



Equality Commission

FOR NORTHERN IRELAND

**Strengthening Protection
for Disabled People
Proposals for Reform -
Full report**

March 2012

Introduction

The Equality Commission for Northern Ireland is calling on the Northern Ireland Executive to make urgent changes to the **disability equality legislation** in Northern Ireland.

These changes are aimed at **addressing inconsistencies** within the disability equality legislation and **strengthening the rights** of disabled employees, customers, transport users, tenants, students in further and higher education and pupils in schools, against unlawful discrimination and a failure to make reasonable adjustments. Further, the changes will give additional protection against discrimination for those who **care for disabled people**.

They will also help **harmonise and simplify** the legislation, as well as ensuring that Northern Ireland equality law **keeps pace** with legislative changes that have already taken place in Great Britain or are due to be implemented.

The Equality Commission considers that disabled people in Northern Ireland should not have **less protection** against disability discrimination either in employment or when accessing goods and services, compared to disabled individuals in other parts of the UK.

The Equality Commission has set out below in detail the changes it recommends, as well as the reasons underpinning its recommendations. In addition, it has summarised the proactive steps it has taken in order to raise awareness of its recommendations for reform, and to secure support for the recommended changes.



The Equality Commission is calling for urgent changes to be made to the disability equality legislation.

What changes are required?

These proposals included recommendations for change in relation to the **Disability Discrimination Act 1995** and the **Special Educational Needs and Disability (Northern Ireland) Order 2005**.



The changes will improve protection for disabled employees, pupils, job applicants, tenants, as well as carers of disabled people.

The **Disability Discrimination Act 1995** (DDA 1995) prohibits discrimination against disabled people in employment and when accessing goods and services, including public transport. It also gives protection to disabled people against discrimination when accessing private clubs (such as golf clubs), buying or renting premises, and when subject to the functions of public bodies, such as the police.

The **Special Educational Needs and Disability (Northern Ireland) Order 2005** makes it unlawful for schools to treat disabled pupils and prospective pupils less favourably than other pupils in all aspects of school life. It also provides protection against discrimination for disabled students and prospective students in further and higher education. In addition, it makes it unlawful for general qualifications bodies (such as the CCEA) to discriminate against disabled pupils when awarding certain qualifications, including GCSEs, GCEs, etc.

In summary, the Equality Commission recommends the following key changes to the disability legislation:-

- the disability legislation is **harmonised, simplified** and **strengthened**, so that there is a uniform set of definitions of discrimination and other provisions across the scope of the legislation;

- disabled people have protection against **indirect disability discrimination** and **discrimination arising from disability**; thus addressing the impact of the House of Lords' decision in June 2008 in the case of *Mayor and Burgesses of the London Borough of Lewisham v Malcolm (Malcolm)* ¹;
- the **definition of disability** is amended so as to **remove the list of capacities** from the definition; thereby making it easier for disabled people to fall within the definition of disability;
- there is express protection for people, such as carers, friends or family members, who are subjected to direct discrimination or harassment because of their **association** with a disabled person, or because they are wrongly **perceived** to be disabled;
- there is increased protection for disabled people from **harassment** related to their disability when accessing goods and services, or private clubs;
- **questions by employers** related to disability and health before a job offer is made are **prohibited**, except in specified circumstances;
- there is an additional duty on schools to provide **auxiliary aids and services** for disabled pupils, where reasonable;
- **disabled tenants** who live in rented residential accommodation are given additional protection in relation to the making of **reasonable adjustments** by landlords to **common parts** (such as an entrance hall in a block of flats).

¹ *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008]UKHL 43
<http://www.bailii.org/uk/cases/UKHL/2008/43.html>

Why are these changes required?



The changes will help address key inequalities facing disabled people and harmonise, simplify and strengthen the law.

In summary, the recommended changes will:-

- help **address the key inequalities** facing disabled people in Northern Ireland, as highlighted in the Equality Commission's *Statement on Key Inequalities in Northern Ireland*²;
- ensure the disability legislation is **harmonised, simplified and strengthened across the legislation**, thereby ensuring consistent levels of protection making it easier for disabled people to understand their rights, and for employers, service providers, schools and others to comply with their responsibilities under the legislation;
- ensure that Northern Ireland disability equality legislation **keeps pace with** changes in legislation which have already taken place in Great Britain in October 2010 or are due to be implemented;³
- help ensure that Northern Ireland disability equality legislation complies with the anticipated requirements of the **draft European Commission Directive** on the provision of goods and services⁴. The Equality Commission further considers that the changes are in keeping with the UK Government's international obligations under the **UN Convention on the Rights of Persons with Disabilities (UNCRPD)**⁵.

² *Statement on Key Inequalities in Northern Ireland*, ECNI, October 2007, available at [http://www.equalityni.org/archive/pdf/Keyinequalities\(F\)1107.pdf](http://www.equalityni.org/archive/pdf/Keyinequalities(F)1107.pdf)

³ It is important to note that the UK Government is still considering some provisions, for example, the additional duty on schools to provide auxiliary aids and services for disabled pupils, where reasonable, and increased requirements on landlords as regards making reasonable adjustments to common parts for disabled tenants, and there is no specific implementation date as yet.

⁴ Draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, July 2008, COM (2008) 0426; available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>

⁵ For further information on the UN Convention see <http://www.equalityni.org/archive/pdf/UNCRPDOptionalProtocolPE.pdf>

A detailed explanation of what changes are required and the rationale underpinning each recommendation is set out below.

Addressing key inequalities

The Equality Commission considers that the recommended changes will help address the key inequalities facing disabled people in Northern Ireland. The Equality Commission's *Statement on Key Inequalities in Northern Ireland* has highlighted the inequalities facing disabled people as regards educational attainment, employment, access to transport and suitable housing, participation in public life, and being subject to harassment and prejudicial attitudes.⁶



The changes will have a significant impact on the day to day lives of a wide range of disabled people.

For example, in the field of education, the Equality Commission's recent report on *Inequalities in Education*⁷ has highlighted that in 2008, economically active and inactive people with a declared disability had lower overall levels of attainment, and were more likely to hold no qualifications, than those without a declared disability. It also concluded that overall between 1998 and 2008, the gap between educational attainment of working-age people with and without a declared disability has widened.

In terms of the impact of these changes, it is of note that results from the Northern Ireland Survey of People with Activity Limitations and Disabilities, show that 18% of the Northern Ireland population of all ages living in private households face limitations in their daily living as a consequence of a disability or long-term health condition. In addition, almost 2 out of every 5 households in Northern Ireland include at least one person with a limiting disability.⁸

⁶ See footnote 2

⁷ *Inequalities in Education, Facts and Trends, 1998-2008*, ECNI, Sept 2011

http://www.equalityni.org/archive/pdf/InequalitiesinEducation_SummaryReport.pdf

⁸ *Northern Ireland Survey of People with Activity Limitations and Disabilities*, NI Statistics and Research Agency, 2006/07. www.csu.nisra.gov.uk July 2007

As indicated above, the changes will have a **significant impact** on the day to day lives of a wide range of disabled people, including disabled job applicants and employees, customers, transport users, tenants, students in further and higher education and pupils in schools.

Prohibiting pre-employment disability-related questions by employers, except in certain limited circumstances, will, for example, reduce the barriers disabled people face in seeking employment.

The need for robust and comprehensive protection for disabled people against unlawful discrimination is clear in light of the number and nature of **disability discrimination complaints** received by the Equality Commission.

For example, over a 12 month period (1 April 2010-31 March 2011), approximately 1,055 disability discrimination enquiries were received by the Commission. The vast majority of these enquiries relate to discrimination in employment (approximately 73%), but a considerable number of complaints relate to access to goods, facilities and services (21%). The Commission received during this period more enquiries/complaints in the area of disability than on any other equality ground.⁹

We set out below the differences that the changes will mean for disabled people.

⁹ Disability enquiries/applications for assistance during this period represented 36% of all enquiries/applications for assistance.

- **Protection against indirect discrimination and discrimination arising from disability**

Currently it is unlawful for employers, service and educational providers and others to treat, without justification, a disabled person less favourably for a reason which relates to the disabled person's disability (**disability-related discrimination**).

In order for a disabled person to establish that they have been subjected to disability-related discrimination, his or her treatment **must be compared** with that of an appropriate comparator; such as a non-disabled person or a person with other disabilities.

However, the House of Lords in its decision in June 2008 in the case of *Mayor and Burgesses of the London Borough of Lewisham v Malcolm (Malcolm)*¹⁰, took a restrictive approach to the establishing of a comparator and, as a result, **significantly restricted** the scope of disabled people to claim disability-related discrimination.

The Equality Commission is of the view that it is essential that steps are urgently taken to address the level of protection for disabled people from discrimination under the disability legislation, which has been severely weakened as a result of House of Lords' decision in *Malcolm*.

As the result of the *Malcolm* decision, individuals seeking assistance from the Equality Commission have been unable to pursue elements of their disability discrimination cases relating to disability-related discrimination in the Courts. This has severely restricted their access to justice. There have also been a number of cases in Great Britain which have highlighted the difficulties facing disabled people claiming discrimination following the *Malcolm* decision.¹¹

In order to address the impact of the *Malcolm* decision, the Equality Commission **recommends** that disability-related discrimination is replaced by provisions prohibiting **indirect discrimination** and **discrimination arising from disability**.

¹⁰ *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008]UKHL 43

¹¹ See for example, *those Express Thurrock Ltd, Jacoms*, UKEAT/0389/08/DM.



The changes will help address systemic discrimination.

The introduction of provisions prohibiting **indirect discrimination** will mean that employers or service providers, cannot, without justification, apply provisions, criterion or practices that, although they are applied equally to everyone, place disabled people at a disadvantage.

Prohibiting this form of discrimination will help address systemic discrimination and dismantle institutional barriers which impact on groups of disabled people; harmonise and streamline the disability legislation in line with protection which exists on other equality grounds; as well as ensuring compliance with the draft European anti-discrimination Directive on the provision of goods and services.¹²

The introduction of provisions prohibiting **discrimination arising from disability** will mean that employers, service providers and others cannot, without justification, treat a disabled person less favourably because of something arising in consequence of his or her disability.

This change will **remove the requirement** for a disabled person to compare his or her treatment with that of someone else; namely, show that s/he has been treated less favourably than someone without a disability or with a different disability.

Discrimination arising from disability will not occur if the employer or service provider can show that treatment was **justified**, or that they did not know, or could not reasonably be expected to know, that the person was disabled.

These changes, which address the impact of the *Malcolm* decision, have already been implemented in Great Britain under the Equality Act 2010. In addition, as highlighted in more detail below, the Joint Committee on Human Rights has raised concerns as regards the compatibility of the disability equality legislation with the UK Government's obligations under the UNCRPD, in light of the *Malcolm* decision.

¹² Draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, July 2008, COM (2008) 0426; available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>

• Changes to the definition of disability

The current definition of disability within the DDA 1995 defines a disabled person as ‘a person with a physical or mental impairment which has a substantial and long term adverse effect on his/her ability to carry out normal day-to-day activities’. The DDA 1995 also states that an impairment is to be taken to affect the ability of a person to carry out normal day-to-day activities **only** if it affects that person in respect of one or more of the following:-

- mobility;
- manual dexterity;
- physical co-ordination;
- incontinence;
- ability to lift, carry or otherwise move every day objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn or understand; or
- perception of the risk of physical danger.

The above list is referred to as a ‘list of capacities’.



The change will make it easier for disabled people to fall within the definition of disability’

The Equality Commission **recommends** the **removal of the list of capacities in total** from the definition of ‘disability’ within the DDA 1995. The changes will make it easier for disabled people to fall within the definition of disability, and are also in line with changes to the definition which have been implemented in Great Britain.

• Association and perception

The Equality Commission **recommends** that there is express protection for people, such as **carers, friends or family members**, who are subjected to **direct discrimination** or **harassment** because of their **association** with a disabled person, or for individuals because they are wrongly **perceived** to be disabled.

This protection should apply across the scope of the disability legislation. This means, for example, that individuals when in employment or accessing goods, facilities, services and premises, have the right not to be directly discriminated against or harassed because of their **association with a disabled person** (including a disabled child).

It also means that employees, customers, pupils and students, who are not disabled, but are subjected to direct discrimination or harassment because they are **wrongly perceived to be disabled**, will have protection under the disability legislation.

This extended protection will **only** apply to **direct discrimination** and **harassment** and not to other forms of discrimination, such as a failure to make reasonable adjustments.

In addition, the European Court of Justice (ECJ) in the case of *Coleman v Attridge Law*¹³ has ruled that treating an employee less favourably because of her caring responsibilities for a disabled child was unlawful and prohibited under the European Framework Directive.¹⁴



The change will improve protection against discrimination for carers of disabled people.

¹³ UKEAT/0071/09/JOJ, 30 October 2009.

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130dedda0d7a97d754ad8a248f2527e423780.e34KaxiLc3eQc40LaxqMbN4NchuLe0?text=&docid=67793&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=1104982>

¹⁴ European Framework Directive, Council Directive 2000/78/EC on employment and occupation

In the *Coleman* case, Mrs Coleman alleged that she had been treated less favourably by her employer because she had a disabled child. She alleged that she had been forced to resign from her job after being harassed by her employer and having being refused flexible working which other employees were granted. Mrs Coleman therefore alleged that her less favourable treatment was due, not because she was disabled, but because of **her son's disability**.

It will be noted that the Employment Appeals Tribunal in Great Britain in October 2009, has ruled that, as a result of the ECJ decision in that case, a new provision had to be read into the disability legislation prohibiting less favourable treatment (direct discrimination and harassment) of a person by reason of the disability of another person.¹⁵

In summary, these amendments will ensure that Northern Ireland law **complies** with the ECJ decision in the case of *Coleman*. In addition, it will ensure **greater protection for carers of disabled people**, and others (such as family and friends) associated with disabled people from direct discrimination and harassment. It will also give greater protection against discrimination for people who are not disabled but are **wrongly perceived** to be disabled.

Finally, these recommended changes reflect legislative changes which have already been introduced in Great Britain under the Equality Act 2010, in October 2010.

• **Protection against harassment**

The Equality Commission **recommends** that there is a free standing right for disabled people against **harassment** related to their disability when accessing goods and services (including public transport), by private clubs, by public bodies when exercising their public functions, or by schools when providing education for disabled pupils.

¹⁵ *Coleman v Attridge law* [2009] UKEAT/0071/09 http://www.bailii.org/uk/cases/UKEAT/2009/0071_09_3010.html



The change will strengthen protection for disabled people against harassment outside employment.

Currently, under the disability legislation in Northern Ireland, there is no free standing protection for disabled people against **harassment** related to their disability outside employment and the provision of further and higher education.

This contrasts with protection which exists under Northern Ireland equality law on other equality grounds.¹⁶ In addition, the recommended changes are in line with legislative changes which have already been implemented in Great Britain under the Equality Act 2010. As highlighted in more detail below, these changes will also help to **harmonise** and **simplify** the disability legislation.

• Prohibit pre- employment enquiries

The Equality Commission **recommends** that **employers** are prohibited from asking **questions about a job applicant's health or disability** prior to making a job offer (on a conditional or unconditional basis); except in certain specified circumstances.

The inclusion of health or disability questions in a job application form or a medical questionnaire can deter disabled people from applying for the job in question. Prohibiting such questions (except in permitted circumstances) is also designed to reduce discrimination by some employers against disabled applicants, who reject the disabled person's application once they become aware of the person's disability.



The change will help remove barriers facing disabled applicants when seeking employment.

¹⁶ For example, there is a free standing right giving protection against harassment under the race equality legislation across both employment and non-employment areas (on the grounds of race, ethnic origin and national origin only).

Employers can still, for example, ask health related questions in order to establish whether the person requires reasonable adjustments during the recruitment process; or whether or not the applicant is able to undertake a function that is intrinsic to the job (with reasonable adjustments in place, as required); or in order to monitor diversity in the workplace.

It is of note that over a 12 month period (1 April 2010-31 March 2011), the Equality Commission received 32 enquiries from individuals who believed that they were not appointed to a post or shortlisted for a job due to their disability.

These changes will ensure greater protection for disabled applicants against unlawful discrimination when seeking employment and are in line with changes which have been implemented in Great Britain.

• **Duty on schools to provide auxiliary aids and services**

The Equality Commission **recommends** that changes are made to the Special Educational Needs and Disability (Northern Ireland) Order 2005 (SENDO 2005), in order to place an additional duty on **schools** to provide **auxiliary aids and services** for disabled pupils, where reasonable; in circumstances where a failure to do would put the disabled pupil at a **substantial disadvantage** compared to non-disabled pupils.

Although schools are currently under a duty to make reasonable adjustments for disabled pupils in order to avoid putting disabled pupils at a substantial disadvantage, this duty **does not extend** to the provision of auxiliary aids and services. This approach was adopted on the basis that auxiliary aids and services would be available under the Special Educational Needs (SEN) framework.¹⁷

¹⁷ A detailed overview of the responsibilities on schools under SENDO is set out in the ECNI's Code of Practice published in 2006. [http://www.equalityni.org/archive/pdf/FSchoolsCOP\(SENDO\).pdf](http://www.equalityni.org/archive/pdf/FSchoolsCOP(SENDO).pdf)



The change will mean that schools must provide auxiliary aids and services to disabled pupils, where reasonable.

The Equality Commission also recommends that the current **residual duty** on **Education and Library Boards** under SENDO 2005 in relation to the making of reasonable adjustments for disabled pupils or prospective pupils, is amended so that it includes a requirement to provide auxiliary aids and services.

It is important to note that not all disabled children who are identified as 'disabled' under the DDA 1995, are considered to have special educational needs. In such circumstances, the disabled child without an identified special educational need, has no right to auxiliary aids or services under SENDO 2005; even if they experience substantial disadvantage at school for a reason related to their disability.

In addition, as the duty to make reasonable adjustments is an **anticipatory** duty, it means that schools will have to anticipate those auxiliary aids and services which it would be reasonable to expect may be needed by disabled pupils who may be admitted to the school in the future.

However, schools will only be required to provide an auxiliary aid or service where it is **reasonable** to do so. If the adjustment is not 'reasonable', then a school will not be under a duty to provide it. In addition, the duty only arises in circumstances where a failure to provide the auxiliary aid or service would mean that the disabled pupil was put at a '**substantial disadvantage**' compared to non-disabled pupils. In addition, the duty will **not** require schools to remove or alter physical features.

The Equality Commission notes that the extension of this duty to schools was recommended in December 2009 by the Lamb Inquiry into special educational needs and parental confidence in Great Britain.¹⁸ The Inquiry concluded that ‘removing the schools’ exemption from the provision of auxiliary aids and services would better reflect schools’ front line role in anticipating and making adjustments for disabled children and will fill gaps in meeting the practical needs of disabled children.’¹⁹

The introduction of this additional duty on schools is recommended for a number of reasons. The changes, for example, will benefit disabled pupils who do not have special educational needs but still require reasonable adjustments (in the form of auxiliary aids or services). This, for example, could include **extra equipment or support** (such as an adapted computer keyboard) for disabled pupils or prospective pupils.

It will also encourage schools to be proactive and to anticipate reasonable adjustments, in terms of the provision of auxiliary aids and services, that may be required for future disabled pupils who may be admitted to the school.

In addition, the proposed extension of the reasonable adjustment duty to auxiliary aids and services will ensure that disabled children in schools are afforded the **same rights** as disabled students in further and higher education; where the reasonable adjustment duty on institutions of further and higher education does extend to auxiliary aids and services.

Finally, the recommended changes are **in line** with legislative changes included in the Equality Act 2010; though it is important to note that the UK Government is still considering this provision and there is no specific implementation date as yet.²⁰

18 Available at <https://www.education.gov.uk/publications/standard/publicationDetail/1/DCSF-01143-2009> h

19 See paragraph 6.42.

20 See consultation by Department of Education in GB in Sept 2011 on this change to the law in England.

The Department of Education has proposed introducing this duty on 1 Sept 2012.

<http://www.education.gov.uk/consultations/downloadableDocs/auxiliary%20aids%20consultation%20document%204.doc>

- **Greater protection for disabled tenants**

The Equality Commission **recommends** that disabled tenants who live in rented residential accommodation are given additional protection in relation to the making of reasonable adjustments by landlords to **common parts** (such as an entrance hall in a block of flats).



The change will give greater protection for disabled tenants when seeking reasonable adjustments.

Currently under the disability legislation, landlords and managers of rented residential premises must not treat a disabled tenant less favourably than a non-disabled person.

They must also make reasonable adjustments (though **not physical alterations**) to the disabled person's home. In addition, they cannot unreasonably refuse permission for disability-related alterations to the disabled person's home to be carried out.

Landlords are not required to make disability-related alterations to the **physical features** of the **common parts** of let residential premises, such as stairs and hallways; even if they are reasonable to make and paid for by a disabled tenant.

The recommended changes will mean that landlords will be **required** to follow a specific process if a disabled tenant requests an adjustment to a physical feature in a common part of residential premises; in circumstances where the physical feature puts the disabled tenant at a substantial disadvantage. This includes a consultation process with others affected by the change which must be carried out within a reasonable period of the request being made.

If the landlord decides it is reasonable to make such an adjustment to avoid the disadvantage to the disabled person, a **written agreement** must be entered into between them setting out their rights and responsibilities. A landlord may require the tenant to pay for the cost of making the alteration. However, if costs are incurred by a landlord, in making a reasonable adjustment, a landlord **can not victimise** a disabled tenant because costs have been incurred.

The recommended changes are in line with legislative changes included in the Equality Act 2010; though it is important to note that the UK Government is still considering this provision and there is no specific implementation date as yet.

Harmonisation and simplification

The Equality Commission **recommends** that provisions within the disability legislation are **harmonised and simplified**, where possible, in order to address the wide-ranging inconsistencies and complexities which exist within the legislation.

Such inconsistencies have meant that the level of protection against discrimination and harassment for disabled people is not uniform across the scope of the disability legislation.

For example, there is **weaker protection** for **disabled pupils** in schools under the disability legislation against disability discrimination and harassment, compared to the protection in relation to disabled students in institutions of further and higher education.

There is also, as set out above, **weaker protection** against discrimination and harassment for disabled people when accessing **goods and services**, (including public transport) or buying or renting property, than when in employment, or in further and higher education.



The changes will strengthen, harmonise and simplify disability equality law.

In particular, the Equality Commission **recommends** that the following provisions within the disability legislation are **harmonised and simplified** across the scope of the legislation:-

- **direct discrimination**, which can not be justified, is **prohibited** across the scope of the disability legislation.

For example, there is **no protection** against direct discrimination for disabled people when accessing goods and services or for disabled pupils in schools. Direct discrimination provisions are particularly important in tackling prejudicial and stereotypical assumptions about disabled people and have been successfully relied on by disabled claimants in the employment field.²¹

The inclusion of protection against direct discrimination in non-employment areas will also ensure compliance with the draft EC Directive on the provision of goods and services (see below).

- the **justification defence** for a failure to make a reasonable adjustment is **removed** across the scope of the disability legislation.

For example, the disability equality legislation only prohibits employers from justifying a failure to make a reasonable adjustment. Service providers, schools or private clubs, for example, are allowed to justify a failure to make a reasonable adjustment for a disabled person.

The Equality Commission is of the view that the possibility of justifying a failure to make a reasonable adjustment is unnecessary. If it is reasonable for a service provider to make an adjustment, then it should not be permissible to justify a failure to make that adjustment. Removing the justification defence will not make the adjustment duty more onerous

²¹ See *Tudor v Spen Corner Veterinary Centre Ltd*, Case no. 2404211/05, Employment Tribunal, May 2006

for service providers and others, as they will still only be required to make an adjustment where it is 'reasonable'.

- a **single threshold** for making reasonable adjustments is **introduced** across the scope of the disability legislation.

Under the disability equality legislation, employers and educational providers have a duty to consider making a reasonable adjustment, where a disabled person would be placed at a '**substantial disadvantage**', compared with other non-disabled people, if no adjustment were made.

Different provisions apply under the non-employment provisions of the disability equality legislation. Currently, service providers and others must consider making a reasonable adjustment whenever a failure to do so would make it 'impossible or unreasonably difficult' for a disabled person to use the service.

The Equality Commission recommends a single threshold for making reasonable adjustments, so that employers, service providers, public bodies and others with responsibilities under the disability equality legislation, are placed under a duty to make a reasonable adjustment where a disabled person would be placed at a **substantial disadvantage**, compared with non-disabled people, if no adjustment were made.

The above changes to the reasonable adjustment duty will ensure greater protection for disabled people in Northern Ireland. Although there will be an increased requirement on service providers and others to make reasonable adjustments, service providers will only be required to make adjustments that are 'reasonable'.

These recommended changes reflect legislative changes which have already been implemented in Great Britain under the Equality Act 2010.



Harmonising and simplifying the legislation will make it easier to understand and comply with.

In general, by harmonising and simplifying the disability equality legislation, it will make it **easier** for disabled people to understand what their rights are, and in what circumstances they can challenge less favourable treatment or a failure to make reasonable adjustments.

Addressing the inconsistencies and complexities within the current legislation will also **help employers and service providers** to understand what their responsibilities are in relation to disabled people.

In addition, there are a number of UK-wide public authorities and service providers who operate both in Great Britain and Northern Ireland. As a result of the changes which have taken place in Great Britain, UK-wide employers and service providers have to grapple with the differences and complexities between disability equality law in Great Britain and in Northern Ireland.

UK-wide employers and service providers have to keep pace with changes and developments in both legislation and case law between the two jurisdictions. In addition, the inconsistencies and gaps between Northern Ireland and Great Britain equality law also present difficulties for equality lawyers and advisers²².

²² See, for example, statement issued by the Employers Lawyers Group, Northern Ireland, 13 October 2011, which warns that “the current mismatch in the legislation is making it confusing and increasingly more difficult for Tribunal chairmen (sic) and judges in Northern Ireland to apply the case law that has been developed by the courts in Great Britain.”

Keeping pace with the changes in Great Britain

The Equality Commission's recommendations for changes to the disability equality legislation, as highlighted above, are in line with changes to the disability equality legislation which either **have taken effect** in Great Britain in October 2010, or are currently **under consideration**.



The changes will ensure that Northern Ireland equality law keeps pace with changes in Great Britain.

As a result of the implementation of the Equality Act 2010, the disability equality legislation in Great Britain has been significantly **harmonised** and **strengthened**.

Some of the changes we recommend have already been implemented in Great Britain; for example, steps have been taken to address the impact of the House of Lords' decision in *Malcolm* by ensuring that disabled people have protection against both indirect discrimination and discrimination arising from disability.

In addition, the Equality Act 2010 has amended the definition of disability thereby making it easier for disabled people to fall within the definition of disability under the disability legislation. Further, disabled job applicants in Great Britain now have additional protection when applying for jobs in that employers cannot, except in specified circumstances, ask questions related to their disability, prior to making a job offer.

A number of changes recommended by the Equality Commission have not as yet been implemented in Great Britain and are still under consideration.

For example, provisions placing an additional duty on schools to provide auxiliary aids and services for disabled pupils, where reasonable, and increased protection for disabled tenants in relation to reasonable adjustments to common parts, are currently under consideration by the UK Government and there is no specific implementation date as yet.²³

The Equality Commission considers that disabled people in Northern Ireland should not have **less protection** against disability discrimination either in employment or when accessing goods and services, compared to disabled individuals in other parts of the UK.

There are also further changes to the disability legislation, which have **not** been implemented in Great Britain under the Equality Act 2010, but which the Equality Commission considers are required.

For example, the Equality Commission previously made clear in *Enabled?*²⁴, that it recommends a **fundamental review of the definition of disability**, in order to address a number of other deficiencies within the definition.

In particular, we recommended changes to the definition in order to reflect the '**social model**' of disability. In particular, that the definition of disability is amended to remove the requirement that the effects of an impairment be '**long-term**'.

This is especially relevant in light of the fact that the UN Convention on the Rights of People with Disabilities (UNCRPD), which has been ratified by the UK Government, contains a non-exhaustive definition of disability which is based on the 'social model' of disability. This change was **not** introduced in Great Britain under the Equality Act 2010.

²³ See also footnote 20.

²⁴ *Enabled? Recommendations for change to the Disability Discrimination Act 1995, 2003*, ECNI <http://www.equalityni.org/archive/word/Enabledfinalpublished260603.doc>

Compliance with the draft EC Directive

The changes recommended by the Equality Commission will also help ensure that Northern Ireland disability equality law complies with anticipated requirements of the draft European Commission Directive on the provision of goods and services.



The changes are in keeping with the UNCRPD and the draft EC Directive.

For example, the Directive, if adopted, will require the Northern Ireland Executive to introduce provisions in relation to **non-employment areas** (within the scope of the Directive) prohibiting **direct discrimination**, **indirect discrimination**, as well as **harassment** when accessing goods and services.

UN Convention on the Rights of People with Disabilities (UNCRPD)

The Equality Commission considers that its recommendations are in keeping with the obligations placed on the UK Government under the UNCRPD.

The Convention is an important overarching framework for human rights for disabled people which contain civil, political, as well as social and economic rights. It sets out the actions that the UK Government must take to ensure that disabled people enjoy their human rights on an equal basis with others.

The UNCRPD (see, in particular, Article 5) places an **obligation** on the UK Government to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

In addition, under Article 4, there is a general obligation on the UK Government to take all appropriate measures, including legislation, to

modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

It is of note that, in relation to the impact of the House of Lords' decision in *Malcolm*, the **Joint Committee on Human Rights** in its report on the *UN Convention on the Rights of Persons with Disabilities*²⁵ (UNCRPD) indicated that it did not 'share the confidence of the Government that the judgement does not create difficulties for the compatibility of existing domestic anti-discrimination law with the requirement of the UNCRPD.'

It further stated that 'at the very least, this change in the law means that the UK is less likely to meet its obligation under Article 5 of the Convention to prohibit all discrimination on the basis of disability, to guarantee to persons with disabilities equal and effective protection against discrimination on all grounds and to promote equality, eliminate discrimination and take appropriate steps to ensure that reasonable accommodation is provided for people with disabilities.'

Pursuant to its role, along with the Northern Ireland Human Rights Commission, as the independent mechanism tasked with promoting, protecting and monitoring implementation of the UNCRPD in Northern Ireland, the Equality Commission has raised with the Office of the First and Deputy First Minister (OFMDFM) the need for legislative reform of the disability legislation and the need to consider what further steps it can take in order to ensure that the obligations placed on the UK Government under the UNCRPD are complied with.²⁶

In addition, recent research commissioned by the Equality Commission has highlighted areas of substantial shortfalls in public policy & programme delivery in Northern Ireland relative to the key requirements of the UNCRPD.²⁷

25 Joint Committee on Human Rights: *The UN Convention on the Rights of Persons with Disabilities*, first report of session 2008/09, Jan 2009, p.35 <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/9/9.pdf>

26 The obligations on the UK Government in relation to implementing international Conventions was highlighted by the Committee on the Elimination of Racial Discrimination (as regards the Convention on the Elimination of Racial Discrimination) in its Concluding Observations on the UK in September 2011. In particular, the Committee recommended that the UK 'take immediate steps to ensure that a single equality law is adopted in Northern Ireland, or that the Equality Act 2010 is extended to Northern Ireland,' and reminded the UK that the obligation to implement the provisions of the Convention in all parts of its territory is borne by the State Party. <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.GBR.CO.18-20.pdf>

27 *Disability Programmes and Policies: How Does Northern Ireland measure up?* Disability Action, commissioned by Equality Commission Northern Ireland, January 2012, www.equality.org

Next Steps

The Equality Commission has taken a number of proactive steps in order to raise awareness of its recommendations for reform of the disability equality legislation, and to secure support for the recommended changes.

In February 2009, the Equality Commission submitted its proposals on legislative reform to Junior Ministers in OFMDFM outlining a number of areas in Northern Ireland equality law which required urgent amendment; including the harmonisation and strengthening of the disability equality legislation. A copy of the Equality Commission's detailed proposals paper submitted to the Junior Ministers is available on the Equality Commission's website.²⁸

Since that date it has met with Junior Ministers on two occasions in order to discuss its proposals in more detail. In addition, it has, and will continue to, proactively engage with a wide range of key stakeholders, including MLAs, Assembly Committees, and representatives from the disability sector.

The Equality Commission has also raised with the Department of Education and the Department for Employment and Learning the need for changes to **Special Educational Needs and Disability (Northern Ireland) Order 2005** in order to strengthen protection against disability discrimination for disabled pupils in schools and in further and higher education respectively.

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²⁸ The proposals paper is available at:-
http://www.equalityni.org/sections/default.asp?secid=5&cms=The+Law_Legislative+Reform&cmsid=4_285&id=285

Equality Commission

FOR NORTHERN IRELAND

Further information and advice

For further information and advice on equality issues and if you would like to find out more about the Equality Commission and its work, or if you would like to request alternative formats of this publication contact us at:

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March 2012



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