Draft Disability Discrimination (Northern Ireland) Order: Response of the Northern Ireland Human Rights Commission

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights,[1] advising on legislative and other measures which ought to be taken to protect human rights,[2] advising on whether a Bill is compatible with human rights[3] and promoting understanding and awareness of the importance of human rights in Northern Ireland.[4] In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding or "soft law" standards developed by the human rights bodies.

2. The Commission welcomes this opportunity to comment on the Draft Disability Discrimination (Northern Ireland) Order (the Draft Order). The Commission also welcomes the ongoing commitment of the Office of the First and Deputy First Minister (OFMDFM) to enhance the rights of disabled people by strengthening the application in Northern Ireland of the Disability Discrimination Act 1995 (the DDA).

[1] Northern Ireland Act 1998, s.69 (1).
[2] *Ibid*, s.69(3).
[3] *Ibid*, s.69(4).
[4] *Ibid*, s.69(6).

3. The structure of this response follows the order of the proposed legislation. The Commission will not comment on all aspects of the Draft Order, but on those that cause some concern. The Commission would welcome feedback from the Department on this response. Where it is decided not to take account of the comments made, the Commission would be grateful for an indication of the reasons for not doing so.

Article 3: District councils
Councils and their members: discrimination and harassment

4. The Commission welcomes the proposed inclusion of local councils and councillors within the scope of Part II of the DDA (duties of employers).

5. It is, however, concerned about the introduction of the exemption for 'political' appointments by the proposed subsection 15B(3). The proposed text would allow decisions on appointments to offices of the council and its committees, or on nomination of representatives to outside bodies, to be taken in a discriminatory manner based on the existing or perceived disability of the candidate. Given that most councillors can expect at some point in their tenure to hold an office or to be nominated to a body, it is difficult to accept the assertion that a disabled councillor denied any such opportunity solely because of the disability "is not subjected to a detriment". A councillor excluded from the normal range of activities open to councillors is quite clearly disadvantaged, and it might even be said that his or her electors are denied the same quality of representation as those who are represented by non-disabled councillors.

6. There is no obvious reason why such appointments should be automatically exempted, and therefore it is suggested that the proposed subsection 15B(3) be deleted or amended so as to offer explicit protection from discrimination.[5] It does not follow that councils would be under an obligation to nominate a particular councillor with a disability to a particular position; but neither ought councillors to be free to discriminate against one of their number purely because that individual, who enjoys the same democratic mandate as the rest, has a disability. It is

[5] See also Joint Committee on the Draft Disability Discrimination Bill *First Report of Session 2003-04*, HL Paper 82-I, HC 352-I (at paras 263 to 266).

likely that the duties of most such positions in the gift of a council can be filled by a disabled councillor, and where any difficulties are encountered, reasonable adjustments should be made so that the councillor has as far as possible the same entitlement to serve his or her constituents, across the full range of duties, as a non-disabled councillor would enjoy.

7. In relation to the delegated powers to make provisions as to the circumstances in which treatment is taken to be justified (proposed subsections 15B(4) and (5)), the Commission would draw attention to the text of Draft Article 7(2)(b) of the UN *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (UN Draft Convention) which states that 'discrimination' should include 'all forms of discrimination, including direct and indirect discrimination'.[6]

8. Although the Convention is some years from completion and will not of itself impose legally binding obligations on the UK, it draws on a substantial international consensus around disability and discrimination issues, and its draft content should be considered in framing new legislation. Accordingly, subsections 15B(4) and (5) should be amended as to apply also to treatment amounting to indirect discrimination; a prohibition on indirect discrimination should extend to all DDA Part 2 provisions.

Councils and their members: duty to make adjustments.

9. In accordance with the proposed section 15C, a physical feature, a provision, criterion or practice employed by the council has to place the disabled councillor at a 'substantial disadvantage' before it triggers the duty to make adjustments. Inclusion of such a trigger implies that certain levels of disadvantage are acceptable to the State and should be tolerated by disabled councillors.

[6] All documents relating to the drafting of the UN Draft Convention can be found at the UN's 'Enable' site, http://www.un.org/esa/socdev/enable/index.html. For the most recent draft of Article 7(2), see *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fourth session* (A/59/350; http://www.un.org/esa/socdev/enable/rights/ahc4reporte.htm).

10. The Commission suggested in its response to the Draft Special Educational Needs and Disability Order (of June 2004)[7] that language similar to that used in 15C could amount to the imposition of two limitations – one of a 'substantial' disadvantage and one of 'reasonableness' of the adjustment. While the reasonableness of adjustment requirement is sufficient to exclude minor and trivial requests, there may be an unnecessary additional barrier of interpretation of 'substantial' disadvantage.

11. Against this, it could be said that 'substantial disadvantage' is the condition, and the 'reasonable adjustment' the required response. If it is made clear, in the legislation or accompanying guidance, that the resources available for making adjustments should be targeted first at those disabled people with the more substantive requirements, the Commission could see the combination of terms as working to ensure that resources are not spread too thinly.

12. In relation to proposed subsections 15C(4)(c) and (d), any regulations as to when adjustments are 'always' or 'never' reasonable should make it clear that a mere reluctance to allocate available resources should not be used to classify a request as 'unreasonable'.[8]

Article 4: Discrimination by public authorities

13. The Commission generally welcomes the extension of the DDA to cover functions of public authorities.

14. The new section 21B(2) proposed in the Draft Order defines 'public authority' as 'any person certain of whose functions are functions of public nature'.[9] The consultation document explains that provisions of this and the following sections are to apply to the exercise of all public functions[10] and cover decisions by

[7] Northern Ireland Human Rights Commission *Response to the Draft Special Educational Needs and Disability Order*, June 2004, p9; available at http://www.nihrc.org (under 'Submissions').
[8] *ibid.*
[9] With the exclusion of prescribed persons (proposed section 21B(3)).
[10] With exceptions including legislative, prosecutorial and judicial acts, and state security.

Ministers, district councils, the police and other governmental organisations.[11]

15. As 'public authority' is defined by function rather than by name or by being added to a specific list of authorities covered, the Commission understands that the provisions of the proposed sections 21B to 21E will also cover functions of public nature performed by private entities contracted to do so. Such an interpretation would be in line with the Government's response to the report of the Joint Committee on the Draft Disability Discrimination Bill (GB).[12]

16. In the light of the difficulties encountered in the practical interpretation of 'public authority' and 'public function' for the purposes of section 6 of the Human Rights Act 1998,[13] the Commission would recommend that the Draft Order includes specific reference to public functions performed by private entities as falling within the scope of the Order.

Meaning of 'discrimination' in section 21B

17. The proposed Section 21D(1) states that a public authority discriminates against a disabled person if for a reason relating to this person's disability it treats him less favourably then persons to whom this reason does not apply AND the authority cannot show that treatment is justified in accordance with further provisions of the Draft Order.[14]

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[11] Office of the First Minister and Deputy First Minister *Draft Disability Discrimination (Northern Ireland) Order. Consultation Document*, p.17, para.21.

[12] See: *The Government's Response to the Report of the Joint Committee on the Disability Discrimination Bill* (available at http://www.disability.gov.uk/legislation/ddb/response.asp; Recommendation 38).

[13] Joint Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act. Seventh Report of Session 2003-04*, London: The Stationery Office Ltd, 2004 (HL Paper 39, HC 382). The Committee specifically drew attention to the fact that: '[…] The Act was intended to be comprehensive in providing effective protection of the rights of individuals and effective redress for those whose rights had been breached. But […] a number of court decisions have applied a restrictive definition of public authority […] which would exclude many service providers […] The consequence would be to exclude many of those receiving services from the Act's protection.' (para.9 at p.6).

[14] Currently, section 21D(3) states that discriminatory treatment – or failure to comply with a duty to make adjustments – is justified if in the opinion of the public authority conditions are satisfied allowing for differential treatment **and** it is reasonable, in all the circumstances of the case, for the authority to hold such opinion. The conditions are (broadly): that the treatment is necessary for health and

18. It is disappointing that the Draft Order extends to public authorities the test of 'reasonable opinion', against which to judge the actions of the public authorities as 'justifiable'. The Commission recognises that this approach is consistent with Part III of the DDA, relating to provision of goods and services by other providers. In this matter, however, we would support the view of the Disability Rights Task Force[15] and of the Equality Commission[16] that the subjective test of 'reasonable opinion' should be replaced by an objective test, and factors such as health and safety or the protection of rights of others should be considered as part of the 'reasonableness' test in a general trigger of duty to make adjustments.

19. According to the proposed section 21D(2), a public authority also discriminates against a disabled person when it fails to make reasonable adjustments required by section 21E and this failure makes it:
    - *impossible* or *unreasonably* difficult for the disabled person to benefit, or
    - *unreasonably* adverse for the disabled person to experience any detriment; *and*
    - the public authority cannot show that its failure to make adjustments is justified in accordance with specified exemptions.[17]

20. The Commission again recognises that this provision is consistent with other provisions of the DDA relating to the provision of goods and services (Part III). We are, however, concerned that such a formulation lowers the threshold of when the act or failure to act is to be considered discriminatory. It is

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safety reasons; that the person concerned is not capable of entering into an enforceable agreement; or that affording equal treatment would attract substantial extra costs which, in the particular case, would be too high. Differential treatment is also justified if the acts of the public authority are a proportionate means of achieving a legitimate aim (section 21D(5)). Further regulations as to conditions when differential treatment is to be taken as justified can be made under section 21D(7).

[15] Disability Rights Task Force *From Exclusion to Inclusion. Final report of the Disability Rights Task Force*, 1999 (Chapter 6, Recommendation 6.7); Available at: http://www.disability.gov.uk/drtf/full_report/#c6_2.

[16] Equality Commission for Northern Ireland *Enabled? Recommendations for change to the Disability Discrimination Act in Northern Ireland*, Belfast, June 2003, p58 (Recommendation 29).

[17] See note 14.

our view that public authorities and any private entity contracted out to perform a public function should adhere to much higher standards.

21. The provisions of this section (and corresponding provisions of the next section) should include the modified trigger from Part II of the DDA and should refer to 'disadvantage' and 'reasonableness' of adjustments only.[18]

Duty for purposes of section 21D(2) to make adjustments.

22. The wording of proposed subsections 21E(1) and (3) may be perceived as lowering the threshold – or trigger – of duty to make reasonable adjustments. The sub-sections repeat (in relation to practices, policies and procedures, as well as physical features) the criterion of those features making it 'impossible' or 'unreasonably difficult' for disabled persons to access particular 'service' of public authority.

23. Again, this formulation of the duty was inserted in order for the Draft Order to be consistent with Part III of the DDA. The Commission would advocate, however, that higher standards of duty to make adjustments be applied to public authorities and to private entities performing public functions. These provisions should also be changed to refer to 'disadvantage' and 'reasonableness' of adjustments.[19]

24. The requirement to undertake steps which are 'reasonable' only (see 21E(2) and 21E(4)) would be sufficient to sieve out situations where adjustment would be unjustified. Additional protection for the public authority from unreasonable demands is also provided by section 21E(9).[20]

25. Section 21E(5)(b) introduces a delegated power to make regulations which prescribe categories of public authorities to whom the duty of making the changes to physical features does not apply. While such a power is needed to ensure the practical implementation of the Draft Order, the importance of the possible exceptions for the situation and rights of disabled persons would require that care should be taken so that

[18] See our comments above at para 11.
[19] See: our comments above at 22.
[20] Section 21E(9): 'Nothing in this section requires a public authority to take any steps which, apart from this section, it has no power to take.'

exclusions are not as wide as to diminish the purpose of the legislation.

Articles 6-9: Application of sections 19 to 21 of the 1995 Act to transport vehicles
Rail vehicles: application of accessibility regulations

26. The Commission notes with disappointment the absence from the Draft Order of the power vested in the Secretary of State by new sub-section 4A of section 46 of the DDA,[21] to make rail vehicle regulations which would ensure that all such vehicles are regulated vehicles by 1 January 2020.

27. The Commission welcomes, however, the fact that the recently published *Accessible Transport Strategy for Northern Ireland*[22] includes an action to be taken by Department for Regional Development to set within the next two years the end date for compliance by all rail vehicles with disability regulations.[23] Given that the Northern Ireland rail network is very small, it ought to be possible to work towards much earlier compliance here.

Article 10: Discriminatory advertisements

28. The Commission generally welcomes the inclusion of provisions extending the DDA duties in relation to responsibility of third parties for discriminatory advertisements.

29. We are, however, concerned that an exemption is to be provided for advertisements inviting persons to apply in their capacity as members of a district council for a relevant appointment or benefit which the council intends to make or confer.[24] As there is no explanation provided for this exemption, our understanding is that this provision is to prevent claims of discrimination in political appointments.[25] The Commission would recommend that this exemption is deleted and that equal protection be given by the Draft Order to members of district councils.

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[21] Inserted by section 6 of the Disability Discrimination Bill (see http://www.publications.parliament.uk/pa/cm200405/cmbills/071/2005071.pdf).
[22] Department for Regional Development *An Accessible Transport Strategy for Northern Ireland,* 2005 (http://www.drdni.gov.uk/uploads/ATS%20Final.pdf).
[23] *Ibid.,* Action Ref.53, p71.
[24] See Schedule I, *Minor and Consequential Amendments*, point 6.
[25] This would relate to article 3 provisions on district councils, as discussed above.

30. The Commission is also concerned that the proposed legislation limits the effects of the anti-discriminatory provisions in this section to advertisements relating to employment. To ensure comprehensive and equal third-party liability provisions, the Commission would recommend that this section be extended to cover advertisements relating to provision of goods, services and facilities.

Article 12: Private clubs, etc.

31. The proposed sections 21F to 21J in the Draft Order would make it unlawful for private clubs to discriminate against disabled persons, and impose a duty to make adjustments. It is intended that the provisions of these sections will cover any profit-making or non-profit association of 25 or more persons (both corporate and unincorporated), where admission to membership is regulated by a constitution, unless the association is a trade organisation.[26]

32. The Commission generally welcomes the extension of the scope of the DDA to private associations, which will cover – among others – the political parties.

33. The inclusion of a minimum number of members as a trigger for protection against discrimination may send the message that discrimination is allowed in smaller organisations. Even if provision was introduced as a way of protecting smaller organisations against the potentially high cost of adjustments,[27] such organisations are protected under general requirements of adjustments being 'reasonable' and there is no obvious justification for such a differentiation.

Meaning of discrimination

34. It is regrettable that the proposed section 21G retains the test of 'reasonable opinion' as justification of differential treatment of

[26] Trade organisations are covered by section 13 of the DDA.
[27] Annex A to the Draft Regulatory Impact Assessment notes that regulation-making powers will be used to ensure that – for example – clubs meeting in private households will be excluded from duty to make adjustments or this duty to be modified in relation to them. See: Office of the First Minister and Deputy First Minister *Draft Disability Discrimination (Northern Ireland) Order Consultation Document*, pp70-75.

disabled persons. The Commission would prefer that this be replaced with an objective test.[28]

Duty to make adjustments

35. The Commission notes that the Draft Order includes a regulation-making power for imposing a duty to make reasonable adjustments on private clubs, instead of including this duty into the primary legislation.

36. The Explanatory Memorandum provided by the Department states: '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'.[29] In view of this statement, and given that Part III of the DDA already provides the triggers of the duty and protects providers of services from demands for 'unreasonable' adjustment, the Commission sees no reason why similar provisions of general duty could not be immediately included in the Draft Order.[30]

37. Necessary modifications reflecting the character of private clubs could then be included in regulations (as is already legislated for in relation to providers of services), bearing in mind that no regulations should go as far as to diminish the purpose of the legislation.

Article 13: Discrimination in relation to letting of premises Duties for purposes of section 24A(2) to provide auxiliary aid or service

[28] See comments at para 18 above.
[29] Office of the First Minister and Deputy First Minister *Draft Disability Discrimination (Northern Ireland) Order Consultation Document*, p22 at para 38. The Department for Work and Pensions has already consulted on regulations relating to private clubs in Great Britain, between December 2004 and March 2005 (at this stage, we are not aware of a similar consultation taking place in Northern Ireland). The proposals put forward in the consultation document do not significantly differ from provisions of Part III of the DDA (see Department for Work and Pensions *Disability Discrimination Bill, Consultation on private clubs; premises; the definition of disability and the questions procedure*, DWP, 2004).
[30] Subject to our earlier observations concerning 'reasonableness'.

38. Under the proposed legislation, the controllers of premises will be under an obligation to provide auxiliary aids or services by taking steps which are reasonable in all the circumstances.

39. The requirement to make only 'reasonable' adjustments sufficiently protects landlords and other controllers of premises from requests that do not fulfil this requirement.[31] Accordingly, the conditions set in section 24C(3)(b) and (4)(b) could be deleted.

Duty for purposes of section 24A(2) to change practices, terms, etc.

40. The trigger to the duty to change practices, etc. should be changed to 'difficult' access and 'reasonable' adjustment.

Section 24C and 24D: supplementary and interpretation.

41. The Commission is concerned that the Draft Order gives blanket exemption for landlords and other controllers from a duty to make physical alterations by stating that for the purposes of the duty to make adjustments, it is never reasonable for controllers of premises to have to take steps involving removal or alteration of physical features.

42. It is our view that this blanket exemption goes too far and can prove a significant barrier for disabled people in equal access to rented premises. It is also not entirely clear from the wording of the Draft Order whether the controllers of let premises may withhold consent for the alterations to physical features to be made at the expense of a disabled tenant.

43. Although the Explanatory Memorandum suggests the change or waiver of terms prohibiting alterations as an example of a change of policies or terms of let under the duty to make reasonable adjustments, explicit inclusion of provisions which prevent controllers from unreasonably withholding such consent would benefit the protection of the rights of disabled persons.

Premises that are to let: discrimination in failing to comply with duty

[31] *Ibid.*

44. The proposed section 24G (in conjunction with section 24K) introduces – yet again – the test of 'reasonable opinion' against which to judge whether the controller of premises discriminates against a disabled person.

45. The definition of discrimination for the purposes of section 24G(1) is quite narrow and includes exclusively situations where the controller fails to comply with duties to make reasonable adjustments and provide auxiliary aids, as imposed by section 24J. Since the discrimination is defined in those narrow terms, it is would suffice to provide that, in order to prove that there was no discrimination, the controller of premises would have to show that it would be 'unreasonable' to require adjustments.

Duties for purposes of section 24G(2)

46. Under the proposed legislation, the controllers of premises that are to let will be obliged to take steps which are reasonable in all the circumstances of the case to provide auxiliary aids or change policies, practices or procedures differentiating between different tenants by virtue of disability.

47. Once again, the Commission's view is that the requirement to make only 'reasonable' adjustments sufficiently protects landlords and other controllers of premises from unjustifiable requests.

48. In the proposed section 24J(5), the Draft Order gives too wide an exemption for landlords and other controllers from a duty to make physical alterations, by stating that for the purposes of the duty to make adjustments it is never reasonable to have to take steps involving removal or alteration of physical features.

Article 16: Meaning of 'disability'

49. The Commission welcomes the fact that the Draft Order removes the requirement for a mental illness to be clinically 'well-recognised' before the protection of the DDA is triggered. This change will ensure that more persons with conditions such as depression will be protected from discrimination.

50. The inclusion of progressive conditions such as cancer, multiple sclerosis and HIV within the scope of the DDA, from the moment of diagnosis, is also welcome.

51. Although we view these changes as generally positive, we are concerned that the addition of some conditions to the list of illnesses covered from diagnosis, while excluding other progressive conditions, may lead to discriminatory treatment in access to rights, contravening Art. 14 of the European Convention of Human Rights.

52. We are also concerned that the delegated power to exclude certain prescribed types of cancer from the DDA provisions will lower the protection of persons suffering from such cancers, while there still will be a potential for them being discriminated by providers of services (for example, by insurance companies providing life insurance) on account of illness.

53. More fundamentally, the provisions relating to defining disability could be entirely reworked to reflect the social model of disability. There is, in any event, a need to iron out the inconsistencies that are exacerbated by the proposed changes (where some disabilities are defined by functional impairments, and others are simply listed).

54. The Commission would also have wished to see the opportunity taken to dispense with the 12-month requirement, and to legislate for full compliance with the EU Framework Directive in respect of perceived disability. In limiting these comments largely to what is in the proposals, rather than what is missing from them, the Commission would stress that the Draft Order, with all of the advances that it contains, is not in itself sufficient to address the social and economic disadvantage faced by people with disabilities. In particular, there is a need to change the culture of the workplace in respect of disabled people, and this could be greatly improved by including in the Order an anticipatory duty for employers.

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