INTO guide - Disability discrimination

Purpose of this guide

This guide sets out the legislation relating to the anti discrimination legislation in Northern Ireland covering the area of disability discrimination. Further advice or this specific piece of legislation or general advice on discrimination is available in the other accompanying leaflets, or by contacting the Northern Office of INTO at 02890381455

Introduction


The DDA recognises that various barriers exist within society which may present practical difficulties for disabled persons who are seeking employment, who are currently in employment and for many when accessing goods, facilities services or premises. Accordingly, in order to address some of the practical difficulties that these barriers present, the disability legislation, unlike other anti-discrimination legislation, creates a positive duty on employers and service providers to make ‘reasonable adjustment’ to their policies and premises where reasonable and appropriate.

Unlike the other anti-discrimination legislation, indirect discrimination is not dealt with explicitly. Rather in the DDA, it is addressed by the combined effect of the direct discrimination provisions and the duty to make reasonable adjustments.

Definition of disability
The DDA defines disability as “a physical or mental impairment which has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities”.

**Physical impairment:** this includes, for instance, a weakening of part of the body (eyes, ears, limbs, internal organs etc.) caused through illness, by accident or from birth. Examples would be blindness, deafness, paralysis of a leg or heart disease.

**Mental impairment:** this includes mental ill health and what is commonly known as learning disability.

**Substantial:** put simply, this means the effect of the physical or mental impairment on ability to carry out normal day to day activities is more than minor or trivial. It does not have to be a severe effect.

**Long-term adverse effect:** the effect has to have lasted, or be likely to last, overall for at least twelve months and the effect must be a detrimental one. A person with a life expectancy of less than twelve months is, of course, covered if the effect is likely to last for the whole of that time.

**A normal day to day activity:** this is something which is carried out by most people on a fairly regular and frequent basis, such as washing, eating, catching a bus or turning on a television. It does not mean something so individual as playing a musical instrument to a professional standard or doing everything involved in a particular job.

The person must be affected in at least one of the respects listed in the DDA:

- mobility;
- manual dexterity;
- physical coordination;
- 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 risk of physical danger.

If the effects of the disability are reduced by medication or other treatment then the relevant effects are those that would be present if there was no medication or treatment taking place. There is an exception to this rule for people who wear spectacles or contact lenses, then the relevant effects are those that remain while the spectacles or contact lenses are being used.

Special provisions cover particular conditions which might otherwise not be considered as disabilities. These are provisions covering:

• **recurring or fluctuating** conditions such as arthritis, where the effects can sometimes be less than substantial, which are treated as continuing to have a substantial adverse effect so long as that effect is likely to recur;
• **conditions which progressively deteriorate**, such as motor neuron disease, which count as having a substantial adverse effect from the first time they have any effect on the ability to carry out normal day to day activities even if it is not substantial, so long as there is eventually likely to be a substantial adverse effect;
• **severe disfigurements**, which are treated as having substantial adverse effects on the ability to carry out normal day to day activities, even if they have no actual effect at all; and
• **people with cancer, HIV infections or multiple sclerosis** will be deemed to be disabled people without the need to show that conditions have an adverse effect on their normal day to day activities (this change will come into effect in December 06/January 07).

The following conditions specifically do not count as impairments:

• addiction to or dependency on alcohol, nicotine or any other substance (unless resulting from the substance being medically prescribed);
• seasonal allergic rhinitis (e.g. hay fever) unless it aggravates the effect of another condition;
• tendency to set fires, or steal, or physically or sexually abuse other persons;
• exhibitionism and voyeurism; and
• disfigurements consisting of tattoos, non-medical body piercing or attachments to such piercing are not treated as having substantial adverse effects.

Much of the DDA also applies to people who have had a disability in the past for example, someone who was disabled by mental ill health but who has now fully recovered. People who were registered disabled under the Disabled Persons (Employment) Act (Northern Ireland) 1945 both on 12 January 1995 and 2 December 1996 will be regarded as having had a disability in the past, if they do not otherwise fall within the definition of the DDA.

The DDA and SENDO outline five types of discrimination:

1. Direct discrimination

This definition of discrimination applies to complaints about discrimination in employment, vocational training and education. This occurs if, on the grounds of a disabled person’s disability, a disabled person is treated less favourably than a person not having that particular disability whose relevant circumstances, including his/her abilities, are the same as, or not materially different from, those of the disabled person.

The idea is to avoid a ‘blanket ban’ on the employment of persons with a disability and this type of discrimination can not be justified by an employer.

Example
A blind person is not short-listed for a job involving computers because the employer wrongly assumes that blind people cannot use them. The employer makes no attempt to look at the individual circumstances. The employer has treated the disabled person less favourably than other people by not short-listing that person for the job. The treatment was on the ground of the person’s disability (because assumptions would not have been made about a non-disabled person).

2. Disability related discrimination
This definition of discrimination applies to complaints about discrimination in employment, vocational training, the provision of goods, facilities or services, education and premises. This occurs when, for a reason related to a person’s disability, the disabled person is treated less favourably than other people to whom the reason does not or would not apply, and this treatment cannot be justified.

The reason must be material and substantial to be capable of justification.

Example
A woman with a disability which requires the use of a wheelchair applies for a job. She can do the job but the employer thinks that the wheelchair will get in the way in the office. He gives the job to the person who is no more suitable for the job but who does not use a wheelchair. The employer has therefore treated the woman less favourably than the other person because he did not give her the job. The treatment was for a reason related to the disability i.e. the fact that she used a wheelchair.

3. Failure to make a reasonable adjustment

Discrimination occurs when an employer or service provider or educational body fails to comply with a duty to make a reasonable adjustment in relation to the disabled person.

Example
A customer with a visual impairment wishes to buy a compact disc player from a small specialist hi-fi shop. The shop arranges for a member of staff to assist the customer by reading out product details, packaging information and prices. This is likely to be a reasonable step for the shop to have to take.

4. Victimisation

Victimisation means treating some less favourably than others because they have complained of disability discrimination or they have assisted someone else to do so.
Example
Someone is dismissed because they were a witness for a colleague in a disability discrimination hearing. This dismissal would be unlawful.

5. Harassment

This occurs where, for a reason related to a disabled person’s disability, a 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 that person. Harassment takes place where, taking into account all the circumstances including in particular the perception of the person who has been harassed, the harasser’s conduct should reasonably be considered as having violated a person’s dignity or created such an environment for him/her.

Employment

The DDA applies to all employers regardless of size.

It is unlawful for an employer to discriminate in:

- recruitment and selection including arrangements for deciding who should be offered employment, in the terms on which employment is offered, or by refusing or deliberately omitting to offer a person employment;
- the terms and conditions of employment;
- the opportunities afforded for promotion, transfer, training or any other benefits, or the refusal of those opportunities; and
- dismissing an employee or causing him/her any other detriment.

It is also unlawful for an employer to harass an employee or a job applicant for a reason which relates to a disabled person’s disability.
Reasonable adjustments in employment

The DDA places a duty on employers to make reasonable adjustments if employment arrangements, or the workplace itself, place a disabled person at a **substantial disadvantage** compared to a non-disabled person. Reasonable adjustments have to be considered at every stage of employment. The duty is ‘reactive’ and requires the employer to have knowledge of the person’s disability and the fact that they will be placed at a substantial disadvantage compared to others who do not have the particular disability.

The duty arises where:

**a provision, criterion or practice** applied by or on behalf of the employer, or any **physical feature** of premises occupied by the employer, places a disabled person at a **substantial disadvantage** compared with people who are not disabled. An employer 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, the employer has to make a ‘reasonable adjustment’. Where the duty arises, an employer **cannot justify** a failure to make a reasonable adjustment.

Example

A person with dyslexia applies for a job which involves writing letters. The employer gives all applicants a test of their letter-writing ability. The disabled applicant can generally write letters very well but finds it difficult to do so in stressful situations and within short deadlines. The disabled applicant is given longer to take the test. This adjustment is likely to be a reasonable one for the employer to make.

The DDA explicitly refers to training, mentoring and support and in order to comply with the duty to make reasonable adjustments an employer may need to:

- alter the person’s hours of work or training;
- allow for absences for rehabilitation/treatment;
- assign him or her to a different place of work or training;
• re-allocate minor duties;
• modify equipment;
• give or arrange training or mentoring; or
• provide supervision or other support.

When determining whether an employer has discharged the reasonable adjustment duty and assessing whether the employer has acted reasonably a tribunal will have regard to:

• the effectiveness of the action;
• the financial cost;
• the extent of disruption;
• resources available;
• availability of financial assistance; and
• the requirements of the disabled person.

The DDA applies to all employers with the exception of the armed forces.

The DDA applies to all employees regardless of how long they have been employed by their employer. In addition, in certain circumstances, former employees will have rights under the DDA. For example, it will be unlawful for an employer to refuse to provide a work reference for a former employee for a reason related to a disabled person’s disability.

Bodies and organisations other than employers are also prohibited from discriminating against a disabled person for reasons related to that person’s disability. The DDA applies to:

• trade organisations;
• bodies that confer qualifications;
• providers of work placements;
• partnerships;
• contract workers;
• barristers;
• councillors;
• trustees and managers of occupational pension schemes; and
• office holders.

The DDA also makes it unlawful for an employer to place an advertisement suggesting that the employer will discriminate against disabled people.

Employers are also liable for acts of discrimination committed by their employees in the course of their employment whether or not the acts were done with the employer’s knowledge or approval, unless the employer can show that he took such steps as were reasonably practicable to prevent the discrimination occurring.

Scope
The DDA covers disability discrimination in employment in Northern Ireland if the employee does his/her work wholly or partly in Northern Ireland, or does his/her work wholly outside Northern Ireland and:

i. the employer has a place of business at an establishment in Northern Ireland;
ii. the work is for the purposes of the business carried on at the establishment; and
iii. the employee is ordinarily resident in Northern Ireland at the time when s/he applies for or is offered the employment or at any time during the course of the employment.

Councillors
It is unlawful for a district council to discriminate against a disabled person who is a member of the council when they are carrying out their official business no matter where that business is being carried out. Council members are protected from discrimination by:

• Being refused or deliberately not afforded opportunities to receive training or any other facility for carrying out official business;
• Being subjected to any other detriment in connection with the carrying out of official business;
• Harassment while carrying out official business; and
• Failing to make reasonable adjustments in relation to disadvantage in connection with the carrying out of official business.

**Goods, facilities and services**

The DDA makes it unlawful in certain circumstances for those providing goods, facilities or services to the public to discriminate against a disabled person for a reason related to their disability, in certain circumstances. It is unlawful for a provider of services to discriminate against a disabled person in:

• refusing to provide, or deliberately not providing, to a disabled person, any service which is provided to members of the public;
• failing to make a reasonable adjustment which makes it impossible or unreasonably difficult for a disabled person to make use of any such service, and the failure cannot be justified;
• the standard of service provided to a disabled person or the manner in which the service is provided; or
• the terms on which the service is provided.

**Reasonable adjustments under goods, facilities and services**

The service provider may have to change a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled people to use their services.

**Examples**

• amending a “no dogs” policy to allow a disabled person accompanied by a guide dog to enter the premises;
• providing an auxiliary aid or service if it would make it easier for disabled people to make use of their services e.g. the provision of information in alternative formats;
• making reasonable adjustments where a physical feature makes it impossible or unreasonably difficult for a disabled person to access a service, the options are to remove the feature, alter it, provide a reasonable means of avoiding it, or to
provide a reasonable alternative method of making the service available e.g. the installation of a lift or ramp.

It is irrelevant whether a service is provided for payment or not.

The reasonable adjustment duty in relation to goods, facilities or services is ‘anticipatory’ in nature and owed to the public at large. This contrasts with the duty in employment where specific knowledge of a person’s particular needs is required.

The DDA provides a list of examples to which the duty applies:

- access to and use of any place which members of the public are permitted to enter;
- access to and use of means of communication;
- access to and use of information services;
- accommodation in a hotel, boarding house or other similar establishment;
- facilities by way of banking or insurance or for grants, loans, credit or finance;
- facilities for entertainment, recreation or refreshment;
- facilities provided by employment agencies; and
- the services of any profession or trade, or any local or other public authority.

**Transport**

Providers of transport services must also comply with this reasonable adjustment duty. The duty applies to:

- breakdown recovery vehicles;
- hire or rental vehicles;
- private hire vehicles;
- public service vehicles;
- rail vehicles;
- taxis; and
- vehicles used on a system using a mode of guided transport.

The reasonable adjustment duty does not apply to aircraft and shipping vessels.
**Education**

Schools, education and library boards, universities and colleges, including teacher training and agricultural colleges, cannot discriminate against a disabled person or a person who has had a disability in the past for an unjustified disability-related reason.

It is unlawful for the body responsible for a school or institution of further and higher education to discriminate against a disabled person:

- in the arrangements it makes for determining admission to the school or institution;
- in the terms on which it offers to admit him/her to the school or institution;
- by refusing or deliberately omitting to accept an application for admission;
- in the education or associated services provided for or offered to pupils, or the student services provided or offered to further and higher education students; or
- by suspending or expelling a disabled pupil from the school or institution; or
- by subjecting a student or pupil to harassment.

It is unlawful for a responsible body to discriminate against a disabled person in relation to the conferring of qualifications. This protection applies to the awarding of qualifications and to the treatment of those holding such qualifications. The duty to make reasonable adjustments also applies to the conferring of qualifications on the treatment of qualification holders.

It is unlawful for a responsible body to discriminate against or harass disabled persons who are former students of the body for example, in the provision of references.

It is also unlawful for a responsible body to instruct or induce another person to commit an act of disability discrimination or to publish a discriminatory advertisement.

**Reasonable adjustments under education**

SENDO places duties on bodies responsible for the provision of education and associated services, admissions and expulsions. The duties can be summarised as follows:
Where a provision, criterion or practice relating to admission arrangements, student services or the granting of a qualification, other than a competence standard, is applied by or on behalf of a responsible body and the provision, criterion or practice places disabled persons at a substantial disadvantage, the responsible body must take all reasonable steps to prevent the provision, criterion or practice having that effect.

A competence standard is defined as being an academical, medical or other standard for the purpose of determining whether or not a person has a particular level of competence or ability.

Where a physical feature of premises occupied by an educational body places disabled persons at a substantial disadvantage in relation to admission arrangements, student services or the granting of a qualification, the responsible body must take all reasonable steps to prevent the feature having that effect.

These duties are both anticipatory and reactive duties. This means that educational institutions must make changes to the delivery of education both in response to the individual needs of pupils and students and proactively for disabled pupils and students generally.

For schools, there is a duty to work towards making the education experience more accessible to disabled pupils and prospective pupils in terms of premises, the curriculum and information. To assist with this particular duty the Department of Education and Education and Library Boards shall produce accessibility guidance and strategies.

**Public authorities**

It is unlawful for public authorities to discriminate against a disabled person or to subject disabled persons to harassment in the course of carrying out any of its functions. The term "public authority" does not include either House of Parliament or parliamentary functions; the Assembly; the Security Service; the Secret Intelligence Service; the government communications headquarters or any part of the naval, military or air forces. Certain judicial and legislative acts, and decisions not to institute criminal proceedings are also not included in the general prohibition against disability discrimination.
Selling, letting or managing land or property

It is unlawful for a landlord or other persons in connection with the selling, letting and managing of premises to treat a disabled person less favourably for a reason related to their disability. In certain circumstances there is an exemption for small premises. Landlords and managers of both commercial and residential premises will, in certain circumstances, be under a duty to make reasonable adjustments on behalf of their disabled tenants or perspective tenants. There is an exemption for small dwellings.

Other unlawful acts

The DDA makes it unlawful to knowingly aid another person to carry out discriminatory acts.

There are exceptions to the general principle of discrimination for a reason related to disability and the DDA exempts:

- small private clubs with less than 25 members
- acts done to safeguard national security; and
- acts done under statutory authority.

The DDA exempts charities when conferring benefits on a category of people determined by reference to any physical or mental capacity or in carrying out any act done in pursuance of its charitable purposes. The DDA also allows for the provision of supported employment for disabled people.

Enforcement of DDA employment complaints

Complaints of discrimination in employment under the Disability Discrimination Act must be made within three months of the act complained of. Complaints are dealt with by an industrial tribunal.

In certain circumstances, employees are required to provide their employer with a written statement of their grievance before a complaint of disability discrimination can be lodged with an industrial tribunal. In these circumstances, the normal time limits for lodging the complaint with an industrial tribunal are extended for a period of three months beginning with the day after the day on which it would have otherwise expired.
Where a tribunal decides in favour of the complainant, it may award such of the following remedies as it considers just and equitable:

- an order declaring the rights of the parties;
- an order requiring the respondent to pay compensation to the complainant; or
- a recommendation that the respondent takes remedial action to obviate or reduce discrimination.

In industrial tribunal proceedings, each party will normally pay its own costs although the tribunal may award costs against either party in certain circumstances. For example if a case is conducted in an unreasonable way by acting vexatiously, abusively or disruptively or if a complainant brings a case which is misconceived. The maximum costs the tribunal can award against a party are £10,000. In practice awards of costs are much lower than this and the tribunal will take into account the claimant’s ability to pay.

There is a right of appeal on a point of law to the Court of Appeal against a decision of an industrial tribunal.

**Enforcement of SENDO complaints**

**Schools**

Claims of unlawful discrimination in relation to education in schools must be made by the parent of a disabled child **within six months** of the act complained of. The claim is made to the Special Educational Needs and Disability Tribunal (SENDIST) for Northern Ireland.

If the complaint is about disability-related discrimination in relation to expulsions from grant-aided schools, the complaint is made to the Education and Library Board Expulsion of Pupils Appeal Tribunal **within ten days** from the date of the principal’s letter to the parents notifying them of their child’s expulsion.
Where a Tribunal decides in favour of the child, it may make:

- a declaration that the child has been unlawfully discriminated against, and
- such other order as it considers reasonable in all the circumstances of the case.

The SENDIST has no power to award compensation but it may make orders which aim to obviate or reduce the adverse effect of the action complained of.

**Institutions of further and higher education**

Claims of unlawful discrimination in relation to education in institutions of further and higher education must be made **within six months** of the act complained of.

Complaints are dealt with in the county court. Where a county court finds in favour of the complainant, it may award any of the following remedies:

- an order declaring the rights of the parties;
- an injunction or order; and
- damages, including compensation for injury to feelings.

**Enforcement of other DDA complaints**

Claims of unlawful discrimination in the provision of goods, facilities and services and in relation to premises must be made **within six months** of the act complained of.

Complaints are dealt with in the county court. Where a county court finds in favour of the complainant, it may award any of the following remedies:

- an order declaring the rights of the parties;
- an injunction or order; or
- damages, including compensation for injury to feelings.

Where the court finds against a party, that party will normally pay its own costs and the costs of the other party.
There is a right of appeal to the Court of Appeal against a decision of a county court. If leave is granted, a further appeal can be made to the House of Lords.