

Equality Commission

FOR NORTHERN IRELAND

Response to proposals for the Special Educational Needs and Disability Bill

January 2003

**This document is available in other formats
upon request (contact details on page 1)**



European Year of People with Disabilities

The logo for the Equality Commission for Northern Ireland. It consists of a dark blue rectangular box at the top containing the text "Equality Commission" in white. Below this is a green rectangular box containing the text "FOR NORTHERN IRELAND" in white.

Equality Commission

FOR NORTHERN IRELAND

Equality Commission for Northern Ireland

Response to proposals for the Special Educational Needs and Disability Bill

Introduction

1. The Equality Commission welcomes the Government's intention to bring forward legislation to promote disability rights in the provision of education, and the opportunity to comment on the proposals for the Special Educational Needs and Disability Bill (SENDDB).
2. In due course, the Commission would be grateful for feedback on the following:
 - Where the Government decides not to take account of some of the comments made by the Commission, its reasons for not doing so
 - The quality of the Commission's response to this consultation exercise. It is one of our values to strive for excellence in all that we do and, therefore, we would also appreciate views on the quality of our comments on the consultation document.
3. The Commission's contact for this response is:

Don Leeson, Deputy Director – Disability Development Unit
Equality Commission for Northern Ireland
Equality House, 7-9 Shaftesbury Square
Belfast
BT2 7DP

Direct Line: 028 90 500 615

Fax: 028 90 315 993

Textphone: 028 90 500 589

Email: dleeson@equalityni.org

Overarching issues

Policy context

4. SENDB is a hugely important, and long overdue, legislative proposal that removes most of one of the unfortunate exemptions of the Disability Discrimination Act (DDA) and, as such, is to be welcomed. The exclusion of disabled people from 'mainstream' education, hitherto legitimised in the DDA, has damaged the education, socialisation and life choices of generations of disabled people. The case for change is compelling and urgent. A recent survey of young disabled people aged 20-24 carried out by NOP on behalf of the Disability Rights Commission showed that:
 - a quarter felt that they had been discriminated against at school
 - a third felt that they had not achieved the things they had hoped they would have achieved when they were younger
 - a fifth felt that they had been discouraged from taking GCSEs
 - a third felt that they were prevented from going onto further and higher education for a reason related to their disability, and a quarter said that they were advised not to go on to further and higher education by their school.
5. In Northern Ireland, the Labour Force Survey (summer 2002) shows that disabled people (44%) are twice as likely as to have no qualifications compared to non-disabled people (20%); and disabled people (12%) were less likely to have obtained a higher qualification compared to non-disabled people (23%). Indeed, another recent survey, conducted by the National Audit Office, showed that disabled people aged 18 are only 40% as likely as non-disabled people to go into higher education.
6. Furthermore, education is a key determinant of inclusion in society. A survey conducted by NOP in 1999 on behalf of Leonard Cheshire found that 61% of people under the age of 35 had had no contact with disabled people, which the Disability Rights Task Force (DRTF) noted as "*...a reminder of how far there is still to go in achieving acceptance of disabled people as equal members of society*". The DRTF went on to state that:

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

['From Exclusion to Inclusion' - DRTF report, December 1999]

Disability Rights Task Force

7. The Commission was pleased to see that many of the recommendations made by the DRTF have been taken onboard in proposals for SENDB. The Task Force had extensive discussions on disability and education, which undoubtedly presents a number of complex issues. The Commission continues to support the general thrust of the DRTF recommendations, particularly on the need for strengthening the rights of disabled children to places in 'mainstream' schools and for making disability discrimination in education unlawful. We strongly endorse the DRTF view that, in addition to attendance at a 'mainstream' school, an inclusive curriculum is essential to ensuring inclusion. As part of the implementation of the legislation, the Commission would like to see work within schools to pave the way for the integration of greater numbers of disabled children in 'mainstream' schools. There is a risk that, without all children being made aware of disability issues, disabled children might be in particular danger of bullying and harassment. We would ask that consideration is given to disability awareness and etiquette training in schools for both staff and pupils, or as part of a wider and ongoing curriculum activity dealing with citizenship.

8. The DRTF stopped short of recommending the complete removal of the school education exclusion from the DDA. This was on the grounds that there are extensive provisions relating to children with SEN in education legislation already in place and the Task Force feared that overlaying these provisions with anti-discrimination duties risked creating a complex legal framework. For the reasons set out below, the Commission diverges from this view on the grounds that, in Northern Ireland, we wish to see single equality legislation that harmonises upwards and clarifies the civil rights of all our people. We consider that the approach taken by the DRTF and SENDB proposals is not consistent with this objective.

Special Educational Needs v Disability Discrimination

9. Whilst the Commission warmly welcomes the proposed Bill as an attempt to end disability discrimination in education and promote equality of opportunity for disabled children by strengthening their right to a 'mainstream' education, we have a number of overarching concerns about the way in which the proposed legislation is conceived. These are:
- The approach taken by the Department of Education (DE) and Department of Employment and Learning (DEL) is to apply legislation, enacted in Great Britain in 2001, to Northern Ireland. However, this does not take account of proposals for single equality legislation in Northern Ireland, which we hope would incorporate the anti-discrimination aspects of an enacted SENDB. It would be appropriate to structure the legislation to anticipate this.
 - The key purpose of the legislation should be to end disability discrimination in education provision. However, SENDB seeks to build on, and modify, the existing SEN framework. Whilst SEN provisions will continue to be important, they should be seen as a 'reasonable adjustment' to meeting the needs of some, not all, disabled children in schools. This is not just a presentational matter - generally, disabled people do not wish to be given 'special' treatment; rather they should be afforded every opportunity to participate fully in all aspects of society, which may require some reasonable adjustments to overcome any barriers they might face. Incidentally, extensive changes to the SEN framework are expected to be made in Great Britain during 2003, and the term 'special educational needs' is likely to be replaced by 'additional support needs'.
 - The proposals, as they currently stand, do not give a holistic and integrated approach to dealing with disability discrimination in education. By attempting to build on the existing framework and infrastructure, the proposals suggest different approaches for meeting the needs of disabled people, depending on whether they are participating in pre- or post-16 educational provision. This results in different rights under the law depending on age in terms of legal remedies, and risks perpetuating transition issues as people move from pre- to post-16 education.

10. In light of these issues, the Commission would recommend that Government:

- Makes it clear that the legislation is first and foremost the enactment of Part IV of the DDA and is, therefore, about tackling disability discrimination in education. In order to signify this, consideration should be given to a different title for the legislation, for example the Disability Discrimination (Education) Act (or Order if appropriate).
- Considers whether this legislation is the appropriate vehicle for refining the SEN framework. Whilst we recognise the need for, and generally support, the proposed changes in this area, it might be advisable to use another piece of legislation to improve the SEN framework. This would establish a clear distinction between disability and SEN ie not all disabled people have SEN, and not all people with SEN have a disability. It is worth noting that the Disability Rights Commission is experiencing a great deal of confusion from parents in respect of SEN issues and disability discrimination. The Code of Practice could then be used to make the links between the two legislative frameworks to show that SEN provision is a way of managing reasonable adjustments for disabled children.
- Considers how 'statements' might be extended into post-16 educational provision to help ensure an effective transition from schools, or at least establish an effective assessment of needs process, on a statutory basis, prior to a disabled person embarking upon a course. Either model should be informed by the previous pre-16 statement, and would also be appropriate to people with SEN returning to education.
- Provides the same legal complaint route for disability discrimination regardless of whether it emanated from pre- or post-16 educational provision. In the longer term, we would wish to see this handled by an Equality Tribunal, which we hope will be established by the Single Equality Act and hear discrimination cases in the fields of both employment and goods, facilities and services. The proposal for a reconstituted Special Educational Needs and Disability Tribunal, as opposed to the County Court, offers a possible interim arrangement for resolving complaints concerning both pre- and post-16 provision. However, we have some concerns about the Tribunal and these are set out below under our response to the consultation questions.

European matters

11. The consultation document makes no mention of addressing two of the significant deficiencies in the DDA, which it might be appropriate to tackle through SENDB, and which the Government needs to deal with as part of its response to the Article 13 European Framework Directive. These concern bringing qualifying, professional and examination bodies and work placements under the scope of the DDA; both are relevant to educational provision.
12. Currently, it is lawful for qualifying and professional bodies, such as the General Medical Council, to discriminate against disabled people. This means that educational providers can prevent disabled students undertaking courses leading to qualifications for professions that stipulate certain mobility or health restrictions. It is also not clear from the proposals whether examination bodies will be brought under coverage of anti-discrimination legislation. Duties should be placed on these bodies not to discriminate against people because of their disability and to make reasonable adjustments in respect of examinations where appropriate.
13. Access to work placements, whether as part of vocational training or more generally, are vitally important for improving disabled people's opportunities in the workforce, and its coverage under the DDA needs to be clarified. The Framework Directive applies to "advanced vocational training and retraining, including practical work experience". Therefore, SENDB could be the appropriate legislation to cover finding and placing people in vocational training. Arrangements, whether through SENDB, or some other legislative vehicle, will be needed to deal with host organisations providing placements and their relationship with disabled people during the course of the placement. The provisions of the DDA need to be expanded to ensure that people on placement are covered by the Act with regard to their on-going relationship with the employer. Consideration will need to be given to where the responsibility for providing reasonable adjustments should most appropriately lie and state assistance provided to facilitate such adjustments where appropriate.

Single Equality Act

14. As mentioned above, the forthcoming Single Equality Act (SEA) needs to be considered when developing SENDB. In addition to ensuring that the SENDB proposals can be accommodated within SEA, and the role of the Equality Tribunal in adjudicating over education cases, the concept of indirect discrimination and the role of monitoring need to be considered.
15. Indirect discrimination (ie an apparently neutral provision that has a detrimental impact on a group covered by anti-discrimination legislation) is a concept that does not yet apply to disability. However, the Commission feels that it could provide additional protection to disabled people. This will be an area that we will seek to address as part of the harmonisation of anti-discrimination legislation through the development of SEA. Indirect discrimination is an issue that might have significant implications in the area of disability and education. For example, a case could be made that blanket requirements for qualifications and grades for entry to certain courses indirectly discriminate against disabled people whose academic achievements may have been hindered through poorer educational provision or ill health.
16. Monitoring is already required by the fair employment legislation in Northern Ireland and we consider this should be extended to other areas as part of SEA. This could apply across all protected groups, both for employment and goods, facilities and services purposes. Again, as a matter of good practice, the Government might consider requiring all education providers, through legislation enacting SENDB, to monitor the numbers of disabled people applying for school and further and higher education places and courses, and participating in schools and colleges.

Specific issues

Consultation questions

17. The Commission responses to the specific questions raised in the consultation document are set out at **annex 1**.
18. The Commission supports the earlier recommendations for change to SENDB made by the Consortium, which we facilitated. Their recommendations are set out at **annex 2** for completeness.

Definition of disability

19. The Commission agrees that the DDA definition should be used for SENDB, so that the education provisions are consistent with other parts of the Act. We would, however, like to note that the Commission is likely to be formally presenting the Government with extensive recommendations for change to the definition of disability in 2003. The key one of these in respect of its impact on education is a proposal, subject to consultation, to remove the requirement for a disability to last, or be expected to last, for 12 months. We are concerned that relatively short periods of absence from education through disability or illness can have a disproportionate effect on an individual's learning. Removal of this requirement would place a duty on service providers to make reasonable adjustments to accommodate such absences and support disabled children/students to regain lost education.
20. Whilst supporting the use of the DDA definition, we would not want children with SEN to be disadvantaged by the change in definition from that contained in the Education (NI) Order 1996, and would ask that DE closely monitors this aspect of the implementation of SENDB proposals in particular.

Codes of Practice

21. Paragraph 3.1.8 of the consultation document states that the Codes of Practice for pre- and post-16 education to support legislation arising from SENDB will have no statutory basis. The Commission is strongly opposed to this and would urge the Government to reconsider. It is important that education providers have a statutory duty to have regard to the provisions of the Codes to ensure that disability issues are taken seriously and real change is achieved for disabled people.

Role of the Equality Commission

22. Paragraph 3.1.10 of the consultation document states that the powers and duties of the Commission will be extended to cover the provisions made by SENDB. We have assumed that these will, at minimum, be:
 - Authority to publish, and revise as appropriate, the Codes of Practice

- Authority to give information and advice to the public and service providers on SENDB provisions
- Authority to support legal cases
- Power to mount formal investigations
- The remit to keep the legislation under review.

However, we would be grateful for confirmation of our duties under SENDB proposals.

Resources

23. Should the Commission be granted powers and duties under legislation enacted by SENDB, there will significant resource implications for us. The Disability Rights Commission has been granted around £1.6m per year to implement legislation from the Special Educational Needs and Disability Act 2001 (SENDA) in Great Britain. This has enabled them to create a number of posts to resource the new duties, including policy development and review, information and advice, practice development and legal, as well as mount an extensive awareness-raising campaign to inform disabled people, parents and education providers about SENDA and its requirements.
24. The Commission and DE have already been in correspondence about the funding requirements for the Codes of Practice and promotional activities, and agreement will be needed shortly on these and other resource issues. It is worth noting that, in the first three months after the implementation of SENDA in September 2002, the Disability Rights Commission received 560 SENDA related calls (split evenly between pre- and post-16 education provision), of which 40% had a potential discrimination case. On this basis, the Commission considers that demand for information and advice and legal support in Northern Ireland may be high.

Special Educational Needs and Disability Bill

Equality Commission's response to the consultation questions

Special educational needs

Q1 Do you see any practical difficulties with the proposals on advice services and conciliation?

The proposals have resource implications and appropriate additional funding will need to be made available to ensure effective implementation. Without additional resources there will be practical difficulties in raising awareness of the new rights and duties with parents, disabled people and education providers, as well providing advice on the rights afforded under the legislation and interpreting the Codes of Practice.

Another practical difficulty concerns possible confusion about the respective roles and responsibilities of the Boards and the Equality Commission in providing advice and information. The early experience of the Disability Rights Commission in Great Britain, where this legislation has been implemented with effect from 2002, shows that there is potential for parents in particular to be confused by the roles of the educational authorities and DRC. Therefore, our respective organisations will need to work closely to ensure that the arrangements for advice and conciliation are clear and well publicised.

The Commission considers that the Boards should have a role in providing information on SEN matters to parents in their area. However, the Boards will need to ensure that geographical matters are taken into consideration and look at outreach arrangements, so that information and advice is readily accessible.

The Commission anticipates that, like the Disability Rights Commission in Great Britain, it will have responsibility for raising awareness of the new rights and duties with parents, disabled people and education providers. It is likely that we will also be responsible for giving advice on the rights afforded under the legislation and interpreting the Codes of Practice.

It is vital that effective conciliation arrangements are put in place to ensure that speedy educational remedies are achieved wherever possible. The Commission believes that such arrangements should be provided by an independent, not-for-profit organisation that covers the whole of Northern Ireland and which can provide immediate access to the service. Experience has shown that, where there is a commercial imperative, inappropriate conciliation can be pursued to the detriment of the parties involved. Ideally, conciliation should be provided by a single organisation to help ensure a consistent approach across Northern Ireland.

Q2 Do you agree that schools should have a statutory duty to notify parents that the school has concluded that their child has SEN?

Yes.

Q3 Do you agree that Boards should not be required to specify the name of a school in Part 4 of a statement in cases where the parents have themselves made suitable alternative arrangements for their child's education?

Whilst the Commission agrees that it might be more appropriate for Boards to name the type of school in a statement, rather than specify a particular one, we do have a number of reservations about how a school will be found. We would want reassurances that the Boards will facilitate the process of identifying an appropriate school, so that the pressure is not transferred onto parents and children. We would not wish to see a situation where parents need to negotiate directly with a number of schools to find a place for the disabled child. We would also like clarification on whether school selection criteria will override the requirements of a child with a statement.

Q4 Do you agree that parents should be allowed to appeal to the SEN Tribunal when the Board has refused an assessment request from the child's school?

Yes.

Q5 Do you anticipate practical difficulties with the proposals in relation to the SEN Tribunal?

The procedural changes in respect of the SEN Tribunal appear sensible, but see our general comments about its wider role.

Q6 Do you agree that the proposals to strengthen the right to a mainstream place strike the right balance between strengthening inclusion and protecting the interests of other children?

Whilst the Commission generally agrees with the proposals, and welcomes the assumption of a place in 'mainstream' education for all disabled children, we do have some concerns about how they might work in practice. Guidance on the grounds for which a disabled child could be excluded from 'mainstream' education would need to make it clear that such a measure can only apply in very exceptional circumstances after all reasonable adjustments have been fully explored. Greater sensitivity will be needed in this guidance in respect of language: the language used in the consultation document is unduly negative (eg "safeguarding", "efficient education of others", and "ordinary schools"). The key point here is that all children have the right to effective education and, in order to do this, alternative arrangements might need to be made for a few children outside of 'mainstream' provision. The Commission would be happy to advise DE in developing this guidance.

Q7 Do you agree that it is necessary, where it is not obvious that a student is disabled, for a student to disclose his/her disability to the institution in order to benefit from the new duties?

No. There is no reason why the educational provisions of the DDA in respect of disclosure should differ from the employment and other GFS provisions. The onus should be on the organisation to both anticipate the needs of disabled people and create an atmosphere where people feel secure and confident enough to disclose their disability.

Q8 What do you consider would be a reasonable and realistic timetable for introducing the new duties which are set out in sections 2 and 3?

There remains a significant amount of work to prepare for, and implement, the legislation arising from SENDB. The delay in publishing the proposals means that the target date of September 2003 will be almost impossible to achieve. September 2004, whilst still ambitious, should be the objective. This date will need the full commitment of Government and all stakeholders, but it cannot be allowed to slip beyond this date, otherwise disabled people will continue to be significantly disadvantaged in educational provision, particularly in comparison to their peers in Great Britain.

Autumn 2004 would also coincide with other changes to the DDA in respect of service provision.

The Commission strongly recommends implementation in full and that it should not be staged, as it is in Great Britain. Staged implementation would only serve to confuse disabled people, parents and educational providers and further delay aspects of the legislation.

Lastly, the Government needs to set an end-date, say 2014, for physical accessibility to be achieved by the school accessibility plans, otherwise school planners will be working in a vacuum.

Q9 If a situation arises where a student develops a condition, or is not aware of any existing condition, and it starts to affect his/her attendance and/or studies:

- (i) Is it reasonable to expect an education provider to consider whether it is a disability related cause; and**

Yes – again, the education provisions of the DDA should be no different from those for employment.

- (ii) Should a student be able to pursue a complaint on the basis that the education provider should have considered whether it was a disability related cause.**

Yes – again, the education provisions of the DDA should be no different from those for employment.

Q10 Do you see any difficulties in implementing the new duties on education providers in the school sector?

The Commission has a number of concerns about the proposals in respect of the new duties in the schools sector as they are conceived in the consultation document. Whilst we appreciate the reasons why the Disability Rights Task Force (DRTF) decided against recommending a general duty on educational providers to provide auxiliary aids and services, we would ask that the Government revisits this issue (para 3.2.4 of the consultation document refers). The DRTF felt that such a provision might leave open the possibility of a secondary action following an unsuccessful case to the Tribunal under SEN provisions, and also that many such services are provided by the health and social care sector, not education providers.

The Commission considers that there should be such a general duty, as elsewhere in the DDA. Whilst the DRTF was right to have reservations, auxiliary aids and services fall under the provision of reasonable adjustments, and it would, ultimately, be for the same Tribunal to decide upon the 'reasonableness' in any case. Furthermore, both the schools and health and social service sectors are already involved in the provision of auxiliary aids and services; why should such provision, where it is unreasonably withheld or withdrawn, not be subject to a legal challenge, no matter which sector is the provider?

The sentiment expressed in paragraph 3.2.5 in respect of the intention to outlaw less favourable treatment and promote a 'level playing field' for disabled children is absolutely right. However, we would challenge the intention that this should not prevent selection on academic ability. The Commission would hope that schools would be encouraged to put in place positive action programmes to increase opportunities for disabled children. Moreover, see our comments above in respect of indirect discrimination; the Commission believes that blanket selection based on educational qualifications is just such an area that might be outlawed under such a provision.

The Commission is strongly opposed to the proposal set out in paragraph 3.2.8 that schools will not be placed under the physical access duty, which will apply to most other service providers from October 2004. Whilst we welcome the proposal for Accessibility Strategies and Plans, we believe that these should be underpinned by a physical access duty. We are concerned that voluntary arrangements generally do not work or fall into disrepute. Also, educational providers are no different from other service providers and, in any case, will already be subject to the new physical access duties for non-educational services (eg elections). Lastly, any such duty would be predicated on grounds of 'reasonableness'. The Code of Practice could be used to make it clear that a school would not be expected to remove or alter any physical features of premises in advance of the timetable agreed in its Accessibility Plan.

In addition to the above comments, the Commission would like further refinement of the proposals in respect of the Accessibility Strategies and Plans set out in paragraphs 3.2.10 – 3.2.13. We would wish to see these timebound, say ten years, to provide the planning and resourcing framework. We would also wish to see them signed-off by independent experts (eg Building Control Inspectors) and progress monitored independently (eg School Inspectors, trained appropriately and informed by Building Control inspection reports).

Q11 Do you agree that the new rights of redress for pupils should mirror the proceedings of the existing SEN Tribunal with its emphasis on remedy through educational means?

As set out above, the Commission believes that disability discrimination cases in respect of goods, facilities and services, including education, as well as all other complaints of discrimination, should be heard by a single Equality Tribunal. However, with some caveats, the recommendation to extend the powers of the SEN Tribunal to hear discrimination cases, appears to be an appropriate interim measure. The caveats that we have are, that:

- the Tribunal should hear all cases concerning discrimination in education, including that in post-16 provision. We do not believe that county courts are an appropriate place to hear discrimination cases – they can be intimidating for applicants and generally lack the expertise to make effective judgements on such issues.

- Tribunals should be able to grant financial compensation where it is appropriate. Whilst an educational remedy might be appropriate in most cases, this may not always be the case. For example, where a disabled child has been denied access to a school trip because the school failed to provide an accessible bus, that educational experience cannot be recaptured and some financial penalty may ensure that such a situation does not recur (the DRC survey referred to above showed that a third of disabled children had missed out on school trips for a reason related to their disability). Similarly, should a disabled child be verbally abused because of her/his disability by a member of staff, compensation for hurt feelings might be appropriate. The provision of an effective conciliation service should help ensure that educational remedies, where these are appropriate, are achieved.
- Time limits are set for hearing cases quickly. Time is of the essence for complaints in the field of education. Any disadvantage experienced by disabled people needs to be addressed speedily, so as not to prolong difficulties, which may not be easily recovered.
- Tribunals should be able to hear cases concerning alleged breaches of the planning duty in respect of Accessibility Strategies and Plans.
- Tribunals should be able to create precedents, which could have weight in future cases.

Q12 Do you agree that the new duties should apply to publicly funded higher and further education institutions and part III to the private and voluntary sectors?

The new duties should apply equally to all further and higher education providers, whether in the public, private or voluntary sectors. Whilst we recognise a distinction between the various categories, the principle of non-discrimination should apply equally to all. We believe that it is essential that all providers are covered, particularly in view of the 'incorporated status' of FE in Northern Ireland, and the possible moves towards independence/private sector status in the HE sector that may come about as a result of the funding problems in that area.

There are, however, a number of possible problems with this division. The reasonable adjustment duties under Part III of the DDA apply where a disabled student finds it 'impossible or unreasonably difficult' to access education services. In SENDA in Great Britain, the duties apply where the student is placed at a 'substantial disadvantage compared to his peers'. Effectively, this means that there is a lower threshold for public sector providers than for the voluntary or private sectors. We would be inclined to regard the Part IV 'trigger' for reasonable adjustments as applicable to all further and higher education providers. We would advise, however, that the impact of the 'Novacold' employment case has resulted in an extremely broad approach to the issue of comparators and we would be happy to discuss the implications of this with the Government.

While this is not a major issue in Northern Ireland at the moment, we are concerned that in future, the status of institutions may change, and consequently reduce education service providers' responsibilities.

Q13 Should education providers be covered by the new duties in relation only to their own provision? Or should this be extended to provisions supplied by contractors on their behalf?

The separation of services and duties between principals and subcontractors is not an approach that the Commission would favour. An educational institution should be responsible for any educational service provided in its name. The shift of emphasis in higher education over recent years towards research has resulted in a growth of the number of academics 'buying out' of some of their teaching commitments, with 'consortia' of postgraduate students and others tendering for teaching duties. In these circumstances, there is an effect on the trigger for reasonable adjustments as noted above (Q12), and any test of reasonableness in case of a complaint. The resources of the institution (and consequent duty to make adjustments) would far outweigh the likely resources of a contracting group of postgraduates.

The Commission takes the view that all education and closely related services should be subject to the Part IV provisions, and that the 'responsible body' should be the educational institution that either provides or commissions these services from a third party.

Q14 Should education and services provided by an institution primarily for students fall within the new duties and other services remain in Part III? Is such a division workable?

We consider that the division is workable, provided that the regulations give sufficient coverage to all services offered primarily for students. Under the proposed 'remedies' complaints under both Parts III and IV would be heard by the County Court, although as noted previously with a different 'trigger'. Services not closely related to education are already covered by Part III of the DDA, and while we wish to see a levelling up of anti-discrimination legislation generally, with the development of the SEA, we do not consider it necessary to attach different triggers to different service providers. In Part IV it should be the nature of the service, i.e. education that attracts the different trigger.

Q15 Are there other types of reasonable adjustments that providers should have to consider (eg should assessment of students' needs be a requirement)?

The paragraphs cited refer to justifications for not making reasonable adjustments, and rights of redress. In general terms, the reasonable adjustments will be determined on a case by case basis. However, institutions should look at their policies, practices and procedures and ensure that their requirements for accessing courses are actually necessary. Is the information / course material they provide accessible to students with differing disabilities? If premises cannot be altered to accommodate physical mobility difficulties, can courses be rescheduled at a different venue? Other issues around the reasonable adjustments will be 'ironed out' as part of the development of the Code of Practice.

With regard to assessment of students needs and abilities, the Commission feels that this should be a statutory requirement of the Act rather than a possible reasonable adjustment.

Q16 Although the list at paragraph 3.3.15 ('assessing what is a reasonable adjustment') is not complete, are there other factors that should be taken into consideration?

Our response to Q15 addresses this issue.

Q17 Are there other factors that should be considered in justifying less favourable treatment?

The thrust of the text is more concerned with the ability of the provider to make adjustments, rather than the requirement to do so. We feel that this sends out a negative message from the start. The basic premise of the legislation is the right to education for students with disabilities. Unfortunately, often spurious reasons are cited for refusing to accept a student onto a course. In the penultimate example given (page 48 of the consultation document), teacher training colleges are used to illustrate a case where a student is medically unfit to teach. To cite the refusal as a likely justification is unsound given the genuine occupational requirement clauses under the European Employment Directive. The medical criteria used to determine this issue will have to be revised in any event, and the use of this type of example may reinforce some of the more negative practices of teacher training institutions.

We would consider that the justification criteria should be limited to an inability to achieve a required academic standard, and to practice the profession (where appropriate) even after reasonable adjustments have been made.

Q18 Should the remedies and court used for these discrimination cases be the same as the Part III and for other discrimination cases in education?

The Commission has concerns over the appropriateness of the County Court system dealing with education cases (see above). The length of time taken to have cases heard can cause unacceptable delays, and under the GB legislation there is no directive power as to future conduct if discrimination is found to have occurred.

Ongoing work on SEA proposes the development of an Equality Tribunal to oversee and enforce anti-discrimination legislation. While this would be our ultimate objective, in the interim we would be inclined to see education cases heard in the reconstituted SEN Tribunal. Under the proposed reforms to the SEN framework, compliance with directions from the tribunal is enforceable within specified timeframes. We believe that the tribunal should have directive powers as to future conduct of an institution that had been found to be discriminating against students.

Q19 What conciliation arrangements would be appropriate?

The same conciliation arrangements should cover both pre- and post-16 education provision (see above).

Q20 Should similar duties to those which are to be placed on schools and providers of further and higher education be placed on providers of youth services?

Yes.

Q21 Should the duties of statutory and voluntary youth service providers be the same, or how should they differ?

The duties should apply equally to both statutory and voluntary youth sectors, with appropriate funding made available for compliance issues.

Special Educational Needs and Disability Bill

Consortium Recommendations

- R1 The requirement for 'long term substantial impact on day to day activities' in the definition of disability should be replaced by 'substantial disadvantage compared to their peers'. The short term needs created by transient disabling conditions in childhood could be more effectively addressed.
- R2 In the guidance on matters to be taken into account relating to the definition of disability, it should be made clear that the effect of a condition on a child or student, across all age groups, and its impact on the ability of the individual to take part in educational or related activities, may be taken as constituting a disability for the purposes of part IV of the DDA (1995).
- R3 The Consortium agrees that there should be a requirement to increase physical access to school buildings, classes and facilities, and that an end date should be set for compliance.
- R4 The concept of 'reasonableness' as set out in the Act generally would apply to determining the physical adjustments required by responsible bodies, however the Department of Education should have a duty to plan strategically for the access and resource requirements of all publicly funded schools.
- R5 Auxiliary aids and or services are currently mandated only where a child has statement of SEN. This should be an obligation owed to all children with disabilities (where required). This duty should apply to the responsible body for the school in the first instance, or relevant Education and Library Board (ELB).
- R6 If a child is recognised as having a disability that impacts on their ability to learn, or creates significant difficulties for them compared to their peers, there should be a statutory duty to assess and meet the educational and related needs of the child.

- R7 The assessment of a child's educational and related needs should be carried out as expeditiously as possible, and within set time limits in all circumstances. There should be an effective monitoring and compliance system established to ensure that the targets are met, and appropriate action taken to improve performance where necessary.
- R8 The consortium recommends that the powers of the Special Educational Needs and Disability Tribunal be extended to consider all pertinent matters relating to the identification and meeting of a child's educational and related needs.
- R9 The Bill / Regulations should set out the minimum content of a statement of needs, and impose a requirement to meet these needs on the relevant ELB.
- R10 Greater emphasis should be placed on multi-disciplinary early years assessment, with a focus on breaking down professional barriers and remits.
- R11 Policies and procedures for the identification assessment and addressing SEN should be harmonised across NI. The SEN Tribunal should be empowered to examine how these are being dealt with and direct accordingly.
- R12 If a child has been statemented in school and subsequently moves to a further education institution, the provisions included in the statement should be maintained, subject to review of ongoing needs.
- R13 There should be a statutory duty on the relevant governing bodies in the sector to ensure that the assistance required to meet a disabled student's needs, is fully assessed and addressed (as part of the requirement for reasonable adjustment). Regulations should require responsible bodies to plan financially to meet future needs of students with disabilities
- R14 Matters relating to disability discrimination in colleges and universities should be addressed through the reconstituted SEN Tribunal.
- R15 The exclusion from part IV DDA of accrediting bodies should be ended upon enactment.

*** **