

## Equality Commission for Northern Ireland

# Response to the Draft Special Educational Needs and Disability Order (June 2004)

### Introduction

1. The Equality Commission welcomes the opportunity to comment on the draft Special Educational Needs and Disability Order (SENDO), which has been published for consultation by the Departments of Education and Employment and Learning. The Commission's response comprises a summary of its overarching comments and, completed at **Annex 1**, the detailed questionnaire provided by the Departments for views on specific Articles within the draft Order.
2. This response has been prepared with advice from, and the endorsement of, a consortium of key stakeholder organisations, education professionals and parents, which was established by the Commission. A list of consortium members is at **Annex 2**. We would ask that, as well as this being a response from the Equality Commission, additional weight is given to it in recognition that it is supported by a wide range of organisations representing disabled people, children and young people, and education providers and professionals.
3. In due course, the Commission would be grateful for feedback on the following:
  - where the Departments decide not to take account of some of the comments made by the Commission, their reasons for not doing so
  - the quality of the Commission's response to this consultation exercise. It is one of our values to strive for excellence in all that we do and, therefore, we would appreciate the Departments' views on the quality of our comments on the consultation document.

4. The Commission's contact for this response is:

Don Leeson, Disability Policy Manager  
Equality Commission for Northern Ireland  
Equality House  
7–9, Shaftesbury Square  
Belfast  
BT2 7DP

Telephone: 028 90 500 615

Textphone: 028 90 500 589

Fax: 028 90 315 993

Email: [dleeson@equalityni.org](mailto:dleeson@equalityni.org)

Website: [www.equalityni.org](http://www.equalityni.org)

## **Summary of the Equality Commission's response**

5. The Commission welcomes this hugely important and long overdue legislation, which extends the Disability Discrimination Act 1995 (DDA) to education. However, we have a number of key concerns about the proposed Order. These are:

- delays in implementing the legislation
- resourcing implementation, transition issues and evaluation
- failure to take account of single equality legislation for Northern Ireland and Section 75 obligations
- the limited extension of the DDA to schools
- the role and powers of the Special Educational Needs and Disability Tribunal, and the use of county courts to hear discrimination cases in respect of colleges of further and higher education
- coverage of examination bodies, education provided in settings other than 'mainstream' schools and other education-related services
- overlooking the importance of accessible transport in ensuring effective education for disabled people

- rights for disabled parents
  - the voice of children in decisions about them
  - the need for statutory time limits to resolve issues concerning the education of disabled children.
6. These concerns are expanded on in paragraphs 17 to 37 below, and more detailed comments are given in **Annex 1**.

## **Policy context**

7. SENDO is a hugely important, and long overdue, legislative proposal. It mirrors the Special Educational Needs and Disability Act 2001, which was implemented in Great Britain from September 2002 with some provisions relating to colleges of further and higher education phased-in over a three year period (reasonable adjustment duties in respect of the provision of auxiliary aids and services (for example, sign language interpretation, etc) and the physical aspects of buildings). The Departments of Education and Employment and Learning consulted on legislative proposals for SENDO from September 2002 to January 2003. A further round of consultation is now being conducted on the draft Order itself.
8. SENDO goes some way to fulfilling the Government's obligations under several articles of the UN Convention on the Rights of the Child. Specifically, it should help:
- ensure “.....that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community” (Article 23(1))
  - ensure “.....that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development” (Article 23(3))

- “.....recognise the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity.....” (Article 28(1))
- “make higher education accessible to all on the basis of capacity by every appropriate means” (Article 28(1)(c))
- “make educational and vocational information and guidance available and accessible to all children” (Article 28(1)(d))
- ensure “..... that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential” (Article 29(1)(a)).

Furthermore, Article 12 of the Convention gives a right for the views of children to be “given due weight”, particularly in judicial and administrative proceedings affecting them. This aspect of the Convention is applicable throughout much of SENDO.

9. SENDO removes most of one of the unfortunate exemptions of the DDA. The exclusion of disabled people from 'mainstream' education, legitimised since 1995 through an exemption in the DDA, has damaged the education, socialisation and life choices of generations of disabled people. The case for change is compelling and urgent. A survey of young disabled people aged 20–24 carried out by NOP on behalf of the Disability Rights Commission in Great Britain showed that:

- a quarter felt that they had been discriminated against at school
- a third felt that they had not achieved the things they had hoped they would have achieved when they were younger
- a fifth felt that they had been discouraged from taking GCSEs
- a third felt that they were prevented from going onto further and higher education for a reason related to their disability, and a quarter said that they were advised not to go on to further and higher education by their school.

10. In Northern Ireland, the Labour Force Survey (Winter 2003–04) shows that disabled people (43%) are twice as likely to have no qualifications compared to non-disabled people (20%); and disabled people (9%) were significantly less likely to have obtained a higher qualification compared to non-disabled people (20%). Indeed, another recent survey, conducted by the National Audit Office, showed that disabled people aged 18 are only 40% as likely as non-disabled people to go into higher education.
11. Participation rates of disabled people in further and higher education in Northern Ireland, whilst gradually increasing, remain extremely low. Research published in 1994 by the Standing Advisory Commission on Human Rights (SACHR) suggested that only around 1% of students had a disability. More recent figures (November 2002) published by the Department for Employment and Learning from monitoring returns showed that around 5% of students had a disability. However, this contrasts with the Labour Force Survey that consistently estimates that around 20% of people of working age have a disability.
12. Research ('Disability', SACHR, 1994; and 'No Choice: No Chance', Educable, 2000) has shown that low participation rates by some disabled people in further and higher education is at least in part due to low expectations of them by parents, teachers and careers advisers. A "self-fulfilling prophecy" was referred to by respondents whereby disabled pupils are not expected to go on to further and higher education or have careers and are, therefore, not 'stretched' academically in school.
13. Furthermore, education is a key determinant of inclusion in society. A survey conducted by NOP in 1999 on behalf of Leonard Cheshire found that 61% of people under the age of 35 had had no contact with disabled people, which the Disability Rights Task Force (DRTF) noted as "...a reminder of how far there is still to go in achieving acceptance of disabled people as equal members of society". The DRTF went on to state that:

“Inclusion of disabled people throughout their school and college life is one of the most powerful levers in banishing stereotypes and negative attitudes towards disabled people amongst the next generation. When disabled and non-disabled people are educated together, this sends powerful messages to the whole community about the potential for a truly integrated and diverse society.”

[‘From Exclusion to Inclusion’ – DRTF report, December 1999]

14. The potential leverage of education in respect of social inclusion was echoed in the findings of SACHR in 1994 where one respondent noted, “If people grow up with somebody in a wheelchair they are not going to be made to feel different or isolated from them anymore, they will know what disability is all about”.
15. Both SACHR and Educable reported that disabled people who had been educated in ‘special’ schools experienced a “culture of passivity and dependency” engendered by the schools. Not only has this led to the “self-fulfilling prophecy” of low expectations and low achievement referred to above, some disabled people reported finding it difficult to adapt and adjust to the wider world and assert their rights, which also inhibits social inclusion.
16. The inclusion of disabled people benefits everyone – disabled and non-disabled alike. Evidence from inspections carried out by the Office for Standards in Education (Ofsted) has shown that, “inclusive schools are effective schools” (‘Evaluating Educational Inclusion’, Ofsted, 2000). Therefore, it is important that the DDA is extended in full to education and related services as quickly as possible in Northern Ireland.

## **Overarching comments**

17. The Commission welcomes the thrust of SENDO in that it seeks to promote the inclusion of disabled children in ‘mainstream’ schools and provides some protection for disabled people against discrimination in education. However, the Commission has a number of overarching concerns and comments about SENDO and these are set out below. Detailed comments on the key Articles of the draft Order are set out in the completed consultation questionnaire, which is at **Annex 1**.

## Implementing SENDO

18. SENDO has already been delayed by over two years and should be implemented in Northern Ireland as soon as possible. However, given the volume of work to be done in the education sector to prepare for the legislation, and to develop and publish Codes of Practice and other guidance on the new duties and rights, the Commission strongly recommends that SENDO is implemented from September 2005. Furthermore, the legislation should not be phased-in (as it was in Great Britain over a three year period) – SENDO should be implemented in full in September 2005, which would equalise the rights of disabled people in Northern Ireland in respect of education with their peers in Great Britain.
  
19. SENDO is intended to bring about significant change in educational provision and achieve the vision for the education of disabled people envisaged by the DRTF for “a truly integrated and diverse society”. This change will need to be managed effectively and a number of transition issues will need to be attended to if increased numbers of disabled children are to be properly educated in ‘mainstream’ schools. These include:
  - greater resources in terms of capital expenditure to make school, college and university buildings accessible; reduced pupil : teacher ratios; increased numbers of specialists (for example, sign language interpreters, speech and language therapists, etc); increased availability of text books in alternative formats, and so on. These mean substantial investment, which can be anticipated, but necessarily needs to be planned for over time
  
  - ensuring that a culture exists amongst educational providers that actively promotes equality for, and the inclusion of, disabled people through, amongst other things, disability awareness training of existing staff
  
  - ensuring that training of new teaching professionals (teachers, learning support assistants, etc) facilitates an appreciation of and respect for diversity issues in general, and disability awareness in particular

- capacity building of disabled children wishing to transfer from 'special' to 'mainstream' schools, so that the upheaval of changing their environment is minimised and they are able to assert their rights
- ensuring that non-disabled children in schools have a respect for and understanding of diversity – particularly disability awareness – through the curriculum, and that effective anti-bullying policies are in place that meet the needs of disabled pupils
- reviewing risk assessments to ensure that effective arrangements are in place for dealing with previously unforeseen situations and that potentially new activities (for example, administering medication) are adequately catered for.

## **Evaluating SENDO**

20. Given the importance of SENDO, it is essential that the effectiveness of the legislation and its implementation is evaluated at the earliest opportunity, say after two years. Whilst the Commission will have some responsibility for reviewing the legislation, full and effective evaluation will require a partnership approach involving the Departments of Education and Employment and Learning and ourselves, as well as other stakeholders.
21. This evaluation should be planned for, with success criteria established prior to implementation. This might, for example, involve setting performance indicators. The Department for Education and Skills (DfES) in Great Britain is "...attracted to the idea of including measures of inclusion in the performance tables and School Profiles" ('Consultation on Performance Tables and Pupils with Special Educational Needs', DfES, April 2004). The rationale is that inclusive schools deserve to be recognised, and evaluating inclusion should become an integral part of schools' evaluation. Similar indicators might be developed for use in Northern Ireland.

## **Single Equality Act**

22. 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 in Northern Ireland. The Commission is concerned that the draft Order, given its complexity, together with exemptions giving different duties and rights in schools and colleges of further and higher education, does not take account of the proposals for single equality legislation, and it will be very difficult to incorporate SENDO within the eventual Single Equality Act.
23. Experience of equivalent legislation to SENDO in Great Britain shows that, by combining changes to the SEN framework and extending the DDA to education, the legislation has caused confusion in schools and amongst the parents of disabled children. This has resulted in limited awareness of disability discrimination issues amongst teaching staff and the Disability Rights Commission being inundated with queries concerning SEN issues over which they have no remit. SENDO is primarily about extending protection against disability discrimination in education. Therefore, the Commission recommends that the title of the draft Order is changed to reflect this (for example, the 'Disability Discrimination (Education) Order'), and another piece of legislation is used to improve SEN arrangements.
24. In keeping with the thrust of harmonising Northern Ireland's anti-discrimination legislation, SENDO should place the same duties in respect of disabled people on all educational providers, regardless of which sector they are in (see paragraph 27 below). Furthermore, the same route for legal redress should be used (see paragraph 28 below) for discrimination cases in schools and colleges of further and higher education.
25. The Departments might also consider other measures that harmonise SENDO with other anti-discrimination legislation, such as protection against indirect discrimination and, as a matter of good practice, introducing monitoring of the numbers of disabled people applying for school and further and higher education places and courses, and participating in schools and colleges.

## **Extending the DDA in full to schools**

26. The draft Order stops short of extending the DDA in full to schools. Whilst the Commission understands the reasons behind this, we believe that greater rights can be given to disabled children, without compromising Government expenditure plans.

27. The key differences between other parts of the DDA and the proposed provisions in schools are as follows:

- accessibility – with the exception of schools, all service providers (including colleges of further and higher education) have a duty to, where reasonable, overcome barriers to physical access. Instead, given the huge investment needed to make all schools fully accessible, the draft Order proposes – in Articles 17 and 18 – a duty for Boards and schools to plan for accessibility over time. Little information is given on the content, timeframe, approval and monitoring arrangements for the access strategies and plans. Moreover, no right of legal redress is given where Boards and schools fail to implement these effectively.

The Commission recommends that there should be a physical access duty placed on Boards and schools to bring them into line with all other service providers. However, in order to recognise the resource constraints that exist, we propose that ‘reasonableness’ in respect of the physical accessibility of school buildings is defined in the Code of Practice, that the Commission will be developing to support SENDO, as compliance with accessibility strategies and plans. This should mean that it would be unreasonable to challenge the accessibility of particular school buildings, or features of those buildings, prior to dates given for their accessibility in the strategies and plans, and therefore any legal case mounted in respect of these would, in all likelihood, fail. This would, of course, depend on a robust system being in place to quality assure the strategies and plans.

The Commission also recommends that the legislation should contain an end date by which time all schools will be fully accessible. This would help ensure that investment in creating accessible schools will continue to be a Government priority and give reassurance that, eventually, all schools will be accessible to everyone.

- auxiliary aids and services – there is no duty placed on Boards and schools to provide auxiliary aids and services (Article 16), unlike all other service providers (including colleges of further and higher education). Instead, additional equipment (for example, lap top computers for children with dyslexia) or support services (for example, sign language interpretation) is accessed through the SEN ‘statementing’ process. Whilst this may continue to be appropriate for the small minority of children with complex or expensive additional support needs, it appears unnecessary and overly–bureaucratic for relatively inexpensive auxiliary aids and services, as well as costly (the National Audit Office estimates that the statementing process costs around £2,500 per pupil). Therefore, we ask the Department of Education to reconsider their approach in this area
- disclosure of disability – Articles 15 and 29 require disabled pupils and students respectively to disclose their disability in order to have rights under SENDO. This is in stark contrast to the other provisions of the DDA. The onus should be on organisations to both anticipate the requirements of disabled people and create an atmosphere where people feel secure and confident enough to disclose their disability.

Moreover, there are practical issues that may lead to injustices. Some disabled people may not know, recognise or accept that they have a disability, but it may be reasonable for educational providers to consider whether, say, performance or attendance issues are for reasons related to disability. For example, it would be reasonable for a school to consider whether a child’s reading or writing difficulties were caused by dyslexia and take appropriate action, rather than wait on the pupil disclosing that they had this disability. The requirement for disclosure has potentially profound implications for children with mental ill health. It can take considerable time before behavioural and personality disorders, for example, are diagnosed by which time a child might have been excluded from a particular school.

### **Special Educational Needs and Disability Tribunal (SENDIST)**

28. Whilst the Commission welcomes the reconstitution of the SEN Tribunal as the Special Educational Needs and Disability Tribunal (SENDIST), so that it can hear disability discrimination cases, we have major concerns about its scope and powers. These are:

- legal remedies – the SENDIST can only direct educational solutions to complaints; it has no power to award financial compensation. There will, in all likelihood, be cases – for example, involving hurt feelings, or where educational experiences cannot be recaptured – where financial compensation is appropriate
- enforcement powers – early experience of the equivalent legislation to SENDO in Great Britain has shown that educational authorities and schools can and do disregard Tribunal directions. Not only is this unjust, but it could lead to continuing litigation or the requirement for intervention by the Department of Education to enforce decisions, which is unsatisfactory
- different legal redress routes for schools and colleges of further and higher education – the draft Order proposes that disability discrimination cases in schools are heard by the SENDIST and in colleges of further and higher education by county courts (Articles 21 and 31 respectively). This could lead to anomalies. For example, a disabled person taking GCSEs in school would have a different course of legal redress – and fewer rights – than someone taking the same qualifications in a college of further education. Also, a number of pupils already attend colleges for part of their curriculum, and this is likely to increase following the proposed ‘collegiate’ arrangements after the abolition of the ‘11+’ Transfer Test – where would alleged discrimination cases occurring against school pupils in colleges be heard?

The Commission would eventually like to see, following the proposed Single Equality Act, all discrimination cases heard by Equality Tribunals, rather than county courts, which are known to have significant shortcomings when it comes to dealing with this specialist area of law. As an interim measure, we propose that the SENDIST should hear all cases brought under SENDO, including alleged discrimination in colleges of further and higher education, provided that the Tribunal’s powers are enhanced in the ways described above.

## **Examination bodies, education other settings and related services**

29. Examination bodies and standard setting agencies are not as yet covered by the DDA, which is anomalous. SENDO will require schools, colleges of further and higher education, etc not to discriminate, and make reasonable adjustments, in respect of examination arrangements under their control. Furthermore, professional or trade qualifications needed for employment purposes are covered by the employment provisions of the DDA. Therefore, for consistency, all examinations, and the bodies that set them, should be covered by the DDA, and SENDO would appear to be the appropriate legislation for addressing this anomaly.
30. Confirmation is needed that SENDO covers all education for disabled children and young people wherever it is provided. The provisions dealing with disability discrimination refer to “schools”, rather than education, which could be interpreted narrowly. It would be unacceptable if disabled people receiving their education in ‘special’ schools, at home, in hospital or youth detention centres do not have the same protection as those in ‘mainstream’ schools.
31. The draft Order also lacks clarity about coverage of the DDA in respect of a number of services related to education. Rather than introduce ‘grey’ areas, SENDO should be used to clarify the following issues:
  - extra-curricular activities – sports, after-school clubs, school plays, trips, etc, should all be covered by SENDO, but this could be made more explicit
  - early years settings – non-statutory pre-school provision (nurseries, etc) should be covered by the current goods, facilities and services provisions (Part III) of the DDA – SENDO should make it clear that it does not cover these
  - youth services – state-funded provision (youth clubs, etc) and that provided by the voluntary and community sector (scouts, guides, etc) should be covered by the DDA and SENDO should make this clear.

## **Transport**

32. The availability and timing of accessible transport is an important component in the effective education of many disabled people. Whilst other legislation is planned to remove the transport exemption from the DDA, SENDO could acknowledge the importance of making school transport accessible by requiring accessibility strategies and plans to include transport issues.

## **Disabled parents**

33. The draft Order does not give any specific rights to disabled parents to fully and actively participate in the education of their children. Clearly, all parents have a vital role – indeed duty under Article 45 the Education and Libraries (Northern Ireland) Order 1986 – to play in, for example, making informed decisions on choice of schools and curriculum subjects, attending parental consultations, school events, etc, and supporting children with their homework. Whilst some of these areas might already be covered by the goods, facilities and services provisions of the DDA (for example, access to events held on school premises), this remains a ‘grey area’ not yet clarified by case law. If SENDO cannot be used to clarify or extend rights for disabled parents in the education of their children, the Commission would urge the Department of Education to ensure that guidance on accessibility strategies and plans covers this important but neglected issue.

## **Voice of the child**

34. The draft Order needs to ensure that children have an appropriate say in decisions about them. This would be consistent with the UN Convention on the Rights of the Child. With the establishment of the Children’s Commissioner, an emerging Children’s Strategy for Northern Ireland, Section 75 (the promotion of equality between persons of different age) and, eventually, age discrimination legislation, the inclusion of children in decision-making is likely to become an increasingly prominent feature in public policy. Therefore, the Commission urges the Department’s to embrace this within SENDO and the changes to policy and processes that flow from it.

## **Time limits**

35. Delays in decision-making about educational matters and resources, as well as discrimination in education, can have disproportionate effects that may not easily be recovered, particularly in respect of children. Therefore, it is essential that issues and disputes are resolved quickly. The Commission urges that SENDO includes statutory time limits, which are well publicised, for all aspects of the statementing and complaint resolution processes to help ensure that any damage to a child's education is minimised.

## **Section 75**

36. Lastly, the Commission is concerned about a number of aspects of the application of Section 75 of the Northern Ireland Act 1998 to SENDO. These concerns are:
  - effective and meaningful consultation – the Departments appear not to have taken into account any of the feedback provided by consultees to the consultation on the legislative proposals which was conducted in 2002–03. Respondents to this consultation included the Commission and a consortium of key stakeholder organisations, education professionals and parents, which was established by the Commission. Indeed, the original consultation document included recommendations made by the consortium for change to the equivalent legislation that had already been enacted in Great Britain. A formal response by the Departments to feedback from the consultation, including reasons for not taking onboard any of the comments, has not yet been made
  - screening – Section 75 requires public authorities to conduct a screening exercise on all new policies, etc to consider whether they impact adversely on protected groups or opportunities exist to further promote equality of opportunity and, therefore, whether conducting an equality impact assessment (EQIA) is appropriate. It is not clear whether or not the screening exercise has been carried out, nor whether there has been consultation on any decision to screen out SENDO for an EQIA

- equality impact assessment – it would appear that at least two of the screening criteria (set out in guidance by the Equality Commission) have been met and, therefore, it would be appropriate to consider conducting a full EQIA on the draft Order. Given the fact that SENDO only partially extends the DDA to education in schools, there are clearly further opportunities to improve the rights of disabled people, and that these were identified in the previous consultation on the legislative proposals, the Commission strongly recommends that an EQIA is conducted on the provisions of SENDO to consider the alternative solutions suggested by consultees or what can be done to mitigate the shortcomings. Such an EQIA would also provide the Departments with an opportunity to give, in mitigation, their reasons for not adopting any recommendations for change referred to above made by the Commission, consortium and others in response to the original consultation on these legislative proposals.

37. The Commission would, therefore, like to know how the Departments intend to comply with their statutory duties under Section 75.

\*\*\* \*\*

## ANNEX 1

For office use only  
Response No:

**Name:** Don Leeson

**Address:** Equality House  
7–9, Shaftesbury Square  
Belfast  
BT2 7DP

**Organisation you are replying on behalf of (if any):**

Equality Commission for Northern Ireland

**Your position in the organisation:** Disability Policy Manager

**Would you like your response to be treated as confidential?** No

**Can we publish your response on our website?** Yes

**Is there anything you feel we should know, which you feel is important to your response?** (For example, if you have a disability or SEN, or care for someone who does)

This response has been prepared with advice from, and the endorsement of, a consortium of key stakeholder organisations, education professionals and parents, which was established by the Commission. A list of consortium members is annexed to this questionnaire. We would ask that, as well as this being a response from the Equality Commission, additional weight is given to it in recognition that it is supported by a wide range of organisations representing disabled people, children and young people, and education providers and professionals.

## PART 2 – SPECIAL EDUCATIONAL NEEDS

Part 2 of the draft Order is Articles 3-12. You can find a plain English summary of these Articles on pages 5-9 of the Explanatory Memorandum.

### Article 3

This strengthens the rights of children with SEN to be educated in mainstream schools where their parents want this and the education of other children can be protected.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
	✓			

### Comments:

The Equality Commission agrees entirely with the thrust of the proposed legislation that the presumption will be that all children will be educated in 'mainstream' schools. We do, however, have some concerns about the two exceptions to this:

- **parental choice** – whilst parents should have the right to choose to send their children to 'special' schools if they feel that is appropriate, the children too should have a voice in – and agree to – decisions about them. Article 12 of the UN Convention on the Rights of the Child states that "...the views of the child [should be] given due weight..." and "...the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child...". This has implications for information provision, which will need to be made available in a range of formats so that it is accessible to people with different disabilities and for children of primary and secondary school ages, as well as appropriate advocacy arrangements.

Furthermore, in order to make the right educational choices, parents and children may need additional advice and support. Research ('Disability', Standing Advisory Commission on Human Rights, 1994; and 'No Choice: No Chance', Educable, 2000) has shown that some parents and teachers, as well as other professionals (eg careers advisers) have low expectations of disabled children whereby they seek and provide a "closeted environment", which does not 'stretch' them academically. This might not always be appropriate, and the low expectations can create a "self-fulfilling prophecy", which may restrict disabled pupils' life choices

- **the efficient education of other children** – whilst there will be cases where the behaviour of individual children severely disrupts the education of classmates, and they may need to be excluded from 'mainstream' school, detailed and sensitive guidance will be needed to ensure that all concerned are clear about the criteria for exclusion and to prevent abuse of the exemption. Such exclusions should be extremely rare. The key issue is that all children have the right to effective education and, in order to do this, alternative arrangements might need to be made for a few children outside of mainstream provision.

## Articles 4 and 5

Education and Library Boards (Boards) must arrange for independent services to provide parents of children with SEN with advice and information, and must establish a means of resolving disputes between parents and schools or Boards.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly that the Boards should have a role in providing information on SEN matters to parents and children, and in providing a conciliation service, in their area. Any conciliation service should run concurrently with, and not compromise or delay, the right of appeal to the SEN Tribunal.

For several reasons, the Commission would encourage the Boards, through the Department of Education, to establish a single SEN conciliation service for Northern Ireland. This on the grounds of:

- economies of scale
- consistency
- minimising disruption that might follow any restructuring as a result of the current Review of Public Administration.

However, the Boards will need to ensure that, in adopting a centralised approach, geographical issues are taken into consideration and look at outreach arrangements, so that information and advice is readily accessible.

Furthermore, we would encourage the Boards to contract with a conciliation provider that is a 'not-for-profit' organisation in order to minimise the risk that parents and children are pressured into settlements.

Moreover, as noted in our response to Article 3 (above), and in keeping with the UN Convention on the Rights of the Child, the views of children should be sought and listened to in the conciliation process concerning their education.

Lastly, a good deal of work will be needed to overcome possible confusion about the respective roles and responsibilities of the Boards and the Commission in providing advice and information, and conciliation. The early experience of the Disability Rights Commission in Great Britain, where this legislation was implemented in 2002, shows that there is potential for parents in particular to be confused by the roles of the educational authorities and the DRC. Therefore, our respective organisations will need to work closely together to ensure that the arrangements for advice and conciliation are clear and well publicised.

## Article 6

Boards must comply, within prescribed periods, with orders of the Special Educational Needs Tribunal for Northern Ireland (SENT). Other technical changes will also be made, supporting SENT appeals and the statementing process.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly that time limits should be set for compliance by Boards and schools with the directions of the Tribunal. We would ask that statutory time limits are also set for SENT to hear cases, so that disputes are resolved speedily and any delays to a child's effective education are kept to a minimum.

Moreover, as noted in our response to Article 3 (above), and in keeping with the UN Convention on the Rights of the Child, the views of children concerning their education should be sought and listened to by the Tribunal.

The Commission has a number of concerns about the Tribunal and these are set out in our response to Article 21 (below).

## Article 7

Parents will have increased rights of appeal against the content of statements of SEN prepared by Boards.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal, provided that the appeal process includes the views of children concerning their education. Also, parents and children should be kept informed throughout the process of time limits, so that they do not miss deadlines and prejudice any ongoing appeals.

## Article 8

When a Board does not oppose an appeal, it must meet the wishes of the parents within a prescribed time, without the Tribunal having to make an order. This would only apply in cases where the appeal is against a refusal to make a statement, assess, reassess or to name a different school in a statement.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal.

## Article 9

Schools must inform parents when they are making special educational provision for their child because they think she/he may have SEN.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal.

## Article 10

Schools will have the right to ask the Board to carry out a statutory assessment of a registered pupil at the school

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal.

## Article 11

Boards need **not** name a school in a child's statement of SEN if the child's parents have decided to make suitable alternative arrangements.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal provided that the Boards facilitate the process of identifying an appropriate school, so that pressure is not transferred onto parents and children, where this support is needed. We would not wish to see a situation where parents need to negotiate directly with a number of schools to find a place for a disabled child. We would also like confirmation that school selection criteria will not override the requirements of a child with a statement.

## Article 12

Boards must maintain a child's statement until the outcome of an appeal to the SENT is known.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal.

## CHAPTER 1 OF PART 3: SCHOOLS

Chapter 1 of Part 3 of the draft Order is Articles 13-27. You can find a plain English summary of these Articles on pages 10-14 of the Explanatory Memorandum.

### Article 14

A school must not discriminate in its admissions arrangements against any child who has a disability.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal. This Article should have a profound effect on schools' current admissions criteria and the '11+' Transfer Test, which is not due to be abolished until 2008, some three years after this legislation is implemented.

Some admissions criteria currently in use is potentially discriminatory and might need to be changed in order to comply with Article 14. For example:

- attendance record – some disabled children may experience higher levels of absence because of their disability (for example, attendance at hospital and clinics). Unless disability-related absences are disregarded (in the same way as they should be under the employment provisions of the DDA), schools that use attendance records as a selection criterion risk discriminating against disabled children on grounds of their disability
- primary school – disabled children may not previously have been able to attend some primary schools (for example, because they were inaccessible) and, therefore, schools that use attendance at specific primary schools as a selection criterion also risk discriminating against disabled children.

In respect of the Transfer Test, a reasonable adjustment duty is likely to be owed to disabled children who, for reason of their disability, may require changes to the way the '11+' is administered in order to create a 'level playing field' with their peers. Some children might, for example, require additional time, or a scribe, or alternative formats. Such changes have been resisted in the past by the Department of Education, which will now need to review its policy in this area in the light of SENDO.

## Article 15

A school must not treat pupils who have a disability less favourably, without justification, for a reason related to their disability.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
			✓	

### Comments:

Whilst the Equality Commission agrees with the main thrust of this proposal, we are concerned about a particular aspect of Article 15 to the extent that we oppose it as currently drafted. The provision that responsible bodies (eg Boards, schools, etc) will not be liable where they do not know or could not be reasonably expected to know of a pupil's or prospective pupil's disability both in relation to the less favourable treatment duty and the reasonable adjustment duty is out of kilter with the philosophy of the DDA. We see no reason why the educational provisions in respect of disclosure should differ from other parts of the DDA. The onus should be on the organisation to both anticipate the needs of disabled people and create an atmosphere where people feel secure and confident enough to disclose their disability.

Moreover, a pupil and their parents might not know, recognise or accept that they have a disability, but it might impact on their performance at school. For example, it would be reasonable for a school to consider whether a child's reading or writing difficulties were caused by dyslexia and take appropriate action, rather than wait on the pupil disclosing that they had this disability.

The requirement for disclosure has potentially profound implications for children with mental ill health. It can take considerable time before behavioural and personality disorders, for example, are diagnosed by which time a child might have been excluded for a particular school.

Clearly, knowledge of a child’s disability and what is required to overcome barriers is needed in order to make reasonable adjustments. However, not all disabled children require reasonable adjustments, nor statements of educational need, but they should be afforded protection from discrimination. For these reasons, the Commission urges the Government to reconsider this requirement to ensure that disabled children have an adequate level of protection from discrimination in an environment where they and their parents can choose whether or not to disclose details of their disability without affecting their statutory rights.

## Article 16

Schools must make reasonable adjustments so that pupils who have a disability are not put at a substantial disadvantage compared to pupils who do not have a disability. (This is not a duty to remove or alter physical features or provide auxiliary aids and services – see Articles 17 and 18, which cover these issues.)

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
			✓	

### Comments:

Whilst the Equality Commission agrees that schools, etc should be under a reasonable adjustment duty like all other service providers, we are concerned about the exceptions that apply to schools to the extent that we oppose Article 16 as currently drafted. The duty to provide auxiliary aids and services, and the physical access duty (see Articles 17 and 18 below), are the cornerstones of the reasonable adjustment duty and, without these provisions, this duty is extremely limited.

The duty to provide auxiliary aids and services has been excluded on the grounds that the statement of SEN provides for the provision of auxiliary aids and adaptations for pupils in schools, and that a DDA-type duty might lead to duplication and a ‘second bite of the cherry’ for pupils denied additional equipment or support under the SEN provisions. The Commission considers that there should be such a duty, as elsewhere in the DDA, and asks the Government to revisit its approach in this area.

Many reasonable adjustments, including auxiliary aids and services, cost relatively little. It would appear overly bureaucratic and costly to force a child to go through the statementing process in order to access a relatively inexpensive aid or service. Indeed, a National Audit Office report in November 2002 drew attention to significant failings in the statementing process:

“Statutory assessment is a costly, bureaucratic and slow process – a statement takes six months to produce and costs an estimated £2,500 – but often it 'adds little value' in helping to meet a child's needs, according to parents and teachers. Despite the fact parents surveyed often felt that they had to fight to get statements, statements provide little guarantee that the child will get the support that they need in school due to weak monitoring arrangements in many LEAs and schools and shortfalls in some health and social services for children. Children with similar needs are getting different levels of support depending on where they live, which school they go to and how assertive their parents are.”

Furthermore, the Audit Commission reported:

“Since most statements for pupils in ordinary schools are vague, they cannot protect a specific level of provision. The notion that statements protect resources is therefore a fallacy..... There is an incentive for local education authorities not to specify what is to be provided because they thereby avoid a long-term financial commitment.”

Whilst this comment dated back to 1992, and the SEN Code of Practice requires statements to be more specific, there remains a risk that Boards and schools cannot always ensure that disabled pupils get the auxiliary aids and services they require to gain an effective education.

As it will, ultimately, be the same Tribunal that will decide upon the 'reasonableness' of an auxiliary aid and service in any case, so it should be possible to prevent a claim for an auxiliary aid or service being made twice under different legislative provisions. Moreover, as both the education and health and social service sectors are already involved in the provision of auxiliary aids and services, the Commission cannot understand why such provision, where it is unreasonably withheld or withdrawn, should not be subject to a legal challenge, no matter which sector is the provider.

Board policies in respect of statements and what they will fund vary from area to area. This means what is considered ‘reasonable’ by one Board, will not necessarily be viewed in the same light in another part of Northern Ireland.

Lastly, by excluding a duty to provide auxiliary aids and services from the legislation, the Equality Commission may be limited in its ability to support and represent parents and disabled children in this complex area, whereas as we can and do support disabled people to assert their rights to auxiliary aids and services elsewhere under the DDA.

## Article 17

Boards must plan, over time, to:

- increase the extent to which pupils who have a disability can participate in the curriculum;
- increase the physical accessibility of school premises for pupils who have a disability; and
- improve the way that schools present information for pupils who have a disability where they present it in writing for pupils who do not have a disability. They must provide the information within a reasonable time, and in ways that take into account the disability and any preferences expressed by the pupils or their parents.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
				✓

## Comments:

The Equality Commission has major concerns about this provision, which stops a long way short of the duty placed on all other service providers, including colleges and universities, to make reasonable adjustments in relation to the operation and physical features of their premises to overcome physical barriers to accessibility for disabled people. Given this, we strongly oppose Article 17 as currently drafted.

The Commission appreciates that, given resource constraints, it would be unrealistic to expect all of Northern Ireland's 1,200 or so schools to be made fully accessible in the short to medium term, hence the decision to require Boards to plan for full accessibility. However, a more robust approach is needed to ensure that the investment in school buildings is effective, that schools become fully accessible at the earliest opportunity, and disabled pupils and their parents are able to challenge Boards where accessibility strategies do not achieve full accessibility.

The current proposals:

- do not set an 'end date' for the full accessibility of schools. The Commission wishes to see the process for developing, agreeing and implementing accessibility strategies timebound to provide an holistic planning and resourcing framework, otherwise Boards will be working in a vacuum. Guidance provided for local education authorities in Great Britain by the Department for Education and Skills (DfES) stopped well short of setting an overall end date for full accessibility – it required accessibility strategies to be produced within six months of implementation of the equivalent legislation and covered a three–year period only (it was not expected that the schools would be fully accessible within three years, nor is that realistic). The Commission recommends that the legislation should contain an end date by which time all schools will be fully accessible. (There is a precedent for this in the DDA – some of the transport provisions contain end dates for the full accessibility of different modes of transport – for example, buses and coaches). This would help ensure that investment in creating accessible schools will continue to be a Government priority and give reassurance that, eventually, all schools will be accessible to everyone.
- do not set the standards for accessibility. Boards need specifications for the accessibility of schools that are detailed and comprehensive, covering such issues as the structural aspects of accessibility to, from and about buildings, as well as sanitary provision, lighting, signage, furniture, colour contrasting and internal finishes. The Government should consider enshrining the appropriate benchmark(s) in the legislation – the provision set out under Article 17(3)(b) for Boards to "...have regard to ... guidance issued by the Department..." is weak and allows them to pursue alternative approaches that may not achieve minimum standards.

Furthermore, the guidance on accessibility strategies in Great Britain produced by DfES signposts a range of guidance in respect of building standards. The key one of these is 'Approved Document M' that supports the Building Regulations, which has been updated to reflect current good practice in respect of access requirements for disabled people. The equivalent guidance in Northern Ireland – 'Technical Booklet R', which is published by the Department for Finance and Personnel – has not yet been updated and, therefore, omits design features, such as handles and the density of doors that are equally important facets of accessibility, as well as many issues affecting people with sensory impairments and people with learning disabilities. It is unlikely that a revised Technical Booklet R will be in place before 2007 and, therefore, is not a sound basis for use in developing accessibility strategies for schools. A more appropriate standard would be British Standard BS 8300 – 'Design of Buildings and their Approaches to Meet the Needs of Disabled People', which was published in 2001

- do not require Boards to publish their accessibility strategies, rather under Article 17(7)(b) they will be required to "...make a copy ... available for inspection at such reasonable times as it may determine" upon request – the requirement should be more proactive and accessibility strategies should be published (for example, on their websites). Furthermore, whilst it is clearly desirable that accessibility strategies should dovetail and be consistent with other plans, they should – unlike the suggestion in the draft Explanatory Memorandum – be "self-standing" to aid scrutiny
- do not give details of quality assurance arrangements for accessibility strategies ie what organisation – if any – is responsible for approving them as effective and cost efficient, and monitoring their implementation. Without an effective quality assurance system, using technical experts, public money could be spent on ineffective solutions and full accessibility of all schools might not be achieved

- do not provide for mechanisms to review and revise accessibility strategies – clearly Boards will wish to review the effectiveness of their overall approach in the light of experience. The process should allow for this and encourage consultation with affected groups, particularly given responsibilities in respect of Section 75 of the Northern Ireland Act 1998, in a spirit of continuous improvement and organisational learning, with sufficient safeguards in place to prevent Boards from using this as an excuse to ‘move the goal posts’ where there has been negligence
- do not provide for a right for disabled pupils and their parents to complain where they find it impossible or unreasonably difficult for disabled people to access education because of the physical features of schools. This right is denied even where a Board fails to implement its accessibility strategy, or implements it ineffectively. The Commission would wish the same physical access duty that applies to all other service providers, including colleges and universities, to apply to schools. In order to take account of the resource constraints issue, we propose that the Code of Practice, that the Commission will be charged to develop to give guidance on the legislation, defines ‘reasonableness’ in this respect as compliance with the accessibility strategy. Where a Board or school’s actions deviate from this, they will be liable to be found in breach of the legislation by the Tribunal
- do not take account of the management of premises – accessibility is as much about maintenance, as it is about changing physical features (for example, maintaining induction loop systems, keeping accessible toilets clear of clutter, etc). The resource implications for the maintenance of accessibility are minimal, yet under the current proposals a case could not be taken where inaccessibility is due to poor practice or management rather than resource constraints, which is the driver for the exemption from a physical access duty
- provide for a broad exemption from the physical access requirements of the DDA that goes beyond the accessibility of premises to include access to the curriculum and information. The rationale for excluding physical features of premises on resource grounds does not apply to these areas on anything like the same scale and should, therefore, be subject to the reasonable adjustment duty

- do not make it clear whether school transport (see the ‘other comments’ section below) and other important aspects of school life, which are considered by some as ‘extra–curricular’ (for example, school trips, sport, clubs, etc) are covered by accessibility strategies. As currently drafted, there is a risk that the Order will create a ‘grey area’ where Boards have no duties (not even to plan for accessibility) in respect of such important activities, which will significantly limit the participation of many disabled children in mainstream school life.

It is important to note that, whilst not yet tested in law, school buildings may already be covered by the service provisions of the DDA in respect of non–educational activities that are open to the public and held on those premises (for example, ‘jumble sales’, polling stations, etc). It would be anomalous indeed if a disabled person could take a case under the DDA because they could not access a school to attend a ‘jumble sale’, but not for the core purpose for which the school is intended.

## Article 18

Schools must include information about their accessibility plans in their governors’ annual report. Independent schools must make their plans available on request. Schools must implement and revise their plans and keep to government guidance.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
				✓

### Comments:

The Commission’s comments under Article 17 also apply to Article 18, which requires grant–aided and independent schools to produce accessibility plans (Article 17 requires Boards to produce accessibility strategies covering all of their maintained schools). For these reasons the Commission strongly opposes Article 18 as currently drafted.

## Article 19

A Board must not discriminate against a pupil or prospective pupil who has a disability in carrying out its functions under various Orders relating to education.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal.

## Article 21

This changes the name of the SENT to the Special Educational Needs and Disability Tribunal (SENDIST) and extends its jurisdiction to hear cases of disability discrimination in schools.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
	✓			

### Comments:

The Equality Commission agrees with this proposal, but with some caveats:

- the SENDIST needs a thorough understanding of the nature and operation of discrimination, and to acquire disability expertise, preferably through the inclusion of disabled people in its membership
- clarity is needed around the process for determining whether a person is 'disabled' as defined by the DDA. It is common for a pre-hearing to take place to establish whether a person has a 'disability' in respect of the employment or goods, facilities and services provisions of the DDA before Industrial Tribunal or County Court proceedings go ahead. This process can be particularly daunting and even humiliating for adults. Should the SENDIST adopt such an approach, great care and sensitivity will be needed to ensure that it is appropriate and not traumatic for disabled children

- time limits are set for hearing cases quickly – time is of the essence for complaints in the field of education. Any disadvantage experienced by disabled people in respect of their education needs to be addressed speedily, so as not to prolong difficulties, which may not be easily recovered
  
- as noted in our response to Article 3, and in keeping with the UN Convention on the Rights of the Child, the views of children should be sought and listened to in the Tribunal process concerning their education
  
- the Tribunal should hear all cases concerning discrimination in education, including that in colleges and universities. We do not believe that county courts are an appropriate place to hear discrimination cases – they can be intimidating for applicants and generally lack the expertise to make effective judgements on such issues (see Article 31 below). Furthermore, this would help remove anomalies that may arise in respect of where a disabled person is being educated. For example, a disabled person taking GCSEs in schools will have fewer rights, and a different route for legal remedy, than someone taking the same qualifications in a college of further education. Also, some pupils already attend colleges for some lessons and activities – it is not clear where alleged discrimination cases under these circumstances would be heard. And, this situation may become exacerbated when new post–primary arrangements are introduced in 2008 (ie following the abolition of the Transfer Test), which may result in even more school pupils being educated in colleges for parts of the curriculum.

## Article 22

The SENDIST will have wide powers to order any remedy it thinks appropriate except for financial compensation. However, it will be able to order that schools and Boards take compensatory action to take account of past discrimination and shape the future prospects of the child.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
				✓

## Comments:

The Equality Commission has major concerns about the powers of the SENDIST and, therefore, strongly opposes Article 22 as currently drafted. The Tribunal should be able to grant financial compensation where it is appropriate. Whilst an educational remedy might be appropriate in most cases, this may not always be the case. For example, where a disabled child has been denied access to a school trip because the school failed to provide an accessible bus, that educational experience cannot easily be recaptured and some financial penalty may ensure that such a situation does not recur.

A recent survey of young disabled people aged 20–24 carried out by NOP on behalf of the Disability Rights Commission in Great Britain showed that a third of disabled children had missed out on school trips for a reason related to their disability. Similarly, should a disabled child be verbally abused because of their disability by a member of staff, compensation for hurt feelings might be appropriate. The provision of an effective conciliation service should help ensure that educational remedies, where these are appropriate, are achieved.

Of even greater concern, is evidence beginning to emerge from Great Britain, where this legislation has been in effect for almost two years, that shows that the power of the Tribunal to enforce decisions is limited. In at least one high profile case, a school which was found to have discriminated against a disabled pupil has ignored directives from the Tribunal. The Government needs to review the legislative proposals to consider what further provisions are required to increase the authority of the SENDIST in Northern Ireland, and what role the Department of Education might play in facilitating the Tribunal's effectiveness.

## Article 22 (continued)

The SENDIST will be able to set deadlines when directing action by schools and Boards. If a responsible body fails to comply within the deadlines, the parent can ask the Department of Education to require compliance.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

## **Comments:**

The Equality Commission agrees strongly with this proposal. However, as stated above, the Government needs to review the legislative proposals to consider what further provisions are required to increase the authority of the SENDIST in Northern Ireland, so that the Department of Education does not need to intervene. That said, the Commission welcomes the Department's willingness to intervene on behalf of disabled pupils and their parents where schools or Boards fail to fulfil their duties under the legislation.

## CHAPTER 2 OF PART 3: FURTHER AND HIGHER EDUCATION

Chapter 2 of Part 3 of the draft Order is Articles 28-34. You can find a plain English summary of these Articles on pages 27-33 of the Explanatory Memorandum.

### Articles 28 and 29

Colleges of Further and Higher Education must not treat students or prospective students who have a disability less favourably, without justification, for a reason related to their disability.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
			✓	

### Comments:

Whilst the Equality Commission agrees with some of these proposals, we are concerned about a particular aspect of Article 29 to the extent that we oppose it as currently drafted. As with our response to Article 15 (above), the provision that responsible bodies (eg colleges of further and higher education) will not be liable where they do not know or could not be reasonably expected to know of a student's or prospective student's disability both in relation to the less favourable treatment duty and the reasonable adjustment duty is out of kilter with the philosophy of the DDA. We see no reason why the educational provisions in respect of disclosure should differ from other parts of the DDA. The onus should be on the organisation to both anticipate the requirements of disabled people and create an atmosphere where people feel secure and confident enough to disclose their disability. For example, it should be reasonable for a college to consider that long periods of absence are for a reason relating to a person's disability, and therefore to consider what reasonable adjustments might be made in order to facilitate the student's return to learning, rather than simply remove them from a course because they did not know that the student had a disability.

Furthermore, greater clarity is needed on the exemption in Article 29(6) that allows less favourable treatment to be justified in order to “...maintain academic or other standards of any other prescribed kind”. The Commission would like to see historic inequalities in the education of disabled people addressed. In Northern Ireland, the Labour Force Survey (Winter 2003–04) shows that disabled people (43%) are twice as likely as to have no qualifications compared to non-disabled people (20%); and disabled people (9%) were significantly less likely to have obtained a higher qualification compared to non-disabled people (20%). We would, therefore, like colleges and universities to consider what reasonable adjustments might be made to requirements for academic qualifications, which do not compromise standards, in order to improve access to further and higher education for disabled people. This might, for example, involve the accreditation of prior learning or experience gained through non-academic activity, or an approach currently being piloted by the University of Ulster in respect of an ‘access’ course for disabled people without the necessary qualifications to join degree courses. The Commission would not wish this justification to undermine such social inclusion policies.

### Article 30

Colleges of Further and Higher Education must take reasonable steps to ensure that students who have a disability are not placed at a substantial disadvantage compared to students who do not have a disability, in their access to education and associated services provided primarily for students.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

### Comments:

The Equality Commission agrees strongly with this proposal.

## Article 31

Cases of disability discrimination against further education and higher education institutions will be taken through the county court.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
				✓

### Comments:

The Commission has major concerns about this proposal and, therefore, cannot support Article 31 as currently drafted. The Commission believes that disability discrimination cases in respect of goods, facilities and services, including education, as well as all other complaints of discrimination, should eventually be heard by an Equality Tribunal, rather than county courts.

The report 'Monitoring the Disability Discrimination Act 1995', published by the then Department for Education and Employment in Great Britain in 1998, looked at claims brought under the DDA and included a wide range of interviews with legal and other experts involved in the Act's implementation. Applicants and potential applicants under the goods, facilities and services provisions, and their advisers, all spoke of the difficulties caused by the formality and complexity of the county court system; judges' inexperience with the DDA and low awareness of discrimination issues; and the lack of accessibility and facilities in courts.

Therefore, with the caveats set out in our response to Article 21 (above), and as an interim measure, the Commission would like to see cases of alleged disability discrimination in colleges of further and higher education heard by the SENDIST, rather than county courts as proposed.

## Article 32

If an FE/HE institution doesn't own the property, the owner cannot unreasonably refuse permission to make the alterations required by this law, but can attach reasonable conditions.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

**Comments:**

The Equality Commission agrees strongly with this proposal, which is consistent with provisions elsewhere in the DDA.

**Article 33**

Any terms in a contract or agreement involving a FE or HE institution, which would be discriminatory under this legislation, will be void.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

**Comments:**

The Equality Commission agrees strongly with this proposal, which is consistent with provisions elsewhere in the DDA.

## CHAPTER 3 OF PART 3: MISCELLANEOUS

Chapter 3 of Part 3 of the draft Order is Articles 35-43. You can find a plain English summary of these Articles on pages 17-18 of the Explanatory Memorandum.

### Article 34 and Schedule 4

The Equality Commission will be able to give assistance in cases of disability discrimination taken under this new law.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
	✓			

#### Comments:

The Equality Commission agrees with this proposal, which is consistent with provisions of the Equality (Disability, etc) (Northern Ireland) Order 2000. However, we would like our powers extended to cover discriminatory advertisements, which was overlooked by the Equality (Disability, etc) Order. This shortcoming has recently been addressed by the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004 in respect of the employment provisions of the DDA, including those that apply to qualifications bodies. Similar powers would, for example, be helpful in addressing discrimination in publicity material for courses in further and higher education and admissions criteria for secondary schools, and make them consistent with the DDA provisions in respect of professional qualifications.

### Article 35

The Equality Commission will prepare and consult on two Codes of Practice for the disability discrimination parts of this new law. One of these will be for schools; the other will be for FE/HE institutions. These will explain and show how the law will work in practice.

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

**Comments:**

The Equality Commission agrees strongly with this proposal, which is consistent with provisions of the Equality (Disability, etc) (Northern Ireland) Order 2000.

**Article 36**

The Equality Commission will arrange independent conciliation services for disability discrimination cases under this new law

Strongly support	Support	No strong opinion	Oppose	Strongly oppose
✓				

**Comments:**

The Equality Commission agrees strongly with this proposal, which is consistent with provisions of the Equality (Disability, etc) (Northern Ireland) Order 2000.

## **PLEASE USE THE SPACE PROVIDED FOR ANY MORE COMMENTS YOU HAVE.**

### **Implementation dates**

The consultation document makes no mention of implementation dates for the Special Educational Needs and Disability Order (SENDO). This hugely important legislation has already been delayed by over two years (equivalent legislation in Great Britain was enacted by Parliament in 2001 and implemented with effect from September 2002) and should be implemented in Northern Ireland as soon as possible. However, given the volume of work to be done in the education sector to prepare for the legislation, and to develop and publish Codes of Practice and other guidance on the new duties and rights, the Commission strongly recommends that SENDO is implemented from **September 2005**.

Furthermore, the provisions of the equivalent legislation in Great Britain were phased-in over a three year period, with the final duties (the physical access duty on colleges of further and higher education) coming into effect from September 2005. The Commission strongly urges the Government **not** to phase-in the duties in Northern Ireland, and to implement the provisions of SENDO in full in September 2005, which would equalise the rights of disabled people in Northern Ireland in respect of education with their peers in Great Britain.

### **Single Equality Act**

On 22 June 2004, the Office of the First Minister and Deputy First Minister (OFMDFM) published a consultation document on a Single Equality Act, which aims to consolidate, harmonise and simplify all anti-discrimination legislation in Northern Ireland. It is anticipated that this legislation will be in place in 2007. The Commission is concerned that the draft Order, given its complexity, together with exemptions giving different duties and rights in schools and colleges of further and higher education, does not take account of the proposals for single equality legislation, and it will be very difficult to incorporate SENDO within the eventual Single Equality Act.

In considering whether the draft Order can be accommodated within single equality legislation, Government will need to look at the respective roles of the SENDIST and county courts in adjudicating over education cases – our response to Article 31 (above) should help the transition to a single Equality Tribunal, which the Commission wishes to see established to hear all cases of alleged discrimination under the Single Equality Act. The concept of indirect discrimination and the role of monitoring also need to be considered.

Indirect discrimination (ie an apparently neutral provision that has a detrimental impact on a group covered by anti-discrimination legislation) is a concept that does not yet apply to disability. However, the Commission feels that it could provide additional protection to disabled people. This will be an area that we will seek to address as part of the harmonisation of anti-discrimination legislation through the development of the Single Equality Act. Indirect discrimination is an issue that might have significant implications in the area of disability and education. For example, a case could be made that blanket requirements for qualifications and grades for entry to certain courses indirectly discriminate against disabled people whose academic achievements may have been hindered through poorer educational provision, inaccessibility or ill health.

Monitoring is already required by some anti-discrimination legislation in Northern Ireland and we consider this should be extended to other areas as part of the Single Equality Act. This could apply across all protected groups, both for employment and goods, facilities and services purposes. Again, as a matter of good practice, the Government might consider requiring all education providers, through SENDO, to monitor the numbers of disabled people applying for school and further and higher education places and courses, and participating in schools and colleges where this is not already in place.

Whereas the Single Equality Act aims to consolidate all anti-discrimination legislation, similar consideration should also be given to consolidation of legislation governing educational provision, which is now spread over a number of Orders-in-Council.

## **Section 75 of the Northern Ireland Act 1998**

The Department of Education and Department for Employment and Learning, like all other designated public authorities, are bound by the requirement of Section 75 of the Northern Ireland Act 1998 to promote equality of opportunity for, amongst other groups, disabled people. This includes a requirement to consult with people and groups affected by particular policies or proposals.

The Commission is concerned that the Departments have not taken into account any of the feedback provided by consultees to the consultation on the legislative proposals which was conducted in 2002–03.

Respondents to this consultation included the Commission and a consortium of key stakeholder organisations, education professionals and parents, which was established by the Commission. Indeed, the original consultation document included recommendations made by the consortium for change to the equivalent legislation that had already been enacted in Great Britain. A formal response by the Departments to feedback from the consultation, including reasons for not taking onboard any of the comments, has not yet been made.

Section 75 requires public authorities to conduct a screening exercise on all new policies, etc to consider whether they impact adversely on protected groups or opportunities exist to further promote equality of opportunity and, therefore, whether conducting an equality impact assessment (EQIA) is appropriate. The Explanatory Memorandum to the draft Order does not make it clear whether or not the screening exercise has been carried out (indeed, any discussion on Section 75 implications of the draft legislation is confined to one paragraph on page 51 of the consultation document). In any case, public authorities are required to consult on their decisions to screen policies out, which the Departments appear not yet to have done. The Commission would, therefore, like to know how the Departments intend to comply with their statutory duties under Section 75 in respect of screening.

In the Equality Commission's 'Guide to the Statutory Duties', four criteria must be considered by public authorities when screening policies:

- is there any evidence of higher or lower participation or uptake by different groups?
- is there any evidence that different groups have different needs, experiences, issues and priorities in relation to the particular policy?

- is there an opportunity to better promote equality of opportunity or good relations by altering the policy or working with others in government or in the larger community?
- have previous consultations with relevant groups, organisations or individuals indicated that particular policies create problems that are specific to them?

Arguably, two of these criteria apply to the draft Order. Given the fact that SENDO only partially extends the DDA to education in schools, there are clearly further opportunities to improve the rights of disabled people. Furthermore, several responses, including the Equality Commission's, to the original consultation on the legislative proposals contained within the draft Order highlighted specific problems created by them. Therefore, we strongly recommend that an EQIA is conducted on the provisions of SENDO to consider the alternative solutions suggested by consultees or what can be done to mitigate the shortcomings. Such an EQIA would also provide the Departments with an opportunity to give, in mitigation, their reasons for not adopting any recommendations for change referred to above made by the Commission, consortium and others in response to the original consultation on these legislative proposals.

## **Disability discrimination and SEN**

The key purpose of the legislation should be to end disability discrimination in education provision. However, SENDO seeks to build on, and modify, the existing SEN framework. Whilst SEN provisions will continue to be important, they should be seen as a 'reasonable adjustment' to meeting the needs of some, not all, disabled children in schools.

This is not just a presentational matter – generally, disabled people do not wish to be given 'special' treatment; rather they should be afforded every opportunity to participate fully in all aspects of society, which may require some reasonable adjustments to overcome any barriers they might face. Incidentally, extensive changes to the SEN framework are expected to be made in Great Britain over the next few years, and the term 'special educational needs' is likely to be replaced by 'additional support needs'.

The proposals, as they currently stand, do not provide a holistic and integrated approach for dealing with disability discrimination in education. By attempting to build on the existing framework and infrastructure, the proposals suggest different approaches for meeting the requirements of disabled people, depending on whether they are participating in schools or colleges of further or higher education. This results in different rights under the law depending on age in terms of legal remedies, and risks perpetuating transition issues as people move from schools to colleges of further or higher education.

In light of these issues, the Commission recommends that Government:

- makes it clear that the legislation is first and foremost the enactment of Part 4 of the DDA and is, therefore, about tackling disability discrimination in education. In order to signal this, consideration should be given to a different title for the legislation, for example the ‘Disability Discrimination (Education) Order’
- considers whether this legislation is the appropriate vehicle for refining the SEN framework. Whilst we recognise the need for, and generally support, the proposed changes in this area, it might be advisable to use another piece of legislation to improve the SEN framework. This would establish a clear distinction between disability and SEN ie not all disabled people have SEN.

It is worth noting that the DRC in Great Britain is experiencing a great deal of confusion from parents in respect of SEN issues and disability discrimination. The Code of Practice could then be used to make the links between the two legislative frameworks to show that SEN provision is a way of managing reasonable adjustments for some disabled children.

## **Resources**

Additional resources and investment in ‘mainstream’ schools and colleges of further and higher education will clearly be required over time for them to fulfil their obligations and achieve the vision envisaged by the DRTF of “a truly integrated and diverse society”, and which could not be achieved through viring funding from ‘special’ schools as the number of disabled pupils attending them, presumably, declines over time.

Accessibility strategies and plans, with all their potential shortcomings highlighted under Articles 17 and 18 above, should help articulate capital expenditure requirements. Other additional resource requirements can be predicted (for example, learning support assistants, the availability of textbooks in alternative formats, etc) and should be planned for rather than waiting on statements of SEN, which inevitably build in delays.

However, major structural issues also need attending to, which require long term planning by the Government. These include:

- class sizes – clearly pupils who require particular attention will place a burden on teachers unless additional support is provided. Smaller class sizes would make it easier for teachers to focus on the specific learning needs and other requirements of every pupil. Educable (see below) found that average class sizes in ‘special’ schools were significantly lower than ‘mainstream’ schools and recommended that class sizes in ‘mainstream’ schools be reduced to no more than 12 pupils
- increasing the availability of communications support (for example, sign language interpreters), which has been called for by, amongst others, RNID
- increasing the numbers of physiotherapists, occupational therapists and speech and language therapists across Northern Ireland. This was also a recommendation of Educable (see below).

## **Transition issues**

Clearly, SENDO is intended to bring about significant change in educational provision and achieve the vision for the education of disabled people envisaged by the DRTF. This change will need to be managed effectively and a number of transition issues will need to be attended to if increased numbers of disabled children are to be properly educated in ‘mainstream’ schools. These include:

- promotion of equality and good relations – SENDO places duties on Boards and schools not to discriminate against disabled children, rather than a positive duty to promote equality. Whilst schools are not yet covered explicitly by Section 75, it would help ease the transition if all concerned thoroughly embraced a culture of equality and respect for diversity. The accessibility strategies and plans might be used as vehicles to show not only what measures will be taken to remove barriers to accessibility, but how equality will be actively promoted
- diversity and disability and deaf awareness and etiquette training for all governors and staff – whilst only a few cases have so far been taken under the equivalent legislation to SENDO in Great Britain, such training has been ordered by the SENDIST in a number of them where schools have been found to have discriminated. The Commission recommends that everyone working in schools and colleges of further and higher education undertake such training. Not only will this help prevent discrimination, it may help address some of the concerns of teaching professionals and others in dealing with disabled people and smooth the transition process. This was also a recommendation of Educable (see below)
- teacher training – teacher training and other relevant courses for new teaching professionals need to be reviewed to ensure that they facilitate an appreciation of and respect for diversity issues in general, and disability awareness in particular
- citizenship – whilst such training might not be appropriate for children, the Commission would urge that the curriculum covers respect for and understanding of diversity, which should include disability issues. Research by Educable (see below) found that some disabled children already in ‘mainstream’ schools were frequently excluded from activities by other pupil (for example, in the playground). If this is a common experience it would negate the benefits of increased integration and potentially contravene Article 23(1) of the UN Convention on the Rights of the Child, which relates to active participation in the community

- a review and reinforcement of school anti-bullying policies to ensure that they are effective and able to meet the requirements of disabled pupils. Research by Educable (see below) reported, as recently as 2000, that, “.....bullying of children with a disability seems to be widespread in ‘mainstream’ schools”. If this is indeed the case, it too would potentially contravene Article 23(1) of the UN Convention on the Rights of the Child, which also states that disabled children should “...enjoy a full and decent life, in conditions which ensure dignity.....”
  
- risk assessments – these need to be reviewed by Boards and schools to ensure that they adequately reflect the new circumstances envisaged by the legislation. As a result of SENDO there should be increased numbers of disabled children in ‘mainstream’ schools, possibly some with complex medical requirements. Schools may need, for example, to review their insurance cover, as well as put in place arrangements for administering medication, bearing in mind that (Article 23(3)) of the UN Convention on the Rights of the Child requires “.....that the disabled child has effective access to and receives education, training, health care services ..... in a manner conducive to the child's achieving the fullest possible social integration and individual development.....”.

## **Evaluation**

Given the importance of SENDO, it is essential that the effectiveness of the legislation and its implementation is evaluated at the earliest opportunity, say after two years. Whilst the Commission will have some responsibility for reviewing the legislation, full end effective evaluation will require a partnership approach involving the Departments of Education and Employment and Learning and ourselves, as well as other stakeholders.

This evaluation should be planned for, with success criteria established prior to implementation. This might, for example, involve setting performance indicators. The Department for Education and Skills (DfES) in Great Britain is "...attracted to the idea of including measures of inclusion in the performance tables and School Profiles" ('Consultation on Performance Tables and Pupils with Special Educational Needs', DfES, April 2004). The rationale is that inclusive schools deserve to be recognised, and evaluating inclusion should become an integral part of schools evaluation. Similar indicators might be developed for use in Northern Ireland.

## **Education outside 'mainstream' provision**

Whilst one of the main thrusts of SENDO to promote the inclusion of disabled pupils in 'mainstream' schools, a number of children and young people will continue to be educated elsewhere. The draft Order (Article 7) envisages a continuing role for 'special' schools, and education is also provided in other settings such as at home, in hospitals and in youth detention centres.

The protection against discrimination to be provided by Chapter 1 of SENDO refers to duties placed on "schools" as defined by the Education and Libraries (Northern Ireland) Order 1986 – under this Order, "school means an institution for providing primary or secondary education.....", which could be open to a narrow interpretation. The Commission would like confirmation that the rights conferred by SENDO on disabled children and young people relate to education as a service and that they have adequate protection from discrimination in whatever setting that service is provided.

## **Early years provision**

It is not clear from the draft Order or Explanatory Memorandum whether education in early years settings (for example, nursery schools) is covered by the proposed legislation. A recent joint publication by Sure Start, the National Children's Bureau and Council for Disabled Children – 'Early Years and the Disability Discrimination Act 1995: What Service Providers Need to Know' (2003) – gives guidance on what parts of the DDA apply to the various types of early years settings in Great Britain:

- Part 4 (to be enacted by SENDO) – covers “early years settings that are constituted as schools.....private or state–maintained, mainstream or special”
- Part 3 (goods, facilities and services) – “...all providers that are not constituted as schools: day nurseries, family centres, childcare centres, pre–schools and play–groups, individual childminders and networks of accredited childminders and other private, voluntary and statutory provision that is not established as a school”.

The Commission would welcome confirmation from the Department of Education that the draft Order is consistent with this guidance and that all possible steps have been taken in the legislation to remove any ambiguities about which early years settings are covered by particular provisions of the DDA.

## **Youth services**

In the original consultation document on the Government’s proposals for the legislative provisions to be enacted through SENDO, published in September 2002, it was proposed that the new rights and duties proposed for the further and higher education sectors should be applied to youth services, including the requirement to make physical alterations to buildings. This would have implemented two of the Government’s commitments in respect of the DRTF report – “From Exclusion to Inclusion” – which was published in 1999:

- “the new rights recommended in further, higher and LEA-secured adult education should be applied to the Youth Service”
- “the exclusion from the DDA access to services provisions of voluntary organisations providing education, social, cultural and recreational activities and facilities for physical education and training should be ended”.

It is not clear from the draft Order or Explanatory Memorandum that these DRTF recommendations, nor the proposal contained in the consultation document, have been addressed. The Commission would welcome confirmation from the Department for Employment and Learning that the draft legislation does indeed cover youth services, and that non–statutory youth provision (for example, scouts, guides, etc) is extended to the goods, facilities and services (Part 3) provisions of the DDA.

## **Examining bodies and standard setting agencies**

Examination arrangements that are under the control of schools, colleges, universities or education authorities fall within the provisions of Part 4 of the DDA, which will be enacted by SENDO. A professional or trade qualification which “is needed for or facilitates engagement in a particular trade or profession” will from October 2004 be covered by the DDA by virtue of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004. The Government's view is that ‘general examinations’ such as GCSE and A-levels are not covered by these Amendment Regulations. Furthermore, there is uncertainty about whether some standard setting bodies, which set standards against which qualifications are awarded, but do not themselves award qualifications, are covered by the Amendment Regulations.

It seems anomalous for some qualification giving bodies to be covered by the DDA and not others. It also seems anomalous that schools, colleges and education authorities are required to make reasonable adjustments in the context of examinations, but that the awarding body is not. However, there seems nothing unique about their situation which would require an exemption from a duty not to discriminate. Therefore, the Commission would like to all examination bodies and standard setting agencies brought within the provisions of the DDA.

This was a recommendation made in May 2004 by the Joint House of Commons and House of Lords Committee on the draft Disability Discrimination Bill for Great Britain, which is now being considered by the Government. Whilst, the Government has given a commitment to consult on a draft Disability Discrimination Order for Northern Ireland, which will mirror the legislation proposed for Great Britain, the Commission feels that examination bodies and standard setting agencies would be more appropriately covered by SENDO. This would enable the Commission to produce comprehensive guidance on examinations in relation to the DDA in the Codes of Practice that we will be developing to support SENDO.

## **Transport**

The use of transport is currently exempt from the provisions of the DDA. The Government, in its response to the DRTF recommendations ('Improving Civil Rights for Disabled People', OFMDFM, 2001) has given a commitment to remove this exemption. It is likely that this will be done through the Disability Discrimination Order referred to above, which OFMDFM will be consulting on towards the end of 2004, and which is expected to become law in 2005.

Given the largely inaccessible nature of our buses, coaches and trains, and substantial rural issues, transport is particularly important to education in Northern Ireland. To a significant extent, transport determines which schools children attend and their ability to participate in after-school activities. Whilst the Commission does not expect SENDO to be used to remove the transport exemption from DDA, it could acknowledge its importance to education and explicitly require accessibility strategies and plans to include transport matters.

## **Disabled parents**

Article 45(1) of the Education and Libraries (Northern Ireland) Order 1986 places a duty on all parents of school age children to "cause [them] to receive efficient full-time education". However, legislation governing education, including SENDO, does not give any specific rights to support for disabled parents to enable them to participate fully and actively in the education of their children.

Clearly, all parents have a vital role to play in, for example, making informed decisions on choice of schools and curriculum subjects, attending parental consultations, school events, etc, and supporting children with their homework. Whilst some of these areas might already be covered by the goods, facilities and services provisions of the DDA (for example, access to events held on school premises), this remains a 'grey area' not yet clarified by case law. If SENDO cannot be used to clarify or extend rights for disabled parents in the education of their children, the Commission would urge the Department of Education to ensure that guidance on accessibility strategies and plans covers this important but neglected issue.

## **Voice of the child**

A key theme running throughout the Commission's – and no doubt others' – response to the draft Order is ensuring that children have an appropriate say in decisions about them, which echoes the UN Convention on the Rights of the Child. With the establishment of the Children's Commissioner, an emerging Children's Strategy for Northern Ireland, Section 75 (the promotion of equality between persons of different age) and, eventually, age discrimination legislation, the inclusion of children in decision-making is likely to become an increasingly prominent feature in public policy. Therefore, the Commission urges the Department's to embrace this within SENDO and the changes to policy and processes that flow from it.

## **Time limits**

Delays in decision-making about educational matters and resources, as well as discrimination in education, can have disproportionate effects that may not easily be recovered, particularly in respect of children. Therefore, it is essential that issues and disputes are resolved quickly. The Commission urges that SENDO includes statutory time limits, which are well publicised, for all aspects of the statementing and complaint resolution processes to help ensure that any damage to a child's education is minimised.

## **'No Choice: No Chance'**

Educable, a group of young disabled people who had been educated in 'special' schools, published a research report called 'No Choice: No Chance' in 2000. The project was supported by Save the Children and Disability Action, and funded by the then National Charities Lottery Board and BBC Children in Need. The report made 31 recommendations for change to improve the integration of disabled pupils in 'mainstream' schools, as well as the quality of education provided in 'special' schools, ranging from practical and inexpensive improvements to processes to structural issues that will require substantial investment over time. The Commission commends this report to the Departments and asks that its recommendations are considered in the context of SENDO and its implementation.

\*\*\* \*\*

## **ANNEX 2**

### **CONSORTIUM MEMBERS**

John Carberry	RNID
Tim Cunningham	Committee on the Administration of Justice
Teresa Degnan	British Association of Teachers of the Deaf
Siobhan Fitzpatrick	NIPPA
Margaret Kelly	Barnardo's
Majella McAteer	British Deaf Association
Joe McCusker	Rethink
Elaine McElduff	Children in Northern Ireland
Paschal McKeown	Mencap
Olive McManus	British Association of Teachers of the Deaf
Denise Magill	Northern Ireland Human Rights Commission
Oonagh Morrison	Muscular Dystrophy Campaign
Maria Murray	Skill NI
Katy Radford	Save the Children
Joe Reid	Belfast Institute of Further and Higher Education
Katy Searle	Downs Syndrome Association
Kathryn Stevenson	Children's Law Centre
Pauline Walker	The National Deaf Children's Society
Jean Wheeler	Belfast Institute of Further and Higher Education
Monica Wilson	Disability Action