



Submission of evidence to the Committee for Health, Social Services and Public Safety

Autism Bill

Introduction

1. The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998 and the disability duties under the Disability Discrimination Act 1995.
2. In addition, the Equality Commission, along with the Northern Ireland Human Rights Commission, has been designated under the U.N. Convention on the Rights of Persons with Disabilities ('UNCRPD') as the independent mechanism tasked with promoting, protecting and monitoring implementation of the UNCRPD in Northern Ireland.
3. The Equality Commission welcomes the opportunity to submit evidence to the Health, Social Services & Public Safety Committee ('the Committee') in relation to the Autism Bill. In responding to the Committee's invitation to submit evidence, the Equality Commission draws on the experience it has gained in advising complainants (including complainants with autism) in relation to disability discrimination under the Disability Discrimination Act 1995 (DDA 1995) and Special Educational Needs and Disability (NI) Order 2005 (SENDO 2005) .

4. We note that the Bill proposes to amend the DDA 1995 with the aim of resolving any ambiguity as to whether the term 'disability' applies to autistic spectrum conditions, and to require the preparation and implementation of an autism strategy. Our comments in relation to both of these proposals are set out below.

Amendments to the Disability Discrimination Act 1995.

5. Clause 1 of the Autism Bill proposes amendments to the DDA 1995 in relation to the definition of disability. In particular, whereas the current definition of 'disability' makes reference to having 'a physical or mental impairment', the Bill proposes to amend the definition to include reference to '**social impairments**', which are to be interpreted as including **communication difficulties**.
6. The current definition of disability within the DDA 1995 defines a disabled person as a person with a physical or mental impairment which has a substantial and long term adverse affect on his/her ability to carry out normal day-to-day activities. The DDA 1995 also states that an impairment is to be taken to affect the ability of a person to carry out normal day-to-day activities **only** if it affects that person in respect of one or more of the following:-
 - mobility;
 - manual dexterity;
 - physical co-ordination;
 - incontinence;
 - ability to lift, carry or otherwise move every day objects;
 - speech, hearing or eyesight;
 - memory or ability to concentrate, learn or understand; or
 - perception of the risk of physical danger.
7. The above list is referred to as a list of 'capacities'.
8. Clause 1 of the Autism Bill proposes to extend the list of capacities within the definition of 'normal day-to-day activities' in Schedule 1 so that a condition which has a substantial and long term adverse affect on someone's ability to **take part in**

normal social interaction or to form social relationships can constitute a 'disability'.

9. These amendments have been proposed to the definition of disability in order to clarify that the DDA 1995 adequately embraces autistic spectrum conditions.
10. The Equality Commission recognises that people with some mental health conditions may be excluded from the definition of disability within the DDA 1995. In 2003, the Commission made a series of recommendations for change to the DDA 1995 in '*Enabled?*'¹ which included recommendations in relation to the definition of disability.
11. In *Enabled?*, the Equality Commission recommended that the list of normal day-to-day activities should be revised to include **'the ability to communicate and interact with others'** and to ensure that self-harming behaviour is covered. In *Enabled?*, the Commission cited examples of people with mental health conditions (not autism) who had been deemed by courts and tribunals not to fall within the definition of disability. These conditions included Post Traumatic Stress Disorder, depression and Bulimia Nervosa.
12. From its experience of dealing with complaints of disability discrimination both under the DDA 1995 and SENDO 2005, the Commission is not aware that the definition of disability within the DDA 1995 has caused particular difficulties for people with autism accessing their rights under the legislation. The Commission has supported a number of complainants (both adults and children) with autism, and it has not been the Commission's experience that Respondents in those cases have alleged that the complainants have failed to meet the definition of disability within the DDA 1995.
13. In addition, it will be noted that the Office of the First Minister and Deputy First Minister (OFMdfM) has issued *Guidance on matters to be taken into account in determining questions*

¹ *Enabled? Recommendations for change to the Disability Discrimination Act 1995, 2003*, ECNI
<http://www.equalityni.org/archive/word/Enabledfinalpublished260603.doc>

relating to the definition of disability,² which concerns the definition of disability within the DDA 1995, and which is also used in Part III of the SENDO 2005.

14. The DDA 1995 requires that courts and tribunals must take into account any aspect of this Guidance which appears to be relevant when deciding whether or not a person is disabled under the DDA 1995.
15. As made clear in the examples cited in the OFMdfM Guidance, autism can affect one or more capacities listed in the definition; including speech, hearing or eyesight; memory or ability to concentrate, learn or understand; or perception of the risk of physical danger.
16. In particular, the OFMdfM Guidance includes under the section which gives examples on the capacity 'memory or ability to concentrate, learn or understand', an example of a man with Asperger's syndrome, a form of autism, who has difficulty in communicating with people.
17. The Guidance makes it clear that 'the ability to learn or understand also covers the perception of what is meant by certain types of verbal communication such as the use of humour or sarcasm as well as non-verbal communication such as body language and facial expressions'.
18. The OFMdfM Guidance also includes an example of a six year old child who has been diagnosed as having autism, who has difficulty communicating through speech and in recognising when someone is happy or sad. It confirms that this amounts to a substantial adverse effect on his ability to carry out normal day-to-day activities, even for such a young child. It states that the capacities of mobility, speech and perception of risk are all affected.
19. It will also be noted that the Equality Commission's *Code of Practice for Schools*³ on SENDO 2005 includes an example of a pupil with Asperger's syndrome and a pupil with autism.

² *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, OFMdfM, 2008, www.ofmdfmi.gov.uk.

³ *Disability Discrimination Code of Practice for Schools*, ECNI, 2006, [http://www.equalityni.org/archive/pdf/FSchoolsCOP\(SENDO\).pdf](http://www.equalityni.org/archive/pdf/FSchoolsCOP(SENDO).pdf)

Changes in Great Britain

20. The Committee will be aware that changes have been made in Great Britain to the definition of disability under the Equality Act 2010. In particular, the definition of disability in the Equality Act 2010 amended the definition of disability by **removing the list of capacities**; thereby making it easier for disabled people to fall within the definition of disability.
21. It did not, as proposed by the Autism Bill, amend the definition so as to clarify that people with autism were covered by the disability legislation.
22. The definition of disability (as amended) within the Equality Act 2010 came into force on 1 October 2010. It will be noted that the Office of Disability Issues in Great Britain undertook a consultation on the **Guidance** on the definition of disability under the Equality Act 2010 (as oppose to the definition of 'disability'), which finished at the end of October 2010⁴.
23. The draft Guidance on the definition of disability under the Equality Act specifically states that a disability can arise from a wide range of impairments which can be 'developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia'. It also includes examples of a child with autism, and a man with Asperger's syndrome. It further includes, in the Appendix, an illustrative and non-exhaustive list of factors which, if they are experienced by a disabled person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These factors include **'significant difficulty taking part in normal social interactions or forming social relationships'**.

⁴ Office for Disability Issues, *Equality Act 2010 Guidance – Guidance on matters to be taken into account in determining questions relating to the definition of disability*.
<http://www.officefordisability.gov.uk/docs/wor/new/ea-guide.pdf>

The way forward

24. As highlighted above, the Equality Commission has previously recommended, in recognition of the fact that people with some mental health conditions (though not specifically autism) may be excluded from the definition of disability within in the DDA 1995, a change to the definition of disability so normal day-to-day activities should be revised to include **'the ability to communicate and interact with others'**.
25. In line with changes that have occurred in Great Britain (GB) under the Equality Act 2010, rather than adding to the current list of capacities, as advocated in the Autism Bill, one alternative approach for consideration is the **removal of the list of capacities in total** from the definition of 'disability' within the DDA 1995.
26. It will be noted that the UK Government in its response to the consultation on the Equality Bill⁵ outlined its reasons behind its proposal to remove the list of capacities. In particular, it stated that its decision was based on evidence indicating that the list served little or no purpose in helping to establish whether someone was disabled in the eyes of the law, and was an unnecessary extra barrier to disabled people taking cases in courts and tribunals.
27. It further indicated that the list of capacities had led to some confusion, and had frequently been misinterpreted as a list of day-to-day activities. The Government also indicated that there was evidence that it can be harder for people with a mental health condition to demonstrate their impairment's effect in one of these capacities; although the Government recognised that the revised statutory guidance on the definition of disability had alleviated this difficulty.
28. In deciding to repeal the list of capacities, the Government stated that removing the list of capacities also simplified the definition of disability. The Government stressed, in the event that the list of capacities was removed, that there was a need for **clear guidance** on the definition of disability in order to

⁵ The Equality Bill-Government Response to the Consultation, Cm7454, July 2008, <http://www.official-documents.gov.uk/document/cm74/7454/7454.pdf>

enable people to understand the law and their rights and responsibilities.

29. It is of note that the Joint Committee on Human Rights in its report on the Equality Bill also welcomed the deletion of the list of 'capacities' from the definition of disability which it stated will 'clarify the law and make it easier for claimants to demonstrate that they are 'disabled' for the purposes of the legislation'.⁶
30. In addition, as an alternative to incremental changes to the definition, in line with its previous recommendation in *Enabled?*, the Commission recommends a **fundamental review** of the definition of disability in order to reflect the social model of disability. This is particularly relevant in light of the fact that the **United Nations Convention on the Rights of People with Disabilities** (UNCRPD), which has been ratified by the UK Government, contains a non-exhaustive definition of disability which is based on the 'social model' of disability.
31. The Committee will note that the Joint Committee on Human Rights in its report on the Equality Bill indicated that there were 'strong arguments for adopting a definition of disability which is more in tune with the 'social model' of disability set out in the UN Convention on the Rights of Persons with Disabilities, rather than one based on medical conditions.' It was of the view that there was 'little risk of this change leading to abuse or trivialisation of the status of being disabled.' In particular, it recommended that the reference to 'long term' impairment should be omitted from the current definition of disability. This change is in line with the Equality Commission's recommendations in *Enabled?*. However, the Committee will also note that these recommendations of the Joint Committee on Human Rights were not taken forward in the Equality Act 2010.

Reform of the DDA 1995

32. On a more general basis, the Equality Commission is of the view that greater protection for autistic children and adults (as

⁶ Joint Committee on Human Rights, Legislative scrutiny: Equality Bill, November 2009, <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/169/169.pdf>

well as other disabled people) could be more effectively secured by a major reform of the DDA 1995 and SENDO 2005.

33. Prior to the implementation of the Equality Act 2010 in GB, the DDA 1995 was a UK-wide Act of Parliament (with some modifications in relation to its application in Northern Ireland). In general, prior to the introduction of the Equality Act 2010, Northern Ireland disability equality law largely reflected GB law. However, since the implementation of the majority of the Act's provisions relating to disability on 1 October 2010, there are now significant differences between GB and Northern Ireland disability equality law.
34. Importantly, these changes will mean that disabled people in Northern Ireland will have less protection against unlawful disability discrimination, harassment, victimisation and a failure to make reasonable adjustments than those in GB.
35. The Committee will be aware that the Equality Commission has supported a number of cases in order to clarify disability equality law including the case of *Elizabeth Boyle v SCA Packaging Ltd*, which sought to clarify the definition of disability within the DDA 1995.⁷
36. The changes which have occurred in GB under the Equality Act 2010 will mean that there will be increased inconsistency and differences not only as regards the legislation but also in relation to emerging case law between the two jurisdictions.
37. The Equality Commission has formally submitted to Junior Ministers in OFMdFM a series of proposals for urgent legislative reform; including reform of the DDA 1995 and SENDO 2005. A copy of the Equality Commission's detailed proposals paper submitted to the Junior Ministers is available on the Equality Commission's website.⁸

⁷ *SCA Packaging Ltd v Elizabeth Boyle* [2009] UKHL 37

⁸ The ECNI proposals paper is available at

<http://www.equalityni.org/sections/default.asp?secid=5&cms=The+Law+Legislative+Reform&cmsid=4+285&id=285>

Autism Strategy

38. Clause II of the Autism Bill proposes placing a requirement on the Department of Health, Social Services and Public Safety (DHSSPS) to prepare and publish a strategy on autism within two years of the passing of the Act and following consultation with the other Northern Ireland Departments.
39. Whilst recognising the need for further action across all Northern Ireland Departments to ensure that effective services for people with autism are delivered, the Commission is not convinced that there is a clear need for the DHSSPS to be placed under a **duty** to prepare a strategy on autism.
40. The Committee will be aware that the Department and other designated public authorities, under Section 75 of the Northern Ireland Act 1998, are already under a duty to consider the need to promote equality of opportunity for disabled and non-disabled people when carrying out their functions. Therefore, the Department and other public authorities must consider what steps it can take to promote equality of opportunity for all disabled people, including people with autism.
41. If people with autism are experiencing barriers in terms of accessing services or in terms of their specific needs not being met, there is a duty on designated public authorities to consider steps to tackle these barriers or meet specific needs. In line with the Commission's revised Section 75 Guide, the Commission has recommended that public authorities carry out an audit of inequalities across all Section 75 grounds (including disability) and that public authorities set out in an action plan, with specific actions, time scales and performance indicators, measures that they intend to take to address key inequalities (including key inequalities affecting disabled people).
42. The Committee will be further aware that the UK Government has ratified the United Nations Convention on the Rights of People with Disabilities (UNCRPD). It is therefore important that Government Departments and all other public authorities in Northern Ireland consider what steps they need to take as regards disabled people (including people with autism) in

order to ensure that the obligations placed on the UK Government under the UNCRPD are fully complied with.

42. We note that the Bill proposes that the Autism Strategy must set out steps the DHSSPS proposes to take to ensure that all Northern Ireland Civil Service staff who deal directly with the public are given autism awareness training.
43. Under the DDA 1995, public authorities in Northern Ireland are under a duty to have due regard to the need to promote positive attitudes towards disabled people and to encourage the participation of disabled people in public life ('disability duties'). In pursuance of the disability duties, public authorities must produce a disability action plan in line with the Guidance on the disability duties published by the Equality Commission.⁹ The Guidance makes it clear that there is one measure which a public authority must outline in its disability action plan; namely, the steps it intends to take in order to ensure that training and guidance on the disability equality legislation and disability awareness is provided to staff and office holders. This training and guidance covers all forms of disability.
44. Finally, we support a cross- departmental action plan, with clear actions, timescales, performance indicators, that delivers tangible outcomes for disabled people, which is aimed at addressing the key recommendations set out in the OFMdFM *Report of the Promoting Social Inclusion Working Group on Disability*.¹⁰

Conclusion

45. To conclude, it is clear that urgent changes are required to the definition of disability within the DDA 1995 (as well as other parts of the disability legislation) in order to ensure that disabled people have access to the law and have effective protection against discrimination. The amendment proposed in the Bill is not sufficient.

⁹ *A Guide for Public Authorities- Promoting Positive Attitudes Towards Disabled People and Encouraging the Participation of Disabled People in Public Life*, ECNI, 2007
<http://www.equalityni.org/archive/pdf/ECNIDisPlan.pdf>

¹⁰ *Report of the Promoting Social Inclusion Working Group on Disability*, www.ofmdfmni.gov.uk, December 2009

46. There is also a need for cross-departmental action to ensure effective services for people with autism. It is also essential that all public authorities in Northern Ireland comply with their obligations as regards disabled people under Section 75 of the Northern Ireland Act 1995, the DDA 1995, as well as ensuring that the Government complies with its obligations under the UNCRPD. The amendment proposed in the Bill is not sufficient.