



Office of the

**First Minister and
Deputy First Minister**

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**Regulations arising from the
Disability Discrimination
(NI) Order 2006**

Consultation Report

CONTENTS

	Page
Introduction.....	3
Distribution.....	5
Summary of responses.....	6
Consideration of responses.....	7
Annex A.....	17

Introduction

This consultation response report marks the conclusion of the consultation exercise on the OFMDFM regulations arising from the Disability Discrimination (Northern Ireland) Order 2006 “the DDO”.

The consultation ran for an 8 week period from 31 July 2006 to 25 September 2006. Since this was an extension of the original consultation on the DDO, with no new policy areas to consider, a limited consultation period of 8 weeks was deemed sufficient to scrutinise the draft legislation.

The consultation provided an opportunity to comment on the wording and effect of the draft legislation in the following areas:

Private Clubs

The DDO brings private clubs within the scope of the Disability Discrimination Act (DDA). The consultation sought views on the draft regulations which place duties to make “reasonable adjustments” on private clubs similar to the existing provisions applying to providers of goods, facilities and services.

Premises

The DDO adds to the existing duties on landlords and managers of rented premises so that they must make reasonable adjustments to their policies, practices or procedures and terms of letting or provide auxiliary aids and services. The consultation sought views

on the draft regulations to support these duties. These included proposals on how to define physical features. **Regrettably, due to an error in the document, a paragraph explaining that “furnishings, furniture, equipment or material” were not to be treated as physical features was omitted. While the draft Regulations did carry the correct text we apologise for any confusion this may have caused.**

Functions of Public Authorities

Article 4 of the DDO amends the DDA to ensure that all the functions of a public authority are covered by the DDA. Previously a public authority was only covered by the DDA when providing a service. A public authority will not be able to treat a disabled person less favourably when carrying out their public functions and will also be under a duty to anticipate making reasonable adjustments. The consultation sought views on the draft regulations to support these duties.

The Questions procedure

The DDA provides for a procedure so that a person who believes that they have been discriminated against in contravention of its employment and occupation provisions can put questions to the alleged discriminator. The consultation sought views on a draft Order extending this existing procedure to discrimination in areas covered by Part III of the DDA.

Distribution

Information packs were issued to individuals and organisations including: people with disabilities, disability organisations, employers, service providers and public authorities.

The document was available on request in a variety of accessible formats. The consultation pack was also available to download from the website of the Office of the First Minister and Deputy First Minister (OFMDFM) at <http://www.ofmdfmi.gov.uk/equality> and respondents could reply to the consultation electronically if preferred.

A total of 15 responses were received. A list of those who responded is at Annex A.

Summary of Responses

Private Clubs

Of the 15 responses received, the majority of respondents indicated their general agreement with the proposals in relation to private clubs, that is, that the duties to make reasonable adjustments be framed in the same way as those for service providers, that the trigger points for the reasonable adjustment duties should be that a service would be impossible or unreasonably difficult for a disabled person to access and that these duties be anticipatory. However, almost half of respondents raised specific queries/comments on private clubs.

Premises

All of the respondents indicated their broad agreement on the draft proposals. Among specific comments received were concerns about defining physical features, a landlord's consent to making alterations and justifying failure to make reasonable adjustment.

Functions of Public Authorities

Again, there was broad agreement among all respondents to the draft proposals relating to the functions of public authorities. However, recurring concerns in relation to specific exclusions and the concept of reasonable adjustments were raised here (also raised in relation to the other sets of regulations).

The Questions Procedure

Of the responses received, all respondents were in agreement with the draft proposals.

Consideration of Responses

The following section “Consideration of Responses” addresses the issues raised in relation to private clubs, premises, the functions of public authorities.

Private Clubs

While not part of this specific consultation, three respondents expressed concerns that a private club had been defined as one which has 25 or more members, leaving smaller clubs outside the scope of the legislation. One respondent favoured a lower threshold of 11 while another could foresee problems with a club whose membership fluctuated above and below the 25 threshold.

The definition of a “private club” used in the DDO is modelled on the definition in the Race Relations (Northern Ireland) Order 1997. That Order also uses a threshold of 25. This is a recognised mechanism to help strike a balance in extending the legislation to private clubs without including those engaged in small private gatherings in, for example, their own homes.

A private club is not only defined by the number of members. It must also have a constitution. This does not have to be a written constitution; as long as there are rules governing issues such as membership this will count. The club must also run its affairs in a way so that its members do not constitute a section of the general public. In practice, this means it must operate a policy of membership selection based on personal criteria. (Clubs not

operating a policy of membership selection are already covered by the DDA.)

Using this established mechanism to trigger protection against discrimination ensures that those organisations meeting the entire definition of a private club will now be brought within the scope of the DDA. However, it also recognises that people have a right to privacy and to associate with whomever they choose. We would not want to intervene in private social arrangements. Therefore, the number threshold provides a suitable exemption for such arrangements.

The consultation specifically asked whether respondents agreed with the proposals that the duties to make “reasonable adjustments” to be applied to private clubs should be framed in the same way as those for service providers and whether they agreed with the proposals for the trigger point for reasonable adjustment duties and that these should be anticipatory.

Almost half of those responding commented on the use of the term “reasonable adjustments”. This was not only in the context of private clubs but also in relation to the other sets of regulations. Respondents generally welcomed a consistent approach to the application of the legislation. One respondent, however, saw difficulties in defining reasonableness in relation to a private club. A concern was also expressed about the use of the trigger “impossible or unreasonably difficult” and the circumstances in which less favourable treatment is justified. Two respondents preferred the trigger of “substantial disadvantage” which already

applies to the employment and education parts of the DDA. Overall, the majority of respondents commenting on these issues broadly welcomed the proposals.

We intend that the duties on private clubs be consistent with those duties already placed on the providers of goods, facilities and services under Part III of the DDA. This is based on the proposition that the relationship between a private club and its members and guests is comparable to the relationship between other providers of goods and services and their customers, and that the same level of protection for disabled people is appropriate. This approach also has the benefit that organisations providing some services only to their members, and other services to the general public, will face the same duties in respect of all their services.

The duty to make reasonable adjustments is a cornerstone of the DDA and requires service providers to take positive steps to ensure that disabled people can access services. This goes beyond simply avoiding treating disabled people less favourably for a disability-related reason. It is not minimalist but requires, so far as it is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public. Accordingly, the purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large.

Defining what is or is not reasonable would not be appropriate because what is a reasonable step for a particular service provider depends on all the circumstances of the case. Obviously this would vary according to the type of service being provided, the nature of the service provider and its size and resources and the effect of the disability on the individual disabled person. There are therefore no plans to further define “reasonable” in the legislation.

In relation to the concern expressed about the trigger mechanism, again this is in keeping with the goods, facilities and services provision of the DDA. It is in the interests of all to ensure that the trigger mechanisms across each section are similar so as to aid understanding and interpretation. As the DDO brings some 40 changes to the DDA it is in the interests of all, especially those with disabilities, to have common themes of trigger mechanisms.

It should be noted however that disability legislation in general will be kept under review by Government to ensure that the required levels of protection are being provided and will be looked at again within the context of a single Equality Bill.

Five respondents mentioned the position of political associations under the private club provisions. All five felt strongly that political associations should be bound by the DDA. Of these five, three went on to say there should be no requirement for the reasonable adjustment duties to be modified for political associations.

As the legislation currently sits, political associations will be covered by private club provisions as long as the political

association conforms to the definition of private club in the legislation (the DDO), which states that there must be 25 members or more. The club (known as the association) must also have a constitution which regulates membership. Following consultation there are no plans to change this to exempt political associations in any way.

Premises

The consultation sought views on the proposals in relation to the rental and management of premises. The consultation highlighted specific proposals in the regulations, i.e. defining physical features, tenants' alterations and justification for failure to make a reasonable adjustment.

Several comments were made on the draft proposals in terms of defining physical features in particular.

There was general agreement with defining physical features in the Regulations. As mentioned earlier, due to an error in the document we omitted a paragraph explaining that “furnishings, furniture, equipment or material” were **not** to be treated as physical features. While the draft Regulations did carry the correct text we apologise for any confusion this may have caused.

Landlord's consent to a tenant making alterations

Article 14 of the DDO introduced new duties so that landlords or those managing rented premises would have to make reasonable

adjustments for disabled tenants and occupiers. These new duties do not extend to requiring a landlord to alter physical features of premises. However Article 16 of the DDO provides for cases where a term of letting permits the making of disability related improvements, subject to the landlord's consent.

Regulation 7 also provides for the situation where the term of a lease prohibits improvements and allows for the term of letting be changed as a reasonable adjustment.

Few specific comments were made on this area but those who did comment broadly welcomed this further development of the reasonable adjustment duty.

Comments were also made on the justification defences. One respondent disagreed with the justification principle (apart from Health and Safety justification) on the basis that disability discrimination is not justifiable. Another respondent raised the issue of justification if the disabled person is incapable of entering into an enforceable agreement or giving informed consent and suggested that consideration be given to its removal or rephrasing to avoid offence to disabled people. The issue of relying on this justification where a disabled person is acting through others (e.g. someone with power of attorney) was also raised.

We believe that the Premises provisions are proportionate and reasonable. They mirror existing provisions in Part II of the DDA, with which service providers and disabled people have become familiar and which are already working. In fact, the Disability

Rights Task Force, in its report, recommended that landlords be placed under a duty to make reasonable adjustments to their policies, practices and procedures in the same way as service providers.

The DDA does not define impossible or unreasonably difficult. However in considering whether it applies in any particular case, controllers of premises should take account of whether the time, inconvenience, effort, discomfort or loss of dignity entailed by the disabled person in renting or seeking to rent premises, or in making use of benefits or facilities, would be judged unreasonable by other people if they had to endure similar difficulties.

Public Authorities

A number of respondents felt it was not clear why political representatives/the NI Assembly and two Houses of Parliament should be exempted from the legislation.

The Disability Rights Task Force in its 1999 report “From Exclusion to Inclusion” looked at whether the DDA should be extended to cover the Houses of Parliament and the NI Assembly. While it sought protection under the law for local councillors, the Task Force recommended that internal procedures of Assemblies or Parliaments should be used to secure reasonable adjustments for their Members.

The inclusion of the Houses of Parliament and the NI Assembly would undermine an important principle. That principle is that

Parliament should have sole control over its own affairs and procedures; the principle of “exclusive cognisance”.

The limited list of exemptions is broadly the same as those contained in the Race Relations (Northern Ireland) Order 1997. We believe that these exemptions are necessary to protect the independence of the Assembly, the sovereignty of Parliament, the integrity of the judicial process and national security.

General Queries

One respondent commented on the lack of consultation with children and young people.

These comments have been noted for future consultations. However, this was an issue that was given significant consideration during the original consultation on the DDO. At that time the Department sought advice from a representative from the Northern Ireland Commissioner for Children and Young People. During a meeting with the representative it was felt that, due to the complex nature of the legal drafting of the DDO, consulting with children was unnecessary.

We did, however, specify in our remit to the organisations that ran meetings on our behalf (as part of the consultation process) that we were keen to have the views of as many young people as possible. Consequently, a number of young people with disabilities did attend the consultation meetings we ran in conjunction with MENCAP and Disability Action.

We also take the view that it would be inappropriate to have specific references to children and young people who are affected by disabilities as this would discriminate against all other age groups of people with disabilities.

We believe that the approach in the DDO, where all people with disabilities are treated equally, is the most appropriate way forward at present. In addition, in the case of the regulations consultation, no new policy areas were being explored and this was very much a consultation on the actual legislation.

Some respondents expressed concern about the complexity of the legislation and the difficulties people face in terms of interpretation.

As far as is practicably possible, the legislation mirrors existing provisions which service providers and disabled people alike have become familiar with. The Equality Commission for Northern Ireland is responsible for producing Codes of Practice and we anticipate that the Commission will include illustrative examples of reasonable adjustments etc as part of that process.

Furthermore, it is also the Department's intention to harmonise existing legislation in the context of a single Equality Bill. The Bill provides an opportunity to examine existing legislation and any inconsistencies within the respective areas of anti-discrimination legislation.

Several respondents were concerned that the emphasis on costs to public authorities, landlords and private clubs was too great.

The Department accepts the position and concerns of respondents that the legislation appears to have 'get out clauses'. However it is important that a fair balance is struck between the rights of disabled people and wider concerns. Again, this approach mirrors the justification defences in the goods, facilities and services provisions as closely as possible, to ensure consistency throughout the DDA.

Several respondents mentioned the use of certain language within the text of the consultation document and several inconsistencies between the draft rules and the consultation document itself. One respondent expressed disappointment at the continued use of the term "learning difficulties" for "learning disabilities" and using "problems" where "disabilities" would be more appropriate. Two respondents drew attention to certain examples which were seen as either exaggerated, misleading or stereotypical.

All grammatical and typographical errors have been taken on board. Comments on the use of certain terminology and on specific examples within the text of the document have also been noted for future reference.

ANNEX A

LIST OF CONSULTATION RESPONDENTS

Andrew Flavelle

Children's Law Centre

Coleraine Borough Council

Derry City Council

Disability Action

Down District Council

Equality Commission for Northern Ireland

Federation of Small Business

Housing Executive

Law Centre

MENCAP

Northern Ireland Commissioner for Children and Young People

Northern Ireland Council for Voluntary Action

Queen's University Belfast

Skill (National Bureau for students with disabilities)