

Consultation on

# **Improving Protection From Disability Discrimination**

November 2008

# Contents

<b>Ministerial foreword</b>	<b>Page 3</b>
<b>Preface</b>	<b>Page 5</b>
<b>Policy background</b>	<b>Page 10</b>
<b>Annex A</b> Other options considered	<b>Page 29</b>
<b>Annex B</b> Disability Discrimination Act 1995: Disability-related discrimination provisions  Race Relations Act 1996: Indirect discrimination provisions	<b>Page 33</b>
<b>Annex C</b> Draft Regulatory Impact Assessment	<b>Page 37</b>
<b>Annex D</b> Draft Equality Impact Assessment	<b>Page 55</b>
<b>Annex E</b> Consultation Questions	<b>Page 66</b>
<b>List of Consultees</b>	<b>Page 69</b>

# Ministerial foreword

The Government is committed to ensuring that disabled people have the same opportunities as non-disabled people to participate fully in all aspects of life. Having effective anti-discrimination law is an essential element in our strategy to achieve this outcome and, since 1997, we have significantly widened and improved rights for disabled people under the Disability Discrimination Act 1995. We are now preparing to introduce an Equality Bill which will extend, simplify and harmonise the wide range of legislation that currently protects people from discrimination based on disability, gender, race, religion or belief, sexual orientation, and age.

In preparing the disability discrimination provisions for inclusion in the Equality Bill, we have been considering the implications of a recent judgment by the House of Lords involving the Disability Discrimination Act 1995, and the European Commission's proposals to introduce a new Directive that will provide protection against discrimination based on disability, religion or belief, sexual orientation and age, in areas beyond employment. This has led to our undertaking of a review on how the present Disability Discrimination Act 1995 operates in respect of discrimination that arises for a reason related to the individual's disability.

We have concluded that it would be appropriate for the disability provisions in the Equality Bill to take a different approach to this type of discrimination from that taken in the Disability Discrimination Act 1995. We intend to base protection for disabled people on the concept of indirect discrimination. This will ensure an appropriate level of protection for disabled people in the Equality Bill. It will also improve consistency within the Bill between the disability provisions and the provisions for people with the other protected characteristics, and ensure compliance with the anticipated requirements of European anti-discrimination legislation.

It is important that we ensure that our proposals for revising the protection for disabled people work effectively. That is why I want to seek your views on the proposals and whether they will work in practice. I hope that you will take this opportunity to consider this consultation document and let the Government have your views.

We have a manifesto commitment to introduce a new Equality Bill in this Parliament and have announced its inclusion in the draft legislative programme for the fourth session, which begins in December 2008. Preparing for the Bill is a substantial undertaking as it will bring together the wide range of equality legislation. In order to ensure that proper consideration is given to how the proposal will fit with the provisions in the Bill, I regret that it is necessary to restrict the consultation period to six weeks. However, I wish to ensure that we obtain an appropriately broad range of input to the consultation. To achieve this, the written consultation is being supplemented by a range of discussions with key stakeholders including representatives from the fields of disability, equality, business, advice and the voluntary sector. The proposals will also, of course, be considered by Parliament during passage of the Equality Bill.

# Preface

## Who is this consultation aimed at?

1. This consultation is aimed at disabled people and their advisers, as well as those who currently have duties under the Disability Discrimination Act. All will have an interest in how the proposed changes will protect disabled people from one aspect of disability discrimination.

## Subject of consultation

2. The consultation concerns the Government's plans for the Equality Bill to include provisions to protect disabled people from indirect discrimination. The principle of indirect discrimination is currently used in other equality legislation and will be used in the Equality Bill to provide protection from discrimination for people with other protected characteristics; sex, race, religion or belief, age, sexual orientation and gender reassignment.

## Purpose of the consultation

3. The consultation seeks views on the proposal to adopt the concept of indirect discrimination for the disability provisions in the Equality Bill and how indirect discrimination might operate in respect of providing protection from discrimination for disabled people. It includes some specific consultation questions for you to consider and answer.
4. You are also encouraged to comment on and/or challenge the assumptions made in the draft Regulatory Impact Assessment and the Equality Impact Assessment which are included as Annexes to this consultation document.

## Scope of consultation

5. This consultation applies to England, Wales and Scotland<sup>1</sup>.

## Duration of the consultation

6. The consultation period begins on **26 November 2008** and runs until **6 January 2009**.

## How can I respond to this consultation

7. Please send your consultation responses to:

Barbara Vincent  
Office for Disability Issues  
Civil and Human Rights Division  
Department for Work and Pensions  
6th Floor  
The Adelphi  
1-11 John Adam Street  
London  
WC2N 6HT

Phone: 020 7962 8523

Email: [ODI.ID@dwp.gsi.gov.uk](mailto:ODI.ID@dwp.gsi.gov.uk)

Please ensure your response reaches us by **6 January 2009**.

8. When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of a larger organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled. We will acknowledge your response.

## Queries about the content of this document

9. Any queries about the subject matter of this consultation should be made to:

**Peter Nokes**

Office for Disability Issues  
Civil and Human Rights Division  
Department for Work and Pensions  
6th Floor  
The Adelphi  
1-11 John Adam Street  
London  
WC2N 6HT

Phone: 020 7962 8527

Email: [ODI.ID@dwp.gsi.gov.uk](mailto:ODI.ID@dwp.gsi.gov.uk)

10. We have sent this consultation document to a large number of people and organisations who we believe have an interest in the proposal. Please do share this document with, or tell us about, anyone you think will want to be involved in this consultation.

## Freedom of information

11. The information you send us may need to be passed to colleagues within the Department for Work and Pensions and published in a summary of responses received, which is referred to below in paragraph 19.
12. All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purpose of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information that is provided, or remove it completely.

If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality of electronic responses even if your IT system claims it automatically.

13. If you want to find out more about the general principles of Freedom of Information and how it applies within the Department for Work and Pensions, please contact:

## **Charles Cushing or Carol Smith**

Department for Work and Pensions, Adjudication and Constitutional Issues, Information Policy Division, Freedom of Information Unit

2nd Floor

The Adelphi

1-11 John Adam Street

London

WC2N 6HT

Phone: 020 7962 8581 or 020 7962 8259

Email: [charles.cushing@dwp.gsi.gov.uk](mailto:charles.cushing@dwp.gsi.gov.uk)

[carol.smith@dwp.gsi.gov.uk](mailto:carol.smith@dwp.gsi.gov.uk)

**More information about the Freedom of Information Act can be found on the website of the Ministry of Justice.**

## The consultation criteria

14. The Cabinet Office Code of Practice on Consultation recommends a minimum 12 weeks consultation period for public consultations, unless there are good reasons for a limited consultation period.
15. The Government is committed to having an Equality Act, which simplifies and harmonises equalities legislation, in place within the lifetime of this Parliament. It has announced the inclusion of an Equality Bill in the draft legislative programme for the fourth session which begins in December 2008. Preparing for the Bill is a substantial undertaking as it will bring together the wide range of equality legislation. In order to ensure that proper consideration is given to how the proposal will fit with the other provisions in the Bill, it is necessary to restrict the consultation period to six weeks. However, the written consultation is complemented by a range of discussion events with key stakeholders, including representatives from the fields of disability, equality, business, advice, and the voluntary sector, to ensure that we receive a full range of views and comments on the proposals.

## Feedback on this consultation

16. We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised), please contact our Consultation Coordinator:

**Roger Pugh**

Department for Work and Pensions' Consultation Coordinator  
Room 2A  
Britannia House  
2 Ferensway  
Hull  
HU2 8NF

Phone: 01482 609571

Fax: 01482 609658

Email: roger.pugh@dwp.gsi.gov.uk

17. In particular, please tell us if you feel that the consultation does not satisfy these criteria. Please also make any suggestions as to how the process of consultation could be improved further.
18. If you have any requirements that we need to meet to enable you to comment, please let us know.
19. The responses to the consultation will be published in April 2009 in a report on our consultation website that will summarise the responses and the action that we will take as a result of them.

# **Improving Protection From Disability Discrimination**

## **Policy background**

### **Summary of proposals**

Currently, the Disability Discrimination Act 1995 includes provisions that protect disabled people from being discriminated against for a reason that relates to their disability. To determine that the treatment is discriminatory, it is necessary to show that the individual has been treated less favourably than other people, to whom that disability-related reason does not, or would not, apply, and that the person or organisation who treated the disabled person less favourably cannot justify that treatment. Following a recent House of Lords' judgment, this protection is now much weaker than previously.

Other anti-discrimination legislation in Great Britain applies the concept of indirect discrimination. This occurs where an apparently neutral provision, criterion or practice puts, or would put, people with a protected characteristic, such as sex or race, at a particular disadvantage compared with other people, unless that provision, criterion or practice can be objectively justified as being a proportionate means of achieving a legitimate aim.

In addition to other changes to disability discrimination legislation which we have already announced<sup>2</sup>, we propose to:

- adopt the concept of indirect discrimination for the purposes of the disability discrimination provisions in the Equality Bill, rather than carry forward to the Equality Bill the existing provisions in the Disability Discrimination Act 1995 that apply to disability-related discrimination. Once a prima facie case of indirect discrimination has been made, it will be possible for the person who imposed the provision, criterion or practice to show that it was objectively justified to defeat the claim; and
- introduce a requirement that those people and organisations that are under a duty to make reasonable adjustments for disabled people must make any reasonable adjustment that the Equality Bill will require them to make before they can seek to justify indirect discrimination. A provision that has a broadly similar effect already exists in the employment provisions of the Disability Discrimination Act 1995.

---

2 The Equality Bill – Government Response to the Consultation

[http://www.equalities.gov.uk/publications/Government\\_Response\\_to\\_the\\_consultation.pdf](http://www.equalities.gov.uk/publications/Government_Response_to_the_consultation.pdf)

# Revision of disability-related discrimination

## Introduction and context

1. Since it first came into force in December 1996, the Disability Discrimination Act 1995, (hereafter referred to as ‘the Disability Discrimination Act’) has provided a disabled person with protection from less favourable treatment occurs for a reason related to that person’s disability, and which cannot be justified.
2. In 1999, the Court of Appeal, in the case of *Clark v Novacold*<sup>3</sup>, established the test for determining whether a disabled person has been subjected to disability-related less favourable treatment. That judgment made it relatively easy for a disabled person to establish that they had been treated less favourably for a reason related to their

disability. However, in considering the recent case of *Lewisham v Malcolm*<sup>4</sup> in June 2008, the House of Lords took a different a view from that of the Court of Appeal in *Clark v Novacold*. The consequence of the House of Lords' judgment is some weakening of protection for disabled people, because it has made it more difficult for a disabled person to establish a case of disability-related less favourable treatment. The judgment has not, however, affected the ability of disabled people to challenge direct discrimination, or discrimination that arises from a failure of the duty holder to make a reasonable adjustment.

3. There have been a number of concerns expressed by representatives of disabled people about the implications of the judgment, and calls on the Government to take action in the Equality Bill to redress the situation for disabled people. In this context, we have been carefully considering the implications of the House of Lords' judgment for disability discrimination law. We have been examining whether an alternative approach is required to protect disabled people from indirect forms of discrimination.

---

3 *Clark v Novacold* [1999] ICR 951

4 *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* ([2008] UKHL 43)

## **The Disability Discrimination Act**

4. The Disability Discrimination Act currently uses a range of provisions to make sure that disabled people are protected from discrimination. These cover direct discrimination, disability-related discrimination, and the duty of reasonable adjustment. The Disability Discrimination Act also protects people from victimisation, which is a further, specific, form of discrimination, and from harassment. However, consideration of victimisation and harassment is not relevant to this consultation.

### **Direct discrimination**

5. Direct discrimination occurs where, simply because a person is disabled, that disabled person is treated less favourably than somebody who does not have that particular disability and whose circumstances are the same as, or not materially different from, those of the disabled person. The Disability Discrimination Act does not allow direct discrimination to be justified.

6. Direct discrimination covers the more overt and prejudicial types of discrimination; for example where an employer refuses to employ a disabled person simply because the person has a disability, without considering whether that person could do the job.

A profoundly deaf person applies for a job in a shop. The employer wrongly assumes that the person would be unable to communicate with customers and refuses to employ the person. This is likely to be direct discrimination.

7. In this situation, the protection against direct discrimination overlaps with that provided for disability-related discrimination and (because direct discrimination cannot be justified) provides a remedy where disability-related discrimination might not. Currently, the Disability Discrimination Act only provides protection against direct discrimination in respect of employment and vocational training. We have already announced<sup>5</sup> that the disability provisions in the Equality Bill will extend protection from direct discrimination beyond employment and vocational training.

In the Equality Bill, direct discrimination provisions will be extended to other fields in which disability discrimination legislation applies. These include access to goods, facilities, services, premises, and larger private clubs, as well as the performance of public functions. This planned extension would, even if we were to make no further changes in response to the judgment in *Lewisham v Malcolm*, provide stronger protection than currently exists in relation to some situations outside of employment and vocational training.

---

5 The Equality Bill – Government Response to the Consultation

[http://www.equalities.gov.uk/publications/Government\\_Response\\_to\\_the\\_consultation.pdf](http://www.equalities.gov.uk/publications/Government_Response_to_the_consultation.pdf)

## Reasonable adjustment

8. A key principle underpinning the protection provided by the Disability Discrimination Act is the duty of reasonable adjustment. Those, such as employers, service providers, private clubs, and public authorities, who are under this duty, are required to make reasonable adjustments to their practices, policies, procedures<sup>6</sup>, or to the physical features of their premises, to overcome the barriers that disabled people experience in accessing employment, goods and services, the functions of public authorities, etc.
9. In respect of employment, the duty to make reasonable adjustments only arises when the employer has a disabled employee or disabled job applicant. In relation to access to goods, facilities and services, private clubs, and the functions of public authorities, the duty to make reasonable adjustments is anticipatory. The service provider, club, etc is required to consider the potential needs of disabled people who may wish to access the service and to make appropriate adjustments in advance.

A theatre recognises that its clientele may include people with a range of impairments. In anticipation, it makes a range of reasonable adjustments such as ensuring that its publicity material is available in a range of accessible formats, that there is gently sloping access to the auditorium with spaces for wheelchairs, that there is an induction loop, and some signed performances.

---

6 Different terminology is used in various provisions of the Disability Discrimination Act though the basic policy principle is the same. For example, the employment and further and higher education provisions refer to 'provision, criterion or practice' to reflect the terminology of the European Framework Employment Directive (Directive 2000/78/EC)

10. In many instances, the duty of reasonable adjustment will overcome the kind of conduct that would presently fall within disability-related discrimination as currently defined in the Disability Discrimination Act, or would fall within the concept of indirect discrimination.

An employee has arthritis that has progressively worsened and made it impossible for the employee to use a keyboard. The employer seeks to dismiss the employee because the job mainly involves producing documents on the computer. The reason for the dismissal is not the fact that the person has arthritis, but that the arthritis affects the person's ability to use a standard keyboard, which is a reason related to the disability. A reasonable adjustment might be for the employee to be provided with voice-activated software in order to continue working and thus avoid dismissal.

An assistance dog user is refused entry to a restaurant because the restaurant owner considers any animal to be a health and safety risk. This would not be direct discrimination as the refusal is not because the person is blind. It is disability-related discrimination as it arises because the person has an assistance dog, which is a consequence of the disability. The restaurant owner is under a duty to make a reasonable adjustment and it may be a reasonable adjustment for the owner to relax the ban on animals solely for assistance dog users.

**Note:** In each of the above examples, the disabled person would be protected under the concept of indirect discrimination if this were applied to disability discrimination. However, the reasonable adjustment would overcome the disadvantage to the disabled person.

In the employment situation, the employer would be operating a provision or criterion that people doing the employee's job should be able to type. This would place people with arthritis who are unable to type at a particular disadvantage when compared to non-disabled people.

In the restaurant situation, the policy would place blind people who rely on guide dogs at a particular disadvantage in that, unlike non-disabled dog owners, they would not have the option of not bringing their dog with them to the restaurant.

11. However, the duty of reasonable adjustment would not, in all cases, provide a timely solution to overcoming the disadvantage caused by disability-related discrimination. In respect of premises, the landlord or controller of premises is not under a duty to anticipate the need for adjustments to their policies, practices or procedures; the duty to make reasonable adjustments only applies if the disabled tenant or person acting on their behalf requests that an adjustment is made. It is likely, in such cases, that a request to adjust the policy will only arise once the policy has been applied, for example where a landlord has started to take action to obtain possession.
12. The duty of reasonable adjustment is to be retained in the disability provisions of the Equality Bill.

### Disability-related discrimination

13. **This is the area of the law that we propose to change**, as explained below.
14. Protection from disability-related discrimination has been a feature of the Disability Discrimination Act since it was enacted. It was intended to cover situations where there was both direct and indirect discrimination, as the Minister at the time explained:

---

7 William Hague. Hansard House of Commons 24 January 1995 Volume 253 Column 150

“The Bill is drafted in such a way that indirect as well as direct discrimination can be dealt with. We have adopted a definition of discrimination that leaves disabled people with practical solutions to the real problems that they face – however they are categorised. A situation where dogs were not admitted to a cafe, with the effect that blind people would be unable to enter it, would be a prima facie case of indirect discrimination against disabled people and would be unlawful.”<sup>7</sup>

15. The Disability Discrimination Act, as enacted, was intended to cover circumstances that would give rise to indirect discrimination, as well as direct discrimination, through the concept of disability-related discrimination, which is set out in a number of individual sections of the Act (see Annex B), each of which adopts a similar form of words:

a person, provider of services, public authority, association, etc. discriminates against a disabled person if –

- (a) for a reason that relates to the disabled person's disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
- (b) he or it cannot show that the treatment in question is justified.

16. These current provisions were intended to provide protection for a disabled person where, for a reason related to their disability, the person experiences less favourable treatment that would not have been experienced by a person to whom that reason did not apply. Outside of employment and vocational training, which are the only areas that currently have specific protection against direct discrimination, the disability-related discrimination provisions currently can also protect the disabled person from direct forms of discrimination based on the impairment, such as a nursery's blanket refusal to admit any child who is disabled. As the Government has announced, the Equality Bill will include specific provisions to protect disabled people from direct discrimination of this kind in fields where it does not currently exist.
17. The current disability-related discrimination provisions were intended to also provide protection from discrimination arising from the application of seemingly neutral rules that have a particular adverse impact on disabled people.

A mother seeks admission to a privately-run nursery for her son who has Hirschprung's disease, which means that he does not have full bowel control. The nursery says that they cannot admit any child until the child is toilet trained. The refusal to admit the boy is for 'a reason related to his disability'. It will be unlawful unless it can be justified under the Act.<sup>8</sup>

18. To make a finding that disability-related discrimination has occurred, the court or tribunal must be satisfied of two things. First, that the disabled person has been subjected to less favourable treatment for a reason related to their disability ('disability-related less favourable treatment'). Second, that the alleged perpetrator of the less favourable treatment cannot justify that treatment. The principle underlying the policy is that it should achieve a proper balance between the rights of disabled people and the interests of those with duties under the Disability Discrimination Act. Therefore, it should be relatively easy for a disabled person to be able to establish a prima facie case of less favourable treatment, but balanced against this should be the opportunity for the duty holder to justify that treatment.

19. To establish that the disabled person has been the victim of disability-related less favourable treatment, it is necessary to find a comparator: that is, a person to whom, the legislation says, 'that disability related-reason does not or would not apply'. The use of the wording 'would not' means that a hypothetical comparator can be used.
20. The question of how to determine who the comparator should be has been subject to interpretation by the courts. Until recently, the key caselaw for establishing the comparator, when determining whether disability-related less favourable treatment has occurred, was the Court of Appeal case of *Clark v Novacold*. The Court of Appeal's judgment in that case established a precedent that made it relatively easy for a disabled person to demonstrate that they had been subjected to disability-related less favourable treatment.

---

8 Disability Rights Commission Code of Practice – Rights of access: services to the public, public authority functions, private clubs and premises. Paragraph 5.9

## Clark v Novacold (1999)

Mr Clark sustained a back injury which resulted in his being a disabled person for the purposes of the Disability Discrimination Act. A consequence of the disability was that he would have had to be absent from work for about a year. He was dismissed from his job because of this prognosis. The Court of Appeal had to decide who to compare Mr Clark with in order to determine whether he had been treated less favourably. It identified two possible comparators:

- (a) someone who did not have a disability, but who was likely to be absent from work for about a year for non-disability-related reasons
- or
- (b) someone who did not have a disability and who would remain in work for that period.

The Court of Appeal decided that the correct comparator was (b) so that the test of less favourable treatment was based on the reason for the treatment of the disabled person; that is, the disability-related absence and not the fact of his being disabled. The effect of this judgment was to make it relatively easy for the disabled person to show that he had been treated less favourably for a reason related to his disability.

The Court of Appeal found the employer would have discriminated against Mr Clark by dismissing him, unless it could show that the less favourable treatment was justified.

21. However, the House of Lords, in considering the recent case of *Lewisham v Malcolm* in June 2008, took a different and more restrictive view than that of the Court of Appeal in *Clark v Novacold*, when deciding who the comparator should be for the purposes of establishing disability-related less favourable treatment.

## Lewisham v Malcolm (2008)

This case concerned proceedings to evict Mr Malcolm from his council home for subletting it, contrary to a term of his tenancy. The Disability Discrimination Act precludes a manager of premises from discriminating against a disabled person who occupies the premises, by evicting them or subjecting them to any other detriment for a reason related to their disability. Mr Malcolm claimed that he was a disabled person under the Act and that his subletting was a consequence of his disability so the court could not grant a possession order in his case because this would be disability-related discrimination (i.e. without justification, subjecting him to less favourable treatment for a reason related to his disability).

In reaching a judgment the House of Lords declined to follow the caselaw in *Clark v Novacold*. Instead they held that the correct approach meant the comparator should be someone who had sublet their flat but who did not have a disability. Since Lewisham Council would have sought possession against anyone who had sublet their council flat, the Law Lords found that the Council had not treated Mr Malcolm less favourably.

22. The effect of the House of Lords' judgment is that it has shifted protection under the Disability Discrimination Act away from the Government's policy intention. While the protection remains sufficient to meet obligations arising from the United Nations Convention on the Rights of Persons with Disabilities, the judgment has disturbed the balance between the rights of disabled people and the interests of duty holders by making it more difficult for a disabled person to establish a case of disability-related less favourable treatment.
23. The Government has been carefully considering the implications of the judgment for disability discrimination law, and what should be included in the Equality Bill to provide the most appropriate way of protecting disabled people from indirect forms of discrimination. In considering the way forward for the Equality Bill, we have had regard to the fact that protection against direct disability discrimination will be extended and that the principle of objective justification is to be applied for indirect forms of discrimination. We have also taken account of anticipated requirements of proposed European anti-discrimination legislation.

## European anti-discrimination legislation

24. European anti-discrimination legislation includes provisions specifically aimed at providing protection from indirect discrimination. In respect of disability, the Framework Employment Directive<sup>9</sup> which provides protection from discrimination in employment and occupation states, at Article 2(2)(b), that:

‘indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation 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) as regards persons with a particular disability, the employer or any 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<sup>10</sup> in order to eliminate disadvantages entailed by such provision, criterion or practice.’

25. In implementing the disability provisions of the Framework Employment Directive, the UK Government chose to adopt the route of reasonable adjustment, as in (ii) above, because the existing structure of the Disability Discrimination Act was consistent with it.

---

9 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

10 Article 5: “**Reasonable accommodation for disabled people.** In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

26. On 2 July 2008, the European Commission introduced proposals for a further anti-discrimination Directive. This will provide protection from discrimination based on disability, age, sexual orientation, and religion or belief in areas beyond employment; for example access to goods, facilities and services. The proposed Directive sets out separate and distinct provisions covering indirect discrimination and 'denial of reasonable accommodation'. Thus, if it is adopted, the Directive would require us similarly to include separate provisions on indirect discrimination and reasonable adjustments in anti-discrimination legislation in Great Britain.
27. In anticipation of the requirements of the new Directive, we have been considering whether it would be appropriate to move from the concept of disability-related discrimination and to adopt the principle of indirect discrimination for the disability provisions in the Equality Bill.

## Indirect discrimination

28. The concept of indirect discrimination takes the approach set out in Article 2(2)(b)(i) of the Framework Employment Directive (see Paragraph 24). This form of discrimination features in most domestic anti-discrimination legislation, for example in section 1A of the Race Relations Act 1996 (see Annex B). Indirect discrimination occurs where someone applies to both people in the protected group and to others an apparently neutral provision, criterion or practice
  - which puts, or would put, persons sharing the protected characteristic at a particular disadvantage compared with other persons; and
  - which puts, or would put, an individual with the protected characteristic at that disadvantage,
  - unless that provision, criterion or practice can be objectively justified as being a proportionate means of achieving a legitimate aim.

When the comparison is made between the individual and the comparator group, there must be no material difference between the circumstances relating to each, apart from the protected characteristic e.g. race, sex, etc.

29. The Disability Discrimination Act is not in line with anti-discrimination legislation covering the other protected characteristics, because it does not include this form of provision to provide explicit protection from indirect discrimination. One of the aims of the Equality Bill is to harmonise protection and legislative provisions where practicable. In light of this aim, the House of Lords' judgment in *Lewisham v Malcolm*, and the proposed EU anti-discrimination legislation, we have considered the case for adopting the indirect discrimination approach for the disability provisions in the Equality Bill.

30. We have compared the practical effect of the indirect discrimination model with the outcomes that would be achieved if the present disability-related discrimination provisions were carried forward to the Equality Bill. This can be illustrated using the circumstances of a tenant who has a mental impairment that prevents him from understanding that he cannot sublet his rented housing association flat and who, consequently, breaches the tenancy agreement by subletting the flat. This is, of course, similar to the circumstances of the Malcolm case, but the same outcome would apply in situations involving, for example, employment or access to goods, facilities and services.

## **A**

### **Disability-related discrimination using the comparator as determined by the Court of Appeal in Clark v Novacold**

Using the comparator as determined in Clark v Novacold, the disabled tenant would be compared with a tenant who had not sublet their flat and who, therefore, would not have had eviction proceedings taken against them. In that situation, the disabled tenant would have been treated less favourably because he had been subject to eviction proceedings. The disabled person would have been discriminated against, unless the housing association could justify its less favourable treatment.

Currently, none of the specific justifications in the Disability Discrimination Act would apply. However, we have already announced that in the Equality Bill, we will introduce the principle of objective justification. The eviction proceedings might be a 'proportionate means of achieving the legitimate aim' of preserving the availability of the housing association's housing stock for homeless individuals. If so, the discrimination would not have been unlawful.

## **B**

### **Disability-related discrimination using the comparator as determined by the House of Lords in Lewisham v Malcolm**

Using the comparator as determined in Lewisham v Malcolm, the disabled person would have been compared with a non-disabled tenant who also had sublet their property. The housing association would have taken eviction proceedings against either tenant for breaching the tenancy agreement. Therefore, the disabled tenant would not have been treated less favourably, and would not have experienced disability-related discrimination, by having been subjected to eviction proceedings.

## C

### Indirect discrimination (as used in other GB anti-discrimination legislation)

Using the concept of indirect discrimination, the first consideration is to identify the apparently neutral provision, criterion or practice.

In this instance, it is the practice of bringing eviction proceedings against any tenant who sublets.

The second consideration is whether the housing association's practice of taking eviction proceedings in such cases would place people who share the individual's characteristic (i.e. they are disabled) at a particular disadvantage compared with other people who do not share that characteristic, (i.e. people who are not disabled). A claimant would not have to show that every disabled person would be put at the particular disadvantage of having eviction action taken against them. They would need to show that, among disabled people in general, some would be more likely to experience that disadvantage, because the effects of their particular disability lead to the same practical outcome, e.g. in this case subletting. So, compared with non-disabled people, there would be a greater likelihood of disabled people, and in particular those who are unable to understand the consequences of their actions (which might arise from a range of individual impairments) being subjected to eviction action for subletting as a consequence of their inability to understand that they may not sublet. Therefore disabled people **would** be put at a particular disadvantage compared with non-disabled people.

The third consideration is whether the disabled individual was placed at that 'particular disadvantage'. A disabled individual against whom eviction proceedings had been commenced would have been put at that disadvantage.

The final consideration is whether the landlord could justify the practice of taking eviction action against a person who sublets, by demonstrating that the practice was a proportionate means of achieving a legitimate aim. This may be the case if, similar to the case in *Lewisham v Malcolm*, a housing association was under a duty to ensure that the limited supply of its accommodation was focused on those people who are in most need.

31. This analysis is based on the way in which the concept of indirect discrimination, the drafting of the test and the interpretation of how it operates, have developed over time. Under the Sex Discrimination Act and Race Relations Act as originally drafted, proving a case of indirect discrimination involved a statistical approach. It focused, first, on determining a 'pool' of people who had the protected characteristic and a comparator 'pool' of people without that characteristic. Then it relied heavily on a statistical demonstration that an apparently neutral provision, criterion or practice had a disproportionate effect on the pool of people who had the protected characteristic, when compared with the comparator pool of people who did not have that characteristic.

32. Over time, the coverage of indirect discrimination has been significantly extended to cover characteristics such as religion or belief, sexual orientation and age. Furthermore, the drafting of anti-discrimination legislation has developed in such a way as to move away from reliance on statistical analysis, and having to demonstrate mathematically disproportionate effects, towards a more flexible approach.
33. The effect of the modern approach means that a comparison no longer has to be made between the exact proportion of people in the two groups who may be disadvantaged by the provision, criterion or practice. Instead, the emphasis is on the 'particular disadvantage'. Therefore, consideration need only be given to whether it is more likely that people sharing the protected characteristic will experience the particular disadvantage. That is the approach taken in Example C. Thus, it is not the case that all, or even most, of the members of the protected group have to suffer the particular disadvantage, as long as they are more likely to suffer it than people in the comparator group.
34. For disability, it would be difficult to apply the former 'pool' approach, given the complexities of determining who should comprise the pool. The diverse nature of disability, which can arise from a wide range of impairments that can have differing levels of effects, means that disabled people cannot be treated as an homogenous group. For example, previously, in the case of indirect discrimination against a blind guide dog user denied entrance to a restaurant, the pool might be all disabled people, all blind people, or all blind users of a guide dog. The levels of uncertainty in this approach mean that it would not have been appropriate to apply it to disability.
35. In contrast, the modern approach appears particularly relevant to disability, not least because, by focusing on the interaction between disability and the particular disadvantage or barrier faced by the disabled individual, this approach is more in tune with the social model of disability. We consider also that this approach will assist with one-off instances of indirect discrimination. Recent case law<sup>11</sup> in relation to indirect discrimination covering other protected characteristics has provided that an action for indirect discrimination can also be brought in relation to 'one-off' instances of discrimination and so claims would not be limited to challenging widespread policies.
36. Using the modern approach, the focus would be more on the consequences of the impairment. In the example given in Paragraph 34 above, the consideration would be whether a practice of excluding dogs would place disabled persons, and in particular those requiring the assistance of guide dogs, at a particular disadvantage compared with non-disabled people. Blind people would be at a particular disadvantage because they are more likely to use a guide dog than sighted people. A disabled individual who required the assistance of a guide dog would be placed at that particular disadvantage and so would be able to bring a claim. It would then be for the restaurant owner to show that the practice of excluding animals from the restaurant could be objectively justified.

## Benefits of indirect discrimination

37. We consider that by focusing the attention of duty holders on proactively ensuring that their policies and practices are not discriminatory, the move to indirect discrimination will provide a more effective way for systemic disability discrimination to be addressed. For example, a restaurant owner might review a policy of banning dogs from his restaurant because it is found to be indirectly discriminatory towards blind people with guide dogs, rather than simply making reasonable adjustments to the policy in individual cases. Such a change would also benefit people who use hearing dogs and other types of assistance dog.
38. One of the aims of the Equality Bill is to simplify and harmonise anti-discrimination legislation as far as is practicable. Adopting the concept of indirect discrimination for disability would be consistent with that aim. Our aim will be to make it as consistent as practicable with the indirect discrimination provisions for the other protected characteristics. This will make the legislation easier for disabled people and duty holders to understand and operate, than if we maintained the current, and very distinctly different, principle of disability-related discrimination.
39. By applying the general principles of indirect discrimination we consider that we would comply with the anticipated requirements of the proposed new European Union Directive which, should it be adopted, will provide for equal treatment on the grounds of disability, age, religion or belief, and sexual orientation across those areas that extend beyond employment, such as access to goods, facilities and services. This will avoid having to make further changes to the law at a later date in order to apply the provisions of the new Directive.
40. We have considered a number of other options for responding to the *Lewisham v Malcolm* judgment (see Annex A). However, we consider that none would achieve the outcome that we seek to achieve for disabled people. Therefore, we propose to adopt the concept of indirect discrimination for the disability provisions in the Equality Bill.
41. This concept of indirect discrimination will extend across the provisions covering employment, vocational training, occupation, access to goods, facilities, services, premises, larger private clubs and the functions of public authorities.

## Consultation Question 1:

Do you agree that the Equality Bill should adopt the concept of indirect discrimination for disability?

If you disagree, please explain your reasons for this and whether you consider any adverse consequences would arise from adopting indirect discrimination.

### Justification and reasonable adjustment

42. As has been described previously, a key principle of protection from indirect disability discrimination is that it should maintain a balance between the ability of the disabled person to establish that discrimination has taken place, and the ability for the duty holder to justify that discrimination. In the disability provisions of the Equality Bill, we will be harmonising the ability to justify indirect discrimination by adopting the more modern test of objective justification. This means showing that the discriminatory treatment was a proportionate means of achieving a legitimate aim.
43. The Equality Bill will retain the duty for employers, service providers, etc to make reasonable adjustments for disabled people. In many, if not most, instances where a person experiences indirect disability discrimination the disadvantage may be overcome by the duty holder making a reasonable adjustment. If the reasonable adjustment removes the disadvantage that the disabled person faces, the question of having to objectively justify that discriminatory policy or provision, etc, may not arise.

A large employer requires an office assistant to collect and distribute printed materials from a bank of numbered printers. Therefore, it has a policy of only employing people who can read numbers. This would disadvantage a learning disabled person who cannot recognise numbers, but who is otherwise able to do the job. The employer makes the reasonable adjustment of colour coding the printers. The disabled person is able to recognise colours and thus is able to carry out the tasks.

44. Consequently, we consider that those who are under a duty of reasonable adjustment should be required to make any such adjustments before they may seek to justify indirect disability discrimination. There is a precedent for this approach in the current employment, vocational training and education provisions of the Disability Discrimination Act (see sections 3A(6), 28B(8), 28S(7) and 31AB(5)). These set out that a person who is under a duty to make reasonable adjustments may not justify disability-related discrimination, unless that discrimination would be justified even if the reasonable adjustment had been put in place. The Disability Rights Commission's Code of Practice recommends this approach for other areas covered by the Act.<sup>12</sup>
45. We propose that this requirement should be adopted for the indirect disability discrimination provisions of the Bill, which will not just apply to employment and vocational training but also to access goods, facilities, services, private clubs and the functions of

public authorities. We consider that such a provision will provide a further opportunity to address systemic discrimination. This is because, where the duty holder is challenged by a disabled person who alleges indirect discrimination, the duty holder will be required to consider what reasonable adjustments might be made to an apparently neutral provision, criterion or practice that might discriminate against the group of persons to which the disabled individual belongs. Adjustments to that provision, criterion or practice may prevent it discriminating against other groups of disabled people.

## Consultation Question 2:

Do you agree that the Equality Bill should include a provision that requires a duty holder to fulfil the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination?

---

12 Disability Rights Commission Code of Practice – Rights of access: services to the public, public authority functions, private clubs and premises. Paragraph 8.13

# ANNEX A

## Other options considered

1. In considering our response to the House of Lords' judgment in *Lewisham v Malcolm*, and our anticipated duties under the proposed new European Directive, we have also examined the following range of proposals. However, we consider that none would provide the outcome that we aim to achieve for disabled people.

### Maintain the principle of disability-related discrimination and seek to reinstate the comparator as used by the Court of Appeal in *Clark v Novacold*

2. This option would require us to make legislation to completely reverse the effect of the House of Lords' judgment in *Lewisham v Malcolm* in order to re-establish the legal position as it had stood since the *Clark v Novacold* judgment.
3. The principle of disability-related discrimination is well-established, having been in place since the Act came into force in December 1996, and its application following the *Clark v Novacold* judgment is well understood by practitioners. Therefore, legislating in this way would have the advantage of ensuring that the legislation operated effectively, and was in accordance with the policy intention prior to the House of Lords' judgment.

4. However, it would not be possible to achieve the degree of legislative certainty that simply carrying forward the current disability-related discrimination provisions to the Equality Bill would seek to achieve. Changes would be needed with a view to ensuring that the provisions were interpreted in accordance with the principles of *Clark v Novacold*, and to remove the ambiguities in the current legislation that the House of Lords criticised.
5. Maintaining the very distinct nature of disability-related discrimination would be contrary to the aims of harmonising equality legislation, as far as practicable, in the Equality Bill. Furthermore, we would not comply with our anticipated obligations under the proposed new European Directive, which, if it is adopted, would require the concept of indirect discrimination to be adopted in GB legislation in addition to denial of reasonable adjustments; and differences would remain with other EU Member States when it came to the employment provisions.
6. We considered whether, in order to meet anticipated European requirements, indirect discrimination might be adopted in addition to the retention of disability-related discrimination (duly amended to reverse the decision in *Lewisham v Malcolm*). This would result, however, in at least four forms of discrimination, in addition to victimisation: direct discrimination; disability-related discrimination; indirect discrimination; and a failure to make a reasonable adjustment. We consider that such an approach would make disability discrimination legislation cumbersome and confusing to operate.

## Remove the need for a comparator

7. This option would require a disabled person to show that they had experienced a detriment because of the impact of their impairment. They would not need to demonstrate that they had been treated less favourably than others whose circumstances were the same, or not materially different.
8. A possible precedent for not requiring a comparator already exists in the Sex Discrimination Act in relation to pregnancy and maternity. However, the removal of the need for a comparator in the Sex Discrimination Act on the ground of pregnancy and maternity is only relevant to direct discrimination. As such, this cannot be considered to provide an appropriate framework on which to model protection against indirect disability discrimination. Discrimination on the ground of pregnancy and maternity is uniquely different from other forms of discrimination. It is, effectively, a form of gender discrimination because, biologically, a man cannot be pregnant and therefore there can be no proper comparator.

9. In addition, pregnancy and maternity discrimination, which is direct discrimination, cannot be justified. Objective justification would have to be provided for a disability version. This would risk rendering direct disability discrimination superfluous and add undue complexity to the legislation, contrary to the principle of harmonisation that the Equality Bill aims to achieve.
10. However, even with the availability of provisions to allow duty holders to objectively justify discrimination, we consider that removal of the comparator would not achieve the balance that we seek to achieve between the rights of disabled people and the interests of duty holders.

### Retain the principle of disability-related discrimination and allow the comparator to be determined in accordance with the House of Lords' judgment in *Lewisham v Malcolm*

11. This is effectively a 'do nothing' option. Under this, the existing provisions on disability-related discrimination would simply be carried forward to the Equality Bill and the more restrictive judgment in *Lewisham v Malcolm* would continue to make it harder for disabled people to successfully challenge disability-related discrimination. Disabled people would then have to rely more heavily on direct discrimination provisions or the duties of reasonable adjustment to provide redress.
12. The direct discrimination route will be made easier by the Equality Bill because the principle of direct discrimination, which currently only applies in employment and occupation, will be extended to areas beyond employment. However, we do not consider that wider availability of enforcement by that route is sufficient to achieve a fair outcome for disabled people.
13. In most cases, disabled people will be able to rely on the duty to make reasonable adjustments to challenge disability-related discrimination. However, this solution will not apply universally. It is less likely to assist in cases involving premises, because managers of premises are not under a duty to make reasonable adjustments in anticipation of the requirements of a disabled person. Instead, they only have to respond to a request for adjustment.
14. It would not be compatible with the anticipated requirements of the proposed new European Equality Directive.

# ANNEX B

## Disability Discrimination Act 1995: Current provisions concerning disability-related discrimination

### The employment field and members of locally-electable bodies

#### 3A Meaning of 'discrimination'

- (1) For the purposes of this Part<sup>13</sup>, a person discriminates against a disabled person if –
  - (a) for a reason that relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
  - (b) he cannot show that the treatment in question is justified.

### Access to goods, facilities and services

#### 20 Meaning of 'discrimination'

- (1) For the purposes of section 19<sup>14</sup>, a provider of services discriminates against a disabled person if –
  - (a) for a reason that relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
  - (b) he cannot show that the treatment in question is justified.

---

<sup>13</sup> Part 2 'The employment field and members of locally-electable bodies'

<sup>14</sup> Discrimination in relation to goods, facilities and services

## Public authorities

### 21D Meaning of 'discrimination' in section 21B

- (1) For the purposes of section 21B(1)<sup>15</sup>, a public authority discriminates against a disabled person if –
  - (a) for a reason that relates to the disabled person's disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
  - (b) it cannot show that the treatment in question is justified under subsection (3), (5) or (7)(c).

## Private clubs

### 21G Meaning of 'discrimination'

- (1) For the purposes of section 21F<sup>16</sup>, an association discriminates against a disabled person if –
  - (a) for a reason that relates to the disabled person's disability, the association treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
  - (b) it cannot show that the treatment in question is justified.

---

<sup>15</sup> Discrimination by a public authority in carrying out its functions

<sup>16</sup> Discrimination by private clubs, etc

## Premises

### 24 Meaning of 'discrimination'

- (1) For the purposes of sections 22<sup>17</sup> and 22A<sup>18</sup>, a person ('A') discriminates against a disabled person if –
  - (a) for a reason that relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
  - (b) he cannot show that the treatment in question is justified.

## Education (Schools)

### 28B Meaning of 'discrimination'

- (1) For the purposes of section 28A<sup>19</sup>, a responsible body discriminates against a disabled person if –
  - (a) for a reason that relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply;  
and
  - (b) it cannot show that the treatment in question is justified.

## Education (Further and Higher Education)

### 28S Meaning of 'discrimination'

- (1) For the purposes of this Chapter<sup>20</sup>, a responsible body discriminates against a disabled person if –
  - (a) for a reason that relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply;  
and
  - (b) it cannot show that the treatment in question is justified.

---

17 Discrimination in relation to premises

18 Discrimination in relation to commonhold

19 Discrimination against disabled pupils and prospective pupils

20 Chapter 2, Further and Higher Education

## Education (General Qualifications Bodies)

### 31AB Meaning of 'discrimination'

- (1) For the purposes of section 31AA<sup>21</sup>, a body discriminates against a disabled person if –
  - (a) for a reason that relates to the disabled person's disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
  - (b) it cannot show that the treatment in question is justified.

## Race Relations Act 1996: Indirect discrimination provision.

### Section 1A

(1A) A person also discriminates against another person if he applies to that other person a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other person, but –

(a) which puts or would put persons of the same race or ethnic or national origins as that other person at a particular disadvantage when compared with other persons,

(b) which puts that other person at that disadvantage, and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.

# ANNEX C

## Regulatory Impact Assessment

Summary: Intervention & Options		
<b>Department /Agency:</b> Department for Work and Pensions	<b>Title:</b> Impact Assessment of proposals to introduce the concept of indirect disability discrimination	
<b>Stage:</b> Consultation	<b>Version:</b> First Draft	<b>Date:</b> 26 November 2008
<b>Related publications:</b> House of Lords' judgment: Mayor and Burgesses of the London Borough of Lewisham v Malcolm ([2008] UKHL 43).		
<b>Available to view or download at:</b> <a href="http://www.officefordisability.gov.uk/indirectdiscrimination">http://www.officefordisability.gov.uk/indirectdiscrimination</a>		
<b>Contact for enquiries:</b> Peter Nokes		<b>Telephone:</b> 020 7962 8527

### What is the problem under consideration? Why is government intervention necessary?

A consequence of the House of Lords' judgment in the case of the Mayor and Burgesses of the London Borough of Lewisham v Malcolm (Malcolm) is that it is now more difficult for a disabled person to establish a case of disability-related discrimination under the Disability Discrimination Act. The Government has had to review how protection from disability-related discrimination operates and whether it should be revised following the Law Lords' judgment and in anticipation of the legislative requirements of a proposed new European anti-discrimination directive.

### What are the policy objectives and the intended effects?

To re-establish an appropriate balance between the rights of disabled people and the interests of those with duties under disability discrimination legislation.

The preferred option of adopting indirect discrimination will establish this balance. It will support the aim of the Equality Bill to harmonise equality legislation, as this concept is used in respect of other protected characteristics. It will also ensure compatibility with the anticipated requirements of European equal treatment legislation.

### What policy options have been considered? Please justify any preferred option.

1. Adopt the concept of indirect discrimination, as applied in other equality legislation.
2. Retain disability-related discrimination and reinstate the pre-Malcolm position.
3. Remove the need for a comparator.
4. Retain disability-related discrimination and allow the effect of the House of Lords' judgment to stand.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Following completion of the consultation exercise and the analysis of its results.

**Ministerial Sign-off** For consultation stage Impact Assessments:

**I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.**

Signed by the responsible Minister:

Jonathan Shaw

Date: 26 November 2008

Summary: Analysis & Evidence			
Policy Option: 1		Description: Introduce the concept of indirect disability discrimination	
COSTS	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' The change is not intended to have a substantial impact on the numbers of claims of discrimination. It seeks to provide an alternative means of enforcing disability rights for those who have been indirectly discriminated against. There will be familiarisation costs for duty holders.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	<b>£ 9.97m</b>	1	
	<b>Average annual cost</b> (excluding one-off)		
	<b>£ 0 - marginal</b>		
		<b>Total cost (PV)</b>	<b>£ 9.97m</b>
Other <b>key non-monetised costs</b> by 'main affected groups' Not applicable			
BENEFITS	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Benefits for disabled people are unquantifiable but are expected to be marginal, as the provision will only have an impact on a very small number of people who are currently unable to enforce their rights.
	<b>One-off</b>	<b>Yrs</b>	
	<b>£ marginal</b>		
	<b>Average annual benefit</b> (excluding one-off)		
	<b>£ marginal</b>		
		<b>Total benefit (PV)</b>	<b>£ marginal</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' Most disabled people who now find it harder to demonstrate disability-related discrimination are still able to enforce their rights under alternative provisions. The preferred option will provide the means for the small number of disabled people to enforce their rights where those alternative provisions do not apply.			

**Key assumptions/sensitivities/risks** The concept of indirect discrimination is well established in respect of equality legislation. There will be a need for some familiarisation with the move to indirect discrimination for disability. Any variation that arises in the numbers of people enforcing their disability rights is anticipated to be marginal.

Price base Year 2007	Time period Years	<b>Net benefit range (NPV)</b> <b>£ Marginal</b>	<b>NET BENEFIT (NPV best estimate)</b> <b>£ - 9.97m</b>		
What is the geographic coverage of the policy/option?		Great Britain			
On what date will the policy be implemented?		To be determined			
Which organisation(s) will enforce the policy?		Disabled individuals			
What is the total annual cost of enforcement for these organisations?		£			
Does enforcement comply with Hampton principles?		Yes			
Will implementation go beyond minimum EU requirements?		No			
What is the value of the proposed offsetting measure per year?		£			
What is the value of changes in greenhouse gas emissions?		£			
Will the proposal have a significant impact on competition?		No			
Annual cost (£-£) per organisation (excluding one-off)		Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?		No	No	N/A	N/A
<b>Impact on admin burdens baseline</b> (2005 Prices)				(Increase – decrease)	
Increase of	£ 0	Decrease of	£ 0	Net impact	£ 0
Key: Annual costs and benefits: constant prices		(Net) present value			

<b>Summary: Analysis &amp; Evidence</b>	
<b>Policy Option:</b> 2	<b>Description:</b> Retain the principle of disability-related discrimination and seek to reinstate the comparator as used in Novacold
<b>5</b>	<b>ANNUAL COSTS</b> Description and scale of <b>key monetised costs</b> by 'main

	<b>One-off</b> (Transition)	<b>Yrs</b>	
	<b>£ 0</b>		
	<b>Average annual cost</b> (excluding one-off)		
	<b>£ 0 - marginal</b>		<b>Total cost (PV)</b> <b>£ 0 - marginal</b>
Other <b>key non-monetised costs</b> by 'main affected groups' None			
<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' It would seek to reinstate the position prior to the restrictive House of Lords' judgment in Lewisham v Malcolm. Although no data exists to facilitate an accurate estimate, the benefits to disabled people are likely to be nil to marginal.
	<b>One-off</b>	<b>Yrs</b>	
	<b>£ 0 - marginal</b>		
	<b>Average annual benefit</b> (excluding one-off)		
<b>£ 0 - marginal</b>		<b>Total benefit (PV)</b> <b>£ 0 - marginal</b>	
Other <b>key non-monetised benefits</b> by 'main affected groups' It would make it relatively easy for a disabled person to demonstrate that they have experienced disability-related discrimination. This would benefit the small minority of people who could not currently enforce their rights under other provisions of disability discrimination legislation.			

**Key assumptions/sensitivities/risks** It would not meet the aims of the Equality Bill to harmonise discrimination legislation, nor would it comply with anticipated obligations of the proposed new EU Directive. Adding indirect discrimination, if necessary, at a later date would add complexity to the legislation.

Price base Year	Time period Years	<b>Net benefit range (NPV)</b> <b>£ 0 - marginal</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ 0 - marginal</b>
What is the geographic coverage of the policy/option?			Great Britain
On what date will the policy be implemented?			To be determined
Which organisation(s) will enforce the policy?			Disabled individuals
What is the total annual cost of enforcement for these organisations?			£
Does enforcement comply with Hampton principles?			Yes
Will implementation go beyond minimum EU requirements?			No
What is the value of the proposed offsetting measure per year?			£
What is the value of changes in greenhouse gas emissions?			£

Will the proposal have a significant impact on competition?				No	
Annual cost (£-£) per organisation (excluding one-off)		Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?		Yes/No	Yes/No	N/A	N/A
Impact on admin burdens baseline (2005 Prices)				(Increase – decrease)	
Increase of	£ 0	Decrease of	£ 0	Net impact	£ 0
Key: Annual costs and benefits: Constant Prices (Net) Present Value					

## Summary: Analysis & Evidence

Policy Option: Remove the need for a comparator

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' Disabled people could easily demonstrate apparent disability-related less favourable treatment. No data exists to enable us to quantify how many additional enforcement cases this will involve or the impact on monetised costs to disabled people and duty holders in respect of legal action. <i>Some familiarisation costs</i>
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	£ 9.97m	1	
	<b>Average annual cost</b> (excluding one-off)		
	£ Unquantifiable		
<b>Total cost (PV)</b>			£ 9.97m
Other <b>key non-monetised costs</b> by 'main affected groups' It would disturb the balance that the Government seeks to achieve between the rights of disabled people and the interests of duty holders and make it disproportionately more difficult for a duty holder to defend/justify indirect discrimination. This could have a negative impact on attitudes towards disabled people.			
<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' It will make it easier for a disabled person to demonstrate an apparent case of indirect discrimination. However, no data exists to enable us to quantify how many additional enforcement cases this will involve or the monetised benefit to disabled people in respect of compensation awards.
	<b>One-off</b>	<b>Yrs</b>	
	£ Unquantifiable		
	<b>Average annual benefit</b> (excluding one-off)		
	£ Unquantifiable		
<b>Total benefit (PV)</b>			£ Unquantifiable
Other <b>key non-monetised benefits</b> by 'main affected groups' It would enable disabled people to very easily demonstrate an apparent case of indirect discrimination.			

**Key assumptions/sensitivities/risks** It would not meet the aims of the Equality Bill to harmonise discrimination legislation, nor would it comply with anticipated obligations under the proposed new EU Directive. Adding indirect discrimination, if necessary, at a later date would add complexity to the legislation.

Price base Year 2007	Time period Years	<b>Net benefit range (NPV)</b> £	<b>NET BENEFIT (NPV best estimate)</b> £ - 9.97m		
What is the geographic coverage of the policy/option?		Great Britain			
On what date will the policy be implemented?		To be determined			
Which organisation(s) will enforce the policy?		Disabled individuals			
What is the total annual cost of enforcement for these organisations?		£			
Does enforcement comply with Hampton principles?		Yes			
Will implementation go beyond minimum EU requirements?		No			
What is the value of the proposed offsetting measure per year?		£			
What is the value of changes in greenhouse gas emissions?		£			
Will the proposal have a significant impact on competition?		No			
Annual cost (£-£) per organisation (excluding one-off)		Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?		No	No	N/A	N/A
<b>Impact on admin burdens baseline</b> (2005 Prices)					(Increase – decrease)
Increase of	£ 0	Decrease of	£ 0	Net impact	£ 0
Key: Annual costs and benefits: constant prices (Net) present value					

## Summary: Analysis & Evidence

<b>Policy Option:</b> 4		<b>Retain disability-related discrimination and allow the comparator as used in Lewisham v Malcolm</b>			
<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' It would continue to be more difficult for some disabled people to demonstrate disability-related less favourable treatment. Most will be able to seek redress under alternative provisions, so any reduction in claims or any impact on monetised cost estimated to be marginal. Some familiarisation costs.		
	<b>One-off</b> (Transition)	<b>Yrs</b>			
	£ 9.97m	1			
<b>Average annual cost</b> (excluding one-off)					

	<b>£ 0 - marginal</b>		<b>Total cost (PV)</b>	<b>£ 9.97m</b>
	Other <b>key non-monetised costs</b> by 'main affected groups' None.			
<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Difficulties for some disabled people to demonstrate disability-related discrimination may marginally reduce claims and consequently payments of compensation. Most disabled people will be able to pursue claims under alternative provisions.	
	<b>One-off</b>	<b>Yrs</b>		
	<b>£ marginal</b>			
	<b>Average Annual Benefit</b> (excluding one-off)			
	<b>£ marginal</b>		<b>Total benefit (PV)</b>	<b>£ Marginal</b>
	Other <b>key non-monetised benefits</b> by 'main affected groups' This option would have the effect of making it harder for a disabled person to demonstrate disability-related discrimination, so there may be marginal non-financial benefits for duty holders arising from reducing risk of challenge.			

**Key assumptions/sensitivities/risks** Maintaining disability-related discrimination would be contrary to the aims of balancing rights of disabled people and interests of business. It would not be consistent with the aims of harmonising equality legislation in the Equality Bill, or with the anticipated requirements of the proposed EU Directive.

Price base Year 2007	Time period Years	<b>Net benefit range (NPV)</b> <b>£ Marginal</b>	<b>NET BENEFIT (NPV best estimate)</b> <b>£ - 9.97m</b>		
What is the geographic coverage of the policy/option?			Great Britain		
On what date will the policy be implemented?			To be determined		
Which organisation(s) will enforce the policy?			Disabled individuals		
What is the total annual cost of enforcement for these organisations?			£		
Does enforcement comply with Hampton principles?			Yes		
Will implementation go beyond minimum EU requirements?			No		
What is the value of the proposed offsetting measure per year?			£		
What is the value of changes in greenhouse gas emissions?			£		
Will the proposal have a significant impact on competition?			No		
Annual cost (£-£) per organisation (excluding one-off)		Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?		No	No	N/A	N/A

<b>Impact on admin burdens baseline</b> (2005 Prices)				(Increase – decrease)	
Increase of	£ 0	Decrease of	£ 0	Net impact	£ 0
Key: Annual costs and benefits: constant prices		(Net) present value			

## Summary: Analysis & Evidence

Policy Option:

4

Retain disability-related discrimination and allow the comparator as used in *Lewisham v Malcolm*

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' It would continue to be more difficult for some disabled people to demonstrate disability-related less favourable treatment. Most will be able to seek redress under alternative provisions, so any reduction in claims or any impact on monetised cost estimated to be marginal. Some familiarisation costs.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	£ 9.97m	1	
	<b>Average annual cost</b> (excluding one-off)		
	£ 0 - marginal		
			<b>Total cost (PV)</b> £ 9.97m
Other <b>key non-monetised costs</b> by 'main affected groups' None.			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Difficulties for some disabled people to demonstrate disability-related discrimination may marginally reduce claims and consequently payments of compensation. Most disabled people will be able to pursue claims under alternative provisions.
	<b>One-off</b>	<b>Yrs</b>	
	£ marginal		
	<b>Average Annual Benefit</b> (excluding one-off)		
	£ marginal		
			<b>Total benefit (PV)</b> £ Marginal
Other <b>key non-monetised benefits</b> by 'main affected groups' This option would have the effect of making it harder for a disabled person to demonstrate disability-related discrimination, so there may be marginal non-financial benefits for duty holders arising from reducing risk of challenge.			

**Key assumptions/sensitivities/risks** Maintaining disability-related discrimination would be contrary to the aims of balancing rights of disabled people and interests of business. It would not be consistent with the aims of harmonising equality legislation in the Equality Bill, or with the anticipated requirements of the proposed EU Directive.

Price base Year 2007	Time period Years	<b>Net benefit range</b> (NPV) £ Marginal	<b>NET BENEFIT</b> (NPV best estimate) £ - 9.97m
-------------------------	----------------------	--	---

What is the geographic coverage of the policy/option?		Great Britain			
On what date will the policy be implemented?		To be determined			
Which organisation(s) will enforce the policy?		Disabled individuals			
What is the total annual cost of enforcement for these organisations?		£			
Does enforcement comply with Hampton principles?		Yes			
Will implementation go beyond minimum EU requirements?		No			
What is the value of the proposed offsetting measure per year?		£			
What is the value of changes in greenhouse gas emissions?		£			
Will the proposal have a significant impact on competition?		No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0	
Are any of these organisations exempt?	No	No	N/A	N/A	
<b>Impact on admin burdens baseline</b> (2005 Prices)					(Increase – decrease)
Increase of	£ 0	Decrease of	£ 0	Net impact	£ 0
Key: Annual costs and benefits: constant prices		(Net) present value			

Evidence base (for summary sheets)

# The Disability Discrimination Act 1995: Disability-related discrimination

## Introduction

1. The Disability Discrimination Act 1995 (DDA), as amended, provides disabled people with protection against discrimination for a disability-related reason. The current definition of disability-related discrimination is set out in a number of individual sections of the Act each of which adopts a similar form of words, i.e.:

a person, provider of services, public authority, or association discriminates against a disabled person if –

- (a) for a reason that relates to the disabled person's disability, it treats him less favourably than it treats, or would treat, others to whom that reason does not, or would not, apply; and
  - (b) he or it cannot show that the treatment in question is justified.
2. In determining who has been the victim of disability-related less favourable treatment, it is necessary to find an actual or hypothetical comparator – a person to whom the disability-related reason does not, or would not, apply.
  3. The question of who the comparator should be has been subject to interpretation by the courts, but the well-established comparator test for the purposes of the DDA was laid down by the Court of Appeal in the case *Clark v Novacold*. The Court of Appeal took a broad approach to the selection of comparators and the *Novacold* judgement established a precedent that made it relatively easy for a disabled person to demonstrate that disability-related less favourable treatment had occurred.
  4. However, a recent House of Lords' judgement in the case of *Lewisham v Malcolm* declined to use the *Clark v Novacold* comparator and took a different approach in establishing who should be the correct comparator.
  5. The consequence of the House of Lords' judgment is that it has moved protection under the DDA away from the Government's policy intention. While the protection remains sufficient to meet obligations arising from the United Nations Convention on the Rights of Persons with Disabilities, the judgment has altered the balance which the policy aims to achieve between the rights of disabled people and the interests of duty holders by making it more difficult for a disabled person to establish a case of disability-related less favourable treatment.

### Preferred option:

#### Introducing the principle of indirect disability discrimination

6. The Government's key policy objective is to re-establish an appropriate balance between the rights of disabled people and the interests of those with duties under disability discrimination legislation in a way that is compatible, as far as practicable, with the aim of the Equality Bill to simplify and harmonise equality legislation and with the anticipated requirements of proposed new European legislation.
7. In order to achieve this policy objective, the Government's preferred option is to adopt the concept of indirect discrimination. This will give disabled people a better level of protection than that which now exists in respect of disability-related discrimination as a

consequence of the judgment in *Lewisham v Malcolm*. Adopting the concept of indirect discrimination for the disability provisions will achieve greater harmonisation across the Equality Bill, because that concept is already used in respect of the other protected characteristics such as race, sex, age etc. It should also ensure compatibility with anticipated European legislative requirements.

## Other options considered

8. In reaching its preferred option, the Government considered a range of alternative options though it believes that none would achieve the key policy aim. These options are described briefly below.
9. **Retain the principle of disability-related discrimination and seek to reinstate the comparator as used by the Court of Appeal in *Novacold*.** Maintaining the very distinct nature of disability-related discrimination would be contrary to the aims of harmonising equality legislation, as far as is practicable, in the Equality Bill. Furthermore, it would not comply with the anticipated obligations under the proposed new European Directive, which would require the adoption of indirect discrimination provisions in areas beyond employment, such as access to goods and services. Adding indirect discrimination provisions at a later date, if necessary to comply with the Directive, would lead to undue complexity in the legislation.
10. **Remove the need for a comparator.** Removal of the comparator would disturb the balance which we seek to achieve between the rights of disabled people and the interests of duty holders. It would enable disabled people to demonstrate an apparent case of indirect discrimination too easily in comparison to those people with other protected characteristics. It would be contrary to the principle of harmonisation for the Equality Bill.
11. **Retain the principle of disability-related discrimination and allow the comparator to be determined in accordance with the House of Lords' judgment in *Lewisham v Malcolm*.** This would mean that it would continue to be harder for disabled people to successfully challenge disability-related discrimination. They would have to rely more heavily on the direct discrimination provisions or the duties of reasonable adjustment to provide redress. However, those solutions would not apply universally. In addition, this option would not comply with the anticipated obligations under the proposed new European Directive which would require the adoption of indirect discrimination.

## Annual costs and benefits

The following is an initial assessment of costs and benefits and will be revised following comments received in consultation.

### Monetised costs and benefits

12. Employment Tribunal Service data for the year ended March 2007 shows that there were 5,533 employment claims of disability discrimination of which 149 were successful at a tribunal. (Source: Employment Tribunal and Employment Appeal Tribunal Statistics (GB) 1 April 2006 to 31 March 2007.) There is no centrally-held data on cases brought through the courts under the provisions of the Disability Discrimination Act governing goods, facilities and services, private clubs and functions of public bodies. However, the former Disability Rights Commission's Legal Bulletin Issue 12 (DRC Legal Achievements 2000-2007) shows that the Commission supported an average of 16 cases per year in its first seven years of operation, almost all of which were settled, or were decided in the favour of the disabled person. The Commission previously advised that it was aware of very few cases covering goods and services etc that were pursued without its assistance.
13. It is not possible to determine how many of the above claims were in respect of direct discrimination (which applies only in relation to employment and vocational training) or a failure to make reasonable adjustment and how many relate to disability-related discrimination.
14. Given that the judgment is relatively recent, and that the numbers of disability-related discrimination cases cannot be determined, it is not possible to estimate what impact the recent restrictive House of Lords' judgment has had on the numbers of people who seek to enforce their rights under the disability-related discrimination provisions of the Disability Discrimination Act 1995.
15. Following the judgment, in the vast majority of instances where a disabled person has been subjected to disability-related discrimination, the person will still be able to, and we consider will, seek redress using alternative provisions in the Act, for example the direct discrimination provisions (for employment and vocational training) or the reasonable adjustment provisions of the Act. Therefore, it is unlikely that the judgment will have led to any appreciable reduction in enforcement. The more restrictive judgment may have resulted in a slight reduction in the numbers of cases, particularly those involving premises, where the opportunity to use the reasonable adjustment route is more limited.
16. However, as described in Paragraph 12 above, the overall number of cases involving goods, facilities, services and premises is relatively low. Within these cases, there are

likely to be very few (possibly in the teens) cases which involve situations where the reasonable adjustment provisions will not apply. Overall, therefore, we estimate the effect of the House of Lords' judgment to be marginal in respect of enforcement and therefore on the financial benefits, e.g. compensation awards, to disabled people or the costs to disabled people or duty holders in respect of taking legal action.

17. The aim of adopting the concept of indirect discrimination is to again make it relatively easy for a disabled person to demonstrate that they have experienced disability discrimination. We consider that the proposed option will achieve that aim. Subject to comments offered on this consultation, it is expected that the effect of the move to indirect discrimination on monetised benefits to disabled people will be marginal.

### **Familiarisation costs and simplification benefits**

18. Although not included under the Disability Discrimination Act, the concept of indirect discrimination is commonly applied in respect of other equality legislation and should be understood by most practitioners. The estimated familiarisation costs are considered to be as follows.

<b>Time to familiarise</b>	<b>No. of firms (SME = small and medium-sized enterprises)</b>	<b>Hourly cost</b>	<b>Total familiarisation costs (£m)</b>
1 hour	230,000 SMEs	£27.03	6.22
2 hours	37,020 medium/large	£29.00	2.14
2 hours	27,840 public authorities	£29.00	1.61

19. Changing to a system of indirect discrimination for disability should be easier for most duty holders to operate because the principle is well established across other equality legislation. Therefore, there may be marginal simplification savings. The change will be made through the Equality Bill and practitioners will also need to familiarise themselves with other changes made through the Bill. There may therefore be some element of overlap in the assessment of familiarisation costs for the measures in the Bill.

## Non-monetised costs and benefits

20. Introducing indirect discrimination will redress the imbalance caused by the House of Lords' judgment in the case of *Lewisham v Malcolm*, which has made it harder for disabled people to successfully challenge disability-related discrimination in employment, education, access to goods, facilities, services and premises, as well as private clubs and the functions of public authorities.
21. In the majority of cases, a disabled person would be able to enforce their rights under the direct discrimination provisions or under the duty of reasonable adjustment. However, those may not be applicable in every case. The preferred option is intended to provide disabled people with an appropriate route to enforce their rights where those other provisions would not apply. This is likely to be a small number of cases, though data does not exist to facilitate an accurate estimate. However, there will be benefits for the small number of disabled people who are currently prevented by the House of Lords' judgment from enforcing their rights under alternative provisions.

## Enforcement

22. As currently for disability-related discrimination, the preferred option would be enforced by the aggrieved individual via: an Employment Tribunal, for cases involving employment and vocational training; a County Court (Sheriff Court in Scotland) in respect of access to goods, facilities, services, premises, private clubs and the functions of public authorities; or Special Educational Needs and Disability Tribunals (Sheriff Court in Scotland and Special Educational Needs Tribunal Wales) in respect of education in schools and County Court (Sheriff Court in Scotland) in respect of post-16 education.

## Impact on operations

23. If there is any increase in legal action to enforce disability rights in comparison to the situation before the House of Lords' judgment, this is likely to be marginal. Therefore, it is unlikely that the preferred option would have any appreciable impact on the operation of the tribunal and court systems.

## Economic impact

### Competition Assessment

24. The preferred option should not affect competitiveness between companies. The Disability Discrimination Act 1995 already places duties on all employers regardless of size (except the Armed Forces in respect of Service personnel) and on providers of

goods, facilities, services and premises. The preferred option will not have an impact on the extent to which the duties under the Act are applied.

### **Small Firms Impact Test**

25. The preferred option should not have any undue impact on small firms. Small firms will be subject to the same need as larger firms to familiarise themselves with the new approach for disability. Similarly, they should benefit from possible marginal savings arising from harmonisation, because the disability provisions will be more in line with the concept of indirect discrimination as it applies across other equalities legislation.

### **Community Legal Services Fund (previously Legal Aid) Impact Test**

26. Most disabled people who experience disability-related discrimination will be able to enforce their rights using alternative provisions under the Disability Discrimination Act. Therefore, there is no evidence to suggest that the proposed provisions will result in any significant increase in the number of disabled people enforcing their rights under disability discrimination legislation. There may be a marginal increase in legal action, for example in cases concerning premises, where the opportunity for disabled people to exercise their rights using the reasonable adjustments provisions of the Act is currently more limited. However, any change is unlikely to increase numbers of cases above the level which existed prior to the House of Lords' judgment.

## **Sustainable development**

### **Environmental impact**

#### **Carbon and Greenhouse Gas Assessment**

27. Any impact of the preferred option on the environment, in terms of using raw materials for the production of guidance, leaflets and similar materials is likely to be minimal. This is because information about the adoption of indirect discrimination and its operation will be incorporated in the wider Codes of Practice and awareness raising materials that will need to be developed for the Equality Bill as a whole.

## **Social impact**

### **Health Impact Assessment Test**

28. The proposal does not have an impact on well-being or health inequalities.

## **Race equality**

29. Disability does not disproportionately affect one ethnic group more than another. Therefore, the proposed policy change is not relevant to the promotion of racial equality. See also the accompanying Equality Impact Assessment.

## **Gender equality**

30. Disability does not disproportionately affect one gender more than another. Therefore, the proposed policy change is not relevant to the promotion of gender equality. See also the accompanying Equality Impact Assessment.

## **Disability equality**

31. The change is intended to promote rights for disabled people. The aim is to re-establish an appropriate balance between the rights of disabled people and the interests of those with duties under disability discrimination legislation. See also the accompanying Equality Impact Assessment.

## **Human rights**

32. The preferred option does not contravene individuals' human rights. It will equally apply to all disabled individuals who are protected under disability discrimination legislation in Great Britain, and will promote their participation in society. It is also consistent with human rights principles, and obligations arising from the United Nations Convention on the Rights of Persons with Disabilities.

## **Rural proofing**

33. The preferred option will apply equally to disabled people who live in rural areas and urban areas. We have no evidence to suggest that people in rural areas would be disproportionately affected by indirect forms of discrimination or, therefore, whether they would be more or less likely to exercise their rights under indirect discrimination provisions, than they do currently in respect of disability-related discrimination.

# Specific Impact Tests: checklist

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	Results in evidence base?	Results annexed?
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable development	Yes	No
Carbon Assessment	Yes	No
Other environment	Yes	No
Health Impact Assessment	Yes	No
Race equality	Yes	Yes
Disability equality	Yes	Yes
Gender equality	Yes	No
Human rights	Yes	No
Rural proofing	Yes	No

# Annex 1

## Clark v Novacold (1999)

1. Mr Clark sustained a back injury that resulted in his being a disabled person for the purposes of the Disability Discrimination Act. A consequence of the disability was that he would have had to be absent from work for about a year. He was dismissed from his job because of this prognosis.
2. The Court of Appeal had to decide who to compare Mr Clark with in order to determine whether he had been treated less favourably. It identified two possible comparators:
  - (a) someone who did not have a disability but who was likely to be absent from work for about a year for other reasons
  - or
  - (b) someone who did not have a disability and who would remain in work for that period.
3. The Court of Appeal found that the correct comparator was (b). Thus, the test of less favourable treatment was based on the reason for the treatment of the disabled person: the disability-related absence and not the fact that Mr Clark was disabled.
4. The effect of the Novacold judgment was to make it relatively easy for a disabled person to demonstrate that he had been treated less favourably for a reason related to his disability.
5. The Court of Appeal found that the employer would have discriminated against Mr Clark by dismissing him, unless it could show that the less favourable treatment was justified.

## London Borough of Lewisham v Malcolm (2008)

6. Mr Malcolm, a tenant of a flat owned by Lewisham Council, has schizophrenia and is a disabled person for the purposes of the Disability Discrimination Act.
7. When Mr Malcolm sublet his flat, which was in breach of his tenancy agreement, Lewisham Council commenced proceedings to evict Mr Malcolm.
8. The Disability Discrimination Act precludes a manager of premises from discriminating against a disabled person who occupies the premises by evicting him or subjecting him to any other detriment by, for example, treating the disabled person less favourably for a reason related to their disability, unless that could be justified.

9. Mr Malcolm claimed that the court could not grant a possession order against him as this would be disability-related discrimination. He claimed that, because of the effect of his impairment, he did not understand that he could not sublet his flat nor did he understand the potential consequences of doing so.
10. The House of Lords declined to follow the approach taken in the case of *Novacold* regarding the comparator to be used. Instead, the House of Lords ruled that the correct approach, in the Malcolm case, was that the comparator should be someone who had sublet their flat but who did not have a disability. Since Lewisham Council would have sought possession against anyone who had sublet their flat, the Law Lords found that Lewisham Council had not treated Mr Malcolm less favourably for a disability-related reason.

## ANNEX D

# Draft Equality Impact Assessment

### 1. What is the current policy?

- 1.1 The Disability Discrimination Act 1995 (Disability Discrimination Act), which received Royal Assent on 8 November 1995, provides disabled people with protection against discrimination for a disability-related reason.
- 1.2 The current definition of disability-related discrimination is set out in a number of individual sections of the Act, each of which adopts a similar form of words, i.e:  
  
a person, provider of services, public authority, or association discriminates against a disabled person if –
  - (a) for a reason that relates to the disabled person's disability, it treats him less favourably than it treats, or would treat, others to whom that reason does not, or would not, do this apply; and
  - (b) he or it cannot show that the treatment in question is justified.

### Comparator

- 1.3 In determining who has been the victim of disability-related less favourable treatment, it is necessary to find a comparator – a person to whom the disability-related reason does not, or would not, apply.

- 1.4 The question of who the comparator should be has been subject to interpretation by the courts but the well-established comparator test for the purposes of the Disability Discrimination Act was laid down by the Court of Appeal in the case of *Clark v Novacold* ('Novacold'). The Court of Appeal took a broad approach to the selection of comparators and the **Novacold** judgment established a precedent that made it relatively easy for a disabled person to demonstrate that disability-related less favourable treatment had occurred.
- 1.5 However, a recent House of Lords' judgment in the case of *Lewisham v Malcolm* ('Malcolm') declined to use the **Novacold** comparator and took a different approach in establishing who should be the correct comparator.
- 1.6 The consequence of the House of Lords' judgment is that it has moved protection under the Disability Discrimination Act away from the Government's policy intention. It has altered the balance that the policy aims to achieve between the rights of disabled people and the interests of duty holders by making it more difficult for a disabled person to establish a case of disability-related less favourable treatment.

## 2. What is the change in policy?

- 2.1 The Government proposes to replace the principle of disability-related discrimination, as currently used in the Disability Discrimination Act, with the concept of indirect discrimination<sup>22</sup> for the disability provisions in the Equality Bill.

## 3. Reason for change in policy

### House of Lords' judgment

- 3.1 The consequence of the House of Lords' judgment in the case of *Lewisham v Malcolm* is that it has moved protection under the Disability Discrimination Act away from the Government's policy intention.
- 3.2 It has narrowed the protection provided by the Disability Discrimination Act by making it more difficult for a disabled person to establish a prima facie case of disability-related discrimination.
- 3.3 In adopting the concept of indirect discrimination, the proposed policy change will re-establish an appropriate balance between the rights of disabled people and the interests of those with duties under disability discrimination legislation.

### Equality Bill

- 3.4 The Equality Bill seeks to simplify and harmonise anti-discrimination legislation.

3.5 Adopting the concept of indirect discrimination in relation to the disability provisions of the Bill, will achieve greater harmonisation across the Bill because the concept of indirect discrimination is already used in respect of other protected characteristics, such as sex, race and age.

---

22 Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put person having a particular characteristic (e.g. race, gender) at a particular disadvantage compared with other persons unless that provision, criterion or practice can be objectively justified as being a proportionate means of achieving a legitimate aim

## Proposed new European Directive on areas beyond employment

3.6 The proposed Directive, as drafted, adopts the direct discrimination, indirect discrimination and reasonable adjustment approach to tackling disability discrimination.

3.7 Adopting the concept of indirect discrimination will be compatible with these proposed European legislative requirements.

## 4. Overall estimated impact of the policy

4.1 The intended aim of the policy is to re-establish an appropriate balance between the rights of disabled people and the interests of those with duties under disability discrimination legislation.

4.2 In re-establishing this balance it is, therefore, considered that the overall impact of the proposed policy should be positive as it will restore disabled people's rights to a position similar to that which existed prior to the Malcolm judgement. In addition, harmonisation with other equality strands should make the law easier to understand for those with duties under disability discrimination legislation and will, consequently, support effective implementation of rights for disabled people.

## 5. Equality impact of the policy

### Disability

5.1 Section 49A of the Disability Discrimination Act requires public authorities, when carrying out their functions, to have due regard to the need to:

- eliminate unlawful discrimination
- eliminate disability-related harassment
- promote equality of opportunity
- promote positive attitudes towards disabled people
- encourage the participation of disabled people in public life
- take steps to take account of disabled people's disabilities, even where that requires more favourable treatment.

This assessment represents our initial view of the impact of this policy in respect of each of the limbs of the Disability Equality Duty.

5.2 The intended aim of the proposed policy change is to re-establish an appropriate balance between the rights of disabled people and the interests of those with duties under disability discrimination legislation.

### **Risk of negative impact**

5.3 There is a potential risk in respect of equality of opportunity in any change to the structure of discrimination law; however, it is considered that any adverse effect in adopting the policy is likely to be negligible.

5.4 In the majority of cases, disabled people will be able to seek redress using the direct discrimination (in employment and occupation cases) or reasonable adjustment provisions of disability discrimination legislation. The proposed policy provides disabled people with an appropriate route to enforce their rights where other provisions would not apply. Although data does not exist to facilitate an accurate estimate, it is likely to apply in only a small number of cases.

5.5 Available data on Employment Tribunal cases shows only the total number of accepted claims made under the Disability Discrimination Act<sup>23</sup>. However, anecdotal evidence suggests that the majority of these cases are brought to Tribunal because of direct discrimination or a failure to make reasonable adjustments.

5.6 Similarly, although no central record is kept of cases brought to Court under the access provisions of Part 3 of the Disability Discrimination Act, anecdotal evidence indicates that the majority of cases brought to Court relate to a failure to make a reasonable adjustment.

### **Opportunity to promote equality**

5.7 The proposed policy will have the effect of restoring disabled people's rights to a position similar to that which existed prior to the **Malcolm** judgement and will thereby assist to **eliminate unlawful discrimination**.

5.8 The proposed policy is not relevant in the context of eliminating disability-related harassment.

5.9 The concept of indirect discrimination is a well understood concept across equality legislation generally. Therefore, changing to a system of indirect discrimination should be easier for disabled people as well as those with duties under disability discrimination legislation, which will help to promote **equality of opportunity** for disabled people.

5.10 Achieving an appropriate balance between the rights for disabled people and the interests of those with duties under disability discrimination legislation is also important as it could impact on attitudes of the public towards disabled people generally. We believe that adopting the concept of indirect discrimination to achieve that balance could have a **positive impact on attitudes**, as it does not single out disabled people for 'special treatment' versus groups of people with other protected characteristics.

---

23 Employment Tribunal Service annual statistics indicate 5655, 4942, 4585 and 5533 disability discrimination claims were accepted in 2003/04, 2004/05, 2005/06 and 2006/07 respectively

5.11 The proposed policy is not relevant in the context of **encouraging the participation of disabled people in public life**.

5.12 The concept of indirect discrimination is sufficiently flexible to take **account of disabled people's disabilities**.

## Race

5.13 Disability does not disproportionately affect one ethnic group more than another. Therefore, the proposed policy change is not relevant to the promotion of racial equality.

5.14 However, it is acknowledged that certain conditions are more prevalent within certain ethnic groups. For example, in Britain, sickle cell disorders are most common in people of African and Caribbean descent. We will be undertaking work to ascertain what data may be available about such conditions.

---

**TABLE 1**

---

<b>Ethnicity/Race</b>	<b>Absolute Numbers of Disabled People<sup>24</sup></b>	<b>Proportion of Disabled People by Ethnicity/Race %</b>	<b>Proportion of General Population by Ethnicity/Race %</b>
<b>White</b>	9,200,000	93.9	90.8
<b>Mixed</b>	-	0.5	0.8
<b>Indian</b>	100,000	1.3	2.1
<b>Pakistani and Bangladeshi</b>	100,000	1.5	1.7
<b>Black and Black British</b>	200,000	1.6	2.2
<b>Other (inc. Chinese)</b>	100,000	1.2	2.3

---

**Source: Family Resource Survey 2006/07**

---

---

24 The figures in this column do not add up to the total number of disabled people (10,400,000) shown in tables 2 and 3. The balance is made up of people who do not report their ethnic origin

## Risk of negative impact

5.15 We do not anticipate adverse impacts from the proposed policy in terms of unlawful race discrimination.

## Gender

5.16 Disability does not disproportionately affect men more than women. Therefore this change is not relevant to the promotion of gender equality.

---

**TABLE 2**

<b>Sex</b>	<b>Absolute Numbers of Disabled People</b>	<b>Proportion of Disabled People %</b>	<b>Proportion of General Population - Comparison %</b>
<b>Male</b>	4,900,000	47	49
<b>Female</b>	5,500,000	53	51
<b>Total</b>	<b>10,400,000</b>		

**Source: Family Resource Survey 2006/07**

---

## Risk of negative impact

5.17 We do not anticipate adverse impacts from the proposed policy in terms of unlawful sex discrimination.

## Age

5.18 There is a strong correlation between disability and age as can be seen in the table below. Harmonising disability legislation with the provisions in respect of age discrimination should make it easier for older people who might face discrimination on both grounds to achieve redress.

**TABLE 3**

<b>Age</b>	<b>Absolute Numbers of Disabled People</b>	<b>Proportion of Disabled People %</b>	<b>Proportion of General Population – Comparison %</b>
<4	100,000	0.9	6.1
5-10	200,000	2.3	6.7
11-15	200,000	2.4	6.3
16-24	500,000	4.4	12.0
25-34	600,000	5.4	13.0
35-4	1,100,000	10.2	15.3
45-54	1,400,000	13.2	13.0
55-59	1,000,000	9.5	6.6
60-64	1,000,000	9.7	5.5
65-74	1,900,000	18.3	8.2
75-84	1,800,000	17.6	5.7
>84	600,000	6.2	1.7
<b>Total</b>	<b>10,400,000</b>		

**Source: Family Resource Survey 2006/07**

## Sexual orientation

- 5.19 We are not aware of any evidence to suggest that disability is linked to sexual orientation and therefore, in general, the proposed policy is not relevant.
- 5.20 Nevertheless, it is acknowledged that there is a link between sexual orientation and HIV, which, for the purposes of disability discrimination legislation, is deemed to be a disability and we will explore whether data exists to support analysis of the expected impact of the proposal in respect of people of particular sexual orientations.

## Religion or belief

- 5.21 There is no correlation between religion or belief and disability and therefore this policy is not relevant to this strand.

## Human rights

- 5.22 The proposed policy will not breach the human rights of any individual and is consistent with human rights principles. Even following the House of Lords' judgment the legislation remains sufficient to meet obligations under the United Nations Convention on the Rights of Persons with Disabilities, and that will remain the case.

## 6. Consultation and involvement

- 6.1 We welcome further input into this first version of the equality impact assessment, which will be included in the public consultation on introducing the concept of indirect disability discrimination.

## 7. Next steps and monitoring

- 7.1 Subject to responses to, and comments on, the public consultation on introducing indirect disability discrimination, the policy proposal will be included in the disability provisions of the Equality Bill.
- 7.2 We will consider at a later date how to monitor the policy change to ensure that we have evidence about the actual impact of introducing indirect discrimination into disability discrimination legislation.

## 8. Changes made

- 8.1 No changes have been made to the policy as a result of this first version of the equality impact assessment.

## 9. Date for revision

- 9.1 This assessment will be reviewed following completion of the consultation and

amended, where appropriate, to take account of comments on, and challenges to, the contents of this assessment.

# ANNEX E

## Consultation Questions

### Consultation Question 1:

Do you agree that the Equality Bill should adopt the concept of indirect discrimination for disability?

If you disagree, please explain your reasons for this and whether you consider any adverse consequences would arise from adopting indirect discrimination.

<input type="checkbox"/>	<input checked="" type="checkbox"/>	
<b>YES</b>	<b>NO</b>	<b>(Please tick)</b>

#### Comments

In principle the idea of indirect discrimination seems to be a welcome advance in disability equality as it would allow organisations like ourselves to pursue general cases where we felt service providers were discriminating against disabled people.

However, indirect discrimination as it exists in Gender and Race related discrimination law does not translate directly to disability. The needs of individual disabled people are too diverse for them to be treated as a homogenised group - for instance the requirements of a wheelchair user differ wholesale from someone who is hearing impaired. Whilst the proposals state that a minority group with unique needs would still be protected in this 'collective' approach, there is no guarantee that in the future this will be established by case law. We have already seen the DDA weakened by legal interpretation and as such it is important that any proposed changes to legislation ensure that disabled people have the same robust protection from discrimination that they have had prior to the Malcolm ruling.

One ruling stating that the majority of disabled people would not need a particular adjustment may result in the minority requiring the adjustment being alienated by the very law meant to protect them. The diverse nature of disability means that all disabilities will be minorities in this larger 'pool', and consequently the opportunities for such a ruling would appear to be increased. This will be of particular concern to those groups with the most unique needs, who are often the most disenfranchised in society and require the individual approach currently afforded by disability related discrimination.

The diverse nature of disability loans itself to an individual approach to discrimination, and as such we favour the alternative proposal of removing the comparator to re-enforce the existing method which has hitherto served the needs of disabled people well.

## Consultation Question 2:

Do you agree that the Equality Bill should include a provision that requires a duty holder to fulfil the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination?

X		
YES	NO	(Please tick)

## Comments

Reasonable adjustment is an important part of disability discrimination and should be a prerequisite for all duty holders before seeking to justify discrimination. As such SIA supports this proposal.

## Consultation Question 3:

Do you agree that the assumptions underpinning the regulatory impact assessment and equality impact assessment are realistic?

<input type="checkbox"/>	<input checked="" type="checkbox"/>	
<b>YES</b>	<b>NO</b>	<b>(Please tick)</b>

## Comments

The onus of the assumptions in the Regulatory Impact Assessments appears to be on whether the suggested policy options would meet the aims of the forthcoming Equality Bill and EU Regulation, rather than whether those options would best suit disabled people pursuing cases of discrimination. The concerns that we have in relation to the suitability of indirect discrimination are addressed in our answer to question 1 of this consultation.

The assumption in chapter 5.10 of the Equality Impact Assessment that adoption of indirect discrimination would have a positive impact on attitudes seems unlikely. SIA is not aware of situations where the public currently adopts negative attitudes towards disabled people because the discrimination law that protects them works differently from those of other equality strands. The ways in which disabled people are discriminated against differ from those of other equality strands due to the additional discrimination of the built environment, and the extremely diverse requirements between different groups. As such disability discrimination will always have to be approached in a way that differs from other equality strands. The requirement for robust legislation that accommodates these needs outweighs any associated minimal negative attitudes that may consequently be adopted by the public.

# List of Consultees

---

A4E

ACAS

Action for Advocacy

Action for Sick Children

Action for Sick Children (Scotland)

Active Volunteering by  
Disabled People

Age Concern

Alzheimers Society

Arthritis Care

Asian Disability Network

Asian People with  
Disabilities Alliance

Association for All Speech Impaired Children (AFASIC)

Association of Directos  
of Social Services

Association of Disabled Professionals

Association of Landlords

Association of Residential Managing Agents

Barclays Bank

BASIC (Brain & Spinal Injury Centre)

BBC

Birth Defects Foundation - Newlife

Breakthrough UK

British Chambers of Commerce

---

British Deaf Association

British Deaf Association Scotland

British Deaf Association Wales

British Property Foundation

British Psychological Society

BT

Cancer and Leukaemia  
in Childhood

Cancer BACUP

Cancer Black Care

Care Services Improvement Partnership

CBI

CBI (Scotland)

CBI (Wales)

Centre 404

Centre for Accessible Environments

Centrica

Changing Faces

Chartered Institute of  
Personnel and Development

Chartered Society of Physiotherapy

Citizen's Advice Bureau

Citizen's Advice Bureau (Scotland)

Contact a Family

COSLA

Council for Disabled Children

---

Council of Employment  
Tribunal Chairs

Council of Employment Tribunal Members' Association

Council of Scottish Local Authorities

Counsel and Care

DeafPlus

Deafway

Diabetes UK

Disability Alliance

Disability Awareness in Action

Disability Employment  
Advisory Committee

Disability Equality in Education

Disability Law Service

Disability Network

Disability Wales

Disabled Living Foundation

Disabled Parents Network

Disabled Persons Transport Advisory Committee

Discrimination Law Association

Early Support Programme

Elcena Jeffers Foundation

Employers' Forum on Disability

Employment Opportunities  
for People with Disabilities

Employment Tribunal Service

---

emPOWER

Enable ME Project

Equal Ability CIC

Equality and Human Rights Commission

Equality and Human Rights Commission (Scotland)

Equality and Human Rights Commission (Wales)

Equalities National Council for Disabled People and Carers from Black and Ethnic Minorities Communities

Equality 2025

Equality Challenge Unit

Every Disabled Child Matters

Faculty of Advocates

Federation of Small Businesses

Glasgow Disability Alliance

Haemophilia Society

Handy Gestures

Hearing Concern

Help the Aged

Housing 21

In Control

Include Me Too

Inclusion Scotland

Inclusive Environment Group

Institute of Directors

Intercontinental Hotels

---

Judicial Services Board

Just Equality

Law Commission

Law Society

Legal Services Commission

Leonard Cheshire Foundation

Lifetrain Trust

Limbless Association

Lloyds TSB

Local Government Association

London Chamber of Commerce

London TfL Independent Disability Advisory Group

Long Term Medical Conditions Alliance

Lupus UK

MacMillan Cancer Research

McDonalds

ME Association

Mencap

Mencap Cymru

MIND

Mobility and Access Committee for Scotland

Motor Neurone Disease Association

Multiple Sclerosis Society

Multiple Sclerosis Trust

Muscular Dystrophy Campaign

---

National AIDS Trust

National Assembly for Wales

National Association of Local Councils

National Autistic Society

National Centre for Independent Living

National Deaf Children's Society

National Federation of the Blind

National Forum of People with Learning Disabilities

National Landlords Association

National League of Blind and Disabled

National Learning Disability and Ethnicity Network

Newcastle Elders Council

OPAAL

Organisation of Blind Afro-Caribbeans

Parkinsons Disease Society

People First

President of the Council of Employment Tribunal Chairmen

President of the Employment Appeal Tribunal

President of the Employment Tribunals (England & Wales)

President of the Employment Tribunals (Scotland)

RADAR

Rethink

RNIB

RNIB Scotland

RNIB Wales

---

RNID

RNID Scotland

Royal Association for Deaf People

Royal London Society for the Blind

Royal Mail Group

Sainsbury Centre for  
Mental Health

SANE

Scope

Scottish Court Service

Scottish Disability Equality Forum

Scottish Executive

Scottish Law Commission

SENSE

SENSE Scotland

Shaping our Lives

Shaw Trust

SIGN

Skill (National Bureau for Students with Disabilities)

Special Educational Needs  
and Disability Tribunal

Spinal Injuries Association

Sue Ryder Care

Terence Higgins Trust

The Bar Council

The British Dyslexia Association

---

The British Polio Fellowship

The Challenging Behaviour Foundation

The Group for Solicitors with Disabilities

The Jewish Deaf Association

The Law Society of Scotland

The Lifetrain Trust

The Multiple Sclerosis Society

Trades Union Congress

Trades Union Congress (Scotland)

Trades Union Congress (Wales)

Treehouse

Turning Point

UK Advocacy Network

UK Council on Deafness

UK Older People's Advisory Group

United Kingdom Disabled People's Council

This publication is also available in Audio, Braille, Welsh and Easy Read. If you would like a copy in any of these formats, please contact us at [www.officefordisability.gov.uk](http://www.officefordisability.gov.uk).

Post: **Office for Disability Issues,  
6th Floor, The Adelphi, 1-11 John Adam Street,  
London WC2N 6HT**

Email: **[office-for-disability-issues@dwp.gsi.gov.uk](mailto:office-for-disability-issues@dwp.gsi.gov.uk)**

Telephone: **020 7962 8799**

Textphone: **020 7712 2032**

We welcome feedback on this publication. Please use the contact details above if you wish to do so.

ISBN 978-1-84763-720-8

Produced by the Office for Disability Issues

© Crown copyright

Produced in the UK, November 2008