Discrimination Law Association

Response to the Call for Evidence by
The House of Lords Select Committee on the Equality Act 2010 and Disability

1. The Discrimination Law Association ("DLA"), a registered charity, 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, and 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 currently consists of some 300 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. Before responding to the Committee's call for evidence, the DLA consulted with our membership on the Committee's questions; we received responses from case workers, consultants, lawyers working for voluntary organisations and those in private practice. The organisations and individuals whose opinions and experience provide the examples in this response work with and represent hundreds of disabled workers, service users, transport users and members of the public. Our focus is on the experiences and concerns of these people and of their advisers, lawyers and representatives.

Q1 Has the Equality Act 2010 achieved the aim of strengthening and harmonising disability discrimination law? What has been the effect of disability now being one of nine protected characteristics?

4. The inclusion of all nine characteristics in one unified piece of legislation gives a sense that everyone is now included. As a legal advisor in a discrimination advice charity comments,

> "The benefit has been to allow for a better understanding by a wider number of groups and individuals about rights (as the law feels simpler even if might not prove to be in practice). There is greater buy-in as it is easy to demonstrate that discrimination law gives protection for everyone in society in some way."

5. A downside is the concern that there has been a loss of focus of resources on the protected characteristic of disability, because of its inclusion as one of nine protected characteristics in the Act. The general approach tends to marginalise two important aspects of disability discrimination, which are different from other types. Firstly, disability includes a wide range of impairments involving very different forms of disadvantage, for example barriers faced by people with visual impairments in contrast to barriers faced by people with mental health disabilities. The concern of some of our members who represent particular groups of disabled service users and employees is that the general developments in discrimination law do not necessarily reflect these differences.

6. Secondly, disability discrimination is covered by specific and particular provisions, and the positive duty to make reasonable adjustments is unique. This is a fair and proper reflection of the fact that the barriers to equality faced by disabled people in different situations are often very different to the barriers faced because of other protected characteristics. There are concerns that the unified approach can lead to disability discrimination, with its particular legal prohibitions and duties, being treated as being just like any other discrimination when it is not.

7. In contrast, there are advantages in that, in purely practical terms, it is easier for claimants and their advisers to explain claims based on more than one protected characteristic because they only need one piece of legislation and the descriptions of the various torts are unified and easier therefore to apply across the protected characteristics.

8. Some members consider that the actual drafting of the Act is relatively easy for disabled people to follow, but the drafting of some specific areas continues to present difficulties. One law centre lawyer comments, “The definition of disability in the Act could be more accessible.” The definition of disability in the EA is potentially wider than previously, since it is not limited by a prescribed list of “normal day to day activities” and thus possibly more easily applied to people with mental rather than physical impairments.

9. However, the definition of disability is reported by many of our lawyer members as a real stumbling block for claimants, with the question of whether a person is or is not disabled often a matter of significant legal debate. Employers are reported as unreasonably disputing the existence of a disability both as a reason not to make adjustments at all -- even where it is evident that they would be simple and would make a difference -- and in resisting a disability discrimination claim in the employment tribunal (ET). This is more prevalent where there is a mental health disability such as depression, and particularly difficult where there is a lack of understanding that even an episodic condition can be long term.

10. There has been significant press interest in the question of whether obesity is a disability of itself (it is not), and our members report continued difficulties where the disability is a mental health issue or a learning disability. In one case, despite clear medical evidence, a disabled claimant was cross examined on the basis that she was not suffering from a disability, but had a personality disorder.

11. The need to fit within the definition is also difficult in terms of the self-labelling. One member states that:

> "Only 12 out of 56 clients self- identified as having a disability or wanting advice on disability rights. The majority had conditions that they would never have understood as falling under the definition under the Act, even though they clearly met the definition of disability. Clients with a variety of problems, for example, those suffering from migraines, back pain, mental health problem, diabetes type 1, heart problems, dyslexia and asthma all identified as not having a disability on our equality questionnaire but then went on to pursue and win disability discrimination claims."

12. We are less concerned about 'harmonisation', since, as we mention above, different and additional legal provisions and duties are needed in order to build in maximum protections against discrimination for disabled people. These are distinct and arguably require different approaches.

13. For example, the application of the burden of proof provision to the duty to make reasonable adjustments is not the same as it is for direct discrimination, since there is no need to prove that a refusal to make an adjustment is caused by the person's disability, only that the adjustment would remove the barrier (the substantial disadvantage) the disabled person faced.

14. A number of our members have expressed concerns that the move in the EA to a single public sector equality duty, which applies to eight relevant protected characteristics, may have worked to the disadvantage of disability equality. Our members report that the focus and attention which employers and service providers and others carrying out public functions had previously given to disability has been spread far more thinly since implementation, and we are very concerned at the lack of engagement by public bodies and transport providers, with the needs of disabled people when planning, developing and carrying out their various functions. (see Question 5 below)

15. While it is not possible to say that making disability one of nine protected characteristics in a single equality law has made it more difficult to combat disability discrimination and to change the attitudes, perceptions and prejudices of employers, service providers and others, we also cannot say that this legislative reorganisation has of itself notably improved the rate of positive change. The evidence we have received cites persistent patterns of discriminatory policies and practices and widespread negative stereotypic perceptions of disability by employers, service providers and others subject to the EA.

    - The Guide Dogs Association reports that many restaurants still refuse entry to people with guide dogs, fail to make menus accessible and seat blind and partially sighted diners in dark corners or in separate rooms.

- Lawyers report that many employers, when they have fewer resources, respond to a request for reasonable adjustment by making the disabled employee redundant.
- Increasingly we are experiencing disabled people being offered a termination package as a first response to a grievance being raised in respect of a reasonable adjustment. We are aware of this in a significant number of cases and in respect of a variety of disabilities including mental health issues and learning disabilities such as dyslexia and any health issue leading to longer term sickness absences. We are very concerned that this is indicative of an attitude amongst some employers that it is easier and cheaper to replace a member of staff than to retain and retrain them and assist them to stay in the workplace.

16. Overall our view is that the EA has not done enough to strengthen protection against disability discrimination, despite disability being one of the nine protected characteristics, and despite the inclusion of some improved provisions such as discrimination arising from disability.

17. As we discuss below, a key concern remains the lack of available advice and assistance to bring litigation at all, and the enormous burden that litigation as a process for resolving disputes places on a disabled individual. We comment on the role of the EHRC and the PSED below, and emphasise that disability discrimination is a problem for the whole of society and that solutions should therefore be looked for at a collective and community level as well as at an individual level.

Q2 Are there gaps in the law on disability and equality not covered by the Equality Act 2010 or other legislation?

Yes.

18. There are gaps which case law has exposed:

- The case of *Stott* makes it clear that, after boarding a plane, disabled passengers are not covered by UK law and the European Regulation on air travel. Nor can disabled people seek compensation from the airline if they are discriminated against during a flight.

19. There are provisions in the EA directly relevant to disability that are not yet in force :

- The provisions in the EA for reasonable adjustments to common parts (section 36(1)(d)) has not yet been implemented (and the government has announced that it has no intention of doing so).

20. In addition there are wider provisions in the EA not yet in force:

- The DLA strongly recommends bringing EA section 1, the public sector duty regarding socio economic inequalities, into force without further delay. In our view this would contribute to the eradication of disability

discrimination by the designated public authorities and more widely and would help to move the emphasis for tackling disability discrimination onto the community and not just the individual. Research has shown time and again that those who suffer most from discriminatory policies and procedures are the poorest and most marginalised in society, of which disabled people form a significant proportion. A public sector obligation to take account of inequality with an aim of reducing it when spending public money is and remains of fundamental importance.

- We also recommend bringing EA section s.14, dual discrimination, into force. The recognition of multiple identities and the fact that discrimination may be because of the interconnection of disability with one or more other protected characteristics, eg disabled black woman, disabled lesbian, is of fundamental importance to the protection of some very marginalised members of society.

21. An example of dual discrimination arises in the context of age and learning disabilities such as dyslexia. An older person with learning disabilities who went to mainstream schools may not have documentary evidence of disability nor will they be able to afford to instruct an expert and thus may have difficulty in proving disability. One member reports difficulties when a person is diagnosed as having a disability under the Act at a late stage in their career, and employers or others refuse to accept the impact or the value of making changes or adjustments apparently because of the person's age.

22. We are also aware of particular difficulties faced by BAME disabled claimants with mental health disabilities. Members have reported numerous incidents of stereotyping of black workers as aggressive and unmanageable where the issue is depression or other mental health issues. We are also aware of difficulties faced by some BAME disabled claimants in accessing services, benefits and even the courts for the same reasons.

23. The repeal of two important provisions of the EA by the Enterprise and Regulatory Reform Act 2013 has hindered the Act's ability to ensure effective rights of redress and to prevent recurrence of workplace discrimination.

    - The DLA strongly recommends amendment of the EA to restore section 138, the statutory questionnaire procedure, which had been a valuable part of UK equality legislation since the 1970's. Many of our members who carry out litigation comment that the removal of this procedure means that disabled people are not able to gain sufficient detail at an early stage of how their treatment differed from the treatment of others, or how their employer has approached questions of reasonable adjustments in other cases. The process of seeking disclosure of documents and requests for information can be complex and some advocates report a consistent rejection of the types of questions previously routinely asked, and costs threats being made when applications are made because of a respondent's refusal to give voluntary disclosure. Advocates also report an increase in the refusal of respondents to provide any form of voluntary disclosure in response to questions on policies practices, records and equality monitoring and the

necessity for hearings with the additional expenses and use of resources.

- The power of employment tribunals after making a finding of discrimination to make a recommendation requiring an employer to take steps to prevent future discrimination across the whole or a relevant part of the workforce had become an important tool in the prevention of future discrimination. The DLA strongly recommends amendment of the EA to restore s.124(3)(b).

24. The following is an example of the need to ensure consistency in secondary legislation:

    - Much public transport remains inaccessible to people with sight loss. This is largely due to a discrepancy between regulations covering trains and those covering buses. The variation of regulations to ensure that all public transport is covered by regulations requiring audio visual announcements systems in a uniform way would be a significant improvement to the ability of disabled people with visual impairment and audio impairment to travel.

Q3 Are the reasonable adjustment duties known and understood by disabled people, employers, service providers and others who have duties under them? How does this apply in the specific cases of public transport, taxis, education and access to sports grounds?

25. Whilst the structured definition of reasonable adjustments is helpful, the concept of ‘reasonable adjustment’ is sometimes hard for the lay person, whether claimant or employer or service provider fully to understand.

26. The definition of a “reasonable adjustment” can be difficult for disabled people and for service providers to understand, and even in some contexts for an ET to operate. For example, where a person develops a disability or discovers one (in the case of dyslexia for example) later in life, members report incidents of dismissal; disbelief, blame and marginalisation in the work place, rather than support to remain in work. In a significant number of cases the employer assumes that the person will not be able to do their job, because they focus on what a person is no longer able to do, rather than considering what they can do, with adjustments in place, and remain wholly focussed on the difficulty of them having to make the adjustments and the inconvenience to them as an employer, rather than the duty to the disabled person.

27. For example, one member reports representing an employee in a civilian role with a police custody unit lost 90% of his sight through MS very rapidly. He had previously driven to various sites and used computer programmes to manage the HR staffing functions for the Police. He wanted to remain in post, using a driver service, assistive technology and remote working. He demonstrated that this would be possible, but was refused because of concerns around his safety and the requirement that everyone be able to assist in the event of an altercation in the unit. It was possible to adjust this aspect of the job, but it was not until the full hearing that the employer accepted that the health and safety

aspects of the work did not trump the claimant's rights to adjustments. The employer remained wholly focussed on the disadvantage and difficulty for them of making the arrangements.

28. Guide dog owners report that reasonable adjustments for people with a disability are often ignored and that service providers do not understand the specific needs of people with sight loss[1]. For example, people with visual impairments report their treatment in restaurants: *"I get no end of people handing me the menu and then walking away"*[2]

29. We have many reports of employers refusing to follow advice from occupational health advisers and employers failing to grasp the way that the duty operates in cases of hidden disabilities such as dyslexia and other learning difficulties, or in cases of mental health disabilities. Advisors report that a large percentage of their case work on disability in the workplace involves persuading employers to adjust their capability procedures, to take account of the disability.

30. Our members report that both disabled people as litigants in person and lawyers representing disabled claimants in employment tribunals far too often have serious difficulty applying the stages of the definition of reasonable adjustments to the facts of their case, which is something they are required to do at case management preliminary hearings or at the start of the full merits hearing. This is particularly the case where the adjustment asked for is to vary or change a provision, criterion or practice rather than to provide an auxiliary aid or alter the physical premises.

31. Wrongly formulating this can limit the claimant's arguments and prospects of succeeding. This would include identifying correctly what 'provision, criterion or practice' was applied and/or identifying what the substantial 'disadvantage' was (is it the disabled person's inability to perform the requirement of the job or is it the respondents' reaction to their inability to perform the job requirement?).

32. Where the provision, criterion or practice is the sick leave policy employees and their advisers continue to report a refusal to treat absences caused by disability, or necessitated to treat a disability differently to any other form of absences. There is no standard practice although many policies do expressly state that disability absences will be discounted, specific guidance would be beneficial.

33. Our members' experience is that 'hidden' disabilities and mental health conditions are still difficult for many employers to understand. An individual with such a disability is often likely to be unfairly labelled as a 'trouble maker'.

34. The law in this area is complicated because it applies the reasonable adjustment duty differently to different situations, so that what is required by an employer will not be the same as what is required by a service provider, a school, a landlord or a provider of different forms of transport. We are concerned that the differences make it harder for a disabled person to

[1] Minutes of the Guide Dogs Access All Areas focus group, Nottingham, August 2015,
[2] Minutes of the Guide Dogs Access All Areas focus group, Nottingham, August 2015,

appreciate the adjustment they should receive and what steps, if any, they need to take to secure or attempt to secure the adjustment they believe they need. It is our experience that whilst the duty to make adjustments is generally known, it is not well understood by employers, service providers or transport providers.

35. As one of our members comments: “There is still a lack of awareness in non-employment areas, where the anticipatory nature of these duties has often not sunk in. Also, the need to alleviate a specific disadvantage is often missed; for example, where a bank makes its statements available in some accessible formats, but not others. The impression you get is that the company feels that it has made an effort, and that should be enough.”

36. The particular provisions in s.36 and Schedule 10 regarding a landlord’s reasonable adjustment duty put a particular burden on the disabled tenant or prospective tenant. We have the same concerns set out above regarding the enforcement mechanisms available to the disabled tenant.

37. In relation to the operation of the duty in the exercise of public functions, our concern is that public bodies are failing to anticipate the needs of disabled people. One example is planning consent given to developments which are inappropriate for people with sight impairments rather than anticipating the adjustments which should be put in place from the outset. We believe that in part this is due to a reduced level of consultation with groups of disabled people.

38. The DLA recommends that there should be more advice and information available about the duty in a variety of formats and through varied sources. We consider that there is a need for a review and update of the guidance in the statutory Codes of Practice to ensure that the Codes adequately reflect the purpose of the EA provisions. There is also a need for further statutory Codes covering education, housing/other premises and transport to be issued. The Codes should draw on case law specific to the EA to illustrate how the duty applies in different situations as well as providing guidance on common situations.

39. On the question of adjustments in public transport areas such as Taxis, we are not satisfied that the duty to make adjustments is either well understood, or properly implemented. We remain very concerned about accessibility of transport to the disabled. Recent legal claims (See Pauley) have highlighted the difficulties faced by a disabled wheelchair user, and the fact that the case progressed to the Court of Appeal before an answer was provided is indicative of some of the shortcomings of the legislative framework.

40. In part our criticism is that the enforcement of adjustments to public transport still relies upon an individual bringing a claim against a provider. The need for a private law action to determine the responsibilities of a bus company to make adjustments so that the bus can be used by disabled passengers seems to us to be wholly undesirable and to place an unreasonable burden upon the individual.

41. We do not consider that accessibility to transport is something that should depend on the will and abilities -- financial and physical -- of the individual. Access and availability of transport to all disabled people who need it is fundamental to the ability to access many other benefits and aspects of civic life and the enforcement of sensible adaption's to all vehicles and enforced access to taxis should be the responsibility of the state, or an enforcement agency and not the individual users.

Q4. Should the law be more explicit on what constitutes a reasonable adjustment? If so, in what way?

42. We asked our members how many of the disabled claimants they advise raised concerns about a lack of reasonable adjustments. The response from a law centre worker was 92 % and from an advice agency 87 % and a barrister, nearly all. This reflects both the reality of the utility of the reasonable adjustments provisions to disabled people but also the huge number of cases where there is disagreement between the disabled person and the provider as to what is required and what is reasonable.

43. However, we do not necessarily suggest that the legal definitions should be varied or amended at this stage. We see that part of the utility of the concept of reasonable adjustment is that it is very flexible and can be used to respond to all sorts of barriers and disadvantages faced by disabled people in part because the contours of the duty shift according to the size of the employer or service provider and other factors including current technology.

44. What we do argue strongly for, is much more extensive and up to date guidance on reasonable adjustments, produced to be sensitive to particular disabilities', particular industries and in respect of the various duties to make adjustments. As we state above, the statutory Codes of Practice and other guidance need to be regularly updated. However, novel and unique situations will always occur that guidance has not contemplated. In this respect we would like to see industry specific regulatory guidance from professional and regulatory bodies.

45. We would also welcome a much wider remit for statutory guidance on what constitutes a reasonable adjustment in areas which are emerging as problematic such as mental health disabilities in the workplace; learning disabilities and HIV and related conditions, and on the adjustments needed where the impairment is hidden as opposed to obvious physical impairments. The last is particularly important, and we consider it would assist in addressing prejudicial and stereotypical assumptions amongst service providers, employers, recruiters and even the courts.

46. Our practical experience is that guidance raises awareness, and one member who conducts training for particular professions on the duty to adjust, reports a huge lack of understanding and a frustration with the lack of availability of any guidance, which reflects the day to day issues they experience.

47. We would welcome more specific and targeted guidance on the adjustment of provisions criteria and practices in a range of contexts, as our members report that these are the areas of most common difficulty in employment. Particular problems arise where there is an emphasis on productivity for people with dyslexia, syndromes involving severe pain, severe fatigue or similar impairments; whilst members report that helpful adjustments are possible, there remains a lack of understanding, particularly in some occupations that the law may require adjustments of their targets as well as their premises. One solicitor member comments: “Most employment matters arise due to the application of a policy or practice by an employer and thus most cases would involve a failure to make reasonable adjustments. An employer would not usually argue expense but would often argue that an adjustment is unnecessary because they have already done enough in their view. “

48. One member in the legal profession illustrates this when he reports that on the second day as a trainee, having disclosed his disability, the practice manager’s response was “Well obviously we don’t want a sick trainee”. There was no sense that the practice manager had any knowledge of the duty to adjust at all or what might be required. The member suffers from chronic pain and chronic fatigue, but the culture in medium-large legal firms involves working very long hours which is not possible for this disabled employee for whom a simple adjustment of shorter hours would resolve the disadvantage. The member states:

> “Working the ‘usual’ 9-5 in such firms is simply not acceptable. Unfortunately due to my fatigue working consistently long hours is a requirement I simply cannot meet. Despite high levels of academic attainment from several top universities and the ability to work comfortably between the hours of 8.00 am-5.30pm, I will never be able to advance my career in medium or large law firms. A form of discrimination perhaps that will affect my advancement for the remainder of my career."

49. Further there is a need for clarification regarding potential conflict between EA provisions on the right to reasonable adjustment and other legislation such as listed building status, money laundering regulations (requirements for identification), health and safety at work laws, etc.

50. In some areas, additional clarity has been achieved through regulations such as the Public Service Vehicle Accessibility Regulations (PSVAR) and the Public Service Vehicle Conduct Regulations (PSVCR). The PSVAR sets out a series of specifications to make public service vehicles more accessible for people with a disability. The PSVCR gives specific direction for bus drivers to accommodate people with disabilities. Similar accessibility regulations would be helpful in other areas, for example, in the area of allowing entry for assistance dog owners in shops, hotels and restaurants. This would remove ambiguity for service providers who no longer would need to rely on case law and precedents to fully understand their obligations.

Q5. How effective has the public sector equality duty been in practice? How do you assess its contribution to the aims of the Equality Act 2010?

51. Our members consider that the public sector equality duty (PSED) is capable of leading to positive outcomes both with and without litigation.

- The contribution of the PSED is significant because people can use it to stop a discriminatory policy without individuals having to bring claims after the event; it makes public authorities think about what the impact will be on disabled people in advance and in some instances, change their minds about a policy or service.
- The duty gives the public an opportunity to raise concerns about equality with public bodies. It gives public bodies an opportunity to reflect on how their policies and decisions impact on persons with disabilities.
- It puts the onus on society to organise itself differently to eliminate barriers for persons with disabilities instead of blaming the individual's disability.
- The impact is much greater than the case law would suggest as many people succeed without ever needing to issue proceedings, since the vast majority of equality duty cases are settled through negotiating with public bodies.
- The duty "*to advance equality of opportunity between people who share a protected characteristic and those who do not"* is particularly useful. There are many barriers that persons with disabilities face that others don't and this duty helps focus decision makers on the need to eliminate those barriers. It also empowers disability groups to voice concerns about equality it addresses the needs of specific groups and does not just solve the problem for one individual. The impact of using it can be significant.

52. For example the PSED has served as a useful tool, in arguing successfully, that a local authority should:

- continue to fund a disability rights advocacy group,
- provide electoral information in accessible formats,
- provide more accessible parking bays,

and that a healthcare provider should fund BSL interpreters at its public meetings.

53. One PSED litigation expert reports mixed outcomes. In a challenge of a local authority policy, when the court quashed the decision because of a failure to comply with the PSED, the policy was dropped by the authority. In contrast, this did not work in relation to proposal to discontinue the Independent Living Fund (ILF). "I still take the view that the Minister for Disabled People didn't meet the PSED; it was clear from the documents that he hadn't engaged with what the duty meant in law, or what was going to happen on the ground to disabled people if ILF closed."

54. While the Equality Bill was going through its parliamentary stages the DLA was engaged with a consortium of disability rights organisations looking for a way to

ensure that the duty would not only require informed consideration of equality impact but actual steps towards the elimination of discrimination, the advancement of equality of opportunity and the fostering of good relations. An amendment for this purpose was developed by the DLA, supported by the EHRC and introduced during Report Stage in the House of Lords. It would have added to what is now s.149 by inserting after s.149(6) the following

> "(6A) To comply with the duties in this section a public authority in the exercise of its functions, or a person within subsection (2), in the exercise of its public functions, shall take all proportionate steps towards the achievement of the matters mentioned in (a), (b) and (c) in subsection (1)."

55. Regretfully, despite a number of Peers speaking strongly in favour, when it was clear that this strengthening of the duty would not be accepted by the Government the amendment was withdrawn. The DLA would encourage the Committee to explore once again an amendment of the EA along the above lines.

56. From their experience, DLA members suggest that there is a difference between central and local government attitudes to the PSED. Local authorities often take this duty more seriously - or are more frightened of litigation, or are dealing with the duty more sensitively more local scale. There are numerous examples of local authorities withdrawing decisions they had made without regard to the duty on the basis of a letter before claim, for example closing a specialist unit without consulting deaf people for whom the unit was established. We are concerned that some local authorities may now attempt to avoid the PSED by arguing that cuts to their services are solely because of cuts imposed by central government. Central government has been and remains far more dogmatic and ideologically driven and far less willing to review or reconsider once they have put forward a policy proposal.

57. A major concern of DLA members is the very significant gap in understanding in organisations that are not "public authorities" under s.150 but are exercising public functions and therefore required to comply with the duty under s.149(2). One member cites as an example a charity/private sector organisation that administers a large fund on behalf of the Government to make grants to disabled people who have shown in their decision-making that they" have no idea about the PSED".

58. We would therefore recommend an early inquiry into the procurement processes adopted by public authorities in contracting with private and voluntary sector organisations for the carrying out of public functions. It is our impression that successful contractors are not regularly made aware of their PSED obligations under s.149(2), with the result that with increasing privatisation of public functions there is a concomitant decreasing degree of compliance with the PSED, to the loss of disabled people, to other groups defined by relevant protected characteristics and to society in general. In our view there is an urgent need to reverse this trend and to ensure that private/voluntary providers of public services are brought into full compliance

with the PSED. So far as the DLA is aware there is no current guidance equivalent to the guidance published in 2007 by the former Disability Rights Commission on meeting the disability equality duty in each stage of public procurement.

59. One of the possible reasons for the PSED not being as effective as it could/should be is the failure by the EHRC to issue a statutory code of practice on the PSED, although we understand a draft had been prepared and submitted to the Government Equalities Office for approval. A statutory code could have assisted public authorities and disabled people to have a fuller understanding of what compliance entails. This could achieve the real aims of the EA for disabled people without the stress and expense of litigation. Courts must take EHRC statutory codes into account and there are equality duty cases under the previous equality legislation in which the CRE statutory Code of Practice was referred to by the High Court. The EHRC has issued technical guidance on the PSED, which is very useful, but both qualitatively different and lacking the influence of a statutory code.

60. DLA members have provided examples in which current policies or practices may be in breach of the PSED:

- the imposition on disabled job seekers by Job Centre staff of agreements with which they are unable to comply and therefore risk punitive sanctioning. Work by the Ipswich and Suffolk Race Equality Council and local CAB creating a national campaign has identified that what is needed is a “national agreement (by the DWP) and education of job centre staff”.
- the failures by local authorities to take account of the needs and representations of blind and partially sighted residents, when planning streetscapes, leading to dangerous shared streets. Guide Dogs Association members reported at least two fatalities and several accidents involving partially sighted and blind members of the public where crossings and street furniture have been moved or removed without taking the needs of this group adequately into account. (The Guide Dogs Association is making a separate submission and we do not repeat their evidence in full here).

Q6 What has been the impact of the different approaches in England, Wales and Scotland to the specific duties designed to support the general public sector equality duty? Have the specific duties supported implementation for disabled people?

61. DLA does not have relevant evidence to compare the impact of the different approaches in England Wales and Scotland. Our members in England have responded with regard to the specific duties that apply to the PSED under the EA in England compared to the specific duties that applied to the disability equality duty under the earlier Disability Discrimination Act.

62. DLA members have observed that the emphasis on disability as a distinct area, which needed focus, resources and engagement from service providers,

transport organisations, local authorities and public bodies as well as employers to improve the ability of disabled people to take a full part in civic society, has been significantly restricted, and in some areas has taken a backward step, because of the removal of obligations to carry out disability impact assessments.

63. One measure which members have recommended to be included in PSED specific duties is the reintroduction of compulsory disability equality action plans as well as action plans for other relevant protected characteristics. Disability equality action plans, under the former disability equality duty, were important and helpful since they placed an obligation on the organisation to develop the plan, then to consult with the disability communities which they served and then to take timely steps to implement the plan and monitor outcomes. There is real concern that the loss of this mechanism has had a detrimental effect on the inclusion of disabled people in planning services and in decision making and the resulting decisions. We refer the Committee to the Guide Dog Association submission for some examples.

Q7 Does the division of responsibilities between Ministers and government departments affect the effective implementation of the Equality Act 2010 in respect of disability?

64. The DLA cannot comment in detail on the divisions of responsibility within the Executive; what we can comment on is the lack of strong commitment and leadership within central government to achieve the aims of the Equality Act 2010. The Government Equalities Office (GEO), which appears regularly to be shifted from one government department to another, also appears to have been reduced in resources and impact. Neither the GEO nor the past or present Minister for Women and Equalities seems to want to take on the role of monitoring or influencing in any way the decisions by various other Ministers when policies which are likely to have adverse impact on disabled people are being considered or adopted. Further the Office for Disability Issues within the Department for Work and Pensions also appears not to see itself as representing the interests of disabled people when its own department is adopting policies with potential severely adverse impact on disabled people.

Q8 How effective has the Equality and Human Rights Commission been in exercising its regulation and enforcement powers and what contribution has this made to the impact of the Equality Act 2010 on people with disabilities?

65. The recent government cuts to the EHRC's remit and resources have inevitably weakened its effectiveness and its independence. In our view the loss to the promotion and enforcement of equality law far outweighs any financial savings that may have been achieved.

66. In our view it is regrettable that the EHRC did not undertake from the outset to use the full range of its enforcement powers, in particular its powers to carry out investigations (s.20, Equality Act 2006) and the further powers following from

investigations or proposed investigations, as well as its powers to take action to secure compliance with the PSED (ss. 31 and 32 Equality Act 2006).

67. We are also concerned that, with less dependence on financial resources, the EHRC has too often chosen not to use its unique position to engage in public discussion regarding policies or practices which their own research or inquiries, or those by other reliable bodies, expose as discriminatory or involving significant disadvantage to disabled people. We miss the strong influence on the public and private sectors which our single statutory equality body should be providing. It is our impression that far fewer disabled people are aware of the existence of the EHRC as an equality body than had been aware of the Disability Rights Commission during its short period of existence.

68. While agreeing that the EHRC's capacity to support litigation is limited, its reluctance to do so -- preferring instead to leave it to potential litigants to find support elsewhere and the EHRC to intervene only at an appellate stage – has been disappointing to individuals and groups often left with nowhere to turn for skilled advice and assistance, especially since the EHRC's helpline was discontinued and the cuts to legal aid and to the funding of law centres and advice centres have taken effect.

69. DLA members advising and supporting disabled people in non-employment discrimination claims have called for re-instatement of the EHRC power to establish a conciliation service, which was repealed under the Enterprise and Regulatory Reform Act 2013.

70. The EHRC used to fund disability rights advocates nationwide in various advice centres. This nationwide project had a real impact in raising awareness about rights and assisting those who experienced discrimination. The EHRC also organised regular casework meetings, which were very effective at highlighting best practice and addressing social policy issues.

Q9 Could other regulatory bodies with a role in the effective implementation of the Equality Act 2010, such as inspectorates and ombudsmen, play a more significant part?

71. The EA needs to be seen as the formal commitment by the state to secure the elimination of discrimination and the advancement of equality of opportunity as defined in the Act. The DLA would therefore argue that it is appropriate for all state-appointed regulatory bodies to have a role in maximising compliance. The EHRC has a unique role as defined in the Equality Act 2006. Given the slow progress towards achieving the aims of the EA, we recommend that consideration should be given to ways in which other regulatory bodies can, within their existing mandates or with amendment, take on certain EA enforcement functions. It is undesirable that the ability of disabled people to take a full part in life remains largely dependent upon the finances and willingness of disabled people themselves to push matters through the courts.

72. We suggest that it may be appropriate to consider the potential enforcement roles for other regulatory separately for the resolution of individual (or group)

claims and compliance with the PSED. This might fit more comfortably with the existing roles of different regulatory bodies. So the role of ombudsmen might be extended to include resolution of individual (group) complaints within the areas of activity they have a mandate to regulate. For example it might be appropriate for the Local Government Ombudsman to be empowered to investigate and make a finding (and award compensation) on a complaint by a disabled resident with mobility impairment regarding access to a local authority's sports and leisure facilities. The role of other audit or inspection bodies, such as OFSTED or HM Inspector of Prisons might more appropriately take on compliance with the PSED by the institutions they inspect.

73. The EA would need amendment to clarify the relationships between the EHRC and other regulatory bodies and legislation establishing the different regulatory bodies might also need amendment.

Q10 Are the current enforcement mechanisms available to private individuals (through Employment Tribunals, County Courts and, in Scotland, Sheriff Courts) accessible and effective for people with disabilities, employers and providers of goods, facilities and services?

74. The consensus of our members is that there are still significant barriers to disabled people enforcing their rights. We know that disabled people with all types of disability are often not willing to take legal action and in part this is because the prospect of litigation, challenging for most litigants, is often a significant further threat to health and wellbeing for a disabled person. Even where a person is able to overcome the barriers to issuing proceedings about disability discrimination, their disability can present an additional barrier in the process and the court room itself.

75. The first concern and the primary issue for the DLA and all of our members is access to justice and the barriers claimants now face with the imposition of employment tribunal fees and increased County Court fees coupled with major cuts to legal aid and the funding of law centres and advice agencies. Thus while the right to redress and enforcement procedures under the EA remain in place, in practice very many people are no longer able to access or make effective use of the mechanisms within the EA to enforce their rights.

76. Good quality advice from advisers who are trained in disability issues and discrimination law is a crucial first step. We would like to see the reinstatement of grants for specialist discrimination law advisers in advice centres and with specialist charities.

77. Our main concern, however, remains that of cost. Our members report many cases where individuals are not able or willing to engage with the employment tribunals, because of the cost of doing so. The cost of even issuing a discrimination claim (£250) is prohibitive for some, and certainly acts as a deterrent for many, for whom the legal system is already intimidating. Far more of a deterrent is the subsequent £950 listing fee and the fear of having to act as a litigant in person at the full hearing if their case does not settle before then.

78. The drastic cuts to legal aid and the limit on income placed on the remission of fees means for many of our members that the greater awareness of rights to which we refer above is not matched by any ability to enforce them in real terms.

79. The following are examples of law centre cases in which clients decided not to bring ET claims because of the fees:

- Client with MS - employer failed to make reasonable adjustments of reducing hours;
- Client with dyslexia - employer failed to make reasonable adjustment of reducing targets
- Client with fibromyalgia was given a written warning for poor performance

80. We also have examples of problems with the tribunal process itself because of disability. Tribunals depend on paperwork, and documentation, and the formalities often present real difficulties for the disabled litigant. Understanding the papers and being able to read them can and does present problems. One example dealt with one of our members is of a partially sighted claimant seeking reasonable adjustments at work having a claim struck out because he had not complied with court orders over the production of documents. He could not read the court orders or the letters sent from a respondent's lawyer, or sort out the relevant documents needed. Once the claimant got pro bono representation the court was made aware of the need for adjustments, the claim was reinstated, and was ultimately successful.

81. Ultimately the legal process in the ET or in the County Court is a very technical one, and is also confrontational by nature. This can be very distressing for claimants with mental health issues, and an unrepresented claimant with mental health issues is at a serious disadvantage at the outset. No amendment of legal provisions can address the central issue of inequality of arms before the ET and the courts.

82. The effect of LASPO means that few, mainly independently wealthy, clients are likely to bring discrimination claims in the County Court. LAG has calculated a shortfall of 77%[3] in the take up of discrimination advice under Community Legal Advice compared to the Government's estimate under the LASPO legal aid reforms. The fact that after-the-event insurance premiums are now not recoverable from the defendant (and that these premiums are often likely to be a sizeable proportion or all of the value of an injury to feelings award) means that the costs of bringing a claim are almost always prohibitive. One welcome measure would be clarification that claims under the EA fall within claims for "personal injuries", allowing qualified one-way costs shifting ("QOCS") to apply.

83. The knock-on effect of these factors is that there is no imperative for employers or service providers or transport providers or educational institutions or persons

[3] Based on figures for three months in 2013. See http://www.lag.org.uk/media/164665/legal_aid_secret_service2.pdf, page 3,

exercising public functions to change their behaviour, or to take steps to change when potentially discriminatory policies or practices within their organisation are brought to their attention.

Discrimination Law Association
4 September 2015