

Equality Commission

FOR NORTHERN IRELAND

EQUALITY COMMISSION FOR NORTHERN IRELAND

Response to Department of Education's consultation on Draft Regulations Prohibiting Discrimination by General Qualifications Bodies on Grounds of Disability

October 2007

Introduction

1. The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Equality Commission is responsible for implementing the legislation on age, disability, fair employment, race relations, sex discrimination and equal pay, and sexual orientation. The Equality Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the positive disability duties on public authorities under the Disability Discrimination Act 1995.
2. The Equality Commission's general duties include:-
 - working towards the elimination of discrimination;
 - promoting equality of opportunity and encouraging good practice;
 - promoting positive/affirmative action;
 - promoting good relations between people of different racial groups;
 - overseeing the implementation and effectiveness of the statutory duty on relevant public authorities; and
 - keeping the legislation under review.
3. The Equality Commission welcomes the opportunity to respond to the Department of Education's consultation on draft Regulations

prohibiting discrimination by general qualifications bodies on the grounds of disability. The Commission, when responding to this consultation, draws on the unique experience and expertise it has gained from its role in enforcing in Northern Ireland, the Special Educational Needs and Disability (Northern Ireland) Order 2005 ('SENDO 2005'), the Disability Discrimination Act 1995 as amended ('DDA 1995'), and in implementing the statutory duties under Section 75 of the Northern Ireland Act 1998, across nine equality grounds including disability.

4. For ease of reference, the draft Special Educational Needs and Disability (General Qualifications Bodies) (Relevant Qualifications, Reasonable Steps and Physical Features) Regulations (Northern Ireland) 2007, are referred to as the 'draft 2007 Regulations'.
5. In general, we welcome many of the proposals contained within the consultation document. We have also welcomed the opportunity to meet with the Department to discuss our response in more detail. The Department will note, as mentioned at our recent meeting and as set out below, that we have sought clarification from the Department in relation to a number of points. We look forward to hearing from the Department, as regards these points of clarification, in the near future. In addition to responding to the specific questions raised in the consultation booklet, we have outlined our recommendations for change in a number of related areas outside the scope of the consultation paper.
6. For ease of reference, our recommendations are summarised below.

Summary of Recommendations

Areas within the scope of the consultation:

As regards areas within the scope of the consultation, we recommend that:-

- the qualifications listed in paragraphs 9 and 10 below, are included within the prescribed list of general qualifications (subject to clarification by the Department as regards the status of these qualifications); and
- the questionnaire procedure is extended to complaints relating to general qualifications bodies.

Related matters outside the scope of the consultation

As regards related matters outside the scope of the consultation document, we recommend that:

- the SENDO 2005 is amended to prohibit instructions and pressure to discriminate, as regards general qualifications bodies, and that the Equality Commission is given power to take legal action in respect of unlawful instructions, or pressure to discriminate;
- the SENDO 2005 is amended to include a list of factors which may have a bearing on whether it is reasonable for general qualifications bodies to make a particular adjustment; and
- other significant deficiencies within the SENDO 2005, as highlighted by the Equality Commission in its response to the draft legislation, are urgently addressed.

Response to specific questions in the response booklet

7. Outlined below are the Equality Commission's comments on the specific questions raised in the consultation response booklet.

List of relevant qualifications

8. The Department has sought views on the content of the prescribed list of general qualifications outlined in the Schedule to the draft 2007 Regulations. It has also asked whether there are further general qualifications, other than those prescribed in the Schedule, which should be added to the list.
9. The Equality Commission welcomes the inclusion of all of the general qualifications listed in Schedule, such as GCE's (A and AS levels) and GCSEs. We recognise that the prescribed list excludes 'trade or professional qualifications' (such as BTECs and City and Guilds), which are already covered under the provisions in the DDA 1995 relating to qualifications bodies. We also recognise that the qualifications in the prescribed list only apply to those conferred by

general qualifications bodies, and therefore do not include qualifications conferred by 'responsible bodies' for the purposes of Chapters 1 & 2 of Part 3 of SENDO 2005 (such as bodies responsible for schools, universities, institutions of further education, colleges of education, etc.). However we seek clarification from the Department, as to why the following qualifications have not been included:

- Vocational Certificate of Education (covered by the equivalent GB Regulations);
- Awards and certificates in education, training and skills (ACETS);
- Graded objectives in modern languages (GOML); and
- OCR (Oxford, Cambridge and RSA examinations, including CLAIT (Certificate/Diploma for IT Users), ECDL (European Computer Driving Licence).

10. The response booklet indicates that the proposed legislation will apply to 'accredited qualifications'. The Equality Commission notes that the following qualifications are accredited by the Council for the Curriculum, Examinations and Assessments (CCEA), but are not included in the Schedule. The Equality Commission seeks confirmation from the Department that these qualifications are deemed to be 'trade and professional qualifications', and therefore covered under Part 2 of the DDA 1995:-

- Certificates in Business Enterprise
- Certificates in Personal Effectiveness
- Certificates in Occupational Studies
- Certificates in Photography
- Certificates in Creative Craft
- Certificates for Working in the Community
- Certificates in Teaching Assistance
- Certificates in Drug Awareness Studies and their application
- Certificates in Drug Awareness
- Certificates in Performance Skills
- Certificates in Employment Skills

11. We have welcomed the clarification from the Department that 'General National Vocational Qualifications', which are included in the proposed prescribed list of general qualifications, are distinct from 'National Vocational Qualifications'; which are already deemed to be covered as qualifications conferred by qualifications bodies (see page

131 of the Equality Commission's Disability Code of Practice on Trade Organisations and Qualifications Bodies)¹.

Definition of 'Physical Features'

12. The Department has sought views on the definition of 'physical features' in the draft 2007 Regulations. The Equality Commission agrees with the proposed definition of 'physical features' relating to premises occupied by qualifications bodies. This definition is consistent with the corresponding definition of 'physical features' relating to premises occupied by trade organisations and qualifications bodies.

The Equality Commission also welcomes the proposed insertion into the SENDO 2005, of the provisions relating to premises occupied by general qualifications bodies under leases.

Physical access duty in schools

13. The Department will be aware that under the SENDO 2005, schools (unlike general qualifications bodies), are not under an immediate duty to remove or alter a physical feature; they are however required to plan for accessibility, which means they must be proactive in making improvements through planned changes over time. The Department will note from Equality Commission's response in June 2004, to the consultation on the draft Special Educational Needs and Disability Order 2005 (copy attached), that we recommend that there should be a physical access duty placed on Boards and schools, in line with the duty placed on all other service providers (including colleges of further and higher education). The Equality Commission recommends that schools have a duty to, where reasonable, overcome barriers to physical access.
14. The need for schools to make reasonable adjustments to physical features is heightened by the fact that, although schools are not general qualifications bodies, many general qualifications bodies contract with schools (and other examination centres), to organise, supervise and undertake the delivery of examinations, testing and assessments. The Department will be aware that the vast majority of the general qualifications included in the prescribed list are assessed in schools. As highlighted in the draft Code of Practice (see

¹ ECNI, 2005, www.equalityni.org

paragraph 9.12) of the Disability Rights Equality Commission (DRC), entitled “Revised Code of Practice: Trade Organisations and Qualifications Bodies”², general qualifications bodies often rely upon examination centres to identify and meet the requirements of disabled candidates for adjustments to examinations, with guidance and input from general qualifications bodies as required.

15. The draft Code stresses that the duties on general qualifications bodies towards disabled candidates ‘cannot always be completely avoided or always discharged simply through delegation of such responsibilities to examination centres’. They recommend that both ‘centres and general qualifications bodies work effectively together to ensure that the requirements of disabled candidates are met and unlawful discrimination is avoided’. The DRC highlight that ‘a failure to do so may mean that both are liable for unlawful disability discrimination’ under the DDA 1995, and state that ‘it is possible that schools and colleges could themselves be individually or jointly liable (with the general qualifications bodies) for unlawful disability discrimination occurring in the context of delivering examinations, tests and assessments for relevant general qualifications.’ The DRC further highlight, in this context, the provisions of the DDA 1995 in relation to responsibility for the acts of others and aiding an unlawful act.

Enforcement Procedures

16. The Department has sought views on the proposed enforcement approach taken in the draft 2007 Regulations. The Equality Commission notes that complaints of discrimination and/or harassment against general qualifications bodies are to be brought to the county court. A claim must be lodged within six months of the alleged discrimination. There is an extension of the time limit by two months, if the conciliation process has been started within six months of the discriminatory act.
17. The Commission has recently commenced a disability conciliation service for goods and services complaints in Northern Ireland, and its conciliation services will extend to complaints against general qualifications bodies once the draft 2007 Regulations come into force.

² Disability Rights Equality Commission, 2007, www.equalityhumanrights.com

18. The Commission has, in the context of a Single Equality Act, recommended that disability discrimination cases in education, as well as other complaints of discrimination (both employment and non-employment), should be dealt with by a Single Equality Tribunal/Court.
19. The Department will be aware of the existing inconsistencies, as regards enforcement procedures, which exist as regards complaints against qualifications bodies and general qualifications bodies; for example, inconsistencies as regards time limits and the availability of legal aid. The Commission recommends, in the context of a Single Equality Act, that these inconsistencies are addressed.

Questionnaire procedure

20. Under the DDA 2005, as regards complaints against qualifications bodies, complainants making an application to an Industrial Tribunal (or within 28 days of lodging it), can request information relevant to his/her claim using a 'questionnaire procedure'. The Department will also be aware that the Disability Discrimination Order (NI) 2006, will introduce into Part 3 of the DDA 1995, a questionnaire procedure for use in county court complaints, similar to that available under Part 2 of the DDA 1995. Such a procedure not only enables people to determine whether or not to take a claim, but can also prompt early settlement of claims.
21. The Commission recommends, in the interest of consistency with complaints under Part 3 of the DDA, and complaints under Part 2 relating to qualifications bodies, that the Department pursuant to its powers under Article 38(5)(e) and (h) of the SENDO 2005, takes this opportunity to extend the questionnaire procedure to complaints relating to general qualifications bodies.

Impact of draft Regulations

22. The Department has sought views on the impact of the draft Regulations 2007. The Equality Commission is concerned that the Department has screened out the draft 2007 Regulations as not requiring an Equality Impact Assessment, without providing evidence of giving full consideration as to whether there is '...an opportunity to better (Equality Commission emphasis) promote equality of opportunity or good relations, by altering the policy or working with others in Government or in the larger community'. *The Guide to the*

*Statutory Duties*³ clearly states (page 63) that ‘public authorities should be alert to the fact that the statutory duties are positive duties. Whilst the main purpose of screening is to identify adverse impact, it also offers the opportunity to identify how to better promote equality of opportunity and good relations’.

23. The answer given in the Department’s screening document to the screening question concerning the opportunity to better promote equality of opportunity is simply a statement that ‘the policy will promote equality of opportunity for disabled people’. The statement does not properly address the stipulations in the Guide concerning screening and evidential requirements (page 62) which emphasise that ‘arrangements must be made to obtain relevant information, whether quantitative or qualitative, so that an authority can clearly demonstrate why a policy is screened in for impact assessment, or screened out as not requiring an equality impact assessment’.
24. Furthermore, the Guide advises that ‘evidence may include information from the public authority’s own information management systems, including service monitoring and complaints handling systems, or from engagement in research, surveys or consultation exercises. Information to help assess the equality impact of a policy may also be sourced from commissioned research, or from research produced by other public authorities, representative groups, umbrella groups, and trades unions or universities. In the absence of researched information there may be anecdotal evidence, feedback from service users and affected groups or ongoing experience within the authority, which may indicate equality impacts’.

Related matters outside the scope of the consultation document

Need to address existing inconsistencies

25. The Equality Commission recommends that the Department takes this opportunity to rectify other inconsistencies which exist, as regards protection against discrimination by general qualifications bodies under the SENDO 2005, and qualifications bodies under the DDA 1995, on the grounds of disability. In particular, the Commission wishes to highlight the following inconsistencies, and recommends that they are urgently addressed:-

³ ECNI, 2007, www.equalityni.org

Instructions and Pressures to Discriminate

26. The Department will be aware that as regards qualifications bodies, it is unlawful under section 16C and section 17B (1) of the DDA 1995, where a person who has authority or influence over another to instruct him or her, or put pressure on him or her, to act unlawfully under the provisions of Part 2 of the DDA 1995.
27. The Equality Commission recommends that the SENDO 2005 is amended to include a similar prohibition against instructions and pressure to discriminate, as regards general qualifications bodies. It further recommends that the Commission be given power to take legal action in respect of unlawful instructions, or pressure to discriminate, as has been granted under the DDA 1995, as regards instructions and pressures to discriminate relating to qualifications bodies.

Examples of Reasonable Adjustments

28. Part 2 of the DDA 1995 lists a number of factors which may have a bearing on whether it is reasonable for a qualifications body to make a particular adjustment. Such factors include, for example, the effectiveness of the step in preventing the disadvantage, the practicability of the step, financial or other costs of the adjustment, and the extent of any disruption caused, etc. In the interests of clarity, we recommend that the SENDO 2005 is amended to include a similar list of examples. In the Equality Commission's view, many of these factors will be relevant to general qualifications bodies, when considering the reasonableness of adjustments, and these factors make a useful checklist for general qualifications bodies, particularly when considering more substantial adjustments.

Further Deficiencies within the SENDO 2005

29. Although not the subject of this consultation, the Department will be aware that the Equality Commission has highlighted both, in its response to the consultation on the draft Special Educational Needs and Disability Order 2005, and in subsequent meetings with Departmental officials, that there are significant deficiencies within the SENDO 2005, which urgently need addressed. We concerned that many of these deficiencies, still remain unaddressed.

30. The Department will also be aware that the Office of the First Minister and Deputy First Minister (OFMDFM) is working towards a Single Equality Act, which aims to consolidate, harmonise and simplify all anti-discrimination legislation Northern Ireland. In order to reduce existing inconsistency and avoid creating further complexity, the Equality Commission recommends that the SENDO 2005, places the same duties, in respect of disabled people, on all educational providers, regardless of which sector they are in. As highlighted in detail in the Commission's response to the draft SENDO legislation, there are a number of anomalies which exist as regards the provisions relating to further and higher education, and those relating to schools, under the SENDO 2005. The Commission recommends that these anomalies are urgently addressed.

19 October 2007