

# DPTAC response to Department for Communities and Local Government consultation on the Discrimination Law Review

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## **Introduction**

1. The Disabled Persons Transport Advisory Committee (DPTAC) welcomes the opportunity to comment on this consultation by the Department for Communities and Local Government on the Discrimination Law Review. We believe that this consultation is of considerable significance to disabled people, and we consider that significant changes are necessary to the Government's proposals if the interests of disabled people are to be safeguarded effectively. While much of the content of the consultation goes beyond the remit

of DPTAC, we consider that the proposals discussed have significant implications for transport.

2. The government set up DPTAC under the Transport Act 1985 to advise it on the transport needs of disabled people. Our aim is to ensure that disabled people can go where everyone else goes and that they can do so easily and without extra cost. We would like to see this happen by 2020.
3. DPTAC has identified four overarching principles on which we base our advice to the government, other organisations and disabled people. Those principles are that:
  - Accessibility for disabled people is a condition of any investment
  - Accessibility for disabled people must be a mainstream activity
  - Disabled people should be involved in determining accessibility
  - Accessibility for disabled people is the responsibility of the provider
4. These principles are the basis of our response to this consultation. We have also included some essential statistics relating to the numbers and nature of disabilities as an annex to these comments.
5. We have tried to answer some of the specific questions in the consultation but begin with some general comments. Past legislation regarding disability discrimination has resulted in considerable advances in the development of accessible transport infrastructure and services. However, there is a long way to go before many of the current barriers to movement by disabled people are eliminated. Until this occurs, the quality of life of many disabled people and their ability to access services and opportunities will continue to be seriously impaired.

### **Underlying issues**

6. The Disability Discrimination Act 2005 represented a marked advance in the promotion of the interests of disabled people – not least in the fact that it introduced a duty on public authorities to publish a disability equality scheme and action plan by December 2006. This was particularly relevant for the planning, highways and transportation functions of local authorities.

7. In February this year, DPTAC reviewed a sample of the Disability Equality Schemes that have been published by local authorities and passenger transport authorities. The Duty under the Disability Discrimination Act 2005 encompasses all the functions of public authorities but in view of our statutory role, our review concentrated on the highways and transportation aspects.
8. We found considerable variation in the approach of the authorities examined. Most of the schemes had good points but of those that we reviewed, only a handful seemed to have got close to what might have been expected as good practice.
9. Our greatest concern lay with those authorities that had sought to promote overall equality strategies rather than a specific disability strategy. This was permitted in terms of the Act and the guidance published by the Disability Rights Commission. However, there was a very obvious and inevitable dilution of the vital disability equality elements in the schemes published by the authorities that had opted for the more general all-encompassing equality strategies, compared with those that had focussed on the disability aspects only.
10. DPTAC can see the attraction and relevance of treating all forms of discrimination in the one Act of Parliament. We agree there are issues that are common to race, gender and disability in terms of eliminating discrimination and promoting equality of opportunity. This applies in particular to employment, vocational training, education and the provision of certain facilities and services. It is clear from the consultation that resolving many of the issues relating to these aspects is largely a matter of changing attitudes with little financial impact.
11. However, there is a very real physical and infrastructural dimension to resolving the issues relating to promoting the quality of life of disabled people and their ability to access services and employment, education and other opportunities. This applies to all disabled people no matter what their ethnic origin, gender, beliefs or orientation. The need for physical changes to be made to the transport and built environment makes it unique in the context of promoting equality and this is an important issue when it comes to consideration of proportionality of response.

12. There is another important difference and that relates to the current duty under disability legislation to take retrospective action. It may be difficult if not impossible with regard to undoing the wrongs that may have been perpetrated with regard to other aspects of discrimination. However, the Disability Discrimination Act 2005 laid down specific requirements for public bodies to review existing policies and past actions to see what could be done to undo barriers to disabled people. Crucially there was also a requirement to prioritise remedial action in consultation with disabled people.
13. We would be very concerned if a consequence of the promotion of a single equality bill was a diminution of the expectation from public bodies that they would be required to promote the interests of disabled people actively.
14. While the Government intends that the law should remain strong and effective on protection against discrimination, the negative impact of the proposals in reaction to the public sector duty would weaken the requirement for public authorities to promote the interests of disabled people. This distinction between promoting equality of opportunity for disabled people as opposed to simply presenting discrimination is at the heart of DPTAC's concerns about this proposed legislation.
15. DPTAC welcomes the proposal to require the Commission for Equality and Human Rights to prepare and issue guidance and codes of practice. It needs to be resourced to do this, and to consult effectively, as the Disability Rights Commission has done.

### **Scope of the review and the consultation**

16. DPTAC welcomes the work that has gone into the consultation from the Equalities Review and other research and policy strands. We welcomed the Government's undertaking to introduce a Single Equality Bill during the lifetime of this Parliament, but we are disappointed that the current proposals do not, in our view, do full justice to the scope and breadth of the Review.
17. We are pleased that an easy to read summary has been made available, but are disappointed that it appears to have been made available in hard copy only and not on the Internet.

## Chapter One

### ***Direct Discrimination***

18. While we understand the rationale behind the concept of a comparator, as is demonstrated in the Annex to these comments, disabled people are not an homogenous group with identical needs. The needs of people with mental health problems or learning disabilities are distinct from those of wheelchair users for example. Even among people with similar impairments, needs vary and, for example, profoundly deaf people will not benefit from induction loops. Our experience of disabled people suggests that the use of a comparator may not be practical for many issues relating to disabled people.

### ***Definition of disability***

19. While DPTAC welcomes in principle the Government's proposal to use a common definition of disability for different contexts of discrimination, we believe that it has missed a vital opportunity to move from a medical to a social model of disability.

20. In responding to the Disability Rights Commission's consultation on the definition of disability last year we welcomed the proposal to amend the definition so that it covered people with temporary disabilities.

21. We are greatly disappointed that this new change to the definition, which would protect anyone who experienced discrimination in the use of transport on the grounds of an impairment, has not been adopted. We know that some local authorities are already making use of it and we think central government should do so too.

22. In this connection DPTAC agrees with the Government that that removing the list of capacities may be helpful. However we think that this should happen in the context of our proposals for a social model definition set out above.

### ***Perception and Association***

23. DPTAC is also concerned that the Government has missed the opportunity to outlaw discrimination on the grounds of perception and of association. This would extend protection to the families, friends, partners and fellow travellers of disabled people. DPTAC notes that the Government has resisted this change on the basis that it would extend protection to several million people who are not themselves disabled.
24. We consider it likely that a significant proportion of those who could be discriminated against on the grounds of association may in fact be disabled (though perhaps in ways not relevant to the discrimination in question). More importantly, since the requirement would be for equal treatment and not for reasonable adjustment, we do not consider that the proposed extension of the law would be burdensome. Our recommendation that discrimination on the grounds of association could also take account of the needs of parents and carers which are described in the consultation document.

### ***Indirect discrimination***

25. As we have indicated above, disabled people are not a homogenous group with identical needs and measures intended to meet the needs of people with one type of disability may not be adequate to meet the needs of others. There is therefore potential for indirect discrimination by a service provider or employer who believes that by, for example, providing ramps for wheelchair users, he has met the needs of all disabled people. We believe therefore that it would be irrational not to extend indirect discrimination to cover disability discrimination law.

### ***Justification tests and threshold trigger points***

26. DPTAC welcomes the move to a single justification test and trigger point for reasonable adjustment. We consider that this will clarify the law and make it easier for transport service providers and for disabled people to understand it. We agree that the lower of the current thresholds, “substantial disadvantage” would be an appropriate threshold. However we note that, while in most instances of discrimination, the most effective action can be

achieved by changes to attitudes and behaviours, in the case of disability, changes to physical features are often needed in addition, even where the impairment in question is not related directly to mobility.

## **Chapter Four**

27. We note and welcome the recognition in paragraphs 4.13 and 4.14 that addressing the needs of disabled people requires positive action. This is no more true than in the field of transportation.

## **Chapter Five**

### Public sector equality duties

28. It is disappointing that the list of public services that introduce this Chapter do not include the essential planning, highways and transportation functions. Without these there is no access to health, social care, education, justice or employment services! The planning, highways and transportation functions also feature very highly in the priorities of disabled people and they are essential to the long term vitality of the UK.

29. The Disability Rights Commission recognised this when they published specific advice on “Planning, Buildings, Streets and Disability Equality” in connection with the statutory code of practice on the Disability Equality Duty.

30. Therefore while DPTAC can see the logic of bringing together existing public sector duties on race, gender and disability, we believe this should be implemented on the basis of the strongest of the present duties, which is currently that relating to disability.

31. We are very concerned that the Government plans to replace a requirement to have due regard to disability across all a public body’s functions will be replaced by a requirement to set (some) objectives and take proportionate action to meet them. While objectives and actions are necessary, the Government’s proposals could have the effect of replacing a duty to take a rigorous and systematic approach to strategic change with a modicum of activity to achieve a few poorly coordinated actions.

32. Any combined duty should be linked rigorously to the work of inspecting, auditing and regulatory bodies, and should cover the procurement of goods and services. Any combined duty must also have the retrospective element of the present duty, requiring authorities to consider their existing policies, whenever they were put into place, in the light of the disability equality duty.

#### The case for a single public sector equality duty

33. We are very concerned that the Government plans to replace a requirement to have due regard to disability across all a public body's functions will be replaced by a requirement to set objectives and take proportionate action. As we indicated in our introductory remarks, the evidence from our consideration of the equality strategies produced by local authorities at the end of 2006 demonstrates that the interests of disabled people were significantly prejudiced where the authority published a combined equality strategy compared with one focussing on the Disability Equality Duty.

34. DPTAC is therefore extremely concerned at the proposal to remove the twin requirements that public bodies should not only produce Disability Equality Schemes but that they should do so in consultation with disabled people. A key principle that disabled people have sought to include in all policies and practices is "nothing about us without us" and this has been commendably integral to the current disability equality duty. We do not doubt that public bodies sincerely wish to consult disabled people, but without the requirement to consult, this engagement could well be less effective and integrated.

35. The proposal to require "proportionate action towards the achievement of priority equality objectives" removes much of the accountability and involvement of the present system. Any combined duty should therefore be linked rigorously to the work of inspecting, auditing and regulatory bodies, and should cover the procurement of goods and services.

#### Purpose of a single sector duty

36. We have no difficulty with the four dimensions of equality as far as they go – but they do not go far enough. The whole basis of the Disability Equality Duty is that disabled people are full involved in determining the priorities that relate to their interests – "nothing for

disabled people without disabled people”. Promoting equal participation may therefore require “proportionate” attention to be given to engaging with and involving different groups such as disabled people.

#### A strategic equality duty / A proportionate duty

37. These two aspects are closely related. The way they are presented in the consultation seems to misunderstand the nature of public services. Local authorities are responsible for delivering on a wide range of services and functions and we believe it is essential that the prioritising of the proportionate actions should be related to each of the services or functions delivered by the authority.

38. Similarly, while government Departments may on the face of it seem to be concerned with a relatively narrow remit, in practice the range of activities within and the influence of each Department is immense. It is also worth emphasising that government delivers relatively little on its own – it relies on local authorities and others (such as the private sector in the case of public transport) to deliver the service to people. It is therefore essential that these linkages are recognised and that government ensures that the funding it disburses to local authorities and other bodies is made conditional on the authority or body meeting its prescribed and agreed objectives regarding the achievement of equality.

#### Ensuring effective performance

39. While the four key principles outlined are self evident it would be impossible to assess relative performance if there were not also to be prescribed performance indicators. This would not prejudice the ability of authorities to supplement these with other local indicators as they saw fit. With the earlier emphasis in this consultation on the role of comparators in determining whether or not there had been direct discrimination, it would seem irrational if this approach was not also to be adopted with regard to assessing performance!

#### Enforcement of a single public sector duty

40. DPTAC is concerned that the Government plans to permit enforcement only by the Commission for Equality and Human Rights, rather than, at present, permitting action also by individual disabled people and other interested parties.

41. The combination of the disability equality duty as it now stands and the Freedom of Information Act, alongside the existing enforcement power, offer disabled people with a potentially powerful means of engaging with public bodies in respect of how they engage in the provision of transport and other services to disabled people.
42. While we consider it too early to judge the impact of the present disability equality duty, there are encouraging signs that awareness of the relevance of disability to policy development and programme delivery is rising. More parts of the Department for Transport and its agencies than ever before seem to be engaging with these issues. There is also evidence that some local authorities are abandoning their own bespoke parking schemes for disabled people in favour of greater emphasis on the national Blue Badge Scheme.
43. DPTAC strongly urges the Government to reconsider these proposals and to consult further on proposals for combined duty that draw positively on the experience of the disability equality duty.

#### Public sector procurement

44. Local authorities are usually good in specifying accessible vehicles in public transport contracts. However, in our review of the Equality Strategies produced by local authorities we noted little evidence if any that local authorities had recognised the significance of existing procurement rules (apart from employment) when it came to the role of in-house or external contractors for highways and other transport related works. The mobility of disabled people can be significantly disadvantaged during construction works. It is therefore essential that any guidance stresses that equality issues apply to contractors and the way they go about works as well as who they employ.

#### Private sector disability equality duty

45. DPTAC considers that transport is one area where the case for a disability equality duty on the private sector is strong, as so much of the delivery of services is in the hands of the private sector. We accept the Government's view that it is important not to bear down disproportionately on small and medium sized service providers.
46. DPTAC is aware that large number of disabled people continue to enjoy a high standard of service from transport providers every day,

and that a number of them have invested considerable resources and commitment to build expertise, knowledge and experience. However we are also aware of operators that use the lack of any enforceable regulations to continue discriminatory practices. Unfortunately this has resulted in many disabled people experiencing discomfort, humiliation, loss of dignity, inconvenience, limited mobility and reduced social interaction as well as in some cases serious injury when trying to travel. For this reason we wish to see the introduction of a proportionate private sector duty for transport operators, and the lifting of the Part 3 exemption of air and water travel.

## **Conclusion**

47. DPTAC welcomes the opportunities presented by this consultation. However, within the scope of our remit, we regretfully conclude that, for the first time that we can recall, we are confronted with a legislative proposal that is more disadvantageous than beneficial to the needs of disabled people. We trust that these comments will be received in the positive and constructive spirit in which they are offered.

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## Annex

### ***Disabled People in the Population***

1. The principal concern of DPTAC is to ensure accessibility for disabled people. By this, we mean inclusive transport systems that are easy to reach, use and understand by all, in safety and comfort.
2. Disabled people and those with long-term illnesses make up about 17% of the population or about 10 million people, including people with limiting longstanding illnesses. Of these 4.6 million are over state pension age and 700,000 are children.<sup>1</sup> While higher numbers of children are being born and living with impairments than ever before<sup>2</sup>, disability levels do increase with age.
3. Currently 985,000 people live with learning disabilities<sup>3</sup>, of whom 796,000 are adults over 20. The adult figure will increase to 855,000 (plus 7%) in 2011 and 891,000 (plus 11%) in 2021. It has been estimated that some 7 million adults have literacy problems<sup>4</sup>.
4. Using a broad definition of disability, a survey by the Department of Social Services reported that the provisions of the Disability Discrimination Act 1995 covered approximately 11.7 million people, including 6.5 million people of working age. The Disability Discrimination Act 2005 will have increased the figure, as it classes AIDS, cancer and multiple sclerosis as disabilities from the point of diagnosis. Multiple disabilities were common, as illustrated by prevalence figures indicating that a third reported sensory deficits, a third learning difficulties, half mobility problems and roughly as many impaired physical co-ordination. Long-term illnesses such as Alzheimer's disease and mental illness were

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<sup>1</sup> Department for Work and Pensions press notice 9 February 2006 - "Updated estimate of the numbers of disabled people including people with limiting longstanding illnesses, and their associated spending power", at <http://www.dwp.gov.uk/mediacentre/pressreleases/2006/feb/drc-015-090206.asp>

<sup>2</sup> Improving the Life Chances of Disabled People 2005 at [http://www.strategy.gov.uk/downloads/work\\_areas/disability/disability\\_report/pdf/disability.pdf](http://www.strategy.gov.uk/downloads/work_areas/disability/disability_report/pdf/disability.pdf)

<sup>3</sup> Foundation for People with Learning Disabilities 2006, at [http://www.learningdisabilities.org.uk/html/content/need2know\\_lives\\_id.pdf](http://www.learningdisabilities.org.uk/html/content/need2know_lives_id.pdf)

<sup>4</sup> [http://www.dfes.gov.uk/pns/DisplayPN.cgi?pn\\_id=2002\\_0276](http://www.dfes.gov.uk/pns/DisplayPN.cgi?pn_id=2002_0276)

included in the estimated total number of people affected by disability.<sup>5</sup>

5. Disabled people are not an homogenous group with identical needs. The needs of people with mental health problems or learning disabilities are distinct from those of wheelchair users for example. Even among people with similar impairments, needs vary, for example, profoundly deaf people will not benefit from induction loops. The needs of disabled people may be best met by any, all or combinations of: adapted forms of communication, attention to light and sound levels, easy to read signage and wayfinding, planning for assistance dogs, the presence of suitably trained and empowered staff, and appropriately designed physical infrastructure such as ramps, lifts and surfaces.
6. Disabled people live throughout the community. One in four households has a disabled resident.<sup>6</sup> The need for access for disabled people is not limited to specific areas, but is present throughout the wider transport system.

### ***Population Trends in Disability***

7. The number of people over state pension age is projected to increase by 11.9% from 10 or so million in 2002 to 12.2 million in 2011 and the population aged 80 and over is projected to grow from 2.5 million in 2002 to nearly 5 million by 2031.<sup>7</sup> The proportion of the working population will increase, as retirement ages advance. Over the same period that will bring about these changes in the population profile, the overall population will increase by about 9%.
8. The Department for Work and Pensions estimated in 2004 that disabled people have a spending power of around £80 billion each year<sup>8</sup>. Planning strategically to design transport facilities that meet the needs of disabled people is likely to further increase this

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<sup>5</sup> K Williams, T Savill and A Wheeler "Review of the road safety of disabled children and adults" 2002, available at [http://217.118.128.203/store/report\\_detail.asp?srid=2710&pid=211](http://217.118.128.203/store/report_detail.asp?srid=2710&pid=211)

<sup>6</sup> James Ruppert, Independent June 15, 2004

<sup>7</sup> DRC Report for Party Conferences 2004

<sup>8</sup> [www.dwp.gov.uk/mediacentre/pressreleases/2004/dec/spending.asp](http://www.dwp.gov.uk/mediacentre/pressreleases/2004/dec/spending.asp)

amount, as more disabled people become creators of the national wealth, rather than consumers of its state benefits.

9. Meeting the transport needs of disabled people by providing inclusive transport policies and infrastructure will be of considerable economic benefit to the country; both allowing them to exert this spending power and enabling them to become or remain part of the country's workforce.
  
10. The mobility of disabled people is also a precondition for the achievement of a wide range of government objectives such as safe and independent living; full participation in civil society; and the maintenance of good physical and mental health through access to recreational and cultural facilities. Some of these links were brought out in the Prime Minister's Strategy Unit's report "Improving the Life Chances of Disabled People"<sup>9</sup>, and in our response to it<sup>10</sup>.

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<sup>9</sup> 2005, at [http://www.cabinetoffice.gov.uk/strategy/work\\_areas/disability/](http://www.cabinetoffice.gov.uk/strategy/work_areas/disability/)

<sup>10</sup> 2005, at <http://www.dptac.gov.uk/consult/11.htm>