



Office for Disability Issues  
HM Government



Consultation on  
Improving Protection From  
Disability Discrimination

Government Response

April 2009

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## Introduction

Since it first came into force in December 1996, the Disability Discrimination Act 1995, (Disability Discrimination Act) has provided a disabled person with protection from less favourable treatment that occurs for a reason related to the person's disability (disability-related less favourable treatment) and which cannot be justified. This form of discrimination is generally known as disability-related discrimination.

In June 2008, the House of Lords in its judgment on the case of *Lewisham v Malcolm*<sup>1</sup> (*Malcolm*) made it much more difficult for a disabled person to establish a *prima facie* case of disability-related less favourable treatment, and therefore to demonstrate a case of disability-related discrimination. The House of Lords' judgment significantly weakened protection for disabled people from disability-related discrimination, contrary to the Government's policy intention.

In order to re-establish an appropriate level of protection from disability-related discrimination, the Government consulted on a proposal to adopt the principle of providing protection from indirect discrimination, which currently applies in relation to other forms of discrimination, for disability in the Equality Bill. The proposal was consistent with one of the primary aims of the Equality Bill, which is to harmonise, as far as practicable, anti-discrimination legislation. It was also in line with the anticipated requirements of an EU Directive, which is currently being negotiated, that would require the adoption of provisions to protect disabled people from indirect discrimination in domestic legislation.

As a consequence of the responses to the consultation, the Government has reconsidered the proposal. It has decided to include in the Equality Bill a revised form of protection from discrimination that arises from a disabled person's disability in addition to extending protection from indirect discrimination to disability.

## Background

The policy principle underlying the current protection from disability-related discrimination is that it should achieve a balance between the ability of a disabled person to establish a case of less favourable treatment, and the opportunity for those, such as employers and service providers, with duties under the Disability Discrimination Act to justify that treatment.

In order to establish that disability-related discrimination has occurred, a court or tribunal has to be satisfied of two things. First, that the disabled person has been subjected to disability-related less favourable treatment. Second, that

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<sup>1</sup> *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43

the alleged perpetrator of the less favourable treatment cannot justify that treatment.

To establish that the disabled person had 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 could be used.

The question of how to determine who the comparator should be has been subject to interpretation by the courts. Until June 2008 the key caselaw for establishing the comparator, when determining whether disability-related less favourable treatment had occurred, was *Clark v Novacold*<sup>2</sup> (*Novacold*). The Court of Appeal’s judgment in *Novacold* established a precedent that made it straightforward for a disabled person to demonstrate that they had been subjected to disability-related less favourable treatment.

In June 2008, the House of Lords considered the case of *Malcolm*. It took a different and more restrictive approach than the Court of Appeal in *Novacold* to establishing the comparator for the purposes of determining whether a disabled person had experienced disability-related less favourable treatment. The consequence of the House of Lords’ judgement was to disturb the balance that underpinned the principle of disability-related discrimination. This is because the judgment made it much more difficult for a disabled person to establish a case of disability-related less favourable treatment. The judgment did not, however, affect the ability of disabled people to challenge direct discrimination, or discrimination that arises because of a failure by an employer, service provider, and others with duties under the act to fulfil their duty to make a reasonable adjustment.

On 2 July 2008 the European Commission introduced proposals for an anti-discrimination Directive to provide protection from discrimination based on disability, age, sexual orientation, and religion or belief in areas outside of employment.

The proposed Directive includes a separate and distinct provision covering indirect discrimination and, if it is adopted, will require the Government to apply the principle of protection from indirect discrimination for disability in domestic anti-discrimination law.

Through the Equality Bill the Government is seeking to redress the imbalance in protection from disability discrimination that has been caused by the *Malcolm* judgment. In developing its proposals for the Equality Bill, it took account of the aim of the Bill to harmonise and streamline equalities legislation, and of the anticipated requirements of the proposed EU Directive. It therefore proposed that the principle of protection from standard indirect discrimination, as applied in relation to other protected characteristics, should be adopted for disability and it consulted on that proposal.

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<sup>2</sup> *Clark v Novacold* [1999] ICR 951

The written consultation, *Improving Protection from Disability Discrimination*, was launched on 26 November 2008 and ended on 6 January 2009. It was supplemented by four consultation events in London and Edinburgh involving a wide range of stakeholders, including disability organisations, representatives of business, and legal practitioners. This document provides a summary of the responses received to the consultation and sets out the Government's revised proposal in the light of those responses.

## **Consultation Responses**

A wide range of organisations responded, including the Equality and Human Rights Commission (EHRC), the Employers' Forum on Disability (EFD), the Confederation of British Industry (CBI), disability organisations representing people with a variety of impairments, legal organisations including the General Council of the Bar, representatives of local government, and trade unions. Further input to the consultation was made at consultation events in Edinburgh and London.

Over all, 79 written responses to the consultation were received:

- 33 were from charities or disability organisations
- 10 were from Trade Unions
- 8 were from legal organisations
- 8 were from individuals
- 5 were from Universities
- 4 were from professional associations
- 4 were from statutory bodies
- 3 were from organisations representing employers
- 2 were from other organisations
- 2 were from Local Authorities

## Key findings and Government Response

The consultation posed three questions. The following section summarises the responses received to each question and the Government's response.

### Overview of the consultation response to question 1

The first consultation question concerned the adoption of indirect discrimination provisions to protect disabled people:

“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.”

The majority of responses to the first question of the consultation were against the adoption of the concept of protection from indirect discrimination, as the breakdown of responses below shows:

- 40 responses did not support the concept of adopting indirect discrimination provisions
- 37 responses did support the concept of adopting indirect discrimination provisions
- 2 responses were difficult to determine as to where their support lay; however their comments were recorded

On analysing the responses to the consultation it became apparent that whilst it was possible to break the response down by those who had ticked the “yes” or “no” box in their answer to the consultation, there was a more technical position outlined in most of the responses. This allowed them to be categorised into five groups, which are outlined below:

- 34 responses supported standard indirect discrimination provisions;
- 30 responses supported restated disability-related discrimination, with the addition of indirect discrimination provisions;
- 9 responses supported restated disability-related discrimination, with the effect of the Novacold judgment put on a statutory footing;
- 3 responses supported restated disability-related discrimination, but without a comparator;
- 2 responses did not fit into the above categories and were categorised as miscellaneous; and
- 1 respondent did not feel able to comment on the consultation document issue.

These groupings form the basis of the analysis below so that common themes can be examined.

## **1. Support for standard indirect discrimination provisions**

Thirty-four responses were positive to the idea of adopting provisions providing protection from indirect discrimination. Of these responses, 26 gave some explanation of, or further thinking on, their response. The majority of responses in this group came from disability organisations and accounted for 13 of the total. The remainder came from individuals (7), higher education organisations (6), business advisory groups (3), legal advice services (2), local authorities (2) and a Scottish NHS organisation (1).

Three broad themes were apparent in these responses:

### **Indirect Discrimination**

There was significant support for provisions providing protection from standard indirect discrimination from the 34 groups. Liberty said it had “been calling for [indirect discrimination provisions] for some time” and welcomed the proposed inclusion of indirect discrimination provisions for disability in the Equality Bill. Sense Scotland thought that provisions providing protection from indirect discrimination would result in the focus being “more on the substance and intent of the law rather than the exact minutiae of any one case” and as such considered its adoption to be a positive step. However, in some of these positive responses a concern was raised that putting protection from indirect discrimination into practice for disability would not be straightforward.

### **Simplification and Harmonisation**

The move to simplify and harmonise anti-discrimination legislation, through the adoption of provisions providing protection from indirect discrimination, received support from a range of organisations such as Liberty and SAMH (one of Scotland’s leading mental health charities), and from individuals. The proposal to harmonise protection from discrimination across all the protected strands was recognised by several groups. For example, SAMH welcomed harmonisation because “indirect discrimination is a commonly understood term” and this was a theme that ran throughout the responses giving their support to the proposal. Heriot-Watt University considered the extension of indirect discrimination provisions to disability would level protection and see “no distinction [made] between equality strands of race, religion and belief, sexual orientation, age, disability, gender or people with caring responsibilities”. Rethink thought that the Equality Bill presented an opportunity to “introduce the concept of indirect discrimination for disability and in doing so, bring legislative protection for disability in line with other strands”.

## **Impact**

The structure and impact of provisions providing protection from indirect discrimination were considered in the responses and were regarded as having the potential to have a positive effect. Rethink believed that legislation providing protection from indirect discrimination could be used to tackle systemic discrimination, as it would encourage consideration of issues to be addressed proactively to prevent indirect discrimination from occurring. The University of Bedfordshire was concerned that, in the course of interpreting the application of indirect discrimination provisions through case law, “the legislation should not lose the effect for which it was intended”.

## **2. Support for restated disability-related discrimination, with the addition of protection from indirect discrimination**

Thirty respondents supported adopting provisions providing protection from indirect discrimination as an *addition* to disability-related discrimination. These respondents also supported the removal of the comparative element of disability-related discrimination.

This group of respondents included the greatest percentage of key stakeholders, with the majority of responses coming from large disability organisations and stakeholders (17). Responses from national organisations including trade unions (7), and legal organisations (2), Citizens Advice, and the Equality Commission for Northern Ireland were included in this category. There was also one response from an individual.

Several broad themes were apparent in these responses. These are outlined below.

### **Disability-related discrimination and the comparator**

All 30 respondents in this category supported the concept of retaining disability-related discrimination and removing the need for a comparator. By doing so, it was felt that the argument would then focus on whether the treatment of the disabled person could be justified. As Unite highlight in its response, both Lords Neuberger and Scott had noted that the “Clark v Novacold test for the comparator [had] introduced a fairly low threshold for the purposes of comparison”. As such it was thought that the removal of the comparator would not radically alter the level of protection which had been present prior to the Malcolm decision. Disabled people would retain a familiar and well understood concept to protect them from individual acts of discrimination, whilst the burden of proof would be with the duty holder to justify any less favourable treatment.

### **Benefits of also adopting protection from indirect discrimination**

Potential benefits of adopting provisions providing protection from indirect discrimination were seen as being its ability to proactively address issues such as encouraging employers to think about systemic disadvantage, or strengthening the protection offered to disabled workers, but also providing

employers the opportunity to objectively justify their actions. However, the utility and value of indirect discrimination provisions was uniformly seen as being limited. In order to ensure appropriate protection for disabled people, it was considered that protection from indirect discrimination should be additional to the disability-related discrimination provisions. These respondents considered that compared to protection from disability-related discrimination, protection from indirect discrimination did not offer an adequate level of protection from the type of individual discrimination that disabled people face.

### **Structure and application of indirect discrimination provisions**

The complexity of indirect discrimination provisions, compared to the disability-related discrimination provisions, was highlighted. The Discrimination Law Association sought clarity as to what the protected characteristic covered by indirect discrimination provisions would be. It questioned whether it would be having a disability, having a particular disability, or having a subset of a disability. This was picked up in other responses as an example of the confusion which protection from indirect discrimination could create both for potential claimants and in the process of any legal proceedings.

The demonstration of a neutral provision, criterion or practice (PCP) was also discussed. Problems were anticipated with how an individual would demonstrate that they had been disadvantaged by a neutral PCP and how they would then show group disadvantage. This was compared to the individual approach used in the disability-related discrimination provisions where the focus is on whether a disabled person has experienced less favourable treatment for a reason related to their disability. The latter was argued to be a far more straightforward matter to demonstrate. The indirect discrimination provisions by comparison were considered to be overly complex and were described by the National Union of Journalists as “artificial”.

Overall, the complexity of the concept of protection from indirect discrimination was considered to mitigate against its use as a straightforward replacement for the disability-related discrimination provisions. However, its value was recognised in helping to achieve systemic change as employers and others would need to avoid apparently neutral PCPs having a discriminatory effect.

### **Comparator groups**

The question of establishing the protected group and the comparator pool for the purposes of pursuing a claim of indirect discrimination was considered in many responses. The concern that was common to these responses was the lack of homogeneity amongst people with impairments. Examples of how impairments could vary were offered by several respondents, including the RNID, the Council for Disabled Children, and Skill. Owing to the diverse

nature of disability, and the different impacts the same disability can have on different individuals, the ability to clearly and accurately define who would be included in a protected group was questioned. When compared to the relative simplicity of disability-related discrimination provisions, the complexity of establishing the comparator pools for claims of indirect discrimination was considered to be a disadvantage. However, the value of indirect discrimination provisions in those situations where a comparator group could be easily defined was recognised.

### **Protection from indirect discrimination in other strands**

Several respondents considered how protection from indirect discrimination had operated for the other protected characteristics and concluded that it would not be sufficient or practicable to simply transfer those provisions to disability discrimination. The EFD commented that there “have been very few indirect discrimination claims under the sex and race discrimination legislations because indirect discrimination is difficult to prove” and this was supported by similar comments in the responses from Equality 2025 and the EHRC. The recent case of *Eweida v British Airways* was used by many groups, including the EHRC, to show how indirect discrimination provisions in the area of religion and belief were not perceived to have offered protection to the individual and revealed how, even among obviously homogenous groups, issues regarding the comparator became crucial to determining the outcome of the case. Owing to the lack of homogeneity amongst disabled people, which is greater than that in the other protected characteristics, a common concern was that the ability of a disabled person to demonstrate a group disadvantage would be even harder than was currently the case for the other protected characteristics.

### **Individual protection**

There was a general consensus throughout the 30 responses in this category, which included those from the RNIB, The Guide Dogs for the Blind Association, and Usdaw, that indirect discrimination provisions would fail to offer the individual redress to discrimination that the disability-related discrimination provisions had been able to offer.

The Scottish Disability Equality Forum thought that, whilst provisions providing protection from indirect discrimination would be an excellent tool for addressing group disadvantage or systemic discrimination, it “cannot be relied upon to tackle individualised forms of unfair treatment”. It was pointed out by several respondents, including the Trade Union Disability Alliance and the Equality Commission for Northern Ireland, that disability-related discrimination had been focused on the individual and the barriers to “equality of opportunity” that the individual faced. It was not felt that indirect discrimination provisions would be able to provide a similar level of individual protection, and as such it could not be considered a direct replacement for disability-related discrimination.

## **Modern approach**

The modern approach to interpreting indirect discrimination as outlined in the consultation document was not recognised by a number of respondents. For example it was criticised as being “overly optimistic” by the RNID. The overwhelming concern was that the approach outlined in the consultation document did not appear to be current practice in courts and tribunals, which are still seen to be taking a more mathematical, proportionate, approach to establishing disadvantage in indirect discrimination cases. Equality 2025 had looked at indirect discrimination and they had “found no legal precedence that would indicate a safe reliance on this due to the diversity of disabled people”; while Unison questioned “how disabled people will find this solution more useful as the notion of probability will still need to be established”. While it was acknowledged, at the consultation events, that there was a shift in the interpretation of indirect discrimination in the light of more modern drafting of the legislation, this was still a comparatively untested area and it would be inappropriate to rely on this happening in all cases.

## **One-off acts**

Clarification was sought in responses regarding the ability to utilise indirect discrimination provisions in relation to one-off acts of discrimination. The strength of the disability-related discrimination provisions was that they focused on the individual and dealt with issues of individual discrimination. In the consultation document there was reference to the case of *British Airways plc v Starmar (Starmer)* in 2005 which established that a one-off act could constitute indirect discrimination.

The Discrimination Law Association considered that *Starmer* case was not sufficient to ensure that a claim of indirect discrimination would be interpreted as covering all one-off acts of discrimination as it had not been “subject of any decisions beyond the EAT”. Similar concern was echoed by the EFD which considered that the judgment had “not set a precedent that cannot be overturned by higher courts”. Several other organisations had similar views and the joint response from Help the Aged and Age Concern summed up these views, urging that the Equality Bill “needs to clearly state that a single, individual act or omission can amount to indirect discrimination”.

## **Harmonisation**

While it was recognised that one of the aims of the Equality Bill is to simplify and harmonise anti-discrimination legislation, several respondents did not support the adoption of indirect discrimination provisions solely on the grounds of harmonisation.

Mind considered it was important to harmonise legislation but stated that it “does not mean that the Equality Bill should adopt a ‘one size fits all’ approach. Sometimes a different approach is needed in order to achieve an equal outcome”. The EFD welcomed harmonisation and simplification of legislation in principle, but thought that harmonisation and simplification “should apply to the spirit of the law so that equal protection is afforded to all

disadvantaged groups and not simply to the letter of the law". The general view on harmonisation was summed up by Usdaw's response which stated that harmonisation should not be done at the "expense of damaging disabled peoples' chances of achieving equality".

### **Engendering Negative Stereotypes and Attitudes**

Some organisations, particularly ones representing disabled people, raised concern that the introduction of provisions providing protection from indirect discrimination would result in the perpetration of negative stereotypes for disabled people. The EFD was concerned that disabled people may be required to use factually inaccurate examples to prove a group disadvantage, and in doing so create negative and potentially false stereotypes, this was also a cause for concern for the EHRC. The EHRC gave the example of an employer who "has a policy of dismissing any employee who is off sick for six months or more. A disabled employee is dismissed for taking six months sick leave (which is disability related). In order to establish a prima facie claim for indirect discrimination the disabled employee would have to show the capability policy had a disparate impact. In practice, this would mean the disabled person providing evidence to the tribunal that non-disabled employees are less likely to be off sick for six months or more and therefore would not be dismissed under the capability policy. In fact, research shows that on average disabled people have less sickness absence than non-disabled colleagues". For the Scottish Disability Equality Forum, the concern was that indirect discrimination provisions "may lead to the perception that disabled people are asking for special treatment rather than reacting to unfair treatment which has affected them individually".

### **3. Support for disability-related discrimination, with Novacold placed on a statutory footing**

Eight organisations did not support the adoption of protection from indirect discrimination as either a replacement for, or as an addition to disability-related discrimination. These organisations argued for disability-related discrimination to be reintroduced with the comparator modified so that the formulation used in the Novacold judgement was put on a statutory basis. Of these organisations, 6 were legal and legal advisory organisations, the other responses were from a business association and a trade union.

There were general concerns about the construction of the comparator pools for indirect discrimination claims, the perpetuation of negative stereotypes, and questions over the suggestion that indirect discrimination provisions would combat systemic discrimination. Three themes stood out strongly from these responses and they are outlined below.

#### **Indirect discrimination**

All eight of the responses expressed concern that indirect discrimination provisions would fail to succeed in replacing disability-related discrimination. The Council of Employment Judges did not believe that indirect discrimination

provisions worked well in practice, whilst the union IPSEA did not consider that providing protection from indirect discrimination would restore protection from discrimination to a pre-Malcolm level. Three of the eight responses were explicitly concerned that providing protection from indirect discrimination would merely add complexity to discrimination law, something that the British Dental Association was especially concerned about in relation to small businesses. Overall the view expressed was that indirect discrimination is a complex idea which is difficult to grasp.

The corporate law firm Addleshaw Goddard outlined the complexity of indirect discrimination provisions in comparison to disability-related discrimination: the “first step for a claimant would be to identify the PCP. If they identify an act or omission that the tribunal decides not to be a PCP, the claim fails. Under [disability-related discrimination] DRD the employee only need show less favourable treatment compared to a comparator, so arguably the hurdle for indirect discrimination is set higher”.

### **Modern Approach**

The ‘modern approach’ to indirect discrimination outlined in the consultation response was again questioned by respondents in this group. Thompson Solicitors were concerned that there was only the Starmer case which was evidence of a PCP being applied to an individual decision, and it felt that the historic focus of protection from indirect discrimination had been on group disadvantage not individual disadvantage. The Employment Lawyers Association had a different concern regarding the ‘modern approach’. In its experience, indirect discrimination provisions in race and sex have traditionally been operated by demonstrating a mathematically disproportionate impact and it remains unconvinced that indirect discrimination provisions would work for individualised forms of discrimination.

### **Disability-related discrimination**

The weight of opinion for these organisations was behind the restatement of disability-related discrimination and, as Addleshaw Goddard summarised, “put Clark v Novacold on a statutory footing”. The responses indicated that disability-related discrimination provisions were thought to be well understood and familiar. When compared to indirect discrimination provisions they were considered less likely to cause confusion or misunderstanding, were less complex, and did not leave the burden of proof on the disabled individual. Addleshaw Goddard expressed the view that they would not be keen to see protection from both indirect discrimination and disability-related discrimination side by side as they thought it would confuse matters and add to the cost of litigation.

## **4. Support for restated disability-related discrimination, without a comparator**

Three responses to the consultation proposed the restatement of disability-related discrimination, which was described by the General Council of the Bar as a “relatively simple concept”, but argued for the removal for the need for a

comparator. These responses came from a disability organisation, a legal organisation and a trade union. The themes raised in these responses are outlined below.

### **Disability-related discrimination without the comparator**

The responses from the Spinal Injury Association (SIA) and PCS (an independent trade union) and the General Council of the Bar all explicitly stated a preference for a form of disability-related discrimination without the comparator. In conjunction with this proposal, each respondent detailed its opposition to the concept of providing protection from indirect discrimination. For example, PCS believed indirect discrimination provisions would “make it difficult for disabled people to secure their rights”, while the General Council of the Bar thought that “indirect discrimination as currently formed will not meet the difficulties created by the Malcolm judgement”.

The respondents did suggest modifications which might enable indirect discrimination provisions to work effectively for disability, these included the specific coverage of one-off acts of discrimination; ensuring that the protected characteristic is easily identifiable; making clear that the comparator pool can be identified without reference to the disability or any matter connected with it; and detailing that knowledge of the disability is not required in indirect discrimination cases. However, the General Council of the Bar are “not convinced such clarification can be done”.

### **Individual nature of disability**

The SIA and PCS both expressed concerns about the ability of indirect discrimination provisions to address the forms of individual discrimination that disabled people face. The SIA commented that the indirect discrimination provisions in gender and race discrimination law, where there are very clear distinctions with regard to race and gender, would not translate directly to disability as “the needs of individual disabled people are too diverse for them to be treated as a homogenised group”. PCS raised a related concern that a claim of indirect discrimination could be complicated “due to the very individualized impact that impairment can have” when trying to establish the neutral PCP which disadvantaged the group. These concerns were also captured in the response from the Disability Sub-Group of the General Council of the Bar’s Equality and Diversity Committee, which sought to ensure that “the focus of disability discrimination law will not be moved from the individual needs of disabled persons to a non-specific protection which will be more difficult to apply in practice and will create legal uncertainty.”

The individual nature of impairments also caused concern when considering who would be put at a particular disadvantage. The General Council of the Bar thought that the identification of pools would be “problematic given the diverse nature of disability and, in particular, the different ways in which individuals are affected”.

## **Modern Approach**

The General Council of the Bar had issues relating to the 'modern approach' to indirect discrimination which was outlined in the consultation document. It considered that this modern approach suggested that there was no longer a requirement to consider pools of disadvantage, as had been the case in the traditional interpretation of indirect discrimination provisions. It stated that a "review of recent cases shows that indirect discrimination cases are still primarily concerned with comparing the advantaged and disadvantaged groups within a pool", which was in conflict with the Government's interpretation of how protection from indirect discrimination would be interpreted. The General Council argued that unless this modern approach was "explicitly built into the legislation it will cause difficulties".

## **One-off acts**

In relation to one-off acts, the General Council of the Bar felt that there was a weakness in the protection offered from indirect discrimination which did not exist in the disability-related discrimination provisions. The General Council was aware that indirect discrimination provisions would be intended to cover one off acts, which appears to have been confirmed by Starmer, but it pointed out "this issue has not been the subject of any decisions beyond the EAT. Given the unexpected outcome of Malcolm there is no guarantee that the appellate courts would share the view of the EAT".

## **5. Uncategorized responses**

The response from the CBI did not draw a definitive conclusion on where its support lay. The CBI did detail its concerns regarding indirect discrimination provisions, but also acknowledged that the draft EU anti-discrimination Directive meant that, if transposed in its current form, "there will be no option but to incorporate indirect disability discrimination". As a consequence the CBI detailed its concerns but did not state either its support or otherwise of protection from indirect discrimination being adopted in the UK.

On the issue of simplification and harmonisation the CBI did not think indirect discrimination provisions for disability would "necessarily produce better understanding" and felt it could increase complexity. It also considered that clarification was urgently required around comparator groups and reasonable adjustments for the provision of goods, facilities and services. The view was expressed that the choice of comparator "will be fraught with difficulty" and the recent Eweida case was given as an example of where choosing comparator pools had been very difficult, without the added complexity of the diverse nature of disability.

The response from Sheffield Law Centre did not support the concept of providing protection from indirect discrimination. The concerns raised by the Centre mirrored those of other responses, citing the complexity of indirect discrimination, the difficulties of establishing comparator groups and the problems associated with this in conjunction with the individual nature of disability. The Centre's response proposed an alternative solution. It considered there were no examples in the consultation document "where

indirect discrimination would achieve a positive result that could not be achieved by a reasonable adjustment duty". As such the suggested remedy was an "appropriate reasonable adjustment duty across the board".

## Consultation Events

Discussions at the consultation events generally gave very little or no support to the proposal to adopt protection from standard indirect discrimination in disability. The issues raised reflected those in the responses to the written consultation. In particular, there were concerns about:

- the complexity of indirect discrimination provisions which, it was argued, was the reason why it was little used in respect of other protected characteristics;
- potential difficulties in identifying the protected and comparator groups, given the lack of homogeneity among disabled people;
- the lack of evidence that the modern approach was, so far, being used in the interpretation of indirect discrimination provisions; and
- the lack of certainty that protection from indirect discrimination would apply to one-off acts.

It was considered that, unless it was modified to take account of these concerns, indirect discrimination provisions would not provide effective protection for disabled people. However, there was also some concern that, if protection from indirect discrimination was modified for disability, this could lead to unintended and inappropriate restriction or expansion of its application in respect of the other protected characteristics.

There was a widely-held view that disability-related discrimination had worked effectively, particularly following the *Novacold* judgment. Therefore, the strong consensus was for the Equality Bill to include a revised form of protection from disability-related discrimination, and that if provisions providing protection from indirect discrimination was to be adopted, this should be alongside a revised form of disability-related discrimination.

## Government Response

We recognise that provisions providing protection from indirect discrimination can be effective in encouraging employers, service providers, and others with duties under the act to consider and critically examine their provisions, criteria and practices to avoid them being discriminatory. Furthermore, the adoption of indirect discrimination provisions for disability is expected to be required by the EU Directive which is currently being negotiated. Consequently, we have decided to apply the principle of protection from indirect discrimination to disability, in the same way as it will apply to other protected characteristics in the Equality Bill.

However, we are persuaded by the views expressed in the responses to the consultation that adopting the principle of protection from indirect

discrimination for disability in the Equality Bill will not, in itself, provide the degree of protection from discrimination that we are seeking for disabled people. Our aim has always been to ensure an appropriate balance is achieved between the ability of a disabled person to demonstrate a case of discrimination that arises because of an effect of the disabled person's disability, and the opportunity for the employer, service provider, and others with duties under the act, to justify the alleged discriminatory treatment. Having considered the responses to the consultation, we consider that this balance is best achieved by also including in the Equality Bill a provision which provides a renewed form of protection from discrimination that arises from the disabled person's disability.

The new provision will not simply restate the disability-related discrimination provisions in the Disability Discrimination Act, but will include certain new features.

First, it will not require the establishment of a comparator. This will effectively mean that a disabled person will be put in a similar position to that which existed as a consequence of the *Novacold* judgment, and prior to the *Malcolm* judgment. The effect of the *Novacold* judgment on determining a comparator had been to make it possible, almost without exception, to demonstrate a case of disability-related discrimination. By removing the need for a comparator, the Equality Bill will simplify the legislation and again make it very easy for a disabled person to demonstrate discriminatory treatment, which the employer, service provider, and others with duties under the act may seek to justify.

In line with other disability discrimination provisions in the Equality Bill, the test of objective justification will apply, and the employer, service provider and others with duties under the act, will need to demonstrate that the treatment was a proportionate means of achieving a legitimate aim.

In reaching their judgment in *Malcolm*, the Law Lords considered the question of whether the perpetrator of discriminatory treatment had to have knowledge of the disabled person's disability before a case of disability-related discrimination could be made. They concluded that knowledge of the disability was a requirement and we have carefully considered the question of knowledge in relation to the proposed new provision. We have decided that the new provision in the Equality Bill should make clear that, in a case of discrimination arising from a person's disability, discrimination cannot be taken to have occurred if the employer, service provider, and others with duties under the act, did not know, and could not reasonably have been expected to know, that the person subjected to the discriminatory treatment had a disability.

Our aim in respect of the treatment of knowledge is to achieve a balance between the right of the disabled person to keep their disability confidential, and the right of the duty holder not to be held liable for discrimination on the basis of a disability of which the duty holder was not aware and had no reason to be aware. We examined the question of whether the issue of knowledge

might be addressed as part of the consideration of justification. However, because objective justification must be based on the facts of the particular case, the matter of whether the duty holder had, or could reasonably be expected to have, knowledge of the disabled person's disability may not be considered as part of establishing objective justification.

We have concluded that the question of knowledge should be considered as part of establishing whether there has been detrimental treatment of the disabled person that arises from the person's disability.

## Overview of the consultation response to question 2

The second consultation question concerned the requirement to make reasonable adjustments and justifications for indirect discrimination:

“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?”

The weight of evidence shows that there was support for duty holders to be required to make reasonable adjustments before they can seek to demonstrate objective justification, as the breakdown of responses shows below:

- 66 responses supported the requirement to make a reasonable adjustment before justification could be sought for indirect discrimination.
- 6 responses did not support the requirement to make a reasonable adjustment before justification could be sought for indirect discrimination.
- 7 responses made miscellaneous comments. However, these were noted and recorded

### **1. Support for the requirement to make a reasonable adjustment**

There was a strong weight of evidence supporting the requirement to make a reasonable adjustment before attempting to objectively justify indirect discrimination. The responses which gave their support to the requirement to make a reasonable adjustment generally did so without reservation. There were, however, six organisations which raised related issues.

The British Property Federation (BPF) and National Landlords' Association (NLA) expressed general support but had specific concern regarding the implications for landlords. However, each considered there was a need for clarity of the proposal. The BPF noted that the wording of the question “suggests that landlords would have to fulfil the reasonable adjustment, when

the intention elsewhere in the paper seems to be that the duty holder, such as a landlord, would need to illustrate what reasonable adjustments had been considered". The NLA considered that the definition and scope of objective justification and reasonable adjustments needed greater clarity so that legislation did not "force landlords into scenarios that would cause their businesses to operate at a loss".

The Northern Ireland Equality Commission (NIEC) agreed with the proposal but noted that it would have "less impact in the employment field, as employers are not subject to a duty to anticipate the requirements of potential disabled employees and applicants".

The Scottish Council on Deafness (SCD) and the Scottish Independent Advocacy Alliance (SIAA) both supported the proposal. However, the SCD was concerned that the cost of making a reasonable adjustment should "not be used as [a means] to justify direct and indirect discrimination". The SIAA suggested that there should be an "agreed time limit for the duty holder [to] make the adjustment".

The Disability Law Service (DLS) strongly agreed with the proposal but was concerned that it seemed to "blur the boundaries between Indirect Discrimination and Reasonable Adjustments". The DLS wanted to ensure that these were recognised as "separate and distinct forms of legal protection". There was also concern that the current requirement to anticipate reasonable adjustments in goods, services and facilities would be weakened if indirect discrimination was made the trigger for reasonable adjustments.

## **2. Opposition to the requirement to make a reasonable adjustment**

Six organisations did not agree with the requirement to make a reasonable adjustment before being able to demonstrate objective justification.

The General Council of the Bar had concerns regarding how this requirement would work in practice and believed that it should be made clear that "fulfilling the duty to make adjustments in relation to an individual does not mean that the test of proportionality will be met".

A similar concern was voiced by the EHRC which whilst recognising the "potential value in this proposal", was concerned that "a reasonable adjustment may be provided to an individual which is then relied on by a duty holder to justify a failure to correct the systemic disadvantage caused by a particular policy, criterion or practice". The EHRC was also concerned that the reasonable adjustment duty and indirect discrimination provisions would not cover all the gaps left by the removal of disability-related discrimination, should indirect discrimination replace it.

The law firm Eversheds felt that requiring a duty holder to consider and fulfil a duty to make reasonable adjustments "before being able to seek to justify indirect discrimination, would considerably and unreasonably raise the requirements in relation to justification", which would result in the "objective

justification test [having] a much higher threshold". Eversheds also had concerns regarding the interaction between reasonable adjustments and indirect discrimination provisions. This was because the reasonable adjustment duty is focused on the individual and in the workplace it requires "dialogue between an employer and a disabled person", whereas indirect discrimination provisions would require anticipatory measures by the employer, which would be "quite different from the current requirement". Eversheds considered that the provisions were "likely to prove highly onerous for employers" and likely to cause "very real confusion".

The British Dental Association was concerned that the proposal would "make litigation more complicated and unnecessarily so". It considered that it would place too high a burden on employers and would "do nothing to help employers understand their responsibilities or help them take action".

The London Metropolitan University sought the promotion of a "clearer understanding of the scope of reasonable adjustments that can be made, and the limits of objective justification" rather than supporting the proposal.

Heriot-Watt University noted that the criteria for making reasonable adjustments are "not prescriptive" and was concerned that there would be large resource issues "if public authorities are deemed to be indirectly discriminating against individuals if an organisation does not undertake a reasonable adjustment".

### **3. Uncategorised responses**

Six organisations did not provide any comment or response to the second question. The CBI did offer comments and was concerned about the "level of expectation and responsibility being placed on providers of goods, facilities and services in these proposals". However, it did not make clear whether it supported or opposed the suggestion in the consultation document.

## **Consultation Events**

The responses to the second question at the consultation events were almost universally positive, though a concern was raised about the potential for overlap between the indirect discrimination provisions and reasonable adjustment duty. It was considered that such a close relationship between the two very distinct duties could result in confusion for duty holders.

## **Government Response**

We acknowledge the significant support for this proposal from a wide range of stakeholders. However, we have reviewed the proposal in the light of our decision that the Equality Bill should both include a revised form of protection from discrimination that arises from a person's disability, and apply the principle of protection from indirect discrimination for disability.

In line with the aim of harmonisation of the legislation, we propose to apply the principle of protection from indirect discrimination to disability in the same

standard form which applies to the other protected characteristics. Consequently, we have decided not to include in the indirect discrimination provisions in the Equality Bill an express requirement that the duty of reasonable adjustment must be fulfilled before indirect discrimination can be justified.

Similarly, we have decided that an express requirement will not be included in the new provision concerning discrimination that arises from a disabled person's disability. However, the Equality Bill will replicate the duty for employers, service providers, and others with duties under the act, to make reasonable adjustments for disabled people, and a failure to make a reasonable adjustment will itself be actionable by a disabled person who, as a consequence of the failure, experiences a substantial disadvantage. Furthermore, the new provision will make clear that, when an employer, service provider, and others with duties under the act, seek to objectively justify discrimination arising from the disabled person's disability, the fact that a reasonable adjustment has been made will not form part of the consideration of whether the discriminatory treatment may be justified.

## Overview of the consultation response to question 3

The third consultation question concerned the assumptions made in the regulatory impact assessment and equality impact assessment.

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

Not all individuals or organisations that submitted written responses addressed the third consultation question. The breakdown of the response figures is detailed below:

- 35 responses did not address the third question;
- 20 responses supported the assumptions made in the impact assessments;
- 19 responses did not support the assumptions made;
- 3 respondents reported that they could not comment; and
- 2 respondents made miscellaneous comments.

Out of the 44 responses which did address the third question, 25 offered some comment or explanation for their view.

### **1. Support for the assumptions made in the assessments**

20 responses were supportive of the assumptions which underpinned the regulatory impact assessment and equality impact assessment. The largest

proportion of responses came from lobby groups (9), the remainder came from individuals (4), legal groups and organisations (2), a business group, a Scottish NHS organisation, local public services (2) and a university.

## **2. Disagreement with the assumptions made in the assessments**

19 responses did not support the assumptions which had been made. Of these responses, 18 gave some explanation or further thinking in their response. The largest proportion of responses came from disability groups (9), the remainder came from legal groups or organisations (5), business advisory groups or associations (3), and trade unions (2). There was limited response to the question from those who attended the consultation events. None of the respondents provided evidence to support revised costings.

### **Impact of Malcolm**

There was some concern, including from the EFD, that as the judgment in Malcolm was comparatively recent, there was insufficient evidence to support an assumption that the introduction of indirect discrimination provisions would not have a substantial impact on the number of claims brought by disabled people, who would previously have used the disability-related discrimination provisions.

### **Cost**

Eleven responses, including those from the Employment Lawyers Association, the General Council of the Bar and the Discrimination Law Association, considered that the familiarisation costs had been underestimated, considering the cost of retraining, advice and legal costs that would be associated with indirect discrimination provisions. The NLA considered that, although the assessment took account of familiarisation, it did "not take into account [the] cost of adjustments". It also suggested that, while one hour of familiarisation time may be sufficient to outline the impacts of protection from indirect discrimination, "a professional may be needed to advise a landlord on their obligations. The cost of this would be greater than the £27.03 suggested in the assessment".

In addition, some respondents, including at the consultation events, suggested that the impact assessment underestimated the increased complexities and, as a consequence, cost of dealing with claims of indirect discrimination.

### **Impact on diverse groups**

Both Unison and the Scottish Disability Equality Forum questioned the statement in the Equality Impact Assessment that "Disability does not disproportionately affect one ethnic group more than another". Unison found the statement which acknowledged that "certain conditions are more prevalent within certain ethnic groups" contradictory with this position. It raised a similar point at a consultation event. The Scottish Disability Equality Forum expected to see a link between disability and ethnicity "given the over-representation of

both people with disabilities and the BME population in the lowest socio-economic groups".

The joint response from Help the Aged and Age Concern raised related concerns. It emphasised that older people are not a homogenous group who all experience poor health or disability and did not think that the figures reflected this. They were also concerned that the "figures do not reflect the numbers of people who have more than one disability or the different ways in which discrimination may affect them" and that the "figures do not accord sufficient weight to the problem of multiple discrimination".

There was discussion on the equality impact assessment figures regarding race and a concern that people from ethnic minority backgrounds and disabled people account for a greater proportion of those in lower socio-economic groups, and that this was not reflected in the assessment figures or calculations.

## Government Response

It is important to recognise that the impact assessments are not intended to capture the overall impact of the new provisions for the Bill, but instead they are intended to reflect the additional benefits or costs that will arise from the new provisions when compared to current protection from discrimination. Our assessment is that, even following the Malcolm judgment, most disabled people will have a means of redress under alternative provisions of the Disability Discrimination Act, such as those governing direct discrimination or a duty to make reasonable adjustments. The new provision will restore the ability for a disabled person who cannot currently make use of those provisions to pursue their case. This is not anticipated to lead to a significant increase in numbers of disability discrimination claims, but will be an important benefit for those disabled people who are currently prevented from pursuing claims of discrimination.

We have prepared revised impact assessments to reflect our decision that the Equality Bill will include a provision to provide protection from discrimination that arises from the disabled person's disability and will apply the principle of protection from indirect discrimination to disability. Where appropriate, the revised impact assessments reflect comments received on the versions included in the consultation document. For example, the costings have been revised to take account of the increased complexity, and therefore cost, of a claim involving indirect discrimination and discrimination arising from a person's disability.

The revised impact assessments that form part of the overall impact assessments for the Equality Bill published by the Government Equalities Office.

## Conclusion

We welcome the wide range of responses we received to the consultation. The advice received has enabled us to review and revise our plans for the Equality Bill. We believe that by including provisions relating to discrimination arising from a person's disability, in addition to protection from indirect discrimination for disability, we will achieve an appropriate level of protection from discrimination for disabled people.



Mind  
National AIDS Trust (NAT)  
National Centre for Independent Living  
National Landlords Association  
National Union of Journalists  
National Union of Teachers  
NHS Health Scotland  
North West Employers  
PCS  
Prospect  
Rethink  
RNIB  
RNID  
SAMH Centre for Research, Influence and Change  
Scottish Council on Deafness  
Scottish Disability Equality Forum  
Scottish Independent Advocacy Alliance  
Sense Scotland  
Sheffield Law Centre  
Skill  
Spinal Injuries Association  
Terrance Higgins Trust  
The General Council of the Bar  
The National Deaf Children's Society  
Thompsons Solicitors  
Trade Union Disability Alliance  
Treehouse  
TUC  
Unison  
Unite the Union  
Universities & Colleges Employers Association (UCEA)  
University of Bath  
University of Bedfordshire  
University of Essex  
Usdaw

## Annex B

### **Date consultation events held**

Guoman Hotel, 4 December 2008  
Edinburgh International Conference Centre, 9 December 2008  
The Oval, 11 December 2008  
CIPFA, 15 December 2008