



## **A Response to the Office for Disability Issues Consultation:**

### ***“Improving Protection from Disability Discrimination”***

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## About HLPAs

The Housing Law Practitioners Association (HLPAs) is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law.

Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. HLPAs has existed for over 10 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves. The Association is regularly consulted on proposed changes in housing law (by primary and subordinate legislation and also by other means such as relevant codes) by the relevant Departments, chiefly the DCLG.

The Chair, Vivien Gambling, is an experienced housing specialist and works for Lambeth Law Centre. Although the Association is London based, the membership is countrywide. The Association is also informally linked with similar Housing Law Practitioners Groups in the North-West, South Yorkshire and the West Midlands.

Membership of HLPAs is on the basis of a commitment to HLPAs's objectives. These objectives are:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.
- To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

The HLPAs Law Reform Working Group has prepared this response. This group meets regularly to discuss law reform issues as they affect housing law practitioners. The Chair of the group reports back to the Executive Committee and to members at the main meetings which take place every two months. The main meetings are regularly attended by over one hundred practitioners.

## Summary

1. The Consultation Paper invites responses to three questions. In responding to the Consultation Paper, HLPAs restricts its submissions to the impact on housing law.

**(1) Do you agree that the equality bill should adopt the concept of indirect discrimination for disability? If you disagree, please explain your reasons for this and whether you consider any adverse consequences would arise from adopting indirect discrimination**

2. HLPAs does not believe that the introduction of the concept of indirect discrimination would adequately address the adverse implications for disabled people of the impact of the House of Lords decision in Lewisham LBC v Malcolm (EHRC Intervening) [2008] UKHL 43; [2008] 3 WLR 194 (“Malcolm”). HLPAs rather recommends that their Lordships’ decision be reversed by the Equality Bill so that the definition of “disability related disability” formulated by the Court of Appeal in Clark v Novacold Ltd [1999] ICR 951 (“Novacold”) be reinstated on a statutory basis. We note that the Office for Disability Issues (“ODI”) discusses this option in Annex A. Whilst HLPAs is sympathetic to the ODI’s desire to simplify and harmonise anti-discrimination legislation, this should not be at the expense of disabled people. When the Disability Discrimination Act 1995 (“DDA 1995”) was enacted, it was recognised that a novel approach was required in order to promote equality of opportunity for disabled people. It is not consistent treatment that is required; rather different treatment is required in order to eliminate the effects of disability and to secure equality of opportunity.

**(2) Do you agree that the Equality Bill should include a provision that requires a duty holder to fulfil the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination?**

3. If the ODI does not accept the above recommendation, HLPAs agrees that the Equality Bill should include a provision that requires a duty holder to fulfil the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination. However, under the premises provisions currently enacted in Part III of the DDA 1995, the duty to make reasonable adjustments only arises if a request has been made. Further, there is no obligation for a landlord to remove or alter a physical feature to make any reasonable adjustment which would alter the physical characteristic of the premises. The Consultation Paper does not suggest a solution to these difficulties.

**(3) Do you agree that the assumptions underpinning the regulatory impact assessment and equality impact assessment are realistic?**

4. HLPAs do not have any detailed representations to make on this issue. However, HLPAs do not accept that the concept of indirect discrimination is a well understood. We suggest that the new enhanced concept of indirect discrimination will be a difficult concept to grasp. It will be a new concept in the premises provisions. It is likely to lead to expensive litigation whilst the reach of the new legislation is clarified. We highlight two concerns:

(i) clarity in the law is required if the Equality Bill is to promote equality of opportunity for disabled people. A new approach to disability discrimination will create uncertainty and undermine the developments that have been achieved over the past 10 years.

(ii) the cost of the proposed changes are likely to be greater than the £9.97m mentioned at p.38 given the litigation that is likely to be generated if the proposed course is adopted.

## **Response**

5. The practical problem in Malcolm arose from the limited defence available in s.24(3) DDA 1995. This will be addressed by an objective test of justification which is proposed for the Equality Bill. This would achieve the outcome sought by Baroness Hale in Malcolm (at [61]):

“There is little doubt what the sensible answer to the issues in this case would be. It would be to enable, in the first place the Council, and in the second place the court to balance the competing interests. On the one hand, there is the public interest in the proper use of social housing, which means that local authorities should not be required to continue to supply a home to a person who no longer needs it and merely wishes to make a profit out of it, or indeed to a person who will never be able to comply with the conditions of the tenancy. On the other hand, there is the right of people with disabilities to be treated as equal citizens, entitled to have due allowance made for the consequences of their disability. This, in essence, is the result which the Equality and Human Rights Commission would like us to be able to achieve.”

6. In the Appendix, we analyse why the decision of the majority in the House of Lords does not represent what Parliament intended when passing the DDA 1995. We agree with the ODI’s statement (see para 22 at p.19) that the effect of their Lordships judgment has been to shift the protection under the DDA 1995 away from the Government’s policy intention. HLPAs further believe that reversing this decision and reinstating the Novacold formulation of “disability related discrimination” is the best means of promoting equality of opportunity for disabled people. That concept is now well understood.

7. HLPAs recognise that the effect of such an amendment would be that a complainant would have little difficulty in establishing an appropriate comparator (see Lord Bingham in Malcolm at [12] – [14]). An alternative approach would be to remove the need for a comparator. As is noted in Annex A, a precedent for not requiring a comparator already exists in the Sex Discrimination Act in relation to pregnancy and maternity.

8. Since March 1999, the law has developed on the basis of Novacold formulation of “disability related discrimination. The positive achievements of the last 10 years would be lost if Malcolm is not reversed. The House of Lords in Malcolm have largely restricted the reach of “disability related discrimination” to direct discrimination. This is not sufficient to secure equality for disabled people.

9. The “Novacold” formulation of “disability related discrimination” has worked well outside the premises provisions where there has been a wider defence of justification. HLPAs do not seek to address the merits of the decision in Malcolm. The trial judge had held that Mr Malcolm had not established the necessary causal connection between the sub-letting and his disability. Their Lordships considered that the trial judge had been entitled to come to that decision. The factual situation was unusual. There were legal difficulties in that Mr Malcolm lost his security of tenure by reason of the sub-letting. It is unlikely to be a situation that is repeated. It should not be taken as a precedent to analyse different approaches to discrimination (see para 30 at pp.22-24).

10. The more common situation where the premises provisions are likely to come into play is in possession proceedings where there is a causal connection between the decision to evict and a disability within the tenant’s household. HLPAs give two examples:

(i) Eviction on grounds of rent arrears where the arrears are related to a disability. The tenant may have a mental health problem which impacts upon their ability to claim housing benefits. Alternatively, a tenant with learning difficulties may find it difficult to read standard letters relating to arrears.

(ii) Eviction on grounds of nuisance where a tenant has a child who is autistic or has learning difficulties; or, a tenant with a hearing impairment who has visitors who need to shout to attract the tenant’s attention.

11. HLPAs believe that any such eviction should be justified so that the tenant with disabilities is not treated less favourably than other tenants. The same should apply regardless as to whether the tenant has security of tenure or whether the landlord is a local authority, a registered social landlord or a private individual. These factors would all be relevant to the issue of justification, but justification should be required in all cases where an eviction is related to a disability within the household.

12. HLPAs recognise that a duty to make reasonable adjustments may arise in the above situations. A landlord may need to change their practices in respect of the tenant with learning difficulties, either by visiting the tenant or providing him with an Easy Read statement. The tenant with a hearing impairment may need a flashing light as an alternative to a door bell. However, under the premises provisions, the duty to make reasonable adjustments only arises if a request has been made. It is not anticipatory as in the goods and services provisions. Further, there is no obligation for a landlord to remove or alter a physical feature to make any reasonable adjustment which would alter the physical characteristic of the premises (see the Disability Discrimination (Premises) Regulations 2006, SI 2006 No.887).

13. The ODI do not suggest how these issues which substantially reduce the reach of the legislation, will be addressed in the Equalities Bill. It would seem that no specific measures are contemplated to resolve these difficulties (see para 11 at p.15).

14. HLPAs do not believe that it would be sufficient to introduce the concept of indirect discrimination to disability discrimination law. We recognise that it is likely that the concept of indirect discrimination is likely to be introduced in any event in order to comply with the proposed EU goods and services framework directive (see para 26 at p.21). However, this would not in itself be sufficient to promote equality of opportunity for disabled people.

15. Merely to introduce the concept of indirect discrimination will create further uncertainty in the law. HLPAs challenge the ODI's statement in the consultation document (see para 59 at p.60) that "the concept of indirect discrimination is a well understood concept across equality legislation generally". We suggest that it is an extremely difficult concept to grasp. It has been difficult to establish in the housing context in respect of racial discrimination (see R v Tower Hamlets LBC, ex p Mohib Ali (1993) 25 HLR 218). It would be a new concept in the premises provisions of Part III of the DDA 1995. It is likely to lead to expensive litigation whilst the reach

of the new legislation is clarified. Further, housing law is extremely complex. One of the problems of the Codes of Practice issued by the Disability Rights Commission is that whilst the examples given demonstrate a sound grasp of discrimination law, they do not adequately grapple with the complexities of housing law.

16. The DDA was passed in order to change the attitudes and behaviour of employers, landlords and other service providers. It was recognised that a novel approach was required. The DDA was not intended simply to secure that disabled people are treated in the same way as other people who do not have their disability. It was rather intended to secure that disabled people are treated differently in order that they can play as full a part in society whatever their disabilities.

17. Any new concept of indirect discrimination would put an undue burden on a disabled person to identify a neutral provision, criterion or practice. S/he would then need to show that that provision, criterion or practice had a disparate impact upon people who share that individual's characteristics. Whilst we recognise that anti-discrimination legislation has developed in such a way as to move away from reliance on statistical analysis towards a more flexible approach (see para 32 at p.24), case law on indirect discrimination continues to focus on the technical requirements of establishing group disadvantage. As Lord Brown noted in Malcolm (at [114]), disabilities are too diverse in their nature for the concept to lend itself easily to the notion of indirect discrimination the imposition of requirements which are ostensibly neutral, but in fact having a disproportionate and unjustifiable impact on those to be protected.

18. These technical requirements would not be required were the Novacold formulation of disability related discrimination to be reinstated together with an objective defence of justification. This would focus the minds of all landlords on the need to consider what proactive steps are required to achieve equality of treatment for disabled tenants. This would encourage the change of approach of the type that the DDA was originally intended to achieve in 1995.

## **Appendix**

### **The Development of the meaning of “Disability Related Discrimination”**

A1. The difficult issue of construction which the House of Lords were required to address in Malcolm arises from the definition of “discrimination” to be found in s.24(1) DDA. A person discriminates against a disabled person if “for a reason which relates to the disabled person's

disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply” and he cannot show that the treatment in question is justified.

A2. When the DDA was first enacted in 1995, provisions for employment (Part II) and goods facilities services and premises (Part III) all contained the same novel approach to discrimination. There was no concept, as in the Sex Discrimination Act 1975 and the Race Relations Act 1976, of direct and indirect discrimination. Rather there was what might broadly be described as disability-related less favourable treatment and, in relation to employment and goods facilities and services, discrimination by failing to comply with the duty to make reasonable adjustments.

A3. The first case under the DDA relating to the definition of discrimination to be considered by the Court of Appeal was Novacold involving discrimination under Part II, namely an employee who was dismissed due to absence from work on grounds of sickness. Mummery LJ noted (at 959A-F) that although the general aims of the Act are clear and commendable, the language in which the detailed implementation of them is expressed is not easy to interpret or to apply to particular cases. The exercise of interpretation is not facilitated by familiarity with the pre-existing legislation prohibiting discrimination on the grounds of sex (Sex Discrimination Act 1975) and race (Race Discrimination Act 1976). Unlike the earlier discrimination Acts, the DDA does not draw the crucial distinction between direct and indirect discrimination on specified grounds; it provides a defence of justification to less favourable treatment which would constitute direct discrimination and be without such a defence under the earlier Acts. Neither does it replicate the express requirement of the 1975 Act (section 5(3)) and the 1976 Act (section 3(4)) that, when a comparison of the cases of persons of different sex or persons of different racial groups falls to be made, the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

A4. One consequence of these differences is that the terms "discriminate" and "discrimination" are not used in the Act in the same sense as in the earlier Acts. Mummery LJ noted that in Part II "discrimination" is defined as less favourable treatment which is not shown to be justified; if the less favourable treatment of a disabled person is shown to be justified it is not "discrimination" within the meaning of the Act. This is to be contrasted with the 1975 Act and the 1976 Act under which a person directly "discriminates" against another if, on the specified ground of sex or race, he treats

that other less favourably than he treats or would treat other persons. Justification does not enter into it. Such treatment can never be shown to be justified.

A5. In Novacold, the applicant had soft tissue injuries around the spine as a consequence of a back injury at work. He was absent from work for a long time as a result of his injuries, and he was eventually dismissed when his medical advisers could provide no clear idea of when it would be possible for him to return to work. The reason for his dismissal was found to be that (at p.981b):

"...he was no longer capable of performing the main functions of his job and that his absence was continuing and that [Novacold] needed somebody to perform the role that he was performing."

A6. The employment tribunal held that an employee who was absent for such a long time for a non-disablement reason would have been treated no differently in these circumstances, and that there had therefore been no unlawful discrimination on grounds of disability. The Employment Appeal Tribunal agreed with this general approach, holding that the tribunal had correctly adopted the identity of the comparator who was unable to fulfil all the requirements of his job, but whose inability was not related to disability as defined by the job.

A7. The Court of Appeal disagreed. It placed emphasis not so much on the phrase "for a reason which relates to the person's disability" as on the later phrase "to whom that reason does not or would not apply". Mummery LJ (with whom Beldam and Roch LJJ agreed) explained how the contrary argument was put on behalf of the employee (at 962D):

"His argument is that '*that* reason' refers only to the first three words of the paragraph – 'for a reason'. The causal link between the reason for the treatment and the disability is not the reason for the treatment. It is not included in the reason for the treatment. The expression 'which relates to the disability' are words added not to identify or amplify the reason, but to specify a link between the reason for the treatment and his disability which enables the disabled person (as opposed to an able-bodied person) to complain of his treatment. That link is irrelevant to the question whether the treatment of the disabled person is for a reason which does not or would not apply to others. On this interpretation, the others to whom '*that* reason' would not apply are persons who would be capable of carrying out the main functions of their job. Those are the 'others' proposed as the proper comparators. This comparison leads to the conclusion that the applicant has been treated less favourably; he was dismissed for the reason that he could not perform the main functions of his job, whereas a person capable of performing the main functions of his job would not be dismissed."

A8. After reminding himself that the statute had to be construed according to its legislative purpose, and saying that the approach of the lower tribunals was a natural one in the historical context of discrimination legislation, Mummery LJ continued (at 963B):

"But, as already indicated, the 1995 Act adopts a significantly different approach to the protection of disabled persons against less favourable treatment in employment. The definition of

discrimination in the 1995 Act does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the ‘reason’ for the treatment of the disabled employee and the comparison to be made is with the treatment of ‘others to whom that reason does not or would not apply’. The ‘others’ with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons ‘to whom that reason does not or would not apply’.”

A9. The meaning of discrimination in the context of s.24(2) of the DDA was considered by the Court of Appeal in Manchester City Council v Romano & Samari (DRC Intervening) [2004] EWCA Civ 834; [2005] 1 WLR 2775 (Romano) at [37] – [47]. The Court held that a landlord seeking to evict a mentally ill tenant on grounds of nuisance needed to justify the eviction. Brooke LJ (at [37]) noted that ss. 5, 14 (both of which are now incorporated in section 3A, which was substituted by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673), 20, 24, 28B and 28S are all concerned with explaining the meaning of “discrimination”. He noted that each of these sections contained the same basic definition of “discrimination”, although some of them contained a secondary definition (which was absent from s.24). He further noted that the justification defence was different in some cases. He later considered (at [47]) whether it might be possible to interpret the basic definition differently in S.24. However, since the statutory language was identical and a justification defence was provided, he concluded that it would be inappropriate to do so. The Court of Appeal was bound by the decision in Novacold. He concluded (at [55]), that if a landlord wishes to obtain possession for a breach of a tenancy agreement that has been committed for reasons relating to a disabled tenant’s disability, he will have to show that his action is justified on one of the grounds identified in section 24.

A10. Brooke LJ had particular regard to the “guide dog” example that had been considered by Mummery LJ in Novacold:

“[45] A blind person with a guide dog might be denied access to a café because no dogs are allowed in the café. But the reason why he has a guide dog relates to his disability, and a café owner denying him access would have to provide justification for this policy in his case (at 964F):

“On the employer’s interpretation of the comparison to be made, the blind person with his guide dog would *not* be treated less favourably than the relevant comparator, that is ‘others’, to whom that reason would not apply, would be sighted persons who had their dogs with them. There could not therefore be any, let alone *prima facie*, discrimination. But the Minister specifically stated that this would be a *prima facie* case of disability discrimination, i.e. less favourable treatment, unless justified. It could only be a case of less favourable treatment and therefore a *prima facie* case of discrimination, if the comparators are ‘others’ *without dogs*: ‘that reason’ for refusing access to refreshment in the cafe would not apply to ‘others’ without dogs.”

A11. Brooke LJ noted at [46] that Mummery LJ had continued at pp.964-5:

‘A waiter asks a disabled customer to leave the restaurant because she has difficulty eating as a result of her disability. He serves other customers who have no difficulty eating. The waiter has therefore treated her less favourably than other customers. The treatment was for a reason related to her disability – her difficulty when eating. And the reason for her less favourable treatment did not apply to other customers. If the waiter could not justify the less favourable treatment, he would have discriminated unlawfully.’

It is clear from this example that the comparison to be made is with other diners who have no difficulty in eating and are served by the waiter, and not with other diners who may be asked to leave because they also have difficulty eating, but for a non-disability reason, e.g. because the food served up by the waiter is disgusting. This interpretation of section 20(1) provides support for Mr Clark’s interpretation of section 5(1). The reason for his dismissal would not apply to others who are able to perform the main functions of their jobs; he has been treated less favourably than those others. He was dismissed for not being able to perform the main functions of his job. The ‘others’ would not be dismissed for that reason.”

A12. The meaning of discrimination was further considered by the Court of Appeal in Richmond Court v Williams [2006] EWCA Civ 1719; [2007] HLR 22: a case involving the lessor’s refusal to consent to the installation of a stair lift. Richards LJ (at [41]), suggested the following approach:

“It seems to me that section 24(1) of the 1995 Act requires one (i) to identify the treatment of the disabled person that is alleged to constitute discrimination, (ii) to identify the reason for that treatment, (iii) to determine whether the reason relates to the disabled person’s disability, (iv) to identify the comparators, namely persons to whom the reason does not or would not apply, and (v) to determine whether the treatment of the disabled person is less favourable than the treatment that is or would be accorded to the comparators. That is the approach laid down in Clark v Novacold Ltd [1999] ICR 951 and in Manchester City Council v Romano [2005] 1 WLR 2775.”

A13. Since the decision in Novacold, the DDA has been amended a number of times. As a result of some of those amendments, the concept of “direct” discrimination, which cannot be justified, has been introduced into the DDA in Part II (employment and occupation) and Part IV (most of further and higher education). Whilst the concept of direct discrimination has been introduced, the concept of “disability related” discrimination, which can be justified, has been retained.

A14. It is in this context that the approach in Novacold was considered by the Court of Appeal in the case of O’Hanlon v Revenue and Customs Commissioners [2007] ICR 1359. The case concerned a claimant who suffered from clinical depression and was a disabled person for the purposes of the Disability Discrimination Act 1995. She had lengthy absences from work, mainly due to her disability but some for unrelated sickness. During these absences she was paid in accordance with the employers’ sick pay rules, under which an employee received full pay for a maximum of six months in any 12-month period, half pay for a further six months subject to a maximum of 12 months in any four-year period, and thereafter the pension rate of pay. The

claimant made a complaint of disability discrimination, claiming both that the failure to pay her full pay for all disability-related sickness amounted to disability-related discrimination under section 3A(1) of the 1995 Act and that the employers had failed in their duty under section 4A to make reasonable adjustments, to counter the disadvantage she suffered under the sick pay rules, for the purposes of section 3A(2). In relation to the claim under section 3A(1), the employment tribunal found that the claimant was not treated less favourably by the employers than others because of her disability, and that, in any event, such discrimination would have been justified, as the cost of changing the sick pay policy and the potential difficulties it would create would be excessive. The tribunal also found that, although the claimant was placed at a substantial disadvantage by the operation of the sick pay rules, the employers, in facilitating the claimant's return to work by reducing her hours and transferring her to a location where commuting would be easier, had taken reasonable steps to prevent the rules having that effect and, accordingly, were not in breach of the duty referred to in section 3A(2). The Employment Appeal Tribunal dismissed an appeal by the claimant. The Court of Appeal dismissed the appeal. It was held, *inter alia*, that in respect of the claim for disability-related discrimination pursuant to section 3A(1), once the tribunal had found that increasing sick pay was not an adjustment a reasonable employer would be required to make for the purposes of section 4A(1), so that the objective test for imposing the duty did not apply, the more subjective test of justification required by section 3A(3) was satisfied, given that the same failure to provide full pay lay behind both claims; and that, accordingly, the claims by reference to both section 3A(1) and (2) failed.

A15. In considering the scheme of the DDA in the employment context, Hooper LJ adopted what the EAT had to say about the three kinds of disability (at [23]):

“20. Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified. Here, where all employees are subject to the same rules irrespective of their disability, there can be no basis for a claim of direct disability discrimination and none is alleged.

21. Second, there is disability related discrimination: section 3A(1). This is in some respects similar to indirect discrimination found in other discriminatory legislation, but there is no requirement here that the discrimination should have a disparate impact on the disabled as a body. It is enough that the employee is treated less favourably for a reason related to his or her particular disability. This form of discrimination can be justified. However, justification can only be established if the employer shows that the reason for the treatment is both material to the circumstance of the particular case and substantial: section 3A(3).

22. Third, there is the failure to make reasonable adjustments form of discrimination in subsection (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages resulting from the disability. However, this is only once he has a duty to make such adjustments. That duty arises where the employee is placed at a substantial disadvantage when compared with those who are not disabled.”

A16. The same approach to discrimination would apply in the further and higher education provisions, albeit with some differences, some of which are addressed further below.

A17. In O’Hanlon, Hooper LJ revisited the guide dog example used in Novacold:

“85. .... Mr Jeans submits that the appeal tribunal is wrong both in respect of less favourable treatment and substantial disadvantage. He accepts that Mummery LJ in Clark v Novacold Ltd [1998] ICR 951 reached the right conclusion because what was in issue in that case was dismissal. He submits that Mummery LJ was wrong in his guide dog example. The blind man is placed at a substantial disadvantage in comparison with persons who are not disabled but he is not treated less favourably than the owner would treat others to whom the reason does not apply. The comparator is the dog owning customer wishing to enter the cafe with his dog. The dog owning customer is not allowed in and therefore the blind dog owning customer is not being treated any differently. Citing a passage of the speech of Lord Rodger of Earlsferry in Archibald v Fife Council [2004] ICR 954, at [36], he submits that one cannot identify a single class of persons who are not disabled for the purposes of comparison. Miss Williams refers to what she submits is a contrary passage in the speech of Baroness Hale of Richmond, at [64]. Mr Jeans submits that to compare in this case the employee absent from work because of a disability with other employees who are not absent makes no sense. The comparison must be with employees who are absent from work because of a non-disability related sickness.

86. In my view the appeal tribunal is right for the reasons given by the appeal tribunal.

87 I would however wish to add few words about the blind man with his dog example. Given that this is an employment case I shall assume that a blind employee cannot work in the employer’s premises without the assistance of his guide dog and that the employer has an absolute rule No dogs. Applying section 3A(1) the tribunal can, in my view, properly approach the case by going through the following questions:

Q1. What has the employer done? A. He has refused to allow the blind employee to come to work.

Q2. What was his reason for refusing to allow the blind employee to come to work? A. Because the blind employee insisted that he would not come to work unless he was accompanied by his dog.

Q3. Was his insistence on being accompanied by the guide dog related to his disability? A. Yes.

Q4. Would the employer have refused to allow other employees to come to work if they did not insist on being accompanied by a dog? A. No.

88 In the light of the last answer, the employer is treating the blind employee less favourably than he treats the other employees to whom the reason for not allowing the blind man to come to work would not/does not apply.

89 The effect of Mr Jeans’s submissions is that question 4 should be worded: Would the employer have refused to allow any employees to come to work with a dog? The answer to that question being Yes, Mr Jeans submits that the blind person is not being treated less favourably.

90 In my view my question 4 more nearly approaches the test laid down by Mummery LJ in *Clark v Novacold Ltd* than the question formulated by Mr Jeans. In any event it produces what, in my view, most people would believe to be the correct answer to the problem discussed by Mummery LJ. The same reasoning can be applied, even more easily, to section 4A.”

A18. In Part III, there remains no concept of direct discrimination. Rather disability-related discrimination operates – potentially including direct discrimination, but subject to justification. To interpret disability-related less favourable treatment in the context of the premises provisions in a more narrow a way than that in *Novacold* had the effect of introducing a concept of “direct” discrimination into these provisions – and one which would be subject to justification.

A19. The definition of disability-related less favourable treatment has also featured in school education cases (where there is no concept of direct discrimination). In *McAuley Catholic High School v C and Others* [2003] EWHC 3045 (Admin), the Administrative Court considered an appeal from the decision of the Special Educational Needs and Disability Tribunal (SENDIST). The case concerned a boy with autistic spectrum disorder who had been temporarily excluded from school as a result of this behaviour and whose parents had appealed against this exclusion to the SENDIST. The SENDIST held that there had been discrimination, and that the appropriate comparator for the purposes of disability-related less favourable treatment was someone who was not disabled and who behaved properly. The school appealed. Silber J held at paragraph 45:

“I consider that when the legislature introduced, as is common ground, provisions for discrimination in education which are identical to those which had been in force in the discrimination in employment provision in the same Act, they intended that both sets of provisions should be construed in the same way. After I had reached that conclusion, I came across Lord Reid’s relevant comment:

‘Where Parliament has continued to use words of which the meaning is settled by decisions of the court, it is to be presumed that Parliament intends the words to continue to have that meaning.’ (See *London Corp v Cusack-Smith* [1955] 1 All ER 302 at 314, [1955] AC 337 at 361.)

Thus, the comparator should be selected in education discrimination claims in the same way as the courts had established that they should be chosen for employment discrimination.”

A20. *Novacold* has also been referred to in the context of goods and services. In the case of *R (Longstaff) v Newcastle NHS Primary Care Trust* [2003] EWHC 3252 (Admin), Charles J considered s.20 DDA (discrimination in goods and services) in relation to a decision made by a PCT on whether or not a plasma substitute could be made available to a haemophiliac who refused plasma derived Factor VIII products:

“[57].....It is important to remember that as explained in Clark v Novacold [1999] ICR 951 (at 959C and 964B) the DDA does not draw the distinction between direct and indirect discrimination on specified grounds and was drafted in such a way that indirect as well as direct discrimination can be dealt with under the statutory test.

[58] With my emphasis for present purposes the crucial part of the statutory test in both s. 5 (which was the relevant section in Clark v Novacold) and s. 20 (the relevant section here) is that: "*an employer / provider of services discriminates against a disabled person if (a) for a reason which relates to the disabled person's disability he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply*". The true construction of that phrase is dealt with in Clark v Novacold (see 961H to 965D).”

A21. The concept of disability-related less favourable treatment in relation to premises must, should be interpreted consistently throughout the DDA, and as demonstrated in the cases set out above. Support for this approach is found in all the statutory Codes of Practice produced by the Disability Rights Commission.

A22. Baroness Hale, in her dissenting judgment in Malcolm, revisited the parliamentary history to demonstrate that the Novacold formulation reflected the intention of Parliament:

“78. The Bill as introduced provided that an employer discriminated against a disabled person if for a reason related to the disability, “he treats him less favourably than he treats or would treat others who do not have that disability” (clause 4(1)(a)). A service provider discriminated if “he treats him less favourably than he treats or would treat other members of the public” (clause 13(1)(a)). The original Bill did not contain anything about premises. These clauses were moved in standing committee in the House of Commons, and the Bill as amended adopted the formula that a person discriminated if “he treats him less favourably than he treats or would treat others who do not have that disability” (clause 18(a)). These matters stood until Report stage in the House of Lords. Then the Minister of State, Department for Education and Employment, Lord Henley, moved a series of amendments to substitute the words “to whom that reason does not or would not apply” for the words “who do not have that disability” in what became section 5(1)(a) and section 24(1)(a), and “others to whom that reason does not or would not apply” for the words “other members of the public” in what became section 20(1)(a).

79. The history alone is enough to indicate that Parliament did not intend the comparison to be with someone who did not have the disability. For what it may additionally be worth, it is clear from Lord Henley’s speech in the House that a change of substance and not just of wording was intended (*Hansard (HL)*, 18 July 1995, col 120):

“Currently the comparison is with the treatment of a person who does not have the disability in question. For example, there may be two employees who cannot type – one because of arthritis and one (who is not disabled) because he has never been taught. Both would argue that he is not treating the disabled person less favourably than someone without that disability. He is treating all people who cannot type in the same way. That argument may well succeed and the person with arthritis would have no ground for complaint, even though the employment was refused for a reason relating to disability. Amendment No. 21 would ensure that the comparison is made with people to whom the reason in question does not apply. It correctly reflects the need to show that the treatment was for a reason relating to the disability and not necessarily the mere fact of disability. Thus if the employer is rejecting people who cannot type he will be treating more favourably those who can. The person with arthritis who did not get the job can show that

he or she was treated less favourably than the person with typing abilities who did. The employer may well be able to justify that treatment . . . But at least the disabled person would have to be given the consideration due under the Bill.”

These amendments were welcomed in the House of Lords. A similar explanation was given in the House of Commons when it was invited to agree to the Lords’ amendments: *Hansard (HC)* 31 October 1995, cols 118-9. This was Parliament’s final and considered response to questions raised during the passage of the Bill.

80. This confirms that the construction chosen by the Court of Appeal in *Clark v Novacold Ltd* was indeed the construction which Parliament intended. There is nothing to suggest that, when Parliament changed all three provisions at the same time, so that they had all the same wording, it was intended that they should have different meanings. The fact that they were all changed at the same time (and that one of them had previously been different from the other two) suggests that they were all intended to have the same meaning. The history also explains why there are three different provisions defining discrimination in exactly the same way. It may well be that Parliament had not understood that the narrow scope for justification in relation to services and premises would give rise to the problems we face in this case. But in the light of the Parliamentary history, I do not think that it is possible, either to hold that *Clark v Novacold Ltd* was wrongly decided or to distinguish it on the ground that the same words mean something different in the context of employment. They must mean the same throughout, however inconvenient the result may now appear to be.

81. In reaching this conclusion I believe that I am faithfully following the intention of Parliament. I am sorry to be disagreeing with your Lordships, but even more sorry that the settled understanding of employment lawyers and tribunals is to be disturbed as a result of your Lordships’ disapproval of *Clark v Novacold*. That decision has stood unchallenged for nine years and has not, so far as we are aware, caused difficulty in practice. Furthermore, Parliament has since legislated on the basis that it is correct.”

**Robert Latham**

**Housing Law Practitioners Association**

**6<sup>th</sup> January 2009**