

Disability Discrimination Act 1995 Part 4

Code of Practice for Schools

New duties (from 2002) not to discriminate against disabled pupils and prospective pupils in the provision of education and associated services in schools, and in respect of admissions and exclusions

London: TSO

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Introduction

1

The purpose of the schools sections of the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001)

- 1.1 New duties, which come into effect in September 2002, extend the Disability Discrimination Act 1995 to cover every aspect of education. The Special Educational Needs and Disability Act 2001 amends the Disability Discrimination Act Part 4 to prevent discrimination against disabled people in their access to education. Chapter 1 of the new Part 4 of the Disability Discrimination Act sets out the requirements on those providing school education. The duties make it unlawful to discriminate, without justification, against disabled pupils and prospective pupils, in all aspects of school life. The principle behind this legislation is that wherever possible disabled people should have the same opportunities as non-disabled people in their access to education.
- 1.2 This Code of Practice (Code) applies to all schools and local education authorities (LEA) in England and Wales, and to all schools and education authorities in Scotland (EA). It explains the new duties and it shows the responsible bodies how they might meet the duties that apply to them.

- 1.3 This Code covers young people over the age of sixteen when in school. The Disability Rights Commission (DRC) is issuing a separate Code of Practice to explain how the duties apply in further and higher education and to give practical guidance to providers of 'post-16' education that are not schools.

Purpose of the Code

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- 1.4 The Disability Rights Commission has powers to issue codes of practice to explain duties under the Disability Discrimination Act. This Code is issued under these powers and at the request of the Secretary of State for Education and Skills.
- 1.5 This Code gives practical guidance on how to avoid discrimination against disabled pupils and prospective pupils in the school stages of education. It describes the duties on the bodies responsible for this provision. It will help disabled children and young people and their parents to understand the law and what they can do if they feel that the child or young person has been discriminated against.
- 1.6 This Code deals only with how to avoid unlawful discrimination against disabled pupils and prospective pupils in education and associated services. Those who work with disabled pupils in schools are encouraged to go beyond mere compliance with the law and work towards eliminating discrimination in education and associated services altogether. Further information on good practice in the school stages of this legislation is available, see **Appendix Three**.

Status of the Code

- 1.7 The Code does not impose legal obligations nor is it an authoritative statement of the law – that is a matter for the courts. However, the Code can be referred to in legal proceedings under the Disability Discrimination Act. A tribunal, appeal panel or court must take into account any part of the Code that appears to it to be relevant to any question arising in those proceedings. If those with responsibility for the provision of education in schools follow the guidance in the Code, it may help to avoid an adverse judgement by a tribunal, appeal panel or court.

Territorial coverage

- 1.8 The new disability discrimination duties in education apply across England and Wales and Scotland. The Disability Discrimination Act does not apply in Northern Ireland.
- 1.9 New planning duties in the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) relate to devolved matters and only apply in England and Wales. Planning duties in Scotland are subject to separate legislation.
- 1.10 The disability duties apply to education throughout Great Britain, but to education systems that work differently in England and Wales and Scotland. The Code takes account of these differences and uses separate chapters or sections of chapters where appropriate so that the application of the new duties is clear in the context of the different education systems. The underlying disability discrimination duties remain the same.

References in the Code

- 1.11 The duties explained in this Code are brought in by the Special Educational Needs and Disability Act 2001. The changes in the legislation are incorporated into the Disability Discrimination Act 1995. The Disability Discrimination Act is the principal Act and throughout this Code it is referred to as 'the Act'. The new schools' duties are referred to as 'the duties'.
- 1.12 The references in the margins of the Code are references to the relevant sections of the Act. So, for example, a reference in the margin to s 28A is a reference to section 28A of the Disability Discrimination Act 1995. A reference to Sch 4A is to Schedule 4A of the Act. Where there is a reference to legislation other than the Disability Discrimination Act 1995, the reference in the margin names that other Act as well as the section that is referred to.

Pupils and children

- 1.13 The definition in the Act refers to a disabled person. In general the Part 4 duties and this Code refer to 'pupils' in the context of their school. However, the duties also cover those who may be admitted to the school as pupils. In this context the Code refers to 'children' or to a 'child' rather than to 'people' or a 'person' as the Act does. Where the Code refers to 'children' and 'child' these terms include young people over the age of sixteen where they are pupils at a school or prospective pupils at a school.

How to use the Code

- 1.14 This chapter gives a general introduction to the Code. The next two chapters set the schools' duties in the wider context of disability and SEN

legislation. **Chapter 2** covers the arrangements in Scotland, and **Chapter 3** the arrangements in England and Wales. **Chapter 4** sets out the detail of how the duties apply in schools: who has responsibilities under the Act, what activities are covered, who is protected. **Chapters 5 and 6** set out the two main disability discrimination duties: the duty not to treat people less favourably, and the duty to make reasonable adjustments for disabled pupils. **Chapter 7** explains duties and rights relating to information and confidentiality. **Chapters 8 and 9** explain rights of redress in Scotland and in England and Wales, respectively. **Chapter 10** explains the relationship of the new duties to other duties under the Act. **Chapter 11** explains the relationship of the new duties to duties under other legislation. **Appendices** to the Code supplement the content of the Code itself, including further information on the statutory definition of a disabled person.

- 1.15 It is important to a proper understanding of the schools' duties that this Code of Practice is read as a whole. Individual sections should not be taken out of the context of the whole Code or read in isolation from each other. To remind the reader of this, there is some repetition in the text and some signposting to related duties.
- 1.16 Many of the terms used in this Code have a particular meaning and are drawn from the legislation. It is for the courts to determine precisely how these terms are interpreted and in which circumstances they apply.
- 1.17 The Code should not be read too narrowly or literally. It is intended to explain the principles of the law and to illustrate how the law might operate in certain situations. There are some questions which the Code cannot resolve and which must

await the authoritative interpretation of the courts. The Code is not intended to be a substitute for taking appropriate advice on the legal implications of particular situations.

Examples in the Code

- 1.18 The Code uses examples in the text to support an understanding of the legislation and to illustrate how the duties might be met or breached. All the examples are drawn from real situations and from what is already happening in schools and in the lives of disabled pupils. All the examples used in the Code relate to children who have a disability as defined in the Act.
- 1.19 All the examples in this Code relate to the aspects of school education that are covered by Part 4 of the Act, namely: admissions, education and associated services, and exclusions. The examples do not cover the provision by schools of services to the public, which are covered by Part 3 of the Act. These duties are explained in a separate code of practice published by the Stationery Office on the duties in Part 3 of the Act, *Rights of Access to Goods, Facilities, Services and Premises*.
- 1.20 The examples illustrate a range of different aspects of school life, different types of school and different disabilities. The examples refer to particular situations but should be understood more widely. They can often be used to suggest how the law might work in analogous situations. However, the examples are illustrative, not comprehensive, and they do not constitute an authoritative interpretation of the legislation.

Timing and implementation of the duties

- 1.21 The duties explained in this Code come into effect in September 2002.
- 1.22 This Code refers to the Disability Discrimination Act as at January 2002. There may be changes to the Act or to other legislation, for example, to the range of people who are considered to have a disability under the law. These changes may have an effect on the duties explained in this Code.
- 1.23 Those with responsibilities under the Act will need to keep up to date with any developments that may affect the provisions of the Act. More information is available from the Disability Rights Commission (contact details, see below).

Further information

- 1.24 Copies of the Act and regulations made under it can be purchased from the The Stationery Office (see **Appendix Three**).

Free information about the Act can be obtained by contacting the DRC Helpline:

Telephone: 08457 622 633

Textphone: 08457 622 644

Fax: 08457 778 878

Email: enquiry@drc-gb.org

Post: DRC Helpline
FREEPOST
MID 02164
Stratford upon Avon
CV37 9BR

Information about the Act is also available in alternative formats or via the Internet:
<http://www.drc-gb.org>

An overview of the legislation, Scotland

2

This chapter explains the relationships between different parts of the legislation in Scotland:

- the disability discrimination duties;
- the planning duties; and
- the Special Educational Needs (SEN) framework.

It explains what each set of duties provides for disabled pupils.

Introduction

- 2.1 There are three main sources of support available to disabled pupils in school. These come from different parts of the legislation. Support is available through:
- the disability discrimination duties;
 - the planning duties;
 - the Special Educational Needs (SEN) framework.
- 2.2 The relationships between these different duties are important. This chapter outlines the disability discrimination duties and sets them in the context of these other duties in Scotland. **Chapter 3** outlines the disability discrimination duties and sets them in the context of these other duties in England and Wales.

The disability discrimination duties

- 2.3 The disability discrimination duties provide protection for disabled pupils by preventing discrimination against them at school on the grounds of disability.

- 2.4 Education authorities and independent and grant aided schools are already familiar with disability discrimination duties under the Act. Parts 2 and 3 of the Act have applied to independent and grant aided schools and education authorities in stages from 1996. These duties affect schools and education authorities in two main areas: employing staff and providing non-educational services to the public.
- 2.5 The definition of disability which is the basis for all the duties is set out in the Disability Discrimination Act. This definition is explained in greater length in **Appendix One**.
- 2.6 There are two key duties involved in ensuring that education authorities and independent and grant aided schools do not discriminate against disabled pupils. These are:
- not to treat disabled pupils less favourably; and
 - to take reasonable steps to avoid putting disabled pupils at a substantial disadvantage. This is known as the reasonable adjustments duty.
- 2.7 The reasonable adjustment duty is limited by a number of considerations. These are examined in more detail in **Chapter 6**, but for the purposes of considering how the statutory duties link with each other, it is important to look briefly at two aspects of the reasonable adjustments duty here:
- the reasonable adjustments duty does not require the responsible body to provide auxiliary aids and services;
 - the reasonable adjustments duty does not require the responsible body to make alterations to the physical features of the school.

2.8 The reasonable adjustments duty does not apply to auxiliary aids and services because it is anticipated that in schools in the publicly-funded sector such provision will be made through the SEN framework. Physical alterations to schools are not required under the reasonable adjustments duty as it is anticipated that these will be achieved through a longer term and more strategic approach to improving access for disabled pupils.

Planning duties in Scotland

2.9 Scottish local authorities are obliged to produce Children's Services Plans every three years. Also, under the Standards in Scotland's Schools etc. Act 2000, educational authorities must produce annual statements of improvement objectives (Improvement Plans) as part of the National Priorities for Education Improvement. Plans should deal with how the authorities intend to improve education and support services in order to provide equal opportunities for disabled children.

2.10 In addition, the Scottish Executive has brought forward draft legislation, the Education (Disability Strategies and Pupils' Records) (Scotland) Bill, which will introduce in Scotland a duty on all those responsible for schools to prepare accessibility strategies to address three distinct elements of planned improvements in access for disabled pupils:

- improvements in access to the curriculum;
- improvement to the physical environment to increase access to education and associated services; and
- improvements in the provision of information for disabled pupils.

The SEN framework in Scotland

- 2.11 The duties in the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. The main purpose of the SEN duties is to make provision to meet the special educational needs of individual children. To the extent that disabled children rely on special educational provision to have their needs met, equal opportunities for disabled children are dependent on the quality of the provision made through the SEN framework.
- 2.12 The SEN framework sits within the general duties of education authorities to secure the 'adequate and efficient provision of school education for their area'. Every child of school age has a right to school education directed to developing 'the personality, talents and the mental and physical abilities of the child or young person to their fullest potential'. In his or her education a child or young person's views must be given due regard in decisions that significantly affect him or her, so far as is reasonably practicable. This requirement does not apply in other situations, where education is being provided by someone other than the education authority.
- 2.13 Schools and education authorities are already familiar with the SEN framework. The duties in the SEN framework are based on the definition of special educational needs. Children and young persons have special educational needs if they have a learning difficulty which calls for special educational provision to be made for them.
- 2.14 A learning difficulty is said to be present if a child or young person:
- a) has a significantly greater difficulty in learning than the majority of those of his age; or

- b) has a disability which either prevents or hinders him from making effective use of educational facilities of a kind generally provided in schools managed by his education authority; or
- c) is under the age of five years and is, or would be if special provision were not made for him, be likely, when over that age, to have a learning difficulty as defined above.

2.15 The definition does not, however, cover children or young people who have problems with learning because they are taught in a language which is not the language they speak at home.

2.16 Provision for special educational needs means, in relation to a child of school age or a young person receiving school education, educational provision which is additional to or otherwise different from that generally made for children of the same age in schools managed by the education authority for the area concerned. In relation to children who have not yet attained school age, it means educational provision as appropriate to their needs.

Children with a disability

2.17 The definition of SEN is widely understood as being primarily about children with learning difficulties, because of the wording in the legislation. It is important to recognise that the definition of children with learning difficulties includes children with a disability where any special educational provision needs to be made. It means that children with a disability have special educational needs if they have any difficulty in accessing education and if they need any special educational provision to be made for them, that is, anything that is *additional to* or *different from* what is normally available in schools in the area.

What is the SEN framework?

- 2.18 The SEN framework consists of the primary legislation, the regulations, and the guidance. In Scotland the SEN framework consists of the provisions in the Education (Scotland) Act 1980, as amended, the Standards in Scotland's Schools etc. Act 2000, guidance from the Scottish Office Education and Industry Department, *Circular 4/96, Children and Young Persons with Special Educational Needs: Assessment and Recording* (SOEID, 1996) and guidance in *A Manual of Good Practice* (SOEID, 1998).
- 2.19 *Circular 4/96* and *A Manual of Good Practice* in Scotland support education authorities in interpreting their duties under the SEN framework. The Standards in Scotland's Schools etc. Act 2000 will establish a presumption that all children will be educated in mainstream schools. Exceptionally, children may be educated elsewhere if one or more of these circumstances apply to education in a mainstream school:
- it would not be suited to the child's ability or aptitude;
 - it would not be compatible with the provision of efficient education for other children;
 - it would result in unreasonable public expenditure that would not ordinarily occur.
- 2.20 A child could still be educated in a mainstream school, even if such exceptional circumstances occur, but the wishes of the child and the parents must be taken into account.
- 2.21 The disability duties in Part 4 of the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. This Code of Practice does not focus on the SEN

framework, but refers across to it. It takes account of the guidance on the SEN duties and complements it by providing guidance on the disability discrimination duties in education. It should be noted that the SEN framework in Scotland is under review following consultation on the arrangements for assessing and recording children with special educational needs.

Complaints and appeals

- 2.22 If parents are not satisfied with the provision that an education authority makes to meet their child's special educational needs, they can complain to the education authority. In certain circumstances, they can complain to Scottish Ministers about any aspect of school education, including provision for special educational needs. If parents do not agree with decisions made by the education authority about the nature of their child's needs as set out in the Record of Needs, or about a decision on whether to open or discontinue a Record of Needs, they have a right of appeal to an Education Appeal Committee and, in some circumstances, to Scottish Ministers. If they disagree with the school proposed by the education authority on the Record of Needs, they may appeal to the education authority's Education Appeal Committee, and from there to the Sheriff Court. Scottish Ministers may be asked for their views.

s 70 Education
(Scotland) Act 1980

3

An overview of the legislation, England and Wales

This chapter explains the relationships between different parts of the legislation in England and Wales:

- the disability discrimination duties;
- the planning duties; and
- the Special Educational Needs (SEN) framework.

It explains what each set of duties provides for disabled pupils.

Introduction

- 3.1 There are three main sources of support available to disabled pupils in school. These come from different parts of the legislation. Support is available through:
- the disability discrimination duties;
 - the planning duties; and
 - the Special Educational Needs (SEN) framework.
- 3.2 The relationships between these different duties are important. This chapter outlines the disability discrimination duties and sets them in the context of these other duties in England and Wales. **Chapter 2** outlines the disability discrimination duties and sets them in the context of these other duties in Scotland.

The disability discrimination duties

- 3.3 The disability discrimination duties provide protection for disabled pupils by preventing discrimination against them at school on the grounds of disability.

- 3.4 Schools and local education authorities are already familiar with disability discrimination duties under the Act. Parts 2, 3 and 4 of the Act have applied to schools in stages from 1996. These duties affect governing bodies and local education authorities in three main areas: employing staff, providing non-educational services to the public and publishing information about arrangements for disabled pupils.
- 3.5 The definition of disability which is the basis for all the duties is set out in the Disability Discrimination Act. This definition is explained in greater length in **Appendix One**.
- 3.6 There are two key duties involved in ensuring that schools do not discriminate against disabled pupils. These are:
- not to treat disabled pupils less favourably; and
 - to take reasonable steps to avoid putting disabled pupils at a substantial disadvantage. This is known as the reasonable adjustments duty.
- 3.7 The reasonable adjustments duty is limited by a number of considerations. These are examined in more detail in Chapter 6, but for the purposes of considering how the statutory duties link with each other, it is important to look briefly at two aspects of the reasonable adjustments duty here:
- the reasonable adjustments duty does not require the responsible body to provide auxiliary aids and services;
 - the reasonable adjustments duty does not require the responsible body to make alterations to the physical features of the school.

3.8 The reasonable adjustments duty does not apply to auxiliary aids and services because it is anticipated that in schools in the maintained sector such provision will be made through the SEN framework. Physical alterations to schools are not required under the reasonable adjustments duty as it is anticipated that these will be achieved through a longer term and more strategic approach to improving access to school buildings through the planning duties.

Planning duties in England and Wales

3.9 Support for disabled pupils comes from the planning duties in Sections 28D and 28E of the Act. These Sections set out requirements on local education authorities and schools in England and Wales to draw up accessibility strategies (LEAs) and accessibility plans (schools) to improve access to education at schools over time. The strategies and plans have to address three distinct elements of planned improvements in access for disabled pupils:

- improvements in access to the curriculum;
- physical improvements to increase access to education and associated services;
- improvements in the provision of information in a range of formats for disabled pupils.

3.10 In Wales, the National Assembly for Wales provides guidance for LEAs and schools on how they should implement the planning duties. ESTYN (HM Inspectorate for Education and Training in Wales) inspects LEA accessibility strategies and school accessibility plans. The National Assembly for Wales has powers to direct schools and LEAs if it thinks that either a school or an LEA has not complied with the planning duties, or has acted unreasonably in carrying out the duties.

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3.11 In England, the Secretary of State for Education and Skills provides guidance for LEAs and schools on how they should implement the planning duties. The Office for Standards in Education (Ofsted) inspects LEA accessibility strategies and school accessibility plans. The Secretary of State for Education and Skills has powers to direct schools and LEAs if it is thought that either a school or an LEA has not complied with the planning duties, or has acted unreasonably in carrying out the duties.

3.12 The planning duties also update the requirements on governing bodies to provide information in their annual report about arrangements for disabled pupils at the school. The governing body of a maintained school, in its annual report to parents, must explain the admission arrangements for disabled pupils, how the governing body helps disabled pupils gain access and what it will do to make sure they are treated fairly. The new Part 4 of the Disability Discrimination Act extends these duties. From September 2002 maintained schools are required to publish information about their accessibility plan in their governors' annual report to parents. Guidance on accessible schools *Accessible Schools: Planning to increase access to schools for disabled pupils*, recommends that schools should reproduce the full accessibility plan in their governors' report to parents. By making their accessibility plans publicly available, schools will encourage contributions to the plan and a sense of ownership amongst staff, governors, pupils and parents.

The SEN framework in England and Wales

3.13 The duties in the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. The main purpose of the SEN duties is to make provision to meet the special

educational needs of individual children. To the extent that disabled children rely on special educational provision to have their needs met, equal opportunities for disabled children are dependent on the quality of the provision made through the SEN framework.

- 3.14 Schools and local education authorities are already familiar with the SEN framework. The duties in the SEN framework are based on the definition of special educational needs. A child has special educational needs if he or she has a learning difficulty which calls for special educational provision.
- 3.15 A child has a learning difficulty if he or she:
- a) has a significantly greater difficulty in learning than the majority of children of the same age; or
 - b) has a disability which prevents or hinders the child from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the LEA;
 - c) is under five and falls within the definition at (a) or (b) above or would do so if SEN provision was not made for the child.
- 3.16 Special education provision means:
- a) for a child of two or over, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of the child's age in maintained schools (other than special schools) in the area;
 - b) for a child under two, educational provision of any kind.

Children with a disability

- 3.17 The definition of SEN is widely understood as being primarily about children with learning difficulties, because of the wording in the legislation. It is important to recognise that the definition of children with learning difficulties includes children with a disability where any special educational provision needs to be made. It means that children with a disability have special educational needs if they have any difficulty in accessing education and if they need any special educational provision to be made for them, that is, anything that is *additional to* or *different from* what is normally available in schools in the area.

What is the SEN framework?

- 3.18 The SEN framework consists of the primary legislation, the regulations, and the guidance. The statutory duties that form the core of the SEN framework in England and Wales are set out in Part 4 of the Education Act 1996, as amended by the SEN and Disability Act 2001. The rest of the framework is provided by the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001, the Education (Special Educational Needs) (Wales) Regulations 2002, the Education (Special Educational Needs) (Information) (England) Regulations 1999, the Education (Special Educational Needs) (Information) (Wales) Regulations 1999, the Special Educational Needs (Provision of Information by Local Education Authorities) (England) Regulations 2001, the Special Educational Needs (Provision of Information by Local Education Authorities) (Wales) Regulations 2002, and guidance, including the Special Educational Needs Code of Practice and Inclusive Schooling – Children with Special Educational Needs 2001. In Wales regulations and guidance,

including the SEN Code of Practice for Wales, are provided separately by the National Assembly for Wales.

- 3.19 The SEN framework makes an increasing assumption that children with special educational needs will be educated in mainstream schools. Amendments to section 316 of the Education Act 1996 strengthen the general duty to provide a mainstream school place for a child with special educational needs, where their parents want that, and so long as that is compatible with the efficient education of other children. The Secretary of State, in England, and the National Assembly for Wales, provide guidance on the operation of the amended section 316 and new section 316A.
- 3.20 Other parts of the educational framework in England support the increased inclusion of children with SEN: the statutory inclusion statement in the National Curriculum (DfES/QCA, 1999) and the inspection of educational inclusion by Ofsted (Ofsted, 2000). Further support to the development of inclusion in England has been provided by the circulation, by the Department for Education and Skills, of copies of the *Index for Inclusion* (CSIE, 2000) to every maintained school. The Index supports schools in reviewing their policies, practices and procedures and developing an inclusive approach.
- 3.21 Other changes to the SEN framework increase parents' access to information from the school and to information and advice through parent partnership services arranged by the local education authority. These arrangements are designed to support parents in working in partnership with schools and local education authorities to determine how their child's SEN should be met.

s 1 SEN and
Disability
Act 2001

3

s 317A
Education Act
1996

s 332A
Education Act
1996

- 3.22 Within this framework, which increasingly emphasises inclusion and parental participation, the SEN duties require local education authorities, maintained schools and others to identify, assess and make provision for children's special educational needs. The SEN Codes of Practice in England and the SEN Code of Practice for Wales support schools and local education authorities in interpreting their duties under the SEN framework.
- 3.23 The disability duties in Part 4 of the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. This Code of Practice does not focus on the SEN framework, but refers across to it. It takes account of the guidance on the SEN duties and complements it by providing guidance on the disability discrimination duties in education.

Complaints and appeals

- 3.24 If parents are not satisfied with the provision that a school makes to meet their child's special educational needs, parents can complain to the school. If parents do not agree with decisions made by the local education authority about the nature of their child's needs or about how their child's needs should be met, parents have a right of appeal to the SEN and Disability Tribunal. See **Appendix Three** for useful publications.

4

The duties: who is covered, who is responsible, what activities are covered

This chapter sets out the practicalities of the disability discrimination duties as they apply to schools. It explains:

- who is covered;
- who has responsibility for the duties;
- what provision is covered; and
- what activities are covered.

Who is covered by the duties?

- 4.1 Disabled pupils and disabled prospective pupils are covered by the duties in the Disability Discrimination Act. Education legislation defines who is a pupil and the Disability Discrimination Act 1995, the Act, defines who is a disabled person.
- 4.2 Section 1 of the Act provides the definition of a disabled person that applies to all the duties in the Act. A disabled person is defined as someone who has a physical or mental impairment which has an effect on his or her ability to carry out normal day-to-day activities. The effect must be:
- substantial (that is more than minor or trivial); and
 - long-term (that is, has lasted or is likely to last for at least a year or for the rest of the life of the person affected); and
 - adverse.

s 135(1) Education (Scotland) Act 1980, and s 3(1) Education Act 1996
s 1

4.3 Physical or mental impairment includes sensory impairments and also hidden impairments (for example, mental illness or mental health problems, learning difficulties, dyslexia and conditions such as diabetes or epilepsy). People who have had a disability within the terms of the Act in the past continue to be protected from discrimination even if they no longer have the disability. People with severe disfigurements are also covered.

4.4 For a fuller understanding of the concept of disability under the Act, see **Appendix One**. A publication available from The Stationery Office, *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, provides additional help in understanding the concept of disability and in identifying disabled persons. Where relevant, the *Guidance* will be taken into account in any legal proceedings. (**Appendix Three** gives details of where to get copies of publications.)

4.5 It is only disabled pupils and disabled potential pupils who are covered by the duties in the Act. It will be for the SEN and Disability Tribunal and admissions and exclusions appeals panels, in England and Wales, and for the Sheriff Court, in Scotland, to determine whether or not a child has a disability for the purposes of the Act.

4.6 The early experience of the introduction of Parts 2 and 3 of the Act, relating to employment and to the provision of goods and services, respectively, was that many of the cases brought turned on the question of definition. This Code cannot determine which pupils have or do not have a disability but the following considerations may be relevant:

- a child may have significant behaviour difficulties and these may relate to an underlying physical

or mental impairment which amounts to a disability as defined by the Act. If they do, the child will be covered by the Act by reason of the underlying impairment. The importance of schools seeking to identify any underlying impairment is highlighted in **Chapter 7** of this Code;

- in addition, a behaviour difficulty may arise from a mental illness. The Act says that mental impairments resulting from or consisting of a mental illness are not covered by the legislation unless that illness is clinically well-recognised, that is, 'recognised by a respected body of medical opinion.' It is therefore likely that, in respect of such illnesses, the extent to which a condition is well-recognised will determine whether or not a child has a disability, for the purposes of the Act;
- where a child has a behaviour difficulty for a reason other than a disability, for example arising from social or domestic circumstances, it is likely that such a difficulty is not covered by the legislation.

4.7 The examples used in the Code all assume a disability that would come under the definition of disability in the Act.

Disabled pupils and special educational needs

4.8 Disabled pupils may also have special educational needs as defined by:

- the Education (Scotland) Act 1980; or
- Part 4 of the Education Act 1996.

4.9 This issue was considered briefly in **Chapters 2 and 3** where the SEN framework was discussed. It should be borne in mind that a pupil with a

disability has a special educational need if they need any special educational provision to be made for them to enable them to access school education. In the light of the discussion above, it is important to recognise that a pupil may have a behaviour difficulty that amounts to a special educational need, but may not have a disability as defined by the Disability Discrimination Act.

- 4.10 Pupils may have either a disability or special educational needs or both. The SEN framework is designed to make the provision to meet special educational needs. The disability discrimination duties, as they relate to schools, are designed to prevent discrimination against disabled children in their access to education.

What provision is covered?

- 4.11 Education provided at all schools in Scotland, Wales and England is covered by the duties in Part 4 of the Act. This includes independent and publicly-funded schools, mainstream and special schools. It includes primary and secondary schools, non-maintained special schools and pupil referral units.
- 4.12 All local education authority and education authority maintained nursery schools and nursery classes and nursery provision at independent schools and grant aided schools are covered by Part IV. There are many private, voluntary and statutory providers of nursery education that are not constituted as schools. From September 2002, education provided in these settings is covered by duties in Part 3 of the Act. Childcare in these

settings is already covered by Part 3 of the Act. More information is provided on these duties in **Chapter 10** of this Code.

- 4.13 Further and higher education are covered by separate duties. The 'post-16' duties include any sixth-form (sixth year in Scotland) provision that is not made at a school. Information and guidance on the 'post-16' duties is provided in a separate Code of Practice.

Who is responsible for the schools' duties?

- 4.14 Those responsible for the duty not to discriminate in school education vary depending on:

- whether the school is in Scotland, or England and Wales;
- the type of school.

- 4.15 For any school, the body that has responsibility under the duties is called the 'responsible body.' In general, the term 'responsible body' is used throughout the Code. However, much of the Code is illustrated with examples of what might and might not constitute disability discrimination in school education. In the examples and in the discussion of the examples the terms 'school' and 'schools' duties' are used because school is where pupils are and that is where the examples arise. Responsibility lies with the responsible body.

- 4.16 Tables 1 and 2, below, show who is the responsible body for different types of school in Scotland (Table 1) and England and Wales (Table 2):

TABLE 1: RESPONSIBLE BODIES IN SCHOOLS IN SCOTLAND

Type of school	Responsible body
School managed by an education authority	The education authority
Independent school	The proprietor*
Self-governing school	The board of management
Grant-aided school **	The managers of the school

* Those responsible for the management of the school depending on the type of school.

** A grant-aided school is one that is receiving grants under section 73(c) or (d) of the Education (Scotland) Act 1980.

TABLE 2: RESPONSIBLE BODIES IN SCHOOLS IN ENGLAND AND WALES

Type of school	Responsible body
Maintained school	The governing body, in general, but see below***
Pupil referral unit	The local education authority
Maintained nursery school	The local education authority
Independent school	The proprietor****
Special school that is not maintained by a local education authority	The proprietor****

*** The responsible body in maintained schools varies according to who has the general responsibility for that function in education, that is, admissions, 'education and associated services', or exclusions. The governing body will generally be the responsible body for a maintained school, except for governance of maintained nursery schools and pupil referral units and admissions to community schools, where the LEA has responsibility.

**** The Education Act 1996 says that the proprietor is the person or the group of people responsible for the management of the school. This will vary according to the type of school but would include the trustees, the governing body, the private owner or the management group of the school.

- 4.17 Generally, responsible bodies will not be those working in schools on a day-to-day basis. Responsible bodies will need to take steps to ensure that employees and those working with the school's authority:
- can support the responsible body in meeting their duties to disabled pupils; and
 - do not act in such a way as to render the responsible body liable to a claim of discrimination.
- 4.18 A claim of discrimination cannot be made against an individual working at the school or with the authority of the school. The responsible body is responsible for the actions of employees and for anyone working with the authority of the school, for example, volunteer helpers (including parents), teachers from support services, those providing school meals, after-school clubs, or any other service that is included in the broad definition of 'education and associated services' (see 4.23).
- 4.19 Where the school has a contract with someone to provide a service at the school, the responsible body will need to ensure that the service is provided with due regard to the duties of the responsible body under Part 4 of the Act. **Chapter 10** provides more detail on contracts and the duties under Part 4 of the Act.

What activities are covered by the schools' duties?

- 4.20 Every aspect of school life is covered by the duties. Responsible bodies must not discriminate:
- in relation to admissions;
 - in relation to education and associated services; or
 - by excluding a pupil.
- 4.21 This chapter considers what is covered by these three areas. This should be read with a full understanding of what discrimination is. **Chapters 5 and 6** set out what is meant by discrimination.

Admissions

- 4.22 Three distinct aspects of admission are covered by the duties. Responsible bodies must not discriminate against a disabled person:
- in the arrangements that they make for determining admission of pupils to the school. This includes any criteria for deciding who will be admitted to the school when it is over-subscribed, and it includes the operation of those criteria;
 - in the terms on which the responsible body offers pupils admission to the school;
 - by refusing or deliberately omitting to accept an application for admission to the school from someone who is disabled.

Education and associated services

- 4.23 'Education and associated services' is a broad term that covers all aspects of school life. This list exemplifies the range of activities that may be covered by the term 'education and associated services':

- preparation for entry to the school
- the curriculum
- teaching and learning
- classroom organisation
- timetabling
- grouping of pupils
- homework
- access to school facilities
- activities to supplement the curriculum, for example, a drama group visiting the school
- school sports
- school policies
- breaks and lunchtimes
- the serving of school meals
- interaction with peers
- assessment and exam arrangements
- school discipline and sanctions
- exclusion procedures
- school clubs and activities
- school trips
- the school's arrangements for working with other agencies
- preparation of pupils for the next phase of education.

4.24 This list is not exhaustive, nor is it intended to be. Part 4 covers all education and associated services that are for pupils and prospective pupils. It does not include other services that are provided to the public. These are covered by Part 3 of the Act. Where, for example, the school holds an open day, the parent teacher association holds a car boot sale, or the governing body holds a public meeting,

such activities are covered by Part 3. The Stationery Office has published a Code of Practice which explains the duties in Part 3 of the Act, *Rights of Access to Goods, Facilities, Services and Premises*.

s 28A (3)

- 4.25 The Secretary of State has powers under the Act to issue regulations about what is and is not education or an associated service. The Secretary of State would issue regulations if it were considered necessary to clarify the position of any service, to make it clear whether it was covered by Part 3 or Part 4 of the Act.
- 4.26 In some areas of school life the duties on responsible bodies will overlap with other duties on other bodies: for example, providers of health services, who have duties under Part 3 of the Act. Responsible bodies have to make sure that they fulfil their responsibilities, regardless of duties on other bodies.

Exclusions

- 4.27 The duties make it unlawful for a responsible body to discriminate against a disabled pupil by excluding him or her from the school for a reason related to the pupil's disability. This would be less favourable treatment, (**see Chapter 5**). The duties apply to exclusions whether they are:
- in Scotland, temporary exclusions or exclusion/removal from register;
 - in England and Wales, permanent or fixed-term exclusions.

5

What is discrimination? Less favourable treatment

This chapter explains what is meant by the duty not to treat disabled children less favourably. It sets out the three questions to be asked in determining whether less favourable treatment amounts to unlawful discrimination.

This chapter in context

5.1 Part 4 of the Disability Discrimination Act 1995, as amended, makes it unlawful for a responsible body for a school to discriminate against a disabled child:

- in relation to admissions;
- in relation to education and associated services;
or
- by excluding a pupil.

5.2 In summary, discrimination against a disabled child can occur in two possible ways. Discrimination is either:

- treating a disabled pupil or prospective pupil less favourably, for a reason relating to his or her disability, than someone to whom that reason does not apply, without justification; or
- failing to take reasonable steps to ensure that disabled pupils or prospective pupils are not placed at a substantial disadvantage in

comparison with their non-disabled peers without justification. This is known as the reasonable adjustments duty.

5.3 The duty not to treat a disabled pupil less favourably and the duty to make reasonable adjustments are the two core duties that lie at the heart of the disability discrimination provisions in education. This chapter explains the less favourable treatment duty in greater detail. *Chapter 6* explains the reasonable adjustments duty more fully. There are circumstances in which less favourable treatment or the failure to make reasonable adjustments may be justified. These circumstances are discussed in relation to each duty.

5.4 It is important that *Chapters 5 and 6*, which look at the core duties, are read in the context of the whole Code. In particular, these chapters need to be read alongside:

- ***Chapter 4* which explains which children and which activities are covered by the Part 4 duties and who has responsibility for these duties; and**
- ***Chapter 7* which explains the lack of knowledge defence and requests for confidentiality.**

Less favourable treatment

s 28B(1)

5.5 The Act says that the responsible body for a school discriminates against a disabled child if:

- **for a reason relating to the child's disability, it treats him less favourably than it treats, or would treat, others to whom that reason does not apply, or would not apply; and**
- **it cannot show that the particular treatment is justified.**

- 5.6 In effect this means that there are three questions to be asked in determining whether unlawful discrimination, in relation to less favourable treatment, has taken place:
- is the less favourable treatment for a reason that is related to the child's disability?
 - is it less favourable treatment than someone gets if the reason does not apply to him/her? and
 - is it less favourable treatment that can be justified?

Is the less favourable treatment for a reason that is related to the child's disability?

- 5.7 There has to be a link between the reason and the disability. Some examples are set out below:

EXAMPLE 5.7A

A father seeks admission to a primary school for his son, who has epilepsy. The school tells him that they cannot take the boy unless he stops having fits.

In effect, the school is placing conditions on the boy's admission because he might have fits. Having fits is an intrinsic part of the boy's epilepsy. The reason for the less favourable treatment is one that relates to the boy's disability.

EXAMPLE 5.7B

An eleven-year-old girl is admitted to a secondary school. The school wants her to have all her lessons in a separate room in case she frightens other children with her muscle spasms and her involuntary noises.

The reasons for placing the girl in a separate room are the muscle spasms and the involuntary noises. These are an intrinsic part of her disability. The less favourable treatment proposed is for a reason that relates to the girl's disability.

EXAMPLE 5.7C

A pupil with Tourette's Syndrome is stopped from going on a school visit because he has used abusive language in class. The school has a policy of banning pupils from trips and after-school activities if they swear or are abusive to staff.

The reason for not allowing the pupil to go on the school visit is his use of abusive language. His involuntary swearing is a symptom of his Tourette's Syndrome. This is less favourable treatment for a reason that relates to the pupil's disability.

- 5.8 The 'less favourable treatment' duty does not mean that disabled pupils have an excuse for disruptive or anti-social behaviour. There has to be a direct relationship between the reason for the less favourable treatment and the child's disability.

EXAMPLE 5.8A

A school has received a number of complaints from local shopkeepers about the rowdy and disruptive behaviour of some of its pupils. It decides that the pupils in question should be banned from taking part in a school theatre visit because of their behaviour. One of the pupils has a hearing impairment.

The rowdy and disruptive behaviour is not directly related to the pupil's impairment. The ban from the visit may be less favourable treatment, but it is not for a reason related to the pupil's disability.

Is it less favourable treatment than someone gets if the reason does not apply to him/her?

- 5.9 To answer this question, a comparison has to be made between the disabled child, with the reason related to their disability, and other children to whom that reason does not apply. The comparison can be real or hypothetical.
- 5.10 The comparison to be made is probably more easily understood if the examples discussed above are re-examined:

EXAMPLE 5.10A

In the case of the example of the boy with epilepsy, whose admission to the school was going to be conditional on his stopping having fits, the comparison has to be made between the treatment that he got and the treatment someone else got, or would get, if they did not have fits. In this case, other children did not have this condition placed on their admission, nor would they have. So, for a reason that relates to his disability, this boy is being treated less favourably than another child to whom that reason does not apply.

EXAMPLE 5.10B

In the example of the eleven-year-old girl, whose lessons were going to be arranged in a separate room, the reason for the treatment was that her muscle spasms and the involuntary noises that she made might frighten the other pupils. The reason is directly linked to her disability. The treatment that she was to receive has to be compared with the treatment that other pupils would receive who did not have muscle spasms or make involuntary noises. This girl would be isolated from the curriculum and from her peers in a way that others would not. So, for a reason that relates to her disability, this girl is being treated less favourably than another child to whom that reason does not apply.

EXAMPLE 5.10C

In the example of the pupil with Tourette's Syndrome who was banned from a school visit because of abusive language, the reason was directly related to his disability. The comparison has to be made with others who had not used abusive language. In this case, the pupil who used abusive language, which is directly related to his disability, was treated less favourably than pupils who had not used abusive language. So, for a reason that relates to his disability, this boy is being treated less favourably than another child to whom that reason does not apply.

Is it less favourable treatment that can be justified?

- 5.11 Less favourable treatment may be justified. The Act says that less favourable treatment that is justified is not unlawful discrimination.
- 5.12 There are two ways in which less favourable treatment may be justified under the Act:
- it can be justified if it is the result of a permitted form of selection, see 5.18 to 5.23;
 - otherwise it can only be justified if there is a reason which is both material to the circumstances of the particular case and substantial.
- 5.13 It may not be possible to justify less favourable treatment if there are reasonable adjustments that should have been made but were not. Reasonable adjustments are considered in **Chapter 6**.

s 28B (6)

s 28B (7)

s 28B (8)

Justification for a material and substantial reason

- 5.14 For the reason to be material, there has to be a clear connection between the reason that the responsible body gives and the circumstances of the particular case. The reason also has to be substantial, that is, one that is more than minor or trivial.
- 5.15 The examples that were considered against the first two questions earlier in the chapter, paragraphs 5.7 to 5.10, are now considered against the third question, justification.

EXAMPLE 5.15A

In the first example the admission of a boy with epilepsy is made conditional on his stopping having fits. So, for a reason that relates to his disability, this boy is being treated less favourably than another child to whom that reason does not apply. The next question is whether this is justified. The responsible body does not seek to justify the less favourable treatment of the boy and it is likely that it is unlawful discrimination.

EXAMPLE 5.15B

In the example of the eleven-year-old, whose lessons were going to be arranged in a separate room because of her muscle spasms and involuntary noises, is the less favourable treatment justified? The responsible body seeks to justify the less favourable treatment on the basis that the girl might frighten the other pupils. In this case the reason is based on general assumptions about the girl and about the other pupils and is unlikely to constitute a material and substantial reason. This is likely to be unlawful discrimination.

EXAMPLE 5.15C

In the example of the pupil with Tourette's Syndrome who was banned from a school visit because of abusive language, is the less favourable treatment justified? In this case the responsible body might argue that the inclusion of the disabled pupil on the visit would make the maintenance of discipline impossible. This may constitute a material and substantial reason.

However, the responsible body would need to have considered the extent to which the disabled pupil's behaviour could have been managed. It would also need to have considered whether reasonable adjustments could have been made to its policies and procedures before it could attempt to justify less favourable treatment.

Were there reasonable adjustments that could have been made?

- 5.16 A further consideration in justification is whether there may be reasonable adjustments that the responsible body could have made. The Act says that a responsible body cannot justify less favourable treatment if there is a reasonable adjustment that should have been made but wasn't (unless the reasonable adjustment would have made no difference in the particular case). Reasonable adjustments are considered in more detail in **Chapter 6**.

EXAMPLE 5.16A

In the case of the pupil with Tourette's Syndrome there were reasonable adjustments that were normally in place; the introduction of new ideas was carefully managed, as were time pressures. Left unmanaged, both of these tended to exacerbate the effects of the pupil's impairment. In this case, a supply teacher was taking the class and failed to make the adjustments that were normally made. Reasonable adjustments might have been made but were not, and therefore the responsible body is unlikely to be able to justify the less favourable treatment.

Some further examples considered

- 5.17 Some further examples are set out below to illustrate the questions that need to be considered in determining whether a disabled pupil or potential pupil has been unlawfully discriminated against by being treated less favourably.

EXAMPLE 5.17A

A mother seeks admission to a nursery school for her son who has Hirschprung's disease. The school explains that they could not admit him until he is toilet trained. That is their policy for all children.

Is this less favourable treatment for a reason related to the pupil's disability?

The child has difficulty in establishing bowel control as a consequence of having Hirschprung's disease, so the reason given is related to the child's disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment he receives has to be compared with a child to whom that reason does not apply, that is, the comparison is with a child who is continent. A child who is continent is not asked to delay admission to the school. It is less favourable treatment than is given to a child who is continent.

Is it justified?

In this case the decision was not based on any assessment of the circumstances of the particular case but on a blanket policy and so there is unlikely to be a material and substantial reason. It is likely that this is unlawful discrimination.

EXAMPLE 5.17B

Some pupils from a special school are going to the theatre. The school does not offer the trip to a pupil with learning difficulties on the basis that he would not understand the play.

Is this less favourable treatment for a reason related to the pupil's disability?

The reason for not offering the boy the opportunity to go on the trip is his limited understanding which is directly related to his disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment that he was to receive has to be compared with the treatment that other pupils would receive who did not have limited understanding. They were being offered the trip.

Is it justified?

The reason for not offering the trip was an assumption that the boy would not understand the play. This was a general assumption and not a material reason. This is likely to be unlawful discrimination.

EXAMPLE 5.17C

A pupil with cerebral palsy who uses a wheelchair is on a trip with her class to an outdoor activity centre. The teachers arrange to take the class on a 12-mile hike over difficult terrain but, having carried out a risk assessment, they decide that the pupil who uses a wheelchair will be unable to accompany her class, for health and safety reasons.

Is the less favourable treatment for a reason that is related to the pupil's disability?

This is less favourable treatment for a reason that relates to the pupil's cerebral palsy, namely the use of a wheelchair.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment that she was to receive then has to be compared with the treatment that the others would receive who did not use a wheelchair. They were being offered the opportunity to go on the hike whereas this pupil was being denied it.

Is it justified?

The responsible body is likely to be able to justify the less favourable treatment for a material and substantial reason: a risk assessment, carried out in relation to this particular pupil in the particular setting in which she would have to travel, indicated that the health and safety of the pupil, and her classmates, could be jeopardised if she were to attempt the hike. This is likely to be lawful.

EXAMPLE 5.17D

At the end of a lesson, homework, is written on the board. A pupil with dyslexia is unable to copy it down in the time. He is given a detention for not doing his homework.

Is this less favourable treatment for a reason related to the pupil's disability?

The reason for the detention is the failure to do the homework. This relates to his inability to write it down in the time available, which is a part of his disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment that he received has to be compared with the treatment that other pupils received who had done their homework. They were not being given a detention.

Is it justified?

There was a general assumption on the part of the teacher that all the pupils would be able to write down the homework in the time at the end of the lesson. It is unlikely that there is a material and substantial reason to justify the less favourable treatment. In addition, it is likely that there are reasonable adjustments that could have been made, (see **Chapter 6**), for example, more time could have been provided. The detention is likely to amount to unlawful discrimination.

EXAMPLE 5.17E

A pupil with autism goes to the front of the dinner queue. A teacher standing nearby tells him not to 'barge in'. The pupil becomes anxious but does not move. The teacher insists that the pupil must not 'jump the queue'. The pupil becomes more anxious and agitated and hits the teacher. The pupil is excluded temporarily from the school.

Is the less favourable treatment for a reason related to the pupil's disability?

The reason for the exclusion, hitting the teacher, may be related to the pupil's disability. Particular features of his autism are that he has difficulty in managing social situations, he has difficulty in understanding the purpose of a queue, he has

difficulty in understanding figurative language, such as 'barge in' and 'jump the queue,' and he has difficulty in managing escalating levels of anxiety. If the hitting is related to these features of his autism, then the less favourable treatment, the exclusion, is for a reason related to the pupil's disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

It is less favourable treatment than someone would get if they had not hit the teacher.

Is it justified?

The less favourable treatment is likely to be justified in terms of the order and discipline in the school. Any assault is likely to constitute a material and substantial reason justifying exclusion. However, there may be reasonable steps that might have been taken to prevent the incident happening in the first place.

For staff there might have been training:

- about autism and how the disability manifests itself;
- on strategies to avoid difficulties, for example, avoiding negative instructions and symbolic language such as 'barging in' and 'jumping the queue', and
- on strategies to overcome difficulties if they do arise.

For the pupil there might have been:

- particular training for social situations, such as queuing;
- the development of strategies for communicating that he is upset or confused.

If reasonable steps of this type could have been taken but were not, it may not be possible for the school to justify the exclusion. If steps of this type were taken but the incident still happened, the school is likely to be able to justify the exclusion.

Permitted forms of selection

- 5.18 A school may be justified in treating a disabled child less favourably if it is as a result of a permitted form of selection. Permitted forms of selection provide justification for less favourable treatment for a reason related to the child's disability. However, the operation of the selection procedures themselves is covered by the duties. Permitted forms of selection vary depending on the type of school and whether the school is in England, Wales or Scotland.

Permitted forms of selection in maintained schools in England and Wales

- 5.19 The *Code of Practice on School Admissions (1999)* published by the Department for Education and Skills provides guidance to the admissions authorities for maintained schools in England. The Admissions Code of Practice sets out the circumstances in which the admissions authority for a school may operate selective criteria:
- grammar schools may select their intake;
 - specialist schools may give priority in their admissions criteria to a proportion of pupils who show a particular aptitude for the subject in which the school specialises.

- 5.20 *The School Admissions Welsh Office Code of Practice (April 1999)* provides equivalent guidance for admissions authorities for maintained schools in Wales. In practice there are no grammar schools in Wales and only one school remaining which selects some pupils on the basis of their ability (partial selection). There are also no specialist schools which select on the basis of aptitude.
- 5.21 Subject to the laws on sex and race discrimination, independent schools in England and Wales may decide on their own selection criteria. Independent schools may select on the grounds of ability and aptitude.

Permitted forms of selection in Scotland

- 5.22 In Scotland, education authority schools may only select pupils for admission if such arrangements have been approved by Scottish Ministers. Subject to the laws on sex and race discrimination, independent schools and self-governing schools may select on grounds of ability and aptitude.

Permitted forms of selection, some examples considered

- 5.23 Examples below illustrate justification and permitted forms of selection.

EXAMPLE 5.23A

An eleven-year old girl with learning difficulties applies to go to a school that selects its intake on the basis of academic ability. She fails the entrance test. She is refused admission.

The refusal to admit the girl is based on her performance in the test. Her performance in the test is related to her learning difficulties, so this is less favourable treatment for a reason that relates to the child's disability. The treatment that she received has to be compared with the treatment that other children received who have passed the test. The treatment was less favourable as she was refused admission. However, the school has operated its selective criteria objectively and the less favourable treatment is likely to be justified because it is the result of a permitted form of selection. This is likely to be lawful.

EXAMPLE 5.23B

The parents of a twelve-year-old boy apply for him to go to an independent school. He passes the entrance test, but when the school hears that he has learning and behaviour difficulties they refuse him admission.

This boy is turned down for admission because the school hears that he has learning difficulties and behaviour difficulties that are directly related to his disability. The reason is related to his disability. Because the treatment is less favourable than it is for someone who does not have learning and behaviour difficulties that are directly related to their disability, this is unlikely to be justified, as his treatment is not as a result of a permitted form of selection. The boy had already passed the entrance test.

What is discrimination? A failure to make reasonable adjustments

6

This chapter explains:

- substantial disadvantage;
- anticipatory duties;
- reasonable adjustments;
- exceptions to the reasonable adjustments duty;
- factors that may be taken into account when considering reasonable adjustments; and
- the circumstances in which a failure to make reasonable adjustments may be justified.

This chapter in context

- 6.1 Part 4 of the Disability Discrimination Act 1995, as amended, makes it unlawful for a responsible body for a school to discriminate against a disabled child:**
- in relation to admissions;
 - in relation to education and associated services; or
 - by excluding a pupil.
- 6.2 In summary, discrimination against a disabled child can occur in two possible ways. Discrimination is either:**
- treating a disabled pupil or prospective pupil less favourably, for a reason relating to his or her disability, than someone to whom that reason does not apply, without justification; or

- **failing to take reasonable steps to ensure that disabled pupils or prospective pupils are not placed at a substantial disadvantage in comparison with their non-disabled peers, without justification. This is known as the reasonable adjustments duty.**

6.3 The duty not to treat a disabled pupil less favourably and the duty to make reasonable adjustments are the two core duties that lie at the heart of the disability discrimination provisions in education. This chapter explains the reasonable adjustments duty in greater detail. *Chapter 5* explains the less favourable treatment duty more fully. There are circumstances in which less favourable treatment or the failure to make reasonable adjustments may be justified. These circumstances are discussed in relation to each duty.

6.4 It is important that *Chapters 5 and 6*, which look at the core duties, are read in the context of the whole Code. In particular, these chapters need to be read alongside:

- ***Chapter 4* which explains which children and which activities are covered by the Part 4 duties and who has responsibility for these duties; and**
- ***Chapter 7* which explains the lack of knowledge defence and requests for confidentiality**

Reasonable adjustments

6.5 The Act says that the responsible body for a school must take such steps as it is reasonable to take to ensure that disabled pupils and disabled prospective pupils are not placed at a substantial disadvantage in comparison with those who are not disabled. The Act says that the responsible body for a school discriminates against a disabled child if it fails to the detriment of the child and without justification to take these reasonable steps.

This is often referred to as the reasonable adjustments duty.

- 6.6 Reasonable adjustments must be made for disabled children generally but discrimination only occurs if failure to make adjustments leads to the detriment of an individual child.
- 6.7 There are two exceptions to the reasonable adjustments duty. These are explained in 6.19 to 6.27.
- 6.8 In certain circumstances there may be justification for a failure to make reasonable adjustments. Justification is considered in more detail in 6.35 and 6.36.

Substantial disadvantage

- 6.9 Responsible bodies must take reasonable steps to ensure that disabled children are not placed at a substantial disadvantage. Substantial has the same meaning as it has elsewhere in the Act: that is, more than minor or trivial.
- 6.10 In the reasonable adjustments duty, the comparison to be made is between disabled children and children who are not disabled. Discrimination may occur where a disabled child is at a substantial disadvantage in this comparison, and because the school has failed to take reasonable steps to prevent that disadvantage.
- 6.11 In considering what might constitute a substantial disadvantage, the school will need to take account of a number of factors. These may include: the time and effort that might need to be expended by a disabled child; the inconvenience, indignity or discomfort a disabled child might suffer; the loss of opportunity or the diminished progress that a disabled child may make in comparison with his or her peers who are not disabled.

EXAMPLE 6.11A

A secondary school with a number of disabled pupils fails to negotiate the special arrangements for disabled pupils who are taking public exams. This is likely to place disabled pupils at a substantial disadvantage and may be unlawful.

EXAMPLE 6.11B

A secondary school hosts a special unit for pupils with a visual impairment. The school is already appropriately equipped for enlarging text and providing Braille versions of documents for pupils who use Braille. When the pupils are working in the unit all information is provided at the beginning of the lesson by the school in the range of formats they need. When they are working in mainstream classes in the school, the school regularly fails to provide information in time to be transferred into different formats for the lesson. Not providing the information in time leaves the disabled pupils unable to refer to written information during the lesson, whilst their non-disabled peers can. This is likely to constitute a substantial disadvantage in comparison with non-disabled pupils. The failure to take reasonable steps to prevent this disadvantage is likely to be unlawful.

An anticipatory duty

- 6.12 The duty on schools to make reasonable adjustments is anticipatory. It is the potential for a substantial disadvantage that should trigger a consideration of what reasonable steps might need to be taken. Schools cannot, in general, wait until

a disabled pupil has arrived before making reasonable adjustments. This may be too late and it may not be possible to take reasonable steps before the pupil is placed at a substantial disadvantage.

- 6.13 The reasonable adjustments duty is owed to disabled children in general, not simply to individual disabled children. This means that schools will need to review their policies, practices and procedures, as a matter of course, to ensure that they do not discriminate against disabled children. It means that schools should not wait until a disabled child seeks admission to the school or is admitted as a pupil to consider what reasonable adjustments it might make generally to meet the needs of disabled pupils.

EXAMPLE 6.13A

Following training on disability, a primary school reviews its policy on bullying to ensure that it addresses bullying linked to disability. This is likely to be a reasonable step that they should take.

EXAMPLE 6.13B

A secondary school takes pupils to an outdoor education centre each year. The school can benefit from a reduced rate if they book with the same centre for three years. The school checks with the centre before booking to ensure that if they were to take disabled pupils as part of a group they would be able to access the facilities of the centre. This is likely to be a reasonable step that the school should take.

EXAMPLE 6.13C

A selective school considers carefully how disabled children can take their entrance exams without being at a substantial disadvantage. The school sets up early 'admissions meetings' with the parents of disabled prospective pupils. The meetings are used to discuss any special arrangements for the exams. The particular arrangements for an individual child can then be put in place in time. This is likely to be a reasonable step that the school should take.

EXAMPLE 6.13D

A school operates a policy of not permitting staff to volunteer to administer medicines to pupils in any circumstances. The school reviews its policy. Following assurances that staff are indemnified by the education authority's insurance policy, the school changes its policy to permit suitably trained staff to volunteer. This is likely to be a reasonable step that the school should take.

- 6.14 In these examples anticipatory changes are made to policies so that disabled pupils would not be placed at a substantial disadvantage. The changes that were made in these examples were of a general nature, although anticipatory changes may be prompted by thinking about groups of children or individual children who might come to the school.

EXAMPLE 6.14A

A large secondary school is opening a special unit for pupils with speech and language impairments. They plan to include the pupils from the unit in mainstream lessons. One of the challenges is how to enable the children from the unit to follow the timetable. They might otherwise be at a substantial disadvantage. The school has an established 'buddy system' as part of its anti-bullying policy. After discussions with pupils, parents and the speech and language specialist teacher, the school extends its buddy system. It provides training for additional volunteer buddies to guide the disabled pupils from class to class. This is likely to be a reasonable step that the school should take.

EXAMPLE 6.14B

A boy with a spinal injury who uses a wheelchair wants to attend his local primary school. The teachers are concerned as they do not know what he should do in PE lessons. The boy might be at a substantial disadvantage if he did not do PE. The physiotherapist is asked to help the school to adjust the PE curriculum appropriately.

Amongst other things the school includes:

- an exercise routine to carry out on the mat which other pupils will also do and benefit from;
- ball work sitting on chairs in a circle.

These are likely to be reasonable steps that the school should take.

- 6.15 It should be recognised that not every school will need to adopt the same approach as the schools in these examples. Other schools might have identified different steps to be taken. The important point about the steps is that they need to ensure that disabled pupils are not at a substantial disadvantage. There may be many different ways of doing this.
- 6.16 In order to make reasonable adjustments, responsible bodies will need good information about children who may be coming to the school and for whom they may need to make reasonable adjustments. For publicly-funded schools, discussions with the local education authority, in England or Wales, or the education authority, in Scotland, may help the school to know about numbers of children and the general nature of the adjustments that may be needed. LEAs and EAs in turn might wish to discuss with local health and social services bodies the potential numbers of disabled children who may be going to attend their schools.
- 6.17 For all schools, discussions with parents and pupils themselves will be important in informing the responsible body more precisely about the nature of the adjustments that may be needed in anticipation of a particular pupil being admitted. There is no onus on pupils and parents to share such information but, to the extent that information is shared, schools will be better able to make appropriate adjustments for the individual pupil. The sharing of information, confidentiality and the lack of knowledge defence are discussed in more detail in **Chapter 7**.

EXAMPLE 6.17A

A small rural primary school has little experience of disabled pupils. The school is going to admit a five-year-old girl with a rare syndrome involving moderate learning difficulties, poor muscle tone, and speech and language difficulties. The head teacher consults the child's mother and a local voluntary organisation and devises a series of short training events drawing on local expertise. The training enhances staff knowledge and confidence and the girl has a positive start to school. This is likely to be a reasonable step to take to prevent the pupil from being placed at a substantial disadvantage.

A continuing responsibility

- 6.18 Schools will need to keep their policies, practices and procedures under continuous review. The need for good information continues after children have been admitted to the school. Schools need to consider on a continuing basis whether disabled pupils may be at a substantial disadvantage.

EXAMPLE 6.18A

An eight-year-old girl has severe asthma. This is normally well managed. The school monitors her condition and, at the end of one term, notices that it is worse after literacy and numeracy sessions. It emerges that, at these times, she is sitting near a blackboard and the chalk dust is exacerbating her asthma. The school is concerned that the pupil might be at a substantial disadvantage. The school is in the process of replacing all the

blackboards with whiteboards. Some classrooms already have whiteboards. From the beginning of the next term her class is allocated to one of the classrooms that already has a whiteboard. This is likely to be a reasonable step that the school should take.

EXAMPLE 6.18B

A child with one arm was happily included in her nursery class, which had a separate playground. When she moves up a year she starts to be bullied by older children in the big playground. She becomes withdrawn in the classroom. It is possible that the pupil is already at a substantial disadvantage. The school's anti-bullying policy includes bullying related to disability. The school is concerned that the policy is not working and they take advice from local support services and from the pupil. The school decides that it needs to take a number of steps, including:

- addressing name-calling and bullying, including bullying related to disability, in two assemblies;
- undertaking work on disability issues in a number of classes.

These are likely to be reasonable steps that the school should have taken and should now take.

Exceptions to the reasonable adjustments duty

6.19 There are two exceptions to the reasonable adjustments duty. Schools are not required to:

- provide auxiliary aids or services;
- remove or alter physical features.

The provision of auxiliary aids or services

- 6.20 The special educational needs (SEN) framework is designed to identify, assess and make provision for children's special educational needs. Special educational provision should include any educational aids and services where these are necessary to meet the child's identified needs. The disability discrimination duties are designed to sit alongside the SEN framework and do not provide an additional route of access to auxiliary aids and services.

EXAMPLE 6.20A

A deaf child attends her local primary school with the regular support of a teaching assistant and twice-weekly visits from a peripatetic teacher of the deaf. Although she is severely deaf, the child's spoken language and use of English is well-established. She wears a personal FM system (radio aid) in all lessons. These auxiliary aids and services are provided through the SEN framework. The use of the aids is covered by the disability discrimination duties. If, for example, a teacher were to refuse to use the radio microphone, it is likely that this would be unlawful under the disability discrimination duties.

The provision of auxiliary aids or services in independent schools

- 6.21 Where pupils attend an independent school at their parents' expense they do not have access to auxiliary aids and services through the SEN framework. Auxiliary aids and services are normally made available by the school, and parents are usually charged for them.

- 6.22 Independent schools, where they are educating children at their parents' expense, can make specialist tuition available and can charge parents for this. Less favourable treatment might occur if charges were made at a level designed to deter disabled pupils from coming to the school.

EXAMPLE 6.22A

A pupil with dyslexia attends an independent school. He has four lessons a week with a specialist teacher. The school charges for these lessons at a rate that reflects the cost of providing the tuition. This is likely to be lawful.

Physical alterations to the buildings in schools in England and Wales

- 6.23 Under the reasonable adjustments duty, schools are not required to remove or alter physical features. Physical alterations are covered by the longer term planning duties. However, this does not mean that schools should do nothing where there is a physical barrier. There is still a positive duty to make reasonable adjustments to ensure that a disabled pupil is not at a substantial disadvantage. One of the examples below, 6.34A, shows how it may be possible to make reasonable adjustments that fall short of physical alterations.
- 6.24 The improvement of the physical environment of schools, in order to increase access for disabled pupils, is covered by the duties on schools and local education authorities to draw up accessibility plans and strategies. The approach taken to increasing the accessibility of school buildings is designed to be strategic and to make improvements over time, see **Chapter 3**.

6.25 The National Assembly for Wales and the Secretary of State for Education and Skills provide guidance for LEAs and schools, in Wales and England respectively, on how they should implement the planning duties.

Physical alterations to the buildings in schools in Scotland

6.26 Under the reasonable adjustments duty, schools are not required to remove or alter physical features. However, this does not mean that schools should do nothing where there is a physical barrier. There is still a positive duty to make reasonable adjustments to ensure that a disabled pupil is not at a substantial disadvantage. One of the examples below, 6.34A, shows how it may be possible to make reasonable adjustments that fall short of physical alterations.

6.27 Physical access to schools is a devolved issue relating to the planning and the provision of education. The Scottish Executive has brought forward draft legislation that introduces planning duties in Scotland.

Considering whether it is reasonable to have to take a particular step

6.28 To comply with the reasonable adjustments duty responsible bodies will need to consider what they might do to ensure that disabled pupils are not at a substantial disadvantage. There may be a variety of ways in which adjustments might be made. In considering whether it is reasonable to have to take a particular step, responsible bodies must have regard to any relevant provisions of this Code of Practice.

- 6.29 The reasonable adjustments duty assumes the involvement of disabled pupils in every aspect of the life of the school. A careful consideration of how that participation is best facilitated will help the responsible body to determine what a reasonable step might be. Any relevant factors need to be explored and balanced. They need to be weighed against the potential for a disabled pupil being placed at a substantial disadvantage.
- 6.30 Some of the factors below may be relevant to this consideration. Where any of these factors is relevant it may be taken into account:
- the need to maintain academic, musical, sporting and other standards;
 - the financial resources available to the responsible body;
 - the cost of taking a particular step;
 - the extent to which it is practicable to take a particular step;
 - the extent to which aids and services will be provided to disabled pupils at the school under Part IV of the Education Act 1996 or Sections 60-65G of the Education (Scotland) Act 1980;
 - health and safety requirements;
 - the interests of other pupils and persons who may be admitted to the school as pupils.
- 6.31 Where a factor is relevant it needs to be considered. It should be used to help determine whether and how a reasonable step might be taken in order to ensure that a disabled pupil is not at a substantial disadvantage.
- 6.32 A consideration of the factors may lead to the adoption of certain reasonable adjustments rather than others, for example on the grounds of cost or

practicability. On other occasions a consideration of the factors may mean that there is no adjustment that it would be reasonable to make, for example, where a disabled pupil did not meet an objective standard required to participate in a particular activity.

- 6.33 A school may choose its best footballers, singers or mathematicians where a consideration of standards is relevant; for example in an inter-school competition. However, it should not be assumed that a consideration of standards will mean that a disabled pupil will be barred from an activity.
- 6.34 Some examples are considered below. Each example is considered in the light of relevant factors to determine how the responsible body might meet the reasonable adjustments duty. Each example illustrates different factors and each is capable of being interpreted in a number of different ways. There is no definitive answer to each example; rather, there is a range of possibilities. The examples seek to illustrate the process to be gone through, rather than the particular conclusion that is reached.

EXAMPLE 6.34A

The need to maintain standards

A secondary school, which includes a number of disabled pupils, plans a musical Christmas production. One of the disabled pupils has a powerful singing voice and is considered for a lead role. However, the stage is inaccessible.

The school goes through the following considerations:

- the need to maintain standards dictates that the show has to be up to the high standards that the school has set in the past;
- enabling the disabled pupil to participate will help to maintain the high standards;
- the school is not required to make physical alterations;
- it is possible to change round the proposed acting area and the auditorium. There would be no additional cost to this option but the audience might not get such a good view.

The school decides that, in order not to put the disabled pupil at a substantial disadvantage, and having considered the need to maintain standards, it will switch round the acting area and the auditorium.

The school has considered the factors and has identified a reasonable adjustment. In making this adjustment it is likely to be acting lawfully.

EXAMPLE 6.34B

The interest of other pupils

An exchange trip is offered to pupils studying Italian in a secondary school. Accessible transport arrangements are made and a suitable host is identified who can accommodate a pupil who uses a wheelchair. At the last minute the Italian host drops out.

The school went through the following considerations:

- it was not practicable to take the disabled pupil without a host to go to;
- the school considered cancelling the trip, but if the other pupils did not go they would lose the opportunity of improving their Italian.

In the interests of other pupils the school decides to go ahead with the trip. The school has considered the factors and, whilst it has not been able to identify a reasonable adjustment that would enable the pupil to go on the trip, it is likely to be acting lawfully.

EXAMPLE 6.34C

Health & Safety

Two physically disabled pupils are going to be admitted to a primary school next term. The school is concerned that the pupils' standing frames will present a health and safety risk to other pupils when stored in the classroom in between periods of use during the school day.

The pupils' educational and physiotherapy programme requires regular movement and the use of the standing frames. Without this movement, the pupils would begin to develop contractures. They would also not be able to access parts of the curriculum where standing is necessary.

The school goes through the following process to determine what steps it might be reasonable to take:

- the school seeks a suitably qualified opinion on the risks. Advice is sought on two risks: the standing frames being left around, and the pupils not being able access them to stand in them;
- the view of the local health and safety officer is that there is a risk in keeping the frames in the classroom but he advises on ways in which the frames can be stored so that they present no significant risk to staff or other pupils.

- In time for the beginning of next term the school rearranges the classroom to enable one frame to be stored in the classroom and the other in a nearby room.

The school has considered the options and has identified a reasonable adjustment that takes account of health and safety requirements. In making this adjustment it is likely to be acting lawfully.

Justification for a material and substantial reason

- 6.35 Failing to make reasonable adjustments can only be justified if there is a reason which is both material to the circumstances of the particular case and substantial. This is the same as the second ground for justification of less favourable treatment.
- 6.36 If a responsible body is to justify failing to make reasonable adjustments for a disabled pupil, it has to provide a reason. There has to be a clear connection between the reason that the school gives and the circumstances of the particular case. The reason also has to be a substantial reason: that is, one that is more than minor or trivial. In **Chapter 5** some reasons were considered, some that might justify and some that might not justify less favourable treatment. The same examples may be considered in relation to a failure to make reasonable adjustments. See 5.14 to 5.17.

Lack of knowledge defence and confidentiality

7

This chapter explains:

- the lack of knowledge defence;
- what schools might reasonably have done to find out about the existence of or the nature of a child's disability, if they are to be able to rely on the lack of knowledge defence subsequently;
- the way in which reasonable adjustments may be affected by a request for confidentiality.

Introduction

- 7.1 The Act includes provision to prevent responsible bodies from being liable to a claim of unlawful discrimination if they did not know that a pupil was disabled, and if they could not reasonably have been expected to have known. This is known as the 'lack of knowledge defence.'
- 7.2 However, the reasonable adjustments duty is anticipatory. This means that, even if there are no disabled pupils in the school at present, responsible bodies will need to consider changes, in the expectation that there will be disabled pupils in their school. A failure to make necessary changes may leave the responsible body open to a claim of disability discrimination if a disabled child is placed at a substantial disadvantage. Many changes will need to be made independently of any knowledge of individual pupils and particular disabilities.
- 7.3 The Act also says what should happen if a parent asks a school to keep confidential the fact that

his/her child has a disability. A child can also request confidentiality and, if the responsible body thinks that the child understands what he or she is asking to be done and what its effect will be, the responsible body should take that request into account.

Lack of knowledge defence

s 28B(4)

7.4 The Act says that if a responsible body for a school treats a pupil less favourably, it is not discrimination if, at the time, the responsible body did not know and could not reasonably have been expected to know that a pupil was disabled.

s 28B(3)

7.5 The same applies to the reasonable adjustments duty. If a responsible body for a school fails to take a particular step, it is not discrimination if, at the time, the responsible body did not know, and could not reasonably have been expected to know that a pupil was disabled, so long as it is also clear that the failure to take that step was due to the lack of knowledge of the pupil's disability.

7.6 Schools need to know that a child is disabled and they need to have some knowledge of the nature of a pupil's disability if they are to ensure that they do not treat the pupil less favourably. The same applies if the school is to make reasonable adjustments for the disabled pupil. Despite the fact that the reasonable adjustments duty is owed to disabled pupils in general, the school will need to know when and how to apply any specific arrangements.

7.7 In the majority of cases, schools will be aware of a child's disability because of arrangements for the assessment of and the provision for special educational needs through the SEN framework. In many cases parents will volunteer information about their child's disability.

- 7.8 It may not be immediately obvious that a child is disabled. Underachievement and difficult behaviour may, in some cases, indicate an underlying disability which has not yet been identified. A responsible body may have difficulty claiming not to have known about a disability if, on the basis of such indicators, it might reasonably have been expected to have known that a pupil was disabled.
- 7.9 It will be in the interests of responsible bodies to ensure that schools are proactive in seeking out information. If they are not, the responsible body may not be able to claim lack of knowledge about a pupil's disability. In seeking out information responsible bodies may, for example:
- want to establish an atmosphere and culture at the school which is open and welcoming, so that pupils and parents feel comfortable about disclosing information about a disability;
 - ask parents, when they visit or during the admissions process, about the existence of and the nature of any disability that their child may have;
 - provide continuing opportunities to share information, for example when seeking permission to go on a school trip or at points of transition within the school.
- 7.10 If, despite actions such as these, and bearing in mind the preceding 7.7, 7.8 and 7.9, the school did not know and could not reasonably have been expected to have known about the existence of a pupil's disability, the responsible body is likely to be able to rely on the lack of knowledge defence if a claim of disability discrimination is made against it.

EXAMPLE 7.10A

A nursery school admits a four-year-old child with coeliac disease. All new parents are asked to complete a form and are encouraged to discuss with the school their child's general development and any special needs. However, the child's parents do not inform the school of the child's condition. On another child's birthday, all the pupils receive a piece of birthday cake. The cake makes the child with coeliac disease ill. The parents argue that the school has discriminated against their child because of his disability. He has eaten food which affects his health. They argue that none of the children should have been offered cake. The school says that it had no information about the child's special dietary needs and that staff would have offered appropriate alternatives to cake if they had been aware of the problem. There are other children in the nursery school with special dietary needs. These needs are met by the school. It is likely that the school has acted lawfully.

- 7.11 However, if any member of staff at the school has been informed that a pupil has a disability, then the responsible body may not be able to rely on the lack of knowledge defence. The school needs to communicate the information to whomsoever may need to know.

EXAMPLE 7.11A

A pupil tells the school secretary that she has diabetes and that she needs to carry biscuits to eat when her blood sugar levels fall. A teacher has no information about her diabetes and

refuses to allow pupils to bring food into the class. The girl has a hypoglycaemic attack. In this case, the school is unlikely to be able to argue that it did not know about her condition. It is unlikely that the responsible body could rely on a lack of knowledge defence.

- 7.12 This example highlights the need for schools to be able to communicate relevant information about a pupil's disability to any staff who may need to know. The communication of such information needs to include all staff who may meet with the pupil at any point during the day. Sometimes it may be necessary to communicate the information beyond the school walls, see example 7.16A.

Confidentiality requests

- 7.13 A parent can ask the school to keep confidential the nature of, or the existence of, their child's disability. A request for confidentiality may also come from a child. Where a child requests confidentiality, the school should take that request into account if it reasonably believes that the child understands what he or she is asking to be done and what the effect of the request will be.
- 7.14 Under the reasonable adjustments duty, the Act says that schools should take into account any confidentiality request that they may have received. If a pupil or a parent requests confidentiality then the nature of the particular steps to be taken for that pupil may then be modified to take account of the request.
- 7.15 A request for confidentiality may limit what the responsible body may be able to do by way of making reasonable adjustments. The Act says that,

in considering what particular steps to take, responsible bodies must think about the extent to which taking a particular step is consistent with keeping confidentiality, where it has been requested.

EXAMPLE 7.15A

The parents of a six-year-old girl ask the head teacher to regard information about her leukaemia as confidential. The parents are concerned that she should be treated 'positively and as if everything is normal'.

The pupil has a number of days away from school and periods of sickness and tiredness because of her treatment. The class teacher expresses concern about this and the girl's poor work and asks to meet the parents. They still say nothing to her about their daughter's condition.

After a further round of treatment the parents complain that the class teacher has 'picked on' their daughter for uncompleted class work.

In this case there were steps that the school might have taken, which they could not because of the confidentiality request. For example, in respect of the teaching and learning expectations, the school could have sought advice from the child's oncology nurse or paediatrician to support the class teacher in managing periods of sickness and tiredness and determining when it might be appropriate to make demands. In effect, if the school could have shared the information, they would have been able to plan positively to maximise the pupil's progress and her personal support in the school.

- 7.16 If a school is concerned about the impact of a confidentiality request it will need to be able to explain this to parents and to disabled pupils themselves. Where a parent, or a pupil who clearly understands the impact of the confidentiality request, remains opposed to the sharing of relevant information about their disability, the school will need to be able to explore with them any possible alternative steps that might be taken to minimise any disadvantage to the pupil.

EXAMPLE 7.16A

The parents of a nine-year-old boy with epilepsy ask the head teacher to keep confidential the existence of and the nature of their child's disability. Their son's medication has been effective in reducing the number of fits that he has and he is unlikely to have a fit in school. However, on seeking professional advice the head teacher is told that it would be unsafe for the boy to go swimming without informing the staff at the pool. The parents do not want them to be told. The head teacher decides that the safety of the child dictates that he should not go swimming unless staff at the pool can be told. This is likely to be lawful.

- 7.17 Parents and pupils who believe that schools will handle sensitively any information about a disability are more likely to agree to the sharing of that information with those who are working with the pupil and who need to know about the existence of and the nature of the pupil's disability.

Redress and conciliation in Scotland

8

This chapter explains:

- what happens in Scotland if someone makes a complaint against a responsible body;
- what routes for redress exist;
- what action may be taken to put right any discrimination that is found to have taken place.

Introduction

- 8.1 If a parent believes that a responsible body has discriminated against their child they can make a claim of unlawful discrimination.
- 8.2 In some circumstances, older children can also make a claim in their own right. This chapter sets out the circumstances in which a claim can be made, how it is made, to whom and against whom. The chapter also explains conciliation as an alternative way of resolving issues.

Claims of unlawful discrimination

- 8.3 A parent or an older child (see 8.5 and 8.6) who believes that a responsible body has unlawfully discriminated may make a claim against that body. Claims of unlawful discrimination are brought as civil proceedings in the Sheriff Court. The claim is made against the responsible body for the school. No claim can be made against an individual, against someone employed by the responsible body or against someone acting on behalf of the responsible body.

- 8.4 The claim of unlawful discrimination must be made to the court within six months of the date of the discrimination unless the matter has been referred to conciliation (see 8.10 to 8.12), when the time in which to make the claim may be extended to eight months. Where discrimination takes place over a period of time, the six months may begin at the date of the last (or most recent) discriminatory act. However, the Court has a discretion in certain circumstances to allow a case which would otherwise be out of time to proceed, where it would be just and reasonable to do so.

Who has the power to bring a case?

- 8.5 A parent may make a claim on behalf of their child up to age 16. Pupils over the age of 16 (if they have legal capacity) may bring claims in their own right.
- 8.6 Under the age of 16, a child can also bring court action in her/his own right if the child has a general understanding of what it means to do so. A person aged 12 or more is presumed to have sufficient age and maturity to instruct a solicitor in such proceedings. Children under 12 are also able to instruct a solicitor provided they too have the requisite general understanding.

Where both child and parent have rights to bring a case, either may do so.

Remedies

- 8.7 The person bringing the claim of unlawful discrimination can ask the Sheriff Court:
- to declare whether the child's rights have been affected and whether any discrimination has taken place (a declarator);

- to grant an interdict to prevent the responsible body from discriminating in the future, either by repeating something they have done already or were going to do. An interim interdict might be available at short notice to prevent a particular course of action. If the interdict is breached, then further court action can be taken against the responsible body which may result in censure by fine, imprisonment or other;
- to make an order requiring positive action by the responsible body in order to comply with its statutory duties. A number of conditions may be specified to ensure that the responsible body complies with the order and a clear timescale will be given for compliance.

Financial compensation is not available.

- 8.8 If the Sheriff Court is hearing a claim under the Disability Discrimination Act 1995 relating to an exclusion, it has the power to 'reduce' a decision to exclude if the decision is unlawful by reason of discrimination. This would have the same effect as annulling (or overturning) the exclusion.
- 8.9 Bringing a disability discrimination claim to the Sheriff Court does not prevent a child or parent from pursuing other remedies available to them (e.g. SEN, placing request or exclusion appeals in terms of the Education (Scotland) Act 1980).

Conciliation

- 8.10 The Disability Rights Commission has set up an independent conciliation service for disputes arising from the schools' duties under the Act. The purpose of the conciliation service is to promote the settlement of disputes without going to the courts. Disputes may be referred to conciliation only if both the claimant and the responsible body

agree. However, it does not have power to impose a settlement on either party.

- 8.11 Agreeing to the conciliation process does not prevent a claimant from deciding to pursue a claim through the courts. The time limit for bringing a claim in court is extended by two months (to eight months) if the dispute is referred to conciliation before the expiry of the six-month period. No information disclosed to a conciliator during the conciliation process may be used in any subsequent court case without the permission of the party who provided the information.
- 8.12 If a dispute concerning unlawful discrimination cannot be resolved by conciliation or agreement, then a case may be brought in the Sheriff Court (see 8.7).

Complaints

- 8.13 Someone with a claim may want to raise it directly with the responsible body. Many responsible bodies will have complaints procedures which will help the dispute to be resolved quickly without needing to make a claim. Claimants should raise their claim with the responsible body before starting legal proceedings but will need to keep in mind the time limits for bringing a claim to court (see 8.4).

Where to go for information and advice

- 8.14 Parents, children or young people wanting to make a claim under the Act against a responsible body may get further information and advice about the process from the Disability Rights Commission. Those making a claim to the Sheriff Court may be eligible for Legal Aid, and in some circumstances may receive direct assistance from the Disability Rights Commission.

- 8.15 The Disability Rights Commission also provides advice to responsible bodies about their legal responsibilities under the Act.

DRC Helpline

Telephone: 08457 622 633

Textphone: 08457 622 644

Fax: 08457 778 878

Email: enquiry@drc-gb.org

Post: DRC Helpline
FREEPOST
MID 02164
Stratford upon Avon
CV37 9BR

Website: <http://www.drc-gb.org>

- 8.16 Information is available from the Scottish Court Service about the court process and bringing court actions:

Telephone: 0131 229 9200

Fax: 0131 221 6895

Email: enquiries@scotcourts.gov.uk

Website: www.scotcourts.gov.uk

Redress and conciliation in England and Wales

9

This chapter explains:

- what happens in England and Wales if someone makes a complaint against a responsible body;
- what routes for redress exist;
- what action may be taken to put right any discrimination that is found to have taken place.

Introduction

9.1 If a parent considers that a responsible body has discriminated against their child they can make a claim of unlawful discrimination. This chapter sets out, in some detail, the circumstances in which a claim can be made, how it is made, to whom and against whom. The chapter also explains conciliation as an alternative way of resolving issues.

Claims of unlawful discrimination

9.2 The Act says that a claim of unlawful discrimination against a child can be made by the child's parents. Claims are brought by the parent on behalf of the child and there is no provision for children to bring their own case. The claim is made against the responsible body for the school. No claim can be made directly against an individual or against someone employed by, or acting on behalf of, the responsible body.

- 9.3 A parent can claim that their child has been discriminated against on the grounds of their disability. Most claims of disability discrimination must be made to a Tribunal. The Special Educational Needs Tribunal has been hearing SEN appeals in England and Wales since 1994 and the Disability Discrimination Act extends the remit of that Tribunal to include most claims of disability discrimination.

The Special Educational Needs and Disability Tribunal (SENDIST)

- 9.4 From September 2002 the Special Educational Needs Tribunal has an extended remit and is renamed the Special Educational Needs and Disability Tribunal (SENDIST). From this time SENDIST will hear most claims of unlawful discrimination in admissions, exclusions and in education and associated services in schools.
- 9.5 Some claims of unlawful discrimination will be heard by admissions appeals panels and, for exclusions, independent appeals panels. These are considered below under separate headings. The legal position is as follows:
- SENDIST hears claims of unlawful discrimination in relation to fixed-period (temporary) exclusions from all schools;
 - SENDIST hears claims of unlawful discrimination in relation to admissions to, and permanent exclusions from, all schools other than maintained schools and City Academies;
 - claims of unlawful discrimination in respect of a refusal to admit to, and permanent exclusions from, maintained schools and City Academies are heard by admissions appeals panels or independent appeals panels.

- 9.6 SENDIST has powers to order any remedy it thinks reasonable with the exception of financial compensation. The range of remedies is explained more fully below.

Timescales for making a claim to SENDIST

- 9.7 Parents must make a claim of unlawful discrimination to SENDIST within six months from when the alleged discrimination took place. This time period is extended to eight months if the dispute is referred to the DRC conciliation service before the expiry of the six-month period. Where the discrimination takes place over a period of time, the six months begins at the date of the last discriminatory act. A claim can be lodged at any time from the time the alleged discrimination occurred to the expiry of the six- (or eight-) month period. In most cases, particularly in respect of fixed-period exclusions, permanent exclusions and admissions, the sooner the claim is made the better. This is because a claim to the Tribunal can take some months to be heard. Once lodged, it is possible to withdraw a claim at any stage. The Tribunal can hear claims which are brought out of time, when it is just and equitable to do so.
- 9.8 More detailed information about how SENDIST deals with claims of unlawful discrimination in school education, including exclusion and admission appeals, can be obtained from SENDIST see **Appendix Three**.

Claims of unlawful discrimination and appeals under the SEN framework

- 9.9 Under the SEN framework (Part 4 of the Education Act 1996) parents have a right of appeal against certain decisions of the local education authority (LEA) about how their child's special educational

needs are to be met. SENDIST hears these appeals and it hears claims of disability discrimination. If a SEN appeal and a disability claim arise in respect of the same child the SENDIST may be able to hear the two together.

- 9.10 It should be noted, however, that the time limit for making an appeal under the SEN framework is two months from the date that the decision letter is received and can only be extended in exceptional circumstances. The fact that there is also a claim of disability discrimination will not necessarily amount to exceptional circumstances which would enable the time limit to be extended.

Remedies

- 9.11 If a claim of unlawful discrimination is successful, SENDIST can make a declaration that a child has been unlawfully discriminated against, and it can order any remedy it thinks reasonable against the responsible body, with the exception of financial compensation. Examples of the kind of orders that SENDIST might make are:
- disability training for staff;
 - the preparation of guidance for staff on combating disability discrimination;
 - meetings between an LEA equal opportunities officer, parents, the pupil and the school to review what reasonable adjustments (short of adjustments to the physical premises or provision of auxiliary aids) might be required;
 - the review or alteration of school or LEA policies, for example, those that prevent visually impaired pupils going into the science laboratory, those that prevent disabled pupils

- going on certain school trips, and anti-bullying policies so that they deal with bullying on the grounds of disability;
- additional tuition to compensate for missed lessons (such as science lessons in the example above);
- the relocation of facilities (short of requiring an adjustment to the physical premises);
- the admission of a disabled pupil to an independent school (where the school had previously refused) or their admission on the same terms as pupils who are not disabled;
- additional tuition for a temporarily excluded pupil to enable the pupil to catch up on education missed due to discrimination;
- a formal written apology to a child.

Information about SENDIST

- 9.12 SENDIST operates under procedures set out in regulations that come into force in 2002. More detailed guidance on the procedure for making a claim can be obtained from the Tribunal:

Telephone: 020 7925 6925

Fax: 020 7925 6926

Powers of the Secretary of State

- 9.13 SENDIST will be able to set deadlines when directing action by schools and LEAs. If a responsible body fails to comply within the deadlines set by SENDIST or if it has acted or is proposing to act unreasonably in complying with SENDIST's order, the Secretary of State can make a direction to require compliance. This is enforceable through the courts if necessary.

Admission appeal panels

- 9.14 Admission appeal panels will hear claims of discrimination in relation to refusals to admit to maintained schools and City Academies. In all other cases the claim is made to SENDIST.
- 9.15 A claim of discrimination is made in writing. It should set out the circumstances that have led to the claim being made. There is often a very short time limit in which to appeal but this should not be less than 14 days (that is, 10 working days) from the date of notification to the parents that their application for a place at the school was unsuccessful. Claims being heard by admission appeal panels will be subject to the usual rules and procedures of those panels.
- 9.16 An admission appeal is made in accordance either with the *Code of Practice for School Admission Appeals* issued by DfES for schools in England and or with the equivalent Code of Practice for Schools Admission Appeals issued by the National Assembly for Wales. These Codes were introduced by the School Standards and Framework Act 1998. Different schools have different procedures.
- 9.17 All community and voluntary controlled schools maintained by the LEA have the appeal arrangements made for them by the LEA. A claim of unlawful discrimination is made and heard in the same way as other admissions appeals. A letter refusing admission explains how to appeal. The education office in the LEA responsible for admissions can also provide the appropriate information.
- 9.18 Voluntary aided and foundation schools and City Academies make their own arrangements to enable an appeal to be made. The school sends out details of how to appeal at the same time as the letter

refusing to admit the child. The school office can also provide the appropriate information about making an appeal.

- 9.19 Admission appeal panels can order that a pupil be admitted.
- 9.20 The website:
(<http://www.dfes.gov.uk/a-z/ADMISSIONS.html>) gives more information about admission appeals.

Independent appeal panels for exclusions

- 9.21 Independent appeal panels will hear claims of unlawful discrimination in relation to permanent exclusions from maintained schools and City Academies. Claims of discrimination in relation to permanent exclusions from other schools and fixed-period (temporary) exclusions from all schools are made to SENDIST. Claims of unlawful discrimination being heard by exclusion appeal panels are made and heard in the same way as other appeals against a decision to exclude.
- 9.22 Exclusions in maintained schools are governed by the School Standards and Framework Act 1998. There is guidance in Annex D of *Circular 10/99 Social Inclusion: Pupil Support* produced by the DfES, and in *Circular 3/99, Pupil Support and Social Inclusion* for guidance on exclusions in Wales produced by the National Assembly for Wales. An overview of the process is given below.
- 9.23 When a pupil is excluded by the head teacher, the parent is notified immediately (usually by telephone) with a letter to follow within one school day. The discipline committee of the school governing body then meets to review the head teacher's decision to exclude the pupil and decide whether to confirm that decision.

- 9.24 A letter to the parents from the clerk to the discipline committee sets out the decision of the committee and explains that, in cases of permanent exclusion where the exclusion has been upheld, there is a further right of appeal to an independent Exclusion appeal panel set up by the LEA. Details of the procedure to be followed are provided in a letter from the LEA.
- 9.25 There are 15 school days from the day the parents are told of the decision of the discipline committee in which to lodge an appeal to the Exclusion appeal panel. The Panel has to meet within 15 school days of the appeal being lodged.
- 9.26 Exclusion appeal panels can order that a pupil be reinstated.
- More information about exclusion appeals can be found on:
www.dfes.gov.uk/a-z/EXCLUSION_ba.html
www.learning.wales.gov.uk
(Subject Index – education and training Document Type – Circulars – 3/99)
- 9.27 There are further remedies in respect of the decision of the Exclusion Appeal Panel’s decision available to the parents through the courts.

Conciliation

- 9.28 The Disability Rights Commission runs an independent conciliation service for disputes arising from the schools’ duties under the Act. The purpose of the conciliation service is to promote the settlement of claims without going to the Tribunal or other body. Disputes may be

referred to conciliation if both the parent and the responsible body agree. However, it does not have the power to impose a settlement.

9.29 Agreeing to the conciliation process does not prevent a parent from deciding to pursue a claim of discrimination through the Tribunal or admission or exclusion appeal panel. However, in the last two cases the very short timescales may prevent there being any effective conciliation.

9.30 The time limit for appealing to the SENDIST is extended by two months if the conciliation process has been requested within six months of a discriminatory act. No information disclosed to a conciliator during the conciliation process may be used in any subsequent Tribunal case without the permission of both parties.

9.31 Full details of the conciliation service are available from the Disability Rights Commission Helpline:

Telephone: 08457 622 633

Textphone: 08457 622 644

Fax: 08457 778 878

Email: enquiry@drc-gb.org

Post: DRC Helpline
FREEPOST
MID 02164
Stratford upon Avon
CV37 9BR

Website: <http://www.drc-gb.org>

The DRC advice line can give information about their rights and responsibilities to both parties to a dispute.

Complaints

- 9.32 Parents may want to consider making a complaint directly to the responsible body either before or at the same time as making a claim to the SENDIST. In maintained schools in England and Wales the responsible body is usually the governing body, but see **Chapter 4** for full explanation of who is the responsible body.
- 9.33 Support for parents making a complaint may be available locally. Locally arranged parent partnership services may be able to put parents in touch with a range of organisations that may be able to provide information and support at the time of making a complaint. The benefit of making a complaint in this way is that it may allow for the informal resolution of the issues before a claim reaches SENDIST or other appeal panel. However, parents need to be aware of the timescales involved in making a claim of discrimination. These only make allowance, see above, for formal conciliation arranged by the Disability Rights Commission.

Other duties under the Disability Discrimination Act 1995

10

This chapter explains other duties that responsible bodies and providers of education have under other duties in the Disability Discrimination Act 1995. It focuses on:

- the residual duty of education authorities;
- how early years education is covered where it is not provided at a school;
- victimisation;
- liability for employees' and agents' actions;
- terms of agreements.

The education authority's residual duties

- 10.1 Part 4 of the Disability Discrimination Act 1995 makes it unlawful for an education authority in Scotland or for a local education authority in England or Wales to discriminate against a disabled pupil or a disabled prospective pupil in the discharge of its functions under various Acts relating to education, in particular:
- The Education Act 1996;
 - The Education (Scotland) Act 1980;
 - The Standards in Scotland's Schools etc. Act 2000.
- 10.2 Sections 28F and 28G of the Disability Discrimination Act 1995 are intended to cover the full range of education-related functions of education authorities that affect pupils or prospective pupils. An authority will already be under certain duties in Part 4 of the Act (where it is the responsible body for a school). In effect, education authorities come under the schools' duties in respect of the schools for which they are responsible and under the residual duty

s 28F and s 28G

for more general functions. The residual duty consists of the schools' duties applied to those general functions. The schools' duties, 'less favourable treatment' and 'reasonable adjustments' duties, are explained in **Chapters 5** and **6**, respectively.

10.3 Authorities should have regard to all their functions under the full range of education legislation to ensure that they are not treating disabled pupils less favourably. Such functions may include:

- policies (such as the authority's policies on special educational needs, capital building programmes, sports, cultural activities, transport, early years provision);
- the education authority's policy and arrangements on school admissions and exclusions and (in England and Wales) the school's admissions policy and arrangements;
- the deployment of the authority's non-delegated budget and any other arrangements which might directly affect disabled pupils;
- services to pupils (such as weekend or after school leisure and sporting activities, school trips, cultural activities).

EXAMPLE 10.3A

Home-school transport for disabled pupils in a local education authority (LEA) always leaves primary schools at 3.30pm. The LEA reviews its transport policy when it realises that disabled pupils who are dependent on taxis might be at a substantial disadvantage if they were not able to stay to after-school clubs. The LEA re-negotiates its contract with the taxi firm so that it is possible to specify later departure times. This is likely to be a reasonable adjustment that the LEA should make.

EXAMPLE 10.3B

Home-school transport for disabled pupils in an education authority in Scotland always leaves primary schools at 3.30pm. The education authority reviews its transport policy when it realises that disabled pupils, placed by them at an independent school and who are dependent on taxis, might be at a substantial disadvantage if they were not able to stay to after-school clubs. The education authority re-negotiates its contract with the taxi firm so that it is possible to specify later departure times. This is likely to be a reasonable adjustment that the education authority should make.

- 10.4 These duties apply to prospective as well as to current pupils and cover the full range of education provision, including nursery education, arrangements for home and hospital tuition, and pupil referral units (in England and Wales) as well as the school stages of education.
- 10.5 When considering which duties apply to its schools' functions, an authority should first consider whether the duties not to discriminate under section 28A of the Act apply. If they do not, then the duty under this section – known as the 'residual duty' of the authority – will apply.
- 10.6 In consequence of these duties, education authorities may wish to review the full range of educational policies, practices and procedures for current and prospective pupils to ensure that they do not discriminate against disabled children.

Early years education that is not provided in a school

- 10.7 There are many private, voluntary and statutory providers of early years services that are not constituted as schools. The social care of young children in these settings has been covered by Part 3 of the Disability Discrimination Act 1995 since 1996. From September 2002, the education that is offered in these settings is also covered by the duties in Part 3 of the Act.
- 10.8 If an early years establishment provides education and day care for children, all of these services will be covered by the provisions set out in Part 3 of the Disability Discrimination Act 1995.
- 10.9 All early years providers will therefore have a duty not to discriminate against disabled pupils in both the education and the day-care or other services provided made within their provision. The table below sets out the disability legislation covering each different type of provider.

TABLE 1: EARLY YEARS EDUCATION PROVIDERS: DISABILITY LEGISLATION (SCOTLAND)

Part 3 of the DDA	Schools' duties in Part 4 of the DDA	EA residual duty in Part 4 of the DDA
Local authority day nurseries (i.e. not on school premises), family centres etc.	Schools (including nursery schools) managed by an education authority	Any home teaching services for young children
Private and voluntary playgroups and pre-schools	Registered independent schools	
Accredited childminders	Grant-aided schools Home teaching services	

TABLE 2: EARLY YEARS EDUCATION PROVIDERS: DISABILITY LEGISLATION (ENGLAND AND WALES)

Part 3 of the DDA	Schools' duties in Part 4 of the DDA	LEA residual duty in Part 4 of the DDA
Local authority day nurseries, family centres etc.	LEA maintained schools	Home teaching services for young children, such as Portage
Private and voluntary playgroups and pre-schools	LEA maintained nursery schools	
Accredited childminders	Independent schools Non-maintained special schools	

The Part 3 duties are explained in a separate Code of Practice published by The Stationery Office on the duties in Part 3 of the Act, *Rights of Access to Goods, Facilities, Services and Premises*.

Victimisation

- 10.10 Victimisation is a special form of discrimination covered by the Disability Discrimination Act 1995. It applies whether or not the person victimised is a disabled person. For the purposes of the schools' duties in Part 4 of the Act, victimisation is treated as discrimination.
- 10.11 The Act says that a person discriminates against another person (the victim) if he or she treats the victim less favourably than he or she treats (or would treat) other people in the same circumstances – regardless of the disability – because the victim has:

s 55(2)(a)(iv)

- brought proceedings under the Act (whether or not proceedings are later withdrawn); or
- given evidence or information in connection with such proceedings; or
- done anything else under the Act; or
- alleged someone has contravened the Act, whether or not the allegation so states. (This covers situations where someone may not have actually made a specific disability claim but it is interpreted as such a claim or it implies that there has been disability discrimination.)

EXAMPLE 10.11A

A non-disabled pupil acts as a witness in a complaint by a disabled pupil against a classroom teacher. The disabled pupil has been repeatedly refused permission to sit at the front of the class or to draw down blinds at a window to prevent the sun's glare from reflecting on her low-vision aid. She has also been refused permission to use a printer in class to produce her large-font notes because of the noise. Other pupils have been clear that they are happy for the printer to be used and to move desks to enable the pupil with the visual impairment to sit in the most suitable place for particular lessons. After the non-disabled pupil has supported the complaint to the head teacher, she finds that her homework sometimes goes missing. She is not always given copies of homework notes and she does not get a part in a school drama production in which she was expected to have a lead role. Her parents are told at a parents' evening that her behaviour is 'not acceptable', although she has never been in trouble in class. She and her parents consider that the other staff are 'joining up against her' because she supported her disabled friend. Although the pupil concerned is not disabled, this is likely to be victimisation under the Act, and therefore unlawful.

- 10.12 Parents and siblings are also protected from victimisation when they are carrying out protected actions under the Act (for example, making a complaint).
- 10.13 The Act also says that a person discriminates against another person (the victim) if he or she treats the victim less favourably than he or she treats (or would treat) other people in the same circumstances because he or she believes or suspects that the victim had done or intends to do any of the things mentioned in 10.11 above. Such victimisation is discrimination, whether or not the victim is disabled.
- 10.14 However, it is not victimisation to treat a person less favourably because that person has made an allegation if the allegation was false and not made in good faith.

s 55

EXAMPLE 10.14A

A pupil with epilepsy makes a series of allegations that she and other disabled pupils are constantly excluded from after-school activities (such as sport and music) because of their disabilities. She is sometimes difficult and disruptive in the after-school sessions and has upset other pupils. Her complaints have been directed against the member of staff co-ordinating after-school clubs at the school. The allegations are investigated and found to be without any foundation, and are considered to have arisen from a personal vendetta against the staff member. Other disabled pupils in the school feel that they have been positively included in the after-school sessions and have no complaint. After discussion, the co-ordinator decides that he will allow the pupil to continue in the after-school activities, provided

that she drops her allegations and does not disrupt the other pupils. Because of the particular circumstances, this is not likely to be regarded as victimisation and hence not likely to be unlawful. The pupil is being asked to modify her behaviour for reasons unrelated to her disability but directly relevant to the well-being of other pupils.

Liability for employees' and agents' actions

s 58(1)

- 10.15 The Act says that employers are responsible for anything done by their employees in the course of their employment. As an employer, a responsible body cannot use the defence that discrimination took place without its knowledge or approval.

EXAMPLE 10.15A

A school's director of music uses a number of specialist teachers on a sessional basis. Unknown to the school, one of the sessional teachers makes little effort to teach two physically disabled pupils, believing that they will never be able to play the clarinet. It is likely that this is less favourable treatment and is unlawful. Although the governing body at the school is not aware that this is happening, the responsible body is likely nevertheless to be liable under the Act.

s 58(5)

- 10.16 If a claim under the Act is made against a responsible body based on anything done by an employee, it is a defence that the responsible body took such steps as were reasonably practicable to prevent such acts. Examples of such steps could be developing policies on disability matters and communicating these to employees, and ensuring

all staff are aware that it is unlawful to discriminate against disabled people.

- 10.17 Under Section 58, any individual act of discrimination on the part of employees renders the responsible body potentially liable unless it can make out a proper defence. It would be difficult for a responsible body to make out such a defence unless it could:
- demonstrate that it has clear policies in place which are backed by appropriate information, advice or training and regularly monitored; and
 - that there are disciplinary procedures in place to back up such policies.
- 10.18 If a complaint of discrimination is made to a school about an individual member of staff the responsible body may have no defence against a claim of unlawful discrimination if it does nothing to stop discrimination. Such action could include fully investigating any complaint of discrimination and taking any necessary disciplinary action.

EXAMPLE 10.18A

A pupil with a physical disability needs access to private toilet facilities for personal care. The facilities must have hot water and sufficient room for a power wheelchair and the pupil's personal assistant. The school has identified some funding to redesign and adapt its toilet and access arrangements. In the interim, the only accessible toilet is small, in the playground and has no hot water. The school agrees that the pupil can use the staff toilet as an interim measure. However, one teacher objects and argues that this is a facility for staff only. The head teacher has instructed her not to block the pupil's access.

However when she is on playground duty, the teacher regularly walks off with the key or claims she cannot find it. Her actions are likely to place the pupil at a substantial disadvantage. The responsible body is liable for the teacher's actions. The parents of the child complain and the head teacher institutes the formal complaints procedure and disciplinary policy of the school. The responsible body is likely to have a defence against a claim of unlawful discrimination.

s 58(2)

10.19 Responsible bodies are also liable for anything done by their agents, if done with their authority. That authority may be explicit or implied and may have been given before or after the act in question.

s 58(3)

EXAMPLE 10.19A

A school has asked a parent to run a martial arts club after school. The parent running the club refused to admit a pupil with a visual impairment, saying that he cannot possibly do martial arts. Because the parent is running the club with the authority of the school, the parent is the agent of the school and the responsible body may have no defence against a claim of unlawful discrimination if it has done nothing to stop any discrimination on the part of the parent.

EXAMPLE 10.19B

A school makes arrangements for a variety of activities to take place at a local leisure centre as part of the school timetable. The arrangements include procedures for:

- the school to inform the leisure centre of any reasonable adjustments that they may need to make for disabled pupils;
- the leisure centre to inform the school of any concerns that they may have about the participation of any disabled pupils in the programmes they provide.

A pupil with asthma wants to join an athletics class with other pupils from his class. The pupil, the school and leisure centre staff plan a modified programme. The leisure centre monitors the programme and discusses any concerns with the school. The duties in Part 4 of the Disability Discrimination Act remain the responsibility of the responsible body for the school. The responsible body has sought to ensure that the arrangements with the leisure centre enable it to meet its duties under the Act. It is likely to have acted lawfully.

Terms of agreements

- 10.20 Any term in an agreement is void (that is to say, unenforceable) if its effect is to require someone to do something which would be unlawful under the Disability Discrimination Act 1995.
- 10.21 A term in an agreement is also void (that is to say, unenforceable) if its effect is to exclude or limit the operation of the Act, or prevent someone making a claim under the Act. However, an agreement to settle or compromise a claim brought under the Act is not affected by this rule.

EXAMPLE 10.21A

A school will only agree to a disabled pupil coming on a field trip if the parents sign an agreement stating that they do not hold the school responsible for making any adjustments which may be necessary to ensure that the pupil benefits from the planned activities on the trip and will not take any action if the pupil is excluded from any activities. It is likely that the agreement is not legally binding.

11

Relationship with other legislation and responsibilities

This chapter sets out the general approach to be taken by responsible bodies when considering the Disability Discrimination Act and its interaction with other legislation and duties. It explains some of the links which they are most likely to encounter. It is not an exhaustive list and responsible bodies need to consider their other responsibilities where relevant.

General approach

- 11.1 Nothing in the Disability Discrimination Act takes precedence over any other statutory duties which responsible bodies or other bodies may have. In carrying out their duties under the Act, responsible bodies must ensure that they comply with all other legal requirements upon them. However, the existence of other legislative provisions and responsibilities does not provide an automatic defence in a case under Part 4 of the Disability Discrimination Act. Responsible bodies are expected to take whatever action is necessary to ensure that they fulfil their responsibilities both under the Disability Discrimination Act and under any other legislation that applies to them.

The Data Protection Act 1998

- 11.2 The Data Protection Act 1998 restricts the processing of personal data and 'sensitive' personal data about individuals, and particularly how and whether that information can be passed on to others. The use of

sensitive personal data is particularly restricted. Information relating to an individual's disability is classified as sensitive personal data. In ensuring that disabled people and pupils are not discriminated against, and that reasonable adjustments are made, responsible bodies may need to pass data about disabled students on to members of staff and others.

11.3 Even if confidentiality has not been requested under the Disability Discrimination Act, the use and transfer of information is restricted by the Data Protection Act. Such processing may often require explicit informed consent. In order to ensure that they are not in breach of either law, responsible bodies may need to:

- ask permission to pass on information necessary for making reasonable adjustments;
- alert pupils and parents to the use that will be made of information when asking them to disclose disability on application, enrolment or examination forms;
- ensure appropriate procedures are in place to keep sensitive and other personal information confidential.

11.4 Should a request for confidentiality under the Disability Discrimination Act be made, information may not, from that point, be passed on for the purposes of making reasonable adjustments.

s 28C(6)

The Health and Safety at Work Act 1974 and related regulations.

11.5 Health and safety legislation requires employers and persons concerned with premises to undertake risk assessments and to produce a health and safety policy. The risk assessment should set out any risks to staff and others, including pupils and

users of services, and what control measures the employer will take to reduce those risks. Control measures to reduce risk may include:

- procedures for lifting pupils and equipment
- guidance on visits to pupils in their homes
- appropriate training and guidance for staff
- keeping passageways and means of access and egress clear and hazard-free
- minimising the risk posed by any machinery or hazardous substances (including any stored medicines)
- procedures for the safe disposal of waste and safe practices in first aid
- adequate procedures for monitoring and auditing to ensure that health and safety practices are operating properly
- provision of personal or intimate care.

11.6 The Disability Discrimination Act 1995 does not require responsible bodies to place employees or pupils at inappropriate risk if a health and safety issue arises. However, changes to policies and procedures and/or the provision of training may mitigate any health and safety risks that arise in relation to disabled people or pupils. The risk assessment process carried out to comply with health and safety legislation may provide an opportunity to consider adjustments required by the Disability Discrimination Act.

EXAMPLE 11.6A

A school has refused to admit a child with HIV to its nursery class, arguing that she constitutes a 'health hazard' to other pupils and that her needs cannot be met in a mainstream school. A risk

assessment has not demonstrated any risk of cross-infection. The admission of the child should not present a risk, provided that the school puts in place procedures for infection control, the safe disposal of waste and the safe practice of first aid. The school's refusal to admit the pupil is likely to be unlawful.

The Fire Precautions Act 1971 and related regulations

- 11.7 Legislation exists to prevent the risk of fire and the risk of injury in fire. In particular there is legislation to ensure adequate warning in the case of fire and the safe egress of people from buildings to a place of safety in the case of a fire. Responsible bodies do not have to make physical alterations or provide auxiliary aids under Part 4 of the Disability Discrimination Act. However, it is often possible to make provision for disabled people through changes to policies, practices and procedures to ensure that fire regulations are not breached.

The Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960

- 11.8 This legislation puts into statute the common law duty of care which occupiers owe to lawful visitors. The duty is to take such care as is reasonable in all the circumstances of the case so that people are reasonably safe when using the premises. For the purposes of this legislation a responsible body will be an occupier if it has sufficient control over premises. The responsible body owes this duty towards its pupils and other people using the premises, and may need to make adjustments to premises to comply with the legislation. The obligation to make reasonable adjustments under

the Disability Discrimination Act may apply at the same time as duties under the Occupiers' Liability Acts.

- 11.9 Landlords in England and Wales who let premises and thereby part with all control are not 'occupiers' under the 1957 Act, even if they retain repair obligations. However, in Scotland the Occupiers' Liability (Scotland) Act 1960 places the same duty on landlords responsible for the maintenance or repair of premises as on occupiers and they must take reasonable care to ensure people on the premises do not suffer injury.

The Defective Premises Act 1972

- 11.10 Some responsible bodies may act as a landlord with regard to their premises. As such, they owe a duty to take such care as is reasonable in all circumstances to see that anyone who might reasonably be affected by defects in the state of the premises is safe from personal injury or damage caused by the defect. Responsible bodies may need to make adjustments where necessary to ensure their compliance with this legislation and this may impact on their duties towards disabled pupils. The Defective Premises Act 1972 applies to England and Wales only.

The Human Rights Act 1998

- 11.11 The Human Rights Act brings into UK law certain of the rights and freedoms guaranteed under the European Convention on Human Rights, and is binding on 'public authorities', which includes bodies whose functions are of a public nature. Most responsible bodies will be public authorities to the extent that they offer education or other related provision. The Human Rights Act includes a right not to be denied access to education, and a

right not to be discriminated against in the enjoyment of that (or other) Convention rights. Some disabled people and students may have rights under both the Disability Discrimination Act 1995 and the Human Rights Act 1998 and may be able to pursue a claim under both Acts together.

The Race Relations Act 1976 and the Race Relations (Amendment) Act 2000

11.12 The Race Relations Act 1976 and the subsequent Race Relations (Amendment) Act 2000 make racial discrimination unlawful in employment, training and related matters, in education and in the provision of goods, facilities and services and in the management and disposal of premises. The legislation applies to Scotland, England and Wales.

11.13 The Race Relations (Amendment) Act places a duty on public bodies to promote equality between different racial groups. Most responsible bodies under Part 4 of the Disability Discrimination Act are also public bodies for the purposes of the Race Relations (Amendment) Act.

The Sex Discrimination Act 1975

11.14 The Sex Discrimination Act 1975, as amended in 1986, makes it unlawful to discriminate on grounds of sex in employment, education, advertising or when providing goods, facilities, services and premises.

11.15 Responsible bodies should be aware that in some cases allegations of discrimination on the grounds of disability may also be related to allegations relating to sex discrimination. Specific reference to the duties of responsible bodies and providers of education are set out in the Sex Discrimination Act 1975 and related guidance.

The Welsh Language Act 1993

- 11.16 Under the Welsh Language Act 1993, public bodies notified by the Welsh Language Board which provide services to the public in Wales have a duty (so far as is appropriate in the particular circumstances and is reasonably practicable) to treat the Welsh and English languages on a basis of equality. This includes a duty to provide information and services in the Welsh language. Public bodies include most education providers affected by this Code.

Common law duties

- 11.17 Responsible bodies have an overarching common law duty to take care that injury or loss is not caused to pupils in a variety of circumstances. This common law duty may sometimes overlap with the duties imposed by the Disability Discrimination Act 1995.

Statutory responsibilities of other bodies

- 11.18 Other bodies may have statutory duties towards disabled people and pupils. For example:
- social services or social work departments or health services may have responsibilities to provide personal assistance or other support;
 - other service providers (such as providers of sport or leisure services) may have responsibilities to make reasonable adjustments under the Disability Discrimination Act 1995.
- 11.19 In some cases, the responsibility of another body may overlap with that of the responsible body to make reasonable adjustments. The fact that another body also has a statutory duty does not reduce the responsible body's duty to make a reasonable adjustment where substantial disadvantage exists. Legally, both have duties.

In practice, responsible bodies will want to negotiate with those who hold parallel duties to ensure that disabled pupils and other disabled people receive the support and adjustments they need in the most effective and efficient way.

- 11.20 Responsible bodies should be aware of their responsibilities towards children in need under the Children Act 1989 in England and Wales and the Children (Scotland) Act 1995 in Scotland.

Other relevant legislation

- 11.21 Other relevant legislation includes:

- the Social Work (Scotland) Act 1968, which places legal requirements on local authorities to promote social welfare;
- the Schools (Safety and Support of Pupils) Scotland Regulations;
- the Chronically Sick and Disabled Persons Act 1970 (England and Wales) and the Chronically Sick and Disabled Persons (Scotland) Act 1972 (Scotland) place a duty on every local authority to know about the number of disabled people in their area and to provide a range of practical assistance for them;
- the Disabled Persons (Services, Consultation and Representation) Act 1986 applies to Scotland, England and Wales and requires schools to inform the education authority if they consider that a pupil might be disabled within the definition of the Disability Discrimination Act (see **Appendix Two**) and to notify the education authority prior to the pupil leaving school with regard to any community care arrangements which she might require;

- the NHS and Community Care Act 1990 sets out the framework for assessment for community care assessments for young people moving into adult services;
- the Children Act 1989, is a piece of overarching legislation relating to all children which sets duties upon schools and local authorities with reference to children's rights and protection;
- the Mental Health (Scotland) Act 1984 and the Mental Health Act 2000 (England and Wales) make a range of provisions relating to the mental health of adults and young people with mental health problems.

The meaning of disability

Appendix one

This appendix is included to aid understanding about who is covered by the Act and should provide sufficient information on the definition of disability to cover the large majority of cases. The definition of disability in the Act is designed to cover only people who would generally be considered disabled. A publication available from The Stationery Office, *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, is also available.

When is a person disabled?

- A1.1 A person has a disability if he or she has a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

Sch 1

What about people who have previously had a disability?

- A1.2 People who have had a disability within the definition are protected from discrimination even if they no longer have a disability.

Sch 2

What does 'impairment' cover?

- A1.3 It covers physical or mental impairments; this includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

A1.4 The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning difficulties. However, the Act states that it does not include any impairment resulting from or consisting of a mental illness, unless that illness is a clinically well-recognised illness. A clinically well-recognised illness is one that is recognised by a respected body of medical opinion.

What is a 'substantial' adverse effect?

A1.5 A substantial adverse effect is something more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

What is a 'long-term' effect?

A1.6 A long-term effect of an impairment is one:

- which has lasted at least 12 months; or
- where the total period for which it lasts is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected.

A1.7 Effects which are not long-term would therefore include loss of mobility due to a broken limb that is likely to heal within 12 months, and the effects of temporary infections from which a person would be likely to recover within 12 months.

What if the effects come and go over a period of time?

A1.8 If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect

ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it is more probable than not that the effect will recur. For example, if a person with rheumatoid arthritis whose impairment has a substantial adverse effect, which then ceases to be substantial (i.e. the person has a period of remission), the effects are to be treated as if they are continuing, and are likely to continue beyond 12 months, if:

- the impairment remains; and
- at least one recurrence of the substantial effect is likely to take place 12 months or more after the initial occurrence.

This would then be a long-term effect.

What are ‘normal day-to-day activities’?

A1.9 Normal day-to-day activities are those which are carried out by most people on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument or a sport to a professional standard or performing a skilled or specialist task related, for example, to a particular academic discipline, education or training course. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition. The test of whether an impairment affects normal day-to-day activities is whether it affects one of the broad categories of capacity listed in Schedule 1 to the Act. They are:

- 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
- perception of the risk of physical danger.

What about treatment?

A1.10 Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects although not the impairment. In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops, because the individual no longer has a disability.

Does this include people who wear spectacles?

A1.11 No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

A1.12 People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

What about people who know their condition is going to get worse over time?

A1.13 Progressive conditions are conditions that are likely to change and develop over time. Examples given in the Act are cancer, multiple sclerosis, muscular

dystrophy and HIV infection. Where a person has a progressive condition he will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment is likely eventually to have a substantial adverse effect on such ability.

Are people with genetic conditions covered?

A1.14 If a genetic condition has no effect on ability to carry out normal day-to-day activities, the person is not covered. Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.

Are any conditions specifically excluded from the coverage of the Act?

A1.15 Yes. Certain conditions are to be regarded as not amounting to impairments for the purposes of the Act. These are:

- addiction to or dependency on alcohol, nicotine, or any other substance (other than as a result of the substance being medically prescribed)
- seasonal allergic rhinitis (for example hay fever), except where it aggravates the effect of another condition
- tendency to set fires
- tendency to steal
- tendency to physical or sexual abuse of other persons
- exhibitionism
- voyeurism.

A1.16 Disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing, are to be treated as not having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

What about other definitions of disability used in education and training?

A1.17 Some students may have had statements or records of needs while at school. Others may come under the definition of learning difficulty in the Further and Higher Education (Scotland) Act 1992 or the Learning and Skills Act 2000. These students may be eligible for different sorts of support because of this. However, being eligible for additional support in school or college does not automatically mean that an individual is disabled under the Disability Discrimination Act.

Where can I find out more?

A1.18 A publication available from The Stationery Office, *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, provides additional help in understanding the concept of disability and in identifying disabled persons. See **Appendix Three** for details of where to obtain publications.

Definitions of disability under other legislation

Appendix two

This appendix sets out definitions of disability in legislation other than the Disability Discrimination Act 1995. **The Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001)** uses the definition of disability as set out in the Disability Discrimination Act 1995 (see **Appendix One**). However, providers of education and responsible bodies should be aware that children and young people may be defined as disabled under other legislation and may be receiving services under that legislation in addition to any other provisions made under this Act.

Introduction

A2.1 Although the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) covers Scotland, England and Wales, there are some important differences within wider education and children's legislation in all three countries and hence the legislative and policy context within which the new duties will be implemented. The appendix sets out the relevant definitions in separate sections for Scotland and for England and Wales.

Section 1: Scotland

(i) Introduction

A2.2 Section 1 of this appendix sets out the current Scottish definitions of disability as used in:

- The Children (Scotland) Act 1995
- The Education (Scotland) Act 1980
- The Chronically Sick and Disabled Persons Act 1970
- The Disabled Persons (Services, Consultation and Representation) Act 1986
- The NHS and Community Care Act 1990
- The Mental Health (Scotland) Act 1984

(ii) The Children (Scotland) Act 1995

A2.3 The Children (Scotland) Act 1995 does not use the same definition of disability as the Disability Discrimination Act 1995.

A2.4 The Children (Scotland) Act 1995 brings together most public and private law relating to children and young people in Scotland. Local authorities have a duty to safeguard and promote the welfare of 'children in need' in their area by providing a range and level of services appropriate to the children's needs.

A2.5 Children with disabilities are defined as 'children in need'. A child is defined as being 'in need' if:

- (i) the child is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development unless there are provided for the child services by a local authority; or

s 22 Children
(Scotland) Act
1995

- (ii) the child's health or development is likely significantly to be impaired, or further impaired, unless such services are so provided; or
- (iii) the child is disabled; or
- (iv) the child is adversely affected by the disability of any other person in the child's family.

A2.6 The Act does not specifically define 'health' or 'development'. However, the Act defines a person as being disabled if he/she is:

- 'chronically sick or disabled or suffers from mental disorder (within the meaning of the Mental Health (Scotland) Act 1984)'.

This definition is also used in:

- The Chronically Sick and Disabled Persons Act 1970
- The Disabled Persons (Services, Consultation and Representation) Act 1986 and
- The NHS and Community Care Act 1990.

A2.7 This definition is also used to interpret local authority responsibilities to 'persons in need' under Section 12 of the Social Work (Scotland) Act 1968 and assistance under Section 29 of the National Assistance Act 1948. Therefore community care and children's 'social care' services are all working to essentially the same definition of disability, which is not the same definition as used in the Disability Discrimination Act 1995. However, health and social services already have duties not to discriminate in the provision of services under Part 3 of the Disability Discrimination Act 1995.

**s 93 (4)(a) Children
(Scotland) Act 1995**

**s 23(2) Children
(Scotland) Act 1995**

A2.8 Further information on the Children (Scotland) Act 1995 is provided in:

The Scottish Office (1997) *Scotland's Children: The Children (Scotland) Act 1995, Regulations and Guidance*, Volumes 1-3, The Stationery Office, Edinburgh.

(iii) The Education (Scotland) Act 1980

A2.9 The Education (Scotland) Act 1980 as amended specifies the procedures to be followed by education authorities with regard to the identification and assessment of children with special educational needs and any special educational provision arising from such assessment.

A2.10 A child or young person has 'special educational needs' if the child or young person has a 'learning difficulty' which calls for provision for special educational needs to be made for them. A learning difficulty is said to be present if a child or young person:

- a) has a significantly greater difficulty in learning than the majority of those of his (or her) age; or
- b) has a disability which either prevents or hinders him (or her) from making effective use of educational facilities of a kind generally provided in schools managed by his (or her) local authority; or
- c) is under the age of 5 years and is, or would be if special provision was not made for him (or her), be likely, when over that age, to have a learning difficulty as defined above.

s 1(5)(d)
Education
(Scotland)
Act 1980

A2.11 The definition does not, however, cover children or young people who have problems with learning because they are taught in a language which is not the language they speak at home.

A2.12 The majority of disabled children (although not all) will also have special educational needs. However, a minority may not because:

- a disability does not prevent or hinder the child from using educational facilities generally provided in the area; and
- the child does not have a learning difficulty as defined in Section 1(5)(d) of the Education (Scotland) Act 1980.

A2.13 A disabled child does not need to be assessed as having special educational needs in order to be protected from discrimination under the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001).

A2.14 The Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) does not require education services to provide auxiliary aids and services. These would usually be provided following assessment under Sections 60-65G of the Education (Scotland) Act 1980.

(iv) The Mental Health (Scotland) Act 1984

A2.15 Although children are rarely considered to have a 'mental disorder' under the Mental Health (Scotland) Act 1984 and will usually receive services through other children's or education legislation, the Act applies to children as well as to adults.

**Section 1 Mental Health
(Scotland) Act 1984**

A2.16 The 1984 Act defines 'mental disorder' as meaning:

'mental illness, including personality disorder or mental handicap however caused or manifested'.

A2.17 A child with a 'mental disorder' under the 1984 Act will by definition have a disability under the Chronically Sick and Disabled Persons Act 1970, the Disabled Persons (Services, Consultation and Representation) Act 1986, the NHS and Community Care Act 1990 and the Children (Scotland) Act 1995.

Section 2: England and Wales**(i) Introduction**

A2.18 Section 2 of the appendix sets out the current definitions of disability as used in:

- The Children Act 1989
- The Education Act 1996
- The Disabled Persons (Services, Consultation and Representation) Act 1986
- The Chronically Sick and Disabled Persons Act 1970
- The Mental Health Act 2000.

A2.19 Although the duties in Part 4 of the Disability Discrimination Act 1995 cover England, Wales and Scotland, there are some important differences within education and children's legislation in all three countries and hence in the legislative and policy context within which the new duties will be implemented.

(ii) The Children Act 1989

- A2.20 The Children Act 1989 (England and Wales) does not use the same definition of disability as is used in the Disability Discrimination Act 1995 (see Appendix 1). The 1989 Act brings together most public and private law relating to children in England and Wales. It describes 'children with disabilities' within a wider definition of 'children in need' and therefore eligible for a range of services and support from the local authority. Schedule 2 of the Children Act 1989 permits a local authority to assess a child's needs at the same time as assessments under different legislation (for example the Education Act 1996).
- A2.21 Local authorities as providers of services are already covered by Part 3 of the Disability Discrimination Act with regard to provisions made for disabled children under Section 17 of the Children Act 1989.
- A2.22 In Section 17 of the Children Act 1989, a child is being described as being 'in need' if:
- a) he/she is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining a reasonable standard of health or development without the provisions for him/her of services by a local authority under this Part of the Act;
 - b) his/her health or development is likely to be significantly impaired, or further impaired, without the provision for him/her of such services; or
 - c) he/she is disabled.

A2.23 'Development' is defined as physical, intellectual, emotional, social or behavioural development. 'Health' means physical or mental health.

A2.24 The Children Act 1989 definition of disability mirrors the National Assistance Act 1948 definition, which states that:

'A child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed'.

A2.25 The National Assistance Act 1948 definition of disability is also used in:

- the Chronically Sick and Disabled Persons Act 1970 (England and Wales)
- the Disabled Persons (Services, Consultation and Representation) Act 1986.

A2.26 Further information on the Children Act 1989, its relationship to other legislation and the assessment framework is provided in:

- *The Children Act 1989 Guidance and Regulations, Volume 6, Children with Disabilities (1991)* Department of Health and HMSO, London;
- *Framework for the Assessment of Children in Need and their Families (2000)* Department of Health, Department for Education and Employment and Home Office, The Stationery Office, London.

(iii) The Education Act 1996

A2.27 The Education Act 1996 specifies the procedures to be followed by Local Education Authorities (LEAs) with regard to the identification and assessment of

children with special educational needs and any special educational provision arising from such assessment. The Act is accompanied by the Special Educational Needs Code of Practice.

'A child has 'special educational needs' for the purposes of this Act if he/she as a learning difficulty which calls for special education provision to be made for him.'

A2.28 The majority (although not all) disabled children will also have special educational needs. Section 312 of the Education Act 1996 mentions disability in the context of special educational needs as follows:

A2.29 A child has a learning difficulty if he/she:

- a) has a significantly greater difficulty in learning than the majority of children of the same age; or
- b) has a disability which prevents or hinders the child from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the local education authority; or
- c) is under five and falls within the definition of (a) or (b) above or would do so if special educational provision was not made for the child.

A child must not be regarded as having a learning difficulty solely because the language or medium of communication of the home is different from the language in which he is she will be taught.

A2.30 A disabled child does not need to be assessed as having a special educational need in order to be protected from discrimination under Part 4 of the Disability Discrimination Act. The interaction between disability and special educational needs is explored further in **Chapter 3**.

A2.31 Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) does not require education services to provide auxiliary aids and equipment. These would usually be provided following assessment under Part 4 of the Education Act 1996.

(iv) The Mental Health Act 2000

A2.32 Although children and young people would rarely be considered to have a 'mental disorder' under the Mental Health Act 2000 and would usually receive services through other children's or education legislation, the Act can apply to them.

A2.33 In the Mental Health Act, 'mental disorder' is defined as:

'mental illness, arrested or incomplete development of the mind, psychopathic disorder or any other disorder or disability of the mind'.

A2.34 Severe mental impairment (or learning disability) is defined as:

'arrested or incomplete development of the mind that includes severe impairment of intelligence and social functioning.' However, people with a learning disability would only come within the provisions of the Mental Health Act if they met the additional criterion of abnormally or seriously irresponsible conduct on the part of the person concerned.

A2.35 Any child or young person meeting the definition of 'mental disorder' or 'severe mental impairment' under the Mental Health Act would also meet the definition of disability within the Disability Discrimination Act 1995.

Appendix **three** Publications and useful addresses

A3.1 Disability Rights Commission publications

A range of information and guidance on the Disability Discrimination Act 1995 is available from the Disability Rights Commission:

Telephone: 08457 622 633

Textphone: 08457 622 644

Fax: 08457 778 878

Email: enquiry@drc-gb.org

Post: DRC Helpline
FREEPOST
MID 02164
Stratford upon Avon
CV37 9BR

Website <http://www.drc-gb.org>

Disability Rights Commission documents are available in alternative formats and languages. Ethnic language translation is available on request of documents that have not been published in that language.

A3.2 Legislation, Regulations and Guidance

The Acts of Parliament referred to in this Code of Practice are available from The Stationery Office.

A3.3 Scottish Executive Publications

Effective Provision for Special Educational Needs (SOEID 1994)

Circular 4/96 Children and Young Persons with Special Educational Needs: Assessment and Recording (SOEID 1996)

A Manual of Good Practice (SOEID 1998)

Improving our schools: Special Educational Needs: The Programme for Action (17th May 2000)
(www.scotland.gov.uk/library2/doc15/sen-00.asp)

All these documents are available in the publications (school education) section of the Scottish Executive website: www.scotland.gov.uk

A3.4 National Assembly for Wales Publications

School Admissions (Welsh Office) Code of Practice 1999

Schools Admissions Appeals; the National Assembly for Wales Code of Practice (1999)

Guidance on Implementing Planning Duties the Education (Special Educational Needs) (Wales) Regulations 2002

the Education (Special Educational Needs) (Information) (Wales) Regulations 1999

the Special Educational Needs (Provision of Information by Local Education Authorities) (Wales) Regulations 2002

SEN Code of Practice for Wales

National Assembly for Wales *Circular 3/99, Pupil Support and Social Inclusion*

A3.5 English Regulations

Education (Special Educational Needs) (England) (Consolidation) Regulations 2001

Education (Special Educational Needs) (Information) (England) Regulations 1999

The Special Educational Needs (Provision of Information by Local Education Authorities) (England) Regulations 2001 (SI No 2218/2001)

Special Educational Needs Tribunal Regulations 2001 (SI No 600/2001)

A3.6 Department for Education and Skills Publications

Code of Practice on School Admissions (1999)

Circular 10/99 Social Inclusion: Pupil Support

Special Educational Needs Code of Practice

The SEN Toolkit (2001) DfES

Available from:

The Department for Education and Skills
Sanctuary Buildings
Great Smith Street
London SW1P 3 BT

Telephone:

Public Enquiries: 0870 000 2288

Publications Centre: 0845 602 2260

The DfES website: www.dfes.gov.uk

In particular:

www.dfes.gov.uk/a-z/admissions.html

www.dfes.gov.uk/a-z/exclusionba.html

A3.7 Estyn publications

The Inspection Handbook

The Framework for the Inspection of Schools

Aiming for Excellence in Provision for SEN (2001)

Standards and Quality in Special Schools

Available from:

ESTYN

Anchor Court

Keen Road

Cardiff CF24 5JW

Telephone: 029 2044 6446

Fax: 029 2044 6448

Email: Enquiries@estyn.gsi.gov.uk

A3.8 Ofsted publications

Handbook for inspecting primary schools, with guidance on self-evaluation. (1999)

Handbook for inspecting secondary schools, with guidance on self-evaluation. (1999)

Evaluating educational inclusion: Guidance for inspectors and schools (2000)

The Ofsted Framework (2001)

A3.9 Qualifications and Curriculum Authority

The National Curriculum: Handbook for primary teachers in England: Key stages 1 and 2 (DfES/QCA 1999)

The National Curriculum: Handbook for secondary teachers in England: Key stages 3 and 4 (DfES /QCA 1999)

Planning, teaching and assessing the curriculum for pupils with learning difficulties (DfES/QCA 2001)

Supporting the target-setting process (revised March 2001): Guidance for effective target-setting for pupils with SEN (DfES /QCA 2001)

QCA website: www.nc.uk.net

A3.10 Guidance on accommodation, equipment, the physical environment of the school:

Building Bulletin 77, Designing for Pupils with Special Educational Needs in Special School (1992)
HMSO

Building Bulletin 87, Guidelines for Environmental Design in Schools (1997) The Stationery Office

Building Bulletin 90, Lighting Design for Schools (1999) The Stationery Office

Building Bulletin 94, Inclusive School Design. Accommodating pupils with Special Educational Needs in Mainstream Schools (2001)

Schools Building and Design Unit, DfES

Designing for 3 to 4 year olds: Guidance on Accommodation for Various Settings (1999)

The Stationery Office

Managing School Facilities, Guide 7: Furniture and Equipment in Schools: a Purchasing Guide

The Stationery Office

Available from:

The Stationery Office

PO Box 29

Norwich NR3 1GN

Telephone orders/

general enquiries: 0870 600 5522

Fax orders: 0870 600 5533

E-mail: bookorders@theso.co.uk

Website: www.clicktso.com

Legislation is also available on the Internet:

www.hmsso.gov.uk

A3.11 Special Educational Needs and Disability Information

- 1 Special Educational Needs and Disability Tribunal guides can be obtained from the Tribunal. Two new guides will be available from SENDIST: *Disability Discrimination in Schools: how to make a claim* which will be available from SENDIST in the summer of 2002; the next version of the current booklet *Special Educational Needs: how to appeal*.

SENDIST7th Floor

Windsor House

50 Victoria Street

London SW1H 0NW

Telephone: 020 7925 5750

Fax: 020 7925 6926

- 2 *Index for Inclusion: Developing Learning and Participation in Schools (2000)*

Available from:

Centre for Studies in Inclusive Education

Room 2S203, S Block

Frenchay Campus

Coldharbour Lane

Bristol BS16 1QU

Telephone: 0117 344 4007

Fax: 0117 344 4005

Website: www.inclusion.org.uk

- 3 The Scottish Consumer Council has produced a document *In Special Educational Needs: A Handbook for Parents and Young People in Scotland with Special Educational Needs (1989)*.

It is available from the SCC at:

100 Queen Street, Glasgow G1 3DN.

- 4 For general advice and information on special educational needs in Scotland, including free copies of:

Parents' Guide to Special Educational Needs
(available in alternative languages and formats)
Young Persons' Guide

Contact:

ENQUIRE (the National Advice Service for Special Educational Needs in Scotland)

Children in Scotland

5 Shandwick Place

Edinburgh EH2 4RG

Helpline: 0131 22 22 400

Text direct – deaf callers: 18001 959 598

Text direct – hearing callers: 18002 959 598

Textphone: 0131 22 22 439

E-mail:

Enquire.SENinfo@childreninscotland.org.uk

Website:

www.childreninscotland.org.uk/enquire.htm

A3.12 Court Service

Scottish Court Service:

Telephone: 0131 229 9200

Fax: 0131 221 6895

E-mail: enquiries@scotcourts.gov.uk

Website: www.scotcourts.gov.uk

English and Welsh Court Service:

Information is available from any county court or from their website:

www.courtservice.gov.uk

ACCAC publications

Qualifications, Curriculum and Assessment
Authority for Wales

Castle Buildings
Womanby Street
Cardiff CF10 1SX

Telephone: 029 2037 5400

Fax: 029 2034 3612

Email: info@accac.org.uk

Website: www.accac.org.uk

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Ref AC/SM/0037, ISBN: 1 86112 229 2