

DISABILITY DISCRIMINATION (NORTHERN IRELAND) ORDER 2006

2006 No. 312 (N.I. 1)

EXPLANATORY MEMORANDUM

INTRODUCTION

1. This Explanatory Memorandum has been prepared by the Office of the First Minister and Deputy First Minister (“the Department”) in order to assist the reader in understanding the Disability Discrimination (Northern Ireland) Order 2006 (“the Order”). It does not form part of the Order. The Order contains measures corresponding to measures in the Disability Discrimination Act 2005.

2. Disability discrimination is a transferred matter under the Northern Ireland Act 1998 and is therefore within the legislative competence of the Northern Ireland Assembly. However, as devolution is suspended, the Order has been made in accordance with the Schedule to the Northern Ireland Act 2000.

BACKGROUND AND POLICY OBJECTIVES

3. The Disability Discrimination Act 1995 (DDA), as originally enacted, contained provisions making it unlawful to discriminate against a disabled person in relation to employment, the provision of goods, facilities and services, and the disposal and management of premises. It also enabled regulations to be made with a view to facilitating the accessibility of taxis, public service vehicles and rail vehicles for disabled people.

4. In December 1997, the Government established the Disability Rights Task Force, an independent body comprising of members from disability organisations, the private and public sectors and trade unions, to advise it on how best to secure comprehensive and enforceable civil rights for disabled people.

5. The Northern Ireland Executive has consulted extensively on the policies underlying the Order. In 2001 the Northern Ireland Executive published its response to the Task Force’s recommendations “Improving Civil Rights for Disabled People”. That response, which was also a consultation document, set out the Executive’s proposals for taking forward those of the Task Force’s recommendations with which it agreed.

6. The main employment proposals set out in the Executive's response have already been taken forward in The Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004¹ ("the Amendment Regulations"), made under section 2(2) of the European Communities Act 1972 in order to implement the disability aspects of the EC Employment Directive (2000/78/EC).

7. The Order gives effect to more of the remaining recommendations proposed in the Executive's response to the Task Force.

CONSULTATION

8. The Department undertook public consultation on the proposed changes to the legislation in two stages from January 2005 to September 2005. Approximately 700 copies of each consultation were issued and 49 substantive replies were received in total. The vast majority of those who replied were supportive of the proposed changes. A report on the consultation can be found at www.ofmdfmi.gov.uk/consultation-report-disability-discrimination-order.pdf.

9. Consultation on the policy underlying the removal of the transport exemption (Article 7) was carried out jointly by the Department of the Environment and the Department for Regional Development. Consultation on the policy underlying the rail vehicle accessibility provisions (Articles 8 to 10) was carried out by the Department for Regional Development.

COMMENTARY ON ARTICLES

Article 3: District Councils

14. Article 3 inserts new sections 15A, 15B and 15C into Part II of the DDA, as amended by the Amendment Regulations. The new provisions make it unlawful for a district council to discriminate against its members in relation to the carrying-out of official business. The new provisions apply to all 26 district councils in Northern Ireland.

15. The duties imposed on district councils by the new provisions only apply where a member is carrying out "official business".

16. New section 15B makes it unlawful for a district council to discriminate against a disabled member by subjecting the disabled member to any detriment in relation to the carrying-out of official business. It also makes it unlawful for a district council to subject a disabled member to harassment in relation to the carrying-out of official business.

¹ S.R. 2004/55

17. Certain matters are excluded from the scope of the duties imposed by new section 15B. These include, for example, appointments to offices or committees of a district council.

18. New section 15C sets out the duty of a district council to make reasonable adjustments in relation to its disabled members, and broadly follows the pattern of Part II of the DDA. A district council will be under a duty to make an adjustment where a provision, criterion or practice it applies, or which is applied on its behalf, or a physical feature of premises which it occupies or controls, places a disabled member at a substantial disadvantage in comparison with non-disabled members in relation to the carrying-out of official business.

Article 4: Discrimination by Public Authorities

19. Article 4 extends the scope of the DDA to cover the functions of public authorities. This brings the DDA into line with Article 20A of the Race Relations (Northern Ireland) Order 1997 (“the Race Relations Order”) as amended by the Race Relations (Amendment) Regulations (Northern Ireland) 2003.

20. The Article will prohibit discrimination in the exercise of all public functions other than (in broad terms) those of legislation, prosecution, judicial acts and state security. The definition of discrimination mirrors, insofar as it is possible to do so, the definition of discrimination used for service providers in section 20 of the DDA. This new prohibition of discrimination therefore covers decisions by Ministers, district councils, the police and other governmental organisations. Discrimination can in certain circumstances be justified.

21. The Article imposes on public authorities a duty to make reasonable adjustments for disabled persons where such persons are – by reason of their disability – disadvantaged in some way by, or in relation to, the carrying-out of the function. The duty requires public authorities to anticipate the requirements of disabled persons and the adjustments that may need to be made for them.

22. The prohibition will not apply where a public authority is exercising a statutory power and has no discretion as to whether or how to exercise that power, or no discretion as to how to perform its duties.

Article 5: Duties of Public Authorities

23. Article 5 inserts new sections 49A and 49B into the DDA. New section 49A(1) requires a public authority to have due regard, in carrying out its functions, to the need to promote positive attitudes towards disabled people, and the need to encourage participation by disabled people in public life. For the purposes of this Article, a public authority is defined in the same way as in section 75 of the Northern Ireland Act 1998.

24. New section 49A(3) makes it clear that compliance with the duty in section 49A(1) is without prejudice to a public authority's obligations to comply with any other statutory provision, including other provisions of the DDA. This would also include the public authority's obligation to comply with section 75 of the Northern Ireland Act 1998.

25. New section 49A(4) requires the Equality Commission for Northern Ireland to keep under review the effectiveness of the duty and to offer advice to public authorities and others in connection with the duty. New section 49A(5) supports the requirement in new section 49(4)(a) by requiring that a report on the effectiveness of the duty be prepared and published by the Commission no later than three years after it comes into operation.

26. New section 49B requires those public authorities subject to 49A to submit to the Equality Commission a disability action plan indicating how they propose to fulfil the new duty, in conformance with guidelines issued by the Equality Commission on form and content. The Commission may request a revised plan. If a public authority fails to submit a plan, or submits a plan that does not, in the opinion of the Commission, comply with new section 49B(4), then the Commission must lay a report of that failure before the Assembly.

27. New section 49B(7) requires a public authority to review its disability action plan when it is required to review its Equality Scheme (under paragraph 8(3) of Schedule 9 to the Northern Ireland Act 1998).

Article 6: Police

28. Article 6 clarifies who the correct defendant is in the case of a claim of discrimination being made against a police officer under Part III of the DDA (for example, where it is alleged that a police officer has discriminated against a disabled person when carrying out a function). The Article also authorises payment from the police fund of compensation or of costs of settlement in relation to such a claim.

Article 7: Application of sections 19 to 21 of the 1995 Act to transport vehicles

29. Article 7 replaces the existing exclusion of transport services from sections 19 to 21 of the DDA with a more precise exclusion, relating only to transport services consisting of the provision and use of a vehicle. It also confers a regulation-making power to enable such services to be brought within the scope of those sections (which make it unlawful to discriminate against a disabled person in the provisions of goods, facilities and services). This will enable the exclusion to be narrowed or removed in whole or in part, or in relation to different transport vehicles at different times.

Article 8: Rail vehicles: application of accessibility regulations

30. Article 8 enables the Department for Regional Development to achieve the policy objectives of applying rail vehicle accessibility regulations to all rail vehicles constructed or adapted to carry passengers. This will include older rail vehicles i.e. those first brought into use before 1st January 1999 which must also comply with the requirements of the regulations by an 'end date' of 1st January 2020. It will also enable the Department to apply the regulations to older rail vehicles once they are refurbished. Article 8 will also require that exemptions are granted only by Statutory Order and that the Department will be required to provide an annual report on any such exemptions granted.

Article 9: Rail vehicles: accessibility compliance certificates

31. Article 9 will require prescribed rail vehicles to have a rail vehicle accessibility compliance certificate. It prohibits a prescribed rail vehicle from being used for carriage unless a valid compliance certificate has been issued for that vehicle. It is intended that the requirement to have a certificate will apply to all new rail vehicles and vehicles that are refurbished. The effect is to set up a certification scheme for rail vehicle accessibility. The provisions include power for the Department for Regional Development to make regulations providing for the appointment of independent assessors, setting out the procedure for obtaining certificates, and charging fees in relation to certification.

Article 10: Enforcement and Penalties

32. Article 10 replaces the existing criminal sanctions in the DDA for non-compliance with rail vehicle accessibility regulations with a civil enforcement regime which enables penalties to be levied. The Article will enable the Department for Regional Development to inspect vehicles and to issue an operator with an improvement notice, which sets a deadline for non-compliance to be rectified. If the non-compliance continues after the improvement deadline, a final notice can be issued. If the final deadline is missed a fine can be imposed. An operator can lodge an objection against either the imposition or the level of a fine. The provisions also provide a right of appeal to the court.

Article 11: Discriminatory advertisements

33. The DDA (as amended by the Amendment Regulations) prohibits employers and others covered by the newly extended scope of Part II of the DDA (employment field) from publishing, or causing to be published, a discriminatory advertisement inviting applications for a job, training or other relevant benefit.

34. Article 11 extends the scope of the prohibition to cover third party publishers (for example, newspapers) who publish a discriminatory advertisement on behalf of another.

35. The Article exempts a third party publisher from liability under new subsection (1) if he can prove that, in publishing the advertisement, he relied on a statement about the lawfulness of an advertisement made by the person who placed it. It also makes it an offence for a person knowingly or recklessly to make a false or misleading statement about the lawfulness of an advertisement, carrying on summary conviction a fine not exceeding level 5 on the standard scale (currently £5000).

Article 12: Group insurance

36. Article 12 clarifies that persons who provide group insurance services to employees of particular employers would be regarded as a “provider of services”, and consequently liable under Part III (services) of the DDA for acts of discrimination they commit against disabled employees. An act of discrimination by the employer in relation to a group insurance scheme, e.g. refusing for discriminatory reasons to permit a disabled employee to have access to the scheme, will fall within Part II (employment) of the DDA.

Article 13: Private clubs, etc.

37. Under the DDA, private members’ clubs are not prohibited from discriminating against their members. Clubs are only prevented from discriminating against disabled persons in their capacity as employers (under Part II of the DDA) and as service providers (under Part III of the DDA) in respect of any service the club offered to members of the public.

38. Article 13 makes it unlawful for clubs with 25 or more members to discriminate against disabled members, prospective members or associates and guests in certain circumstances. The new sections are modelled on the provisions of Article 25 of the Race Relations (Northern Ireland) Order 1997.

39. The Article enables regulations to be made prescribing the circumstances in which clubs will be under a duty to make reasonable adjustments. As the Department intends to consult before imposing such duties, the draft provisions only set out the framework of this duty. It is not expected that the duties will go further than those which providers of goods, facilities or services are already under by reason of the DDA. In addition, it is expected that regulations will make provision for the failure to make a reasonable adjustment to be justified in certain circumstances.

Article 14: Discrimination in relation to the letting of premises

40. Disabled people are already protected against some forms of discrimination in relation to premises. It is unlawful for persons who are selling or letting premises to discriminate against a disabled person in the way they offer to dispose of the premises to the disabled person, by refusing to offer to dispose of the premises to the disabled person, in their treatment of the disabled person in relation to any waiting list for the premises, or in the way they permit the disabled person to use any benefits or facilities, or by evicting the disabled person or subjecting him to any other detriment.

41. Article 14 will make it unlawful for landlords and managers, in relation to premises they wish to let or that are let, to discriminate against a disabled tenant or prospective tenant by failing without justification to comply with a duty to provide a reasonable adjustment for the disabled person. The letting of commercial and residential premises is covered. "Letting" is defined widely.

42. The new provisions will require a landlord or manager to take reasonable steps to change a policy, practice or procedure which makes it impossible or unreasonably difficult for:

- a disabled person to take a letting of the premises, or
- (where there was a letting already in existence) a disabled tenant - or other disabled person lawfully occupying the premises - to enjoy the premises or use a benefit or facility conferred with the lease, so that the policy, practice or procedure concerned no longer had that effect.

43. The provisions will also require a landlord or manager to take reasonable steps to provide an auxiliary aid or service which would either enable or facilitate a disabled person's enjoyment of the premises or use of a benefit or facility conferred with the letting, or (as the case may be) enable or make it easier for a disabled person to take a letting of a premises. This duty would apply if, were the auxiliary aid or service not provided, it would be impossible or unreasonably difficult for a disabled person or occupier to enjoy the premises, to make use of any benefit or facility they were entitled to or (as the case may be) to take a letting. For example, a landlord or manager may need to put correspondence in large print for a visually impaired person.

44. These duties will not require the making of any alteration to the physical features of a premise. However, if the terms of the letting are modified so as to permit an alteration with the landlord's consent, then the provisions of Article 16 would apply. A landlord would not have to take any steps under the new provisions unless requested to do so by the tenant or prospective tenant. There is an exemption in respect of small dwellings. In limited circumstances, a landlord or manager may justify less favourable treatment or a failure to take reasonable steps.

45. The Article confers power on the Department to make supplementary provisions by regulations, for example to prescribe what steps it is reasonable for a landlord to have to take, or as to what constitutes an auxiliary aid or physical feature.

Article 15: Power to modify or end small dwellings exemption

46. Article 15 confers a power on the Department, by order, to amend the exemption for small dwellings for the purpose of restricting the cases in which the small dwellings exemptions are available; or by removing those exemptions.

47. The small dwellings exemption is set out in section 23 and Article 15. Broadly speaking, the exemption applies to owner-occupiers either where they share living accommodation with those not of their own household and let out accommodation to not more than two other households, or where there is not normally residential accommodation on the premises for more than six persons in addition to the landlord or manager and members of his household. Where the exemption applies, the DDA's provisions relating to premises generally do not apply.

48. Any order to modify or end any of those exemptions will be consulted on.

Article 16: Improvements to let dwelling houses

49. Article 16 makes procedural and evidential provision with regard to consent to improvements to let dwelling houses. The provisions apply to residential premises only and do not affect premises that are to let. The Article applies where a lease or tenancy agreement provides that a tenant may make improvements to the premises with the landlord's consent. Where the lease prohibits the making of improvements absolutely, the tenant could seek a reasonable adjustment of the terms of the letting under new sections 24A to 24E (Article 14) where those terms have the effect of making it impossible or unreasonably difficult for the disabled person to enjoy the premises. Article 16 also provides for the Equality Commission to issue a code of practice and provide conciliation services and support in disputes.

Article 17: Generalisation of section 56 of the 1995 Act in relation to Part III claims

50. Section 56 of the DDA sets out a framework for a questionnaire procedure which may be used by complainants in deciding whether to bring a claim or in bringing claims under Part II (employment) of the DDA. Article 17 extends that framework so that it will also apply to claims brought or to be brought under Part III (services) of the DDA.

Article 18: Meaning of “disability”

51. Article 18 removes the requirement that a mental illness must be “clinically well-recognised” before it can amount to a mental impairment for the purposes of the DDA. The removal of this requirement does not affect the need for people with a mental illness to demonstrate that they have an impairment which has a long-term and substantial adverse effect on their ability to carry out normal day-to-day activities.

52. Article 18 also deems people with HIV, cancer or MS to be disabled, and enables the Department to make regulations excluding persons who have cancer of a prescribed description from the provisions of sub-paragraph (1). This power could be exercised, for example, to exclude those types of cancer which do not require substantial treatment. Any regulations made under this power are subject to affirmative resolution by the Assembly.

53. Paragraph 7(5) of Schedule 1 to the DDA contains a power to deem a person to have a disability in prescribed circumstances. Article 18(4) inserts new paragraph 7(5A) into Schedule 1 to the DDA in order to make it clear that there are no implied limitations on that power. Regulations made under paragraph 7(5) will then be able to deem any group of people to be disabled, even a group covered in some way by another provision of Schedule 1 to the DDA.

Schedules 1 & 2

54. Schedule 1 contains minor amendments consequential on the changes made by the Order. Schedule 2 provides for the repeal of certain provisions in the DDA and in other enactments in consequence of amendments made by the Order.

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Printed and published in the U.K. by The Stationery Office Limited
under the authority and superintendence of Carol Tullo, Controller of
Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament
N2516 2/2006

£3.00

ISBN 0-337-96359-2



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