

EXPLANATORY MEMORANDUM TO
THE DISABILITY DISCRIMINATION (QUESTIONS AND REPLIES) ORDER 2005
2005 No. 2703

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.
2. **Description**
 - 2.1 The Disability Discrimination Act 1995 (“the Act”) contains a procedure (“the questions procedure”) for asking questions and making replies about alleged discrimination or harassment under Part 2 of the Act (which applies to employment and occupation) and under section 21A in Part 3 (which applies to employment services). The Disability Discrimination Act 2005 (“DDA 2005”) extends this questions procedure to cover alleged discrimination under Part 3 of the Act (discrimination in other areas eg access to goods and services) with the exception of cases falling within section 21A (employment services) and sections 19 to 21 insofar as they relate to group insurance arrangements. The Order prescribes the forms to be used and some procedural matters for the Part 3 questions procedure, and makes consequential amendments to the Disability Discrimination (Questions and Replies) Order 2004 (SI 2004/1168) (which prescribes forms and procedural matters for the Part 2 procedure) (“the 2004 Order”).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None
4. **Legislative Background**
 - 4.1 Section 56 of the Act sets out the Part 2 questions procedure. This is a formal mechanism by means of which a person can question those with duties under Part 2 of the Act (eg an employer or trade organisation) or under section 21A in Part 3 (ie a provider of employment services) about alleged discrimination or harassment. The procedure was extended to employment services and harassment by Article 22 of the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673).
 - 4.2 The 2004 Order prescribed the forms for use in cases of alleged discrimination or harassment under Part 2 of the Act or Part 3 in relation to employment services. This Order also prescribed certain procedural matters (eg the period within which questions must be served in order to be admissible in employment tribunal proceedings and the manner in which questions and replies may be served).
 - 4.3 The prescribed forms are used to gather information about the reasons for an alleged unlawful act, and might enable a dispute to be resolved without going to an employment tribunal. If a case is taken to an employment tribunal, and

the complainant has used the prescribed forms (or ones to like effect), the information collected must be admitted by the employment tribunal as evidence. Where the employer etc (“the respondent”) deliberately fails to reply to the questions within the period of eight weeks without reasonable excuse, or the reply is evasive or equivocal, an employment tribunal may make any inference it considers just and equitable. The forms, and guidance on their use, are published in a free booklet by the Disability Rights Commission (DRC) (booklet DL56).

- 4.4 Section 17 of the DDA 2005, which largely comes into force on 5 December 2005, extends the questions procedure to the whole of Part 3 of the Act by replacing section 56 with a new version which applies to both Part 2 and Part 3. From 5 December 2005, therefore, there will be two questions procedures - the current Part 2 procedure for cases heard by employment tribunals and a new Part 3 procedure for cases heard by county courts (or sheriff courts in Scotland).
- 4.5 The DDA 2005 also makes some changes to the scope of Part 3 of the DDA 1995. From 5 December 2005, Part 3 will apply (as now) to those providing goods, services and facilities to the public. However, this category will then include those who provide group insurance arrangements to an employer’s employees (consequent upon the repeal of section 18 DDA 1995 by section 11 of the DDA 2005, although such cases will continue to be heard in employment tribunals – see paragraph 4.6). Part 3 will also apply in respect of less favourable treatment of a disabled person to those who sell, rent or manage premises (as now) and, for the first time, to private clubs. From 4 December 2006, Part 3 will apply also to public authorities exercising functions; and to private clubs and to landlords and managers of rented premises in respect of reasonable adjustments.
- 4.6 Section 56(2) requires the Secretary of State to prescribe the forms by which a person (“the person aggrieved”) may question the respondent on their reasons for an alleged unlawful act. This Order accordingly prescribes the forms for questions and replies for cases falling within Part 3 of the Act with the exception of those cases which concern employment services which are already covered by the Part 2 procedure (i.e. on employment and occupation) and cases falling within sections 19 to 21 insofar as they relate to group insurance arrangements. Section 21A and group insurance cases are within the jurisdiction of employment tribunals (by virtue of new sections 25(6A), (7) and (8) of the Act), whereas the other Part 3 cases (the cases to which this Order applies) are within the jurisdiction of a county court or, in Scotland, the sheriff court.

5. Extent

- 5.1 This instrument applies to Great Britain and will come into force on 5 December 2005.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The Act is intended to tackle the discrimination that disabled people face in a number of areas, including employment and access to goods and services. A number of changes to the Act have been made since 1995 to improve it. The latest of these is the DDA 2005.
- 7.2 The questions procedure, which was in the Act when enacted, is intended to help a person who thinks they have been treated unlawfully by another to obtain information from that person about the alleged treatment. This can help the person decide whether or not to bring legal proceedings and, if proceedings are brought, to present any complaint in the most effective way. Other anti-discrimination legislation (eg the Race Relations Act 1976) has similar procedures.
- 7.3 The Act's questions procedure applied originally only to the employment provisions, and various procedures and forms were prescribed for asking and answering questions. In 2001, the Government accepted a recommendation (from the Disability Rights Task Force) that the procedure should be extended to Part 3 of the Act. That was partly implemented in October 2004 when the provision of employment services (in section 21A of Part 3) was brought into scope. Revised forms were prescribed for that in the 2004 Order.
- 7.4 The rest of Part 3 will come into scope of the questions procedure on 5 December 2005 when section 17 of the DDA 2005 is commenced. This introduces a new, generalised, section 56 into the Act.
- 7.5 From 5 December 2005, the Part 2 (i.e. employment and occupation) procedure, and the 2004 Order, will apply to the whole of Part 2 of the Act, to the provision of employment services and to the provision of group insurance arrangements. Group insurance arrangements are currently covered by Part 2 of the Act and its questions procedure. However, changes made by the DDA 2005 mean that these arrangements will be covered by Part 3 from 5 December 2005, but the arrangements will nonetheless remain in scope of the Part 2 questions procedure. This has been done because cases about such arrangements are likely to involve the employer and general employment issues and they are therefore best heard by employment tribunals which hear all Part 2 cases. This Order makes some changes to the 2004 Order for the Part 2 procedure consequential on the various changes made by the DDA 2005.
- 7.6 From 5 December 2005, the new questions procedure will apply where a person wants to ask questions about alleged discrimination in access to goods, services and facilities (other than employment services and group insurance arrangements); by private clubs; and by those who sell, rent or manage premises. In addition, from 4 December 2006 when the relevant sections of DDA 2005 are commenced, the procedure will apply to questions about

alleged discrimination by public authorities exercising functions; and by landlords and those who manage rented premises.

- 7.7 A public consultation on the questions procedure (Cm 6402) seeking views on the detail of the forms to be used, and various procedural matters (eg the time limits for serving questions for them to be admissible in evidence in court proceedings) began on 16 December 2004 and ended on 18 March 2005. The document was sent to a wide range of professional and representative bodies as well as disability organisations and others. The results of the consultation were announced on 21 July 2005 (House of Commons Hansard vol: 436, col: 169WS). Responses indicated clear support for the proposed approach. Of the 28 responses about the questions procedure, 93% agreed with the proposals. An analysis of the responses to the consultation (which also covered proposals in respect of private clubs, premises and the definition of disability) and the Government's formal response is available at:
<http://www.dwp.gov.uk/consultations/consult/2004/ddb/response-private-clubs.doc>

8. Impact

- 8.1 A Regulatory Impact Assessment is attached to this memorandum.
- 8.2 The impact on the public sector from the questions procedure is likely to be minimal. This is based on information available on the use of the Part 2 (i.e. employment and occupation) questionnaire. Only 4.3 per cent of the 1,757 cases that reached a hearing under Part 2 of the Act by 1 September 2000 are known to have used a questionnaire, although this is likely to be an underestimate as the use of a questionnaire was not always recorded (Source: "Monitoring the Disability Discrimination Act 1995 (Phase 2)", page 33 – published in 2002 as DWP in-house research report 91). This, coupled with the small number of cases known to have been brought under Part 3 (52 by 1 February 2001 – *ibid* page 139) suggests that initial use of the Part 3 questions procedure is unlikely to be widespread.

9. Contact

Richard Timm at the Department for Work and Pensions can answer any queries regarding the instrument. Tel: 020 796 28741 or e-mail: Richard.Timm@dwp.gsi.gov.uk

1. Title of proposal

Full Regulatory Impact Assessment

1.1 DISABILITY DISCRIMINATION ACT 2005 (DDA 2005): Regulations brought forward under the DDA 2005's duties on private clubs; premises; the definition of disability and the Questions Procedure.

1.2 This RIA, which was first published in December 2004 in support of a Department for Work and Pensions consultation on the Government's proposals for using certain regulation-making powers under what was then the Disability Discrimination Bill, has been updated to take account of the outcome of that consultation in respect of the Government's approach to the Questions Procedure. **It will be further updated to support other Regulations and outcomes of the consultation in due course.** It should be borne in mind that the main duties to which the Regulations relate have been separately costed in an RIA to support the Disability Discrimination Act 2005, which gained Royal Assent on 7 April.

1.3 The Government undertook the consultation exercise to help ensure that the eventual Regulations operate properly and coherently and best support the then Bill's main duties.

2. Purpose and intended effect of measures

(i) The objective

2.1 The Disability Discrimination Act 2005, makes a wide range of amendments to the Disability Discrimination Act 1995 (DDA 1995). This includes provisions which:

- i. bring within scope of Part 3 of the DDA (i.e. dealing with access to goods, services, facilities and premises) private clubs with 25 or more members;
- ii. extend the duty of reasonable adjustment, apart from in respect of removing or altering physical features, to those who let or manage rented premises;
- iii. ensure that landlords cannot unreasonably refuse consent for a disability-related improvement to rented residential premises;

- iv. extend the definition of disability to people with cancer, HIV and multiple sclerosis effectively from the point of diagnosis; and
- v. introduce into Part 3 of the DDA a Questions Procedure which is similar to that in Part 2 of the Act (i.e. employment and occupation).

2.2. These provisions include specific regulation-making powers that allow the Government to introduce detailed measures necessary to implement the main duties.

2.3 The Regulatory Impact Assessment which accompanies the Disability Discrimination Act 2005 (i.e. *Disability Discrimination Act 2005: Regulatory Impact Assessment*) provides a full analysis of the possible costs and benefits arising as a result of the new duties that will be imposed on private clubs, landlords, service providers and others, and from the provisions in the Act which extend the definition of disability to cover more people with HIV, cancer and multiple sclerosis.

2.4 The consultation document *DISABILITY DISCRIMINATION BILL: CONSULTATION ON PRIVATE CLUBS; PREMISES; THE DEFINITION OF DISABILITY AND THE QUESTIONS PROCEDURE* which this RIA was originally published to support is available from:

TSO Customer Services
Telephone: 0870-600-5522
Fax: 08457-622-644

This publication can also be accessed on the internet at www.dwp.gov.uk/publications.

2.5 The consultation document set out the Government's proposals for using the regulation-making powers. These proposals did not, in the main, add to or vary the duties in the Bill, now the DDA 2005. Rather, they provided clarification of provisions where the underlying principle had already been established.

2.6 The following issues were considered in the consultation document:

Private clubs

Private clubs should be subject to broadly similar duties as already apply to other providers of goods, services and facilities under the DDA 1995. The consultation document set out arguments and sought views on:

- Whether the “trigger” for the duty should be the point at which it is *impossible or unreasonably difficult* for the disabled person to use the benefits, facilities or services provided by the club for its members;
- Making the duty to make reasonable adjustments *anticipatory*;
- Setting out the same limited range of defences to justify not making a reasonable adjustment as currently applies to service providers (see chapter 4 of this RIA).
- Whether the practical duties to make reasonable adjustments should be modified, and if so how, in respect of political associations
- Introducing the duty to make reasonable adjustments from December 2006.

Premises

The DDA 2005 requires “controllers of premises” (i.e. landlords and those who manage rented premises) to make reasonable adjustments to their policies, practices or procedures, to change a term of the letting, or to provide auxiliary aids or services in certain circumstances. However, there is no requirement for the controller of premises to remove or alter physical features of the premises. The consultation document set out arguments and sought views on:

- Whether regulations should prescribe what is to be treated as a physical feature in respect of rented premises;
- Whether to clarify the scope of the duty of reasonable adjustment to avoid the possibility that it could include allowing tenants to make alterations to rented premises (Note: this proposal was made redundant by subsequent changes made when the Bill was before Parliament);

- Whether the justification for not making a reasonable adjustment on the grounds of a disabled person's incapacity to enter into an enforceable agreement, or inability to give informed consent, should apply where the disabled person is acting through certain other people, for example a person who has power of attorney; and
- Whether regulations should ensure that commonhold associations are placed under the duty of reasonable adjustment.

Definition of disability

People with cancer should be covered, in effect, from diagnosis rather than from the onset of symptoms. However, the Government proposed to use available powers to limit this provision so that it only applied to cancers requiring substantial treatment. The consultation document set out arguments and sought views on:

- Excluding certain cancers from the scope of the extended definition because they do not require substantial treatment. It identified a list of the cancers to be excluded (e.g. basal cell carcinomas and Bowen's Disease).
- How to define "substantial treatment".

Questions Procedure

The existing procedure for asking and answering questions about alleged discrimination which is in Part 2 of the DDA 1995 (which applies to employment and occupation) should be extended to complaints arising under Part 3 (access to goods, services, facilities, premises, private clubs and public authority functions). The consultation document set out arguments and sought views on:

- The detail of the forms to be used;
- The manner of serving questions and replies; and
- Time limits for serving questions for them to be admissible in evidence in court proceedings.

2.7 The proposals for Regulations in all of the areas identified above were designed to ensure that there is greater clarity for those with duties

and rights. Once in place, the consultation document argued, the new duties would be a significant further step toward the overall aim of comprehensive civil rights for disabled people breaking down barriers and tackling discrimination across a wide range of areas.

2.8 There were no devolution issues arising from the proposals in the consultation document on using regulation-making powers.

(ii) The background

2.9 In December 1997, the Government established a Disability Rights Task Force, comprising members from disability organisations, organisations representing large and small employers, trade unions, businesses and local authorities, to consider how best to deliver the Government's 1997 Manifesto commitment to consider comprehensive and enforceable civil rights for disabled people.

2.10 Having first looked at, and made recommendations on, setting up a Disability Rights Commission (DRC), the Task Force's final report was made in December 1999 ("From Exclusion to Inclusion"). It contained 156 recommendations for action (both legislative and non-legislative) across a number of areas: defining disability; education; employment; access to goods, facilities, services and premises; travel; the environment and housing; participation in public life; local government; and health and social services.

2.11 The Government implemented the Task Force's recommendations on the DRC in 1999/2000, and on civil rights in education in the Special Educational Needs and Disability Act 2001. The Government has also taken forward, under section 2(2) of the European Communities Act 1972, Amendment Regulations implementing the disability provisions of the Employment Directive brought forward under Article 13 of the EU Treaty, other than some changes concerning Further and Higher educational institutions for which Ministers in the Department for Education and Skills are responsible.

2.12 The Task Force's recommendations foreshadowed a number of the changes that were required by the Directive and which were implemented in the Amendment Regulations from 1 October 2004. These include: ending the small employer exemption in the DDA 1995; and ending the exclusion of a number of occupations from the scope of the DDA 1995 (including police officers, prison officers and barristers in chambers). However, other measures recommended by the Task Force required primary legislation and the Government renewed its commitment to disabled people in its 2001 Manifesto.

2.13 On 3 December 2003, the Government published a draft Disability Discrimination Bill which underwent pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Bill was revised as a result of the scrutiny process, although the measures which are considered in this RIA derive from the original work undertaken by the Task Force, and was introduced into the House of Lords on 25 November 2004, and gained Royal Assent on 7 April 2005.

(iii) Risk Assessment

2.14 The measures in the Disability Discrimination Act 2005, the Disability Discrimination Bill as was, create new or improved civil rights for around 10 million disabled people in Great Britain who may potentially be covered by the DDA 1995, which the 2005 Act amends. They address a number of current omissions in the 1995 Act and help to tackle discrimination and barriers that disabled people face in accessing services and facilities.

2.15 The specific proposals in the consultation document that this RIA was originally published to support were intended to ensure that, in complying with the new duties in what was then the Disability Discrimination Bill, private clubs, landlords and managers of rented premises, service providers, employers and others understand the key concepts and detailed requirements that they would be obliged to meet. Without the certainty provided by the Regulations it would not be possible for those with duties to ensure they are meeting or fully meeting those duties. The Regulations also bring clarity for courts and employment tribunals required to adjudicate on cases under the Bill's provisions.

3. Options

3.1 In general the options are:

- a. leave in abeyance the regulation-making powers and rely on the DDA 2005's main duties. However, this would mean that private clubs had no duty to make reasonable adjustments as that duty is not on the face of the Act and it would mean the Secretary of State was in breach of a duty to prescribe forms for the Questions Procedure;
- b. use regulation-making powers in the Act to define key concepts (such as time limits) to ensure certainty for those with duties and enforcement responsibilities under the Act's

provisions, and to ensure that private clubs have equivalent duties to other bodies covered under Part 3 of the DDA 1995;

- c. adapt some of the Government's proposals depending upon the outcome of consultation.

3.2 Option a. is not viable. It would not fulfil the Government's commitment to place private clubs under a duty of reasonable adjustment. It would also mean that the Secretary of State was in breach of a statutory duty. It would cause confusion and uncertainty in the application and enforcement of the Act's duties. Option b. would ensure greatest clarity for those affected, including the courts and tribunals, introduce consistency of approach for private clubs, and allow the Secretary of State to comply with his statutory duty. In respect of option c., the consultation exercise showed that, in the main, there was majority support for nearly all of the Government's specific proposals and the Government has therefore produced regulations on that basis. The full analysis on the consultation exercise, which was placed in the Libraries of both Houses of Parliament, is at **Annex B**. As will be seen from that, in respect of the proposals on cancer, opinion was divided and, following a separate review with the Disability Rights Commission and the main cancer charities, the Government has reconsidered its approach.

4. Costs and Benefits

Questions procedure

The DDA 2005 RIA

4.1 The DDA 2005 RIA acknowledged that it is particularly difficult to estimate the number of questionnaires that may be instigated if a Questions Procedure is introduced into Part 3 of the DDA 1995. On this basis, illustrative examples were provided of the possible costs that might arise. It was estimated that the unit cost of a questionnaire to the business would be £58-£116, or £396-£454 on the basis that the business seeks external legal advice.

The Questions Procedure

4.2 The DDA 1995 provides a procedure by which a person who believes they have been discriminated against in contravention of its employment and occupation provisions can put questions to the alleged discriminator (called the "respondent").

4.3 Special forms have been prescribed which can be adapted to cater for individual circumstances, but there are benefits from using the prescribed forms (or ones which have a like effect).

Effect of the DDA 2005

4.4 The DDA 2005 extends the DDA 1995 so that it also applies in the areas of Part 3 not already covered. This means that the Questions Procedure will also apply where a person wants to ask questions about alleged discrimination:

- In access to goods, facilities and services;
- By public authorities, with some exceptions, for example, if answering questions would prejudice a decision to institute criminal proceedings;
- By private clubs;
- By those who sell, rent or manage premises; and
- By those who control rented premises.

4.5 Cases about the issues covered by the Part 3 Questions Procedure will be heard in county courts (sheriff courts in Scotland). All questions and replies will be admissible as evidence subject to certain conditions and a court will be able to draw any inference that it considers just and equitable if a respondent fails, without reasonable excuse, to reply to questions within 8 weeks or replies in an evasive or equivocal way.

4.6 Following this consultation, the Government has decided to retain the existing prescribed questions and replies forms which were introduced in October 2004 for employment and occupation cases. These will also cover the new duties applying to disabled local councillors when they come into force from December 2005. However, the draft Regulations make some necessary minor modifications to the forms.

4.7 The Regulations prescribe new forms for the new Questions Procedure, building on the existing Part 2 model. They prescribe the same requirements as in the existing questions procedure for serving questions and replies and they prescribe the time limit for serving questions.

Costs and benefits

4.8 While it is not possible to estimate the total number of questionnaires that might be initiated, this RIA adopts the assumptions set out in the DDA 2005 RIA but has updated them to reflect later data on non-wage costs. That is, it assumes, an average unit cost of such a questionnaire would be approximately £75-151, based on a senior manager on average salary of £25.00 per hour taking 3-6 hours to complete the questionnaire (**FOOTNOTE 1**). If the business seeks legal advice on completing the questionnaire, the approximate unit cost would rise to £413-489, based on 2 hours of externally obtained legal advice from a salaried partner charging £169 per hour (**FOOTNOTE 2**).

4.9 The RIA for the DDA 2005 also noted (section 12 of Annex 1) that there was likely to be a one-off cost from familiarisation with the Act's new duties, but that the cost of this was unquantifiable.

4.10 Balanced against this, the extended Questions Procedure may help to limit formal complaints against e.g. service providers as it will draw to their attention issues around the provision of services to disabled people which they may be able and willing to address. This could help to avoid the expense of legal action. (Any changes needed to comply with legal requirements will not lead to extra costs as they are already factored into the costs of Part 3 of the DDA 1995.)

Private clubs

To be updated.

Premises

To be updated.

Definition of disability

To be updated.

5. Consultation with small business: the small firms' impact Test

5.1 Excluding from the scope of the DDA 1995 definition people whose cancers result in only minor treatment will not have any significant impact on small businesses. There will be possible costs in respect of landlords and private clubs, some of whom may be small businesses. In addition, the DWP carried out a series of Focus Groups to gauge views on the overall impact of the Bill when it was published in draft. The findings from those Groups are at paragraph 10.2 to 10.5 below.

5.2 The Groups comprised representatives of nine private clubs, eleven small businesses and fourteen landlords, some of whom were small private landlords, from the Doncaster area that would be affected by the changes brought about by the draft Bill.

5.3 Participants' overall knowledge of the DDA 1995, which the DDA 2005 amends, was limited. There was also limited experience, awareness and understanding of disability and disabled people in general, although around half of the small landlord group indicated they were already making adjustments for disabled tenants and both small business and private clubs participants identified changes they had made for disabled members, customers or staff.

5.4 In respect of the small business Focus Group, the main findings were that;

- The majority agreed with the Government's aim of extending rights and opportunities to disabled people and of removing barriers to full participation;
- There was concern over whether the new duties would impose financial obligations, although none of the participants could identify any measure that would have that effect;
- In contrast to this view, there were some examples given where support for disabled employees/customers had exceeded what might reasonably be expected, and yet was felt reasonable by those giving the support; and
- The Group stated that they would probably employ a non-disabled person in preference to a disabled person if significant costs were involved;
- There was a view that the Government should provide some form of funding for small businesses to help or encourage them to support a disabled person within their workforce.

5.5 A couple of participants said they had insurance that extended to Employment Tribunal costs. Others felt expert resources would be beneficial in assisting businesses in meeting the needs of disabled people, and recognition was given to the role Jobcentre Plus Disability Employment Advisers play.

5.6 However, the Group was unable to give many examples of adjustments they had made to date or the associated costs and they had

no particular views on the cost of adjustments under the Bill. Those adjustments made to date, which included offering services in a different way, were cost free. Some concerns were expressed about the potential burden on other employees of supporting a disabled member of staff, or of other employees feeling that they were being treated less favourably in relation to a disabled employee.

5.7 The overall response to the outcomes of the Focus Groups (at paragraph 10.6 below) mentions that the Department has taken note of these issues, which are largely matters for guidance.

6. Competition Assessment

6.1 The Competition Assessment Filter Test has been applied to the measures considered in this RIA and it has been concluded that no private sector competition issues arise. The measures concerned apply equally across all private sector industries. Furthermore, the measures do not impose disproportionate costs or burdens on business start-ups, compared to existing firms, nor do they affect the ability of firms to choose the price, quality, range or location of their products.

7. Equity and Fairness

7.1 The Regulations which this RIA supports will have a positive impact on disabled people across a wide range of areas.

7.2 By building on the main duties laid down in the DDA 2005, the Regulations will help to ensure that disabled people have greater access to, for example, private clubs, and they will give disabled people a statutory procedure for asking questions when they believe they have been discriminated against in accessing goods and services. In addition, more disabled people annually would be covered by extending the definition of disability in the DDA 1995 to cover cancer, HIV and multiple sclerosis effectively from point of diagnosis.

7.3 There will be costs arising on those sectors affected, including small firms, in respect of the main duties in the DDA 2005, and these are considered in the RIA which supports the Act. There will also be costs arising in respect of the draft Regulations on private clubs. However, the Government believes that these costs are counter-balanced by the need to ensure that barriers and discrimination faced by disabled people are overcome. This is a pivotal aspect of the Government's policy for ensuring equality of opportunity for all.

7.4 The regulations do not have any impact on race equality issues. People from minority ethnic groups who are disabled will be fully covered under the Act's duties and the draft regulations that this RIA supports. Similarly, the Regulations do not have a disproportionate impact on rural areas or specific geographical locations in the UK.

8. Enforcement and sanctions

8.1 Enforcement and sanctions are, in the main, already laid down in the DDA 1995 and the Disability Rights Commission Act 1999. The courts and employment tribunals (and in Scotland, the Sheriff Courts) continue to be the means for individuals to obtain legal redress. The DRC continues to have enforcement powers and can support individual disabled people with legal complaints.

9. Monitoring and review

9.1 The DRC, as part of its overall duty to monitor the DDA 1995, will keep the legislative framework under review and come forward with proposals for change as and when it believes they are required. The DRC publishes an annual strategy document setting out its priorities for the proceeding three year period.

9.2 The Department for Work and Pensions will continue to monitor and review the operation of the Act, including by commissioning and disseminating appropriate research. The Department currently undertakes a programme of research to examine how those with responsibilities under the DDA are responding to their duties. That programme will be extended to monitor how the new duties introduced through the Disability Discrimination Act 2005 are implemented and the impact on those affected.

10. Consultation

10.1 The Department for Work and Pensions consulted on the proposals for using regulation-making powers in the document DISABILITY DISCRIMINATION BILL: CONSULTATION ON PRIVATE CLUBS; PREMISES; THE DEFINITION OF DISABILITY AND THE QUESTIONS PROCEDURE. The consultation document was published on 16 December and the consultation ran until 18 March 2005. The document was produced in a range of accessible formats.

10.2 It should also be noted, as previously stated in this RIA, that the Department for Work and Pensions considered it was important to assess the likely impact of new proposals on small business, landlords

and private clubs. It therefore held a series of Focus Groups in May 2004 comprising representatives from those interests.

10.3 The Focus Groups identified a number of common themes:

- a general lack of awareness of the Draft Disability Discrimination Bill and limited understanding of the DDA 1995;
- support for the moral and ethical objectives underpinning the Government's aim to extend civil rights and inclusion to enable disabled people to participate fully in all areas of society;
- concern about how the draft Disability Discrimination Bill would fit with the cost effectiveness of their individual businesses and organisations and the extent of reasonable adjustments that might have to be made;
- positive experiences of making adjustments to accommodate disabled people.

10.4 The Department also recognised that throughout all the groups, participants were unclear about the term 'reasonable adjustments' and were keen to understand how the test of reasonableness would be applied. All participants agreed that a Code of Practice would be helpful.

10.5 There were concerns, especially from the private clubs' group, about the health and safety implications associated with disabled people, and any increased liability that may arise. There were fears from landlords about tenants who have or could cause damage to properties because of their anti-social behaviour or because they required additional medical care: examples were given of carpets and fixtures needing to be replaced. There was concern surrounding covering more people with HIV. Also, people with mental health disabilities evoked a strong response, e.g. that tenants with a mental health disability would cause damage to properties, or need support in excess of what landlords were able to provide.

10.6 The Department has taken note of these issues, which are largely matters for guidance. The Department has had regard to them during drafting of revised statutory guidance on the definition of disability. Codes of Practice are a matter for the DRC and the Department is working closely with the Commission during its development of new Codes in relation to the issues identified by the Focus Groups. Full consultation is being undertaken on revised Guidance and Codes of Practice. The Commission has been involved, for example, in the

Department's 2004 consultation on proposals for using regulation-making powers under the Bill's public body duties to inform its drafting of a Code of Practice.

11. Summary and recommendation

11.1 This RIA supports the Government's regulations on the Questions Procedure following the outcome of its consultation document **DISABILITY DISCRIMINATION BILL: CONSULTATION ON PRIVATE CLUBS; PREMISES; THE DEFINITION OF DISABILITY AND THE QUESTIONS PROCEDURE**. It identifies possible costs and benefits arising from the Regulations and should be read in conjunction both with the consultation document and the main RIA on the DDA 2005. It will be further updated to support other Regulations and outcomes of the consultation.

11.2 In the main, the Regulations do not add to or vary the duties in the DDA 2005. Rather, they provide clarification of provisions where the underlying principle has already been established. They will assist landlords, private clubs, service providers, employers and others to comply with the Act's main duties and enable the Secretary of State to meet statutory obligations which fall on him in respect of a new Questions Procedure under Part 3 of the DDA. They will also ensure that tribunals and courts are better placed to ensure that those with duties under the DDA 1995 are meeting them effectively.

11.3 In most instances, the costs from the Regulations are expected to be minor or negligible.

Footnote 1: Average hourly rate for the occupation group "managers and senior officials" (source: New Earnings Survey)

Footnote 2: Average hourly charge rate for a salaried partner undertaking "commercial property" work (source: The Law Society Fact Sheet information series, utilising findings from the Law Society's Business Survey).

ANNEX A

This table summarises the costs that could result from the Government's proposals for regulations.

Regulation	One-off costs	On-going annual costs	coverage
Private clubs	To be updated	To be updated	To be updated
Premises	To be updated	To be updated	To be updated
Definition	To be updated	To be updated	To be updated
Questions Procedure	Negligible	Negligible	a

a. The DDA 2005 RIA notes that only 4.4 per cent of the 1,757 cases that reached a hearing under the DDA Part 2 duties (i.e. on employment) are known to have used a questionnaire. It concludes that it is not possible to estimate the total number of questionnaires that might be initiated under Part 3, on which far fewer cases have reached a hearing.

Annex B

Implementation of the Disability Discrimination Act 2005 (DDA 2005)

Outcomes of: "Disability Discrimination Bill: Consultation on private clubs; premises; the definition of disability and the questions procedure"

Introduction

1. This paper, which is being placed in the Libraries of both Houses of Parliament, provides information on the outcomes of a public consultation exercise carried out by the Government between 16 December 2006 and 18 March 2005.
2. The consultation sought views on the Government's proposals for using certain regulation-making powers in the Disability Discrimination Act 2005, which gained Royal Assent on 7 April 2005, in respect of the Act's provisions on private clubs, premises, the definition of disability and a new "Questions Procedure".
3. The document was sent to around 500 organisations including a wide range of professional and representative bodies with an interest in private clubs, rented premises and cancer, as well as disability organisations and others.
4. This paper also provides information on, and sets out the Government's conclusions in relation to, the separate but connected review of discrimination experienced by people with minor forms of cancer.

Proposals in the consultation document:

5. In broad terms, the consultation document set out the following Government proposals:

Private clubs:

6. The document proposed that private clubs – being brought within scope of civil rights legislation for the first time - should be subject to broadly similar duties as already apply to other providers of goods, services and facilities under the Disability Discrimination Act 1995 (DDA 1995). Specific issues consulted upon were:

- Setting the “trigger” for the duty at the point where it is *impossible or unreasonably difficult* for the disabled person to use the benefits, facilities, services etc provided by the club for its members;
- Making the duty to make adjustments *anticipatory*;
- Setting out the same limited range of defences to justify not making a reasonable adjustment as currently applies to service providers;
- Whether duties to make reasonable adjustments should be modified in special circumstances, particularly in respect of political associations
- The implementation timetable for reasonable adjustments
- The likely regulatory impact of the Government’s proposals and information on the costs of training associated with compliance for these proposed new duties

Premises:

7. The DDA 2005 extends existing duties so that landlords have to make reasonable adjustments in certain circumstances. The document sought views on:

- Whether and how regulations should specify what is to be treated as a physical feature in respect of rented premises;
- Clarifying the scope of the duty of reasonable adjustment to avoid the possibility that adjustments could extend to issues around tenants making alterations to rented premises. However, this proposal was made redundant by subsequent changes to the Bill relating to improvements to let dwelling houses;
- Whether the justification for treating a disabled person less favourably or for not making a reasonable adjustment on the grounds of a disabled person’s incapacity to enter into an enforceable agreement should apply where the disabled person is acting through certain other people, for example a person who has power of attorney; and
- Whether regulations should ensure that commonhold associations are placed under the same duty of reasonable adjustment as landlords and managers of rented premises.

Definition of disability:

8. One effect of the DDA 2005 is that people with cancer are covered from diagnosis rather than from the later on-set of symptoms. The document sought views on:

- Whether the Government had got the right list of those cancers which it proposed to exclude (i.e. mainly skin cancers) from the scope of the

extended definition because they were likely to require “substantial treatment”, and how to define “substantial treatment”.

Questions procedure:

9. The DDA 2005 extends the existing questions procedure in the DDA 1995 (which applies to employment and occupation) to complaints arising on access to goods, services, facilities, public functions, private clubs and premises. The document sought views on the detail of the forms to be used, the manner of serving questions and replies, and time limits for serving questions for them to be admissible in evidence in court proceedings.

Outcomes of the consultation:

10. **Annex B** is a table of the outcomes of the consultation. Response rates vary and, in many instances, respondents did not provide direct answers to the specific questions posed. However, and other than in respect of two issues, support for the Government’s proposals, on those questions where respondents were asked to indicate if they agreed or disagreed, ranged from 53%-94%.

11. There were two questions where response rates were ambiguous:

- (i) The Government’s overall approach to the coverage of cancer: where 47% agreed and 47% disagreed. There were two main arguments from those who disagreed with the approach who, in the main, tended to be representatives from groups with some expert knowledge of this area, such as the DRC and the cancer charities.

Firstly, it was argued that fear and stigma associated with the word ‘cancer’ would lead to discriminatory treatment regardless of the level of treatment, or whether it is successful. Secondly, the approach was too complex to follow and difficult to implement as employers, service providers and patients would not be aware of the different types of cancers or types of treatment.

- (ii) The regulatory impact of the private clubs provisions and in particular the costs of compliance training: where 28% of respondents agreed with the regulatory impact assessment. While no respondent disagreed, 72% (i.e. 13 respondents) expressed views which did not directly answer the questions posed: e.g. 5 said that costs would be difficult to quantify; 3

that many clubs were run by volunteers; 2 that the costs would be too high; and 2 that many adjustments would cost very little. Only one reply expressed any quantified view on costs. No further information was forthcoming on training costs to comply with the proposed new duties

Separate evidence based review of cancer discrimination:

12. The extended definition of disability provided for by the Disability Discrimination Act 2005 includes a regulation-making power to exclude certain types of cancer from the scope of that definition. The Government indicated during pre-legislative scrutiny of the draft Disability Discrimination Bill and during the passage of the Bill itself that this power would be used to exclude cancers (mainly minor skin cancers) which were not likely to require substantial treatment.

13. However, during passage of the Disability Discrimination Bill the Government undertook not to exercise the regulation-making power until it had conducted a review of the evidence relating to disability discrimination in respect of cancers not likely to require substantial treatment with the Disability Rights Commission and other organisations, including the main cancer charities. This review complemented the public consultation exercise.

14. Twenty-four organisations (i.e. medical bodies – including Royal Colleges and other professional medical organisations, disability organisations, cancer charities – including those focused on black and ethnic minority groups - and bodies representative of employers and employees) were invited to submit evidence to the review. The Disability Rights Commission as well as three cancer charities (Macmillan Cancer Relief, CancerBACUP and Cancer Research UK) participated in a meeting with the Department for Work and Pensions. The Department also examined evidence in employment and employment appeal tribunal cases where cancer was cited as the cause of disability. Information was sought from six countries (Australia, New Zealand, Canada, United States, South Africa and the Republic of Ireland) which have legislation similar to the Disability Discrimination Act 1995 as to their experience of disability discrimination in relation to cancers not likely to require substantial treatment.

15. The review found there was no ‘hard’ evidence that ‘minor’ forms of cancer (mainly skin cancers) attracted stigmatic discrimination. What was clear, and the Government accepts, was the complexity and practicality of the Government’s approach to exclude cancers based on the level of treatment required, given the number of treatments available,

patient and consultant choice, location of the cancer on the body, recurrence of the cancer, and the types and amount of follow-up treatment available.

Government response to consultation:

The definition of disability: cancer

16. Responses to the consultation document indicated a split of opinion on whether or not the Government should exercise the regulation-making power to exclude minor types of cancer from the extended definition of disability in the DDA 2005.

17. The Government has concluded, in the light of public consultation and the separate evidence based review, that it is not possible to distinguish effectively between those people whose cancers are likely to require substantial treatment and those whose cancers are not and that, were there an attempt to do so it would introduce uncertainty and complexity into the definition of disability. This would lead to unfair and unequal outcomes for disabled people, and make it difficult for employers and others with responsibilities under the Act to understand and comply with their duties. Treating all people who have cancer as disabled people ensures a straightforward approach, which will provide equity of outcome, while having minimal consequences for employers and service providers.

Therefore, the Government has decided not to exercise the regulation-making power to exclude any types of cancer from the scope of the extended definition of disability.

Private clubs

19. Responses to the consultation document indicated support for the Government's proposals to place broadly similar duties on private clubs with 25 or more members as already apply to other providers of goods, services and facilities under Part 3 of the Disability Discrimination Act.

Therefore, the Government will bring forward implementing regulations on that basis.

Premises

20. The Government sought views on: whether what is to be treated as a physical feature should be prescribed and a proposed approach to this; proposals to regulate on justifications for treating a disabled person less favourably and for not making reasonable adjustments; proposals to

regulate in respect of commonhold; and any other areas relating to reasonable adjustment duties on which the Government should consider regulating. Responses indicated majority support for the thrust of all of the proposals, with some specific suggestions for how physical features should be prescribed.

Therefore, the Government will bring forward implementing regulations on that basis.

The questions procedure

21. Views were invited on the forms and procedures to be used in the new Questions Procedure, which will apply in relation to access to goods, services, facilities, public functions, private clubs and premises. Responses indicated clear support for the proposed approach.

Therefore, the Government will bring forward implementing regulations on that basis.

Outcomes of consultation on using regulation-making powers under the DDA 2005's duties on private clubs, premises, definition of disability and questions procedure

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS	
			No.	%	No.	%	No.	%
Private clubs	1 Do you agree that that the duties to make "reasonable adjustments" to be applied to private clubs should be framed in the same way as those for service providers?	33	31	94	2	6	0	0
	2 Do you agree that, for private clubs, the trigger point for the duty to make reasonable adjustments should be the same as for service providers?	27	21	78	4	15	2	7
	3 Do you agree that the duty on private clubs to make reasonable adjustments should be anticipatory, as it is for service providers?	32	26	81	3	9	3	9
	4 Do you agree that justifications for not making reasonable adjustments should be the same as for service providers?	30	19	63	2	7	9	30

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS		
			No.	%	No.	%	No.	%	
Private clubs	5	Do you agree with the implementation timetable for the duty to make reasonable adjustments? (Dec 2006)	27	16	59	6	22	5	19
	6	Do you agree with the proposed modifications of the reasonable adjustment duty under special circumstances, particularly in respect of political associations?	19	11	58	0	0	8	42
	7	Do you agree with the regulatory impact proposals?	18	5	28	0	0	13	72
Premises	8	Do you consider that what is to be treated as a "physical feature" should be prescribed for the purposes of the new duties of reasonable adjustment applying to controllers of premises?	32	27	84	2	6	3	9
	9	If the Government decides to prescribe what is to be treated as a "physical feature", do you agree with its proposed approach?	33	20	61	8	24	5	15

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS		
			No.	%	No.	%	No.	%	
Premises	10	The Government would like to know whether you agree with its proposals to regulate on tenant's alterations to premises. [These proposals were made redundant by changes to the Bill relating to improvements to let dwelling houses.]	32	17	53	2	6	13	41
	11	The Government would like to know whether you agree with its proposals to regulate on justifications for treating a disabled person less favourably and for not making reasonable adjustments.	30	26	87	0	0	4	13
	12	The Government would like to know whether you agree with its proposals to regulate in respect of commonhold.	26	23	88	0	0	3	12
	13 *	Are there any other areas relating to the new duties of reasonable adjustment on which you think the Government should consider regulating?	26	7	27	4	15	15	58

	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS		
			No.	%	No.	%	No.	%	
The definition of disability	14	The Government would like to know whether you agree with the proposed overall approach to the coverage of cancers.	36	17	47	17	47	2	6
	15 *	The Government would like to know whether the list of proposed exclusions is comprehensive and includes the most common cancers which are considered not to require substantial treatment or whether there are further conditions that should be included in the list.	16	10	62.5	6	37.5	0	0
	16 *	The Government would welcome views on whether any commonly occurring cancer included in the list should not be there because it does, in fact, generally or regularly require substantial treatment.	15	6	40	0	0	9	60
	17 *	The Government would welcome views on whether a provision is necessary to ensure that individuals with exempted conditions who are considered to require substantial treatment are covered by the DDA.	18	14	78	1	6	3	17
	PROPOSAL	NUMBER OF RESPONSES	AGREE		DISAGREE		OTHER VIEWS		

			No.	%	No.	%	No.	%
The questions procedure	18	The Government would like to know whether you agree with its detailed proposals in relation to the extension of the questions procedure.	28		26	93	1	3.5
	19*	Do you think there are any other areas to do with the extended questions procedure which should be provided for by Order?	16		5	31	9	56
							2	13

* None of these questions require explicit "agree"/"disagree" answers. Therefore some interpretation has been required in allocating responses to the relevant headings in the table. On that basis, the breakdown of responses is as follows:
Q13) 7 respondents believed there were areas in which the Government should consider regulating, 4 did not, and 15 made comments outside the scope of the consultation.
Q15) 10 respondents believed the list was comprehensive, 6 did not.
Q16) 6 respondents agreed with the list, 9 disagreed with the overall approach.
Q17) 14 respondents believed that a provision was required, 1 did not, and 3 made comments outside the scope of the consultation.
Q19) 5 respondents believed that there were other areas which should be provided for, 9 did not, and 2 made comments outside the scope of the consultation.

RESPONDENT TYPE

DISABILITY GROUP	12
REPRESENTATIVE BODY - OTHER	11
PUBLIC BODY	7
INDIVIDUAL	6
LANDLORD ASSOCIATION	5
REPRESENTATIVE BODY - PREMISES	4
SERVICE PROVIDER	4
REPRESENTATIVE BODY - CLUBS	3
PRIVATE CLUB	2
SOLICITOR	2
EMPLOYER	1