the Disability Discrimination Act 1995 ('the Act') with a view to ensuring that it is consistent with the requirements of the Directive. The large majority of amendments are to Part 2 of the Act – which is concerned with employment-related matters. Save in a few limited respects, the Directive's scope does not extend to the subject matter of Parts 3 and 4 of the Act – see paragraphs 22 and 24 below.
9. The main provisions of the Directive (so far as it relates to disability) are summarised below.

OVERALL APPROACH AND SUMMARY

Overview

10. The intention of the Directive is to ensure that disabled people are protected from discrimination in the areas of employment and vocational training and guidance. The Directive does not define 'disability' but allows Member States to provide an appropriate definition. The Government's intention is to continue to use the very wide definition in Section 1 of the Act. The definition is expanded upon in Schedule 1 to the Act and in the Disability Discrimination (Meaning of Disability) Regulations 1996 (S.I. 1996/1455). Not only will anyone who meets this definition be protected by the Act, as amended to reflect the requirements of the Directive, but also people who have had such a disability (see section 2 and Schedule 2).
11. The Act already meets many of the Directive's requirements but some changes are needed. Most significant amongst them will be the changes to ensure that many currently omitted forms of employment are covered. This will ensure

that some 7 million additional jobs, in which around 600,000 disabled people currently work, will be subject to the Act's protection.

12. The Government has made clear that, subject to approval of the proposed Regulations by Parliament, they will be brought into effect on 1 October 2004. This will allow time for employers and others to plan for the changes, for effective advice and information to be provided for them and for awareness of the amended Act to be raised generally.

Key provisions in the Directive

13. Article 2.2 defines the concepts of direct and indirect discrimination. Member States are given a choice as to how to tackle indirect disability discrimination: either an "objective justification" or a "reasonable adjustments" approach.

14. Article 3.1 of the Directive sets out its scope. It provides as follows—

"Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) Conditions for access to employment, self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation whose members carry on a particular profession, including the benefits provided for by such organisations."

15. The Directive contains (or permits) a number of exceptions to the prohibition on direct or indirect discrimination—

- differences of treatment based on nationality (Article 3.2);
- payments under state schemes (Article 3.3);
- the armed forces (Article 2.5);
- measures necessary for public security, the maintenance of public order, the protection of health and the protection of the rights and freedoms of others (Article 2.5);
- genuine occupational requirements (Article 4.1);
- positive action (Article 7).

16. Article 5 requires the provision of “reasonable accommodation” by employers for disabled persons. This equates with existing provisions in the Act which impose a duty on employers and trade organisations to make reasonable adjustments. It is also one means given by the Directive to tackle indirect discrimination.
17. Other main provisions of the Directive—
 - prohibit harassment (Article 2.3), instructions to discriminate (Article 2.4), discrimination after the relevant relationship has ended (Article 9.1) and victimisation (Article 11);
 - require victims of discrimination to be given the right to enforce rights conferred under the Directive (Article 9) and to obtain compensation or other relief where appropriate (Article 17);
 - lay down rules for the shifting of the burden of proof in cases where a complainant establishes a prima facie case of discrimination (Article 10).

Main changes to the Disability Discrimination Act

18. Part 2 of the Act already goes some way to implementing requirements of the Directive, but we need to make some changes. In particular, we need to—
 - ensure that treatment amounting to “direct discrimination” against disabled people cannot be justified because the Directive requires such protection on the ground that people have a particular disability;
 - expressly prohibit harassment against disabled people on the grounds of their disability;
 - ensure that currently excluded employment is covered – employers with fewer than 15 employees, employment on ships, planes and hovercraft, fire-fighters, prison officers and specialised police forces;
 - widen the scope of Part 2 to cover the police, partnerships, barristers and advocates and their pupils, qualifications bodies, and practical work experience and to cover office and post holders more extensively (see paragraphs 199 to 203);
 - make unlawful instructions and pressure to discriminate;
 - provide for discriminatory collective agreements and rules of undertakings to be declared void;
 - clarify rules on burden of proof in tribunal cases.
19. We intend to apply the “reasonable adjustments” approach where people with a particular disability face indirect discrimination, as the Act does at present, save in a few limited areas where the objective justification test will apply (competence standards in relation to qualifications bodies, group insurance and occupational pensions).

20. We are also proposing to strengthen existing provisions of the Act concerning discriminatory adverts – giving additional powers to the Disability Rights Commission (DRC) in this regard.
21. With all the changes needed, we have restructured Part 2 of the Act – e.g. introducing common definitions of discrimination and reasonable adjustments, with a view to making it easier for persons affected to understand and use the legislation.
22. Some amendments are needed to Part 3, sections 19 to 21 of the Act (which apply to service providers) to the extent that they apply to anyone providing vocational guidance, vocational training or services to help people find and retain jobs – given that these fall within the Directive’s scope.
23. Where practicable, we have sought to achieve consistency with the concepts used in other existing and proposed discrimination legislation.
24. Where any minor changes are required to Chapter 2 of Part 4 of the Act, which deals with discrimination against disabled students and prospective students in Further and Higher Education, these will be dealt with separately and to a different timescale.

COMMENTARY ON THE DRAFT REGULATIONS

Amendments to the Disability Discrimination Act 1995

Regulation 3

Meaning of “discrimination” and “harassment” for the purposes of Part 2.

25. Currently, “discrimination” is defined in section 5 of the Act in relation to discrimination by employers against applicants and employees (and discrimination by principals against contract workers: section 12(3)), and section 14 for discrimination by trade organisations as—
 - (a) unjustified less favourable treatment of a disabled person for a reason related to his disability, in comparison with others to whom that reason does not or would not apply; or
 - (b) unjustified failure to make a reasonable adjustment.
26. Regulation 3 replaces these provisions with a new definition of discrimination applying throughout Part 2 of the Act, that is, in relation to employers, contract workers and trade organisations as well as to those being brought within the scope of the Act by these Regulations (such as partners and barristers). Note, however, that the new provisions on occupational pensions, insurance services and qualification bodies (sections 4D, 4E and 14A) apply variants to the common definition in a number of circumstances.

27. New section 3A re-enacts much of the existing definition of discrimination but now makes clear that what the Directive describes as ‘direct discrimination’ cannot be justified. It also removes the possibility (which existed under section 5(2)(b) of the Act) of justifying a failure to make an adjustment which it is reasonable for a person to have to make.
28. New section 3B, which applies to all of Part 2, sets out a statutory definition of ‘harassment’. Subsequent provisions (for example, new section 4(3)) confirm that such conduct is covered by the Act.

New section 3A – meaning of “discrimination”

29. Section 3A(1) restates in precisely the same terms the definition of discrimination currently used in current sections 5(1) and 14(1) of the Act. The section provides that, unless it can be justified, it will be discrimination to treat a disabled person less favourably for a reason related to his disability than others to whom that reason does not (or would not) apply.
30. Similarly, section 3A(2) restates the current position in Part 2 that less favourable treatment of a disabled person can be justified only if the reason for it is both material to the circumstances of the particular case and substantial.
31. Section 3A(3) is a new provision designed to implement Articles 2(1) and 2(2)(a) of the Directive (which prohibit ‘direct discrimination’ as there defined). The section makes clear that less favourable treatment cannot be justified if it occurs merely because an individual has a disability, rather than being based on a consideration of that individual’s abilities. The subsection thus ensures that direct discrimination in the sense used in the Directive cannot be justified under Part 2. Whilst the Act will continue to permit less favourable treatment where that is required by other legislation, the scope for that will be more limited than at present: see the explanation (in the supplementary points listed at the end of these notes) concerning possible amendments to section 59. The intention of the changes in section 3A is to outlaw prejudicial treatment imposed simply because a person is disabled, such as a ‘blanket ban’ on the employment of persons with a particular disability. Justification of such treatment has always been unlikely, but the subsection now makes this explicit.
32. Thus, for example, section 3A(3) would be likely to apply in circumstances where:
 - (a) an employer, on learning that a job applicant has diabetes, summarily rejects the application without giving any consideration of the applicant’s circumstances or whether the person concerned would be competent to do the job (with or without a reasonable adjustment);
 - (b) a disabled employee is refused access to the employer’s sports and social club simply on the basis that the club does not allow disabled members, and

without any consideration of whether the employee might benefit from membership, and even though they could access the club with a reasonable adjustment;

- (c) without any consideration of whether he will be able to work for as many years as other employees, a newly recruited disabled person is required to pay the same contributions to an occupational pension scheme even though he is denied access to ill health retirement benefits available to other members of the scheme.
33. Section 3A(4) ensures that a failure to comply with a duty to make reasonable adjustments is also discrimination. This restates the current position under Part 2 of the Act, although it will not be possible (as is currently the case) to justify failure to make a reasonable adjustment. The Directive does not allow for a second defence. In any event, any “reasonable” adjustment which an employer, say, might argue he was justified in not making would have been unreasonable for him to have to make in the first place.
34. Section 3A(5) reproduces a provision which currently appears in a number of places in Part 2 (see, for example, current section 6(12)). It makes clear that, subject to the duty of reasonable adjustment that may apply in any situation, Part 2 does not require a disabled person to be treated more favourably than another person.
35. Sections 3A(6) and (7) reproduce without change existing provisions of Part 2 of the Act in relation to reasonable adjustments.
36. Section 3A(8) is a new provision based on recital (17) to the Directive. It makes clear that the prohibition of ‘discrimination’ in the Act does not require the recruitment or maintenance in employment (or in an occupation) of a disabled person who is not able to perform the essential functions of the employment or occupation concerned (even after any duty to make reasonable adjustments has been complied with). The provision is intended as an aid to interpretation, or ‘pointer’, making clear that a decision not to recruit (or to dismiss) such a disabled person is not treatment prohibited by subsection (3) – and is not “direct discrimination” in the narrow sense used in the Directive.
37. Because subsection (8) is only an aid to interpretation, it has not been formulated to cover every case which could possibly arise under Part 2 of the Act, but the intention is, nevertheless, that a uniform interpretation of Part 2 should (of course) be adopted. Thus, for example, although subsection (8) does not explicitly mention qualifications bodies (see new section 14A), it is intended that Part 2 should be interpreted so that there is no requirement on a qualifications body to confer a professional or trade qualification on a disabled person who (after any reasonable adjustments have been made) would be unable to perform the essential functions of the profession or trade in question.

New section 3B – meaning of “harassment”

38. Article 2.3 of the Directive deems harassment to be a form of discrimination. The Act does not currently mention harassment as a distinct form of discrimination. However, the statutory Employment Code of Practice states that harassing a disabled person on account of a disability will almost always amount to a "detriment" under the terms of section 4(2)(d) of the Act.
39. Section 3B defines the meaning of harassment for purposes of Part 2. The Regulation thus puts beyond doubt that harassment for a reason related to disability is unlawful discrimination.
40. It should be noted, in relation to the definition of harassment, that section 3B(2) states that conduct which, having regard to all the circumstances, should 'reasonably be considered' as having the effect of violating the disabled person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, will amount to harassment. (This is in addition to conduct which is 'intended' to have these effects). The intention is that, when considering whether it is reasonable to consider that conduct amounts to a violation of dignity or creation of an offensive environment etc., Tribunals should be required to take into account all relevant circumstances, in particular the perception of the person alleging harassment. This proposed provision reflects the judgment of the Employment Appeal Tribunal in the case of Driskel v Peninsula Business Services Ltd [2000] IRLR 151 (which concerned the approach to be followed by tribunals when considering whether alleged harassment amounted to sex discrimination).

Regulation 4

Employment

Summary

41. This regulation is about employment and employment-type situations – discrimination against employees, job applicants, contract workers and police officers. It also contains some specific provisions about particular benefits employees can receive: occupational pension schemes and group insurance services such as permanent health insurance.

The current position

42. Currently:
- section 4 of the Act says when discrimination by employers is unlawful and section 5 defines discrimination in this context;
 - section 6 describes the duty on employers to make reasonable adjustments;
 - section 7 excludes employers with fewer than 15 employees;

- section 12 says when discrimination against contract workers is unlawful; and
 - the Disability Discrimination (Employment) Regulations 1996 (SI 1996/1456) ('the Employment Regulations'), regulation 7, contain supplementary provisions concerning the duty of employers and principals to make reasonable adjustments for contract workers.
43. Other provisions in the Act (section 64(5)) exclude from Part 2 the following forms of employment: fire-fighters, prison officers, employment on board ships, aircraft or hovercraft, members of the Ministry of Defence Police and fire fighting service, the British Transport Police, the Royal Parks Constabulary and the United Kingdom Atomic Energy Authority Constabulary. Police officers in the Metropolitan and County Constabularies are excluded from Part 2 because they are not employees as currently defined.
44. Section 6(11) of the Act excludes occupational pension schemes and group insurance services from the duty to make reasonable adjustments. Sections 17 and 18 of the Act contain specific provisions about such schemes and services. These are supplemented by the Employment Regulations, regulations 4 and 5, the Disability Discrimination (Services and Premises) Regulations 1996 (SI 1996/1836) regulations 2 to 4, and the Disability Discrimination (Description of Insurance Services) Regulations 1999 (SI 1999/2114).

The proposed changes

45. Regulation 4 replaces the sections and regulations mentioned above. The new provisions will apply to employment (other than employment as a member of the armed forces), contract workers, police, occupational pensions and group insurance schemes. The common definitions of discrimination and harassment in new sections 3A and 3B also apply.
46. The regulation replaces the current sections 4 and 5 (relating to unlawful discrimination by employers) with new sections setting out the circumstances in which it is unlawful to discriminate, and what duties there are to make adjustments in relation to employers, those providing opportunities for contract work, police forces, the trustees and managers of occupational pension schemes and providers of group insurance services.

New section 4 – Employers: discrimination

47. New section 4 sets out the circumstances in which discrimination (as defined in section 3A) by an employer is unlawful. This mirrors the provisions relating to unlawful acts by employers in section 4 of the Act as it currently stands, save in the respects noted below. Note, however, the provision in new section 18D(1) defining “detriment” (which appears in section 4(2)(d) and in later new provisions). This is explained in the notes below on regulation 19.

48. Section 4(3) states explicitly for the first time that harassment (defined in section 3B) by an employer of a disabled person he employs, or a disabled person who has applied to him for employment will be unlawful.
49. Section 4(5) spells out that the following are included within the meaning of “dismissal” in section 4(2): first, the termination of employment by the expiry of a period of time (unless employment is immediately renewed on the same terms); and secondly, constructive dismissal.
50. The separate draft Regulations (published by the DTI) concerning discrimination on the grounds of sexual orientation and religion or belief each have a provision based on Article 4.1 of the Directive that allows an employer to recruit a person of, for example, a specific religious belief in the limited circumstance where that is a genuine and determining occupational requirement. There is no need to have a similar provision for any of the matters covered by the Act. This is because, under the Disability Discrimination Act as it stands, where employers need to recruit someone who has a particular disability (for example, deafness), no discrimination occurs where they reject a non-disabled person or a person who has a different disability (e.g. a visual impairment). In the case of the visually impaired applicant, they have not been turned down for a reason related to their disability (blindness), but instead because they are not deaf. Their disability is entirely irrelevant to the rejection. The Directive, and the insertion of section 3A(3) making blanket bans unlawful, do not affect this position. The specific provisions in section 10 of the Act that, in certain circumstances, permit charities and “supported employment” (now known as “Workstep”) to recruit people with particular disabilities will also continue to apply (as new section 18C).

New section 4A – Employers: Duty to make reasonable adjustments

51. Section 4A sets out how the duty to make adjustments applies to employers, whilst new section 18B (Reasonable adjustments: supplementary) specifies those factors that are to be taken into account when determining whether a step is reasonable, and gives examples of what appropriate steps might be.
52. Many provisions in section 18B mirror provisions currently in section 6 or in the Employment Regulations, and the duty on employers to make reasonable adjustment in relation to disabled people is broadly unchanged. It should, however, be noted that the Act will now make clear that the duty to make adjustments (other than adjustments to the physical features of premises) is to extend to any ‘provision, criterion or practice’ applied by an employer which places ‘the disabled person concerned’ (defined in section 4A(2)) at a substantial disadvantage compared with non-disabled persons.
53. The reference to ‘provision, criterion or practice’ ties in with the provisions of the Directive concerning indirect discrimination (Article 2.2(b)). These say that indirect discrimination occurs where—

“an apparently neutral provision, criterion or practice would put persons having a particular ... disability ... at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- (ii) ... the employer or other person or organisation to whom this Directive applies is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 [which concerns the duty to provide reasonable accommodation] in order to eliminate disadvantages entailed by such provision, criterion or practice.”

54. New section 4A(1) applies the second approach permitted by the Directive in relation to indirect discrimination. So where it is reasonable to do so, an employer will be required to modify (or even disapply) any provision, criterion or practice which causes more than a minor or trivial disadvantage to a particular disabled employee to the extent needed to remove the disadvantage. For example, if it were reasonable to do so, an employer might have to vary a rule under which all employees have to work from 9 a.m. to 5 p.m. – in order to allow a disabled employee to work flexible hours to enable additional breaks to overcome fatigue arising from the disability. But it will not be necessary for the employer to show that the ‘fixed-hours’ rule is objectively justified (as he would have to do if the first limb of Article 2.2(b) applied).

55. “Provisions, criteria and practices” encompass matters such as—

- (a) arrangements for determining to whom employment should be offered, and
- (b) terms, conditions or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.

56. The duty to make reasonable adjustments in respect of physical features of premises is unchanged from current section 6 of the Act.

New section 4B – Contract workers

57. Discrimination in respect of contract workers is currently covered by section 12 of the Act. A contract worker is a person (for example a temporary secretary) who provides services for another person (“the principal”) under a contract made between that person and the worker’s employer (e.g. an employment agency). The intention of the Act is to make it unlawful for the principal to discriminate against the contract worker, and to require the principal to make reasonable adjustments for the worker – unless the worker’s employer is required to do so. To continue to achieve this, the new section 4B will replace the current section 12 of the Act and regulation 7 of the Employment Regulations. Many of the existing provisions have been mirrored in this new section. Where new or different provisions have been made, these are noted below.

58. Section 4B(1) sets out the basic rule that it is unlawful for a person providing work for contract workers to discriminate against a disabled person. The new definition of ‘discrimination’ in section 3A will apply.
59. Section 4B(2) makes it clear that harassment (defined in section 3B) by a person providing contract work is unlawful.
60. Section 4B(3) requires an employer of contract workers to make reasonable adjustments where all or most of those to whom he is providing contract workers apply a ‘provision, criterion or practice’ that is likely to put a disabled person at a similar substantial disadvantage, or occupy premises where a physical feature is likely to put the disabled person at a similar substantial disadvantage. (This change to the wording of the duty to make reasonable adjustments is the same as that for employers noted above.) For example, where an employer supplies a blind word processor operator to work for several principals, the employer might have to provide her with a specially adapted portable computer because she would otherwise be at a similar substantial disadvantage in doing the work wherever she does it. Each of the principals would have to cooperate by letting her use the computer, provided it was compatible with their systems.
61. Sections 4B(5) and (6) make provision in relation to the duty to make reasonable adjustments for a person providing contract work. They mirror, respectively, the existing provisions in section 12(3) of the Act and regulation 7 of the Employment Regulations.

New section – 4C Police

62. This section brings police officers within the scope of the employment provisions of the Act for the first time, and makes the Chief Officer of Police or the Police Authority (or the Chief Constable in the case of Scottish Police forces) liable for acts of unlawful discrimination (including failures to make reasonable adjustments) or harassment against individual police officers in relation to their employment. It deems police officers and police cadets to be employees for the purposes of Part 2 of the Act. The provision is similar to section 17 of the Sex Discrimination Act 1975 (“SDA”). However subsection (2) is different: it has been inserted to ensure that a chief officer of police will be liable under section 58 of the Act for the discriminatory acts of one police officer (or cadet) committed against another. (On this issue, see Liversidge v Chief Constable of Bedfordshire [2002] IRLR 651 (CA)).

New section 4D – Occupational Pension schemes: discrimination

63. The provisions in the Regulations concerning occupational pension schemes can be summarised as follows.

64. For employers, discrimination in relation to occupational pension schemes will be dealt with by the general provisions in new sections 4 and 4A.
65. Note that new section 4A does not contain any provision equivalent to section 6(11) of the Act, which excluded occupational pension schemes and certain other benefits from the scope of the duty to make reasonable adjustments. Thus, in future, where it is reasonable to do so, an employer may have to arrange for literature about the firm's occupational pension scheme to be read to a person who is blind if they would otherwise be placed at a substantial disadvantage compared to other members.
66. For trustees or managers of occupational pension schemes, discrimination will be dealt with by new sections 4D (less favourable treatment and harassment) and 4E (reasonable adjustments). These sections replace the current provisions in section 17 relating to occupational pensions.
67. The new sections are intended to make trustees and managers liable for their acts of discrimination, but not for discrimination which arises from the application of a scheme rule which they cannot alter and did not set: see below.
68. Section 4D(1) sets out the circumstances in which it is unlawful for the trustees or managers of an occupational pension scheme to discriminate against a disabled person. The definition of discrimination set out in section 3A will apply (subject to modifications to the defence of justification in cases falling within section 4D(3): see below).
69. Section 4D(2) makes clear that harassment (as defined in section 3B) of a disabled person by a manager or trustee is unlawful.
70. Section 4D(3) makes provision as to the defence to be applied in a case of less favourable treatment discrimination (within the meaning of section 3A(1)) arising out of the application by trustees or managers of an apparently neutral provision, criterion or practice to a disabled person. In such a case, the defence of objective justification (set out in Article 2(2)(b)(i) of the Directive) is to apply instead of the 'reasonable adjustments' approach (set out in Article 2(2)(b)(ii) of the Directive) applying to the majority of the other provisions of the Act (including, in particular, the provisions of the Act relating to discrimination by employers in relation to pensions). This is because it seems more appropriate that the trustees/managers of occupational pension schemes should be able to justify the application of scheme rules (etc) by reference to objective evidence, such as actuarial evidence, rather than being obliged to make adjustments in individual cases.
71. Trustees or managers will, thus, have to justify the application of neutral provisions (etc.) to disabled people by reference to the test of objective justification. They will, therefore, have to show that the provision in question is justified by reference to a legitimate aim and is a proportionate way of achieving that aim. Thus, trustees and managers of occupational pension

schemes who do not provide ill health retirement benefits to people who are likely to have to leave paid employment before a certain age, will have to show that the rule is applied for the purposes of achieving a legitimate aim, to all relevant members (or potential members of the scheme) and that the aim cannot be achieved in a less discriminatory way.

72. Note, however, that cases relating to the provision of information relating to the terms and conditions of an occupational pension scheme will be dealt with by a 'reasonable adjustments' approach: see under section 4E, below.
73. Section 4D(4) makes it clear that trustees or managers are not to be held liable for acts of discrimination arising from the application of any provision, criterion or practice which they did not set and cannot alter. (Where discrimination arises from the application of a rule which the trustees and managers cannot alter and did not set, a disabled employee would normally be able to make a claim against their employer under sections 4 and/or 4A.) Section 4D(5) makes further provision about this, to ensure that trustees or managers cannot escape liability if they have failed to seek appropriate consent to an alteration.

New section 4E – Occupational pension schemes: duty to make adjustments

74. This new section imposes a duty to make reasonable adjustments on trustees or managers of an occupational pension scheme in relation to the provision of information relating to the terms and conditions of the scheme (section 4E(1)). Thus, for example, if trustees and managers provide information in written form, they might, if it is reasonable for them to do so, have to provide it in some other way, for example by reading it out, to a person who has a visual impairment.
75. Section 4E(2) sets out the scope of the duty to make reasonable adjustments. The duty only applies if the format in which information is provided places a disabled person at a substantial disadvantage in comparison with non-disabled people.
76. Section 4E(3) sets out circumstances, relating to the trustees' or managers' lack of knowledge about the disabled person in question, in which the duty to make reasonable adjustments does not apply.
77. **Further to the question on the practical implications of this change in *Equality and Diversity – The Way Ahead*, do you have any views on the costs and benefits that might arise from sections 4D and 4E?**
78. **Since December 1996 the current section 17 of the Act has inserted a non-discrimination rule into occupational pension schemes. It will continue to do so until October 2004, when the new provisions come into force. Do you have any views on whether there is a need to ensure that the non-discrimination rule continues to apply in respect of members' rights accrued between 1996 and 2004?**

New section 4F – Insurance services

79. This section replaces the existing section 18 relating to discrimination by a provider of insurance services to an employer in respect of his employees.
80. Section 4F(1) and (2) largely re-enact the existing section 18(1) and (2). Note that it is made clear in section 4F(2) that the new definition of discrimination in Part 2 cases (set out in section 3A) will not apply in section 4F cases (which will continue to be governed by a modified version of Part 3: see below).
81. Section 4F(3) is inserted so as to limit the cases in which an insurer can be held liable for acts of discrimination. It aims to ensure that an insurer cannot be held liable for an act of discrimination committed *by an employer* in relation to a group insurance scheme. Previously, the liability of insurers was restricted by regulation 2 of the Disability Discrimination (Description of Insurance Services) Regulations 1999 (SI 1999/2114) (which prescribed insurance services for the purposes of section 18(3) of the Act). Under those Regulations, an insurer could only be held liable for acts of disability discrimination if he *alone* exercised *all* of the following functions: (a) determining eligibility criteria; (b) determining the extent, or terms and conditions, of provision to eligible employees; (c) determining the effect in individual cases of the application of eligibility criteria or terms and conditions for receipt of benefits.
82. This had the effect of creating a gap in the protection for employees provided by the section 18 regime: if an employer had some influence over (for example) eligibility criteria (thus taking the insurer outside the scope of the 1999 Regulations), then an act of discrimination by an insurer in relation to (for example) the level of benefits paid would fall outside the scope of section 18 and the employee might have no remedy. (The 1999 Regulations will no longer have any effect under new section 4F, because the definition of ‘insurance services’ in section 4F(9) (unlike that in section 18(3)) contains no reference to services ‘of a prescribed description’.)
83. Section 4F(4) to (7) modify the provisions of Part 3 in relation to group insurance to ensure that they are consistent with requirements of the Directive. The provisions amend section 19, 20 and 21 appropriately, so that the trigger for the duty of an insurer providing group insurance to make reasonable adjustments in relation to practices, policies or procedures is lowered to that of substantial disadvantage, in line with the reasonable adjustment provisions of Part 2 of the Act. Moreover, the insurer will no longer be able to justify a failure to make a reasonable adjustment of this type.
84. Note that the duty to make reasonable adjustments will not apply in the case of a ‘relevant rule’, defined to mean a provision, criterion or practice which applies for determining whether a person should receive, or is to be given the opportunity to receive, benefits under the insurance service concerned (section 4F(6)(f) and 4F(7)(b)). This is because the policy is to apply an objective

justification approach to such rules, allowing them to be justified on the basis of, for example, actuarial evidence without requiring insurers to make adjustments to a scheme in individual cases. The defence of objective justification in relation to rules of this kind is set out in 4F(6)(e) (substituting a new paragraph (e) in section 20(4) for group insurance purposes).

85. On the other hand, the reasonable adjustments approach will continue to be applied to areas other than relevant rules – that is, matters such as documentation, communications and grievance procedures. The reasonable adjustments approach is considered more appropriate in such areas: for example, it might be appropriate for an insurer to provide Braille policy documents or to alter claims procedures for those unable to use a telephone or keyboard.
86. The provisions also modify the justification defence set out in section 20 in a number of ways so as to ensure compatibility with the Directive. First, they remove consideration of the insurer’s opinion in determining whether less favourable treatment of a disabled person is justified under any of the conditions set out in section 20(4).
87. Secondly (although provision has not yet been made for this in the draft Regulations), it is proposed to disapply for the purposes of section 4F the defence of justification set out in the Disability Discrimination (Services and Premises) Regulations 1996 (SI 1996/1836), regulation 2, which (by virtue of section 20(8)) allows less favourable treatment to be justified where it is based on actuarial (etc.) information relevant to the assessment of risk and from a source upon which it is reasonable to rely, if the treatment is ‘reasonable’ in all the circumstances. This defence is being removed because—
 - (a) the reference to reasonableness might leave open the possibility of justifying what the Directive describes as directly discriminatory conduct; and
 - (b) the defence is no longer necessary because cases relating to the assessment of risk will now be dealt with under the new defence of objective justification (see above).
88. Thirdly, the defence currently set out in section 20(4)(e) is disapplied for group insurance purposes. This is because it is unlikely that under the Directive, indirect discrimination could be justified merely on the basis of additional cost.
89. Section 4F(8) makes it unlawful for a person providing insurance in respect of a disabled employee to subject that employee to harassment (as defined in section 3B).
90. Section 4F(9) and (10) largely re-enact the definitions currently set out in section 18(3) and (4), but note that in the definition of insurance services—

- (a) there is no longer a reference to services ‘of a prescribed description’: the restriction imposed by this reference has been replaced by new section 4F(3) – see above;
- (b) there will no longer be power (as under existing section 18(3)) to prescribe new matters (other than termination of service, retirement, old age, death, accident, injury, sickness and invalidity) as falling within the definition of ‘insurance services’. Note that this power to prescribe additional matters had, in any event, not been used.

91. **Further to the question on the practical implications of this change in *Equality and Diversity – The Way Ahead*, do you have any views on the costs and benefits that might arise?**

Regulation 5

Partnerships

New section 6A – Partnerships: discrimination

- 92. The Regulations are intended to confer on a partner or applicant for partnership similar rights against the firm as applicants for employment or employees have against an employer under Part 2 of the DDA, with similar remedies. These rights also extend to cover a disabled person who is a prospective partner where people are proposing to form themselves into a partnership. The draft provision is closely based on section 11 of the SDA.
- 93. Section 6A(1) defines the area in which discrimination is unlawful against a disabled person who is an existing or prospective partner. (The general definition of discrimination in section 3A applies.) Section 6(3) outlaws harassment.
- 94. Section 6A(2) ensures that, where section 6A(1) outlaws discrimination in relation to benefits, it only applies to benefits which are solely reserved for partners. It reflects the provision in section 4(4) relating to benefits provided by an employer.

Section 6B – Partnerships: duty to make adjustments

- 95. The duty to make reasonable adjustments falls on the firm. This duty applies to any physical feature of premises, as well as to provisions, criteria or practices applied by the firm which substantially disadvantage particular disabled partners or prospective partners, provided that such provisions, criteria or practices relate to the subject matter set out in section 6B(2).).
- 96. Section 6B(5) makes it clear that it would not be discrimination for the firm to require the disabled person concerned to make a reasonable contribution toward

the costs to the firm of any adjustment. We suggest that the easiest way to assess the reasonableness of the contribution would be by reference to the disabled person's share in the profits of the firm.

Regulation 6

Repeal of exemption for small businesses

97. This regulation removes the current section 7 of the Act under which employers who have fewer than 15 employees are exempt from Part 2 of the Act. It follows that, upon the coming into force of the Regulations, the duties imposed by new sections 4 and 4A will apply to all employers (other than the armed forces), irrespective of the size or nature of their business or undertaking.

Regulation 7

Barristers and advocates

New section 7A – Barristers: discrimination

98. Currently neither barristers nor pupils in chambers are afforded rights under Part 2 of the DDA because they are not persons in “employment” within the meaning of section 68(1) of the DDA.
99. The new section (which is based closely on section 35A of the SDA) describes the areas in which it is unlawful for a barrister or a barrister's clerk to discriminate against a disabled person when offering a tenancy or pupillage and once they hold the position as a tenant or pupil. It also outlaws harassment.
100. Section 7A(4) (which is modelled on section 35A(3) of the SDA) makes discrimination unlawful in relation to the giving, withholding or acceptance of instructions to a barrister. So, for example, it would be unlawful for a solicitor to refuse to instruct a barrister merely because they have a disability. (But note that solicitors would not discriminate by failing to provide reasonable adjustments in relation to a barrister whom they instruct – because they are under no duty to do so.)
101. Section 7A(5) defines the terms “barrister's clerk”, “pupil”, “pupillage”, “set of chambers”, “tenancy” and “tenant”. The term “set of chambers” is used in section 7B(2): see below.
102. Section 7A(6) provides that this section and section 7B apply to England and Wales only. Scottish Advocates are dealt with in sections 7C and 7D.

New section 7B – Barristers: duty to make adjustments

103. Section 7B provides for barristers and barristers' clerks to be under a duty to make reasonable adjustments for disabled prospective pupils, pupils, prospective tenants, and tenants. Section 7B(1) makes it clear that any provision, criterion or practice, or any physical feature, which places 'the disabled person concerned' at a substantial disadvantage is subject to the duty to make reasonable adjustments, provided that it relates to the subject matter set out in section 7B(3).
104. Section 7B(2) ensures that, not only individual barristers, but also groups of barristers would be under a duty to make adjustments depending on who was responsible for the disadvantage. This provision has been included because barristers usually practice in a set of chambers along with other barristers.

New section 7C – Advocates: discrimination

105. Currently Scottish advocates' pupils (usually referred to in Scotland as "devils") are not afforded rights under Part 2 of the DDA because they are not persons in "employment" within the meaning of section 68 (1) of the DDA. Unlike sections 7A and 7B on barristers etc., sections 7C and 7D deal only with disabled pupils and not with disabled advocates. This is because Scottish advocates do not practice in sets of chambers.
106. Section 7C (which is based on section 35B of the SDA) makes it unlawful for an advocate to discriminate against, or to harass a disabled pupil.
107. Section 7C(4) (modelled on section 35B(4) of the SDA) makes discrimination unlawful in relation to the giving, withholding or acceptance of instructions to an advocate. (See the note on section 7A(4) above in this respect.)

New section 7D – Advocates: duty to make adjustments

108. Section 7D makes general provision for advocates to be under a duty to make reasonable adjustments for an existing or prospective pupil. This duty applies to any provision, criterion or practice, or any physical feature, which place the disabled person concerned at a substantial disadvantage. The provision, criterion or practice in question must fall within the subject matter set out in section 7D(2).

Regulation 8

Enforcement

109. This amends the existing section 8 (enforcement, remedies and procedure).
110. The amendment made by paragraph (3) confers power on Employment Tribunals to deal with complaints concerning unlawful harassment (defined in section 3B).

111. Paragraph (4) inserts a new subsection (1A). This is intended to implement Article 10 of the Directive (concerning burden of proof). The new provision is based on section 63A of the SDA (as inserted by S.I. 2001/2660, reg. 5). In cases where a complainant makes out a *prima facie* case of discrimination or harassment, the Tribunal will be required to find for the complainant unless the respondent can show that his or her conduct was not unlawful. The provision largely reflects the existing practice followed by Tribunals.
112. Section 8 is also renumbered as section 17A to reflect the revised structure of the Act.

Regulation 9

Repeal of section 9 (validity of certain agreements)

113. This regulation removes section 9 of the Act (validity of certain agreements). New section 17D and Schedule 3A (inserted by regulation 16) make fresh provision concerning unlawful terms of contracts of employment, collective agreements and rules of undertakings.

Regulation 11

Repeal of sections 11 (advertisements) and 12 (contract workers)

114. This omits sections 11 (Advertisements) and 12 (Contract workers). These sections have been replaced and extended by new sections 16B and 4B, respectively.

Regulation 11

Trade and professional bodies; Qualifications Bodies; practical work experience

115. This regulation replaces sections 13, 14 and 15 relating to discrimination by trade organisations with—
- new sections 13 and 14 relating to discrimination by trade organisations;
 - new sections 14A and 14B relating to discrimination by qualifications bodies; and
 - new sections 14C and 14D – relating to practical work experience.

New section 13 – Trade organisations: discrimination

116. This new section replaces the current section 13. The provisions are broadly the same, but now the common definition of discrimination in new section 3A is applied instead of the similar one in existing section 14.

117. Section 13(3) makes clear that it is unlawful for a trade association to harass a disabled person who is a member of the trade association, or who applies for membership of the organisation.

New section 14 – Trade organisations: duty to make adjustments.

118. This new section replaces the current section 15, although there are no substantial changes apart from the replacement of “any arrangements” with “provision, criterion or practice”. There thus remains a duty on trade organisations to make reasonable adjustments. New section 18B (Reasonable adjustments: supplementary) sets out those factors that are to be taken into account when determining whether a step is reasonable, and gives examples of what appropriate steps might be.

New section 14A – Qualifications bodies: discrimination

119. Qualifications bodies are defined in section 14A(4) authorities or bodies which can confer a professional or trade qualification such as the General Medical Council, the Law Society, the Public Carriage Office or CORGI. They are not currently covered by the Act. Section 13 of the SDA and section 12 of the Race Relations Act 1976 (“RRA”) already cover such bodies, although they use the term “qualifying body”. The change in terminology is designed to clarify, not to suggest any different coverage.
120. “Professional or trade qualification” is defined widely: see section 14A(4). It can include any type of authorisation which facilitates engagement in a particular profession or trade. (Note that existing section 68(1) of the Act says that “trade” includes any business.)
121. Part 4 of the Act (as recently amended by the Special Educational Needs and Disability Act 2001) deals with discrimination by schools, colleges and local education authorities, so they are excluded from the definition of qualifications bodies in subsection (4).
122. Section 14A(1) sets out the circumstances in which it is unlawful for a qualifications body to discriminate against a disabled person. The general definition of discrimination in section 3A applies, but subject to special provisions as to the defence of justification in relation to ‘competence standards’: see section 14A(3), below.
123. Section 14A(2) specifies that harassment of a disabled person seeking or holding a qualification by a qualifications body is unlawful.
124. Section 14A(3) makes special provision as to the defence to be applied in a case of less favourable treatment discrimination (within the meaning of section 3A(1)) based on the application of a ‘competence standard’, that is, an academic, medical or other standard used to determine whether a person has a

particular level of competence or ability (see the definition in section 14A(5)). In such a case, the defence of objective justification (set out in Article 2(2)(b)(i) of the Directive) is to apply instead of the ‘reasonable adjustments’ approach (set out in Article 2(2)(b)(ii) of the Directive) applying to the majority of the other provisions of the Act (including, in particular, the provisions of the Act relating to discrimination by employers). This is because it is considered highly desirable, and in the public interest, that qualifications bodies should be able to apply one professional standard, applying equally to all applicants, rather than being obliged to adjust that standard on a case-by-case basis. The “knowledge” test for London taxi drivers is a good example of such a standard.

125. It follows that a qualifications body will be obliged to justify a competence standard which particularly disadvantages persons having a particular disability by reference to the test of objective justification. It will, therefore, have to show that the standard is justified by reference to a legitimate aim and is a proportionate way of achieving that aim. This is likely to entail clear evidence that any standard is genuinely necessary and fundamental to the requirements of the trade or profession in order to ensure competence in that trade or profession. (Note that section 14B(1)(a) explicitly excludes competence standards from the duty to make reasonable adjustments).
126. By contrast, in cases not involving the application of a ‘competence standard’ (for example, cases relating to the practical way in which qualifications bodies assess standards, such as the conditions under which candidates have to sit examinations leading up to a professional qualification), the duty to make reasonable adjustments will apply (see section 14B, below). In such cases, the ordinary defence of justification set out in section 3A(2), rather than the defence of objective justification applying to competence standards, will apply.

New section 14B – Qualifications bodies: duty to make adjustments

127. Section 14B makes provision for qualifications bodies to be under a duty to make reasonable adjustments in relation to applicants for, or holders of, a professional or trade qualification. Section 14B(1) makes it clear that any provision, practice or criterion, or any physical feature, which places the disabled person concerned at a substantial disadvantage is subject to the duty to make reasonable adjustments, provided it relates to the subject matter set out in section 15A(2). This could include allowing extra time, supplying the exam papers in alternative accessible formats or supplying a separate room for disabled candidates. As already noted, section 14B(1)(a) specifically excludes competence standards from the duty to make reasonable adjustments

New section 14C – practical work experience: discrimination

128. Practical work experience falls within Article 3.1(b) of the Directive. It is not currently covered by the Act where the trainee concerned is not an employee of the person providing them with the practical work experience.

129. Sections 14C and 14D seek to prohibit unlawful discrimination and harassment, and require the provision of reasonable adjustments, in relation to practical work experience provided as part of a vocational training programme where such matters are not dealt with by other provisions of the Act.
130. Section 14C(1) specifies the areas in which it is unlawful for a “work placement provider” to discriminate against a disabled person. Section 14C(2) makes it unlawful for a training provider to subject a disabled person (whom he is training or who has applied to him for training) to harassment.
131. Section 14C(3) refers to the areas in which 14C(1) and (2) do not apply, namely, the provisions of the Act which already cover vocational training: see below. (The Employment Directive, which these Regulations implement, does not in any event cover the subject matter of Chapter 2 of Part 4 of the Act – which concerns schools.)
132. Section 14C(4) defines “work placement” and “placement provider”.

New section 14D –Work placements: duty to make adjustments

133. Section 14D(1) outlines the areas in which a work placement provider is under a duty to make a reasonable adjustment. When a disabled person is placed at a substantial disadvantage by a provision, criterion or practice made by or on behalf of a work placement provider, or by premises in which the training is carried out, the provider is under a duty to make a reasonable adjustment, provided that the provision (etc.) falls within the scope of section 14D(2).
134. A work placement provider might have to consider the same kind of reasonable adjustments as an employer would make for an employee. Any reasonable adjustments will reflect the length and circumstances of the placement. The sending organisation may also under Part 3 have reasonable adjustment duties in respect of the person sent on the work placement.
135. **Do you have any views on whether the definition of work placement makes it sufficiently clear that the duty not to discriminate, and the duty to make reasonable adjustments, are only to be imposed on providers of placements where the relationship between the provider of practical work experience and the person being trained, is part of a vocational training programme with the clear goal of the trainee being made fit for employment at its end?**

Regulation 13

Alterations to premises occupied under leases

136. This regulation makes consequential amendments to section 16 (alterations to premises occupied under leases). The section will now apply to all those who have a duty to make reasonable adjustments as a result of the extension of Part

2 to cover partnerships, barristers, advocates, qualifications bodies and work placement providers. The section is also renumbered as 18A.

Regulation 14

Other unlawful acts

New section 16A – Relationships which have come to an end

137. This section makes unlawful certain acts of discrimination and harassment after a relationship to which Part 2 applies, for example employment, contract work, partnership etc., has come to an end. The intention is that it will be unlawful for a disabled former employee (for example) to be discriminated against at an internal appeal hearing following their dismissal, or in relation to the provision of references, or in access to company sports or social facilities offered to other ex-employees. This provision reflects Article 9.1 of the Directive, and the judgment of the European Court of Justice in the sex discrimination case of *Belinda Coote v Granada Hospitality Ltd.*, Case C-185/97 [1998] IRLR 656 (which concerned interpretation of the Equal Treatment Directive 76/207/EEC).
138. Section 16A(3) limits the section's application to cases where discrimination or harassment arises out of, and is closely connected to, the previous relationship. So it will not cover, for example, an act of harassment committed by a former employer at a private social function long after the employment relationship ended.
139. Section 16A(4) creates a duty to make reasonable adjustments in relation to provisions, criteria or practices, or to premises, after a relationship to which Part 2 applies has ended in circumstances where a disabled person suffers a substantial disadvantage relative to a person without disabilities in the same position as the disabled person. The section is drafted so as to make clear who is the correct comparator: for example, if an ex-employee claims that he has been placed at a substantial disadvantage, he must show a disadvantage relative to a non-disabled *ex-employee* rather than to a current employee. For example, it might be reasonable for the employer to provide a sign language interpreter at an internal appeal hearing where a former employee who is Deaf was appealing against a dismissal that had already taken effect.

New section 16B – Discriminatory advertisements

140. At present, section 11 of the Act makes provision in relation to discriminatory advertisements. That provision is evidential only in nature, in that the use by an employer of a discriminatory advertisement obliges a tribunal to assume, unless the contrary is proved, that the reason for a disabled complainant being refused a job was related to his disability. It is, moreover, superseded, by the new rules on burden of proof in tribunal cases: see the explanation on regulation 8(4) above).

141. Section 16B replaces the current provisions in section 11 with a broader prohibition on discriminatory advertisements which will be enforceable by the Disability Rights Commission ('DRC') (under new sections 17B and 17C of the Act, inserted by regulation 16). This new, wider provision on advertisements is broadly similar to the corresponding provisions in the SDA (section 39) and RRA (section 29).
142. Section 16B(1) sets out the types of advertisements which are unlawful, namely those which invite applications for a "relevant position or benefit" (defined in subsection (3)) and which might reasonably be understood as indicating an intention to determine the application in a manner which discriminates against a disabled person, or a reluctance to make reasonable adjustments for an applicant. For example, it could be unlawful to say in an advertisement that only persons in perfect health need apply. However, section 16B(2) makes it clear that the advertisement will be lawful where it would in fact be lawful to determine an application in the manner specified. For example, it would not be unlawful to say that persons applying for the position of train drivers must have a specific level of sight and concentration.
143. The provisions relate not only to advertisements for employment by an employer (as under existing section 11), but also to advertisements relating to a broad range of matters falling within Part 2 of the Act (as amended by these Regulations). Thus, for example, discriminatory advertisements by partnerships and by qualifications bodies are covered. See section 16B(3).
144. Section 16B(4) makes provision excluding from liability those who have innocently published a discriminatory advertisement – provided they can show that they reasonably relied on a statement provided by the person who placed it to the effect that the publication would be lawful. The making of a false statement to the publisher of an advertisement in relation to this matter is a criminal offence punishable by a fine (section 16B(5)).
145. By virtue of new section 17B, proceedings for a contravention of section 16B may only be brought by the DRC: see the notes on regulation 16 below.
146. **Further to the question in *Equality and Diversity – The Way Ahead*, do you have any views on the practical implications of this provision?**

New section 16C – Instructions and pressure to discriminate

147. This section makes it unlawful for a person who has authority or influence over another person to instruct them, or put pressure on them, to act unlawfully under Part 2 of the Act. This could arise, for example, where the Chief Executive of a parent company instructed, or pressurised, the Managing Director of a subsidiary company to dismiss a disabled employee of the subsidiary in circumstances in which this would be unlawful under section 4.

148. Section 16C(3) makes it clear that pressure to discriminate, whether made directly to the person concerned, or indirectly but in a way where they are likely to hear of it, both come within this section.
149. This section will be enforceable only by the DRC, as for section 16B (discriminatory advertisements), and will be subject to the same remedies (decision and injunction) as that section: see new section 17B of the Act, inserted by regulation 16.

Regulation 15

Repeal of section 17

150. This regulation removes section 17 (occupational pension schemes) which has been replaced by the new sections 4D and 4E.

Regulation 16

Enforcement of sections 16B and 16C; validity of certain agreements etc.

151. This regulation inserts new provisions (sections 17B to 17D and Schedule 3A) which: confer power on the DRC to take action in respect of discriminatory advertisements and instructions and pressure to discriminate; and replace and extend provisions currently contained in section 9 of the Act in relation to the validity of provisions in contracts of employment or other agreements which purport to contravene Part 2 of the Act.

New section 17B - enforcement of sections 16B and 16C

152. This section, which reflects section 72 of the SDA, provides that proceedings to enforce the provisions outlawing discriminatory advertisements and the use of instructions or pressure to discriminate can only be taken by the DRC. See the explanatory notes to sections 16B and 16C above. The DRC will be able to seek a decision from an employment tribunal as to whether an advertisement is unlawful. The DRC will also, in certain circumstances, be able to seek an injunction from a county court restraining further acts contrary to section 16B or 16C

New section 17C – enforcement of sections 16B and 16C: supplementary

153. This section reflects section 73 of the SDA. It allows the DRC, with a view to applying to a county court for an injunction against a person under new section 17B(4), first to seek a ruling from an employment tribunal that that person has committed an act contrary to new section 16B or 16C. Where they do make such an application, and the act complained of also contravenes any provision of Part 2 of the Act, the tribunal has power, if it thinks it just and equitable to do so, to make a declaration or recommendation against the person concerned under section 17A(2) (currently section 8(2)) of the Act, as if the complaint had

been brought by the person discriminated against. The tribunal does not, however, have the power to award compensation to the person discriminated against in these circumstances.

New section 17D – Validity of certain agreements, rules of undertakings etc.

154. This section inserts into the Act new Schedule 3A, which is set out in the Schedule to the Regulations. This concerns validity of contracts of employment, collective agreements and rules of undertakings. See below for notes on that Schedule.

Regulation 17

Omission of section 18

155. This regulation removes section 18 (insurance services) which has been replaced by the new section 4F.

Regulation 18

Supplementary and general

156. This regulation inserts new section 18B.

New section 18B – Reasonable adjustments: supplementary

157. This section replaces the current sections 6 and 15 in so far as they relate to employers' and trade organisations' duty to make reasonable adjustments. It sets out for all the duties to make reasonable adjustments across Part 2 the factors to be taken into account and examples of steps that may be required. These broadly reflect the factors already set out in the Act and the Employment Regulations.

158. Section 18B(1) lists a number of factors which, in particular, should be taken into account in determining whether it is reasonable for a person or body to have to make an adjustment for a disabled person. It is very similar to current section 6(4) of the Act. However two new factors have been added—

- paragraph (f) which concerns the nature of the activities carried on by the person who has the duty to make reasonable adjustments, and the size of his undertaking. This is inserted in consequence of the removal of the small employer exemption;
- paragraph (g) is concerned with adjustments for disabled persons who work in private households. Even if the financial cost would be minimal, an adjustment may not be reasonable if it would entail disruption to the household (e.g. repeated re-arrangement of furniture) or disturbance to

persons who live there (e.g. by requiring them to change their routines in order to accommodate the disabled person).

159. Section 18B(2) lists examples of particular steps that might have to be taken to comply with the duty of reasonable adjustments. It closely resembles existing section 6(3) of the Act. However paragraphs (d), (e), (g) and (l) are modified to refer to training, mentoring and support.
160. Note that the provisions in section 18B(3) and (4) (consent to alteration of premises) mirror those currently set out in regulation 10 of the Employment Regulations.

Regulation 19

New section 18D – Interpretation of Part 2

161. Section 18D(1) includes definitions of relevant terms used in Part 2 as amended by the new regulations. Note in particular that:
- (a) ‘detriment’ is now defined so as to exclude harassment (as defined in section 3B): this is so as to avoid the overlap which would otherwise have arisen between (for example) discrimination contrary to new section 4(2)(d) (‘any other detriment’) and discrimination contrary to new section 4(3) (‘harassment’);
 - (b) the definition of ‘employer’ is extended to make clear that it includes a person seeking to employ another, but who currently has no employees;
 - (c) ‘provision, criterion or practice’ is broadly defined: it is stated to ‘include’ (but is not limited to) ‘any arrangements’. This ensures continuity with existing section 6(1)(a) and 15(1)(a) which refer to “arrangements rather than ‘provision, criterion or practice’”.
 - (d) the definition of ‘physical feature’ currently appears in the Employment Regulations.

Regulation 20

Amendments to Part 3

New section 21A – Employment services: modification of section 19 to 21

162. Sections 21A and 21B apply to “employment services” which are offered to the public or section of the public. These are:
- vocational guidance or training services, or
 - services designed to assist people to find or keep jobs, or to establish themselves in an occupation in a self-employed capacity.

They include services provided by an employment agency, or those provided under arrangements made by the Secretary of State under section 2 or 10 of the Employment and Training Act 1973.

163. All of these types of services currently fall within Part 3 of the Act. Sections 21A and 21B modify the provisions of Part 3 in relation to such services to ensure that they are consistent with requirements of the Directive.
164. Sections 21A(1) and (2) define the employment services in relation to which the modified version of Part 3 of the Act is to apply. Note, however, that services of this nature provided by schools, colleges or local education authorities are excluded from the definition – as these are dealt with under Part 4 of the Act (as amended by the Special Educational Needs and Disability Act 2001).
165. Section 21A(3) to (6) amends section 19, 20 and 21 appropriately, so that the trigger for the duty of an employment service provider to make reasonable adjustments in relation to practices, policies or procedures is lowered to that of substantial disadvantage, in line with the reasonable adjustment provisions of Part 2 of the Act. Moreover, the provider will no longer be able to justify a failure to make a reasonable adjustment of this type.
166. The provisions also modify the justification defence set out in section 20 so as to remove consideration of the employment service provider's opinion in determining whether less favourable treatment of a disabled person is justified under any of the conditions set out in section 20(4). Since none of those conditions permit the justification of treatment which would amount to direct discrimination in the narrow sense used in Article 2.2(a) of the Directive, it is not necessary to modify these.

New section 21B – Employment services: supplementary

167. This section incorporates the further amendments to Part 3 of the DDA required in order to bring the treatment of employment services into line with the requirements of the Directive. Thus, section 21B(1) specifies the areas in which it is unlawful for an employment service provider to subject a disabled person to harassment (and the definition in new section 3B will apply for this purpose); and section 21B(2) to (4) specify that sections 16A (relationships which have come to an end), 16B (advertisements) and 16C (instructions and pressure) apply in relation to the employment services covered by section 21A.
168. Further, section 21B(3) amends section 25 of the Act to provide that a claim of discrimination or harassment in relation to the provision of employment services may be presented to an employment tribunal. This is a departure from the remedy used in the rest of Part 3 of the Act: however it is in line with related employment provisions in Part 2.

Regulation 21

Codes of Practice

169. This section amends section 53A of the Act, which sets out the DRC’s powers to issue codes of practice, in consequence of the changes in these regulations made to Part 2 of the Act. Specifically, the DRC will now also have power to issue codes of practice in relation to—

- any of the new areas to be covered by Parts 2 of the Act (for example, the prohibition on direct discrimination, or discrimination by partnerships or qualifications bodies); and
- the avoidance of discriminatory advertisements, instructions/pressure to discriminate, and harassment.

Regulation 22

Amendments to section 55 (victimisation)

170. This regulation inserts a new subsection (5) in section 55 (victimisation) of the Act which sets out that victimisation of a person who is not disabled (as well as a disabled person) is unlawful. This is not a new substantive provision in relation to the areas already covered by Part 2 of the Act (see for example existing section 4(5) as to victimisation of non-disabled employees and applicants), but is simply a consequence of restructuring the Act (for example, new section 4 does not contain any provision equivalent to existing section 4(5): instead that provision will be made in new section 55(5)).

171. The regulation also makes an amendment to the definition of victimisation – for the purposes only of Part 2 of the Act (see new section 55(6)). That amendment will bring Part 2 of the Act into line with the Sex Discrimination Act 1975 (see section 4(1)(c)) and the Race Relations Act 1976 (see section 2(1)(c)), making it clear that the definition of victimisation in the Act is equally broad in scope.

Regulation 23

Help for persons suffering discrimination

172. This regulation makes two amendments to section 56 (help for persons suffering discrimination).

173. Firstly, it allows for the “questionnaire” procedure that currently applies where a person alleges discrimination to be used in cases of alleged harassment (defined in section 3B).

174. Secondly, it specifies that responses to questionnaires must be delivered within a period of eight weeks (beginning on the day when the questionnaire was

served), rather than within “a reasonable period” as at present. Failure to meet this deadline may result in a Tribunal drawing adverse inferences pursuant to section 56(3) of the Act.

175. Note also that we plan to amend the current form of questionnaire to reflect changes to the Act made by these Regulations. At the same time, we will increase from 3 to 4 weeks the time allowed after a complaint has been filed with an Employment Tribunal for individuals to serve questions on a respondent.

Regulation 24

Application to the Crown etc.

176. This regulation repeals the current sections 64(5) and (6) of the Act and ends the current exclusion from Part 2 of the Act of members of the Ministry of Defence Police, the British Transport Police, the Royal Parks Constabulary or the United Kingdom Atomic Energy Authority Constabulary, prison officers and fire fighters. Note that the Directive (Article 3(4)) allows the Act to exclude the armed forces, so that their exclusion from the Act (see section 64(7)) will continue to apply.

Regulation 25

Interpretation

177. This regulation removes from section 68 certain definitions as a consequence of changes made by these regulations to Part 2 of the Act.

Regulation 26

Amendments to Schedules 2, 3 and 4

178. This regulation makes consequential amendments to Schedule 3 (enforcement and procedure) and Schedule 4 (premises occupied under leases). The final version of the regulations (to be laid before Parliament next year) will also make consequential changes to Schedule 2 (past disabilities). We have not yet drafted these as they will depend on the precise wording adopted for other provisions in the Regulations.

Amendments to the Disability Rights Act 1999 ('the 1999 Act')

Regulation 27

General Functions of the Commission

179. This regulation amends the definition of "discrimination" in section 2(5) of the DRC Act so that it includes harassment as defined in section 3B of the Act.

Regulation 28

Non-discrimination notices

180. This regulation amends section 4 (non-discrimination notices) of the DRC Act in consequence of changes made to Part 2 of the Act relating to discriminatory advertisements, pressure to discriminate and harassment.

Regulation 29

Agreements in lieu of enforcement action

181. This regulation amends section 5 (agreements in lieu of enforcement action) of the DRC Act in consequence to changes made to Part 2 of the Act relating to discriminatory advertisements, pressure to discriminate and harassment.

Regulation 30

Persistent discrimination

182. This regulation amends section 6 (persistent discrimination) of the DRC Act to allow the DRC to obtain an injunction where a person persists in harassing (as defined in section 3B of the Act) a disabled person. There is also a consequential amendment to subsection (5).

Regulation 31

Formal investigations and non-discrimination notices

183. This makes amendments to Schedule 3 to the DRC Act (investigations of unlawful acts) consequential to the changes to the 1995 Act dealing with harassment and instructions and pressure to discriminate.

Regulation 32

Amendments to other legislation

184. This will make a number of consequential amendments to provisions of other legislation. These amendments are yet to be drafted.

185. With the changes made by these Regulations, certain provisions of S.I. 1996/1836 and S.I. 1996/2803 will no longer apply. We will be considering whether these two Statutory Instruments need amendment, or even revocation and re-enactment of the provisions that continue to apply.

The Schedule

Validity of agreements; rules of undertaking etc.

186. This sets out the new Schedule 3A, inserted into the 1995 Act by new section 17D (see regulation 16(2)). It replaces and extends the scope of existing section 9 of that Act. Schedule 3A provides that terms in contracts of employment or other agreements, collective agreements and rules of undertaking are void so far as they purport to—
- (a) require a person to do anything which would contravene a provision of Part 2 of the Act,
 - (b) exclude or limit the operation of any provision of Part 2, or
 - (c) prevent a person from presenting a complaint to a tribunal.
187. Paragraphs 2 to 9 to the Schedule (which substantially reproduces existing section 9(2) to (6) of the Act) provide for limited exceptions in relation to items (b) and (c) in the case of compromise agreements. They set out the conditions which must be met before the exceptions can apply.
188. Paragraphs 10 to 12 are new provisions. They allow for a disabled person to apply to an employment tribunal to have a discriminatory term in a contract of employment or other agreement modified.
189. Paragraphs 13 to 19 are also new. They are based on section 77 of the SDA and section 6 of the Sex Discrimination Act 1986. Paragraph 13 extends the effect of paragraph 1 to discriminatory terms in collective agreements or discriminatory rules made by employers, trade organisations and qualifications bodies.
190. Paragraph 14 allows a disabled person who comes within paragraphs 15 and 16 to apply to a tribunal to have a discriminatory term or rule declared void if he believes that it may affect him in the future. Under paragraph 17, a tribunal has the power to declare such a discriminatory term or rule void.
191. Where a discriminatory term or rule has been rendered void by virtue of paragraph 1, paragraph 18 has the effect, in certain circumstances, of preserving the existing rights of the disabled person discriminated against and those of any person treated more favourably as a result of the discrimination.
192. Note that we are considering whether the provisions of the Schedule should be aligned with the corresponding Schedule in the draft Regulations on sexual orientation and religion and belief. This would mean, in particular, amending paragraph 1, and also changing paragraph 10 so that the county court instead of

an employment tribunal has power to amend contracts of employment and other agreements.

SUPPLEMENTARY POINTS NOT DEALT WITH IN THE DRAFT REGULATIONS

Statutory Authority (section 59(1) and (2) of the Act)

193. Section 59(1) and (2) currently exempt from the Act any act done in pursuance of any enactment (or in pursuance of any instrument or condition/requirement made or imposed under or by virtue of any enactment).
194. We are considering whether to amend this so that the only measures falling within the exemption in section 59(1) and (2) are those which are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.
195. This might be done by inserting in section 59 a new subsection (1ZA) (to come before subsection (1)) stating as follows:
- ‘(1ZA) Nothing in Part 2 of this Act makes unlawful any act which is required to be done under any enactment concerned with—
- (a) the health and safety of persons;
 - (b) public order and the prevention of crime; or
 - (c) the protection of the rights and freedoms of others.’
196. (Subsection (1) would then be modified so that the opening words read ‘Nothing in any other Part of this Act...’.)
197. We are also reviewing whether we need a provision (along the lines of that set out in section 1(1) of the Employment Act 1989, which supplements the Sex Discrimination Act 1975) “striking down” legislation (outside the areas referred to above) which is inconsistent with Part 2 of the Disability Discrimination Act 1995 (as amended by these Regulations). An alternative approach might be to identify individually every piece of legislation which is inconsistent with the Act and modifying or repealing it as appropriate.
198. **For the present, we would welcome specific examples of legislation (giving its name and year of enactment) that might interfere with the principle of equal treatment of disabled people.**

Office and Post Holders

199. We propose to insert a Regulation to bring certain office and post holders within the scope of Part 2 of the Disability Discrimination Act 1995, where

their position is similar to that of employees but who do not fall within the definition of employment used in section 68(1) of the Disability Discrimination Act. The following paragraphs explain the issue and invite views.

200. Some workers are not technically employees because they do not have a contract of employment or contract for services, but their position may be similar to that of employees. They may, for example, provide services under the direction of another in return for remuneration, though the degree of day-to-day-control varies depending on the nature of the work. Some of these types of workers can be described as "office-holders" and can include, for example, company directors and the chairs/members of some independent public bodies.
201. Existing anti-discrimination legislation on race, sex and disability already provides some office-holders and holders of other posts with some rights and protection. Under section 76 of the Race Relations Act 1976 appointments made or recommended by a Minister or Government department are covered. Under section 86 of the Sex Discrimination Act 1975 and section 66 of the Disability Discrimination Act 1995 appointments made by a Minister or a Government department are covered to the extent of the appointment process only. For disability the duty to make a reasonable adjustment in relation to making arrangements for determining who should be appointed falls on the person making the appointment.
202. **We should welcome views on the practical issues involved in extending Part 2 of the DDA to cover offices and posts which meet the criteria referred to above. In particular, who should have responsibility for making reasonable adjustments where the person appointing the office holder may have little or no role in the post-appointment working relationship?**
203. **In framing your comments/views you might like to bear in mind that the DTI is currently conducting a review of employment status, considering the application of other employment rights to workers such as this: see discussion document at—**

< <http://www2.dti.gov.uk/er/individual/statusdiscuss.pdf> >

Territoriality

204. Section 68(2) means that Part 2 of the Act does not cover employment wholly outside Great Britain. There are similar provisions in s.10 of the SDA and s.8 of the RRA. This means that the Act covers a disabled employee who works partly in Great Britain and partly in another country, but not one who works wholly outside Great Britain.
205. We are considering whether to amend this provision. If we were to amend it, the main alternatives appear to be—

- (i) to continue with the current exclusion but also cover employees working wholly outside Great Britain in particular situations;
- (ii) to continue with the current exclusion but also cover the situation where the employment relationship has a sufficiently close link with Great Britain;
- (iii) not to specify any territorial limit (i.e. repeal the existing limit without any replacement).

206. **While we would not expect these options to have widely different effects on the number of people covered by the provisions, we would welcome views on this and other practical implications of these options in covering employment wholly outside Great Britain.**

207. The Act does not currently cover employment on ships, planes and hovercraft. By contrast, the SDA covers employment on board a ship registered at a port of registry in Great Britain and employment on aircraft or hovercraft registered in the United Kingdom and operated by a person who has his principal place of business, or is ordinarily resident, in Great Britain. There are also SDA provisions relating to employment concerned with the exploration of the seabed or subsoil or the exploitation of their natural resources. The Government has announced that it will extend the protection of Part 2 of the Act to employment on board ships, planes and hovercraft. We will consider the most appropriate way of doing this in conjunction with the changes referred to above on territorial coverage of the Act.

Transitional provisions

208. We are considering the extent to which transitional provisions will be required. For example, regulation 8 adds a new subsection (1A) to section 17A (currently section 8 of the Act). We will need to decide whether that new provision should apply only to employment tribunal proceedings instituted after 1 October 2004, or to all cases that have not by then reached a conclusion. Our current thinking is that the subsection should apply to all cases that have not been concluded by 1 October 2004. This would be consistent with how a similar provision was introduced in 2001 into the SDA.

SENDING COMMENTS

These Explanatory Notes seek views on a number of issues (shown in bold above) where the detail of the Regulations is still being refined. We welcome your comments on any of these matters or on any other aspect of the draft regulations. Please send them to:

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The deadline for receipt of comments is 24 January 2003.

For further advice please telephone the disability consultation freephone number:
0800 389 5685 (textphone: 0207 712 2492).