

Draft Disability Discrimination (Northern Ireland) Order

Addendum to the
Consultation Document



Office of the
**First Minister and
Deputy First Minister**

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CONTENTS

	Page
Introduction	3
Statement of Freedom of Information Act	7
Addendum to the Draft Explanatory Memorandum	9
Addendum to the Draft Regulatory Impact Assessment	11
Commentary on the proposed new duty	15
Annex A – Draft Article	26

Introduction

1. In March 2004, it was announced that separate disability legislation similar to the draft GB Disability Bill would be taken forward in Northern Ireland. Work on preparing the necessary legislation, in the form of a Disability Discrimination Order in Council, began immediately and on 31st January 2005, a proposal for a draft Disability Discrimination Order in Council was launched for a period of eight weeks. The shortened consultation was to facilitate the Order's passage through Westminster with the intention of making the Order at Privy Council in July 2005. This was to ensure that people with disabilities in Northern Ireland could enjoy the same legal protection as their counterparts in GB within a similar timeframe.

The Purpose of this Consultation Addendum

2. During its parliamentary passage, several significant amendments were made to the GB Bill. In order to consider these amendments for Northern Ireland, the Department extended the closing date of the consultation on the Order to twelve weeks and, in preparation for this addendum, has consulted with disability organisations within the voluntary sector and the Equality Commission for Northern Ireland. The Department now aims to seek your views on a proposal which may change the Order to reflect amendments made to the GB Bill. In keeping with our earlier commitment to have the Order made this year, it should be noted that this is a limited **six week** consultation. A draft version of the proposed Article can be found at Annex A.

3. On this occasion we have **not** enclosed a questionnaire booklet so as not to restrict comment on the draft proposal. That said, in particular, we would be interested in having your views on:

- The proposed new statutory duty itself;
- How it will affect public bodies amongst others; and
- The arrangements for implementing the new duty, particularly the compliance arrangements.

Timing

4. Although this means that there will now be a delay in making the Order at Privy Council, we hope that consulting on these changes will prompt debate among both disabled people and the public sector so we can ensure that any proposed new duties are:

- effective in creating a culture in which disabled people are properly valued, as employees, as service users and in public life; and in which they can participate fully in society;
- a proportionate means of achieving a more participative society; and
- deliverable by the public sector.

5. Similarly, having this consultation addendum is intended to ensure that disabled people in Northern Ireland are not placed at any disadvantage to their GB counterparts and, that Northern Ireland continues to maintain parity with GB in the area of disability

legislation while recognising the established principles of section 75 of the Northern Ireland Act 1998.

Equality Impact Assessment

6. A full draft Equality Impact Assessment was included with the original consultation paper. In the main, responses received on the original consultation (which dealt with the main provisions of the draft Order) were positive and no concerns were raised which indicated that the Order might not have a positive impact on equality of opportunity. Similarly, the new draft proposals (which place a duty on public authorities to promote positive attitudes towards disabled people and encourage participation of disabled people in public life) are likely to have a positive impact. A full consultation report dealing with all of the issues and comments raised will be made available after this part of the consultation closes.

7. The closing date for this part of the consultation will be
14th September 2005.

8. If this document is not in a format that meets your requirements, please contact us at the address below.

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FREEDOM OF INFORMATION ACT 2000 – CONFIDENTIALITY OF CONSULTATIONS

1. The Department will publish a summary of responses following completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional circumstances. **Before** you submit your response, please read the paragraphs below on the confidentiality of consultations and they will give you guidance on the legal position about any information given by you in response to this consultation.

2. The Freedom of Information Act gives the public a right of access to any information held by a public authority, namely, the Department in this case. This right of access to information includes information provided in response to a consultation. The Department cannot automatically consider as confidential information supplied to it in response to a consultation. However, it does have the responsibility to decide whether any information provided by you in response to this consultation, including information about your identity, should be made public or treated as confidential.

3. This means that information provided by you in response to the consultation is unlikely to be treated as confidential, except in very particular circumstances. The Lord Chancellor's Code of Practice on the Freedom of Information Act provides that:

- The Department should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the Department's functions and it would not otherwise be provided.
- The Department should not agree to hold information received from third parties 'in confidence' which is not confidential in nature.
- Acceptance by the Department of confidentiality provisions must be for good reasons, capable of being justified to the Information Commissioner.

4. For further information about confidentiality of responses please contact the Information Commissioner's Office (or see website at: <http://www.informationcommissioner.gov.uk>).

5. For further information about this particular consultation please contact the consulting branch at the address above.

ADDENDUM TO THE DRAFT EXPLANATORY MEMORANDUM

[under MAIN ELEMENTS OF THE ORDER]

1. "iii) Article 5 introduces a new duty on public authorities requiring them when exercising their functions, to have due regard to the need to promote positive attitudes towards disabled people and the need to encourage participation by disabled people in public life."

[under COMMENTARY ON ARTICLES]

2. "Article 5 inserts new sections 49A and 49B into the DDA. New section 49A(1) requires a public authority to have due regard, when carrying out its functions, to the need to promote positive attitudes towards disabled people, and the need to encourage participation by disabled people in public life. For the purposes of this Article, a public authority is defined in the same way as in section 75 of the Northern Ireland Act 1998.

3. New section 49A(3) makes it clear that compliance with the duty in section 49A(1) will not prejudice a public authority's obligations to comply with any other statutory provision (including other provisions of the DDA). This would also include the public authority's obligation to comply with section 75 of the Northern Ireland Act 1998.

4. New section 49A(4) requires the Equality Commission for Northern Ireland to keep under review the effectiveness of the duty and provide advice to public authorities and others in connection with the duty. New section 49A(5) supports the requirement in new section 49A(4)(a) by requiring that a report on the effectiveness of the duty be prepared and published by the Commission no later than three years after it comes into operation.

5. New section 49B requires those public authorities subject to 49A to submit a disability action plan to the Equality Commission indicating how they propose to fulfil the new duty, in accordance with guidelines issued by the Equality Commission on form and content. The Commission may request a revised plan. If a public authority fails to submit a plan, or submits a plan that does not, in the opinion of the Commission, comply with new section 49B(4), then the Commission is empowered to lay a report of that failure before the Assembly.

6. New section 49B(7) requires a public authority to review its disability action plan when it is required to review its Equality Scheme (under paragraph 8(3) of Schedule 9 to the Northern Ireland Act 1998)."

ADDENDUM TO THE DRAFT REGULATORY IMPACT ASSESSMENT

[to be inserted into Annex 1 of the main RIA, as Article 5]

1. Introducing a new statutory mainstreaming duty on public authorities

The Order would introduce a general duty on public authorities to have due regard to the need:

- to promote positive attitudes towards people with disabilities; and
- to encourage participation of people with disabilities in public life.

Costs to the public sector

1.1 Requiring public authorities to have ‘due regard’ to both these matters means that they will be expected to balance the requirements of this duty against other material considerations, their other legal obligations (including those under section 75 of the Northern Ireland Act 1998), and the resources they have available. However, in effect, each authority has the flexibility to determine, within its own financial and other constraints, how to comply with the duty. It is also worth bearing in mind that, depending on their size, location and nature, authorities will provide a greater or lesser range of services to disabled customers.

1.2 It is therefore difficult to quantify the costs to the public sector of this new duty. However, costs may arise in relation to the administrative arrangements required of public authorities.

1.3 Guidelines to help public authorities meet the requirements of the new duty will be issued by the Equality Commission for Northern Ireland.

1.4 Existing legislation (section 75(1) of the Northern Ireland Act 1998) already requires public authorities to have due regard to the need to promote equality of opportunity between people with a disability and people without and it may be the case that, in observing this duty and in producing their Equality Schemes, some authorities are already looking at ways to encourage participation of disabled people in public life and promote positive attitudes towards disabled people.

1.5 Furthermore, the ground-breaking nature of Part Three of the DDA, which requires service providers to take action in advance of disabled people presenting themselves, means that public authorities which are service providers (that is, the vast majority of public authorities) are already under a legal duty to anticipate the needs of disabled people, and since 1st October 2004, this has been extended to require such authorities to make adjustments to physical features of premises. Also, Article 4 of the draft Order extends the scope of the DDA to cover the functions of public authorities and imposes on them a duty to make reasonable adjustments for disabled persons where such persons are - by reason of their disability - disadvantaged in some way by, or in

relation to, the carrying-out of the function. The duty requires public authorities to anticipate the requirements of disabled persons and the adjustments that may need to be made for them.

Costs to the taxpayer

1.6 In the longer term, there should be a reduction in dispute resolution costs as public sector bodies become systematically better at encouraging participation and promoting positive attitudes.

Benefits to the public sector

1.7 The new duty is primarily designed to improve outcomes for people with disabilities. However, it will also have positive implications for the public sector:

- decision making becomes more transparent, reasonable and rational in relation to disability related issues;
- as a result of this improved decision-making, employment practices and service delivery are better attuned to the needs of disabled people, delivering greater satisfaction and better value for money; and
- there is a reduction in individual grievances – saving time, money and effort which can be better spent, for example, on improving service delivery all round which will be able to act as an exemplar in encouraging participation and promoting positive attitudes for disabled people thereby increasing the sector's standing in the communities they serve.

1.8 It is not possible to quantify meaningfully the social, commercial and personal value of such benefits in financial terms.

Benefits for people with disabilities

1.9 The duty is intended to drive up the performance of the public sector across all its interactions with disabled people – as employees or as service users. The following are among the benefits which should accrue:

- people with disabilities have growing confidence that the public sector is treating them lawfully, fairly and reasonably;
- people with disabilities find that the services provided by the public sector take better account of their needs;
- the independence of people with disabilities is increased to ensure better integration within their communities.

COMMENTARY ON THE PROPOSED NEW DUTY

Content of the Order at present

1. The measures which appear in the draft Disability Order in Council will make a wide range of amendments to the DDA 1995 in Northern Ireland. A summary of the contents of the Order, which were consulted on during the initial consultation, is provided below.

2. The Order will introduce significant improvements in a number of areas by:

- a. making it unlawful for district councils to discriminate against disabled local councillors;
- b. ensuring that, with some exceptions, those functions of public authorities not already covered by the Act are brought into its scope;
- c. clarifying who the correct defendant is in the case of a claim of discrimination being made against a police officer;
- d. clarifying the exemption of transport services from Part III of the DDA and introducing a regulation making power to enable such services to be brought within the scope of the DDA;
- e. providing for amendments to enable an 'end date' to be introduced after which rail vehicles which do not comply with the Rail Vehicle Accessibility Regulations (Northern Ireland) cannot be used. The changes also require existing trains going through

significant refurbishment to be upgraded to compatibility either in part or in total. This will be supported by the setting up of a certification and civil enforcement regime and changes to the exemption process;

- f. making third party publishers (e.g. newspapers) liable for publishing discriminatory advertisements;
- g. amending the way the DDA applies to group insurance to clarify the responsibilities of those concerned with its provisions;
- h. bringing membership of larger private clubs (i.e. those with 25 or more members) within scope of Part III of the DDA;
- i. extending to those who let or manage rented premises the duty of reasonable adjustment, apart from in respect of physical features;
- j. providing a power to rationalise or end the small dwellings exemption;
- k. introducing into Part III of the DDA a questionnaire procedure similar to that in Part II of the Act;
- l. extending the definition of disability to include people with cancer, multiple sclerosis and HIV; and
- m. removing the requirement that people with a mental illness must show that it is a “clinically well recognised” illness before it counts as a mental impairment.

Background to the proposed changes

3. Clause 3 of the GB Disability Bill, as introduced, provided a new section 49A to the DDA, which imposed the following duty in relation to public authorities:

49A General duty

(1) Every public authority shall in carrying out its functions have due regard to-

- (a) the need to eliminate discrimination that is unlawful under this Act;
- (b) the need to eliminate harassment that is unlawful under this Act;
- (c) the need to promote equality of opportunity between disabled persons and other persons; and
- (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.

4. The draft Order issued for public consultation did not contain a provision equivalent to this clause for several reasons. Firstly, clause 3 of the GB Bill was considered similar in effect to section 75 (1) of the Northern Ireland Act 1998:

75(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –

- (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- (b) between men and women generally;
- (c) between persons with a disability and persons without; and
- (d) between persons with dependants and persons without.

5. Although it was recognised that the two provisions differed in certain aspects, the view was taken that, for the time being, section 75 corresponded well to clause 3 of the Bill. Secondly, arising out of the Joint Declaration of April 2003, a review of the operation of section 75 was being undertaken by Professor Eithne McLaughlin and Mr Neil Faris. In addition to this, the Equality Commission is due to conduct a major review of the effectiveness of the section 75 duties later this year. Consequently, it was decided that any moves to introduce new statutory duties directly reflecting clause 3, should be considered within the context of the Equality Commission's 2005 review of the effectiveness of section 75.

6. However, on 3 February 2005 amendments to the GB Bill were introduced at Report Stage in the House of Lords which

changed the clause 3 duty by amending 49A (1) (b) and adding two new elements (e) and (f):

49A General duty

(1) Every public authority shall in carrying out its functions have due regard to-

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons ***that is related to their disabilities;***

(c) the need to promote equality of opportunity between disabled persons and other persons;

(d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;

(e) the need to promote positive attitudes towards disabled persons; and

(f) the need to encourage participation by disabled persons in public life.

7. In light of these amendments, we would now like to look at the new duty again and obtain your views on a proposal to include some of the amendments in the NI Order.

The GB Amendments

8. The first amendment (to section 49A(1)(b)), broadens the need to eliminate harassment in order to catch all forms of harassment of disabled people that relates to their disabilities. However, the amendment does not introduce a new concept since harassment appeared in clause 3 as introduced. At the time of issuing our initial consultation paper, we held the general view that section 75(1) sufficiently covered this. We continue to hold the view that section 75(1) is an adequate means by which public authorities should be considering the elimination of harassment when carrying out their functions.

9. In addition, harassment on an individual basis is covered by Regulation 4 of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004, which inserts a definition of harassment into the DDA and adds provision for prohibiting harassment in employment and office holding circumstances.

10. However, the second amendment which newly introduces (e) and (f), adds two further matters to which due regard must be given.

11. It is these amendments that we would now like to consider for inclusion in the draft Order and we are keen to have your comments on our draft proposal for their inclusion. A draft Article is attached (at Annex A) and is explained in more depth in the next section.

General Duty on Public Authorities

12. The draft Article sets out the two prongs of the proposed new duty, which will require a public authority to have due regard, when carrying out its functions relating to Northern Ireland, to the need to promote positive attitudes towards disabled people, and the need to encourage participation by disabled people in public life.

13. The proposed Article defines a public authority in the same way as in section 75 of the Northern Ireland Act 1998 and makes clear that compliance with the new general disability duty will not detract from a public authority's separate obligations to comply with any other statutory provision, for example, section 75 of the Northern Ireland Act 1998 or other provisions of the DDA.

14. Furthermore, responsibility for reviewing the effectiveness of the new disability duty will rest with the Equality Commission which will also be expected to offer advice to public authorities in connection with it. The Commission will also be required to prepare and publish a report on the effectiveness of the new duty within three years of it coming into operation.

Compliance

15. The draft Article sets out the framework for compliance. Public authorities will be required to submit to the Equality Commission a disability action plan (or a revised plan in cases where it is deemed by the Commission to be unsatisfactory) which will show how they intend to fulfil the new duty. Submitted plans should be in keeping with any advice or guidance issued by the

Equality Commission in relation to the new duty. The Commission may also request a revised plan. The draft Article also empowers the Commission to lay before the Assembly a report on any public authority that either fails to submit a plan or, submits an unsatisfactory plan.

Implementation issues

- **The effect:**

16. Enacting corresponding provision to GB amendments (e) and (f) here in Northern Ireland would have several implications:

17. Firstly, it would result in a new separate mainstreaming disability duty to have due regard to the need to promote positive attitudes and encourage participation in public life and a separate compliance mechanism to oversee that duty. This would mean that public authorities would be expected to submit a disability action plan in relation to their new disability duty (under the draft Article) and continue to submit an Equality Scheme in relation to their ongoing equality duty (under section 75).

18. Although this would result in additional work for public authorities, the proposed new duty and its compliance mechanism would be sufficiently separate from the existing Equality Scheme regime to prevent unnecessary confusion or conflict.

- **Consideration of alternatives:**

To incorporate the new duty with existing section 75 requirements, either by way of amending section 75 or using the existing Schedule 9 of the NI Act 1998.

19. While this would alleviate the need for separate legislation and separate compliance requirements, it must be remembered that section 75(1) applies not only in relation to disability, but also to eight other categories and details a requirement on public authorities to promote equality of opportunity between a range of other groups. Doing so would therefore give rise to one statutory duty in relation to disability and another in relation to the other eight categories under section 75 – resulting in a twin-track or hierarchical approach to the mainstreaming of equality.

To draft a separate scheme that is largely similar (and deliberately based on) the enforcement regime laid out in Schedule 9 of the NI Act 1998, which supports section 75 and that would require a public authority to produce a Disability Scheme in much the same way as it would produce its Equality Scheme.

20. While the new duty could be enforced in a similar way to the existing Equality Scheme regime and would be familiar to public authorities, it would still result in a dual track approach to enforcement whereby public authorities would be expected to submit two detailed schemes: one in relation to their new disability duty and one in relation to their ongoing equality duty at different times with two sets of consultation. This would also mean a

substantial increase in work to administer/oversee the new duty and accompanying enforcement regime.

To enact section 49A of the GB Act in its entirety

21. While this would appear to be the easiest way of maintaining parity with GB, enacting a directly equivalent duty would result in major changes to the way that section 75 operates. Firstly, there would be obvious conflict between section 75(1) and the new disability mainstreaming duty which might require the amendment of section 75 and the removal from it of the disability dimension for it to make sense. Furthermore, the GB duty applies to a different definition of public authorities than that applied to section 75, and applying two different lists for each statutory duty is liable to cause more confusion. Finally, the enforcement regime applied in GB differs from section 75 and enacting similar provision here would again cause confusion and conflict.

Conclusion

22. After careful consideration of all the options, we have taken the view that the proposed Article, as presently drafted, would be the most appropriate vehicle for enacting similar provision here in Northern Ireland. It avoids confusion and complication, while at the same time aiming to bring the rights of disabled people in Northern Ireland in line with those in GB.

23. Furthermore, by drafting the new provisions in this way, we have attempted to ensure consistency of concepts and familiarity

with basic operational principles in keeping with the now well established equality duty regime. Finally, by keeping the proposed duty separate from section 75 we have attempted as far as possible to ensure that, in terms of disability legislation, parity with GB is maintained without conflicting with a public authority's duty under section 75 or any imminent review of the section 75 duty itself.

ANNEX A DRAFT ARTICLE

Duty of public authorities [j49a]

*. In the 1995 Act after section 49 insert—

“PART VA

PUBLIC AUTHORITIES

General duty

49A.—(1) Every public authority shall in carrying out its functions have due regard to—

- (a) the need to promote positive attitudes towards disabled persons; and
- (b) the need to encourage participation by disabled persons in public life.

(2) Subsection (1) does not apply to—

- (a) the functions of the Director of Public Prosecutions for Northern Ireland relating to the prosecution of offences; or
- (b) any act of a description prescribed by regulations.

(3) Subsection (1) is without prejudice to any obligation of a public authority to comply with any other statutory provision (including any other provision of this Act).

(4) The Commission shall—

- (a) keep under review the effectiveness of the duty imposed by this section;
- (b) offer advice to public authorities and others in connection with that duty.

(5) Not later than 3 years after the appointed day, the Commission shall prepare and publish a report on the effectiveness of the duty imposed by this section.

(6) In this section—

“the appointed day” means the day appointed under Article {j13}(2) of the Disability Discrimination (Northern Ireland) Order 2005 for the coming into operation of Article {j49a} of that Order;

“the Commission” means the Equality Commission for Northern Ireland;

“public authority” has the same meaning as in section 75 of the Northern Ireland Act 1998 (c.47).

Plan as to duty under section 49A

49B.—(1) A public authority to which this subsection applies shall prepare and submit to the Commission a plan showing how the public authority proposes to fulfil the duty imposed by section 49A in relation to the relevant functions.

(2) Any other public authority shall prepare and submit to the Commission such a plan if requested to do so by the Commission.

(3) A public authority—

- (a) may at any time revise its plan and submit the revised plan to the Commission;
- (b) shall, if requested to do so by the Commission, revise its plan and submit the revised plan to the Commission.

(4) A plan (or revised plan) shall—

- (a) conform to any guidelines as to form or content which are issued by the Commission with the approval of the Office;
- (b) specify a timetable for measures proposed in the plan;
- (c) include details of how it will be published.

(5) Subsection (1) applies to any public authority except one which is notified in writing by the Commission that that subsection does not apply to it.

(6) If a public authority—

- (a) fails to submit a plan under subsection (1) before the end of the period of 6 months beginning with the appointed day or, if later, the establishment of the authority,
- (b) fails to submit a plan under subsection (2) before the end of the period of 6 months beginning with the date of the request under that subsection,
- (c) fails to submit a revised plan under subsection (3)(b) before the end of the period of 3 months beginning with the date of the request under that paragraph, or
- (d) submits to the Commission under paragraph (3)(a) or (b) a revised plan which in the opinion of the Commission fails to comply with subsection (4),

the Commission may lay before the Assembly a report of that failure containing such comments and other material as appear to

the Commission to be appropriate to bring to the attention of the Assembly.

(7) A public authority—

(a) shall review its current plan under this section—

(i) in the case of an authority in relation to which there is a scheme under Schedule 9 to the Northern Ireland Act 1998, at the same time as the authority reviews its current scheme under paragraph 8(3) of that Schedule;

(ii) in the case of any other authority, at such times as the Commission may request; and

(b) inform the Commission of the outcome of the review.

(8) In this section—

“the appointed day”, “the Commission” and “public authority” have the same meanings as in section 49A;

“the relevant functions” means the functions of the public authority or, in the case of a plan submitted in response to a request which specifies particular functions of the public authority, those functions.”.