

# THE DISCRIMINATION LAW ASSOCIATION

## RESPONSE TO:

### “DELIVERING EQUALITY FOR DISABLED PEOPLE”

#### Introduction

1. The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.
2. The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 400 members. Membership is open to any lawyer, legal or advice worker or other person substantially

engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

3. We are a company limited by guarantee.
4. The Discrimination Law Association warmly welcomes the proposed disability equality duty, as we believe that it will do much to further equality of opportunity in the field of disability. It is a given that individual cases of discrimination which are adjudicated before a tribunal or county/sheriff court cannot tackle systemic discrimination, and positive duties in this vein will do much to root out institutionalised discrimination. We hope that positive duties in relation to gender and indeed the three new strands of religion or belief; sexual orientation; and age will follow.
5. We do, however, have grave concerns about the approach taken by the government in respect of those bodies which are subject to the general duty to promote disability equality. Whilst we can see the attraction of the generic Human Rights Act definition in outlining who is a public authority for the purpose of the duty, one of the key aspects of the effectiveness of a general duty is, in our view, certainty as to who is covered by the duty. Such a generic definition does not provide such certainty: this is particularly in light of the confusing caselaw on what are often referred to as “hybrid”

authorities – those who are not public authorities in respect of every function, but are in respect of those functions which are those of a public nature. In the present context, this would mean, for example, that the general duty on the Home Office would cover all aspects of prison management but the general duty on a private company with a contract to manage a prison would not apply to the employment of staff working in that prison. DLA would urge the government to consider again the wisdom of this approach, and to consider instead the listing approach taken in the Race Relations Act. In addition, there are a number of bodies which are not pure “public authorities” but which, because of the critical nature of what they do, should be subject to the general duty. A specific example of such bodies would be registered social landlords. We would suggest that these be made subject to the specific duties, ensuring also that they would be subject to the general duty in respect of all their functions, such as, for example, employment contracts.

6. In addition, whilst we particularly welcome the nature of the specific duties in that they are outcome focussed, we are concerned about the language used in the consultation document to describe those duties. In addition, we have grave concerns about paragraph 3.15 in the consultation document, where it states that “ The government will therefore make it explicit on the face of the legislation that even if bodies commit to certain actions they will not be legally bound to continue with them if experience proves that

the activity will not promote equality or will only have a negligible effect on the promotion of equality of opportunity, or will incur a cost that is disproportionate to the duty to promote equality”. This would appear to drive a coach and horses through the duty as outlined in the consultation document. Whilst we appreciate that there may be circumstances where it is no longer appropriate to pursue a particular action - and we would not wish the duty to commit any authority to actions which are ineffective – the approach outlined seems very broad. Any such provision should ensure that the duty is only mitigated if the reason for not pursuing the plan was not foreseeable at the time at which it was entered into. This also raises the issue of how compatible such an approach to the specific duty is to the general duty; it would not be consistent with the general duty for an authority to continue with an approach which was not promoting equality of opportunity and thus one would expect them to be monitoring their activity and revising it if necessary.

7. DLA also welcomes the extension of the DDA to cover those public functions which fall outside the definition of goods, facilities and services within the meaning of s.19 of the Disability Discrimination Act 1995. However, as providing facilities or services to the public or a section of the public is one of the functions of some public authorities, it is confusing, and, in our view, inaccurate, to draw a line in legislation or in guidance between “services” and “public functions”. Further, it is our experience that in many cases there is little, or no, “clear blue water” between what is a

service and what is a different type of function carried out by the same authority.<sup>1</sup> We would therefore strongly recommend that the ‘triggers’ for reasonable adjustments and any justification provisions should be the same, or as nearly the same as possible, as those that currently apply in relation to “services”.

8. Our answers to the questions posed in the consultation document are set out below. However, we have not answered all the questions, believing that some are more appropriate for public authorities to answer. Where we have answered a specific question, we have set it out prior to our answer.
9. **Q1. In order to assist the Disability Rights Commission to produce the most helpful guidance on the extension of the DDA to public functions, the Government would welcome views on the issues and advice the guidance should cover.**
10. As we have indicated above, without a clear line in practice between the services and other functions of a public authority, if the current proposed different tests are maintained, for example justification, the DRC will need to provide extremely detailed guidance so that public authorities will be able to understand what is expected of them and

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<sup>1</sup> See, for example, Farah –v- Metropolitan Police Commissioner [1998] QB 65 and Brooks – v- Metropolitan Police Commissioner [2002] EWCA Civ 407

disabled people will be able to understand how, and to what extent, they are protected against discrimination.

11. DLA also believes that such guidance may be difficult in view of the tortuous drafting currently in the draft bill around the duty to make adjustments and less favourable treatment definitions.
12. **Q2. The Government would welcome views on whether any circumstances in which an adjustment would, or would not, be reasonable need to be prescribed in legislation.**
13. DLA presumes that there will be regulations, as in relation to goods facilities and services, which will exempt public authorities from alterations to physical features of premises where such features meet Approved Document M. This should provide consistency with the goods facilities and services provisions. DLA sees no reason for any further regulations.
14. **Q3. The Government would welcome views on our proposals for specific duties, and in particular: (i) how they might be improved to assist public bodies to comply with the general duty to promote equality; and (ii) whether the bureaucratic burden could be reduced.**
15. DLA particularly welcomes the fact that the proposed specific duties are outcome focused and, as such, build upon those duties in the Race Relations Amendment Act. In addition, the emphasis upon involvement of disabled people (as opposed to merely consultation) is to be welcomed. However, the specific duties need to be clear, appropriate,

and capable of execution by the particular public authorities to which they apply. DLA is not convinced that the duties currently outline achieve this. In particular:

- the reference to impact assessment (at page 22 of the consultation document) is to assessing the impact on disabled people, whilst the race specific duties and those in s.75 of the NI Act refer to the impact on the promotion of race equality/promotion of equality of opportunity
- - whilst looking at activities will be useful, there is no focus here on policies
- 1(d) contains the same disjunction between services and functions as referred to above.
- Point 1(e) does not require evidence from impact assessments to be analysed and used to update action plans. If bodies are assessing current activities, then that should feed into action planning.

16. In general, the requirements on reporting are not particularly detailed or stringent.

17. With regards to involvement: whilst we welcome the emphasis on involvement of disabled people, we are particularly concerned that disabled people and organisations may spend all their time being consulted, rather than carrying out their ordinary functions. There will need to be considerable support available from public authorities to facilitate the level of involvement which is envisaged in this consultation document.

18. The duties do, however, appear to allow sufficient flexibility to reduce any perceived bureaucratic burden – and in view of the fact that the duties will enable authorities to effectively deliver to the community, they should be enhancing performance and not hindering it. As a result of this flexibility, however, it is important that authorities do not believe that they will be able to adopt a somewhat “laissez faire” approach, and that the DRC guidance is sufficiently clear about what might be expected of particular sized bodies, so far as is possible within guidance.

19. **Q4. The Government would welcome views on the range of bodies it intends to require to comply with the specific duties**

20. It is essential that the duty applies to government Ministers and central government departments as well as all of their executive agencies. It also needs to apply to all of the NHS institutions in England Wales and in Scotland. It must also apply to local authorities, the housing corporation and its equivalent in Scotland.

21. It is also essential that the duty applies to schools. Education is a key aspect of achieving equality, whatever the disadvantaged group, and schools and further and higher education institutions are key to this. Schools in particular are key to disabled people’s participation. The flexibility of the proposed duties means that schools should be able to use the duty to enhance their performance, without it becoming bureaucratic.

**22. Q5. The Government would welcome views on the guidance that should be offered to smaller bodies in order to assist them to comply with the duty to promote equality.**

23. One of the lessons from the race equality duty is that, regardless of the size of the body, no progress will be made without continuing commitment and effective leadership from the top. The guidance should make clear the basic principles that underlie the general duty - for example, as in the CRE Code<sup>2</sup>: obligatory, relevant, proportionate and complementary. proportionality, transparency. It is important that smaller bodies, as well as larger ones, embed the disability equality duty into their everyday practice; the DLA would not expect elaborate bureaucratic systems to be required for any authorities.

**24. Q6. The Government would welcome views on the necessary content of guidance relating to procurement.**

25. Public procurement is an extremely important aspect of the public sector duty, enabling discrimination to be tackled in the private as well as the public sector.

26. Under the RRA the general duty applies only to listed public authorities, and therefore remains the responsibility of a listed authority when they arrange with a private or voluntary sector body to carry out some of their functions. The DLA is aware of the guidance produced by the CRE on public procurement and the RRA duty , and we presume that

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<sup>2</sup> Chapter 3 Code of Practice on the Duty to Promote Race Equality

the guidance produced by the DRC on this issue in relation to contracts for works, goods or services which do not transfer a public function to the contractor will to some extent mirror that in the CRE guidance.

27. Wholly different and quite complex guidance will be required in relation to the procurement of services which will transfer to the contractor responsibility for certain public functions of the public authority. The extreme difficulty that is likely to arise in distinguishing these two types of contracts is another reason that the DLA urges reconsideration of the definition of “public authority”, since this difficulty would not arise if the general duty applied to a list of public authorities.

28. In particular, if authorities subject to the general duty are defined as in the HRA the application of the duty to procurement becomes extremely complex. Very clear guidance will be necessary as to when:

- a public authority remains responsible for compliance with their disability equality duty in relation to a particular function when some aspect is being performed by an external organisation and
- when a private or voluntary sector (or even a different public authority) carrying out a statutory function under contractual arrangements with a statutory public authority will take over responsibility for compliance with the disability equality duty in respect of that function (for the duration of the contract).

29. Public authorities purchase a wide range of goods, works and services from external bodies. In a majority of cases there is not an issue regarding the external body taking over the authority's functions – for example in contracts for works and contracts for goods there would never be a case of the contractor becoming a public authority by virtue of the contractual arrangements. Additionally in relation to certain services -- for example repair and maintenance of plant and equipment, IT maintenance and support, design and publishing, legal, accountancy or security (except in prisons and other secure premises) – the authority remains fully responsible for its statutory functions which these services assist it to carry out.
30. In relation to such contracts, it will be very important in the interests of the public authority for the code to provide clear guidance as to the ways in which the disability equality duty will impact on different stages of the procurement process as well as the monitoring and enforcement of the contract.
31. Arguably if the contractor becomes a “public authority” by virtue of the award of a contract for performing functions of a public nature, for example a contract to manage a prison establishment, the whole of the procurement process would be of lesser importance in terms of how disability equality is incorporated into specifications, contract conditions, monitoring and contract enforcement.

32. Overall, for the public authority seeking to carry out procurement in a way that is consistent with their obligations under the general duty to promote disability equality, to have a legal regime that is different from that under the RRA, even with excellent, careful detailed guidance from the DRC, is likely to discourage rather than encourage good practice.

**33. Q7. The Government would welcome views on the most effective ways for public bodies to involve disabled people.**

34. DLA believes that public bodies must as a first step ensure that disabled people are involved in the variety of involvement methods already in existence, as well as considering specific methods which will enable disabled people's input to be sought not only to the Disability Equality Scheme, but also in relation to the various components of it (e.g. impact assessment, monitoring etc). DLA particularly welcomes the emphasis on "involvement" as opposed to consultation. Involvement is a much more active way of ensuring input from disabled people, whilst consultation implies a certain degree of passivity. DLA trusts that this distinction will be made clear within any guidance. However, DLA retains some concerns as to the capacity of consultees – please see above.

**35. Q16. The Government would welcome views on whether a duty on certain Secretaries of State to report on progress towards equality would be a proportionate**

**driver of equality activity, or whether it would risk duplication with other duties.**

36. DLA has concerns regarding the very low level of action taken by Secretaries of State in relation to the Race Relations Act duty (after the initial activity) and so would welcome anything that will require Secretaries of State to be aware of progress or lack of progress within their spheres of influence and, in particular, to set targets which will improve equality of opportunity for disabled people.