



# **Draft Guide to Disability Discrimination Law that relates to General Qualifications Bodies**

**The Special Educational Needs and Disability (General Qualifications Bodies)  
(Relevant Qualifications, Reasonable Steps and Physical Features)  
Regulations (Northern Ireland) 2008 as amended; and**

**The Special Educational Needs and Disability (2005 Order) (Amendment)  
(General Qualifications Bodies) (Alteration of Premises and Enforcement)  
Regulations (Northern Ireland) 2008**



This draft guidance was developed by the Equality Commission for Northern Ireland (the Equality Commission) to explain how the Special Educational Needs and Disability (Northern Ireland) Order 2005 (SENDO) applies to general qualifications bodies. For further information please consult our website or contact our Enquiry Line on 028 890 890.

The guide is relevant to:

- General Qualifications Bodies
- Examination Centres
- Schools
- Further Education Colleges
- Education Authorities
- Individuals taking general qualifications
- Parents and those who support disabled pupils and students.

It is available in a range of accessible formats on request from the Equality Commission. If you would like a copy in an alternative format please contact us and state which format you require.

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You can also use Typetalk to contact us.

# Equality Commission for Northern Ireland

The Equality Commission is an independent public body established under the Northern Ireland Act 1998.

The Equality Commission's mission is:

- to advance equality, promote equality of opportunity, encourage good relations and challenge discrimination through promotion, advice and enforcement.

The Equality Commission promotes equality of opportunity and enforces the anti-discrimination legislation in relation to:

- age
- disability
- equal pay
- religious belief or political opinion
- race
- sex
- sexual orientation.

The Equality Commission also oversees the effectiveness of the statutory equality and good relations duties on public authorities under Section 75 of the Northern Ireland Act 1998 and the disability duties on public authorities under the Disability Discrimination Act 1995 (as amended).

As well as a duty to work towards the elimination of unlawful discrimination, the Equality Commission has a general duty to keep equality legislation under review and to advise government on recommendations for change.

## Further information

Further information on anti-discrimination and equality law, including disability discrimination law and the duties on education and qualifications bodies in particular, is available from the Equality Commission by contacting our Enquiry Line on 028 90 890 890. Our information and advisory services are free and confidential.

Detailed information and publications are also available on our website at [www.equalityni.org](http://www.equalityni.org) or by contacting our Enquiry Line on 028 90 890 890.

The law enables disabled people to bring complaints of discrimination by general qualifications bodies to a county court. It also allows complaints to be settled by conciliation, where this is what both parties want. Conciliation is about finding a solution that satisfies all parties but where this process does not produce a satisfactory outcome for the disabled person, they still have the right to pursue their complaint through the courts. Further information about the Disability Conciliation Service can be obtained by contacting the Equality Commission's Enquiry Line on 028 90 890 890.

## Disclaimer

This guide provides general guidance only and should not be regarded as a complete or authoritative statement of the law. The guide is not a Code of Practice and does not of itself impose legal obligations. Authoritative interpretation of the legislation is a matter for the courts.

While every effort has been made to ensure that the information provided is accurate at the time of publication, readers should be aware that legislation may change and it may be necessary to seek independent advice before relying on the contents in any legal proceedings.

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# 1 Introduction

- 1.1 The Disability Discrimination Act 1995 (DDA 1995), as originally enacted, contained provisions making it unlawful to discriminate against a disabled person in relation to employment, the provision of goods, facilities and services, and the disposal and management of premises. It also contained some provisions relating to education.
- 1.2 The education provisions were substantially extended by the Special Educational Needs and Disability (Northern Ireland) Order 2005 (SENDO 2005) which came into effect in September 2005.
- 1.3 SENDO 2005 is based on the principle that disabled people should not be discriminated against in accessing educational opportunities or discriminated against during the course of their education in schools, colleges or universities.
- 1.4 SENDO 2005 was itself amended on 1 September 2006 in order to fully implement Council Directive 2000/78/EC - the EU Framework Employment Directive. This amendment applied to institutions of further and higher education. It gave greater protection to disabled persons against disability discrimination in further and higher education, including in the conferring of qualifications and the treatment of persons who hold such qualifications. The Equality Commission produced an addendum to the “Disability Discrimination Code of Practice for Further and Higher Education” explaining these changes.
- 1.5 A person’s employment prospects may be affected by his or her ability to obtain a general, professional or trade qualification.
- 1.6 Part 2 of the DDA 1995 contains provisions that make discrimination by trade and professional qualifications bodies unlawful. These are explained in separate guidance produced by the Equality Commission entitled “Disability Code of Practice -Trade Organisations and Qualifications Bodies”.

- 1.7 The provisions that make discrimination in the arrangements for awarding **general qualifications** by general qualifications bodies unlawful are contained in Chapter 3 of Part 3 of SENDO 2005. Regulations which detail the relevant qualifications covered and the enforcement mechanisms came into operation in Northern Ireland in April 2008. They mirror those effective in England, Wales and Scotland from September 2007 ensuring common arrangements. Further amending Regulations were enacted in 2009.

## Purpose and status of this draft guidance

- 1.8 The Equality Commission has issued this draft guidance under SENDO 2005. It refers to Part 3, Chapter 3 of SENDO 2005 as amended by:

The Special Educational Needs and Disability (2005 Order) (Amendment) (General Qualifications Bodies) (Alteration of Premises and Enforcement) Regulations (Northern Ireland) 2008.

The draft guidance also takes account of two further sets of regulations that have been made under Part 3, Chapter 3 of SENDO 2005:

- The Special Educational Needs and Disability (General Qualifications Bodies) (Relevant Qualifications, Reasonable Steps and Physical Features) Regulations (Northern Ireland) 2008
  - The Special Educational Needs and Disability (General Qualifications Bodies) (Relevant Qualifications, Reasonable Steps and Physical Features) (Amendment) Regulations (Northern Ireland) 2009.
- 1.9 The regulations protect disabled people from disability discrimination by **general qualification bodies**. Further changes that may have an effect on the duties explained in this draft guidance may be considered during 2010. The Equality Commission has therefore issued this draft guidance on an ongoing

consultative basis until such time that the legislation is finalised and a full consultation on up-dated guidance can take place.

1.10 This draft guidance:

- describes the duties placed on **general qualifications bodies that offer qualifications in Northern Ireland**;
- is intended to illustrate how the law might operate in certain situations;
- provides general guidance on good practice.

1.11 It is **not** an authoritative statement of the law - that is a matter for the courts. Neither is it intended to be a substitute for taking **appropriate legal advice about particular situations**.

1.12 It is **not** a Code of Practice and **does not** impose legal obligations. If bodies follow the draft guidance, it may help them to avoid an adverse decision by a court in proceedings.

1.13 A separate Code of Practice applies to bodies in England, Scotland and Wales.

## About examples in the guidance

1.14 Examples based on everyday situations are given in boxes. They are intended simply to illustrate the principles and concepts used in the legislation and assist understanding of the law. They should **not** be treated as complete or authoritative statements of the law.

1.15 Because their purpose is to show how obligations under the law may or may not be met in different situations, sometimes extreme events are described in the examples. The examples are **not** based on actual events.

1.16 While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. They can often be used to test how the law might

apply in similar circumstances involving different disabilities or situations. The examples attempt to use as many different varieties of disabilities and situations as possible to demonstrate the breadth and scope of law. Examples relating to males or females are given for realism and could, of course, apply to people of either gender.

## Keeping up-to-date with the law

- 1.17 Over time, there may be changes to SENDO 2005 or to other legislation, for example, to the range of people who are considered to be disabled under the law or the range of qualifications deemed to be relevant qualifications. These changes may have an effect on the duties explained in this guidance. Everyone who has responsibilities under SENDO 2005 will need to keep up-to-date with any changes that may affect what the law requires them to do. Future up-dates will be available on the Equality Commission's website [www.equalityni.org](http://www.equalityni.org)

### Further information

- 1.18 SENDO 2005 and regulations made under SENDO 2005 are available on the Equality Commission's website [www.equalityni.org](http://www.equalityni.org)
- 1.19 Copies of SENDO 2005 and regulations made under SENDO 2005 can also be obtained from The Stationery Office (TSO) see Appendix 2 for contact details.

## 2 Discrimination by general qualifications bodies – an overview

### Who has rights?

- 2.1 SENDO 2005 gives protection from discrimination to a ‘disabled’ person within the meaning of the DDA 1995. A disabled person is someone who has a physical or mental impairment which has an effect on his or her ability to carry out normal day-to-day activities. That effect must be:
- substantial (that is, more than minor or trivial), and
  - adverse, and long term (that is, it has lasted or is likely to last for at least a year or for the rest of the life of the person affected).
- 2.2 Physical or mental impairment includes sensory impairment. Hidden impairments are also covered (for example, mental illness or mental health problems, learning disabilities, dyslexia, diabetes and epilepsy). The DDA’s definition treats severe disfigurements as disabilities, although they have no effect on a person’s ability to carry out normal day-to-day activities.
- 2.3 People with cancer, HIV or multiple sclerosis are deemed to be disabled people from the point of diagnosis, regardless of whether or not they have any symptoms.
- 2.4 The definition of disability used in the DDA 1995 is not the same as definitions of disabled persons in other legislation that applies to education in schools and colleges – for example in relation to the special educational needs framework in Northern Ireland. It is possible that some people may be covered by more than one definition, and others may be covered by only one of these definitions. In considering its duties under SENDO 2005, a general qualifications body should not use any definition of ‘disabled person’ which is narrower than that in the DDA 1995. If a general qualifications body is asked to make a disability-related adjustment, it may ask the person requesting it for evidence that the impairment

is one which meets the definition of disability in the DDA 1995. It may be appropriate to do so where the disability is not obvious. However, it is not appropriate to ask for more information about the impairment than is necessary for this purpose. Nor should evidence of disability be asked for where it ought to be obvious that the SENDO 2005 will apply.

## People who have had a disability in the past

- 2.5 People who have had a disability within the meaning of the DDA 1995 in the past are protected from discrimination even if they no longer have the disability.

## More information about the meaning of disability

- 2.6 For a fuller understanding of the concept of disability under the DDA 1995, see Appendix 1 or the Equality Commission's publication 'Definition of Disability - Disability Discrimination Act 1995' which is available from the Equality Commission's website [www.equalityni.org](http://www.equalityni.org). A government publication, 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', provides additional help in understanding the concept of disability and in identifying who is a disabled person. This guidance is available on the Office of the First Minister and Deputy First Minister website [www.ofmdfmni.gov.uk](http://www.ofmdfmni.gov.uk). Where relevant, the Guidance must be taken into account in any legal proceedings.

## Who has responsibilities?

- 2.7 SENDO 2005 places responsibilities on general qualifications bodies which it defines as "any authority or body which can confer a relevant qualification". (Conferring a relevant qualification includes renewal or extension of a qualification, and the authentication of a qualification awarded to him or her by another person).
- 2.8 Qualifications that the 2008 Regulations deem to be relevant general qualifications are:

- AEA's (Advanced Extension Awards)
- Entry level qualifications
- Free standing Maths qualifications
- GCE A and AS levels (General Certificate of Education Advanced level and Advanced Subsidiary levels)
- GCSEs (General Certificate of Secondary Education)
- GNVQs (General National Vocational Qualifications)
- The International Baccalaureate
- Key Skills
- Essential Skills.

This list may be up-dated as new qualifications are developed or these qualifications cease to exist.

2.9 A relevant general qualification cannot also be a professional and trade qualification (and vice-versa). This is the case even if the underlying purpose of an individual undertaking a relevant general qualification is to facilitate entry into a particular profession or trade. For further good practice guidance for trade or professional qualifications, please see the "Disability Code of Practice - Trade Organisations and Qualifications Bodies" which is available on the Equality Commission's website or by contacting the Equality Commission's Enquiry Line 028 90 890 890.

2.10 The Council for the Curriculum, Examinations and Assessment (CCEA), Edexcel, the Assessment and Qualifications Alliance (AQA), Oxford, Cambridge and RSA Examinations (OCR) and the Welsh Joint Education Committee (WJEC) are the main bodies likely to be conferring relevant general qualifications in Northern Ireland.

- 2.11 Qualifications regulators set criteria and objectives for assessment in respect of relevant general qualifications. In addition to being a general qualifications body, the CCEA is also responsible for the regulation of all qualifications in Northern Ireland (except National Vocational Qualifications - NVQs). Current plans are that the regulation of assessment will pass to DENI when the CCEA is dissolved and the Education and Skills Authority is established<sup>1</sup>.
- 2.12 Some educational institutions or other bodies may run their own courses and confer qualifications. They will not have duties under SENDO 2005 because they do not confer relevant general qualifications. They may, however, have separate duties under the DDA 1995 as service providers. Good practice guidance for these bodies can be found in the “Code of Practice: Rights of Access Goods, Facilities, Services and Premises” which is available on the Equality Commission’s website or by contacting the Equality Commission’s Enquiry Line 028 90 890 890.

## Liability for the actions of others

- 2.13 It should be noted that SENDO 2005 treats the discriminatory actions or omissions of agents of a general qualifications body (with the express or implied authority of the general qualifications body in question) as being done by the general qualifications body itself. Furthermore, agents could also be **individually or personally liable** for aiding unlawful discrimination.
- 2.14 A general qualifications body contracts with third parties to organise, supervise and generally undertake delivery of examinations, testing and assessments. It employs invigilators for exams that are delivered at examination centres occupied and controlled by third parties. Many of these centres are also schools and colleges of further education. It is often these centres that inform and steer pupils/students towards studying and trying to secure particular general qualifications.

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<sup>1</sup> At time of publication the timetable for legislation to establish the Education and Skills Authority is uncertain.



- 2.15 Furthermore, communication between the general qualifications body, examination centre and the disabled candidate is usually facilitated through the centre. Consequently, the general qualifications body often relies upon centres to identify and meet the requirements of disabled candidates for adjustments to examinations, with guidance and input from the general qualifications body where required.
- 2.16 Nevertheless, bodies have duties under SENDO 2005 that cannot always be avoided or completely discharged simply through delegation of responsibilities to examination centres. It is very important that both the general qualifications body and centres **work effectively with each other** to ensure that the requirements of disabled candidates or disabled potential candidates are met and that unlawful discrimination is avoided. A failure to do so may mean that **either or both** are liable for unlawful disability discrimination under SENDO 2005.
- 2.17 Schools and colleges have duties themselves under SENDO 2005. Good practice guidance on these duties is contained in the “Disability Discrimination Code of Practice for Schools” and the “Disability Discrimination Code of Practice for Further & Higher Education” which are available on the Equality Commission’s website or by contacting the Equality Commission’s Enquiry Line. It is possible that schools and colleges could be **individually or jointly liable** with the general qualifications body for unlawful disability discrimination occurring in the context of delivering examinations, tests and assessments for relevant general qualifications.
- 2.18 Examination centres that are not schools or colleges are not covered by SENDO 2005 but **have separate duties** under the DDA 1995 as service providers. Good practice guidance for these centres is found in the “Code of Practice: Rights of Access Goods, Facilities, Services and Premises” which is available on the Equality Commission’s website or by contacting the Equality Commission’s Enquiry Line.

## Summary of the duties placed on general qualifications bodies

2.19 It is unlawful for a general qualifications body to discriminate against a disabled person in relation to 'conferring' relevant general qualifications by:

- treating him/her less favourably on the grounds of his/her disability (direct discrimination); and/or
- treating him/her less favourably without justification for a reason relating to his/her disability (disability-related); and/or
- failing to make reasonable adjustments; and/or
- subjecting him/her to disability-related harassment.

2.20 It is also unlawful for a general qualifications body to victimise any person for a reason related to a complaint (whether disabled or not) or to knowingly help another person to do something made unlawful by SENDO 2005 or the DDA 1995.

## Scope of the duties

2.21 It is unlawful for a general qualifications body to discriminate in respect of:

- its arrangements for determining on whom to confer a relevant general qualification;
- the terms on which it confers, renews or extends such a qualification;
- refusing or deliberately omitting to grant a disabled person's application for a qualification; or
- withdrawing a qualification or varying the terms on which the disabled person holds it.

## Disability duties under other legislation

- 2.22 It should be noted that the provisions of SENDO 2005 which relate specifically to general qualifications bodies focus only on the functions of conferring relevant general qualifications. The performance of other functions by such bodies may be subject to **other** provisions of the DDA 1995.
- 2.23 For example, a general qualifications body may also have duties under the DDA 1995 if they are an employer or service provider. Guidance on these functions can be found in the “Disability Code of Practice: Employment and Occupation” and the “Code of Practice: Rights of Access Goods, Facilities, Services and Premises” which are available on the Equality Commission’s website or by contacting the Equality Commission’s Enquiry Line.
- 2.24 In addition to these responsibilities, bodies which are public authorities with functions in Northern Ireland have responsibilities to comply with their statutory duties to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act **and** the ‘disability duties’ under the DDA 1995 (as amended).
- 2.25 **Section 75** duties are explained in separate Equality Commission guidance entitled “Guide to the Statutory Duties - A guide to the implementation of the statutory duties on public authorities arising from Section 75 of the Northern Ireland Act 1998” revised February 2005<sup>2</sup>.
- 2.26 The ‘**disability duties**’ are explained in the Equality Commission’s guidance “A guide for Public Authorities – Promoting positive attitudes towards disabled people and encouraging the participation of disabled people in public life” (2007).
- 2.27 Further information is available on the Equality Commission’s website or by contacting the Equality Commission’s Enquiry Line.

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<sup>2</sup> This guidance will be updated and published in 2010.

### 3 What amounts to direct discrimination?

3.1 Treating a disabled person less favourably amounts to unlawful direct discrimination if:

- it is on the ground of his or her disability;
- the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated; and
- the relevant circumstances, including the abilities of the person with whom the comparison is made, are the same as, or not materially different from, those of the disabled person.

3.2 In general, treatment is on the ground of disability if a disabled person would not have received it but for his or her disability. If less favourable treatment occurs because of a general qualifications body's **generalised** or **stereotypical assumptions** about the disability or its effects, it is **likely** to be direct discrimination.

#### **Example 1**

A general qualifications body has a blanket policy not to allow candidates with epilepsy to take practical chemistry examinations. This is based on an assumption that they present an unacceptable health and safety risk. A candidate with epilepsy is refused the opportunity to take practical chemistry examinations. This is likely to amount to direct discrimination.

3.3 Blanket policies and practices that are operated without considering the individual circumstances of each person are likely to amount to direct discrimination.

#### **Example 2**

A general qualifications body has a practice of not allowing disabled wheelchair users to undertake a GCSE qualification in Dance. This is likely to amount to direct discrimination.

- 3.4 In addition, less favourable treatment which is disability-specific, or which arises from **actions and omissions** based on prejudice about disability (or about a particular type of disability), is also likely to amount to direct discrimination.

**Example 3**

A student has anaemia associated with her HIV and experiences severe tiredness. She has applied to take a GCSE biology exam and has asked for a rest period during the exam. The general qualifications body refuses this adjustment because of prejudice about the applicant's HIV. This is likely to amount to direct discrimination.

- 3.5 Direct discrimination can **never** be justified.
- 3.6 Discrimination, including direct discrimination, can often be unconscious. People may hold prejudices that they do not admit, even to themselves. Thus, people may behave in a discriminatory way whilst believing that they would never do so.
- 3.7 In order to prove he or she has been treated less favourably on the grounds of his or her disability, a disabled person would need to show that a comparator not having his or her disability (an actual or hypothetical person) has, or would have, been treated more favourably in the same, or not materially different, relevant circumstances (including abilities).
- 3.8 Direct discrimination only occurs where the **relevant** circumstances of the comparator, including his or her abilities, are the same as, or not materially different from, those of the disabled person. It is therefore important to focus on those circumstances which are, in fact, relevant to the matter to which the less favourable treatment relates. Although, in some cases, the effects of a disabled person's disability may be relevant, the fact of the **disability itself is not a relevant circumstance** for these purposes. This is because the comparison must be with a person **not** having that particular disability. It is important to identify correctly the relevant circumstances before establishing the correct comparator, and then use the comparison to decide if direct discrimination has occurred. By doing this, one should arrive at the right conclusion.

**Example 4**

A physically disabled student complains that he has been directly discriminated against by not being awarded a qualification in GCSE Maths because he failed the examination, whereas a non-disabled person received the qualification after passing the examination in the same subject.

Someone who does not have the same disability, but who shares the same relevant intellectual/cognitive abilities as the person using a wheelchair in respect of the GCSE Maths qualification, would also have failed.

Therefore, in these relevant circumstances, there has been no direct discrimination.

- 3.9 It does **not** constitute direct discrimination for a general qualifications body to treat a disabled person **more favourably** than another disabled person (for example, by discharging the duty to make a reasonable adjustment) where the relevant circumstances between the two are not the same and are materially different.

**Example 5**

A visually impaired candidate taking an exam for a relevant general qualification is allowed to use speech synthesised computer software to access the examination paper and record his responses to the questions, which he cannot do using the standard, or adapted, paper-based format.

A person with a different impairment, who does not have these difficulties, is not granted the same facility. This second person is not being treated less favourably on the ground of her disability than the visually impaired candidate, because the relevant circumstances (ie ability to access the examination) for the comparison between the two are materially different.

Therefore, in these relevant circumstances, there has been no direct discrimination.

- 3.10 It should be noted that the same comparison is not to be used to determine claims of discrimination by way of a failure to make reasonable adjustments, or for disability-related discrimination.
- 3.11 Treatment of a disabled person is '**on the ground of**' his or her disability if it is caused by the fact that he/she is disabled or has the disability in question. In general, this means that treatment is on the ground of disability if a disabled person would not have received it **but for** his or her disability. However, disability does not have to be the only (or even the main) cause of the treatment complained of – provided that it is an effective cause, determined objectively from all the circumstances.

## 4 What amounts to disability-related discrimination?

- 4.1 Less favourable treatment of a disabled person may be unlawful under SENDO 2005 even if it does not amount to direct discrimination. This will be the case if it amounts to disability-related discrimination instead.
- 4.2 This is treatment of a disabled person by a general qualifications body which amounts to unlawful discrimination because:
- it is for a reason related to the person's disability;
  - the treatment is less favourable than the way in which the general qualifications body treats (or would treat) others to whom that reason does not (or would not) apply; and
  - the general qualifications body cannot show that the treatment is justified.
- 4.3 Disability-related discrimination occurs when the reason for the less favourable treatment **relates to** the disability but **is not** the disability itself.
- 4.4 The key comparison for disability-related discrimination is with someone **to whom the disability-related reason does not or would not apply**.
- 4.5 Unlike treatment which amounts to direct discrimination (which is incapable of justification), a general qualifications body's treatment of a disabled person does not amount to disability-related discrimination if the general qualifications body can show that it is **objectively justified**.
- 4.6 In summary, where disability-related discrimination does occur (and it is not due to the application of a competence standard), such treatment can be justified only if the reason for the treatment is **material** to the circumstances of a particular case and **substantial**.



- 4.7 It should be noted that where a general qualifications body fails to discharge the duty to make **reasonable adjustments** and this leads to less favourable treatment for disability-related reasons (when such treatment otherwise would not have occurred had the duty been discharged), the general qualifications body then cannot justify disability-related discrimination.
- 4.8 Where the application of a **competence standard** results in disability-related less favourable treatment, justification can only be made out where:
- the competence standard is, or would be, applied equally to persons who do not have his or her particular disability; and
  - its application is a proportionate means of achieving a legitimate aim.
- 4.9 At the time of publication of this guidance, it is expected that legislative changes will give general qualifications regulators responsibilities in identifying what part of a general qualification is **not subject** to reasonable adjustment and what adjustments **cannot** be made available for a particular qualification because they would undermine the integrity of the qualification.
- 4.10 The regulators of general qualifications will provide awarding bodies with guidance in defining what adjustments cannot be used. The needs of disabled candidates **will** be taken into account as well as the need to maintain public confidence that the qualification is a reliable indication of the knowledge, skills and understanding of a person to whom it is awarded.
- 4.11 Currently, the tension between maintaining the integrity of the qualification and ensuring that access arrangements for disabled students are considered is covered by the competence standard. When the proposed changes are implemented this will result in the removal of the concept of the competence standard for general qualifications.

## 5 Other forms of discrimination

### Harassment

- 5.1 It is also unlawful for a general qualifications body to harass a disabled person for a disability-related reason and to victimise a person (**whether or not** he or she is disabled).
- 5.2 **Harassment** occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct which has the purpose or effect of:
- violating the disabled person's dignity; or
  - creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.
- 5.3 If the conduct in question was engaged in with the **intention** that it should have either of these effects, then it amounts to harassment, irrespective of its actual effect on the disabled person. In the absence of such intention, however, the conduct will only amount to harassment if it should reasonably be considered as having either of these effects. Regard must be had to all the circumstances in order to determine whether this is the case. Those circumstances include, in particular, the **perception of the disabled person**.

### **Example 6**

A person employed by an examination centre to invigilate an examination for a GCSE qualification refuses to allow a candidate with a severe disfigurement into the examination hall as he believes this candidate's disability would be off-putting for other candidates. This is likely to constitute unlawful direct disability discrimination. The invigilator in question is acting on behalf of the examination centre in relation to delivery of the examination and, therefore, he is likely to be acting as an agent of the general qualifications body who ultimately confer the GCSE qualification. The general qualifications body would be liable under SENDO for the unlawful actions of the invigilator, who, together with the examination centre, would also be individually liable.

### **Example 7**

A general qualifications body offers resources and guidance for exam officers on exam administration. The materials suggest that candidates with dyslexia may be more likely to cheat and abuse the reasonable adjustments that they are offered. This would be harassment, because comments in the materials are hostile, humiliating or offensive to people with dyslexia.

## **Victimisation**

5.4 **Victimisation** is a particular form of discrimination which is made unlawful by SENDO 2005. It is unlawful for one person to treat another ('the victim') less favourably than he/she treats or would treat other people in the same circumstances because the victim has:

- brought, or given evidence or information in connection with, proceedings under SENDO 2005 or the DDA 1995 (whether or not proceedings are later withdrawn); or
- otherwise done anything else under SENDO 2005 or the DDA 1995; or

- alleged someone has contravened SENDO 2005 or the DDA 1995 (whether or not the allegation is later withdrawn); or
- because the person believes or suspects that the victim has done or intends to do any of these things.

### **Example 8**

A disabled pupil previously made a complaint of disability discrimination against a general qualifications body which it took exception to. After taking another examination the pupil was unhappy with the mark obtained and requested that the paper be re-marked. If the body was able to identify this examination paper as belonging to the pupil who had previously complained of disability discrimination, and refused to re-mark it, this is likely to amount to victimisation.

- 5.5 It is not victimisation to treat a person less favourably because that person has made an allegation which was false and not made in good faith.
- 5.6 However, the fact that a person has given evidence on behalf of an applicant in a claim which was unsuccessful does not, of itself, prove that his evidence was false or that it was not given in good faith.
- 5.7 Unlike the other forms of discrimination which are made unlawful by SENDO, victimisation may be claimed by people who are **not** disabled as well as by those who are.

## **Aiding an unlawful act**

- 5.8 A person who knowingly helps another to do something made unlawful by SENDO 2005 will be treated as having done the same kind of unlawful act. This means that, where a general qualifications body is liable for an unlawful act of its employee or agent, that employee or agent will be liable for aiding the unlawful act of the general qualifications body.

5.9 Where an employee of a general qualifications body discriminates against or harasses a disabled person, it is the general qualifications body which will be liable for that unlawful act – unless it can show that it took such steps as were **reasonably practicable** to prevent the unlawful act in question. But the employee who committed the discrimination or harassment will be liable for aiding the unlawful act – and this will be the case even if the general qualifications body is able to show that it took reasonable steps to prevent the act.

## Statutory obligations

5.10 Nothing is made unlawful by SENDO 2005 if it is required by an express statutory obligation. However, it is only in cases where a statutory obligation is specific in its requirements, leaving a general qualifications body with no choice other than to act in a particular way that the provisions of SENDO 2005 may be over-ridden. The provision in Article 46 of Part 3, Chapter 4 of SENDO 2005 is thus of narrow application, and it is likely to permit disability discrimination only in rare circumstances.

## 6 How does the duty to make reasonable adjustments apply to general qualifications bodies?

### Who is the duty owed to?

- 6.1 A general qualifications body has a duty to make **reasonable adjustments** for a disabled applicant or potential applicant for a relevant general qualification. It also has a duty to make reasonable adjustments for disabled people who hold a relevant general qualification conferred by it.

### How does the duty arise?

- 6.2 Under SENDO 2005, the duty upon bodies to make reasonable adjustments arises in three distinct ways.
- 6.3 Firstly, it arises where a provision, criterion or practice (other than a competence standard), applied by or on behalf of a general qualifications body, in relation to **determining on whom a relevant general qualification is to be conferred**, places a disabled person (subject to paragraphs 6.15 – 6.20) at a substantial disadvantage (ie a disadvantage that is more than minor or trivial) in comparison with persons who are not disabled.

#### **Example 9**

A general qualifications body receives an application from a centre wishing to enter disabled candidates for an examination which, if undertaken successfully, will lead to a relevant general qualification. A candidate with a physical impairment affecting her ability to write cannot complete the written examination papers. The general qualifications body allows the centre to provide a scribe for this individual. This is likely to be a reasonable adjustment for the general qualifications body to make.

- 6.4 Secondly, the duty arises where a provision, criterion or practice which is applied by or on behalf of a general qualifications body, **other than one for determining on whom a relevant general qualification is to be conferred**, places a disabled person (who applies for, or holds, a relevant general qualification) at a substantial disadvantage in comparison to non-disabled persons.

**Example 10**

The Joint Council for Qualifications (JCQ) regularly publishes a list of the approved access arrangements. In the light of comments from candidates, centres and organisations representing disabled people, it regularly reviews these arrangements to ensure that the criteria set out are fit for purpose. Awarding bodies ensure that they have arrangements in place for requests for reasonable adjustments that are not covered in the guidance on access arrangements. **This is an example of good practice.**

- 6.5 Thirdly, the duty arises where any **physical feature of premises** occupied by a general qualifications body places a disabled person, who holds or applies for a relevant qualification conferred by the general qualifications body, at a substantial disadvantage in comparison to non-disabled persons. A physical feature may include:
- any feature arising from the design or construction of a building on the premises occupied by the general qualifications body;
  - any feature on any approach to, exit from, or access to such a building;
  - any fixtures, fittings, furnishings, furniture, equipment or materials in or on the premises; and
  - any other physical element or quality of any land comprised in the premises occupied by the general qualifications body.
- 6.6 All these features are covered, whether temporary or permanent. They include steps, stairways, kerbs, exterior surfaces and paving,

parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items. This is not an exhaustive list.

- 6.7 Making reasonable adjustments to premises may be affected by **leases, building regulations and other statutory requirements**. SENDO 2005 does **not** over-ride the need to obtain such consents. If consents for alterations to premises are unreasonably refused or made subject to conditions, the general qualifications body or disabled person affected may refer the matter to a county court. Further information about how building regulations and leases affect the duty to make reasonable adjustments can be found in the Equality Commission's "Code of Practice: Rights of Access, Goods, Facilities, Services and Premises".
- 6.8 Even where consent is not given for altering a physical feature, the general qualifications body still has a duty to consider taking **other steps** to overcome the disadvantage which the feature causes in respect of the disabled person.

#### **Example 11**

A general qualifications body allows a candidate who has a mobility impairment and uses a wheelchair to undertake a Key Skills assessment at home in circumstances where the assessment venue is inaccessible for wheelchair users and suitable alternative locations are not available. This is likely to be a reasonable step for the general qualifications body to take.

### **Deciding what is 'reasonable'**

- 6.9 The following factors may be relevant to general qualifications bodies when they are considering the reasonableness of adjustments:
- **The effectiveness of the step in preventing the disadvantage**



An adjustment that would provide little benefit to the disabled person is unlikely to be reasonable. However, where such an adjustment is one of several adjustments which are effective when combined, it is likely to be reasonable to have to make it.

- **The practicability of the step**

It is more likely to be reasonable to have to take a step which is easy to take than one which is difficult. In some circumstances it may be reasonable to have to take a step even though it is difficult.

- **The financial and other costs of the adjustment and the extent of any disruption caused**

If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as practicability or effectiveness) made it unreasonable. It may of course be reasonable to have to make more expensive adjustments in some circumstances. The costs to be taken into account include those for staff and other resources. The significance of the cost of a step may depend in part on what the general qualifications body might otherwise spend in the circumstances. In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account.

- **The extent of the financial or other resources available to the general qualifications body**

It is more likely to be reasonable for a body with substantial financial resources to have to make an adjustment with a significant cost, than for one with fewer resources. The resources in available practice to the organisation or body as a whole should be taken into account as well as other calls on those resources. It is good practice for general qualifications bodies to have a specific budget for reasonable adjustments – but limitations on the size of any such budget will not affect the existence of the duties owed to disabled people. The reasonableness of an adjustment will depend not only on the resources in available practice for the adjustment but also on all other relevant factors (such as effectiveness and practicability).

- **The availability of financial or other assistance to help make an adjustment**

The availability of outside help may well be a relevant factor. This help may be financial or practical. Disability organisations may be able to provide further information or assistance.

A disabled person is not required to contribute to the cost of a reasonable adjustment. However, if a disabled person has a particular piece of special or adapted equipment which he or she is prepared to use, this might make it reasonable for a general qualifications body to have to take some other step (as well as allowing the use of the equipment).

- **The nature of the activities of the general qualifications body, and the size of its undertaking**

## Can failure to make a reasonable adjustment ever be justified?

- 6.10 A general qualifications body **cannot justify** a failure to comply with a duty to make a reasonable adjustment.
- 6.11 Clearly, however, a general qualifications body will only breach such a duty if the adjustment in question is one which it is **reasonable** for it to have to make. So, where the duty applies, it is the question of 'reasonableness' alone which determines whether the adjustment has to be made.

## Reasonable adjustments and competence standards

- 6.12 When proposed changes to legislation mentioned in paragraphs 4.9 – 4.11 of this guidance are implemented, this will result in the removal of the concept of the competence standard for general qualifications.
- 6.13 It should be noted that at the time of publication of this guidance the duty to make reasonable adjustments **does not apply to competence standards**. However, the process of assessing the competence standard is in most cases subject to the duty.

### **Example 12**

The method of assessing whether candidates have achieved the various grades for A-level History involves scrutiny of essays written by candidates in an examination setting.

The marks assigned in respect of the essays demonstrate various degrees of knowledge, analysis and application of the subject that are the competence standards for this qualification.

The **means** by which essays are written **are not** competence standards. Any provisions, criteria and practices concerning the means by which essays are written, which the general qualifications body applies, are subject to the duty to make reasonable adjustments if they result in substantially disadvantaging a disabled candidate due to his or her disability.

### **Example 13**

The competence to translate French for a GCSE or A-level can be assessed either orally or in writing. The competence standard a candidate must reach is not subject to the duty to make reasonable adjustments, but **the process** by which this is done (ie, oral or written) is subject to the reasonable adjustments duty, where one method, as opposed to the other, places a deaf, speech or visually impaired candidate at a substantial disadvantage.

## **Reasonable adjustments and exemptions from examination components**

6.14 Where it is a general qualifications body's duty to make reasonable adjustments in order to prevent a disabled candidate from experiencing substantial disadvantage in relation to a provision, criterion or practice, it is **always** a reasonable adjustment to exempt the candidate from one or more inaccessible examination and assessment components in the following circumstances:

- the provision, criterion or practice is the requirement for candidates to undertake one or more components of an

examination or assessment in order to determine upon whom a relevant general qualification is conferred;

- the substantial disadvantage in question cannot be eliminated by any **other** reasonable adjustment.

6.15 The Special Educational Needs and Disability (General Qualifications Bodies) (Relevant Qualifications, Reasonable Steps and Physical Features) Regulations (Northern Ireland) 2008 define a “component” in this context as a discrete, assessable element of a qualification that is not certificated separately.

6.16 They make it clear that such an exemption is an **adjustment of last resort** in that it is only to be considered where **no other** reasonable adjustment can be made. It would not, therefore, be reasonable to grant a component exemption where another adjustment could have been made to discharge the duty where it arises that would have allowed a disabled person to access the component(s) in question. The first consideration must be whether the duty to make reasonable adjustment arises and then what reasonable adjustments, other than component exemptions, can be made to discharge the duty, **before** even considering component exemptions.

#### **Example 14**

A GCE Geography specification includes coursework assessment of research skills regarded as **essential** to the subject. The component requires candidates to give a short talk. The talk is assessed for its lucidity, relevance and evidence that the required skills have been deployed.

A disabled candidate who has a communication impairment would find it difficult or impossible to present their subject attainments orally. Before considering a component exemption, the general qualifications body considers what reasonable adjustment might be made. They decide that assessment component could be modified to allow a presentation to be made in various ways, all of which would permit assessment against the criteria specified. This may be a reasonable adjustment for the general qualifications body to make.

- 6.17 Where an exemption has been granted, it is always a reasonable step for the general qualifications body to assess the disabled candidate on those components that he or she has taken, as if they comprise the **entire** examination or assessment.
- 6.18 Since the duty to make reasonable adjustments **does not** apply to competence standards, there is no duty under the reasonable adjustment duties to exempt a disabled candidate from competence standards.
- 6.19 However, the fact that the duty to make reasonable adjustments does not apply to competence standards must not lead to the assumption that general qualifications bodies are under no duty to amend competence standards. The application of a competence standard could, in certain circumstances, constitute disability-related discrimination. Where it does, a general qualifications body is required (together with the regulator, where applicable) to consider whether such a competence standard is a **proportionate means of achieving a legitimate aim** in order to be in a position to justify such discrimination. In practice, this may require **consideration** of granting component exemptions where no other appropriate alternative exists. Otherwise, unlawful disability-related discrimination may occur in the application of competence standards.

## Knowledge of disability and reasonable adjustments

- 6.20 The duty to make reasonable adjustments only applies if the general qualifications body **knows**, or could **reasonably be expected to know**, that the disabled person concerned is, or may be, an applicant for a relevant general qualification.
- 6.21 Likewise, the duty only applies if the general qualifications body **knows or should know that the person has a disability** and is likely to be placed at a substantial disadvantage compared with people who are not disabled.
- 6.22 Although there is no duty on a general qualifications body to make a reasonable adjustment if it does not have the requisite knowledge, it

will be **deemed to have that knowledge** in certain circumstances. Where information is available which should alert a general qualifications body to the circumstances mentioned in paragraphs 6.15 and 6.16, or would be if it were reasonably alert, the general qualifications body cannot simply ignore it.

- 6.23 If disabled people wish to take full advantage of the provisions of SENDO 2005, they should let educational institutions and general qualifications bodies know of their disability and of substantial disadvantages that are likely to arise. The earlier a general qualifications body is told about a disability and its effects, the **more likely** it is to be able to make effective adjustments.
- 6.24 SENDO 2005 does not prevent a disabled person keeping a disability confidential from a general qualifications body (although other legislation may require its disclosure). But unless the general qualifications body could **reasonably** be expected to know about the person's disability anyway, it will **not** be under a duty to make a reasonable adjustment.
- 6.25 If a disabled person expects a general qualifications body to make a reasonable adjustment, he or she will need to provide it with **sufficient information** to carry out that adjustment.

## What is the practical effect of the reasonable adjustment duty for general qualifications bodies?

- 6.26 The duty to make reasonable adjustments is **most likely** to affect arrangements in relation to, for example, taking tests and examinations, and other methods of assessment (see also paragraph 7.5). In order to discharge the duty, where it arises, it is advisable that bodies undertake a **proper assessment** of reasonable steps that could be taken in any given case.

**Example 15**

A woman with mental ill health is informed that a French oral examination has been arranged for 9:15 am. The timing of the examination would substantially disadvantage the woman, because a side effect of her medication is extreme drowsiness for several hours after taking her morning dose which affects her concentration. The general qualifications body agrees to her request to take the examination later in the day. This may be a reasonable adjustment for the general qualifications body to make.

**Example 16**

A man who lip-reads because of his hearing impairment is due to have a practical test as part of his chemistry A level course. The general qualifications body instructs an examination centre to provide a staff member to work with the candidate on a one-to-one basis in a separate room to issue the instructions during the assessment. This is likely to be a reasonable adjustment to make.

**Example 17**

A craft, design and technology relevant general qualification incorporates a lengthy carpentry test consisting of a 3 hour practical examination. A woman with arthritis undertaking this examination wishes to take this test as two sessions of one and a half hours on two consecutive days because taking it over three hours would put her at a disadvantage. The general qualifications body awarding the qualification allows the test to be taken in this way. This could constitute a reasonable adjustment.

**Example 18**

A candidate for a written examination for a relevant general qualification has a visual impairment. The general qualifications body conferring this qualification allows this candidate the option of accessing and taking the examination using specially adapted suitable computer software, with extra time to sit the examination if required, or permits the candidate to use a reader and a scribe. Subject to the individual requirements of this visually impaired candidate, any of these measures may be a reasonable adjustment.

## What advance steps should general qualifications bodies take?

6.27 It is recommended that bodies set up effective systems for ensuring that they obtain the information they need to make adjustments for disabled students who are taking examinations or other assessments in order to obtain a relevant general qualification. For example, such a system could comprise the following steps:

- the general qualifications body issues guidance to educational institutions on seeking timely information from candidates about whether they have disabilities and what reasonable adjustments are required in respect of exams, testing or assessments;
- the educational institution gathers information using the general qualifications body's guidance. It explains to individuals why disclosure to the general qualifications body is necessary, obtains consent and promptly passes the information on to the general qualifications body;
- the general qualifications body provides a single appropriate point of contact within their organisation, for individual students and pupils who may need to discuss their particular requirements further. This ensures that matters are dealt with efficiently and effectively;
- the general qualifications body uses the full information it obtains to consider the range of steps it can take and the reasonableness of each step. It can then decide what reasonable adjustments should be made and, thereafter, notify educational institutions of what adjustments it can allow and how such adjustments will be effectively implemented.



### **Example 19**

A body which confers A level general qualifications asks a college for information about students who may require reasonable adjustments. The college seeks this information from its students. A student with cerebral palsy has difficulty writing, and therefore asks to be allowed to take the examinations using a computer. The college relays this request to the general qualifications body, which gives its consent to this adjustment being made and the college ensures that it can provide him with appropriate facilities to take the examinations. These are likely to be reasonable steps for the general qualifications body and for the college to have to take.

- 6.28 Educational institutions or other organisations often provide education, training or other services (such as facilities for taking examinations or assessments) which lead to the attainment of a relevant general qualification, even though they do not themselves confer the qualification. Such institutions or organisations are likely to have separate duties under SENDO 2005 and Part 3 of the DDA 1995 in respect of the education, training or other services they provide.
- 6.29 In Northern Ireland, although schools are not general qualifications bodies, they contract with many bodies to organise, supervise and undertake the delivery of examinations, testing and assessments. Under SENDO 2005, schools (unlike general qualifications bodies) are not under an immediate duty to remove or alter a physical feature of their premises (see paragraphs 6.5 and 6.6 for examples of physical features). However, as highlighted in paragraphs 2.7 to 2.12 of this guidance, it is possible that schools and colleges could be **individually or jointly liable** with the general qualifications body for unlawful disability discrimination occurring in the context of delivering examinations, tests and assessments for relevant general qualifications. It is therefore recommended that schools make reasonable adjustments to physical features of premises even though they are not required to do so by SENDO 2005.
- 6.30 To ensure full compliance with the legislation, it is advisable for such institutions or organisations to inform general qualifications bodies at an **early stage** about an applicant's disability and its

relevant implications – subject, of course, to obtaining the applicant’s consent first.

- 6.31 In practice, the needs of a disabled person who is taking an examination, test or assessment can only be met fully if the educational institution or organisation and the general qualifications body concerned work together to achieve an appropriate outcome.

**Example 20**

A partially sighted man requests a test paper in large print and a desk light. The general qualifications body provides a large print test paper and the college where the man is sitting the test ensures that it provides a desk light. This is an example of good practice.

**Example 21**

A general qualifications body provides written guidance to schools and colleges on the range of adjustments to exams and assessments that it can authorise. Within this guidance, it makes it clear that applications for reasonable adjustments will be considered on an individual basis, according to the needs of the candidate. In addition, it highlights that further advice can be sought from its dedicated enquiry line and recommends that schools and colleges appoint an appropriately trained person to liaise between the candidate and the general qualifications body in respect of adjustments. This is an example of good practice.

## **7 How can discrimination be avoided?**

- 7.1 There are various actions that bodies can take in order to avoid discriminating against disabled people. By doing so, bodies are not only likely to minimise the incidence of expensive and time-consuming litigation, but will also improve their general performance and the quality of the services they provide.

### **Understanding the social dimension of disability**

- 7.2 The concept of disability discrimination in this guidance reflects an understanding that it is often environmental factors (such as the structure of a building), attitudes, communication or an organisation's practices, rather than limitations arising from a disabled person's disability, which unnecessarily restrict the person's ability to participate fully in society.
- 7.3 This principle underpins the duty to make reasonable adjustments. Understanding this will assist bodies to build upon already existing inclusive practices.
- 7.4 It is as important to consider which aspects of a general qualifications body's activities create difficulties for a disabled person as it is to understand the particular nature of an individual's disability.

### **Recognising the diverse nature of disability**

- 7.5 18% of all people living in private households in Northern Ireland have some degree of disability (the prevalence rate for adults is 21% and 6% for children)<sup>3</sup>. The nature and extent of their disabilities vary widely, as do their requirements for overcoming any difficulties they may face.

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<sup>3</sup> The prevalence of disability and activity limitations amongst adults and children living in private households in Northern Ireland – first report of the Northern Ireland Survey of people with Activity Limitations and Disabilities. Northern Ireland Statistics and Research Agency 2007.

- 7.6 The evidence shows that many of the steps that can be taken to avoid discrimination and promote equality of opportunity cost little or nothing and are easy to implement.
- 7.7 Any given disability will affect different people in different ways, so individual requirements will differ also. Listening carefully to disabled people and finding out what they want will help bodies to meet their obligations by identifying the best way of meeting disabled people's needs. There is a better chance of reaching the best outcome if discussions are held with disabled people at an early stage.
- 7.8 Often, discussing with disabled people what is required to meet their needs will reassure a general qualifications body that suitable adjustments can be carried out cheaply and with very little inconvenience.
- 7.9 There are various ways in which the views of disabled people can be obtained. Bodies may have established formal structures for seeking and representing the views of disabled people. Bodies that are public authorities must involve disabled people in the development of their policies and their equality scheme under Section 75 of the Northern Ireland Act. See the Equality Commission guidance entitled "Guide to the Statutory Duties - A guide to the implementation of the statutory duties on public authorities arising from Section 75 of the Northern Ireland Act 1998" (Revised February 2005). It is recommended that they also consult disabled people about their disability action plan. See the Equality Commission guidance entitled "A guide for Public Authorities – Promoting positive attitudes towards disabled people and encouraging the participation of disabled people in public life" 2007.

## Seeking expert advice

- 7.10 In addition to seeking disabled people's views directly, it may be possible to avoid discrimination by using personal or in-house knowledge and expertise – particularly if information or views are obtained from the disabled person concerned. However, although SENDO 2005 does not specifically require anyone to obtain expert

advice about meeting the needs of disabled people, in practice it may sometimes be necessary to do so in order to comply with the principal duties set out in the legislation. Expert advice might be especially useful if a person is newly disabled or if the effects of a person's disability become more marked. Local and national disability organisations in particular may be able to give useful advice about the needs of disabled people and steps that can be taken to meet those needs.

## Planning ahead

- 7.11 The duties which SENDO 2005 places on bodies are owed to the individual disabled people with whom those bodies have dealings. There is no duty owed to disabled people in general. Nevertheless, it is likely to be cost effective for bodies to **plan ahead**. Considering the needs of a range of disabled people when planning for change is likely to make it easier to implement adjustments for individuals when the need arises.
- 7.12 In addition, the Section 75 disability duties require bodies that are public authorities to have due regard to the need to promote equality of opportunity – including the need to eliminate discrimination. This may require them to adopt a **proactive** approach, anticipating the needs of disabled people.
- 7.13 It is good practice for general qualifications bodies to check whether access audits have been carried out to identify any improvements which can be made to a building to make it more accessible. Access audits should be carried out by suitably qualified people, such as those listed in the National Register of Access Consultants. Websites and intranet sites can also be reviewed to see how accessible they are to disabled people using access software.

### **Example 22**

As part of the approval process for centres to deliver examinations and assessments for general qualifications, a general qualifications body asks a prospective centre to give details of the accessibility of its premises. Where there are concerns with the accessibility of the premises, the prospective centre is advised of the need to identify and make any improvements. The general qualifications body provides a leaflet with further information for centres on where to get advice and assistance in relation to access audits. This is an example of good practice.

## **Designing examinations that offer fair access to all**

7.14 The regulatory authorities in the United Kingdom in partnership with the Joint Council for Qualifications (JCQ), awarding bodies and representatives of disability groups have produced a guidance<sup>4</sup> document entitled 'Fair Access by Design'. The rationale of this document is that designing qualifications that are as accessible as possible would minimise the need to make reasonable adjustments for candidates who have particular requirements at a later date. The guidance reinforces the principles underlying current good practice in making qualifications accessible to everyone. Copies of this guidance are available on:

[www.rewardinglearning.org.uk/regulation/accreditation\\_and\\_monitoring/fair.asp](http://www.rewardinglearning.org.uk/regulation/accreditation_and_monitoring/fair.asp)

or by contacting the Council for the Curriculum, Examinations and Assessment (see Appendix 2 for contact details).

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<sup>4</sup> Fair Access by Design - Guidance for awarding bodies and qualifications regulators on designing inclusive general qualifications

## Implementing anti-discriminatory policies and practices

7.15 Bodies are more likely to comply with their duties under SENDO 2005, and to avoid the risk of legal action being taken against them, if they implement anti-discriminatory policies and practices. These are often referred to as equality policies or diversity policies. Additionally, in the event that legal action is taken, bodies may be asked to demonstrate to a County Court that they have effective policies and procedures in place to minimise the risk of discrimination.

### **Example 23**

As part of the approval process for centres to deliver general qualifications, a general qualifications body advises centres that disabled learners should be accommodated in examination rooms that are appropriate to their needs. For example, a candidate with learning difficulties, who relies on the use of a prompter, is best accommodated in a room with few distractions, away from other candidates.

An inspector working on behalf of the general qualifications body visits a centre to ensure that the examinations are being carried out in accordance with relevant requirements. His checklist includes a check that any disabled candidate has access to suitable accommodation. He reports to the general qualifications body any circumstances where unsuitable accommodation has been provided and it takes up this issue with the centre. This is an example of good practice.

7.16 It is advisable for bodies to take the following steps:

- establish a policy which aims to prevent discrimination against disabled people and which is communicated to all employees and agents of the general qualifications body;
- provide disability awareness and equality training to all employees and office holders (this is a compulsory action within

a Disability Action Plan<sup>5</sup> under the ‘Disability Duties’) . In addition, train employees and agents so that they understand the general qualifications body’s policy on disability, their obligations under SENDO 2005 and the DDA 1995 and the practice of reasonable adjustments;

- ensure that people who wish to have a qualification conferred on them and people who already hold a qualification are informed about the general qualifications body’s disability policy;
- ensure that people within the general qualifications body who have responsibility for liaising with applicants have more in-depth training about the general qualifications body’s duties under SENDO 2005, the DDA 1995 and Section 75 of the Northern Ireland Act;
- inform all employees and agents that conduct which breaches the anti-discrimination policy will not be tolerated, and respond quickly and effectively to any such breaches;
- monitor the implementation and effectiveness of such a policy;
- address acts of disability discrimination by employees as part of disciplinary rules and procedures;
- have complaints and grievance procedures which are easy for disabled people to use and which are designed to resolve issues effectively;
- regularly review the effectiveness of reasonable adjustments made for disabled people in accordance with SENDO 2005 or the DDA 1995, and act on the findings of those reviews;
- keep clear records of decisions taken in respect of each of these matters;

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<sup>5</sup> Promoting positive attitudes towards disabled people and encouraging the participation of disabled people in public life – a guide for Public Authorities. Equality Commission for NI 2007



- regularly review (where relevant with regulators) the requirements for relevant general qualifications to ensure that they are framed in a way which does not unnecessarily exclude disabled people from being able to meet them. This will involve carefully scrutinising each requirement to check that it is not discriminatory. Consideration should be given to whether each requirement is objectively reasonable or, in the case of competence standards, legitimate and proportionate;
- ensure that there are effective systems in place for disabled people to request reasonable adjustments for examinations or practical tests, so that bodies are in a position to respond quickly and effectively to individual requests for specific adjustments. This may well involve establishing procedures for direct contact between disabled people, general qualifications bodies and educational institutions to ensure that all relevant information reaches the bodies. In practice, most requests for adjustments may be received through educational institutions; and
- ensure that disabled people have effective recourse to the general qualifications body's appeal procedures in respect of examinations and assessment results.

## Auditing policies and procedures

7.17 There is no duty upon general qualifications bodies under SENDO 2005 to anticipate the needs of **disabled people in general**. However, it is recommended that they keep all their policies under review, and consider the needs of such disabled people as part of this process. It is advisable for bodies to do this in addition to having a specific policy to prevent discrimination. In addition, the Section 75 disability duties require bodies that are public authorities to have due regard to the need to promote equality of opportunity – including the need to eliminate discrimination. This may require public authorities to adopt a proactive approach, anticipating the needs of disabled people. General qualifications bodies are likely to have policies about matters such as:

- information provision;
- testing, assessment and examination arrangements;
- adjustments to the testing, assessment and examination process;
- standards for qualifications; and
- their relationship with those who are responsible for conducting examinations, testing and assessments (eg schools and colleges).

#### **Example 24**

A general qualifications body is updating its exam timetable. It ensures that the guidance to centres on timetabling refers to the flexibility available to candidates who may require adjustments to the timetable for a reason related to their disability. This is an example of good practice.

## **Monitoring**

7.18 Monitoring of people applying for a qualification or people who hold qualifications is an important way of determining whether anti-discrimination and equality promotion measures taken by a general qualifications body are effective, and ensuring that disability equality is a reality. Information must be gathered sensitively, with appropriately worded questions, and confidentiality must be ensured. Knowing the proportion of disabled people and their status in respect of a general qualifications body can help it determine where practices and policies need to be improved.

7.19 Monitoring will be more effective if disabled people feel comfortable about disclosing information about their disabilities. This is more likely to be the case if bodies explain the purpose of the information gathering, and if applicants believe that the general qualifications body genuinely supports equality for disabled people and is using the information to create positive change.

### **Example 25**

A general qualifications body monitors the number of disabled people who take their qualifications. The general qualifications body finds that disabled people are less likely to choose certain courses. It uses the information to involve disabled people to consider and review the accessibility of the syllabuses/specifications and the nature of the assessment of the qualifications in question. This is an example of good practice.

7.20 Some organisations choose to monitor by broad type of disability to understand the barriers faced by people with different types of impairment.

### **Example 26**

A general qualifications body decides to monitor the number of issues raised by disabled people and groups representing disabled people. It finds that most of these issues relate to a particular examination paper which included materials that created an unnecessary barrier to assessment and one which was not required. It reviews the results of the candidates affected and then requires the subject team to check questions as they are written so that the problem can be avoided in future. This is an example of good practice.

7.21 Gathering information on students is a different process to gathering information from individual disabled students about their reasonable adjustment requirements. The processes should be separate and it should be made clear to students and applicants **why** the information is being collected.

## **Promoting equality**

7.22 In terms of disabled students' attainment levels, there is a limited amount of data available on educational outcomes and the terminology of existing data sets is ambivalent. However, in terms of the population, over two-fifths (41%) of disabled people have no

qualifications, more than twice the proportion of non-disabled people (17%). Disabled people are less qualified than those who are not disabled. For example, 13% of disabled people hold higher qualifications compared with 27% of non-disabled people.<sup>6</sup>

7.23 If bodies are to avoid discriminating and address these educational inequalities, they need to be aware of the effects their decisions and actions (and those of their agents and employees) may have on disabled people.

7.24 In order to enhance disabled people's opportunities for gaining, retaining and progressing in employment, bodies need to consider equality of opportunity for disabled people from two perspectives. Firstly, bodies should ensure that disabled people have equal access to opportunities for gaining and retaining a general qualification. Secondly, it is good practice for a general qualifications body to seek to promote equality for disabled people within the employment/education sector in which it operates.

**Example 27**

A general qualifications body advises schools and colleges which can enter candidates for its qualifications about the variety of ways in which it delivers the course and its assessment in ways which meet the particular needs of disabled people with a variety of impairments. This is an example of good practice.

7.25 Bodies should be ensuring that any marketing activity which features students or prospective students, such as advertising a course, represents disabled students in a positive manner. As well as contributing to the overall goal of equality of opportunity, promoting such attitudes will ensure that bodies demonstrate that they are aware of the needs of disabled people. This will, in turn, generate broader representation of disabled people in terms of the activities of the bodies, and will also encourage participation of

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<sup>6</sup> DETINI (2007) *Labour Force Survey (April-June 2007)*.

disabled people in their monitoring activities in particular. Bodies that are public authorities are required by the DDA 1995 disability duties to have due regard to the need to promote positive attitudes towards disabled people.

7.26 Bodies that are public authorities should refer to Equality Commission guidance on their Section 75 statutory duties<sup>7</sup> and their DDA 1995 disability duties<sup>8</sup>. These publications can be downloaded from the Equality Commission's website [www.equalityni.org](http://www.equalityni.org) or obtained in hard copy by contacting our Enquiry Line on 028 90 890 890.

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<sup>7</sup> Section 75 of the Northern Ireland Act 1998 – Guidance to the Statutory Duties.

<sup>8</sup> Promoting positive attitudes towards disabled people and encouraging the participation of disabled people in public life - A guide for Public Authorities.

## 8 Resolving disputes

### Resolving disputes informally

- 8.1 Complainants may want to raise complaints directly with general qualifications bodies before resorting to legal proceedings. Many bodies will have complaints procedures which aid the speedy resolution of disputes.
- 8.2 Although SENDO 2005 does not require general qualifications bodies to resolve disputes internally, it is good practice wherever possible to resolve problems as they arise. This should be done in a non-discriminatory way to comply with the requirements of the Order.
- 8.3 General qualifications bodies must make reasonable adjustments to any internal complaints procedures to prevent a disabled person from being placed at a substantial disadvantage in comparison with people who are not disabled. Failure to do so will itself amount to a breach of SENDO 2005.
- 8.4 So, for example, it is likely to be a reasonable adjustment for a general qualifications body to allow a disabled person who has communication difficulties some assistance to make a written statement of a complaint he or she wishes to make (such as providing assistance via a neutral party). Depending on the circumstances, it may be reasonable to allow a disabled person with learning disabilities to be accompanied to a meeting by a family member or friend, or to send written communications to a blind or visually impaired person in a format which is accessible to him or her.
- 8.5 Although, as stated above, it is good practice to try to resolve disputes internally wherever possible, there may be exceptional occasions where this will not be practical or appropriate.

## Conciliation

- 8.6 The Equality Commission has set up a free and independent conciliation service to promote the settlement of disputes in relation to disability discrimination. For further information on this service see the Equality Commission's leaflet entitled "Disability discrimination - a new way to resolve complaints through conciliation" 2008, available to download from the Equality Commission's website [www.equalityni.org](http://www.equalityni.org) or in hard copy by contacting the Equality Commission Enquiry Line on 028 90 890 890.
- 8.7 There is no requirement by law to enter into this conciliation process. Disputes may be referred to the conciliation service only if both the person claiming disability discrimination and the general qualifications body concerned agree to this. The conciliation service does not have power to impose a settlement on either party.
- 8.8 Agreeing to participate in the conciliation process does not prevent a complainant from pursuing a case through the County Court. Complainants have a right to proceed directly to the County Court to make a complaint of unlawful disability discrimination against a general qualifications body.
- 8.9 A claim of unlawful disability discrimination must be made to the County Court within **6 months** of the date of the alleged disability discrimination. This time limit is extended by **2 months** if the dispute is referred to conciliation before the expiry of the 6 month period.
- 8.10 No information disclosed to a conciliator during the conciliation process may be used in any subsequent court case without the permission of the party who provided the information.

## Making a complaint

- 8.11 A person who believes that a general qualifications body has discriminated against him or her or subjected him or her to

harassment, may bring civil proceedings. Those proceedings take place in a County Court.

8.12 Similar proceedings may also be brought against a person who has aided someone else to commit an unlawful act.

8.13 A claim of unlawful disability discrimination must be lodged within **6 months** of the alleged discrimination. Where the discrimination takes place over a period of time, the 6 months may begin at the date of the last (or most recent) discriminatory act. A court has the discretion in certain circumstances to allow a case which would otherwise be outside the 6 month time limit to proceed, where it would be just and reasonable to do so.

8.14 If a complaint cannot be resolved and it is heard and determined by a court, the court may:

- make a declaration of discrimination
- order the defendant to pay the claimant compensation, including compensation for injury to feelings; and
- impose an injunction requiring a general qualifications body to take positive action or to prevent it from repeating any discriminatory act in the future.



# APPENDIX 1

## Definition of a disabled person

This appendix is included to aid understanding about who is covered by the DDA 1995 (as amended) and should provide sufficient information on the definition of disability to cover the large majority of cases. The definition of disability in the Act is designed to cover only people who would generally be considered to be disabled. A Government publication 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' is also available from The Stationery Office.

Disability is defined as:

A **physical or mental impairment** which has a **substantial** and **long-term adverse effect** on a person's ability to carry out **normal day-to-day activities**.

### Explanation of Impairment

The definition covers physical and mental impairments. These include:

- physical impairments affecting the senses such as sight and hearing, heart disease, diabetes, epilepsy
- mental impairments including learning disabilities and mental ill health.

### Explanation of Substantial

For an effect to be substantial, it must be more than minor. The following are examples that are likely to be considered substantial:

- inability to see moving traffic clearly enough to cross a road safely
- inability to turn taps or knobs
- inability to remember and relay a simple message correctly.

## **Explanation of Long-term**

These are effects that:

- have lasted at least 12 months; or
- are likely to last at least 12 months; or
- are likely to last for the rest of the life of the person affected.

Long-term effects include those which are likely to recur. For example, an effect will be considered to be long-term if it is likely both to recur, and to do so at least once beyond the 12-month period following the first occurrence.

## **Explanation of Day-to-day activities**

Day-to-day activities are normal activities carried out by most people on a regular basis, and must involve one of the following broad categories:

- mobility - moving from place to place
- manual dexterity - for example, use of the hands, wrists or fingers
- physical co-ordination
- continence
- the ability to lift, carry or move ordinary objects
- speech, hearing or eyesight
- memory, or ability to concentrate, learn or understand
- ability to recognise physical danger.

The Government has issued guidance, under the DDA 1995, about whether an impairment has a substantial and long-term effect. This guidance does not in itself impose legal obligations on an employer or service provider, but a tribunal or court must, when considering a complaint about discrimination, take into account any of the guidance which appears to be relevant.

## **Particular cases or conditions**

### **Severe disfigurements**

The DDA's definition treats severe disfigurements as disabilities, although they have no effect on a person's ability to carry out normal day-to-day activities.

If, however, the disfigurement consists of a tattoo which has not been removed, or non-medical body piercing, or an object attached through such a piercing, regulations have the effect of ensuring that this would not be treated as a disability.

### **Impairments helped by treatment or artificial aids**

Medication or equipment (such as an artificial limb) which helps an impairment, is not taken into account when considering whether an impairment has a substantial effect. For example, a person who wears a hearing aid to improve their hearing is considered to have the hearing loss that would exist without the use of the aid.

For example, a person who manages their diabetes with insulin is considered to have the diabetes that would exist without the insulin treatment.

An exception is when people wear glasses or contact lenses - it is the effect on the person's vision, while wearing their glasses or contact lenses that is considered.

If, however, the treatment is likely to cure the impairment, this should be taken into account in assessing whether the impairment is long-term.

### **Progressive conditions**

The DDA covers progressive conditions where impairments are likely to become substantial. Examples of progressive conditions include:

- Cystic fibrosis
- Alzheimer's disease
- Huntington's chorea
- Muscular dystrophy
- Motor neuron disease.

The DDA covers people with these conditions from the moment that there is a noticeable effect on normal day-to-day activities, however slight, not when there is a substantial effect as with conditions that are not progressive.

### **Cancer, HIV and multiple sclerosis**

People with cancer, HIV or multiple sclerosis are deemed to be disabled people from the point of diagnosis, regardless of whether or not they have any symptoms.

### **Recurring or fluctuating conditions**

Conditions such as arthritis where the effect can sometimes be less than substantial are treated as continuing to have a substantial adverse effect so long as the effect is likely to reoccur.

### **Genetic predispositions**

The DDA does not cover people with a gene that causes a disability unless they develop the disability.

For example, people with the gene that causes Huntington's chorea are not covered if they do not have the condition. People are covered as soon as the first effects on normal day-to-day activities appear.

### **Past disabilities**

The definition covers people who have had a disability in the past. If a person once had a disability which is covered by the DDA, they are still protected even if they have now recovered. This applies even if they recovered before the DDA came into force.

### **Babies and children under the age of six**

It may be difficult to see the effects of an impairment on a baby or young child and thus determine if he or she is disabled. However, a young child with an impairment will be treated as disabled under the DDA if someone over the age of six with such an impairment would normally be covered by the DDA.

### **Impairments which are excluded**

The following conditions are not to be treated as impairments for the purposes of the DDA:

- addiction to or dependency on alcohol, nicotine or any other substance (unless the addiction resulted from the substance being medically prescribed)
- seasonal allergic rhinitis (e.g. hayfever) except where it aggravates the effect of another condition

- a tendency to set fires
- a tendency to steal
- a tendency to physical or sexual abuse of others
- exhibitionism

**For more information, please contact the Equality Commission's Enquiry Line – Telephone 028 90 890 890**

## APPENDIX 2

### Useful contacts

Department of Education  
Rathgael House  
43 Balloo Road  
Bangor  
BT19 7PR  
Telephone: 028 9127 9279  
Textphone: 028 9127 9472  
Fax: 028 9127 9100  
e-mail: [mail@deni.gov.uk](mailto:mail@deni.gov.uk)  
Website: [deni.gov.uk](http://deni.gov.uk)

Department for Employment and Learning  
Adelaide House  
39 – 49 Adelaide Street  
Belfast  
BT2 8FD  
Telephone: 028 9025 7777  
Fax: 028 9025 7778  
Website: [delni.gov.uk](http://delni.gov.uk)

Council for the Curriculum, Examinations and Assessment,  
29 Clarendon Road,  
Clarendon Dock,  
Belfast  
BT1 3BG  
Telephone: 028 9026 1200  
Textphone: 028 9024 2063  
Email: [info@ccea.org.uk](mailto:info@ccea.org.uk)  
Website: [www.ccea.org.uk](http://www.ccea.org.uk)

AQA  
Stag Hill House,  
Guildford,  
Surrey  
GU2 7XJ  
Telephone: 01483 506 506  
[www.aqa.org.uk](http://www.aqa.org.uk)

Edexcel,  
190 High Holborn,  
London  
WC1V 7BH  
Website: [www.exexcel.com](http://www.exexcel.com)

OCR  
Riverwood House,  
Newforge Lane,  
Belfast  
BT9 5NW  
Telephone: 028 9066 9797  
Email: [ocr-ireland@ocr.org.uk](mailto:ocr-ireland@ocr.org.uk)  
Website: [www.ocr.org.uk](http://www.ocr.org.uk)

WJEC  
245 Western Avenue  
Cardiff  
CF5 2YX  
Telephone: 029 2026 5000  
Email: [info@wjec.co.uk](mailto:info@wjec.co.uk)  
Website: [www.wjec.co.uk](http://www.wjec.co.uk)

The Stationery Office (TSO)  
16 Arthur Street  
Belfast  
BT1 4GD  
Telephone: 028 9023 8451  
Fax: 028 9023 5401  
E-mail: [enquiries@tsoireland.com](mailto:enquiries@tsoireland.com)  
Website: [www.tso.co.uk](http://www.tso.co.uk)





# How can we help?

The Equality Commission for Northern Ireland can give advice and information on the Special Educational Needs and Disability (Northern Ireland) Order 2005 (SENDO).

We can also provide training on request. For further information please contact:

Telephone Enquiry Line: 028 90 890 890

Textphone: 028 90 500 589

Fax: 028 90 248 687

You can also use Typetalk to contact us.

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

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

## **Equality Commission for Northern Ireland**

Equality House  
7-9 Shaftesbury Square  
Belfast  
BT2 7DP

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