

Bond Pearce LLP

# *Disability Discrimination Act 2005*

*Bond Pearce*

## **The impact on educational institutions**

### **Introduction**

You are already under the statutory duty not to discriminate against disabled students by treating them less favourably than other persons. You are also under the statutory duty to make reasonable adjustments, both anticipatory adjustments and individual adjustments.

The Disability Discrimination Act 2005 (the "Act") received royal assent on 7 April 2005. The Act has been heralded as a "*stepping stone towards the goal of giving disabled people full opportunities in life to live, work and contribute to our society like anyone else, and to have equal respect and equality*" (Maria Eagle, Minister for Disabled People).

The Act imposes duties on public authorities in areas in which disabled people previously had no rights or limited rights such as within functions of public bodies. We are still awaiting the date for the Act to come into force but it is likely to be brought into force in two stages, December 2005 and December 2006.

Accordingly, the Act will have a substantial impact on educational institutions and this briefing primarily focuses on the new positive duty on public bodies to promote equality of opportunity between disabled and other persons together with suggesting how we can assist you with these new statutory responsibilities. The briefing also goes on to explain other relevant changes including:

- amending the meaning of "disability"
- making it unlawful for general qualification awarding bodies to discriminate against disabled persons, and
- imposing liability on publishers of discriminatory advertisements as well as those that place the advertisements.

### **Equality of opportunity between disabled and other persons**

The Act introduces a new positive statutory duty on public bodies, when exercising your functions, to have regard to the need to eliminate unlawful discrimination against and harassment of disabled persons, and to promote equality of opportunity for such persons. This duty is likely to come into force in December 2006.

To assist, the Disability Rights Commission has earlier this year published a draft Code of Practice entitled "*The Duty to Promote Disability Equality: Statutory Code of Practice*". The consultation period on this draft Code of Practice ended on 22 April 2005. The Disability Rights Commission has indicated that it will provide separate guidance particular to educational institutions by end of May 2006. In the long term, the existing Code of Practice for providers of Post 16 education and related services (together with the other existing Codes of Practice) will need to be updated but until then public bodies will have to refer to a variety of sources.

Most educational institutions will not only be subject to the general duty but also to specific duties (set out below).

## The general duty

The Act specifically states that public bodies (including higher education institutions, colleges and universities) shall, in carrying out their functions have regard to the need to:

- eliminate discrimination that is unlawful under the Act;
- eliminate harassment that is unlawful under the Act;
- promote equality of opportunity between disabled persons and other persons;
- promote positive attitudes towards disabled persons; and
- encourage participation by disabled persons in public life.

The aim of the duty is to make the promotion of disability equality central to the work of public authorities and is designed to have a significant impact on improving the lives of disabled people. However, it does not create new individual rights for disabled people.

In practice, this means that educational institutions must take account of disability equality in the day to day work of policy making, delivering lectures/tutorials, employment practice and other functions. Educational institutions may wish to address this duty as part of a more general equality strategy when dealing with wider equality issues such as race, gender, sexual orientation, religion or belief and age. However, the specific duties set out below must be clearly identifiable within this.

## The specific duties

In addition to the general duty, most governing bodies of educational institutions will also be subject to specific duties which set out steps which must be taken to assist such bodies in fulfilling the general duty insofar as public functions are concerned. Therefore, most educational institutions will be required to produce a **Disability Equality Scheme**, and the specific duties within regulations set out what must be included within that scheme.

In order to ensure that the operation of the specific duties are successful, educational institutions should ensure that their Disability Equality Scheme demonstrates commitment at the highest level of the public body by, for instance, a senior member of staff taking overall responsibility for the disability equality duty.

The Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 set out the core requirements of the specific duties on educational institutions, namely:

### Preparation and publication of a Disability Equality Scheme

1. An educational institution must publish a Disability Equality Scheme – that is, a scheme showing how it intends to fulfil its general duty and its duties under the specific duties regulations.
2. An educational institution shall involve in the development of the Disability Equality Scheme those disabled people who appear to you to have an interest in the way in which you carry your functions.
3. A Disability Equality Scheme shall include a statement of:
  - a) The ways in which such disabled people have been involved in its development;
  - b) Your methods for assessing the impact of your policies and practices, or the likely impact of your proposed policies and practices, on equality for disabled persons;
  - c) The steps which you propose to take towards the fulfilment of the general duty (outlined above) within the period of time covered by the Disability Equality Scheme;
  - d) Your arrangements for gathering information on the effect of your policies and practices on disabled persons and in particular your arrangements for gathering information on:
    - (i) The effect on the recruitment, development and retention of your disabled employees; and
    - (ii) The effect on the educational opportunities available to, and on the achievements of, disabled pupils and students.
  - e) Your arrangements for making use of such information to assist you in the performance of your general duty (outlined above) and, in particular, your arrangements for:
    - (i) Reviewing on a regular basis the effectiveness of the steps referred to in sub-paragraph (c);
    - (ii) Preparing subsequent Disability Equality Schemes; and

- (iii) You shall, by no later than [3 years after the date above] and every three years thereafter review your Scheme and publish a revised Disability Equality Scheme.

### **Implementation of the Disability Equality Scheme**

You shall, by no later than the end of the period of time covered by the Disability Equality Scheme:

- a) Take the steps which you are required to set out in the Disability Equality Scheme
- b) Put into effect your arrangements for:
  - (i) Gathering information; and
  - (ii) Making use of such information which you are required to set out in the Disability Equality Scheme.

Nothing in the regulations impose any duty on you where, in all the circumstances of the case, it would be unreasonable or impracticable for you to perform the duty.

### **Annual reporting**

You shall, by no later than one year after the date for publication of the first Disability Equality Scheme and annually thereafter publish a report containing a summary of:

- a) The steps you have taken for the purposes of the regulations;
- b) The results of the information gathering you have carried out for the purposes of the regulations;
- c) The use made of such information gathered for the purposes of regulations.

### **Failure to comply**

Any person, including the Disability Rights Commission, could apply to the High Court for judicial review of a public body that they felt was failing to comply with the General Duty.

If a public body fails to comply with the specific duties then the Disability Rights Commission may serve a compliance notice. The notice will require a public body to comply with the duty concerned and to furnish to the Disability Rights Commission, by the end of the period of 28 days beginning with the day on which the notice is served, with details of the steps that have been taken, or are being taken, to comply with the duty. Failure to comply with any such notice within 3 months may result in the Disability Rights Commission applying to a County Court for an order requiring a public body to furnish any information required by the notice. Taking this further, if the Disability Rights Commission does not believe that the duty has been complied with, then they can apply to the County Court for an order requiring a public body to comply with the duty. If the County Court makes an order and the public body does not abide by it, the public body may be found to be in contempt of court.

### **The meaning of "disability"**

The Act now deems people with HIV infection, multiple sclerosis and cancer to be disabled for the purposes of the Act. In other words, such persons will be protected even when they are not experiencing any adverse effect on their daily activities. However, the government has reserved the right to make regulations for this automatic classification not to apply in the case of a person who has cancer if he has cancer of a prescribed type. At present the government has suggested that this amendment will extend protection to at least another 175,000 people.

The Act also removes the requirement that mental illnesses must be "clinically well-recognised". This amendment brings the requirements to establish a mental impairment in line with the same requirements to establish a physical impairment, namely that *a person has an impairment which has a long term and substantial adverse effect on their ability to carry out normal day to day activities.*

You need to be alert to the fact that an increased number of students may be "disabled" by reason of mental illness which might include stress related problems.

These changes are likely to come into force in December 2005.

## General qualification awarding bodies

The Act makes it unlawful for a general qualification awarding body to discriminate against a disabled person:

- in the arrangements which it makes for the purpose of determining upon whom to confer relevant qualification
- in the terms on which it is prepared to confer a relevant qualification on him
- by refusing or deliberately omitting to grant any application by him for such a qualification, or
- by withdrawing such a qualification from him or varying the terms on which he holds.

As with other areas, the Act places an obligation on such bodies to make reasonable adjustments and not to treat disabled people less favourably, without justification. The defence of justification can be the application of a competence standard if the body can show that:

- the standard is, or would be, applied equally to persons who do not have his particular disability, and
- its application is a proportionate means of achieving a legitimate aim.

Other reasons for justification need to be, as in other areas, both material to the circumstances of the particular case and substantial.

In terms of making reasonable adjustments, a general qualification awarding body will need to ensure that any provision, criterion or practice does not place disabled persons at a substantial disadvantage in comparison with persons who are not disabled. It will be important, therefore, for you to ensure that your disabled students make the general qualification awarding body aware of their disability or to do so on their behalf. This change is likely to come into force in December 2006.

## Imposing liability on publishers

The Act imposes liability on educational institutions who publish advertisements which are discriminatory as well as imposing liability on the person placing the advertisement. The liability for so doing is that an offence will have been committed, and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

This means that you will need to be alert in vetting any advertisements that you place within any publications. Our experience shows that most of our clients are alert to this change as we are increasingly being asked to vet various advertisements. This change is likely to come into force in December 2005.

## Summary

The Act supplements the anticipatory duties owed by educational institutions to disabled students and imposes duties to actively promote equality of opportunity.

Educational institutions will not only have to have due regard to disability equality when making decisions in the future, but will also need to take action to tackle the consequences of poor quality decision making in the past.

Although the provisions of the Act may appear onerous, by ensuring that disability is "built in" at the outset, this should assist educational institutions to avoid costly retrospective action.

In respect of the positive duty to promote equality of opportunity between disabled and other persons, the duty is designed to help widen participation and retention in further and higher education.

Our advice to you is to start work now on laying the framework so that you are ready to comply with the statutory duties when they come into force in December 2006.

## How we can help

As advisors to the drafters of the Post 16 Code of Practice relating to the Disability Discrimination Act ("DDA"), Bond Pearce is recognised as one of the leading providers of advice, training and auditing of educational institutions compliance with their duties under Part 4 of the DDA.

We can provide:

- a range of training programmes addressed to your governing bodies and staff
- an audit programme dealing with non-physical accessibility (see the accompanying document setting out the scope of this product)
- a new audio visual training tool designed to be used by all of your staff (please see the advertisement attached)
- an annual audit to ensure that you are complying with your new statutory duty
- a first draft of your Disability Equality Scheme following such audit.

If you are interested in finding out any more about these services that we can offer to enable you to comply with your statutory duty, contact details are as follows:

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# *Non physical accessibility*

The logo for Bond Pearce, featuring the company name in a cursive script font on a light green rectangular background.

## **An audit programme**

Our disability audit is designed to assess whether an institution's policies, procedures and practices (excluding physical access) comply with the Disability Discrimination Act 1995. The audit is always tailored to meet the specific requirements of the institution, but in broad terms the audit is intended to cover the following areas:

- admissions, enrolments, registration and induction of students
- disclosure and confidentiality
- planning
- course delivery
- training/ awareness of SENDA
- placements
- access to general facilities and support and outsourced services
- assessments
- monitoring and evaluation.

The audit involves a review of documentation and an audit visit (which will usually take place over two very full days). The audit visit consists of a series of interviews and generally we would expect to see the following people:

1. Principal
2. Disability adviser or person with responsibility for disability issues
3. Head of admissions
4. Head of enrolments, registration and induction of students
5. Head of placements (work and academic) and field trips
6. Head of assessments
7. Head of academic department x 2
8. Head of staff development
9. Head of library
10. Head of student services (including accommodation (if applicable), catering, leisure, welfare, careers and counselling services) and contracted out services
11. Focus group interview with a range of academic staff
12. Focus group interview with a range of disabled students.

Following the audit, we would then prepare a detailed report which we would be happy to come and present to the institution.

Our audit does not cover physical accessibility, website accessibility, or the curriculum. Nor will it include a detailed review or re-drafting of an institution's policies and procedures although we would be delighted to accept separate instructions to do so.

Bond Pearce LLP

# *Accessible new education matters*

In association with Skill Boosters

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## **Obligations of the Disability Discrimination Act 1995: Part IV: Post 16 Education**

The Disability Discrimination Act (DDA) has far-reaching implications for learning providers and individuals working for learning providers. In order to comply with the DDA and avoid discrimination all staff have a responsibility to comply with the DDA and be aware of disability issues.

Accessible Education Matters provides specific, area by area guidance to enable staff to meet their responsibilities under the DDA and adopt best practice.

### **Course content**

The DDA is not just about physical access; it concerns all aspects of learning and the provision of student services. As a result, the DDA affects all staff who work for a learning provider, from tutors and administrative staff, to library, IT and catering staff. All these people need to have at least a basic understanding of how the DDA works and an awareness of disability issues.

Demonstrating how the DDA formalises existing best practice, Accessible Education Matters is both a training course and a reference guide. Raising awareness and educating staff are both central themes. Disability is not a marginal issue; it is a key factor in inclusion – there are over 8.6 million disabled people in the UK with a diverse range of disabilities, requiring a broad range of adjustments.

The multimedia content features disabled learners who provide an invaluable insight into how reasonable adjustments can help them to achieve their full potential.

Expert contributions – including National Association of Disability Officers, and the London School of Economics – highlight the specific issues to consider.

Above all, this is a practical, educational tool for positive change. The on-screen content is supplemented with printable checklists that include additional information.

An assessment quiz enables users to check their knowledge.

## Course content (cont..)

<p><b>Introduction</b></p> <ul style="list-style-type: none"> <li>• Learning objectives</li> <li>• Key features</li> <li>• Contributors</li> <li>• Checklists</li> <li>• Assessment quiz.</li> </ul>	<p><b>Key provisions</b></p> <ul style="list-style-type: none"> <li>• Aims and effects of the DDA</li> <li>• Definition of disability</li> <li>• Who is protected under the DDA?</li> <li>• Medical evidence.</li> </ul>	<p><b>Less favourable treatment</b></p> <ul style="list-style-type: none"> <li>• Discrimination</li> <li>• Less favourable treatment</li> <li>• Justification.</li> </ul>
<p><b>Rights and responsibilities</b></p> <ul style="list-style-type: none"> <li>• Learners' experiences</li> <li>• Who has responsibilities under the DDA?</li> <li>• Who has rights under the DDA?</li> <li>• What activities are covered?</li> <li>• Why is the DDA needed?</li> <li>• Facts about disability</li> <li>• The importance of the DDA</li> <li>• Barriers to disabled people</li> <li>• Checklist.</li> </ul>	<p><b>Knowledge and confidentiality</b></p> <ul style="list-style-type: none"> <li>• Knowledge of disability</li> <li>• Confidentiality</li> <li>• Data protection.</li> </ul>	<p><b>Reasonable adjustments</b></p> <ul style="list-style-type: none"> <li>• Reasonable adjustments</li> <li>• Auxiliary aids or services</li> <li>• Examples of reasonable adjustments</li> <li>• To whom is the duty owed?</li> <li>• How long does the duty last?</li> <li>• Reasonable and unreasonable adjustments</li> <li>• Justification</li> <li>• The dangers of a compliance approach.</li> </ul>

## Assessment quiz

<p><b>Checklists</b></p> <ul style="list-style-type: none"> <li>• Responsibilities and rights</li> <li>• Key provisions of the DDA</li> <li>• Knowledge and confidentiality</li> <li>• Less favourable treatment.</li> </ul>	<p><b>Available in the following versions:</b></p> <ul style="list-style-type: none"> <li>• Rich media version (including audio and video)</li> <li>• Rich HTML version (made in Java script, featuring 'comic strip' versions of the video and no audio – also ideal for organisations with IT.</li> </ul>
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## Diversity – available online and CD-Rom

<p><b>Ideal for:</b></p> <ul style="list-style-type: none"> <li>• All staff – academic and non academic</li> <li>• Post 16 Education Sector - FE and HE institutions: Local education authorities or education authorities securing further education, including adult education, community education and statutory youth services; Schools providing FE for adults.</li> </ul>	<p><b>Outcomes:</b></p> <ul style="list-style-type: none"> <li>• Legal understanding of the DDA</li> <li>• Better access for disabled students</li> <li>• Improved opportunities for disabled students</li> <li>• Adoption of best practice.</li> </ul>	<p><b>Key learning points:</b></p> <ul style="list-style-type: none"> <li>• Why the DDA is needed</li> <li>• Rights and Responsibilities under the DDA</li> <li>• Less favourable treatment</li> <li>• Reasonable adjustments</li> <li>• Issues around knowledge and confidentiality</li> <li>• Best practice measures.</li> <li>• Available as printable resource</li> </ul>
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