

ASSOCIATION OF RETIREMENT HOUSING MANAGERS

DISABILITY DISCRIMINATION AND RESIDENTIAL PREMISES

OVERVIEW

- From December 4th 2006 all managers and landlords will have to be aware of new duties regarding disabled persons who may require assistance or alterations to enjoy their homes.
- If you are an employer of staff it will not be a defence to show an employee discriminated without your knowledge. You have a legal liability for your employee's actions.
- The new duties do have impact on the common parts of blocks of flats to some degree.
- This GPN draws from relevant parts of the 2006 code of practice on access of the Disability Rights Commission (DRC).

WHAT IS THE DEFINITION OF DISABILITY

It is a wide definition. Disability is a physical or mental impairment, which has a substantial or long term (more than 12 months) adverse effect on a person's ability to carry out normal day to day activities. The definition includes HIV, cancer, mental illness and diabetes.

As managers you may not be aware of lessees or their family who are disabled. It would be sensible to review your information or standard letters on alterations and improvements and any handbooks to acknowledge the needs of disabled persons.

FORMS OF DISCRIMINATION

There are two main ways in which you can discriminate.

The first is called giving "less favourable treatment". An example might be a landlord who refuses consent to sublet because the sub-tenant is disabled.

The second is a failure to make reasonable adjustments if requested by a disabled person. An example might be a request to have a portable ramp placed to gain access to a refuse area.

LEGAL LIABILITY OF EMPLOYERS FOR DISCRIMINATION

If discrimination is committed by an employee it is not a defence for the employer to show he was not aware of the employee's actions. The employer is legally liable for the employee.

The best defence is to consider issuing a policy or guidance note to all employees about disability discrimination and draw their attention to the ways in which procedures will have to change for disabled persons because of the new duties outlined in this GPN.

LESS FAVOURABLE TREATMENT

Less favourable treatment arises if the disabled person would not have received that treatment or service but for his/her disability. The requirement not to give less favourable treatment applies to sales, lettings and management activities including assignments and consents arising from them.

Examples might include:

A manager refuses to allow a child of a lessee with attention deficit disorder to use the communal garden. This is likely to be unlawful.

A manager refuses consent to an assignment of a flat to a disabled person because of the disability. This is likely to be unlawful unless the agent can prove that there are health and safety grounds why the disabled person cannot access the flat.

A resident association committee harasses a disabled lessee who they believe is not capable of living in the block and the use of wheel chair is damaging communal areas. This behaviour is likely to be unlawful.

DUTY TO MAKE REASONABLE ADJUSTMENTS

This duty on managers and landlords including RMCo's only arises in relation to a disabled person and only if an adjustment is requested. The duty is not anticipatory and the liability does not fall on lessees selling their flats. However, the request need not be in writing or be specific. A disabled person may approach you to say he/she is having difficulties accessing the laundry or refuse store; this should be treated as a request. The disabled person requesting need not be the lessee; it can be any person lawfully occupying a flat.

The duty is that once a request is received you should take reasonable steps to address the barriers experienced by the disabled person. The DDA identifies three main types of adjustments which will apply to residential premises.

- Auxiliary aids and services.
- Policies, procedures and practices
- Charge to a term of a letting or lease.

AUXILIARY AIDS AND SERVICES

The following are specifically defined in regulations as auxiliary aids and services that a manager would have to consider.

- Replacement or provision of signs and notices.
- Replacement of taps and door handles

- Replacement or provision of door bells or door entry systems.
- Changes to colour of walls and doors.

The duty to make reasonable adjustment applies not only to the premises – the flat occupied – but also to the benefits and facilities of the block such as gardens, laundries, residents' lounges, and refuse areas. Examples of auxiliary aids and services are as follows.

A disabled lessee has started to use a wheelchair. She is unable to leave the block because she cannot get down the steps at the main door. A portable ramp would help and the local services are willing to supply one. The manager decides this is a reasonable step to allow the ramp.

A deaf lessee requests a BSL interpreter when the agent asks to speak to her about arrears of service charge. A blind lessee asks if the handbook explaining her lease can be available in Braille or on tape.

ADJUSTMENTS TO POLICIES, PRACTICES AND PROCEDURES.

Do your current policies etc make it impossible or unreasonably difficult for disabled persons? *An example might be a parking policy which prevents a disabled person parking near to her flat.*

THE DUTY TO CHANGE A TERM OF A LEASE

If a term in a lease makes it unreasonably difficult or impossible for a disabled person to enjoy the flat or the benefits and facilities in a block, a duty to adjust the term may arise. For example:

A lessee develops a sight impairment and wishes to have an assistance dog. The lease states no pets and the lessee asks the landlord to waive the restriction. This is likely to be a reasonable step for the landlord to take.

A disabled lessee cannot access the drying area because of the disability. The landlord on request agrees not to enforce a covenant that prevents lessees from hanging out clothes on balconies.

THE SPECIFIC DUTY TO CHANGE A TERM THAT PROHIBITS THE MAKING OF DISABILITY RELATED IMPROVEMENTS.

The DDA contains a specific duty with regard to changing the terms of leases. It is a duty to take steps to change a term which **prohibits** the making of alterations or improvement within a flat.

A disabled lessee requests the removal of a bath and the installation of a walk-in shower. A technical inspection shows the change is feasible and the lessee will meet all costs. It is reasonable for a landlord to change the term of that lease to overturn the prohibition. In addition the landlord can attach normal reasonable conditions that would apply with such a consent.

PHYSICAL FEATURES AND REASONABLE ADJUSTMENTS

The duty to consider reasonable requests for adjustments from disabled persons does **not** require a landlord to take steps that would require the removal or alteration of a physical feature including fixtures. So it would not cover a request to move a drying area to make access easier for disabled persons, or to change the communal entrance door to a block of flats.

However, remember signs, notices, doorbells, door entry and colour schemes and furnishings, fittings etc (so long as they do not amount to a fixture) are **not** physical features according to the DDA, and thus the duty to make reasonable adjustments will apply to these features.

WHAT IS IT REASONABLE FOR A LANDLORD/MANAGER TO DO?

The DDA states that managers should take “reasonable steps” to make reasonable adjustments on request. What are reasonable steps? Each request will be different and depend on the circumstances, but the DRC code of practice helpfully lists a number of factors which might be taken into account when considering what is reasonable. So assess any request against the following before making a decision.

- The nature of the letting. A request from a person with an assured six monthly tenancy could be treated differently than a 99 year lease.
- The effect of the disability on the individual person.
- The effectiveness of the proposed step. Will what is proposed actually work?
- The extent to which it is practicable to take the steps. The installation of a walk- in shower may not be practicable if there is not enough depth in the floor for the plumbing required.
- The financial and other costs of making the adjustment.
- The extent of any disruption and the effect on other lessees.
- The extent of the landlord or manager’s financial and other resources and availability of other sources of assistance.
- The amount of resources already spent on making adjustments.

How might these factors work in practice?

A large landlord with several thousand properties with standard leases is asked to provide a video of the lease and/or handbook in BSL. This is likely to be reasonable step for a very large landlord, but not for a small one. An option may be to offer the new lessee a home visit to talk through the handbook.

HEALTH AND SAFETY

The DDA allows for the justification of health and safety to be grounds for the refusal to carry out a reasonable adjustment. The health and safety can be that of the disabled person or of any other occupiers of a block.

However, a landlord or manager using this reason must be able to show objective evidence to support it. A blanket policy to refuse storage of mobility scooters in common areas or to ban stairlifts should have properly researched evidence and a risk assessment.

REFUSAL OF CONSENT TO IMPROVEMENTS REQUESTED BY DISABLED PERSONS

This part of the DDA is not about changing the term of a lease which prohibits all improvements or alterations by lessees. It is where a lease does allow improvement or alteration subject to the landlord's consent.

The DDA applies to all long leases the following:

- If a lease permits improvements to a flat subject to consent
- And a disabled person is the lessee or a lawful occupier using the flat as their principle home.
- And a request is made for an alteration or improvement.
- And the landlord's consent is unreasonably withheld.
- **The consent may be treated as if it had been given**

Note we are dealing with requests for improvements or alterations within flats here, not common parts. Each request will depend upon the circumstances but the DRC code helpfully sets out some factors that should be taken into account when considering unreasonableness.

- What would the impact of any refusal be on the disabled person?
- Would the improvement make the property less safe?
- To what extent would the improvement reduce the price of the flat? (more relevant to landlord of a short let flat).
- The ability of the lessee to pay for the improvement.
- The scale of the proposed adaptations.
- The nature of the tenancy – type and length.
- Nature of the premises (e.g. their type).
- The feasibility of the work.
- The length of the term of years remaining.
- Disruption to other lessees.
- Building regulations and other necessary consents.
- The need for re-instatement.

A manager can attach reasonable conditions to any consent and most will do so. However, if the conditions are unreasonable then once again consent can be deemed to be given. The DRC code helpfully gives examples of possible conditions that can be attached to alterations and improvements.

- Requirement to obtain necessary consents e.g. building regulations.
- Requirement for pre or post inspection by landlord
- Carry out works in accordance with agreed plans and specification.

- Payment of landlord's costs of consent.
- Requirement for lessee to pay for any ongoing maintenance.
- Requirement for re-instatement but not if the improvement would increase the value of the flat.

WHO PAYS?

Where a disabled person asks for an improvement or alteration to a physical feature as defined by the DDA (see above), then the manager will have no obligation to provide a reasonable adjustment. In other circumstances, where the manager has a duty to make a reasonable adjustment, many things can be done without costs to the landlord. Portable ramps and other items are often supplied by local social services.

Where other sources like social services will not pay the entire cost of the adjustment then, as with other aspects of the DDA, the manager will have to pay for such an adjustment, where reasonable. Managers will wish to consider in what circumstances they can reclaim the costs of such an adjustment. This will depend both on the terms of the lease and the provisions of the DDA. The DDA makes clear that requests for reasonable adjustments to auxiliary aids and services, and changing terms of leases are not payable by the disabled person or the lessee in whose flat the disabled person lives.

However, it may – depending on the terms of the lease- be permissible to pass this cost on to all lessees, without singling out only the disabled lessee or occupiers benefiting from the change. Auxiliary services such as hearing loops, BSL interpreters, and Braille documents could be a relevant management fee item but it would be necessary to check the leases as usual. A lease that contains a clause that the landlord can recover all other costs of management may be interpreted as covering the costs of such reasonable adjustments. The DDA and the code of practice of the DRC infer that a reasonable manager should consider these changes to management practices that incur expense.

If leases contain a clause that the landlord can charge the cost of any statutory requirements then this may also cover the costs of compliance with the DDA.

What about expensive adjustments? The DRC code states that the financial resources of the landlord are a relevant factor in considering reasonableness. So a RMCo which has taken advice that an adjustment cannot be recovered under the terms of the leases may refuse if it has no other funds. A large landlord or agent with thousands of properties in management may have to take another view.

WHAT ABOUT ALTERATIONS TO COMMON PARTS?

The main thrust of the changes in the DDA 2005 is about making it easier for disabled persons to carry out improvements or alterations to their premises, i.e. to within their own flats. The duty to change a term that prohibits improvements, or that unreasonable refusal to consent to an improvement for

a disabled person shall be deemed as consent, do not apply to common parts (though see below).

There is one potential exception to this position: a requirement to treat requests for alterations from disabled and non-disabled tenants even-handedly. In one case (currently the subject of an appeal) where a landlord allowed one lessee to install something in the common parts, but then refused consent to installation of a stairlift: this was held to be disability related less favourable treatment, and the landlords were required to consent to this alteration (subject to appeal).

The requirement to consider reasonable adjustments for auxiliary aids may affect common parts, for example allowing a portable ramp to a main entrance.

However, whatever the DDA says or not, managers should consider requests for alterations to common parts which would assist disabled persons, particularly where the lessee is willing to pay for the alteration, ongoing maintenance and reinstatement if that is a requirement. A typical example may be a stair-lift which other lessees will accept and a risk assessment should be carried out before permission was given. Use the relevant factors set out here to assess whether consent should be given and do not assume that the other lessees will always object.

MORE INFORMATION

- The DDA 2005 amends the DDA 1995 with regard to premises.
- The definition of physical features is in the Disability Discrimination (Premises) Regulations 2006, SI No 887.
- The relevant Disability Rights Commission Code of Practice is called 'Code of practice-rights of access: services to the public' and can be downloaded free of charge from www.drc.org.uk. Click on library, then publications, then services and transport. Or it ordered from the stationery office.