



Response to ODI Consultation on Improving Protection from Disability Discrimination

January 2009

1. The Equality Commission for Northern Ireland ('the Commission') is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. The Commission welcomes the opportunity to respond to the Office for Disability Issues ('ODI') consultation on 'Improving Protection from Disability Discrimination'. The Commission, when responding to this consultation, draws on the unique experience it has gained from its role in enforcing the Disability Discrimination Act 1995 ('DDA 1995'), and in implementing the statutory duties under Section 75 of the Northern Ireland Act 1998, across nine equality grounds including disability, and the disability duties on public authorities under the DDA 1995.
3. It is clear that, following the House of Lords decision in *Malcolm*, the level of protection for disabled people in the case of disability-related discrimination has been considerably weakened. In light of the decision, the ODI has indicated that it proposes to adopt the concept of indirect discrimination for the purposes of the disability discrimination provisions in the Equality Bill, rather than carrying forward the existing

provisions in the DDA 1995 that apply to disability-related discrimination.

4. The Commission recognises that all options, including the ODI's preferred option, have strengths and weaknesses. In general, it is of the view that the overriding principle when deciding which option to progress, is that the proposed changes, at a minimum, do not result in a lower level of protection for disabled people against disability discrimination than that which existed prior to the *Malcolm* decision. In addition, the Commission recommends that the ODI take this opportunity to provide **additional** protection for disabled people against disability discrimination, to that which existed prior to *Malcolm*.
5. As previously recommended in '*Enabled? Recommendations for change to the Disability Discrimination Act in Northern Ireland*'¹, the Commission is of the view that the DDA 1995 should be amended to provide protection from indirect discrimination (subject to changes to the proposed definition as outlined below).
6. This change is recommended for a number of reasons. Firstly, it will ensure compliance with the draft EU Directive which will provide protection from discrimination based on disability and other grounds outside the workplace and which, if adopted, will require the inclusion of indirect discrimination in relation to the non-employment areas of the DDA 1995, in addition to a reasonable adjustment duty.²
7. Secondly, indirect discrimination provisions will help address systemic discrimination and dismantle institutional barriers which impact on groups of disabled people. Although in many instances where indirect discrimination occurs, making a reasonable adjustment will overcome the disadvantage to the disabled person, in certain circumstances, a reasonable adjustment will not automatically remedy indirect discrimination.³ In summary, the Commission is of the view

¹ Enabled? Recommendations for change to the Disability Discrimination Act in Northern Ireland, June 2003, www.equalityni.org

² See in particular, Article 2 (1) of the draft Directive.

³ See for examples '*Discussion paper reasonable accommodation*' by European Network of Legal Experts in the non-discrimination field, p20, prepared for the Legal seminar 25 November 2008, www.ec.europa.eu

that the DDA 1995 should prohibit indirect discrimination so as to provide a remedy in circumstances where disabled people are placed at a disadvantage and which cannot be challenged under the duty to make reasonable adjustments.

8. Finally, as set out in the consultation paper, including explicit protection from indirect discrimination is in line with protection which exists on other equality grounds, and therefore will ensure greater harmonisation within the scope of the anti-discrimination legislation.

Definition of Indirect discrimination

9. As set out in detail below, the Commission is, however, of the view that the proposed definition of indirect discrimination is inadequate in a number of key respects. In order to address these deficiencies, the Commission recommends that the definition:-
 - conforms to the definition of indirect discrimination in the EC Framework Directive and the draft EC Directive;
 - does not include a requirement that a person must be placed at an *actual* disadvantage.

Conform to EC Directive requirements

10. The Commission recommends that the definition of indirect discrimination should fully conform with the definition of indirect discrimination in the Framework Directive and the draft EC Directive. This makes it clear that an apparently neutral provision, criterion or practice, which puts persons of a particular disability at a particular disadvantage must be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.
11. The ODI has indicated that it aims to make the indirect discrimination provisions in the DDA 1995 as consistent as practicable with the indirect discrimination provisions for the other protected characteristics. In its response to the Discrimination Law Review, the Government has indicated that it intends to harmonise the definitions of indirect discrimination to refer to an apparently neutral 'provision, criterion or practice

which puts, or would put people of the Claimant's group at a particular disadvantage, and that justification is defined as a 'proportionate means of achieving a legitimate aim'.

12. As highlighted in its response to the Discrimination Law Review, the Commission recommends that the means of achieving that aim should be "*appropriate and necessary*", rather than proportionate. The Government has indicated, in its response to the Discrimination Law Review, that the wording "appropriate and necessary" is problematic in domestic discrimination legislation because of the extreme exigency associated with "necessity" in domestic law. It has also indicated that if the wording were to be used, there might be a risk that this might be interpreted by the courts as an overly strict requirement.
13. It is of note that the words "appropriate and necessary" have, in compliance with the EC Framework Directive, been adopted without difficulty by other Member States, including Sweden and the Republic of Ireland. The courts in any event will have to apply domestic provisions in line with the definition in the Directive and in accordance with ECJ case law.

Remove requirement of 'actual' disadvantage

14. The Commission further recommends that if the concept of indirect discrimination is introduced in the DDA 1995 it does not impose a requirement that the apparently neutral provision, criterion or practice must put the person at an *actual* disadvantage. The definition of indirect discrimination on the grounds of disability in the Framework Directive makes it clear that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice *would put* persons having a particular disability at a particular disadvantage compared with other persons unless objectively justified. The definition of indirect discrimination which currently exists in relation to other equality grounds requires that an individual must have suffered an *actual* disadvantage. In consequence, an applicant who is, for example, deterred from making a job application due to the inclusion of an unjustifiable apparently neutral rule which will place him/her at a disadvantage due to his/her disability, will have no redress under the DDA 1995.

15. The Commission recommends that the proposed definition of indirect discrimination in the DDA 1995 reflects changes to the Race Relations Act 1976 by the Race Relations Act 1976 (Amendment) Regulations 2008, which came into force on 22 December 2008.

Anticipatory reasonable adjustment duty on employers

16. The Commission is of the view that in order to fully comply with the EU Framework Directive, employees and applicants should be able to challenge a provision, criterion or practice before it is applied and therefore to challenge indirectly discriminatory practices in an anticipatory manner.
17. However, it is of note that the duty to make reasonable adjustments in employment is not an “anticipatory” duty and the Government in its response to the Discrimination Law Review, has indicated that it does not intend to change the DDA 1995 to impose an anticipatory duty on employers.
18. As highlighted in *Enabled?*, the Commission recommends that employers are subject to a duty to anticipate the requirements of potential disabled employees and applicants, and to take reasonable action to remove barriers in advance of an individual complaint. Employers will only be required to take steps which are ‘reasonable’. The anticipatory duty in itself would not be enforceable, but it could be considered by Tribunals when an individual is claiming a particular reasonable adjustment.
19. The imposition of an anticipatory duty on employers is in keeping with the potential for employees and applicants to challenge indirectly discriminatory practices in an anticipatory manner. It will significantly enhance the level of protection for disabled people against disability discrimination, and ensure that employers proactively make the necessary changes to prevent a disabled employee or applicant being placed at a substantial disadvantage. As recommended by the Disability Rights Task Force in its final report ‘*From exclusion to inclusion*’, the Commission recommends that further work is taken forward to explore ways of employers having to anticipate the need for adjustments, rather than awaiting

contact with individual employees and job applicants before considering and making adjustments.

20. It will, in addition, ensure greater harmony of protection across the scope of the DDA 1995, where an anticipatory duty already exists in relation to service providers, schools and institutions of further and higher education.
21. In summary, in light of the effects of *Malcolm* which substantially reduced the level of protection for disabled people against discrimination, the shortcomings of the concept of indirect discrimination (see paragraphs 27-35 below), and in the interests of harmonisation across the scope of the DDA 1995, the Commission is of the view that a review of the Government's decision not to introduce an anticipatory duty on employers is urgently required.

Proposed removal of disability- related discrimination

22. As set out above, the Commission is of the view that the DDA 1995 should be amended to include protection against indirect discrimination. The consultation document has sought views on whether indirect discrimination, in light of the effects of the *Malcolm* decision, should **replace** disability-related discrimination.
23. One course of action, ultimately rejected by the ODI, was to maintain the principle of disability-related discrimination and seek to reinstate the comparator as used by the Court of Appeal in *Clark v Novacold*; such an option requiring the ODI to introduce legislation to completely reverse the effect the House of Lords' judgment in *Malcolm*. The ODI refer to difficulties in ensuring a degree of legislative certainty, though it has not elaborated on the nature of these difficulties.
24. The Commission's preferred approach is that the concept of disability-related discrimination (duly amended to reverse the decision in *Malcolm*) is retained within the DDA 1995, **in addition** to the concept of indirect discrimination.
25. The Commission supports the option (ultimately rejected by ODI) of removing the need for a comparator, so that a disabled

person no longer needs to demonstrate that s/he has been treated less favourably than others in the same or not materially different circumstances. Discrimination will therefore arise where a disabled person is placed at a substantial disadvantage for a reason related to his/her disability unless objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

26. This approach is recommended for a number of reasons. Firstly, as recognised by the consultation document, the principle of disability-related discrimination is well established and its application is well understood. Secondly, and critically, the Commission has concerns, as outlined below, that the removal of the concept of disability-related discrimination and its replacement with indirect discrimination, may not adequately amend the DDA 1995 in accordance with the provision prior to the House of Lords' judgment in *Malcolm*, and may result in a lower level of protection for disabled people against disability discrimination than that which existed prior to the *Malcolm* decision.
27. In particular, the concept of disability related discrimination was introduced in order to address the highly individualised barriers to equality of opportunity faced by a disabled person. An essential part of the concept was exploring the *reason* for the less favourable treatment and its connection with the disabled person's disability.
28. In contrast, indirect discrimination primarily concentrates on the *impact* of a provision, criterion or practice on a *group* of disabled persons, rather than the reason for the treatment. When attempting to allege indirect disability discrimination, a complainant, unlike in the case of disability -related discrimination, has the additional burden of showing that it is more likely that people sharing the protected characteristics will experience the disadvantage.
29. There have been many difficulties in other equality strands in proving indirect discrimination, particularly as regards identifying the appropriate "pool" on which a provision, criterion or practice has a disparate impact. Of note is the recent case

of *Eweida v British Airways PLC*⁴, a case which involved indirect religious discrimination, in which the Employment Appeal Tribunal made it clear that when proving indirect discrimination there “must be evidence of group disadvantage, and the onus is on the claimant to prove this” and that “the whole purpose of indirect discrimination is to deal with the problem of group discrimination.”

30. It also stated as follows:-

“The claimant must show that particular disadvantage because otherwise she could not show that she was a victim; the provision would not adversely affect her. But in our judgment it is not enough for a claimant to identify a disadvantage which she personally suffers and which others not sharing her belief do not, and then establish liability merely by discovering- anywhere it seems- a like minded soul who shares her belief so that he or she would be similarly disadvantaged if employed in similar circumstances by BA (British Airways).”

In that case, the EAT concluded that the claimant had not adduced evidence of group disadvantage, and the fact that there may somewhere be some other persons who shared the beliefs of the claimant, was not sufficient to establish the necessary degree of disparate impact or group disadvantage. The EAT also highlighted the fact that “the only effect was on the claimant” and that “even if other religious persons elsewhere may have been similarly placed, there was no evidence at all that anyone at BA was.”

Due to the very individualised nature of certain disabilities, it is likely, in certain indirect discrimination cases, to prove difficult to show disparate impact, and to show that anyone other than the disabled claimant was (or likely to be) disadvantaged.

31. In addition, the consultation document has not clarified in relation to indirect discrimination the degree to which a service provider or employer must know or be reasonably expected to know about the disability.

⁴ UKEAT/0123/08/LA

32. As made clear in the House of Lords' decision in *Malcolm*, knowledge of a person's disability is required in order for there to have been discrimination under the DDA 1995, and justification also assumes knowledge of disability. Lord Neuberger indicated "it would require very clear words before a statute could render a person liable for damages for discrimination against a disabled person owing to an act which was not inherently discriminatory carried out at a time when the person had no reason to know of the disability which could render the act discriminatory." He did however state "different considerations apply where the act is obviously liable to be actually or even potentially discriminatory". As the outcome of the appeal did not turn on this issue, he declined to give any further guidance on this matter.
33. Clarity is therefore needed as to the extent of knowledge of a person's disability required by employers, service providers and others when seeking to justify indirectly discriminatory practices which are 'obviously liable to be actually or even potentially discriminatory'.
34. It is of note that the EAT in *Eweida v British Airways PLC*, stated that "it would be legitimate to infer that BA ought to have been aware of the potential discriminatory consequences, and in those circumstances their failure to address the issue until it had been raised by the claimant could properly be criticised".
35. In addition, the consultation document does not address the issue of compensation as regards indirect discrimination complaints, in particular, the lack of compensation in certain circumstances where the indirect discrimination is unintentional. In contrast, compensation is available for unintentional disability –related discrimination.
36. Finally, the Commission is concerned that the proposed provisions on indirect discrimination will not adequately address 'one-off' acts of discrimination as suggested by the consultation document.
37. In arriving at its preferred approach, the ODI has rejected the option that indirect discrimination might be adopted in addition to the retention of disability-related discrimination (duly amended to reverse the decision in *Malcolm*), on the basis that

it will result in at least four forms of discrimination and will make the disability discrimination legislation cumbersome and confusing to operate. It has also indicated that maintaining the very distinct nature of disability-related discrimination would be contrary to the aims of harmonising equality legislation, as far as practicable in the Equality Bill.

38. Although, in principle, the Commission favours a harmonised approach across single equality legislation, where possible, it is of the view that a variation from a common approach may be necessary in certain circumstances. Even with the proposed changes to the DDA 1995 as set out in the Government's response to the Discrimination Law Review, there will still be a significant number of inconsistencies both within the DDA 1995 and between the DDA 1995 and the other anti - discrimination statutes. The key question is whether or not a variation in protection is justifiable. In light of the limitations of the proposed concept of indirect discrimination as highlighted above, the Commission is of the view that both concepts (indirect discrimination and disability-related discrimination (duly amended)), are necessary and justifiable.
39. In summary, the Commission recommends, for the reasons outlined above, that:-
- the concept of disability-related discrimination is amended to remove the requirement of a comparator and is subject to objective justification; and
 - indirect discrimination is prohibited in the DDA 1995; subject to the concerns highlighted above in relation to the definition of indirect discrimination, proving indirect discrimination and remedies available under indirect discrimination, being effectively addressed.
40. The Commission further recommends that the Government reviews its decision not to introduce an anticipatory duty on employers. Such a review is proposed in light of the effects of *Malcolm*, the shortcomings of the concept of indirect discrimination on the grounds of disability, and in the interests of harmonisation across the scope of the DDA 1995, particularly if the concept of disability –related discrimination is ultimately not amended,.

41. Finally, ODI has also sought comments on whether the Equality Bill should include a provision which requires a duty-holder to fulfil the duty to make reasonable adjustments before that duty-holder can seek to objectively justify indirect discrimination. The Commission agrees that those who are under a duty of reasonable adjustment should be required to make any such adjustments before they seek to justify indirect disability discrimination. This is in line with the current approach in the employment, vocational training and education provisions of the DDA 1995. As noted above, however, this provision will have less impact in the employment field, as employers are not subject to a duty to anticipate the requirements of potential disabled employees and applicants.