

Proposals for legislative reform

February 2009

Proposal 1

Recommendation

The Commission recommends the extension of age discrimination legislation to non-employment areas.

The Commission recommends that discrimination and harassment on the grounds of age is prohibited in non-employment areas, including the provision of goods, facilities, services and premises, and the exercise of public functions.

The introduction of age discrimination legislation will have wide ranging and significant implications on the day to day lives of people in NI.

The need for protection against age discrimination outside the workplace is heightened in light of the growing evidence that many people, particularly older people, in Northern Ireland, are being subjected to unjustifiable discrimination and harassment on grounds of age.

For example, independent research recently conducted in Northern Ireland, entitled '*Older People's Access to Financial Services: A review*'¹ has "found numerous examples of direct and indirect age discrimination across the scope of financial services". It concludes "it is clear that protection for older people from abuse and discrimination in provision of financial services is essential".²

¹ B Fitzpatrick and I Kingston, June 2008, commissioned by ECNI, www.equalityni.org

² See page 10

As highlighted in the Commission's statement on *Key Inequalities in Northern Ireland*³, the social inclusion of older people is inextricably linked to their wellbeing and access to services. Over 80,000 older people live alone in Northern Ireland and recent research by Help the Aged indicates that 53% of older people feel that loneliness is the major issue facing older people today. Social isolation is caused by a number of factors, including differential access to and availability of health and social care, and differential access to financial services.

The need for age discrimination legislation outside the workplace was also recognised by the Government for Great Britain ('GB Government') in its response to the Discrimination Law Review. In particular, it noted that there was "a significant amount of evidence that older people are being treated in a discriminatory way by those providing goods and services, including health and social care. There were also strong concerns about restricted access to some financial services, such as insurance".

The GB Government has made a commitment that its proposed Single Equality Bill will contain powers to extend age discrimination legislation to the provision of goods, facilities and services and the exercise of public functions. It has indicated that the legislation will contain a specific harassment provision, prohibiting harassment in these areas, and it proposes to consult in 2009 on draft secondary legislation. This legislation will be phased in, with the longest transition period for the health and social care sector.

The GB Government has made it clear that the legislation will not prevent the differential provision of products or services for people of different ages where this is justified; for example, free bus passes for those aged over 60 and discounted rail travel for young people, or priority flu vaccinations for those aged over 60.

It is also of note that legislation to outlaw age discrimination in the provision of goods and services, including health services, has already been enacted in a number of other countries including Ireland, Australia, Canada (Ontario), Belgium and the USA.

³ 2007, ECNI, www.equalityni.org

It is essential that legislation which effectively addresses discrimination and harassment on the grounds of age is introduced in Northern Ireland within a similar time scale as GB.

There needs to be a strong legislative driver in terms of clear enforceable rights, in order to effectively address discrimination and harassment as a result of negative stereotypical ageist assumptions, challenge systemic discrimination and indirectly discriminatory policies, practices and procedures on the grounds of age outside the workplace. It is clear that voluntary initiatives by service providers and others to tackle age discrimination in both GB and NI have failed.

When considering the impact of such legislation, and those likely to benefit from its introduction, it is important to reflect that the Northern Ireland population is an increasingly ageing society. For example, the population aged 50 and over in Northern Ireland is approximately 30% of the total population. Those of pensionable age represent over 16%.⁴ In addition, population projections show that, by 2041, the estimated population of persons aged 50 and over will increase by 64% - to 42% of the total population.

It is important, however, that the legislation applies to all ages and the Commission is strongly opposed to the blanket exclusion of minors from statutory protection, as proposed by the GB Government. If such a blanket exclusion exists minors will remain unable to challenge discriminatory practices such as supermarkets which ban schoolchildren in school uniforms; harassment and less favourable treatment resulting from stereotypical ageist attitudes about children and young people (for example failing to take complaints or queries seriously, or assuming that children or young people steal or cause trouble); and differential treatment when accessing mental health and child protection services.

Public support in Northern Ireland for the extension of age discrimination legislation to non-employment areas is clear. In March 2008, the Equality Commission appointed independent researchers to conduct a survey of the general public in Northern Ireland regarding age related issues and attitudes. There was strong disapproval of the exclusion of goods, facilities and services from the age Regulations (45% moderately or strongly disagreed),

⁴ Source: NISRA Annual abstract of statistics: 2007

with only 9% agreeing with the exclusion. In a Northern Ireland Life and Times survey (ARK 2004) which was conducted more than 2 years prior to the introduction of the age employment legislation, it was found that 71% of respondents were in favour of the provision of goods and services being covered by the age Regulations.⁵

The need for age discrimination beyond the workplace has also been recognised by the European Commission which has a proposal for a European Union Directive on equal opportunities and access to goods, facilities and services on the grounds of age, disability, sexual orientation and religion or belief⁶. The Directive, if adopted, will require Member States to introduce an effective legal framework to address age discrimination beyond the workplace within two years of adoption.

Critically, the enactment of legislation which provides protection against age discrimination in non-employment areas is in keeping with the overarching aims and objectives of the Executive's older people's strategy '*Ageing in an inclusive society*',⁷ which sets out its strategic vision and objectives and key recommendations to improve the lives of older people in Northern Ireland. It is of note that one of the key objectives in the strategy is "to promote equality of opportunity for older people and their full participation in civic life, and challenge ageism where ever it is found". Other key objectives of the strategy include ensuring that "older people have access to financial and economic resources to lift them out of exclusion and isolation", and have "access to services and facilities that meet their needs and priorities".

The introduction of such legislation is also in keeping with the Executive's *Programme for Government 2008 – 2011*, which includes the aim to "drive a programme across Government to reduce poverty and address inequality and disadvantage" and to "take forward a co-ordinated strategic action to promote social inclusion for older people".

Finally, this legislative change will ensure greater harmonisation and simplification of the equality legislation. Currently, protection

⁵ *Awareness of the age Regulations and attitudes of the general public in Northern Ireland towards age related issues*, June 2008, commissioned by ECNI, www.equalityni.org

⁶ 2008/0140 (CNS)

⁷ 2005, www.ofmdfni.gov.uk

against unlawful age discrimination exists only in the areas of employment and vocational training. It is the only equality ground which does not have protection outside these areas. Enacting age discrimination in this area will, for example, ensure that older people in Northern Ireland are afforded similar protection against unlawful discrimination and harassment when accessing goods and services, as people of different community backgrounds, members of ethnic minority communities, disabled people, and people of different sexual orientation and gender.

Proposal 2

Recommendation

The Commission recommends that the Race Relations Order (NI) 1997 ('RRO 1997') is amended to ensure that the protection from discrimination and harassment on the grounds of colour and nationality is afforded the same level of protection as other racial grounds, across the scope of the RRO 1997.

Currently, there is less protection from discrimination and harassment under the RRO 1997 on the grounds of colour and nationality, than on other racial grounds. "Racial grounds" as defined in the RRO 1997 include colour, race, nationality, ethnic origin and national origin. However, as the Race Directive⁸ was considered only to apply to the grounds of race, ethnic and national origin, the **Race Relations Order (Amendment) Regulations (Northern Ireland) 2003** which were introduced in order to give effect to the Race Directive, did not amend the provisions in the RRO 1997 as regards the grounds of colour and nationality.

In particular, the following provisions, for example, apply **only** to the grounds of race, ethnic or national origins under the RRO 1997 and **not** the grounds of colour and nationality, across the scope of the RRO 1997:-

⁸ Council Directive 2000/43/EC

- **exercise of public functions**

Under the RRO 1997, it is unlawful for a public authority to discriminate on the grounds of race, ethnic or national origins, or to subject a person to harassment, when carrying out its functions in certain areas. These provisions cover the exercise of public functions by public authorities, such as the police, immigration services, prison authorities, government departments and local councils, or by private bodies acting on behalf of a public authority. This protection against unlawful discrimination by public bodies only exists on the grounds of race or ethnic or national origins and not colour or nationality.

- **the statutory definition of harassment**

The introduction of a statutory definition of harassment on the grounds of race, ethnic or national origins resulted in a wider range of unwanted conduct being covered under the RRO 1997, and meant that a person alleging racial harassment was no longer required to show that s/he had been treated less favourably than an actual or hypothetical comparator.

The provisions on harassment apply across the scope of the RRO 1997, including employment, vocational training, the provision of goods, facilities, services and premises, the exercise of public functions by public authorities and by educational establishments. This additional protection against racial harassment in the workplace, when accessing goods and services, in schools and institutions of further and higher education, etc., under the RRO 1997, does not, however, extend to the grounds of colour and nationality.

- **the revised definition of indirect discrimination**

The revised definition of indirect discrimination, which applies only to the grounds of race, ethnic or national origins, broadened the scope of practices which could potentially be unlawfully discriminatory. In particular, it made it clear that practices, procedures or informal policies which, although applied equally, place persons of a certain race or ethnic or national origins at a particular disadvantage are unlawful, unless such practices or informal policies can be justified by a proportionate means of achieving a legitimate aim. In addition, the revised definition

eliminated the need for an applicant to have to rely on statistics or establish a suitable pool for comparison. A more restrictive definition of indirect discrimination applies to the grounds of colour and nationality.

- **exceptions**

There are also differences in relation to the exceptions which exist under the RRO 1997, depending on the racial ground in question. For example, the exception relating to employment for the purposes of a private household only applies to the grounds of colour and nationality. In addition, under the RRO 1997, it is unlawful for a firm consisting of six or more partners to discriminate on the grounds of colour or nationality. The limitation to six or more partners does not apply in relation to discrimination on the grounds of race or ethnic or national origins.

Similarly, the exception for owner-occupiers (i.e. it is not unlawful for a person who owns and occupies premises to privately sell or rent the premises, provided he does not use the services of an estate agent or publish an advertisement), only applies to the grounds of colour and nationality, and not the grounds of race, ethnic or national origins.

Finally, the exception for small dwellings does not apply to the grounds of race, ethnic or national origins, but does apply to the grounds of colour and nationality.

- **relevant relationship has come to an end**

Protection against discrimination and harassment where a relevant relationship has come to an end is only unlawful on the grounds of race, ethnic or national origins and not colour or nationality. These provisions, for example, provide a remedy for former employees who are subjected to discrimination or harassment on the grounds of race, ethnic or national origins by their former employer, after their employment has ended.

- **indirectly discriminatory practices**

Protection against indirectly discriminatory practices only applies to the grounds of race, ethnic or national origins and not colour and nationality.

- **burden of proof provisions**

The reversal of burden of proof provisions in the County Court only apply to the grounds of race, ethnic or national origins, and not the grounds of colour and nationality. This means that as regards the former grounds, it is first up to the claimant to establish facts which could, in the absence of an adequate explanation from the respondent, lead to the conclusion that there had been discrimination. The burden of proof then shifts from the claimant to the respondent to show that there is a non-discriminatory reason for his/her actions. These provisions make it easier for claimants alleging unlawful discrimination on the grounds of race, ethnic or national origin to successfully prove their case.

- **genuine occupational requirement test**

The genuine occupational requirement test applies only to the grounds of race, ethnic or national origin and not colour or nationality. These provisions allow direct discrimination by an employer, but only where it can be shown that being of a particular race is a genuine and determining occupational requirement; namely that a person not of that race would be unable to do the job adequately and that it is proportionate to apply the requirement in the case in question.

- **education complaints**

The enforcement mechanism for education complaints under the RRO 1997 on the grounds of colour or nationality must be dealt with in the first instance by the Department of Education for Northern Ireland. The Department is then given up to 2 months notice to deal with the complaint. This procedure does not apply to the grounds of race, ethnic or national origins.

- **office holders**

Protection for office holders (such as chairpersons or members of non-departmental public bodies) against unlawful discrimination and harassment under the RRO 1997 only exists on the grounds of race, ethnic or national origins, and not colour and nationality.

These anomalies have led to difficulties and confusion for those seeking to understand their responsibilities and to exercise their rights under the legislation, as well as reduced protection on the grounds of colour and nationality.

In its consultation on a Single Equality Bill for Northern Ireland in 2004, OFMdfM indicated that it intended to rectify this gap in the RRO 1997. However, to date no further action has been taken to address these anomalies. It is of note that the GB Government in its response to the Discrimination Law Review, has indicated its intention to “abolish the existing “two-tier” levels of definitions and tests in the Race Relations Act...”

Such changes to the RRO 1997 are urgently required in order to give the same level of protection against discrimination and harassment across all racial grounds to people in Northern Ireland as in GB within a similar timeframe.

In addition, in the recent case of *Abbey National PLC v Chagger*⁹, the Employment Appeal Tribunal was of the view that the Race Directive was intended to apply to discrimination on the ground of colour, as such discrimination is in practice necessarily an aspect or manifestation of discrimination based on racial or ethnic origins. They were also of the opinion that the Race Relations Act in GB should be construed so far as possible to give effect to that position.

Although this is a welcome clarification as regards protection on the ground of colour, there is still an urgent need to amend the RRO 1997 in order to ensure equal levels of protection against discrimination and harassment across all racial grounds protected under the RRO 1997, as well as ensuring clarity as regards rights and responsibilities.

⁹ UK EAT/0606/07/RN

Proposal 3

Recommendation

The Commission recommends that the Sex Discrimination Order (NI) 1976 ('SDO 1976') is amended to prohibit unlawful discrimination and harassment by public authorities on the grounds of sex in the exercise of their public functions.

The SDO 1976 currently does not prohibit unlawful discrimination by public authorities on the grounds of sex in the exercise of their public functions. This is a significant gap in Northern Ireland sex equality law, as it means that individuals cannot bring a complaint if they are discriminated against or harassed on grounds of their sex by public bodies, such as the police or immigration services, or prison authorities, when exercising their public functions, or by private bodies acting on behalf of a public authority.

For example, there is currently no protection for women (or men) under the SDO 1976, if there are unlawfully discriminated against on grounds of their sex by public authorities when exercising public functions, in prisons or other places of detention, or as regards applications for asylum, or the denial of primary health care services, or access to shelters for asylum seekers, victims of domestic violence or trafficking.

It is of note that the UN Committee on the Elimination of Discrimination against Women ('CEDAW Committee') in its recent concluding observations on the UK, highlighted its concerns about the situation of women in prisons, particularly in Northern Ireland, and urged the UK Government to "address the situation of women in prisons through the development of comprehensive gender-sensitive policies, strategies and programmes"¹⁰.

Many of the activities of a public authority will amount to the provision of goods, facilities and services to the public, for example, the provision of library or leisure services. The provisions prohibiting discrimination or harassment by public authorities while carrying out public functions apply to acts that a private person cannot do.

¹⁰ CEDAW/C/GBR/CO/06, www.2ohchr.org, ibid paragraph 20

In GB, the Sex Discrimination Act 1975 was amended to make it unlawful for public authorities to discriminate on grounds of sex when carrying out their functions. A small number of public authorities are exempt from the GB public functions provisions in the Sex Discrimination Act 1975¹¹, and discrimination in the exercise of public functions is permitted in certain limited circumstances; for example, positive action measures to address the effects of discrimination or disadvantage; the provision of single sex services where only persons of that sex require the service; or the provision of separate services for each sex where a joint service would be less effective.

Such a change to the SDO 1976 will ensure parity with GB anti-discrimination law, where protection against discrimination by public bodies when exercising their functions has existed since April 2007¹².

In summary, although public authorities are required by Section 75 of the Northern Ireland Act 1998 to have 'due regard' when carrying out their functions 'to the need to promote equality of opportunity between men and women', unlike in GB, where public authorities are also under a similar mainstreaming duty, individuals in Northern Ireland do not have a *separate* course of action against a public authority who discriminates on the ground of sex when carrying out its public functions.

In addition, protection against unlawful discrimination by public bodies when exercising their public functions already exists on the grounds of religious belief, race (the grounds of race, ethnic or national origin only), sexual orientation and disability. There is no justifiable reason why there should be weaker protection against unlawful discrimination on the grounds of sex in the exercise of public functions than that which exists under other equality grounds.

¹¹ For example, the Security Service, House of Commons, the House of Lords, the Secret Intelligence Service, the Government Communications Headquarters (GCH) and parts of the armed forces assisting the GCH.

¹² The changes to the Sex Discrimination Act 1975 in GB, were introduced by Part 4 of the Equality Act 2006.

Further, there is a commitment in OFMdfM's *Gender Equality Strategy*¹³ for government departments, their agencies and other statutory bodies to lead actions to 'tackle the root causes of gender inequalities, including those created by structural gender inequalities and promote gender equality for men and women through a number of key measures'. These key actions include 'improving protection against discrimination by improving legislative measures and keeping their effectiveness under review'.

The *Gender Equality Strategy* also contains a commitment by government departments and others to 'ensuring that gender stereotypes and sexism do not influence policy development and decision-making processes'.

In summary, the proposed changes to the SDO 1976 are in line with the aims and objectives of OFMdfM's *Gender Equality Strategy*, which the Executive, as outlined in its *Programme for Government 2008- 2011*, has made a commitment to implement.

Finally, in line with the CEDAW Committee's recommendation that the Government take 'the necessary steps to ensure that national machinery continues to give priority attention to gender equality and discrimination against women', it is recommended that legislation providing protection against discrimination and harassment by public authorities in the exercise of their public functions on the grounds of sex is introduced, as a matter of priority.

¹³ *Gender Equality Strategy: A strategic framework for action to promote gender equality for women and men 2006-2016*, www.ofmdfmi.gov.uk.

Proposal 4

Recommendation

The Commission recommends amendments to the Disability Discrimination Act 1995 ('DDA 1995') and the Special Educational Needs and Disability (Northern Ireland) Order 2005 ('SENDO 2005') in order to secure greater protection for disabled people against unlawful discrimination and harassment; to include the following :-

- **the concept of disability- related discrimination is amended in light of the recent House of Lord's decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm*¹⁴;**
- **direct discrimination is prohibited across the scope of the disability legislation;**
- **the justification defence for a failure to make a reasonable adjustment is removed across the scope of the disability legislation;**
- **harmonisation of the threshold for the point at which the duty to make reasonable adjustments is triggered;**
- **a duty is placed on landlords under the DDA 1995 to make reasonable adjustments to the physical features of the common parts of premises.**

The Commission recommends a number of important changes to the DDA 1995 and SENDO 2005 which will result in increased protection against unlawful discrimination and harassment for disabled people in Northern Ireland.

In terms of the impact of these changes, it is of note that results from the recent 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

¹⁴ [2008] UKHL 43, House of Lords

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.¹⁵ Around one fifth of these households contain more than one person with a disability.

The legislative changes are recommended for a number of key reasons. First, they will, in combination, help address the inequalities facing disabled people in Northern Ireland, as highlighted in the Commission's statement on *Key Inequalities in Northern Ireland* - in particular, as regards educational attainment, employment, access to transport and suitable housing, participation in public life and being subject to harassment and prejudicial attitudes.

They will secure greater protection for disabled people against discrimination, harassment, and a failure to make reasonable adjustments across the scope of the DDA 1995, including access to goods and services (including premises), employment and transport (once the proposed amending Regulations are introduced)¹⁶.

In addition, the changes to SENDO 2005 will provide enhanced protection against disability discrimination for disabled pupils in schools and disabled students in further and higher education institutions, as well as against disability discrimination by general qualifications bodies.

Of particular concern is the weaker protection for disabled pupils in schools under SENDO 2005 against disability discrimination and harassment, compared to the protection under SENDO 2005 in relation to disabled students in institutions of further and higher education. For example, under SENDO 2005, unlike the provisions relating to institutions of further and higher, the following additional protection against discrimination and harassment, **does not apply** to disabled pupils in schools:-

- direct discrimination;
- harassment;

¹⁵ Northern Ireland Survey of People with Activity Limitations and Disabilities, NI Statistics and Research Agency, 2006/07. www.csu.nisra.gov.uk, July 2007

¹⁶ The draft Disability Discrimination (Transport Vehicles) Regulations (Northern Ireland) 2009

- removal of the justification defence for a failure to make a reasonable adjustment;
- instructions and pressure to discriminate;
- relationships which have come to an end;
- discriminatory adverts; and
- provisions relating to the reversal of the burden of proof.

Secondly, the changes to the DDA 1995 highlighted below will further the aims and objectives of the Executive's *Programme for Government 2008- 2011*, by helping to achieve a measurable improvement in the lives of disabled people, to address inequality and disadvantage and promote their social inclusion.

The barriers faced by disabled people across all sections of society was recognised by the Executive's *Programme for Government 2008- 2011*, which outlined its commitment to 'develop strategic recommendations to tackle poverty and promote social inclusion'¹⁷ for disabled people and ' work across government to remove barriers to participation and achieve a measurable improvement in the lives of people with disabilities by 2012'.¹⁸

Thirdly, the Commission is of the view that several of the changes recommended to the DDA 1995 will have to be introduced in order to comply with the anticipated requirements of the draft European Commission Directive on equal opportunities and access to goods, facilities and services on the grounds of age, disability, sexual orientation and religion or belief¹⁹.

In particular, the Directive, if adopted, will require Member States, to introduce provisions in relation to non-employment areas of the DDA 1995 (as regards areas within the scope of the Directive) on the following:-

- direct discrimination;
- indirect discrimination;
- harassment;
- instructions to discriminate;
- relationships which have ended; and
- reversal of the burden of proof.

¹⁷ Ibid PSA 7 Objective 2

¹⁸ Ditto

¹⁹ 2008/ 0140 (CNS)

As explained in more detail below, the above provisions only currently apply to certain areas of the DDA 1995 and SENDO 2005, and **not** across the full scope of the legislation.

Fourthly, the changes will ensure greater harmonisation and simplification across the scope of the disability legislation and thereby provide greater clarity both for disabled people and service providers, schools, employers, etc., as regards their respective rights and responsibilities under the legislation.

The complex nature of the DDA 1995 and SENDO 2005 and the inconsistencies both within the disability legislation and with other equality legislation, has made it difficult and expensive for employers and service providers to understand their responsibilities and to act upon them. It has also made it difficult for disabled people to understand their rights under the legislation.

Finally, the changes will ensure parity of protection for disabled people in Northern Ireland in line with proposed changes to the DDA 1995 announced by the GB Government in June 2008.

The Commission's specific recommendations and the rationale underpinning each recommendation, are set out in detail below.

Recommendation

The Commission recommends that the definition of disability-related discrimination in the DDA 1995 and SENDO 2005 is amended in light of the recent House of Lord's decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* ('*Malcolm*').

As a result of the recent House of Lord's decision in *Malcolm*, the level of protection for disabled people from discrimination for a reason that relates to their disability has been significantly reduced.

The Office of Disability Issues ('ODI') has recently consulting on proposed amendments to the DDA 1995, in response to the *Malcolm* decision, as it recognised that the judgment has 'disturbed the balance between the rights of disabled people and the interests of duty holders by making it more difficult for a

disabled person to establish a case of disability-related less favourable treatment.’ It was also of the view that the judgment had ‘shifted protection under the Disability Discrimination Act away from the Government’s policy intention’.

ODI propose to adopt the concept of indirect discrimination, rather than carry forward to a GB Single Equality Bill the existing provisions under the DDA 1995 which apply to disability - related discrimination. It also proposes to introduce a requirement that those with responsibilities to make reasonable adjustments, must make these adjustments before they can seek to justify indirect discrimination.

As outlined in the Commission’s recent response to the ODI consultation²⁰, the Commission in general agrees that the DDA 1995 should provide protection from indirect discrimination for a number of reasons. In particular, it will:-

- help address systemic discrimination and dismantle institutional barriers which impact on groups of disabled people;
- ensure compliance with the Draft EU Directive which will provide protection from discrimination based on disability and other grounds outside the workplace; and
- ensure harmony with protection which exists on other equality grounds.

As indicated in its response, the Commission has, in addition, recommended a number of changes to the proposed definition of indirect discrimination, as well highlighting a number of other areas of concern in relation to the ODI’s proposals. It has also recommended that the concept of disability-related discrimination is amended to remove the requirement of a comparator and is subject to objective justification.

The Commission further recommends, as proposed by ODI, that those who are under a duty of reasonable adjustment should be required to make any such adjustments before they seek to justify

²⁰ *Response to ODI consultation on ‘Improving protection from disability discrimination’*, January 2009, ECNI, www.equalityni.org.

indirect disability discrimination. This is in line with the current approach in the employment, vocational training and education provisions of the disability legislation.

It is essential that steps are urgently taken to address the level of protection for disabled people from discrimination under the DDA 1995 and SENDO 2005, which has been severely weakened as a result of the *Malcolm* decision.

Recommendation

The Commission recommends that the current definition of disability discrimination which applies to the non-employment areas of the DDA 1995 and the schools provisions of SENDO 2005, is amended to prohibit direct discrimination which can not be justified.

The employment provisions of the DDA 1995, and the further and higher education provisions of SENDO 2005, prohibit four forms of discrimination; namely:

- direct discrimination;
- failure to comply with a duty to make reasonable adjustments;
- disability-related discrimination; and
- victimisation.

Direct discrimination, failure to comply with a duty to make a reasonable adjustment and victimisation, can never be justified. In contrast, disability-related discrimination can be justified.

Under the non-employment provisions of the DDA 1995, and the schools provisions of SENDO 2005, disability-related discrimination and a failure to comply with a duty to make reasonable adjustments, are unlawful. However, both disability-related discrimination *and* a failure to comply with a duty to make reasonable adjustments can in certain circumstances, be justified by service providers, schools and others.

The Commission recommends that the definition of disability discrimination contained within the non-employment provisions of the DDA 1995 and the schools provisions of SENDO 2005, is amended to reflect the definition of discrimination in the

employment provisions of the DDA 1995 and the further and higher education provisions of SENDO 2005.

This will mean, for example, that **direct discrimination** which cannot be justified will be unlawful under the non-employment provisions of the DDA 1995 and the schools provisions of SENDO 2005. Direct discrimination occurs where a person is treated less favourably than another is (or has been or would be treated) in a comparable situation on the ground of the disabled person's disability.

This change is recommended for a number of reasons. First, direct discrimination provisions are particularly important in tackling prejudicial and stereotypical assumptions about disabled people (such as unfounded health and safety concerns) and have, for example, been successfully relied on by disabled claimants in the employment field.²¹

Secondly, the inclusion of protection against direct discrimination will ensure compliance with the Draft EU Directive which will, if adopted, provide protection from discrimination based on disability and other grounds outside the workplace, and require the inclusion of direct discrimination in relation to the non-employment areas of the DDA 1995 (as regards areas within the scope of the Directive), in addition to indirect discrimination and a reasonable adjustment duty.²²

Lastly, these changes will, in addition, provide greater harmonisation across the scope of the DDA 1995 and SENDO 2005, provide increased clarity for those with rights and responsibilities under the disability legislation and they are consistent with proposed changes to the DDA 1995 announced by the GB Government in June 2008.

Recommendation

The Commission recommends the removal of the justification defence for a failure to make a reasonable adjustment by service providers and others under the non-employment

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

²² See Article 2

provisions of the DDA 1995, and by schools under SENDO 2005.

Currently under the DDA 1995 service providers, public authorities and others can justify a failure to make a reasonable adjustment. Similarly, under SENDO 2005, schools can justify a failure to make a reasonable adjustment in relation to a disabled pupil. This contrasts with the provisions of the DDA 1995 in the field of employment, and the further and higher education provisions of SENDO 2005, where a failure to make a reasonable adjustment cannot be justified.

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

This proposal is in line with the recommendations of the Disability Rights Task Force²³, as well as proposed GB changes to the DDA 1995. The change will also ensure greater harmonisation across the scope of the DDA 1995 and SENDO 2005 and ensure greater clarity for as regards rights and responsibilities under the disability legislation.

Recommendation

The Commission recommends that a single threshold for making reasonable adjustments is introduced across the scope of the DDA 1995, so that employers, service providers and others have a duty to consider making a reasonable adjustment, where a disabled person is placed at a “substantial disadvantage”, compared with other non-disabled people, if no adjustment was made.

Under the employment provisions of the DDA 1995 and under SENDO 2005, employers and educational providers have a duty to consider making a reasonable adjustment, where a disabled

²³ *From Exclusion to Inclusion, Final report of the Disability Rights Task Force*, Disability Rights Task Force 1999, www.dft.gov.uk.

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 DDA 1995 (and under the draft transport Regulations)²⁴.

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 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”. Whether or not a step is reasonable will depend on a number of factors including the extent to which it is practicable, financial or other costs of making the adjustment and the extent of the service provider’s financial or other resources. In addition, service providers will be able to benefit from the increased number of disabled customers who will be able to access their services.

This change would simplify the DDA 1995 and align the non-employment provisions of the DDA 1995 with the employment provisions in this regard; thus making it clearer to disabled people, employers, service providers and others what their rights and responsibilities are under the legislation. Such changes will also ensure parity with proposed protection in GB.

Recommendation

The Commission recommends that a duty is placed on landlords to make disability-related alterations to common parts of residential premises (such as hallways or stairs), where reasonable and where requested to do so. The duty applies where the disabled person is placed at a substantial disadvantage compared to a non-disabled person.

²⁴ The draft Disability Discrimination (Transport Vehicles) Regulations (Northern Ireland) 2009

The Commission also recommends that its powers to provide a conciliation service should be extended to include disputes in relation to this new duty.

Currently under the DDA 1995, 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 Commission recommends that landlords and managers are required to make disability-related adjustments to the physical features of the common parts of let residential premises, where it is reasonable to do so and when requested by a disabled tenant or occupier.

The introduction of such a duty will require landlords to make alterations to the physical features of common parts, such as installing a stairlift, handrail, or ramp. The duty to make the alteration to the common parts will only apply where the disabled person is placed at a substantial disadvantage compared to non-disabled persons. In addition, landlords will only be required to make "reasonable" adjustments. Importantly, the costs and any reasonable maintenance costs of the alterations will be borne by the disabled tenant.

Such additional protection for disabled people in Northern Ireland will reduce the risk of disabled people being isolated in their own homes, when a simple alteration, such as a handrail or ramp, would enable the disabled person to access the common parts of their home. This recommendation is supported by the GB Review Group on Common Parts in its report of 2006.²⁵

²⁵ *A review of the current position in relation to adjustments to the common parts of let residential premises, and recommendations for change*, the Review Group on Common Parts, December 2005, www.dwp.gov.uk

Although a disabled person may be able to make disability-related adjustments to his/her own flat, s/he does not have the same rights in relation to the common parts of a block of flats. A disabled person, may, for example, need a handrail in the hallway in order to access his or her flat. Landlords will only be required to make an adjustment where it is “reasonable”.

This change is also consistent with proposed developments in GB, as the GB Government has indicated its intention to introduce such additional protection for disabled people in GB as part of a GB SEB.

The Commission also recommends that its powers to provide a conciliation service under the DDA 1995 should be extended to include disputes in relation to this new duty. This recommendation is in keeping with the recommendation by the Review Group on Common Parts that the former Disability Rights Commission be granted such powers.

Other changes

There are, in addition, other significant changes required to the non-employment areas of the DDA 1995 and the schools provisions of SENDO 2005. These include:-

- prohibiting **discriminatory advertisements**;
- prohibiting disability discrimination in respect of **relationships which have ended**;
- amending the rules regarding the reversal of the **burden of proof** in discrimination cases.

In summary, these changes will ensure:-

- increased protection for disabled people (including disabled pupils) against discriminatory practices and, in the case of the reversal of proof provisions, make it easier for disabled claimants alleging unlawful discrimination to successfully prove their case;

- compliance with the Draft EU Directive²⁶;
- a harmonised approach between the employment and non-employment provisions of the DDA 1995, as well as across the SENDO 2005 provisions relating to schools and further and higher education; thereby ensuring consistency and clarity as regards rights and responsibilities;
- greater harmonisation across the scope of the equality legislation; and
- parity with proposed developments in GB.

²⁶ 2008/ 0140 (CNS)

Proposal 5

Recommendation

The Commission recommends the extension of monitoring requirements under the fair employment legislation to the grounds of nationality and ethnic origin, and the introduction of other changes in order to ensure the continuing effectiveness of the monitoring Regulations.

The Commission recommends an extension of the monitoring requirements under the fair employment legislation to cover the additional grounds of **nationality** and **ethnic origin**. This will mean that registered employers, in addition to monitoring the community background and sex of their employees and applicants, will be required to collect monitoring information as regards nationality and ethnic origin.

A proposal paper outlining in detail the rationale for this proposal, the ways in which the additional monitoring information will benefit employers and the likely impact the proposal will have on employers, has already been submitted to OFMdfM for consideration. The Commission's view that urgent consideration needs to be given to this matter is supported by recent independent research on the issues and challenges facing government, employers and other in Northern Ireland as a result of increasing inward migration²⁷.

In summary, the primary reason for the proposed changes is to ensure the continuing usefulness of the fair employment monitoring Regulations. In particular, it will help employers identify which employees and applicants are migrant workers and new residents, and enable employers make a more accurate and meaningful assessment of fair participation in employment in their organisation.

The fair employment monitoring and affirmative action provisions are based on the premise that the majority of people in Northern Ireland are of local origin and may be determined as either members of the Protestant or Roman Catholic communities.

²⁷ *New Migration, Equality and Integration, issues and challenges for Northern Ireland*, A. Martynowicz & N. Jarman, ICR, commissioned by ECNI, October 2008, www.equalityni.org.

However, there has been a significant increase of migrant labour and new residents in Northern Ireland. For example, statistics show that the estimated net international migration into Northern Ireland has increased from 416 in 2003/04 to 9,023 in 2005/06²⁸.

This increase in net migration necessitates a review of the applicability of the current fair employment provisions. This is most easily understood by the fact that many migrants from the States recently accessed into the European Union (EU) appear in employers' monitoring returns as Roman Catholic.²⁹ This has made it more difficult for employers in terms of making comparisons with local labour availability information, and therefore reaching conclusions on fair participation.

The collection of monitoring data on these grounds will also:-

- enable a more accurate assessment of overall changes in the employment and applicant profile in Northern Ireland, in terms of community background;
- assist employers in assessing the impact of their employment policies and procedures on particular ethnic groups in the workplace, and in identifying discriminatory employment practices, which impact directly or indirectly on these groups;
- enhance the ability of public authorities to perform their duties under Section 75 of the Northern Ireland Act 1998 effectively and efficiently;
- provide consistency with benchmark datasets for comparison purposes;
- provide a valuable and extensive source of data for a range of organisations and inform high level indicators for monitoring priority outcomes of Government strategies.

²⁸ www.nisra.gov.uk, July 2007. It should be noted that these figures include, but are not exclusively made up of, the number of migrant workers *per se*. Current estimates however allow for an identification of the overall trends.

²⁹ E.g. the proportion of Worker Registration Scheme (WRS) approvals for Polish nationals in June'07 make up to 62% of all approvals in Northern Ireland; WRS monitoring data, 2007.

Finally, the collection of such data is a key recommendation in the Equality Commission's Race Code of Practice for employers and, as made clear in the Race Directive, the monitoring of workplace practices is an important way of promoting social dialogue and fostering equal treatment on the grounds of racial or ethnic origin.

There are, in addition, other changes required in order to ensuring the continuing effectiveness of the fair employment monitoring Regulations. For example, the Commission recommends that employers are required to provide monitoring data on **applicants and appointees** in relation to each recruitment competition, and not, as is currently the case, overall figures for each year.

The present monitoring Regulations do not enable employers to accurately assess the success rate by community background in recruitment. Appointments may relate to applications recorded in a previous year and applications may relate to appointments yet to be made and not recorded in an employer's monitoring return to the Commission.

In addition to assisting employers, the recommended changes will also enable a more accurate assessment of overall changes in the appointee and applicant profile in Northern Ireland, in terms of community background.

Proposal 6

Recommendation

The Commission recommends the removal of the exception in the employment provisions of Fair Employment and Treatment (NI) Order 1998 ('FETO 1998'), as regards the recruitment of teachers in secondary level schools, and early consideration as to whether the exception should also be removed as regards primary level schools.

There is currently an exception under FETO 1998 which allows schools to lawfully discriminate on the grounds of religious belief, in the appointment of teachers in schools. This exception applies both to the initial recruitment of teachers and to promotion.³⁰

One other important aspect of the exception is that, unlike other employers with more than 10 employees, schools are not required to monitor the community background of their teaching staff. In addition, they are not required to carry out reviews of their teaching workforces, or of the employment policies and practices affecting teaching staff, or consider whether they are providing fair participation to members of the Protestant and Roman Catholic communities, in relation to the employment of teachers.

In 2004, the Commission carried out an investigation into the exception of teachers from FETO 1998. The investigation, highlighted the following concerns which led to original inclusion of the exception.

“Roman Catholic educational interests were concerned that, without an exception for teachers, the Act could eventually lead to a system of non-denominational education, with a resulting loss of Catholic ethos. On the other hand, Protestant educational interests were concerned, that Protestant teachers would be placed in an unduly unfavourable position. They believed that the state education system would come within the scope of the legislation, while the maintained schools, which are in the main Catholic, would not as they could conceivably claim that religion was a bona fide occupational qualification. In other words, Roman Catholics

³⁰ See *Beatrice Debast and Caroline Flynn v. Dr Malcolmson, Laurelhill Community College and SEELB*, www.equalityni.org.

would have a right to equality of opportunity in state schools but Protestants would not have the right to equality of opportunity in Catholic schools.”³¹

Following the investigation, the Commission recommended that the teachers’ exception be narrowed to restrict the exception to teachers in mainstream primary schools.

It formed this opinion in light of its consideration that the genuine occupational exception permitted under FETO 1998 would exempt many more posts in the maintained sector than the controlled sector and accordingly reduce the relative opportunity for Protestant teachers. The genuine occupational exception allows employers to discriminate when recruiting on the grounds of religious belief, where the essential nature of the job requires it to be done by a person holding, or not holding a particular religious belief.

In the investigation report, the Commission made it clear that it considered that within integrated schools, where it is necessary to ensure a workforce which includes Protestants, Roman Catholics and those of other and no religion, it is likely that the need for a staff member of a particular religion will meet the test of genuine occupational requirement. Similarly, within Roman Catholic maintained schools, certain posts, especially within the primary sector, may meet the genuine occupational requirement test.

However, it was also of the view that it was no longer acceptable to exclude the entire teaching workforce from the fair employment legislative provisions covering all other occupations in Northern Ireland. It recommended that teachers should be included in monitoring and review requirements, as are all other occupations, as this would ensure that the benefits of annual data collection and the rigour of regular review are brought to the teaching workforce as all other employment groups.

However, the Commission concluded that it would not improve the equality of opportunity for Protestant teachers, to remove the exception entirely, given the present situation, where the majority of schools divide into distinctly Catholic schools and other non-

³¹ *The Exception of Teachers from the Fair Employment & Treatment (Northern Ireland) Order 1998*, Seamus Dunn and Tony Gallagher (2004), www.equalityni.org

denominational schools, and that the exception should continue for teachers in mainstream primary schools for the present time.

In summary, the Commission is of the view that all teachers should be able to enjoy the same legislative protection as other workers, and the exemption should be abolished at secondary level, as previously recommended; with early consideration given to the question of urging the removal of the exemption at all levels.