

Response of the Equality and Human Rights Commission to the Office of Disability Issues consultation 'Improving protection from Disability Discrimination'

Introduction

1. 1. The Equality and Human Rights Commission (“the Commission”), established by the Equality Act 2006, has a number of statutory duties including to “(a) promote understanding of the importance of equality and diversity, (b) encourage good practice in relation to equality and diversity, (c) promote equality of opportunity, (d) promote awareness and understanding of rights under the equality enactments, (e) enforce the equality enactments, (f) work towards the elimination of unlawful discrimination and unlawful harassment”.
2. The Commission incorporates a statutory Disability Committee with extensive decision-making powers.
3. The Disability Committee is empowered by the Equality Act 2006 to advise central government on the effectiveness of Parts 1, 3, 4, 5 and 5B of the Disability Discrimination Act 1995 and to recommend to government the amendment, repeal, consolidation (with or without amendments) or replication (with or without amendments) of any of these parts of the DDA. The Equality and Human Rights Commission carries these powers with respect to the remainder of the Disability Discrimination Act, including in respect to discrimination in employment and across other equality and human rights enactments.
4. The unexpected and disappointing House of Lords judgment in *London Borough of Lewisham v Malcolm*¹ (*Malcolm*) has

¹ For details of this judgement and its impact see:
<http://www.equalityhumanrights.com/en/policyresearch/legalupdates/Pages/LondonBoroughofLewishamvMalcolm.aspx>

weakened disabled people's protection from discrimination as originally envisaged under the Disability Discrimination Act (DDA)1995 by - in effect - severely limiting disability related less favourable treatment as a form of protection which was distinct from and wider ranging (albeit subject to justification) than direct discrimination.

5. The Government has announced its intention to address this gap in protection via the Equality Bill, announced in the 2008 Queen's Speech. The Equality Bill is intended to replace the Disability Discrimination Act and all domestic anti-discrimination and equality law.
6. In November 2008, the Government Office of Disability Issues set out its proposals in a consultation paper **Improving protection from disability discrimination**. The Commission welcomes the Government's commitment to address the impact of the Malcolm judgment. This paper is the Commission's response to the Government's proposals.

Summary of the Commission's response

7. The Commission welcomes the Government's proposal to extend indirect discrimination provisions to cover disability in the Equality Bill. We share the Government's perspective that alongside the duties to make reasonable adjustments and promote equality in the public sector, indirect discrimination has the potential to offer incentives to duty holders to take preventive action to eliminate discrimination. Such a step is likely to be required by European law in any case.²
8. The Commission does not however share the Office of Disability Issues' (ODI) confidence concerning how indirect discrimination, as set out in **Improving protection from disability discrimination**, would work in practice and questions whether relying on the approach proposed would alone ensure the Equality Bill met the Government's original policy intent.
9. The Commission supports harmonisation of protection from discrimination in the Equality Bill. This is not however the same as simply harmonising the letter of the law without regard to important and necessary differences.

² Proposal for a council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation 2008/0140

10. In particular, the Commission is concerned that the scope and purpose of indirect discrimination, as currently formulated, will not protect disabled people against unique instances and one-off acts of discrimination which were covered well by disability related discrimination prior to the Malcolm judgment. This would limit the ability of the law to recognise the diversity of disabled people's experiences of discrimination and narrow the scope of the law's protection when compared to the situation prior to the Malcolm judgment.
11. The Commission is concerned that some disabled people will be put in the invidious position of having to rely on negative and inaccurate stereotypes, and be subject to interrogation concerning the nature and impact of their impairment in order to establish indirect discrimination, contributing to a medical rather than social focus on disability. This clearly goes against the intent of existing disability equality law which explicitly requires the promotion of positive attitudes towards disabled people.
12. The Commission is concerned that the complexity involved in bringing a case of indirect disability discrimination, as proposed in the consultation, could lead to far lengthier and more costly litigation both at first instance and on appeal than bringing a case of disability related discrimination, further narrowing protection for individuals and increasing litigation, costs and regulatory burden for duty holders.
13. Society's acceptance of disability discrimination as a phenomenon remains relatively under-developed. A central benefit of the model pre-Malcolm was its moral clarity concerning which acts or behaviours were right or wrong. This is a critically important aspect of the law's ability to affect cultural and attitudinal change. The Commission believe indirect discrimination or reasonable adjustments provisions lack such clarity in their own right.

Background

Understanding the Disability Discrimination Act 1995 approach to discrimination

14. At the time that the Disability Discrimination Act (DDA) was in Parliament the then current discrimination legislation (the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Northern Ireland Fair Employment Acts of 1976 and 1989, and the Race

Relations Act 1976) were all based on a comparative approach concerned with consistent treatment between the protected persons and similarly situated others not having the same characteristic of gender, race or ethnic origin, religion or political belief.

15. However, the DDA did not provide for comparative treatment between disabled and non-disabled people. It recognised that where the disability was relevant to the treatment that a person received then consistent treatment was the last thing that they needed. It was different treatment which eliminated the effects of the disability that was required. For example, a cafe owner might treat all customers the same by refusing them entry if they have a dog with them. The DDA recognised that in this situation a disabled customer needed different treatment - that is to be allowed to enter the cafe with an assistance dog - to get equal treatment.
16. While the DDA was not enacted with a single definition of discrimination that applied across all its provisions it was based on two central concepts that permeated the Act, which were new when the 1995 Act was passed. These were the concept of disability related less favourable treatment and the need to make reasonable adjustments for disabled persons.
17. The meaning of disability related less favourable treatment was not clear to those brought up on or more familiar with the comparative based discrimination legislation. It was inevitable that it would be litigated to appellate level and this happened in *Clark v Novacold* [1999] ICR 951 ('*Novacold*') where the Court of Appeal determined the proper approach to identifying a comparator in a case of disability related discrimination within section 5(1) of the DDA.
18. 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."

19. The employment tribunal held that, whilst the applicant was dismissed for a reason relating to his disability, another 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 therefore there had been no less favourable treatment within the meaning of s.5(1).
20. 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.
21. However 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):

"[The] 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."

22. 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 one³ 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:⁴ they only have to be persons 'to whom that reason does not or would not apply'."

23. Mummery LJ placed particular emphasis on the guide dog example that was used by the Minister during the passage of the DDA through Parliament.

"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

³ i.e. under the pre-existing non-discrimination legislation such as the Sex Discrimination Act 1975 and the Race Relations Act 1976.

⁴ as required under the 1975 and 1976 Acts.

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."

24. Mummery LJ continued at pp.964-5 with an example from the Statutory Code of Practice on Part 3, produced by the Secretary of State:

"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."

The impact of the Malcolm judgment

25. The effect of the *Malcolm* judgment⁵ is that the threshold for proving disability related discrimination is now much higher and is, in effect, set at the same high level as for direct discrimination claims. The reasons why *Malcolm* has had this damaging effect are: firstly, because the ruling expressly overturned the *Novacold* comparator test and secondly, because it ruled that a duty holder must know about the disabled person's impairment - and possibly the effects of it - to discriminate for reasons relating to disability. It is widely accepted that the effects of the Malcolm judgment now apply across the DDA and not just in relation to premises, although this will be tested in relation to Part 2 of the Act in an upcoming case in the Employment Appeal Tribunal.

The post-Malcolm comparator test
In the <i>Malcolm</i> judgment the House of Lords ruled that the correct comparator in disability related discrimination claims is now someone to whom the disability related reason for the less favourable treatment <i>does</i> apply, that is: someone in the same or very similar circumstances. This reversed the <i>Novacold</i> comparator test which was someone to whom the disability related reason does <i>not</i> apply.
Case study: comparator test pre-Malcolm
Assuming Mr Malcolm could show that it was because of his disability that he breached the tenancy rules, to establish a prima facie case of disability related discrimination he would have to show that other tenants who had not breached their tenancy agreements were treated more favourably ie. they were or would not be evicted.
The success of his claim would then have turned on whether or not the council could justify its less favourable treatment of him.

⁵ For more information on the Malcolm judgment please see <http://www.equalityhumanrights.com/en/policyresearch/legalupdates/Pages/LondonBoroughofLewishamvMalcolm.aspx>

Case study: comparator test post-Malcolm

Mr Malcolm's claim failed because under the new comparator rules he could not show that a non or differently disabled tenant who had also breached the tenancy was or would be treated better than him and was not evicted. Because Mr Malcolm could not establish a prima facie claim of disability related less favourable treatment the case did not go forward to consider whether the council had a valid justification defence.

What is the Government's position on the Malcolm judgment?

26. The Government accepts that the Malcolm judgment means that the Act no longer meets its original intent:

"The effect of the House of Lords' judgment is that it has shifted protection under the Disability Discrimination Act away from the Government's policy intention...the judgment has disturbed the balance between the rights of disabled people and the interests of duty holders by making it more difficult for a disabled person to establish a case of disability-related less favourable treatment."⁶

27. However, the Government does not propose to restore the approach taken before the Malcolm judgment. Instead it is proposing to rely on the approach taken to other areas of equality, which is 'indirect discrimination', in the forthcoming Equality Bill, which it suggests will meet the same policy intent.
28. European Law, including the proposed EU Directive (2008/0140) on Goods, Facilities and Services, is likely to mean that the Government will be required to include provisions for indirect discrimination relating to disability in any case. Therefore, whether or not to include indirect discrimination in relation to disability in the Equality Bill is not under question.

⁶ Improving protection from disability discrimination Office of Disability Issues 2008

29. The key question is whether indirect discrimination alone will be sufficient to address and provide disabled people with protection from the particular and diverse forms of discrimination they experience.

What is indirect discrimination?

30. The ODI consultation document proposes that the Equality Bill will use the definition of indirect discrimination, which came into force domestically a few years ago, across all the equality strands including disability. Under this definition, indirect discrimination happens when:

an apparently neutral provision, criterion or practice puts, or would put, people with a 'protected characteristic' at a particular disadvantage compared with other people, unless that provision, criterion or practice can be objectively justified as a being a proportionate means of achieving a legitimate aim.

31. As well as actual disadvantage, the Commission believes that this concept must allow individuals to challenge potentially disadvantageous provisions, criteria and practices that a protected group would experience. The domestic legislation currently requires the complaining individual to have experienced the disadvantage in order to proceed with a complaint.

32. It is 'common ground'⁷ that in determining a claim for indirect discrimination, a court or tribunal must consider the following four legal tests:

Firstly, the claimant has to:

- 1) identify the provision, criterion or practice which is causing a particular disadvantage,
- 2) show that the provision, criterion or practice disadvantages more people who have the same protected characteristic (eg. race or sex) as the claimant compared with people who do not have that characteristic - this is known as 'disparate impact'. This comparison between the disadvantaged and advantaged *groups* is an essential

⁷ R on the application of Watkins-Singh v Aberdare Girls' High School and Anor [2008] EWHC 1865

requirement for establishing a prima facie claim of indirect discrimination,

3) show that the provision, criterion or practice disadvantages the claimant personally.

The defendant then has opportunity to defend the claim if they can:

4) show that the provision, criterion or practice is objectively justified as a proportionate means of achieving a legitimate aim.

33. Indirect discrimination could work well for disability in certain circumstances and we agree with the ODI that it can help achieve systemic change beyond an outcome for an individual litigant. A potential positive benefit of indirect discrimination is that were the Equality Bill to expressly adopt the EU formulation of indirect discrimination a disabled person could take a claim on the basis that a policy, criterion or practice 'puts or *would put* them at a particular disadvantage'. This would give disabled people new rights to challenge discriminatory practices and policies before they take effect and is particularly welcome in the employment and schools education contexts⁸ where there is no general, anticipatory reasonable adjustment duty.

How was disability related discrimination different from indirect discrimination?

34. What was unique, and powerful, about disability related discrimination (as interpreted by the Court of Appeal in *Clark v Novacold*) was that it focused on the reason for the treatment of the disabled person and the comparison was with the treatment of '*others to whom that reason does not or would not apply.*'⁹ In practice, this meant that in most cases the disabled person would succeed in establishing prima facie less favourable treatment following which the success of a case would turn on whether or not that treatment was justified.

⁸ Although there is a general anticipatory duty to make reasonable adjustments under the services and post-16 education parts of the DDA, a disabled person can only bring a legal claim if the failure to make adjustments makes it 'impossible or unreasonably difficult' for them personally to use the service.

⁹ s20(1)(a) Disability Discrimination Act 1995

35. The benefit of this concept was it made determining whether there had been an act of discrimination, which may or may not be justified, the focus of any legal claim. Although it was relatively easy for a disabled person to establish a prima facie claim - and without the need to adduce complex evidence in respect of group comparisons - this was balanced to take account of the legitimate interests of duty holders by the availability of the justification defence. It was because the very limited justification defences¹⁰ then available under the premises part of the DDA tipped this balance too heavily against duty holders that the House of Lords made the restrictive and reductive interpretation of disability related discrimination in Malcolm.
36. The Government has since committed to introducing a standard objective justification defence across all the disability discrimination provisions of the Equality Bill. The Commission believes that the new justification test will be a better and clearer way to achieve a fair and consistent balance between disabled people's and duty holders rights than limiting what amounts to prima facie disability related discrimination.
37. Another important benefit of disability related discrimination was that - unlike indirect discrimination - it covered one-off and individual instances of discrimination. Cases turned on a 'one on one' comparison between the disabled person and an actual or hypothetical comparator. It was irrelevant to the success of a claim whether or not people with the same 'protected characteristic' as the claimant would experience the same or similar less favourable treatment. This meant that a disabled person was protected even if they were the only person affected by the discrimination.

How does the ODI consultation say indirect discrimination will work in practice?

38. The ODI proposals rely largely upon theoretical opinion of how the model of indirect discrimination outlined above could apply in future. In particular, the ODI consultation suggests that the pools of comparison and the protected characteristic will operate in a 'more flexible' manner when applied via the Equality Bill to

¹⁰ The only defences available to Lewisham under the premises provisions of the DDA at the time the case was decided were that the council was justified in evicting Mr Malcolm for health and safety reasons or because Mr Malcolm was not able to enter into or understand a legal agreement.

disability, presumably, including permitting a comparison between a disadvantaged 'group of one' (ie. the individual disabled person bringing the claim) and the advantaged 'others'. The consultation goes on to say that *using the modern approach, the focus would be more on the consequences of the impairment* and therefore is, in the ODI's view, *more in tune with the social model of disability*.¹¹

The Commission's concerns

39. Even if indirect discrimination worked in the manner suggested in the consultation document, the Commission is not convinced that this would, on its own, replicate the benefits of disability related less favourable treatment. The Commission does not share the ODI's confidence in indirect discrimination as a catch all solution which will replicate the effect of the DDA prior to the Malcolm judgment, and believes further consideration is required.
40. The evidence for the ODI assessment is very limited. The updated indirect discrimination formulation has only been in force domestically for about two years and is relatively untested. Neither the actual wording of the indirect discrimination provisions nor current case law supports the view that the courts and tribunals are applying (or could apply) a *new modern, more flexible approach to indirect discrimination* in the way in which the ODI consultation document suggests. We explain why in detail below.

This approach risks significantly narrowing the range and scope of instances of discrimination which are protected

41. There is the risk that attempting to stretch the interpretation of indirect discrimination in its current form to better fit the Government's stated policy intent for disability could damage the concept in other strands. For example, a 'group of one' comparison if established in disability would apply across all the strands significantly extending the scope and purpose of indirect discrimination. This runs the risk of a new Malcolm scenario, whereby the courts make a 'policy' judgment which either rolls the concept back to its current formulation, which falls short of what is required in disability, or worse still, restricts the concept even further but across all strands.

¹¹ **Improving protection from disability discrimination** Office for Disability Issues 2008

Legislation needs to be explicit that "one-off" acts of indirect discrimination are covered

42. The Commission is concerned the scope of indirect discrimination as currently proposed in the consultation will not protect disabled people against individualised and unique instances of discrimination as was the case before Malcolm with disability related less favourable treatment.
43. A further difficulty for disability is whether a 'provision, criterion or practice' can be interpreted to apply to one-off acts of discrimination. To date, there is very little evidence to support that position. The case example¹² cited in the ODI consultation document as evidence that indirect discrimination will easily encompass one-off acts of discrimination is unconvincing given that the case concerned the application of a clearly identifiable policy of requiring all pilots including those working part-time to complete a minimum number of flying hours, from which a legitimate generalisation could be made about the disadvantage this caused to women as opposed to men.

It is unclear what the 'protected characteristic' should be

44. For indirect discrimination to work effectively for disability, more thought will need to be given to how the 'protected characteristic' is defined in legislation. For example, is the protected characteristic disabled people in general; disabled people with the same impairment as the claimant or disabled people with a different impairment to the claimant but who, because of the effects of their disability, experience the same barriers or disadvantage as the claimant as a result of the policy criterion or practice in question (such as disabled people who have an assistance dog or use a wheelchair)?

The requirement for comparator pools will generate complex legal and evidential problems

45. Identifying the correct groups of comparison for indirect discrimination claims isn't a straightforward task under the existing provisions such as race and sex legislation, and has proved problematic in relation to religion/belief legislation.

¹² British Airways plc v Stamer [2005] IRLR 862

46. The Employment Appeal Tribunal (EAT) recently reiterated that *'the whole purpose of indirect discrimination is to deal with the problem of group discrimination.'*¹³ This judgment was in the context of religion and belief which because of the diverse range of personal belief most resembles disability. The claimant, a practising Christian, argued that her employer's policy prohibiting staff from wearing religious symbols over their uniform was indirectly discriminatory on grounds of her religious belief that wearing a cross visibly was an intrinsic part of her faith. The EAT ruled that *'if someone holds subjective personal religious views' and could show no evidence that others with the same views were similarly disadvantaged he or she is protected only by direct and not indirect discrimination.'*
47. This judgment makes clear that whilst statistical evidence is less necessary indirect discrimination claims could still turn on establishing disparate impact between groups based on 'pools of comparison'. This means that a disabled person could still have to show that more - if not most - people with the same 'protected characteristic' are disadvantaged by the provision, criterion or practice compared with others *as well* as showing that they personally are disadvantaged by it. This contradicts the suggestion in the consultation document that indirect discrimination, as currently formulated, can protect a disabled claimant if, as will often be the case with disability, that they are the only person disadvantaged by a particular provision, criterion or practice.
48. The breadth of the DDA's definition of disability, impairments and health conditions, the effects they have on individuals and the interaction of those individuals with the world around them are hugely varied, often unique and frequently complex, and as such extremely diverse across the population of disabled people. There could therefore be many instances where a disabled person is unable to show (through evidence where generalisations aren't accepted) that other disabled people are disadvantaged by a particular provision, criterion or practice and therefore will not be able to establish disparate impact as is required in cases of indirect discrimination. Because of this the Commission's view is that relying on indirect discrimination alone, as proposed, will lead to the loss of a key strength of pre-Malcolm disability related discrimination in recognising and dealing effectively with this

¹³ Eweida v British Airways plc EAT/0123/08

diversity. In doing so it could lead to protection for far fewer disabled people than was the case prior to the Malcolm judgment.

49. Following the Employment Appeal Tribunal judgement in *Eweida - v- British Airways* (UKEAT/0123/08) it is likely that wider evidence of group disadvantage - beyond a numerically small group - will have to be adduced in order to demonstrate that indirect disability discrimination has occurred. Complex and protracted arguments are therefore highly likely as to the correct pools of comparators in many indirect disability discrimination claims. Without greater clarity on the face of the legislation, the practical problems presented for individuals, those with responsibilities, advisers, courts and tribunals will be both considerable and profound.

Indirect discrimination could inadvertently lead to the promotion of negative attitudes towards disabled people

50. The Commission is concerned that the proposed 'indirect discrimination alone' option could result in cases being decided on the basis of a medical model of disability and/or negative stereotypes about disabled people rather than on the question of whether there has been discrimination which may or may not be objectively justified.
51. The group comparison requirement in indirect discrimination and the process of identifying the 'protected characteristic' both focus on the impairment, its consequences and effects, rather than on whether there has been unlawful discrimination. The Commission is concerned that cases could proceed on the basis of an interrogation of the individual's impairment, its symptoms and its impact on the individual, and not on the barriers faced, in the vein of the social model of disability as ODI suggest.
52. The requirement to establish disparate impact in order to show indirect discrimination could put disabled people in the invidious position of having to rely on negative and inaccurate stereotypes to pursue their case. Such evidence is unlikely to be found without considerable difficulty, if at all, and the search for it could be difficult and costly as well as generating a real risk of perpetuating negative stereotypes about disabled people.

53. For example, an employer has a policy of dismissing any employee who is off sick for six months or more. A disabled employee is dismissed for taking six months sick leave (which is disability related). In order to establish a prima facie claim for indirect discrimination the disabled employee would have to show the capability policy had a disparate impact. In practice, this would mean the disabled person providing evidence to the tribunal that non-disabled employees are less likely to be off sick for six months or more and therefore would not be dismissed under the capability policy. In fact, research shows that on average disabled people have less sickness absence than non-disabled colleagues.
54. Whereas pre-Malcolm the disabled employee could show a prima facie case for disability related discrimination - and the success of their claim would turn on whether the employer's action were justified - under indirect discrimination they would have no grounds to bring a claim as the evidence does not support the stereotype. The risk is that in requiring evidence to support negative stereotypes such as 'disabled people are sick more often' or 'disabled people are more likely to be problem tenants' in order to prove disparate impact, the indirect discrimination model will reverse the government's stated policy aims.
55. The promotion of negative attitudes is clearly at odds with the policy intent of anti discrimination and equality law, including the current Disability Equality Duty which requires public authorities, including Government to promote positive attitudes towards disabled people. That includes ensuring, through equality impact assessment, that policies, practices and legislation such as the Equality Bill do not have a negative impact on attitudes towards disabled people.

Indirect discrimination is silent on knowledge of disability

56. A further way in which Malcolm has damaged and narrowed the scope of disability related discrimination is that the House of Lords ruled that a duty holder must have knowledge of disability - and possibly its effects - to discriminate unlawfully. The indirect discrimination model proposed by ODI is silent on the issue of whether a duty holder has to know of the impairment (and its effects) to discriminate and as such is likely to replicate the high threshold for proving discrimination as post-Malcolm disability related discrimination. Given that many disabilities are fluctuating, hidden (for example, epilepsy or diabetes) or masked by coping

strategies and that the effects of impairments are very often unique to an individual, it is essential that the finalised Equality Bill proposals expressly address on the face of the law that knowledge is not required to establish prima facie indirect discrimination.

57. Explicitly stating in the legislation that knowledge plays no part in determining liability for indirect disability discrimination is essential. This should not be a difficult task; it would simply be reiterating and entrenching the current consensus. The House of Lords judgement in *Malcolm* demonstrates that statutory guidance and previous case law alone may not be sufficient safeguards to ensure legislation is interpreted as required. In the absence of clear legislative purpose and intent there is a real risk that a knowledge requirement could be implied, and the law's effectiveness in tackling societal barriers would be greatly reduced.

Relying on indirect discrimination alone will lead to greater complexity, litigation and regulatory burden

58. Indirect discrimination claims are legally and evidentially complex. Identifying the correct comparator groups in indirect discrimination claims is complex and already many cases are appealed on this point. The difficulty of identifying the protected characteristic in disability cases will add to these difficulties. By way of contrast, feedback from both claimants' and duty holders' representatives at the consultation meetings has been that disability related discrimination was a well understood and widely accepted concept.
59. Given the particular difficulties in fitting all instances of disability discrimination into the indirect discrimination model, the Commission is concerned that the ODI's proposals may result in far lengthier and more costly litigation both at first instance and on appeal. This will make it more costly and burdensome for duty holders and far more difficult for many disabled people to establish a prima facie case of disability discrimination. As such, the Commission believes that in practice relying solely on the approach proposed by the ODI would fail the test of simplifying the law.

This approach will not harmonise protection from discrimination

60. Whilst applying indirect discrimination to disability would harmonise the letter of the law, it would mean that disabled people

do not regain that protection which they enjoyed prior to the Malcolm judgement which was the original intention behind the legislation . Specifically, disabled people would not regain protection against discrimination which is a consequence of, rather than being directly based on disability, which was provided under disability related discrimination.

Indirect discrimination and reasonable adjustments lack clarity about the unacceptability of behaviours

61. Disability related less favourable treatment offered a high degree of certainty concerning the unacceptability of particular behaviours, clearly separating right from wrong on such matters as whether a guide dog user should be able to access a shop or restaurant for example. Such clarity is a critical element of promoting the cultural and attitudinal change required to overcome pervasive notions of disabled people as objects of charity, welfare or 'special assistance' rather than citizens with human and civil rights. The Commission considers that indirect discrimination and reasonable adjustments alone lack such clarity, and that the resulting ambiguity could set the process of cultural and attitudinal change back.

Consultation question 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?

62. The Commission can see potential value in this proposal. However, further analysis is required in respect of its practical effect. For example, a reasonable adjustment may be provided to an individual which is then relied on by a duty holder to justify a failure to correct the systemic disadvantage caused by a particular policy, criterion or practice. Because the reasonable adjustment duty is individualised and, in the employment, schools education and premises contexts, relies on the duty holder having knowledge of disability it cannot effectively fill the gaps in protection under indirect discrimination which were covered well by disability related discrimination.

Consultation question 3: Do you agree that the assumptions underpinning the regulatory impact assessment and equality impact assessment are realistic?

63. The Commission does not routinely formally review draft Equality Impact Assessments(EIA), such as that which accompanies the current proposals. However, the Commission has noted that the concerns expressed by a number of stakeholders regarding the content, coverage and robustness of the current EIA. These will be considered as part of any future full review of the EIA.

Further considerations and questions

64. It not clear from the ODI consultation document¹⁴ whether the government intends to extend indirect discrimination to the schools and post-16 education contexts. To exclude education (other than vocational education which falls under the employment provisions of the Act) from the Equality Bill proposals to remedy the Malcolm judgment would be an unacceptable omission and resulting reduction in the scope of protection and would run counter to the government's stated aim of harmonisation and simplification of the law. **The Commission would welcome clarification from ODI on this issue.**
65. As noted above (paragraph 48) dismissals (but not the stages leading up to dismissal) are currently exempt from the duty to make reasonable adjustments. This substantial gap in protection should and can easily be remedied by express provision in the Equality Bill as part of the measures to remedy the Malcolm judgment.

Conclusion

66. The Commission seeks an Equality Act which harmonises protection from discrimination and the promotion of equality and which makes the law simpler and easier for those with rights and responsibilities to understand and use.
67. Whilst welcoming the extension of indirect discrimination to disability, the Commission does not believe it can be relied upon alone to recognise often unique instances of disability discrimination or to achieve the goals of harmonised protection and simplification.

¹⁴ 'This concept of indirect discrimination will extend across the provisions covering employment, vocational training, occupation, access to goods, facilities, services, premises and larger private clubs and the functions of public authorities' paragraph 41 page 27 **Improving protection from disability discrimination** ODI 2008

68. Whichever model is adopted in the Equality Bill to put right the problems caused by the Malcolm judgment, in order to achieve the government's stated policy aims it must:

- protect against disability discrimination which affects both individuals *and* groups
- protect against one-off acts of discrimination
- overcome difficulties in identifying comparator pools for varied and varying disabilities
- not be dependent on a duty holder having knowledge of disability, or its effects/consequences, to discriminate unlawfully
- provide a fair balance by means of objective justification defence between disabled people rights and interests fo duty holders

69. The Commission believes the answer lies in one of two options:

1. A provision *in addition* to the indirect discrimination model proposed in the consultation or;
2. Concretising the approach to indirect discrimination proposed by the ODI in the consultation by spelling this out on the face of the Equality Bill