



# Disability Rights Commission

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# Disability Rights Commission



RESPONSE TO OFMDFM CONSULTATION PAPER, 'A SINGLE  
EQUALITY BILL FOR NORTHERN IRELAND'

The Commission welcomes the opportunity to respond to the Office of First Minister and Deputy First Minister (OFMDFM) Consultation Paper, 'A Single Equality Bill for Northern Ireland' and congratulates the OFMDFM on progressing the wide ranging debate on the future structure and content of a Single Equality Act (SEA) for Northern Ireland.

The Disability Rights Commission (DRC) is a publicly funded, non-departmental public body, created by the Disability Rights Commission Act 1999. The Commission has the following statutory duties:

- To work towards the elimination of discrimination against disabled persons;
- To promote the equalisation of opportunities for disabled persons;
- To take such steps as is considered appropriate with a view to encouraging good practice in the treatment of disabled persons; and
- To keep under review the workings of the Disability Discrimination Act (DDA) 1995 and this Act.

The DRC strongly supports moves towards a Single Equality Act. The arguments in favour of a single Act are compelling. It is needed in order to promote a coherent approach to tackling the range of equality and diversity issues. The existing framework creates a hierarchy of rights. We think that this is damaging and should be avoided.

The DRC will itself be considering many of these issues in depth over the next two years, in anticipation of GB moves towards a SEA. At present we have not reached a firm position on many of the issues raised by the Consultation Document. We will confine our response to those subjects on which we have a firm position. Inevitably these focus primarily on issues which particularly impact on disabled people.

## Chapter 2

The process of creating a SEA is complex and fraught with potential conflicts and difficulties. We applaud the approach of setting out the guiding principles and purpose, and endorse those set out in the document. In particular it is vital that a SEA removes the current ‘hierarchies of inequalities’ and that harmonisation must take place according to the principle of non-regression.

## Chapter 3

The DRC welcomes the proposals to extend the definition of disability in Northern Ireland to reflect the changes which are being introduced in GB by the Disability Rights Bill (DRB). We propose over the next two years to examine the potential for moving the definition of disability in the DDA to better reflect the social model of disability. We will look to co-operate with NIEC in this work. Depending on the timing of the introduction of legislation we would hope that it will be possible to take into account these future recommendations.

In relation to discrimination on the basis of genetic characteristic the DRC has proposed (Disability Equality: Making it Happen) that the definition of disability should be extended to include people with a genetic predisposition to have an impairment which has a substantial impact of day to day activities. In addition, specific legislation relating to personal genetic information is required to prohibit employers or insurers from viewing the results of genetic tests save in the specific circumstances outlined below.

With regard to insurance it should be unlawful to require an individual to undergo a genetic test or to disclose the results of a genetic test.

The sole exception should apply where the scientific validity of a test had been established by an impartial arbitrating body, and where insurance applied for was significantly higher than the norm.

It should remain lawful for an individual to voluntarily disclose the results of a genetic test. Employees should not be obliged to take a genetic test for employment purposes.

The one possible legitimate use for genetic screening in pre employment situations is where the condition in question is one which may arise quickly and cause serious danger to the safety of the public and co-workers. At present, we can only see rare occasions where this may be necessary, in some, but certainly not all, safety critical jobs and this must be based on sound clinical evidence. Nevertheless, even in safety critical jobs, it would be far better to monitor people for early warning signs of illness that could compromise safety.

#### Chapter 4. Scope

The DRC supports option b): that scope should be the same for all grounds.

The DRB will introduce protection from discrimination for disabled councillors, following a recommendation by the Disability Rights Taskforce. The main rationale for such protection is the need to ensure that councillors are provided with sufficient reasonable adjustments to carry out their duties.

Volunteering makes a hugely important contribution to the community. Many disabled people actively engage in volunteering, for its own sake and as a step towards employment. Discrimination against disabled people needs to be prohibited in this key sector. At present the law regarding when volunteers count as being covered by discrimination laws is very complex. Extending the protection of the law to volunteers would bring helpful clarification. In this regard the DRC favours the wide definition of 'employment' set out in option (c)

#### Chapter 5 Reasonable adjustment

The DDA is unique in UK law in having a reasonable adjustment duty. It has proved to be enormously important to the successful operation, so much so that it is often described as 'the heart' of the DDA. Whilst this success might argue for its potential benefit to other strands, we consider that it is also a strong caution that any changes must be introduced with great care so as to preserve the benefit of this key term for disabled people. We have strong concerns that extending the duty to other strands might introduce judicial interpretations of the concept which would limit or distort its operation in relation to disability. We do not think it should be extended automatically to all strands but the precise benefits of

extension to particular strands should be weighed against any potentially problems.

## Chapter 6. Exceptions

Our comments are limited to pointing out that whatever exceptions (or as they are described in the DDA 'justifications') are permitted they should be strictly scrutinized by the courts or tribunals on an objective basis. Under the DDA less favourable treatment will be taken to be justified if in the opinion of the service provider one of the conditions set out in the Act applies, and if it is reasonable in all the circumstances to hold such an opinion

## Chapter 10 Enforcement

We strongly support option d) in relation to the options for enforcement of goods and services outlined in paragraph 10.1: Establish a new system of equality tribunals dealing with all discrimination matters relating to employment and GFS. The Industrial Tribunal would retain responsibility for all other employment cases.

The report "Monitoring the Disability Discrimination Act 1995"<sup>1</sup>, looked at the claims brought under the Act and included a wide range of interviews with legal and other experts involved in the Act's implementation. Applicants and potential applicants under Part 3 and their advisers all spoke of the difficulties caused by the formality and complexity of the court system; judges' inexperience with the Act and low awareness of discrimination issues; and the lack of accessibility and facilities in courts.

This experience was reflected in the evidence given by a wide range of groups to the UK Review of Anti-Discrimination Legislation, which indicated widespread dissatisfaction with county and sheriff courts in relation to all types of discrimination cases<sup>2</sup>. This report therefore called for goods and services cases to be heard in employment tribunals. The RNIB report, "The Price of

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<sup>1</sup> Meagre N., Doyle B., Evans c., Kersley B., Williams M., O'Regan S and lackey N. (1998) Monitoring the Disability Discrimination Act 1995, London: Department for Education and Employment

<sup>2</sup> "Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti Discrimination Legislation", Hepple et al, 2000

Justice<sup>3</sup> (2000), argued that the cost and complexity of bringing proceedings in the county or sheriff court is deterring disabled people who have experienced discrimination from pursuing their claim. Whilst there is no fee for initiating a goods and services claim in the tribunal, a fee of up to £235 is payable in county and sheriff courts. There is also a much greater risk that an applicant who loses their claim will have to pay the legal expenses of the service provider-which maybe hundreds (or even thousands in complex cases) of pounds. Although legal aid is sometimes in theory available, in practice it is very rarely awarded.

Research on the operation of the DDA reveals that, compared to the thousands of employment cases, there have been very few cases involving the provision of goods and services; approximately 50 cases taken in the first 4.5 years of its operation<sup>4</sup>.

The reason lies neither in the absence of discrimination by service providers, nor in disabled people's lack of concern about such discrimination. There is evidence that disabled people are widely discriminated against in the provision of services and the readiness of disabled people to challenge discrimination in this area is attested to by the volume of complaints received by the DRC Helpline.

Part, but not all, of the explanation lies in the fact that, from DRC casework experience, Part 3 cases are more easily resolved without resort to court than employment cases. However, it is also our experience that a significant proportion of complainants are deterred from going to court by the complexity and cost of proceedings. Our caseworkers have regular experience of applicants who simply can not proceed with a case without the commission's support, because of the risk and fear of costs.

This deterrent effect upon applicants is of concern not only because individuals may be deprived of justice, but also because an absence of case law leaves many areas of the law untested and unclear. Another advantage in transferring non employment cases to employment tribunals is that discrimination cases, whether arising from employment, services or housing, raise

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<sup>3</sup> "The Price of Justice" RNIB 2000

<sup>4</sup> Leverton S., (2002) Monitoring the Disability Discrimination Act 1995 (Phase 2), London: Department for Work and Pensions

common legal themes, and sensitivities in relation to drawing inferences from primary facts. Employment and services discrimination cases often have more in common than service discrimination cases have with other types of case taken in the county or sheriff court. Where a discrimination claim is part of a set of claims more appropriately dealt with in the county or sheriff courts, for example a breach of contract claim, there should be a power to transfer cases.

We agree with the UK Review of Anti Discrimination Legislation that where the claim does not relate to employment, the tribunal should be designated as an "equity tribunal". Lay members should be called to hear cases having regard to their knowledge and experience of the relevant field. Where necessary, additional members should be appointed with relevant expertise.

In relation to the question at 10.7, we are in favour of representative actions. Defined classes of organisations – certainly including NIEC and trade unions – should have the power to institute proceedings in their own name or jointly with individuals where there is a common question of fact or law affecting a number of individuals whether identified or not. This will make it easier for individuals to obtain redress and improve effectiveness of strategic enforcement.

November 04