

Disability Discrimination Act 1995 – Support for people with disabilities

Note: This paper sets out the PSNC's position with respect to the Disability Discrimination Act 1995, but in common with all laws, only the courts can give an authoritative interpretation. In all cases of doubt, you should refer to the original legislation and seek professional legal advice from a solicitor or counsel.

This paper sets out the important parts of the Act, as they relate to the supply of medicines and the 'reasonable adjustments' that are required for people with disabilities. The paper does not address other aspects of the DDA, such as those that deal with access to premises.

In the PSNC new contract book, we included a service – 'support for people with disabilities' and this paper provides an update, following the decision by the Department of Health not to include the detailed service specification in the NHS (Pharmaceutical Services) Regulations 2005.

The Law

Extracts from the Disability Discrimination Act 1995 are set out in Annex 1. To simplify the document, we have chosen to selectively extract those parts that we believe to be relevant.

Meaning of Disabled person

What does a 'person with a disability' or 'disabled person' mean?

A person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

This simple sentence has several words that are subject to legislative interpretation – they are

- 'impairment',
- 'long-term',
- 'adverse effect on his ability to carry out normal day to day activities'.

The impairment may be physical (for example, a patient with arthritis) or mental (for example, a person with Alzheimer's). **It is no longer necessary for the mental impairment to be clinically recognised (updated 5 December 2005).**

The impairment is 'long term' if it has lasted 12 months, or is likely to last for 12 months or for the rest of the person's life.



The 'adverse effect on his normal day to day activities' includes effects on mobility; manual dexterity; physical co-ordination; continence; ability to lift, carry or otherwise move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand; or perception of the risk of physical danger.

As well as these legislative interpretations, a person is disabled only if the impairment has a 'substantial' effect.

A person with a progressive condition, such as multiple sclerosis, will fall within the definition of a disabled person even if the degree of impairment is not substantial, if the condition is likely to deteriorate to a point where it becomes substantial.

The following could thus fall within the definition-

- A patient with arthritis, who cannot open a child resistant container;
- A person with MS which is likely to lead to loss of manual dexterity, even if the deterioration is not yet so advanced;
- A patient who has a visual impairment, such that a dispensing label cannot be read, even with contact lenses or spectacles; or
- A patient whose short term memory is so poor that he or she cannot remember if medicines have been taken.

The impairment must result in substantial adverse effect, so mild arthritis or simple forgetfulness may not be enough. Remember that the Act requires the impairment to have a substantial adverse effect on the person's ability to carry out normal day to day activities.

A person who finds it convenient to have medicines dispensed in a monitored dosage system, or a person who wants tablets popped out of blister packs because of a preference for glass screw top bottles are not necessarily disabled.

What if a person is 'registered disabled'?

There is now no register on which a person with a disability is recorded. When the Act was introduced there was statutory recognition for persons who, on 12th January 1995 and on the date when the provision came into force were in the register of disabled persons maintained under section 6 of the Disabled Persons (Employment) Act 1944. A person on this register was, for a period of three years, deemed to be a 'disabled person' within the meaning of the Act. A disabled person now, is not required to be on any register – the person need just fit the description above. A person who was 'registered disabled' may have had difficulty in walking, might have tired easily, or may have had emphysema. A person with any of those conditions could satisfy the definition of a disabled person, but would not necessarily have difficulties with medicines.

What are the obligations towards a disabled person?

As seen from the Annex, it is unlawful for a contractor to discriminate against a disabled person by failing to comply with a duty in which the effect of that failure is to make it impossible or unreasonably difficult for a disabled person to make use of any services provided.

This document, as stated above relates only to the dispensing of medicines, but contractors will now recognise that failing to make provision for suitable access to premises resulting in a situation in which a disabled person cannot use the pharmaceutical services, could be unlawful.

What are the obligations relating to the supply of dispensed medicines?

The Act states that a contractor would discriminate against a disabled person if the contractor fails to comply with a 'section 21 duty' imposed on the contractor in relation to the disabled person, unless it can be shown that the failure to comply with that duty is justified.

A 'section 21 duty' arises where a contractor has a practice, policy or procedure which makes it impossible or unreasonably difficult for a disabled person to make use of a service which the contractor provides. The contractor is then under a duty to take such steps as it is reasonable, in all the circumstances of the case, for the contractor to have to take in order to change that practice, policy or procedure so that it no longer has that effect.

The Act helpfully suggests that if the supply of an 'auxiliary aid' would help the disabled person, this should be considered, if it is likely to assist and it is reasonable in all the circumstances to supply an auxiliary aid. The Act uses by way of demonstration the provision of information on audio tape, for a person who is visually impaired, but in relation to the supply of medicines, examples might include the use of reminder charts, large print labels or compliance aids. All of these are 'auxiliary aids', so a contractor should not presume that a patient with a disability, who requires an auxiliary aid, must always be supplied with an MDS.

A contractor may wish to consider circumstances when failing to comply with a duty may be justified. The failure is justified only

'where, in the opinion of the contractor, one or more of the conditions mentioned are satisfied; and it is reasonable, in all the circumstances of the case, for the contractor to hold that opinion'.

The conditions specified, which might provide justification to fail to comply with a duty, include where the way in which medicines are provided to the disabled person is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person).

One example where this might apply, is where a patient with arthritis cannot open a child resistant container, and asks for a plain screw top bottle. Contractors will understand that there is a consequent risk to the health of any child in the patient's

home, from accidental poisoning. But in the circumstances, an understanding of the risks by the patient, together with an undertaking that they will be stored well out of children's reach, would make it unreasonable for the contractor to refuse to repackage.

But, in a similar situation, if a medicine is included in a special container, sealed under inert gas, to protect the product from deterioration, and the product would be expected to deteriorate if repackaged, to such an extent that it would be harmful to the patient, then it could be reasonable for the contractor to refuse to repackage, because repackaging would harm the product and endanger the health of the patient. In these circumstances, alternative arrangements would need to be made – but this may require, for example, the PCT to arrange for home visits by a care worker, to open containers each time a dose of medicine is required.

The tests to apply

From the above, contractors will see that there is a two stage test. First, is the patient disabled within the meaning of the Act – a person with severe arthritis, a person who cannot walk unaided and a person with loss of short term memory which has a substantial impact on normal day to day living would all fit the definition.

The second stage is to determine whether the services provided make it impossible or unreasonably difficult for the disabled person to use the services (i.e. the medicines). In the first example above, the practice of supplying a child resistant container would make the service impossible or unreasonably difficult for the patient. In the second example, there would appear to be nothing about the disability that would make it impossible or unreasonably difficult to use medicines. In the third, the supply of medicines loose in a bottle may make it impossible or unreasonably difficult. But – if the medicine is normally packed by the manufacturer in a calendar pack, it is possible that supplying the calendar pack would not make it impossible or unreasonably difficult to use the medicines.

Assessment tool

In the new contract book, PSNC stated that an assessment tool is being prepared. This will assist a contractor in identifying whether a person is disabled and whether the services provided by the pharmacy would make it impossible or unreasonably difficult to use the medicine.

Having identified the difficulties in using the medicine, it is then possible to determine the type of adjustment that might assist.

The assessment tool cannot, however, be considered to be a definitive solution. The definition of disability, which requires the interpretation of 'substantial', 'long term' and 'adverse effect' means that each case must be considered individually. The assessment tool assists, but could not be developed in a way that encapsulates every possible disability and adjustment.



The assessment tool is therefore a guide only – a helpful guide which will identify correctly in most cases, a person who is disabled and what type of adjustment may assist – but there remain exceptions that the assessment tool cannot predict.

The NHS (Pharmaceutical Service) Regulations 2005

The Department of Health in preparing the regulations to give effect to the negotiated essential services, took the service specifications from the new contract book, and lawyers phrased these in legal language. But, the lawyers were concerned that the regulations as drafted could direct a contractor to act unlawfully. This would occur if the regulation stated that a particular patient fell outside the eligibility for support, or that a certain adjustment should be made, in circumstances where this does not address the disabled patient's needs. As the section 21 duty is on the provider of the service, and not the Department of Health, the lawyers decided that the regulations should not direct a contractor at all, in terms of the actions that should be taken to comply. One law cannot direct a person to break another law. The removal of the service specifications from the regulations was therefore inevitable.

Funding

But the Department of Health accepted that the costs of complying with the section 21 duty should be reimbursed. All the funding negotiated by PSNC will be provided. PSNC therefore discussed with the Department how this funding could be distributed fairly. As there is no evidence available of the likely distribution of disabled persons who may require support, the decision was taken on the basis that the distribution of patients will reflect the distribution of prescriptions – i.e. that the more prescriptions that are dispensed, the more patients with a disability are likely to be encountered. It is recognised that there may be regional variations, and that some types of pharmacy may be visited more by a disabled person than others. But, unless and until such evidence emerges, the fairest way of distributing the funds is on a pence per prescription basis.

It is very important to understand that the Department of Health has not reneged on the negotiated agreement. The only change is that it cannot give the precise directions to a contractor on how to comply with the obligations under the DDA. PSNC will work with the Department to ensure that funding is adequate, and if evidence emerges that payment across the board produces an unfairness that can be overcome by a different funding mechanism, PSNC will press for change.

Compliance

Contractors will need to comply with their duties under the DDA for those patients with a disability. Contractors may use the assessment tool but must be mindful that it may not identify every disabled person or the adjustments necessary. The areas of danger for a contractor are where a patient does not appear eligible for support, so whatever system is used by contractors, the rejection of a request by a patient for support must be taken on a sound basis. It was stated at the beginning of this document that only the courts can give an authoritative interpretation of the



law. The PSNC is aware of one case being pursued through the courts, where a contractor supplied MDS to any patient who requested, but made a small charge. The Disability Rights Commission is supporting a patient in claiming that under the DDA, a reasonable adjustment must be provided free of charge. This case, and any that follow could produce useful precedents but contractors should be under no illusion that any contractor could be challenged at any time, if they fail to provide reasonable adjustments.

Can MDS be provided to persons who are not disabled

By this stage, contractors will be aware of what their duties are, how they may assess them, and what steps it is reasonable for them to take for compliance with DDA. But, over recent years, many contractors have participated in both voluntary and funded schemes to supply MDS. This might be on individual request by a patient or it may be part of a PCT locally commissioned service for certain types of patient. It is likely that many patients who currently receive their medicines in MDS would not fall within the definition of disabled – ask yourself and the patient – does the patient suffer from an impairment that has a substantial adverse effect on the ability to carry out normal day to day activities. In many cases the answer will be no. But a patient may prefer the convenience of MDS as it saves the trouble of opening several different manufacturer's packs of medicines and selecting the correct dosage. It reduces the need to think too deeply about what the patient is taking.

For some patients in the community, the PCT and prescriber may believe that patient compliance would be improved by use of an MDS. The contractor is under no obligation whatsoever, to supply patients who are not disabled with an MDS. Some contractors supply MDS free of charge to some patients, and some make modest charges. These are purely commercial decisions and contractors are free to make their own decisions. With the involvement of the LPC, the PCT could be encouraged to provide funding for MDS for patients who are not entitled to support under the DDA, if the PCT or prescriber believes that there would be a benefit to the patient. PCTs should not seek to require contractors to supply medicines using MDS for patients not eligible for DDA, through the funding available for DDA support.

Is compliance optional

A patient turned away from a pharmacy or denied support under the DDA, has two options. First, to challenge the pharmacist in the courts (and there is a possibility that the Disability Rights Commission would support a patient in that position). The adverse publicity would be bad for the pharmacy, but the legal and time costs of defending a court case are substantial. Secondly, the patient could complain to the PCT. Under the new regulations, the PCT is able to take action against a contractor for fitness to practise matters. In the case of a serious fitness to practise breach, the contractor could be removed from the pharmaceutical list, or have conditions imposed. PSNC advises all contractors to maintain records so that self-audit of compliance with the DDA can be carried out. This means retaining the assessment records, and records of adjustments made. This information is useful not only as a

defence against a complaint, but also to assist in making adjustments to the level of future funding.

What if the adjustment is beyond what is reasonable

Finally, contractors should recognise that for some patients, the adjustments necessary are beyond those that could reasonably be requested of the majority of pharmacies. Labels printed in Braille may be helpful for some visually impaired patients who can read Braille, but it would be unreasonable to expect every pharmacy to invest in a Braille printer. There may also be considerable difficulties for a very small pharmacy, with no space available in which to fill a compliance aid, and for which it may be held that it would not be reasonable to expect it to supply compliance aids as an adjustment. In these cases, the PCT has a duty to provide care to the population in its area, and persons who travel into the area, and it may find it necessary to commission as a local enhanced service, the more costly adjustments required for some patients.

If contractors would like to research the matter further, the following links may provide a suitable starting place

Disability Discrimination Act

<http://www.legislation.hmso.gov.uk/acts/acts1995/1995050.htm>

Disability Commissions 'open 4 all' website <http://www.drc-gb.org/open4all/>

The ongoing legal case

<http://www.drc-gb.org/thelaw/casedetails.asp?category=legal&id=422&cat=-6>

Annex 1 – Extracts from the Disability Discrimination Act

Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities and "disabled person" means a person who has a disability.

Schedule 1 of the Act sets out the meaning of various terms – Impairment

'Mental impairment' includes an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness. **[Note: this definition has been amended by the Disability Discrimination Act 2005, and no longer requires the mental impairment to be a clinically well recognised illness].**

Long-term effects

The effect of an impairment is a long-term effect if-

- (a) it has lasted at least 12 months;
- (b) the period for which it lasts is likely to be at least 12 months; or
- (c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring shall be disregarded in prescribed circumstances.

Normal day-to-day activities

4. - (1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following-

- (a) mobility;
- (b) manual dexterity;
- (c) physical co-ordination;
- (d) continence;
- (e) ability to lift, carry or otherwise move everyday objects;
- (f) speech, hearing or eyesight;
- (g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger.

Persons deemed to be disabled

7 - (1) Sub-paragraph (2) applies to any person whose name is, both on 12th January 1995 and on the date when this paragraph comes into force, in the register of disabled persons maintained under section 6 of the Disabled Persons (Employment) Act 1944.

(2) That person is to be deemed-

(a) during the initial period, to have a disability, and hence to be a disabled person; and

(b) afterwards, to have had a disability and hence to have been a disabled person during that period.

(3) A certificate of registration shall be conclusive evidence, in relation to the person with respect to whom it was issued, of the matters certified.

(4) Unless the contrary is shown, any document purporting to be a certificate of registration shall be taken to be such a certificate and to have been validly issued.

(7) In this paragraph-

"certificate of registration" means a certificate issued under regulations made under section 6 of the Act of 1944; and

"initial period" means the period of three years beginning with the date on which this paragraph comes into force.

Progressive conditions 8. - (1) Where-

(a) a person has a progressive condition (such as cancer, multiple sclerosis or muscular dystrophy or infection by the human immunodeficiency virus),

(b) as a result of that condition, he has an impairment which has (or had) an effect on his ability to carry out normal day-to-day activities, but

(c) that effect is not (or was not) a substantial adverse effect,

he shall be taken to have an impairment which has such a substantial adverse effect if the condition is likely to result in his having such an impairment.

Section 19(1)(b) states that 'It is unlawful for a provider of services to discriminate against a disabled person ... in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service';

20. - (1) For the purposes of section 19, a provider of services discriminates against a disabled person if - (a) he fails to comply with a section 21 duty imposed on him in relation to the disabled person; and (b) he cannot show that his failure to comply with that duty is justified.

For the purposes of this section, treatment is justified only if - (a) in the opinion of the provider of services, one or more of the conditions mentioned in subsection (4) are satisfied; and (b) it is reasonable, in all the circumstances of the case, for him to hold that opinion.

Subsection (4) includes 'The conditions are that - (a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);

21. - (1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.

Subsection (4) states 'Where an auxiliary aid or service (for example, the provision of information on audio tape or of a sign language interpreter) would -(a) enable disabled persons to make use of a service which a provider of services provides, or is prepared to provide, to members of the public, or (b) facilitate the use by disabled persons of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provide that auxiliary aid or service.