



DISABILITY: CURRENT PROTECTION, COMPARATIVE ANALYSES AND OPTIONS FOR ENHANCED PROTECTION

Research and Library Service

This Research Paper has been prepared to assist the Committee of the Office of the First Minister and deputy First Minister in its consideration of legislation and protection for people with disabilities and the areas where protection could be enhanced. The paper outlines the current protection offered to people with disabilities in Northern Ireland and discusses the definition of disability, with comparative analysis from GB, Ireland, Europe and internationally. The paper also considers disability within a human rights framework. Finally, the paper considers the notion of a specific office for people with disabilities, again with comparative information, and other areas for enhanced protection.

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SUMMARY OF KEY POINTS

- Defining disability is a crucial part of addressing disability issues
- Disability lobby groups favour the social model of disability, by which a person is disabled because of the societal factors around them (society is the problem)
- Legislation has tended to follow the medical model, which defines a disabled person according to their impairment (the impairment is the problem)
- Disability is unique in anti-discrimination law in that the concepts of less favourable treatment and reasonable adjustment are at its core
- Disability discrimination law is also unique because of the justification principle, which means that it remains legal for disabled people to be less favourably treated than others
- Disability lobby groups consider addressing disability discrimination from a human rights perspective will result in more substantive equality
- Positive actions can help to mainstream disability to become part of the universal human experience
- There are options for enhanced protection in a range of areas, including:
 - Establishing a commissioner for people with disabilities
 - Extending the current definition of disability to other categories
 - Amalgamating complaints mechanisms in cases of disability discrimination in schools and further and higher education
 - Introducing employment quotas for people with disabilities
 - Introducing a statutory requirement for public bodies to appoint access officers

CONTENTS

Section 1: Defining disability	1
1.1 Introduction	1
1.2 Medical and social models of disability	1
1.3 A Note on Language	2
1.4 Definitions	3
1.5 European definitions	4
1.6 International definitions	6
Section 2: Legislative protection for people with disabilities in Northern Ireland.....	8
2.1 Introduction	8
2.2 Employment	9
2.3 Goods, facilities and services	10
2.4 Property and premises	11
2.5 Education	12
2.6 Transport.....	12
2.7 Criminal Justice.....	13
2.8 District councils	13
2.9 Public authorities.....	13
Section 3: Timetable of entry into force of key disability discrimination legislation relating to Northern Ireland	16
Section 4: Disability Discrimination and Human Rights	18
4.1 Less favourable treatment and reasonable adjustment	18
4.2 The European Convention on Human Rights (ECHR).....	20
4.3 Case law	20
4.4 The United Nations	22
Section 5: Complaint Mechanisms and Means of Redress.....	23
5.1 Introduction	23
5.2 Northern Ireland	23
5.3 Great Britain.....	25
5.4 Ireland	25
5.5 International bodies.....	28
Section 6: Options for enhanced protection	31
6.1 Commissioner for people with disabilities	31
6.2 Extending the current definition of disability.....	33
6.3 Education	34
6.4 introduction of new statutory requirements	34
6.5 Employment	35
Appendix 1:	38
United Nations Convention on the Rights of Persons with Disabilities	38
Appendix 2:	39
Health and Disability Commissioner for New Zealand – Code of Rights	39
Appendix 3	40
Selected Single Equality Bill Consultation Summary	40

SECTION 1: DEFINING DISABILITY

1.1 INTRODUCTION

The importance of defining the limits, or extent, of disability is crucial. If a person does not meet the terms of a definition, this will impact on a range of issues, from exercising one's rights to meeting eligibility requirements for benefits or accessing health or educational services. International instruments from the European Union and United Nations tend to be drafted without specific definitions as to what constitutes disability, as these issues are left for individual states to determine and legislate on. Instead, they concentrate on working towards the elimination of discrimination against people with disabilities and the promotion of equality of opportunity.

This section explains the medical and social models of disability. There then follows an explanation of legislative definitions in the UK and Ireland, and other comparisons in Europe and further afield. It should be noted that, although the principal UK Act on disability — the Disability Discrimination Act 1995, as amended — covers the UK in its entirety, anti-discrimination legislation is a devolved matter under the Northern Ireland Act 1998.

1.2 MEDICAL AND SOCIAL MODELS OF DISABILITY

The development of the definition of disability has centred on what are known as the “medical” and “social” models of disability, which have both contributed to statutory interpretations of the term. The essential difference between the medical and social models is that the former focuses on impairments and what a person cannot do as a result of their disability, while the latter concentrates on how a person is disabled by society to the extent that they are treated less favourably than others.

The medical model of disability locates the disability within an individual, thereby focusing on the disability or impairment rather than the person. This model is predicated on the assumption that there is something inherently wrong with a person who has a disability that requires either care or cure. The disabled person is seen as a problem to be addressed, often through charity, and, as a result, ‘a cycle of dependence and exclusion’¹ can arise. The medical model has been heavily criticised by disability groups, but it has been considered to provide ‘clarity and certainty by relating two inextricably linked concepts — disability and medicine.’²

¹ Richard Rieser ‘Disability equality: Confronting the oppression of the past’ in Cole (ed.) *Education, Equality and Human Rights – Issues of Gender, ‘Race’, Sexuality, Disability and Social Class* (2006) (2nd edition) 134

² Alison McCarn ‘Rights not charity? An analysis of the models of disability and their contribution to the construction and interpretation of the definition of disability under the Disability Discrimination Act 1995 *Contemporary Issues in Law* (2002) Volume 6.2: 103

The social model is a political and rights-based concept, which contends that disability occurs through a person's relationship with their environment; that is, that they are disabled not by themselves but by societal and other extraneous factors. This model is closely linked to the wider concept of civil rights, advocating positive and proactive action that will result in equality of opportunity and treatment. With a social model of disability, it is argued that 'the appropriate intervention is to modify the environment to accommodate the needs of people with disabilities.'³

The differences between these two models of disability have led to a shift from a charitable approach to a rights-based approach. To illustrate, article 1 of the Universal Declaration of Human Rights states that 'all human beings are born free and equal in dignity and rights' — without any restrictions or limitations based on the individual characteristics of a person. However, disability lobby groups would argue that the freedom and equality contained in human-rights instruments exist in a technical sense, rather than true reality or practice. A rights-based approach, therefore, based on the social model of disability seeks to allow people with disabilities to exercise their rights as easily as others through positive action.

The concept of 'reasonable adjustment' is a key concept in disability discrimination legislation, and is derived from the social model in that it concentrates on external factors rather than on a person's disabilities. In contrast, however, many definitions of disability in national legislation, such as those that operate in the UK, Ireland and Europe tend to follow the medical model of disability, also known as the individual model, because it concentrates on the disability or impairment, rather than on the person.

1.3 A NOTE ON LANGUAGE

The importance of language and terminology cannot be underestimated, as these reflect society's attitudes towards people with disabilities. The social model of disability is underpinned by a desire to remove societal and attitudinal barriers, which are often inherent and obvious through our use of language. The shift away from the medical model is perhaps best illustrated through changes in terminology. For example, references that were commonplace in the past were rooted in negativity and hinted at what a person was unable to do or in what respect they were lacking in what was perceived to be normal, such as "the handicapped" or "the blind".

A salient example is the term "wheelchair-bound", intimating powerlessness, and the now more commonly used "wheelchair user", which is more positive. The disability lobby has sought to change societal attitudes through changing acceptable and appropriate language. Modern terminology reflects the social model, in that it concentrates on the person rather than the impairment or

³ Andrew et al 'The Americans with Disabilities Act as engine of social change: Models of disability and the potential of a civil rights approach' *Policy Studies Journal* (Winter 2001) Volume 29.4: 690

disability, such as “a disabled person” or “visually impaired”. Following the social model, which places disablement within society as part of the universal human experience, appropriate language is crucial in influencing how people with disabilities are treated.

1.4 DEFINITIONS

Northern Ireland / UK

Section 1 of the Disability Discrimination Act 1995 defined disability as:

‘a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.’

This definition was amended in its application to Northern Ireland via article 18 of The Disability Discrimination (Northern Ireland) Order 2006, which mirrored the amendments to the definition of disability made under the Disability Discrimination Act 2005, which applies to England, Scotland and Wales relating to progressive illnesses and mental health. A ‘long-term’ effect is taken to mean a condition that has lasted for at least 12 months or is likely to last at least 12 months.

The 2006 Order removes the need for people with a mental illness to demonstrate that it is ‘clinically well-recognised’ in order to fall within the definition of a mental impairment under the 1995 Act. In such cases, there must still be a demonstrable ‘substantial and long-term adverse effect’ on everyday activities, but the Order removes the need for a clinical assessment. This illustrates a shift from the medical/individual model to the social model. The 2006 Order also includes people with cancer, HIV virus, and multiple sclerosis as being disabled from the point of diagnosis. It should be noted, however, that other progressive illnesses, such as cystic fibrosis, Alzheimer’s disease or muscular dystrophy do not come under the definition until they begin to affect a person’s everyday activities.

IRELAND

Irish law provides two definitions of disability.

The Disability Act 2005 defines disability as:

‘a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.’

As in GB and Northern Ireland, the reference to ‘enduring’ in the Disability Act 2005 is taken to mean a period of 12 months. Section 7 of the 2005 Act defines the term “substantial restriction” for the purposes of Part 2 of the Act, which deals with assessment of health needs and the educational needs of children. For this part of the Act, “substantial restriction” is defined as something that:

- (a) is permanent, or likely to be permanent, results in a significant difficulty in communication, learning or mobility or in significantly disordered cognitive processes; and
- (b) gives rise to the need for services to be provided continually to the person whether or not a child or, if the person is a child, to the need for services to be provided early in life to ameliorate the disability.

The Employment Equality Act 1998 and the Equal Status Act 2000 define disability within the terms of the following four categories:

- (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person's body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.

The Equal Status Act 2000 applies to goods and services, accommodation and educational establishments. It is interesting to note that a genetic predisposition to a disease or illness is included in the definition.

1.5 EUROPEAN DEFINITIONS

The Framework Employment Equality Directive (2000/78/EC) established a framework for the elimination of discrimination on grounds of religion or belief, disability, age and sexual orientation and the promotion of equal treatment in employment and occupation. The Directive is based on the social model, as its principle aim is to combat discrimination on the range of grounds outlined above. Article 5 of the Directive provides for reasonable adjustments to be made to ensure equality for people with disabilities.

When the Framework Employment Equality Directive was drafted, the definition of disability was not addressed on a Europe-wide level, as the issue was left for member states to determine nationally. As such, different definitions apply throughout Europe. In order to place the UK and Irish definitions in a wider context, the definitions of disability used in Denmark, Germany and Sweden are outlined below.

DENMARK

There are no definitions of disability in Danish law. Danish disability policy is therefore a relatively new concept, in that the welfare state operating in Denmark is such that disability issues appear to have been mainstreamed for some time. The standard of the Danish welfare system has meant that, because people with disabilities were naturally presumed to have the same rights as others, it was considered that no additional protection was needed.

In a report to the European Union on disability discrimination law in employment, it was stated that: *'human rights and other fundamental rights were considered either superfluous because disabled people were presumed to have exactly the same rights as non disabled citizens or of little if any importance because of the high standard of the Danish welfare system.'*⁴

Although disability lobby groups in Denmark have moved towards a more rights-orientated approach, this is seen as a supplement to, rather than a replacement for, the existing system.

GERMANY

For the purposes of discrimination, German law defines people with disabilities as:

'persons, whose physical functions, mental capacities or psychological health are highly likely to deviate for more than six months from the condition which is typical for the respective age and whose participation in the life of society is therefore restricted.'

The time period that a person must have a condition in order to fall within the remit of the German definition of disability is explicitly mentioned in German legislation, and is half as long as that in Irish and UK legislation. The phrase 'typical for the respective age' echoes the principles of the medical model as opposed to the social model, which seeks to redefine disability as a universal human experience. A distinction is also made in respect of employment discrimination, as the prohibition on discrimination in employment only covers those who are classed as severely disabled, which is defined as a level of disability of at least 50%.⁵

SWEDEN

The Prohibition of Discrimination Act 2003 is a multi-disciplinary statute that prohibits discrimination on the grounds of gender, ethnic origin, religion or belief, sexual orientation or disability. Section 4 of the Act defines disability as:

⁴ Holger Kallehaug (2004) [Danish Disability Discrimination Law in the Field of Unemployment](#)

⁵ Theresia Degener (2004) [Executive Summary on Employment Directive - State of Play in Germany](#)

'permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of injury or illness was present at birth, has arisen since or may be expected to arise.'

The Swedish definition differs from others in that it requires a permanent limitation, in contrast to the UK / Northern Ireland model, which stipulates a “long-term effect”. However, the definition provides for past, present and future limitations.

CASE LAW

It is useful to note two recent cases from the European Court of Justice (ECJ) that could potentially affect the definition and extension of disability.

A case referred to the ECJ from an employment tribunal in England could pave the way for the principle of equal treatment in employment being expanded to include people who do not themselves have a disability but who have a relationship with someone who do⁶. The case involved a woman who claimed that she was the subject of direct discrimination because she is the mother of a disabled child. The Court held that the woman had suffered “discrimination by association and that the Employment Equality Directive (2000/78/EC) applied even though the person explicitly covered by the Directive (the child) was not the person who was the subject of unfair treatment in employment (his mother)⁷.

Another pertinent case⁸ concerned the extent of the meaning of “disability”, concluding that it did not cover “sickness”. The court ruled that a person who is dismissed by an employer on grounds of sickness was not discriminated on the grounds of disability under the Employment Equality Directive. The court held that sickness was not deemed to constitute disability for the purposes of the Employment Equality Directive, highlighting that the Directive specifically referred to the term ‘disability’ rather than ‘disabled’, and that the grounds listed in article 1 of the Directive could not be extended by analogy.

It should be noted that EU member states can go beyond the provisions laid down in EU Directives — Directives constitute a framework of minimum standards to which states must adhere, but are free to exceed. The definition used in the UK and Northern Ireland does extend to sickness, provided that the sickness in question meets the statutory requirement of ‘a substantial and long-term adverse effect’.

1.6 INTERNATIONAL DEFINITIONS

The International Classification of Functioning, Disability and Health (ICF) is the framework used by the World Health Organization to measure health and disability at individual and population levels. It was endorsed by 191 Member

⁶ Under US law, people with a known relationship or association with a person with a disability are covered by Americans with Disabilities Act 1990, explained below.

⁷ [ECJ judgement in the case of Sharon Coleman](#)

⁸ [ECJ Judgement in the case of Sonia Chacón Navas](#)

states. The ICF adheres to the social model of disability, in that it moves the issue of disability from something that affects only a minority of people to mainstreaming disability to the universal human experience. Furthermore, the ICF does not solely define disability as a medical condition, but encompasses social and environmental factors. The ICF is the most widely accepted set of classifications of health and disability⁹ and 'provides an appropriate instrument for the implementation of stated international human rights mandates as well as national legislation.'¹⁰

AUSTRALIA

The Disability Discrimination Act 1992 defines disability as:

- (a) total or partial loss of the person's bodily or mental functions;
- (b) total or partial loss of a part of the body;
- (c) the presence in the body of organisms causing disease or illness;
- (d) the presence in the body of organisms capable of causing disease or illness;
- (e) the malfunction, malformation or disfigurement of a part of the person's body;
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction;
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

The definition also includes current disabilities, disabilities that previously existed, potential disabilities that may arise in the future, or disabilities that are imputed to a person. It is interesting to note the inclusion of a predisposition to illness or disease, such as genetic factors, that may or may not arise.

NEW ZEALAND

Section 21 of the Human Rights Act 1993 details prohibited grounds of discrimination in New Zealand. Disability is defined as:

- (a) physical disability or impairment;
- (b) physical illness;

⁹ [New Zealand Human Rights Commission Definition of Disability in the Human Rights Act 1993](#)

¹⁰ <http://www.who.int/classifications/icf/site/intros/ICF-Eng-Intro.pdf>

- (c) psychiatric illness;
- (d) intellectual or psychological illness or impairment;
- (e) any other loss or abnormality psychological, physiological or anatomical structure or function;
- (f) reliance on a guide dog, wheelchair or other remedial means;
- (g) the presence in the body of organisms capable of causing illness.

The New Zealand definition is perhaps the most wide-ranging, and the seven factors the make up the definition have been described as 'exhaustive'. The definition covers possible conditions that may or may not materialise, such as the present of genetic factors that may predispose a person to an illness, similar to the equivalent Australian statute. The definition also follows the social model, in that it refers to elements outwith an individual, such as the use of an assistance dog or wheelchair.

UNITED STATES

The Americans with Disabilities Act of 1990 defines disability as:

'a physical or mental impairment that substantially limits one or more of the major life activities'.

The impairment must be recorded or the person must be regarded as having such an impairment. Protection is also extended to individuals who have a known relationship or association with someone with a disability. The American definition is firmly rooted in the social model of disability. The definition does not specify or list impairments, and there has been some criticism that the definition is too all-encompassing as a result.

SECTION 2:

LEGISLATIVE PROTECTION FOR PEOPLE WITH DISABILITIES IN NORTHERN IRELAND

2.1 INTRODUCTION

The section outlines the current legislative protection afforded to people with disabilities in Northern Ireland. As outlined in section 1 of this paper, anti-discrimination legislation is a devolved matter. As such, there are some differences in the legislative position in the UK and in Northern Ireland.

Disabled people have rights in the following areas: employment; education; goods, facilities and services; and property and premises¹¹. Certain protection is available in relation to transport, but further regulations are scheduled to be enacted into Northern Ireland law this year.

¹¹ The [Equality Commission for Northern Ireland](#) has published several papers in relation to [disability discrimination](#).

In addition to rights held by disabled people, various groups have duties in relation to people with disabilities: employers; education providers, whether in schools or higher and further education institutions; providers of goods, facilities and services; and those involved in selling, renting or managing land or property.

Essentially, the main areas of discrimination relate to less favourable treatment, a failure to make reasonable adjustments, victimisation and harassment. It should be noted that there is no prohibition on people with disabilities being the subject of more favourable treatment. Moreover, the concepts of less or more favourable treatment, and that of reasonable adjustment, are unique to the ground of disability in anti-discrimination legislation. However, it should further be noted that there are instances where less favourable treatment is justified, and that there are limitations to the concept of reasonable adjustment. This section provides an overview of the protection afforded to people with disabilities and the responsibilities incumbent on others.

2.2 EMPLOYMENT

Under the Disability Discrimination Act 1995, as amended, there are five forms of discrimination in the field of employment:

- (a) Less favourable treatment on the grounds of disability
- (b) Less favourable treatment for a reason relating to a person's disability for an unjustifiable reason
- (c) Failure to make adjustments for a person with disabilities
- (d) Victimisation arising from a person's disabilities
- (e) Harassment arising from a person's disabilities

In this context, less favourable treatment is when a person with a disability is treated in a worse way than a person who does not have a disability. Therefore, employers must take steps in order to ensure that all employees are treated equally.

Employers' duties apply to prospective employees, employees who have a disability and existing employees who become disabled while in employment. There is also a retrospective duty for former employees, for example in providing references or allowing disabled former employees to enjoy the same benefits as all other former employees.

All employers¹² have responsibilities under the 1995 Act in relation to all aspects of employment, such as recruitment, promotion, career development, redundancy and dismissal. Employers are under a duty to make 'reasonable adjustments' to allow people with disabilities to fulfil the demands of a job as easily as people who do not have disabilities.

¹² With the sole exception of the armed forces.

Reasonable adjustments can take the form of altering premises or working patterns, transferring people or duties or providing additional training or support. However, it is important to note that there are limitations to the concept of reasonable adjustment. Whether adjustments are reasonable will depend on the cost and the resources of the organisation, how effective the adjustments will be and the availability of outside funding or practical assistance. The cost of adjustments can often be minor, such as rearranging the layout of premises or transferring another employee to a different part of an organisation.

The duty to make reasonable adjustments also applies to prospective employees. Therefore, employers are under a duty to make adjustments to enable all job applicants to complete the recruitment process equally. For example, a now common reasonable adjustment in job advertisements is to offer application forms and job descriptions in alternative accessible formats, such as large print, audio or Braille. During the recruitment process, employers are permitted to inquire about a candidate's disability, but only insofar as relates to their ability to do the job.

COMPLAINTS

Complaints of discrimination in relation to employment are made to an industrial tribunal, and must be lodged within three months of the act in question.

2.3 GOODS, FACILITIES AND SERVICES¹³

People with disabilities are protected in respect of using goods, facilities and services provided by all organisations from shops to hotels, churches to public amenities. Discrimination in respect of goods, facilities and services is covered by Part III of the 1995 Act and can take the following forms:

- (a) where service is refused because of a person's disability
- (b) where a person with a disability receives a worse service than someone who does not have a disability
- (c) where terms of service offered to a disabled person are less favourable than those offered to others (e.g. an increased charge or extra restrictions)
- (d) where a reasonable adjustment is not made

All organisations that provide goods, facilities, services are under a duty to make reasonable adjustments where it is impossible or unreasonably difficult for a person to avail of a service. Reasonable adjustments include the following:

- (a) changing a practice, policy or procedure, such as allowing assistance animals into a premises
- (b) removing, altering or avoiding physical features of a building
- (c) providing a reasonable alternative method to allow a person to use a service, such as an accessible means of entry

¹³ Sections 19 to 21 of the 1995 Act deal with discrimination in the provision of goods, facilities and services.

- (d) providing auxiliary aids or services, such as information in Braille or large print

Exceptions to reasonable adjustments include health and safety, entering into contracts¹⁴, where reasonable adjustments to provide a service to a disabled person would result in no one else being able to avail of the service, or where the fundamental nature of a business or service would be altered as a result of the adjustment.

COMPLAINTS

Complaints of discrimination in the provision of goods, facilities and services are made to a county court, and must be made within six months minus one day of the act in question.

2.4 PROPERTY AND PREMISES

Disabled people are protected against less favourable treatment when buying or renting land, property or premises. The incumbent duties fall on those involved in selling, letting or managing land or property, including estate agents, landlords and housing associations.

Discrimination arises in the following circumstances:

- (a) a disabled person is prevented from buying or renting a property on account of their disability
- (b) a disabled person is offered worse terms than someone else, such as a higher rental deposit
- (c) waiting lists are manipulated to the disadvantage of a disabled person
- (d) a disabled person is prevented or restricted from using benefits and facilities
- (e) a disabled person is evicted or placed at a disadvantage
- (f) consent is refused to sub-let a property to a disabled person

Less favourable treatment is acceptable because of health and safety reasons or where a person is incapable of entering into a contract¹⁵ or of giving informed consent. Access may be denied where it would prevent others from availing of the benefit or facility. A different route of access can be offered, where that will enable a disabled person to access premises. Alteration to enable access does not have to be made for those who are buying or renting a property.

COMPLAINTS

As with goods, facilities and services, complaints of discrimination are heard by a county court, and must be made within six months minus one day from the date of the act in question.

¹⁴ Except where a power of attorney is in force.

¹⁵ Unless a power of attorney is in force.

2.5 EDUCATION

Disability discrimination in education is governed by the Special Education Needs and Disability (Northern Ireland) Order 2005, more commonly known as SENDO.

The Order relates to education providers, including education and library boards, schools, higher and further education institutions and teacher-training and agricultural colleges. SENDO places three duties on schools and higher and further education providers:

- (a) a duty not to treat current or prospective pupils or students with disabilities less favourably than others
- (b) a duty to make reasonable adjustments to ensure that pupils and students with disabilities are not put at a significant disadvantage to other pupils and students.¹⁶
- (c) a duty not to victimise pupils or students who make a complaint of discrimination under SENDO or any pupil or student who supports another in making a complaint.

It is interesting to note that the duty to make reasonable adjustments operates insofar as it will ensure that pupils and students with disabilities will not be put at a significant disadvantage.

COMPLAINTS

In respect of schools, complaints are made to the Special Educational and Disability Tribunal (SENDIST). Complaints of discrimination against further and higher education institutions are made to the county court. In both cases, complaints must be lodged within six months of the act in question. During the consultation on the Single Equality Bill, the fact that different systems operate for schools and in further and higher education institutions was as an issue of concern for some groups.

2.6 TRANSPORT

Regulations that will compel transport service providers to make reasonable adjustments are not yet in force in Northern Ireland, although it is expected that regulations will be made during 2008. By 2017 and 2020 respectively, buses and trains will have to be accessible by people with disabilities. Vehicles that will have to comply with the duty of reasonable adjustment are: breakdown recovery vehicles; rental vehicles; taxis and private-hire vehicles; public service vehicles; rail vehicles; and vehicles that use a mode of guided transport. Currently, taxis and private-hire vehicles cannot refuse to carry a passenger who uses an assistance dog or levy an additional charge for doing so.

The duty of reasonable adjustment does not apply to aircraft or shipping vessels. However, under the Civil Aviation (Access to Air Travel for Disabled Persons and

¹⁶ Third level institutions are also under a duty to provide auxiliary aids and to make reasonable adjustments to the physical environment. In schools, auxiliary aids are provided through the Special Educational Needs Framework.

Persons with Reduced Mobility) Regulations 2007¹⁷, air carriers, their agents, tour operators and managing bodies of airports have responsibilities to provide assistance to people with disabilities and those with reduced mobility. The Regulations incorporate an EU regulation into UK law. Under the 2007 Regulations, complaints can be made to the Consumer Council for Northern Ireland. Compensation claims are heard by a county court, and must be made within six months.

2.7 CRIMINAL JUSTICE

Under the Criminal Justice (No.2) (Northern Ireland) Order 2004, a court can deem that a victim's actual or presumed disability can be treated as an aggravating factor when considering the seriousness of an offence, and by extension, the sentence imposed. The Order also amended article 8 of the Public Order (Northern Ireland) Order 1987 to include disability in the definitions of "fear" and "hatred" in respect of acts intended or likely to stir up fear and hatred.

2.8 DISTRICT COUNCILS

District councils have direct statutory duties in relation to council members who have disabilities. These duties are designed to ensure that council members who have a disability are not placed at a significant disadvantage, in comparison to council members who do not have a disability, in carrying out council functions. Although councillors are not employed by district councils, the duties towards district councillors are similar to employment duties in respect of people with disabilities. Councils are bound to make reasonable adjustments in this regard, such as removing or altering a physical barrier or amending a policy or practice of the council. Furthermore, discrimination or harassment of a disabled council member is prohibited. However, those duties do not relate to councillors being elected or nominated to an office of function of a council.

2.9 PUBLIC AUTHORITIES

Article 4 of the Disability Discrimination (Northern Ireland) Order 2006 makes it illegal for public authorities, in carrying out their functions, to discriminate against people with disabilities. Discrimination is defined as less favourable treatment of a person with a disability in comparison to how a person who does not have a disability is treated. Public authorities are also under a duty to make reasonable adjustments where it is unreasonably difficult for a person with a disability to avail of a benefit, or where a detriment would have an unreasonably adverse effect on a person with a disability.

It is interesting to note that the duty to make reasonable adjustments extends insofar as a person with a disability is faced with an unreasonable difficulty or adverse effect. The duty on public authorities is subject to several exceptions: parliamentary, policing, security and judicial functions are exempt under the 2006 Order. Furthermore, the concept of less favourable treatment is limited in

¹⁷ The Regulations will be fully in force by 26 July 2008.

respect of health and safety considerations and the protection of the rights and freedoms of others.

PUBLIC FUNCTIONS AND PRIVATE BODIES

Section 6 of the UK-wide Human Rights Act 1998 states that: *'it is unlawful for a public authority to act in a way which is incompatible with a Convention right.'* A public authority is defined as *'any person certain of whose functions are of a public nature.'*

It should be noted that there have been developments on the issue of public functions that are undertaken privately but which are paid for by the state in respect of private care homes. The exclusion of private care homes from the terms of the Human Rights Act 1998 has been highlighted as a loophole in the law. Following a House of Lords judgement in June 2007, it was held that the definition of a public authority did not include private care homes. In its report on the definition of a public authority¹⁸, the Westminster Joint Committee on Human Rights highlighted concerns in respect of private organisations undertaking public functions under contract, without being subject to the obligations of the 1998 Act. In such instances, the report stated that organisations were 'standing in the shoes of the state'.

The Human Rights Act 1998 (Meaning of Public Authority) Bill¹⁹ was introduced to the House of Commons by Andrew Dismore MP, Chairman of the Joint Committee on Human Rights, and received its First Reading on 18 December 2007. The purpose of the Bill is to clarify the meaning of public authority for the purposes of section 6(3) of the 1998 Act.

Clause 1 of the Bill states that: *'a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function.'*

DISABILITY EQUALITY DUTY

Article 5 of the Disability Discrimination (Northern Ireland) Order 2006, which introduces new section 49A into the 1995 Act, places a positive duty on public authorities to have due regard to the need to promote positive attitudes towards disabled people and to encourage disabled people to participate in public life.

The duty has been in force in Northern Ireland from 1 January 2007. Public authorities have a duty to have due regard to the following: to promote equality of opportunity between people who have disabilities and people who do not; to eliminate unlawful discrimination under the Disability Discrimination Act 1995; to eliminate disability-related harassment; to promote positive attitudes towards disabled people; to encourage positive attitudes towards disabled people; to encourage people with disabilities to participate in public life; and to take steps to

¹⁸ <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf>

¹⁹ <http://www.publications.parliament.uk/pa/cm200607/cmbills/043/2007043.pdf>

ensure that the needs of disabled people are met, even where this requires more favourable treatment.

The Equality Commission for Northern Ireland is charged with reviewing the effectiveness of the duty and providing advice to public authorities in connection with the duty. Public authorities are required to prepare and submit action plans to the Equality Commission on how they propose to fulfil the duty. The Commission is also charged with laying before the Assembly a report on the effectiveness of the duty within three years of the duty coming into effect (i.e. by January 1, 2010.)

People with disabilities are also a section 75 group under the Northern Ireland Act 1998, and public authorities are therefore under a duty to have due regard to the need to promote equality of opportunity between people who have a disability and those who do not. The duty in article 5 of the 2006 Order (section 49A of the 1995 Act) does not override public authority obligations to comply with any other statutory provision.

SECTION 3: TIMETABLE OF ENTRY INTO FORCE OF KEY DISABILITY DISCRIMINATION LEGISLATION RELATING TO NORTHERN IRELAND

Date	Duty
2 December 1996	Employers not to discriminate in employment
2 December 1996	Providers of goods, facilities and services not to discriminate
2 December 1996	Those involved in selling, renting or managing property or premises
1 October 1999	Service providers under a duty of reasonable adjustment; duty to provide auxiliary aids and services; and a duty to provide reasonable alternatives in order to make a service available
2 October 2000	Main provisions of the Human Rights Act 2000 come into force
1 October 2004	Service providers under a duty to remove or alter physical features
1 October 2004	Duty not to discriminate in employment extended to employers with fewer than 15 employees
1 October 2004	Duty not to discriminate in employment extended to include police, fire and rescue service staff, prison officers and shipping and aircraft workers
28 September 2004	Offences motivated by disability treated as aggravated offences and liable for stronger penalties
1 September 2005	Special Education and Disability (Northern Ireland) Order provides increased rights for pupils and students and introduces the concept of reasonable adjustments into schools
1 September 2006	Main provisions of the SENDO 2005 (Amendment) (Further and Higher Education) Order 2005.
4 December 2006	Disability Discrimination (Transport Vehicles) Regulations 2005 come into force in GB. (Northern Ireland legislation is due to be enacted this year)
30 March 2007	United Nations Convention on the Rights of People with Disabilities opened for signature ²⁰

²⁰ The UK and Ireland signed the Convention on this date.

- 31 October 2007 Definition of disability extended to cover cancer, HIV virus and MS; requirement of mental ill-health to be clinically well-recognised is removed from definition
- 31 December 2007 The Disability Discrimination (Questions and Replies) Order (Northern Ireland) 2007
- 31 December 2007 The Disability Discrimination (Service Providers and Public Authorities Carrying Out Functions) Regulations (Northern Ireland) 2007
- 31 December 2007 The Disability Discrimination (Premises) Regulations (Northern Ireland) 2007
- 13 February 2008 Disability Discrimination (Private Clubs etc.) Regulations (Northern Ireland) 2008

SECTION 4: DISABILITY DISCRIMINATION AND HUMAN RIGHTS

In recent times, disability lobby groups have sought to shift the basis for discussing disability issues from one of charity and medicine to one of social and rights-based concerns. Many disability organisations see a rights-based approach as a more appropriate and more successful avenue through which to secure equality. The Human Rights Act 1998, which incorporated the European Convention on Human Rights into UK law and made Convention rights directly enforceable by UK courts, is a much broader instrument than the Disability Discrimination Act 1995, which provides that, in certain circumstances, it is permissible to treat a person with a disability less favourably than a person who does not. By seeking to address the twin issues of discrimination and equality from a human-rights foundation, the statutory exemptions permitted by the Disability Discrimination Act 1995 may be avoided.

4.1 LESS FAVOURABLE TREATMENT AND REASONABLE ADJUSTMENT

There is an important distinction to be made between anti-discrimination legislation for people with disabilities and other categories of discrimination. Prohibitions relating to disability discrimination are broadly similar to other forms of discrimination, such as gender or race, save for two important factors: the concepts of less favourable treatment and reasonable adjustment. Prohibitions on the discrimination of a person because of their gender or race are absolute: it is illegal to treat a person different on those grounds, except in extremely specific instances.²¹

The concepts of less favourable treatment and making reasonable adjustments undoubtedly serve to better allow people with disabilities to exercise their rights. However, the fact that there are limitations to less favourable treatment and reasonable adjustments means that people with disabilities do not have an absolute guarantee that they will be able to exercise their rights in the same way that women and men or people from different racial backgrounds do.

Put simply, there can be no difference in treatment between a woman and a man. However, there are still scenarios where it will be perfectly legal for a woman with a disability to be treated less favourably than a woman who does not have a disability.

For example, section 21 of the Disability Discrimination Act 1995 places a duty on providers of goods, facilities and services to make adjustments for people with a disability. However, subsections (6) and (7) prescribe limitations on any changes that may be necessary:

(6) Nothing in this section requires a provider of services to take any steps which would fundamentally alter the nature of the service in question or the nature of his trade, profession or business.

²¹ For example, certain women-only employers, such as Women's Aid, are permitted to employ only women.

(7) Nothing in this section requires a provider of services to take any steps which would cause him to incur expenditure exceeding the prescribed maximum.

Therefore, where an adjustment or change would be too costly, or where an adjustment would fundamentally alter the nature of a service²², service providers can treat people with disabilities less favourably than people who do not have a disability. However, if a service provider were to argue that it would be too costly to alter their premises or to change a policy, practice or procedure to enable men and women to equally avail of a service, that argument would not be held as justifiable under gender discrimination legislation.

By basing equality of opportunity for people with disabilities on their rights as people, as opposed to protection afforded to them on account of their disability, the exemptions outlined above can be avoided.

This argument introduces the idea of different treatment to create equality. Discourse on equality and discrimination often mentions ‘the level playing field’ — the notion that everyone should be treated equally. This is a central tenet in gender equality, for example. However, in order to create the level playing field, by necessity, some people will have to be treated differently and, in some cases, better than others.²³

In the case of *Archibald v Fife Council*²⁴, Baroness Hale of Richmond highlighted the difference in disability discrimination and gender or race discrimination:

‘In the [Sex Discrimination Act 1975 and the Race Relations Act 1976] men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The [Disability Discrimination] 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.’

By using human rights to achieve equality of opportunity, exemptions based on less favourable treatment or making reasonable adjustments do not apply. Any exemptions to human rights automatically apply to everyone, irrespective of the individual characteristics of a person, be they age, disability, gender, race or religion etc. It has been contended that it is not the treatment that needs to be equal, but the end result: *‘By implication, if it takes a bit more*

²² The Equality Commission uses the example of providing additional lighting in a nightclub for disabled patrons.

²³ For example, *Price v United Kingdom* (2001) 34 EHRR 1285, discussed below.

²⁴ [2004] UKHL 32. The full text of the judgement is available at: <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040701/arch-1.htm>

*effort or imagination to achieve that end, then so be it. Equality is, paradoxically, about being treated differently, not the same.*²⁵

4.2 THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

As mentioned previously, disability groups have sought to achieve equality through human rights. The ECHR rights most commonly cited by people with disabilities are articles 2, 3 and 8.

ARTICLE 2: RIGHT TO LIFE

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3: PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 8: RESPECT FOR PRIVATE AND FAMILY LIFE

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The rights, freedoms and protection afforded through European Convention, which was incorporated into UK law through the Human Rights Act 1998, are subject to certain limitations. However, those limitations apply to everyone, in contrast to the limits and restrictions on specific disability legislation.

4.3 CASE LAW

There is an ever-increasing body of case law that illustrates where applicants with disabilities can use human rights legislation as a means of attaining equality as opposed to using specific disability legislation. Convention rights are directly enforceable in UK law through the Human Rights Act 1998, and

²⁵ Nick O'Brien (September 2004) 'Accentuating the Positive – Disability Rights and the idea of a Commission for Equality and Human Rights' (Speech given to the Industrial Law Society). The [full text](#) is available from the Disability Rights Commission's archived website.

judgements from the European Court of Human Rights themselves remain highly relevant.²⁶

As outlined above, the extent and restrictions on the rights and freedoms within the ECHR apply equally to everyone. The following cases illustrate where human rights standards can prove to be more effective and beneficial than disability legislation. With the former, it is the end result that is crucial — how a person is able, or not, to exercise and enjoy a particular right. With disability legislation, the focus is on what goes before: whether reasonable adjustments were made or whether less favourable treatment was justified or unjustified. For disability groups, the focus on how people with disabilities are able to exercise their human rights represents a path to substantive equality.

BOTTA V ITALY²⁷

This case has been lauded as a landmark for people with disabilities. While holidaying on the Italian coast, Mr Botta had been unable to use a private beach because of a lack of suitable access. He sought to rely on article 8 of the ECHR, which is the right to respect for private and family life. Although his case was not upheld, the court held that the right to respect for private life included respect for a person's physical and psychological integrity, specifically participation in the life of the community. It was therefore held that article 8 of the ECHR provided for the development of an individual's personality through their relations and interactions with others.

A crucial point to note is that the court decreed that it was not only omissions on the part of a state that could lead to a breach of human rights, but that positive actions were necessary in some instances to allow people to assert their right under article 8. Article 8(2) prohibits a state from intervening with the substantive right, but the court held that states are not solely compelled to refrain from interference, but that they may be required to undertake positive action to ensure that the right to private and family life can be exercised.

PRICE V UNITED KINGDOM²⁸

The applicant in this case had four shortened limbs as a result of thalidomide. She used a wheelchair and also experienced kidney problems. During proceedings in a civil court, Ms Price was sentenced to a short term of imprisonment for contempt of court. She claimed that she was refused permission to take the battery charger for her wheelchair, as this was deemed to be a luxury item. In addition, the custodial facilities in the police station and the prison were completely unsuitable for her needs. Ms Price relied on article 3 of the ECHR, which provides a prohibition against torture and inhuman or degrading treatment or punishment.

The European Court of Human Rights upheld that article 3 had been violated. The important point to note is that, while Ms Price's detention was not unlawful, the conditions in which she was detained were such that the end result amounted to inhuman or degrading treatment or punishment. This case

²⁶ It is interesting to note that section 29(2)(d) of the Scotland Act 1998 provides an Act of the Scottish Parliament is not law where it is incompatible with Convention rights or with EC law.

²⁷ (1998) 26 EHRR 241

²⁸ (2001) 34 EHRR 1285

is a particularly illustrative example of where the equal treatment of a person with a disability and a person who does not have a disability will produce an unequal, and what was held in this case to be an especially harsh, result. By not treating Ms Price differently, she was subjected to a level of hardship that would not have been experienced by someone in the same situation who did not have a disability. As a judicial opinion explained, ‘she has to be treated differently from other people because her situation is significantly different.’

R (ON THE APPLICATION OF A AND B) V EAST SUSSEX COUNTY COUNCIL²⁹

The applicants were two sisters with severe learning and physical difficulties who lived in the family home. The council adopted a ‘no-lifting’ policy, where manual lifting was no longer allowed. The effect of the no lifting policy, which the council had adopted on health and safety grounds in respect of its employees, meant that the applicants were unable to go shopping, swimming or horse riding. Citing the Botta case, the High Court held that the rights included in Article 8 of the ECHR included the right of people with disabilities to participate in the life of the community, and included:

‘the positive obligation of the state to take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not so “circumscribed and so isolated as to be deprived of the possibility of developing his personality”.’

4.4 THE UNITED NATIONS

United Nations instruments that concern the specific rights of people with disabilities are detailed below. Although the Convention on the Rights of the Child is the only binding³⁰ instrument in force at present, the standards and rights contained in the other listed documents are worthy of note.

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES³¹

People with disabilities share the same rights and entitlements contained in the Universal Declaration of Human Rights, but the UN Convention sets out specific rights for people with disabilities and obligations for states parties. The UK and Ireland both signed the Convention when it was opened for signature on 30 March 2007 but have yet to ratify it. It should be noted that the Convention is not yet in force.

UNITED NATIONS STANDARD RULES ON THE EQUALIZATION OF OPPORTUNITIES FOR PERSONS WITH DISABILITIES

The Standard Rules do not constitute a binding agreement, but show a moral and political will on the part of Governments. The rules form a set of principles that are designed to be used as a policy-making tool.

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

All rights contained in the Convention on the Rights of the Child are applicable to all children, but certain articles make particular reference, or are of particular relevance, to children and young people with disabilities. The

²⁹ CO 4843/2001

³⁰ Signing a UN Convention imposes no obligations on a state; it is upon ratification that a Convention’s obligations will become binding. Furthermore, a Convention must be in force; usually, this is a particular number of days after a certain number of ratifications.

³¹ Please see Appendix 1 for a list of the Convention rights.

Convention entered into force on 2 September 1990, and both Ireland and the UK have signed and ratified it.

The Optional Protocol to the UN Convention on the Rights of Persons with Disabilities (which the UK and Ireland have both signed but not yet ratified) contains a complaint mechanism whereby individuals may refer a “communication” to the Committee on the Rights of Persons with Disabilities. The Committee can forward its views and any recommendations that it may have to the state and make them public.

SECTION 5: COMPLAINT MECHANISMS AND MEANS OF REDRESS

5.1 INTRODUCTION

In Europe, Denmark and Sweden have established bodies that are concerned specifically with the rights of people with disabilities. Australia has a body similar to those in the UK and Ireland, the Human Rights and Equal Opportunities Commission, but places responsibility for different forms of discrimination, including disability, with different Commissioners. The Health and Disability Commissioner operates in New Zealand, but with a specific remit that relates solely to the quality of care provided.

In general, recourse to commissions or ombudsmen is considered as a last resort, with most bodies urging potential complainants to seek redress from the organisation directly. Issues can often be resolved relatively informally, before formal complaints procedures are invoked.³²

5.2 NORTHERN IRELAND

There is no one specific body that deals exclusively with cases of discrimination against people with disabilities in Northern Ireland, as the Equality Commission for Northern Ireland is the overarching authority in respect of all forms of discrimination. However, children and young people with disabilities can make complaints through the Northern Ireland Commissioner for Children and Young People.

NORTHERN IRELAND OMBUDSMAN

The Northern Ireland Ombudsman is the body charged with dealing with complaints of maladministration by Government Departments or public bodies. In respect of disability, the main relevant bodies would be within the healthcare and education sectors. From 1 December 1997, the Ombudsman assumed the power to deal with complaints arising from family health services, such as doctors, dentists, pharmacists and optometrists. There is also a power to investigate private health services, but only where National Health Service funding is involved. The Ombudsman has the power to investigate clinical judgements made by health professionals; however, complaints in respect of medical negligence or compensation are outwith his remit.

³² For the year 2006-07, for example, the New Zealand Health and Disability Commissioner resolved 96% of complaints on the day of receipt.

EQUALITY COMMISSION FOR NORTHERN IRELAND

The Equality Commission for Northern Ireland has advisory and enforcement roles in relation to all matters of discrimination in Northern Ireland, including disability. The Commission also monitors the section 75 duty on public authorities. To ensure compliance with legislation, the Commission has powers of enquiry and investigation. The Commission has the power to issue non-discrimination notices, legally binding agreements and legally enforceable directions. The Commission is able to provide advice and guidance on legal rights to prospective complainants, and considers all applications for legal assistance, including those seeking representative functions. The Commission does not adjudicate on whether discrimination has occurred, as this is within the remit of a tribunal or court.

DISABILITY CONCILIATION SERVICES NORTHERN IRELAND

From September 2007, the Equality Commission has offered a conciliation service for people with disabilities in the areas of goods, facilities and services, premises and education³³. Once consent has been received from an aggrieved party, a discrimination advice officer will assess whether a complaint is suitable for conciliation. Contact is made with the relevant service provider, and the conciliation process is administered by Disability Conciliation Services Northern Ireland. The Equality Commission is prohibited by statute³⁴ from providing conciliation services. The majority of outcomes remain confidential between the parties and the conciliator. As the service has only been operating for around six months, it is too early to assess its success.

NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Created by the Good Friday/Belfast Agreement, the Northern Ireland Human Rights Commission is charged with reviewing the adequacy and effectiveness of human rights law and practice. The Commission can provide assistance to individuals and can bring proceedings involving law or practice concerning the protection of human rights.

NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

The principal aim of the Children's Commissioner is to safeguard and promote the rights and best interests of children and young people. In exercising the functions of the office, the Commissioner's paramount consideration is the interests of the child or young person. The Commissioner must also have regard, in particular, to the ascertainable wishes and feelings of the child or young person, in the light of their age and understanding.³⁵ The Children's Commissioner has identified issues concerning children and young people with disabilities as a key priority.

SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL FOR NORTHERN IRELAND (SENDIST)

Established by the Education (Northern Ireland) Order 1996 (as amended by the Special Educational Needs and Disability (Northern Ireland) Order 2005),

³³ Employment complaints are within the remit of the Labour Relations Agency.

³⁴ Article 12 of the Equality (Disability etc.) (Northern Ireland) Order 2000 amended section 28 of the Disability Discrimination Act 1995 in respect of dispute conciliation in Northern Ireland.

³⁵ Under Article 12 of the Convention on the Rights of the Child.

SENDIST considers appeals from parents about their child's special educational needs, where no agreement can be reached with the education and library board.³⁶ It also considers complaints of disability discrimination.

NORTHERN IRELAND HEALTH AND SOCIAL SERVICES COUNCIL

In respect of health and social care matters, the Northern Ireland Health and Social Services Council provides assistance to anyone making a complaint about the NHS. The council's role is purely advisory and it does not have an investigatory role.

5.3 GREAT BRITAIN

DISABILITY RIGHTS COMMISSION / EQUALITY AND HUMAN RIGHTS COMMISSION

The Disability Rights Commission was charged with helping to secure civil rights for people with disabilities. It ceased to exist in 28 September 2007 and its functions were subsumed into the Equality and Human Rights Commission, along with the Commission for Racial Equality and the Equal Opportunities Commission. The current chair of the Equality and Human Rights Commission is Trevor Phillips.

DISABILITY CONCILIATION SERVICE

The Disability Conciliation Service (DCS) operates in England, Scotland and Wales and aims to resolve disputes³⁷ before they reach a court or tribunal. Referral to the service is through the Equality and Human Rights Commission, which determines whether the case is suitable for conciliation. Both parties must agree to the process, which is facilitated by a DCS conciliator.

OFFICE FOR DISABILITIES

The Office for Disabilities works across Government to support the rights and aspirations of people with disabilities within Government. Anne McGuire MP is the current Minister for Disabled People.

5.4 IRELAND

HUMAN RIGHTS COMMISSION

The Irish Human Rights Commission (IHRC) was established under the Human Rights Commission Act 2000 and came into existence in July 2001. The IHRC is charged with protecting and promoting the human rights bestowed on Irish citizens through the constitution and all treaties and conventions to which Ireland is a party and therefore has a general overarching responsibility.

Complaint mechanism

Individuals can make a request for an enquiry, but the purpose of the enquiry must conform or be linked to one of the Commission's four functions: conducting enquiries; acting as *amicus curiae* (friend of the court) in legal proceedings; providing assistance with legal proceedings involving human rights; taking legal proceedings to vindicate human rights in the state.

³⁶ The Dispute Avoidance and Resolution Service has been in operation from 1 September 2005 for disputes involving children with special educational needs. This does not affect the right of appeal to SENDIST. Grievances involving disability discrimination are referred to the Equality Commission.

³⁷ Disputes must relate to Parts 3 and 4 of the DDA 1995 (goods, facilities, services and premises and education).

All formal enquiry requests are considered, but the Commission can elect not to conduct an enquiry where the matter could be dealt with more appropriately by another body. As with other bodies, the Commission will not engage in trivial or vexatious enquiries and unfounded allegations.

EQUALITY AUTHORITY

Established in October 1999, the Equality Authority is an independent body that seeks to eliminate forms of discrimination on nine grounds, broadly similar to the section 75 groups mentioned in the Northern Ireland Act 1998. The nine grounds within the remit of the Equality Authority are: age, disability, gender, family status, marital status, race, religion, sexual orientation, and the Traveller community. The authority deals with issues relating to employment and access to goods and services.

The Equality Authority can, at its discretion and subject to certain criteria, provide legal assistance to people making a complaint of discrimination under the Employment Equality Act 1998 and the Equal Status Act 2000. In order to qualify for assistance, a complaint must be deemed by the Chief Executive Officer to be of strategic importance. Only a small percentage of cases, however, fulfil the required criteria and receive assistance.

THE HEALTH AND SAFETY EXECUTIVE

The Health and Safety Executive (HSE) was created by the Mental Health Act 2004, replacing a structure that comprised 10 regional health boards, the Eastern Regional Health Authority and several other agencies. The HSE is responsible for providing health and personal social services to everyone in Ireland, either directly or through contractual arrangements with service providers. The 2004 Act placed a statutory duty on the HSE to establish a complaints procedure, although service providers may establish their own. In both instances, there is no fee for making a complaint.

COMPLAINTS PROCEDURE

From 1 January 2007, a new statutory complaints system for the HSE came into operation under Part 9 of the Mental Health Act 2004. Complaints may be made about actions undertaken by the HSE or a service provider and can relate to actions that a complainant does not consider to be fair or reliable administrative practices or where there is an adverse effect as a result of any action.

COMPLAINTS MECHANISM UNDER THE DISABILITY ACT 2005

Section 14 of the 2005 Act provides for a complaints procedure about disability assessments or service statements made in respect of health or educational needs. The Act confers powers on independent complaints officers, including the power to undertake informal resolution procedures. The Act also confers powers of investigation and a right of appeal. Complaints are to be made as soon as possible, and not more than three months after the date on which the complaint arose.³⁸ It should be noted that Part 2 of the 2005 Act came into force in 1 June 2007, but only insofar as it relates to

³⁸ Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007.

children under the age of 5.³⁹ It is expected that Part 2 of the Act will come into operation for children and young people between the ages of 5 and 18 by 2010, and for adults as soon as possible, but no later than 2011.⁴⁰

OFFICE OF THE OMBUDSMAN

The Office of the Ombudsman⁴¹ has been in operation since 1984 and is an independent organisation that deals with complaints relating to Government Departments, the Health Service Executive, local authorities and An Post.

COMPLAINTS PROCEDURE

Organisations, companies and individuals can make complaints, as can a person acting on behalf of an individual, providing written permission has been given. Complainants should attempt to resolve issues directly with the body concerned in the first instance. Complaints are assessed to determine their validity, and the majority of complaints are resolved informally. Where investigations are undertaken, the Ombudsman may make a recommendation to the public body concerned. In most instances, recommendations are accepted. However, the Ombudsman has the power to present a special report to the Houses of the Oireachtas, if a public body fails to act. It should be noted that complaints in relation to clinical judgements made by doctors are not within the Ombudsman's remit, as are actions of dentists, pharmacists or private practitioners.

OMBUDSMAN FOR CHILDREN

The office was established by the Ombudsman for Children Act 2002 and came into operation in 2004. The Ombudsman for Children is responsible for advising Government on issues affecting children and young people and has a complaints procedure.

COMPLAINTS PROCEDURE

Complaints are first assessed to determine whether they fall within the office's remit. The role of the office is to be neutral and to examine both sides of the complaint. The public body is then given an opportunity to address the situation, and many complaints are resolved at this stage. After an investigation, the Ombudsman can make recommendations to the public body, if necessary, and issue a timescale for their completion. As with the Office of the Ombudsman, the Ombudsman for Children can, in certain circumstances, present a special report to the Houses of the Oireachtas.

THE NATIONAL DISABILITY AUTHORITY

The National Disability Authority is an independent agency and is the lead authority providing independent advice to Government on policy and practice. Jimmy Devins TD is the current Minister of State with responsibility for mental health and disability.

³⁹ The Disability Act 2005 (Commencement) Order 2005.

⁴⁰ Department of Health and Children Sectoral Plan.

⁴¹ It should be noted that the Ombudsman is also the Information Commissioner in Ireland.

5.5 INTERNATIONAL BODIES

AUSTRALIA: THE HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION

The Commission is an independent body that reports to the Australian federal government on human rights, discrimination in respect of age, gender and race, disability rights and issues relating to indigenous Australians. The Commission, which was established in 1986, is headed by a president and five Commissioners, including one with specific responsibility for disability discrimination.

REMIT

The Commission has roles in relation to policy and legislative development, compliance with human rights, education and awareness raising, and dealing with discrimination and complaints. The Commission is responsible for administering federal human rights and anti-discrimination laws.

COMPLAINTS PROCEDURE

Complaints lodged with the Commission are initially assessed to ensure that they can be investigated under the laws for which the Commission has responsibility (in this instance, the Disability Discrimination Act 1992) and whether the complaint should be terminated or referred to conciliation. The conciliation process is administered by the Commission and brings parties together in a bid to resolve the complaint. The Commission is impartial and does not provide legal representation or advocacy services.

While most complaints are successfully conciliated, those that are not are terminated. Complainants who wish to pursue their case can refer the complaint to the Federal Court of Australia or the Federal Magistrates Service, where a determination will be given 28 days following the lodgement of the complaint.

DENMARK: THE DANISH DISABILITY COUNCIL

Established in 1980, the Danish Disability Council is a government-funded body, headed by a chairperson appointed by the Danish Minister of Social Affairs, comprising 14 members, with an equal number of representatives of people with disabilities and public authorities. Experts in housing, building, culture, family and information and communication are also attached to the Council.

REMIT

The Council is an advisory body to Government and Parliament on disability issues, and Government, Parliament and national authorities may consult the Council on various matters. The Council also has a proactive role in taking initiatives and proposing change.

NEW ZEALAND: THE HEALTH AND DISABILITY COMMISSIONER

The Health and Disability Commissioner (HDC) is an independent agency that aims to promote and protect the rights of consumers who use health and disability services. The HDC also seeks to help to resolve problems between consumers and providers of health and disability services and to improve the quality of healthcare and disability services. The remit of the HDC is limited to the quality of care provided and cannot intervene in funding or entitlement

concerns. The HDC affords rights to consumers of health and disability services and places duties on service providers.

THE CODE OF HEALTH AND DISABILITY SERVICES CONSUMERS' RIGHTS

The Code applies to all health and disability services, but the Commissioner's remit is limited to the quality of care provided — issues of funding of, and entitlement to, care are outwith the HDC's jurisdiction. The Code affords rights to all consumers and places obligations on service providers, whether public or private, including: hospitals, doctors, dieticians, psychiatrists, counsellors, nurses, optometrists, rest homes, home care providers, homeopaths, therapeutic masseurs and midwives. The code outlines what consumers of such services can expect⁴², and all service providers must inform consumers of their rights and enable them to exercise them.

TEST OF REASONABLENESS

Clause 4 of the Code states that service providers are not in breach of the Code if they have taken 'all reasonable actions in the circumstances' to comply with the Code's rights. The onus is on the service provider. The definition of "circumstances" includes the consumer's clinical circumstances and the resource constraints of the service provider.

COMPLAINTS PROCEDURE

Where consumers of health and disability services consider that their rights have been breached, the HDC encourages them to contact the service provider directly. Most complaints are resolved promptly, although investigations can range from one month to two or three years for complex cases. A free advocacy service is also available, where health and disability advocates can deal with complaints, provide advice and assist with settlement options. Advocates are not neutral parties, and are explicitly on the side of the consumer.

The HDC also has a formal investigative role, where an expert in the relevant field will review all the information and advise whether the rights in the Code have been breached. After a review, the Commissioner, who is tasked with enforcing the Code, will issue a report. Whereas health and disability advocates are on the side of the consumer, the Health and Disability Commissioner is impartial. Reports on investigations usually include recommendations for action, such as an apology, or a recommendation to change a practice or policy. The Commissioner can also send reports to the New Zealand Ministry of Health to draw its attention to the issue. The identities of the parties usually remain undisclosed.

APPEALS AND REPARATION

As the Commissioner's decision is final, there is no right to an appeal. Rarely, and only in the most serious cases, the Commissioner may refer a case to an independent prosecutor, known as the Director of Proceedings, to decide whether a service provider should be disciplined or taken to court. However, complainants still have the option of taking their case to the Human Rights

⁴² The Code of Rights is listed at Appendix 2.

Review Tribunal, should the Commissioner decide not to refer the case to the Director of Proceedings.

Where the Commissioner finds in favour of a complainant, the recommendations will not usually stipulate that compensation be paid. However, the Commissioner may recommend that complainants be refunded, in part or in total, moneys that they have paid for services that have been found to be below standard.

FURTHER INFORMATION

For the year 2006-07⁴³, the HDC responded to 7,444 enquiries, of which 96% were closed on the day of receipt. A total of 1,289 new complaints were received during that time, of which 96% were closed within one year of receipt. By June 2007, 99% of all complaints were closed within two years of receipt. Three investigations took longer to be resolved because of their complexity. The HDC had set a target of 100% compliance with recommendations by providers. Two providers failed to do this, and both were referred to their relevant professional bodies for follow-up action.

SWEDEN: THE DISABILITY OMBUDSMAN

The Swedish Disability Ombudsman (in Swedish, Handikappombudsmannen, or HO) is a Government agency that monitors all issues relating to the rights and interests of people with disabilities. The HO was established under the Disability Ombudsman Act 1994, although the foundations of the Ombudsman can be found in the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities. The HO is tasked with ensuring that 'people with disability are ensured full participation in the life of the community and equality of life conditions' and that people with disabilities have the same rights, and are able to do the same things, as others.

REMIT

There are four main statutes that apply to people with disabilities in Sweden: The Prohibition of Discrimination in Working Life of People with Disability Act 1999; Equal Treatment of Students at Universities Act 2001; The Prohibition of Discrimination Act 2003; and the Act on the prohibition of discrimination and other degrading treatment of children and pupils 2006. Where inadequacies in legislation come to light that affect people with disability, the HO can draw this to the attention of the Swedish national Government.

The HO has the power to contact authorities, businesses or organisations to achieve improvements for people with disability. The HO can order authorities, county councils and municipalities with obligations towards people with disabilities to provide details of their activities. The HO can also obligate these bodies to attend deliberations with the Ombudsman, if so directed.

COMPLAINTS PROCEDURE

Individuals can make a complaint to the HO, which usually prompts an investigation, or the HO can undertake an investigation of their own volition.

⁴³ [Health and Disability Commissioner Annual Report](#) for year ended 30 June 2007:

The HO also considers reports from individuals who consider that they have been discriminated or excluded because of their disability.

SECTION 6: OPTIONS FOR ENHANCED PROTECTION

While there is scope for extending the current levels of protection afforded to people with disabilities, many of the issues relating to enhanced protection for people with disabilities have already been discussed within the context of the consultation exercise on the Single Equality Bill (SEB). As such, any proposals for enhancing current protection for people with disabilities will have to be considered in light of the impact that the SEB will have. That said, potential areas in which current protection could be enhanced are:

- A commissioner for people with disabilities
- Extending the current definition of disability to include:
 - People with a genetic predisposition to an illness or impairment
 - Discrimination by association
- Statutory duty for public bodies to employ access officers
- Employment monitoring requirement in respect of people with disabilities
- Public-sector employment quota for people with disabilities

6.1 COMMISSIONER FOR PEOPLE WITH DISABILITIES

Section 5 outlined complaints mechanisms in bodies specifically charged with protecting the rights of people with disabilities. This section outlines a variety of models for consideration.

- (a) Establishment of a commissioner / ombudsman for disability in a similar vein to the Northern Ireland Commissioner for Children and Young People

The Northern Ireland Commissioner for Children and Young People (NICCY) provides an obvious and local example of the work that a disability commissioner could undertake. Although Northern Ireland was the first region in the UK or Ireland to establish a children's commissioner, it was advantageous that the United Nations Convention on the Rights of the Child had been in operation for some time before NICCY came into being. The United Nations Convention on the Rights of Persons with Disabilities has not yet come into force.⁴⁴

- (b) Establishment of a commission for disability with a specific remit, such as healthcare provision, similar to the Health and Disability Commissioner in New Zealand

The New Zealand Health and Disability Commissioner has a specific remit relating to the quality of care provided, but the HDC does not consider issues of entitlement or funding. There may be specific areas of health or disability policy that could benefit from a commissioner.

⁴⁴ The Convention will enter into force 30 days after the twentieth ratification; at time of writing, 17 countries have ratified the Convention. The UK and Ireland signed the Convention on 30 March 2007, but neither has ratified it as yet.

(c) Creation of a commissioner specifically charged with disability issues within the Equality Commission for Northern Ireland

The Australian Human Rights and Equality Commission has a broadly similar remit to human rights bodies in Northern Ireland, Ireland and the UK. However, it is particularly interesting to note that each of the HREC's Commissioners is responsible for particular discrimination issues, be it disability, age, gender, race or indigenous peoples. Establishing a commissioner for specific responsibility for disability within the existing structure of the Equality Commission could give rise to calls for other commissioners to act as champions for other interested groups.

It is noteworthy at this juncture to refer to potential impact that the proposed SEB, which seeks to harmonise, update and extend anti-discrimination and equality legislation in Northern Ireland, will have on the equality sector. Many equality and lobby groups that submitted responses to the consultation on the SEB argued that harmonisation of existing equality and anti-discrimination legislation should be a priority, according to the principle of non-regression⁴⁵.

If a commissioner for disability were to be established, other groups in the equality and anti-discrimination fields would be likely to seek the establishment of commissioners for other interest groups such as race or sexual orientation. There is a possibility that the creation of a commission for disability could lead to accusations of a hierarchy of rights or discrimination. Indeed, in response to the SEB consultation, several groups highlighted the need to remove any actual or perceived hierarchy or inequalities. Furthermore, it could be suggested that the creation of a separate body for people with disabilities would be a retrograde step, in that it would go against the *raison d'être* of the Equality Commission for Northern Ireland and the Equality and Human Rights Commission in GB, both of which subsumed single-issue bodies into one cohesive organisation.

A commissioner for disability could provide a 'one-stop shop' for people with disabilities to obtain information and assistance on a range of public issues with a specific focus on disability. As discussed in section 4.1, the difference in approach between disability discrimination⁴⁶ and, for example, gender discrimination means that an office with an explicit disability remit could prove to be of benefit, although the proposed SEB, and any moves towards harmonisation, could impact upon that. However, the fact that, at present, less favourable treatment is justified in certain circumstances in disability discrimination but not in other areas of discrimination could be used as an argument for the need to create a specific commissioner for people with disabilities. That said, the removal of the justification for less favourable treatment in the provision of goods, facilities and services was highlighted in some responses to the SEB consultation.

⁴⁵ A summary of consultation responses received from disability and other relevant groups is attached at Appendix 3.

⁴⁶ i.e. the concepts of less favourable treatment and reasonable adjustment.

6.2 EXTENDING THE CURRENT DEFINITION OF DISABILITY

There is scope to extend the current definition of disability under the Disability Discrimination Act 1995, as amended by the Disability Discrimination (Northern Ireland) Order 2006 to include other categories. Any amendments to the 1995 Act would be enacted through Regulations.

PREDISPOSITION TO GENETIC FACTORS

There are many conditions that are linked, to greater or lesser degrees, to genetic factors. One example is Huntington's disease, an incurable and hereditary degenerative brain condition that causes chorea and progressive dementia. The complex genetic factors involved mean that the disease will often not be diagnosed until after the age of 40, by which time many carriers of the disease will have had children. (There is a 50% chance that a parent with the Huntington's gene will pass it on to their children.)

Genetics is a complex issue for disability groups, particularly with the issue of eugenics, which is obviously incongruent with the social model of disability. However, the legislative definitions of disability in Ireland and Australia include the presence of organisms likely to, or capable of, causing illness or disease.

In developing the original definition of disability that was included in the Disability Discrimination Act 1995, the Disability Rights Task Force report [From Exclusion to Inclusion](#)⁴⁷ recommended that genetic predispositions to impairments should not be considered as an impairment for the purposes of the 1995 Act.

The Task Force took the view that, because genetics is an ever-advancing field of science, genetic predisposition should not be included within the definition, as Government should not be in the position of taking reactive, as opposed to proactive, measures to protect people's civil rights. The report suggested that specific legislation may be the most appropriate vehicle for protecting rights in this area. However, the report also stated that the Disability Rights Commission and the Equality Commission for Northern Ireland should keep the issue under review.

In response to the OFMDFM consultation on the SEB, the Disability Rights Commission stated that the definition of disability should be extended to include genetic predisposition. This view was shared by Disability Action and the Children's Law Centre.

DISABILITY BY ASSOCIATION

The definition of disability could be extended to include discrimination by association. The Americans with Disabilities Act 1990 extends the definition to persons who have a known relationship with a person with a disability. Furthermore, the UK case of *Coleman v Attridge Law*, as outlined in Section 2, held that discrimination was suffered where the person covered by the Framework Employment Equality Directive and the person who was the subject of discrimination at work were not the same.

⁴⁷ The report can be viewed or downloaded from the Department of Transport website.

Carers Northern Ireland estimates that 188,000 people in Northern Ireland have caring responsibilities. In its response to the consultation on the SEB, Carers NI stated that carers required protection from social exclusion and direct and indirect discrimination. The organisation further stated that 'carers' should be included as a ground under the SEB, explaining that that was a more helpful definition than the current section 75 categories of marital status and whether a person has dependants. Protection for carers under the provisions of the SEB was also highlighted by Disability Action, the Equality Commission for Northern Ireland and Speechmatters.

6.3 EDUCATION

Legislation regarding disability discrimination by an education provider is governed by the Special Educational Needs and Disability (Northern Ireland) Order 2005 (SENDI), which came into operation on 1 September 2005. Complaints of disability discrimination in respect of schools are heard by the Special Educational Needs and Disability Tribunal for Northern Ireland, but where a complaint relates to a further education or higher education provider, it must be made to a county court. Both mechanisms have the same statute of limitation (six months minus one day from the act in question). During the consultation on the SEB, the operation of two complaint mechanisms for dealing with disability discrimination in education was raised as an issue of concern. The provisions of SENDI could be amended to provide that all complaints of disability discrimination be heard by one body.

6.4 INTRODUCTION OF NEW STATUTORY REQUIREMENTS

STATUTORY REQUIREMENT FOR PUBLIC BODIES TO APPOINT ACCESS OFFICERS

In order to underline current accessibility requirements, a statutory requirement could be introduced on public bodies to appoint an access officer who would be charged with co-ordinating accessibility arrangements for members of the public, including physical barriers to access and the provision of auxiliary aids.

Section 26 of the Irish Disability Act 2005 places a duty on public service providers to ensure that access to the services that they provide is integrated for people with and without disabilities. There are limitations to the duty, in that it is only applicable 'where practicable and appropriate'.

Heads of public bodies are under a duty to authorise at least one member of staff as an access officer, whose role is to co-ordinate assistance and guidance for service users who have a disability.

For the purposes of the 2005 Act, a public body includes a Department of State, the offices of the President, the Attorney General, the Comptroller and Auditor General, the Houses of the Oireachtas, local authorities, the Health Service Executive, statutory bodies and persons or organisations established under the Companies Acts.

In practice, bodies promote and publicise information about their access officer or officers, providing contact details for service users with a disability in literature and on websites. The National Disability Authority is the lead state

agency for disability issues and co-ordinates information awareness, training and good practice among access officers.

6.5 EMPLOYMENT

There are issue in respect of disability and employment where statutory positive action measures could be introduced. Several employment initiatives are already in place to enable people with disabilities through the Department for Employment and Learning. The feasibility and merits of placing positive action measures on a legislative basis will require further consideration.

The two suggestions below outline a statutory requirement for employers to monitor their workforces in respect of disability and a statutory duty on public-sector employers to employ a quota of people with disabilities. Currently, the Fair Employment and Treatment (Northern Ireland) Order 1998, as amended, provides for workforce monitoring of religion and gender.

DISABILITY EMPLOYMENT MONITORING

Current employment monitoring requirements under the Fair Employment and Treatment (Northern Ireland) Order 1998 could be amended to include disability. This suggestion was favoured by several groups in response to the consultation on the SEB, namely, Disability Action, Northern Ireland Commissioner for Children and Young People, Northern Ireland Human Rights Commission and Speechmatters.

In its response to the SEB, the Human Rights Commission's suggestion that disability employment monitoring could be phased in by initial monitoring of public-sector employees. In its submission on the SEB, the Human Rights Commission attached certain provisos in relation to disability employment monitoring. The suggested conditions were: there should be no compulsion to declare a disability; where disability is declared, it should be self-defined; and that employers should not be able to ascribe descriptions of disability to their employees.

STATUTORY PUBLIC-SECTOR DISABILITY EMPLOYMENT TARGET

Section 47 of the Irish Disability Act 2005 provides that all public bodies must '*in so far as practicable take all reasonable measures to promote and support the employment... of persons with disabilities.*'

The statutory employment target for public bodies is 3%. Each Government Department has a monitoring committee for the public bodies under its remit. The Department of Finance is the monitoring committee for other Government Departments. The National Disability Authority (NDA) is the overarching monitoring authority for compliance with the target. The NDA's first report, covering data gathered in 2006, was published on 4 January 2008.⁴⁸

UK QUOTA SCHEME

A quota scheme for the employment of people with disabilities previously existed in the UK, including Northern Ireland. Under the Disabled Persons

⁴⁸ [National Disability Authority 2006 Compliance Report](#)

(Employment) Act (Northern Ireland) 1945⁴⁹, provision was made for a register of people with disabilities. The Act also placed a duty on employers with more than 20 staff to employ a quota of people with disabilities. The standard percentage quota, which applied to the public and private sector, was 3%. The register and quota requirements of the Acts were repealed by the Disability Discrimination Act 1995.

Although the scheme was not repealed until 1995, there was wide non-compliance for many years, and the scheme was not successful for several factors. The requirement to register as disabled was voluntary, with the result that many people did not apply for inclusion on the register — often, due to a fear of stigmatisation. Commentators have also cited a lack of enforcement on the part of successive Governments.⁵⁰ The scheme was also considered to be administratively cumbersome.⁵¹

One of the disadvantages with the quota scheme was the lack of redress for people with disabilities. Penalties were available for employers, but disabled employees had no remedies or redress in respect of their employment. The legislation required employers to maintain a register of disabled employees and to employ staff in accordance with the 3% quota. The Disability Discrimination Act 1995 offers more substantive equality, in addition to effective means of redress. The 1995 Act protects current and prospective employees with disabilities against discrimination and less favourable treatment.

Offences under the 1945 Act were liable to a fine of £100 or a term of three months' imprisonment. These penalties were never revised or updated⁵². It was an offence for an employer to be below the 3% quota and employ a person who was not disabled. It was also an offence for an employer to dismiss a disabled employee without reasonable cause, where that dismissal would result in the employer falling below the quota. However, there was widespread non-compliance with the scheme, despite the fact that employers could meet their quotas quite easily, by employing people with disabilities in low-skilled roles. It is noteworthy to mention that, during the scheme's operation, only 10 employers were ever prosecuted for offences under the Act.⁵³

The 1945 Act provided for exemption permits, which allowed non-compliance with the quota scheme. Applications for permits increased to such an extent that, from 1972 onwards, employers with exemption permits outnumbered the employers who complied with the scheme. With the increase in permits, the scheme was in abeyance until its repeal under the 1995 Act, with policy-

⁴⁹ The corresponding UK Act is the Disabled Persons (Employment) Act 1944.

⁵⁰ Colin Barnes (1992) *Disability and Employment* British Council of Organisations of Disabled People (University of Leeds)

⁵¹ Michael Floyd and Klaus North (1986) *Quota schemes and the Assessment of Employment Handicap in Britain and West Germany* Disability, Handicap and Society Volume 1, Number 3 page 291.

⁵² Colin Barnes (1992) *Disability and Employment* British Council of Organisations of Disabled People (University of Leeds)

⁵³ Colin Barnes (1992) *Disabled People in Britain and Discrimination – A Case for Anti-Discrimination Legislation* C. Hurst and Co.

making stagnating to the extent that a 'stalemate' arose.⁵⁴ The criteria for exemption permits were set at a low threshold, and permits could be granted unconditionally. In contrast, the only exempted employer from the provisions of the 1995 Act is the armed forces.

The guiding principle of the 1945 Act was to ensure that the employment quota was met, but the 1995 Act contains more proactive measures designed to afford tangible equality of opportunity, such as the prohibition on discrimination and the duty to make reasonable adjustments, in addition to recourse to an employment tribunal.

As illustrated above, the format and enforcement of the UK quota scheme was unsuccessful. However, the option of a quota scheme could be reconsidered in light of the fact that both the concept and practice of disability rights have moved on immeasurably since 1945. Consideration would have to be given to how any proposed quota scheme would work alongside current initiatives aimed at bettering employment opportunities for people with disabilities that are administered by the Department for Employment and Learning.⁵⁵

Introducing a proposed quota scheme to the public sector would underline Government commitment to improving employment opportunities for people with disabilities. The experience in Ireland would be useful in investigating the feasibility of implementing and monitoring such a scheme.

⁵⁴ ⁵⁴ Michael Floyd and Klaus North (1986) *Quota schemes and the Assessment of Employment Handicap in Britain and West Germany* Disability, Handicap and Society Volume 1, Number 3 page 292.

⁵⁵ The main initiatives are: the Job Introduction Scheme, Access to Work, the Workable scheme, New Deal for Disabled People and Pathways to Work.

APPENDIX 1:

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES⁵⁶

- Article 1: Purpose
- Article 2: Definitions
- Article 3: General principles
- Article 4: General obligations
- Article 5: Equality and non-discrimination
- Article 6: Women with disabilities
- Article 7: Children with disabilities
- Article 8: Awareness-raising
- Article 9: Accessibility
- Article 10: Right to life
- Article 11: Situations of risk and humanitarian emergencies
- Article 12: Equal recognition before the law
- Article 13: Access to justice
- Article 14: Liberty and security of the person
- Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment
- Article 16: Freedom from exploitation, violence and abuse
- Article 17: Protecting the integrity of the person
- Article 18: Liberty of movement and nationality
- Article 19: Living independently and being included in the community
- Article 20: Personal mobility
- Article 21: Freedom of expression and opinion, and access to information
- Article 22: Respect for privacy
- Article 23: Respect for home and the family
- Article 24: Education
- Article 25: Health
- Article 26: Habilitation and Rehabilitation
- Article 27: Work and employment
- Article 28: Adequate standard of living and social protection
- Article 29: Participation in political and public life
- Article 30: Participation in cultural life, recreation, leisure and sport

⁵⁶ The full text of the Convention can be found at <http://www.un.org/esa/socdev/enable/documents/tcccconve.pdf>

APPENDIX 2:

HEALTH AND DISABILITY COMMISSIONER FOR NEW ZEALAND – CODE OF RIGHTS⁵⁷

- Right 1: The right to be treated with respect
- Right 2: The right to freedom from discrimination, coercion, harassment and exploitation
- Right 3: The right to dignity and independence
- Right 4: The right to services of an appropriate standard
- Right 5: The right to effective communication
- Right 6: The right to be fully informed
- Right 7: The right to make an informed choice and to give informed consent
- Right 8: The right to support
- Right 9: Rights in respect of teaching and research
- Right 10: The right to complain

⁵⁷ A detailed explanation of the Code of Rights can be found at: <http://www.hdc.org.nz/files/hdc/code-leaflet.pdf>

APPENDIX 3

SELECTED SINGLE EQUALITY BILL CONSULTATION SUMMARY

In order to facilitate consideration of suggestions for further protection for people with disabilities, it is necessary to refer to the proposals for a Single Equality Bill (SEB). The SEB seeks to update and harmonise, as far as practicable, equality law in Northern Ireland.

The consultation document sought views on the harmonisation of existing equality legislation, the purpose and principles underpinning the Bill, grounds and scope of protection, issues around under-representation in employment, definitions and exceptions, provision of goods, facilities and services, the role of the Equality Commission for Northern Ireland and tribunals and courts, and the issue of alternative dispute resolution.

The consultation process was initiated under direct rule and ran from June 2004 until November 2004. The [consultation document](#) and a [summary of responses](#) are available on line, as are the [responses](#) that were received from groups within the statutory, community and voluntary sectors, political parties and individuals.

Outlined below are issues that were raised by several groups that replied to the OFMDFM consultation exercise in relation to disability. It should be noted that the following issues relate specifically to disability and were part of each organisation's wider response.

The selected groups are: Carers NI; Disability Action; Equality Commission for Northern Ireland; Northern Ireland Commissioner for Children and Young People; Northern Ireland Human Rights Commission; Meningitis Trust; Speechmatters; and RNID Northern Ireland.

CARERS NORTHERN IRELAND

- Advocates dual approach of prohibiting discrimination and promoting equality of opportunity;
- Perception of hierarchy of rights should be removed, with the same standards of fairness and equality for all;
- Asserts that carers need protection from social exclusion and direct and indirect discrimination;
- Supports the inclusion of carers as a ground for protection, citing this as a more helpful definition than the catch-all terms of family status or whether a person has dependants.

DISABILITY ACTION

- Equality law should be harmonised to the greatest degree and extended to all grounds; any justifications should be explicitly justified;
- Favours promotion of equality, as opposed to the principle of non-discrimination, in order to move beyond compliance to develop a culture of equality;
- SEB should be underpinned by human-rights standards;
- Contends that a hierarchy of inequalities exists;
- Support inclusion of carers as a ground for protection, due to the significant potential for discrimination;
- Supports inclusion of people with genetic predisposition as a ground for protection;

- Volunteers should be included as part of the definition of employment, but their position should be clearly defined;
- Duty of reasonable adjustment should remain for disability;
- Principle of justification in respect of the provision of goods, facilities and services should be removed;
- Indirect discrimination should cover all grounds, including disability;
- To address under-representation in employment, disability should be included as a monitoring ground;
- Codes of Practice in relation to disability should not be extended to other grounds;
- The requirement under the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) to supply information should be extended to cover all grounds, including disability.

DISABILITY RIGHTS COMMISSION⁵⁸

- Contends that existing equality framework creates a damaging hierarchy of rights, advocating that the scope of the SEB should be the same for all grounds;
- Contends that harmonisation must be according to the principle of non-regression and that the hierarchy of inequalities must be removed;
- Advocates extending the definition of disability to better reflect the social model;
- Support amending the definition of disability to include a genetic predisposition to have an impairment that substantially impacts on a person's everyday activities;
- Supports the inclusion of volunteers within a wide definition of "employment";
- Supports the retention of the duty of reasonable adjustment in relation to disability, but is against extending the duty on the ground that it could dilute the protection afforded to people with disabilities.

EQUALITY COMMISSION FOR NORTHERN IRELAND

- Supports the harmonisation of equality laws according to the principle of non-regression to the best standards, supports the minimisation of hierarchy of inequalities;
- In order to mainstream equality, advocates a "common template" across all grounds, with common and effective enforcement mechanisms;
- Accepts that there will be variation on diversity grounds, referred to as "variable geometry";
- Highlights that "a weakening one the protection of one group weakens the protection for all";
- Advocates a broad-based definition of disability;
- Supports the inclusion of the grounds outlined in the Framework Equality Directive in an SEB, but not the section-75 wording of "persons with or without disabilities";
- Supports the inclusion of carers and those with dependants as a ground for protection in an SEB, but these categories should be subject to asymmetrical protection;
- The issue of genetic predisposition should be kept under review, ensuring that the rights of those with a genetic predisposition to a condition are protected, highlighting that specific legislation may be the most appropriate vehicle by which to achieve this;

⁵⁸ The remit of the Disability Rights Commission is now part of the UK Equality and Human Rights Commission.

- ECNI wants all its recommendations on the definition of disability to be included in an SEB;
- Supports the inclusion of volunteers within the definition of “employment”;
- Expresses disquiet at the separate disability discrimination regime that operates in the education sector under SENDO;
- Supports the extension of the duty of reasonable accommodation to all grounds within the SEB, with the anticipatory approach being extended to employment and training;
- Welcomes the inclusion of indirect discrimination into disability discrimination.
- To address under-representation in employment, monitoring should be up to the FETO standard;
- Seeks an expanded role for positive action, “albeit short of quotas”.

MENINGITIS TRUST

- Expresses concern about including volunteers as employees, especially in respect of the impact that would have on contractual and insurance arrangements;
- Advocates a separate category and definition for volunteers, citing the relationship as “unique”, and to define it within employment terms would alter the relationships of organisations and their volunteers fundamentally;
- Advocates voluntary code of practice for volunteers, with emphasis on mediation.

NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

- Supports the harmonisation of equality law upwards and seeks the elimination of hierarchy of inequalities;
- Does not support the extension of the definition of “employment” and “employment relationship” to include volunteers;
- Supports the inclusion of all sectors of education within the remit of the SEB to eliminate the different disability regime that exists under SENDO;
- Supports the extension of the duty of reasonable adjustment to other grounds, citing that “disability should not be seen as first among equals”;
- Supports the extension of employment monitoring to include disability (and gender and race) up to the FETO standard.

NORTHERN IRELAND HUMAN RIGHTS COMMISSION

- Supports the harmonisation of equality laws to the greatest possible degree and according to the principle of non-regression, with a move away from non-discrimination towards a proactive duty to promote equality of opportunity;
- Supports the inclusion of a genetic predisposition as a ground for protection;
- Advocates including volunteering as a service as opposed to defining it within the terms of “employment” in order to bridge the gap between fears around bureaucracy and ensuring that volunteers are protected;
- Supports the retention of the duty of reasonable adjustment for disability, but not the requirement to show a “substantial disadvantage”;
- Supports the extension of the duty of reasonable adjustment to other grounds, including age;
- In order to address under-representation in employment, supports the extension of employment monitoring to include disability (and gender and race) to the FETO standard with immediate effect; suggests a phased implementation for the new grounds within the public sector;

- Emphasises the right to privacy in employment monitoring; recommending that there should be no compulsion to disclose, and that monitoring should be self-defining (i.e. no descriptions ascribed by employers).

SPEECHMATTERS

- Supports the harmonisation of equality law and the addition of new grounds for protection, according to the principle of non-regression, with a move away from the principle of non-discrimination towards the more proactive duty to promote equality of opportunity;
- Supports the inclusion of a new ground of protection of marital status/dependents in order to protect carers from non-discrimination;
- Supports the inclusion of genetic predisposition as a new ground of protection;
- Does not support the inclusion of volunteers within the definition of “employees”, stating that the difference should be defined and that volunteers’ rights should be maintained;
- Duty of reasonable adjustment for disability should be maintained;
- Justification principle in the provision of goods, facilities and services should be removed;
- In order to address under-representation in employment, disability (and gender and race) should be included for monitoring purposes, and monitoring should be up to the FETO standard.

ROYAL NATIONAL INSTITUTE FOR THE DEAF (RNID) NORTHERN IRELAND

- Supports amendments to the definition of disability to remove the current 12-month qualifying period; expresses concern at the inclusion of the terms “adverse” and “substantial” in relation to the effects of a disability, asserting that only individuals can truly determine these terms for themselves;
- Supports the inclusion of volunteers within the definition of the terms “employment” and “employment relationship”;
- Supports the inclusion of language as a new ground for protection, specifically people for whom British Sign Language or Irish Sign Language is a first language;
- Supports the inclusion of victims as a new ground, citing that many of the people whom RNID represents acquired their hearing impairments as a result of the Troubles;
- Supports the inclusion of socio-economic status as a ground, highlighting the fact that some reports state that 50% of people with disabilities live below the poverty line.