

# Select Committee on the Equality Act 2010 and Disability – Call for evidence

A response by the National Deaf Children's Society

## Introduction

The National Deaf Children's Society (NDCS) is the leading charity dedicated to creating a world without barriers for every deaf child. There are over 45,000 deaf children in the UK. We welcome the opportunity to respond to the Committee's call for evidence on the Equality Act 2010 and Disability. Our response is informed by our work to support families in appeals against decisions that disadvantage deaf children.

NDCS uses the Equality Act in our work across Great Britain, including in the devolved administrations. Largely for reasons of space, our response focuses on how the Equality Act is used in England though many of the issues we identify apply equally in Scotland and Wales.

## General

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

1.1 We believe that the Equality Act has been positive in harmonising and strengthening legislation. One key strength is the new duty on schools and local authorities to provide auxiliary aids to deaf children.

1.2 One possible negative effect has been in relation to the broad requirement for public bodies to set 'equality objectives'. Public bodies are only required to set one objective and to review this every four years; there is no requirement that the objective cover disability equality. This means that, over a four year period, a public body may only have an equality objective relating to, for example, gender equality, without any specific focus on disability equality.

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

2.1 The lack of read-across to the UN Convention on the Rights of Persons with a Disability is one key gap. Many of the young people and families we work with are confused that the UK is a signatory to the Convention but that their rights under the Convention cannot be directly enforced within the UK.

2.2 Another gap is in education. Local authorities are required to produce accessibility strategies to promote equality in education. However, many schools in England have become academies and so are independent of local authorities. As far as NDCS is aware, there are no similar duties on academy chains to produce accessibility strategies.

### **3. Are the reasonable adjustment duties known and understood by disabled people, employers, service providers and others who have duties under them?**

3.1 No. Among families, we find that there is a poor understanding of their rights under the Equality Act. A survey of NDCS members in 2014 found that only 8% had received any training or information about deaf children's rights in relation to discrimination. We recommend that more be done by the Government and the Equality and Human Rights Commission to raise awareness.

- 3.2 In education, Tribunals have the power to hear cases under Equality Act legislation. However, we understand that very few cases are actually brought to the Tribunal, which again suggests a poor awareness among families of their rights under the Equality Act.
- 3.3 We find that there is also a poor understanding among public bodies of their duties. In the aforementioned survey, 35% of families reported that their local authority or school had failed to provide any information about the provision of auxiliary aids and services. 64% of families in England and Wales had never seen or were aware of the existence of an accessibility plan at the school.
- 3.4 In health, NDCS's My Life, My Health campaign heard from deaf young people of widespread failures to ensure access to health services. Examples include systems where appointments can only be booked by telephone and sign language interpreters not being provided when requested.
- 3.5 One specific issue and concern relates to the trend for services to be sub-contracted to private bodies. In our experience, we find that private bodies have little knowledge or awareness of the Equality Act. Specifications by public bodies rarely seem to be state that the private body delivering the service must have a good awareness of the Equality Act and their obligations under it.

#### *Reasonable adjustment*

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

- 4.1 One of the advantages of the concept of reasonable adjustments is that it takes into account the individual facts of a case and can be flexibly applied to different circumstances. We would be concerned that any move to 'standardise' what a reasonable adjustment is would remove that flexibility in a way that would not always be positive. There is also a risk that any 'standardisation' or minimum legal requirements would then lead to a situation that public sector providers only provide the bare minimum required, even if it might not be unreasonable for them to provide more support.
- 4.2 This notwithstanding, NDCS would agree that further clarification should be provided to bodies around their legal requirements when it comes to consider how to reach a decision on what is or isn't a reasonable adjustment. We would also recommend that more be done to publicise existing examples of case law or Tribunal decisions to help services and the public consider how to reach a decision on what a reasonable adjustment looks like.

#### *Public Sector Equality Duty*

#### **5. 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**

- 5.1 The duty has been effective in a number of cases that we have worked on. Some of the positive outcomes that we have achieved through citing the duty include:
- A local authority (Stoke on Trent) which reversed an earlier decision to reduce the number of Teachers of the Deaf after being reminded that it not demonstrated that it had regard for the impact this would have on deaf children.
  - The Department for Work and Pensions agreed to look at its decision-making process for Disability Living Allowance (DLA) benefits after we suggested that deaf children were

being disadvantaged by a general failure to collect evidence from specialists in deafness for DLA claims from parents of deaf children.

5.2 However, we feel that the duty has not been as effective as it could have been. Some of the possible reasons for this are touched upon elsewhere in our response. They include: lack of awareness of what the duty involves; costs involved; and the adversarial nature of making claims.

5.3 We do not always feel that the Government leads by example in considering the public sector equality duty. For example:

- We do not feel that the Department for Work and Pensions (DWP) considered its public sector equality duty when introducing the new Personal Independence Payment (PIP) benefit for disabled adults over the age of 16. This is reflected in the fact that the claim process largely relies on being able to use a telephone. An email option was introduced at a later point and is not, we feel, widely publicised. An online claim form has yet to be introduced, even though the benefit has now been fully rolled out. In addition, where the telephone claim process is used, claims are backdated to the first point of contact. However, where an application is made by email or post, claims are backdated to when DWP receive the requested information by post, even where a disability prevents someone from making a telephone application. However, DWP do not accept that this might amount to indirect discrimination.
- In recent years, the Department for Education have made a number of changes to the curriculum including a move away from modular exams and coursework and a move towards longer examinations. There appears to have been no substantive consideration of the impact this might have on disabled pupils. For example, deafness and delays in developing communication and language can sometimes cause issues with working memory which means that deaf young people may struggle to demonstrate their abilities in long examinations.
- Separately, governments in England and Wales are considering reducing the support provided to disabled students via Disabled Students Allowance. This is being justified on the basis that universities are already subject to a duty to make reasonable adjustments. There seems to be an implication that this absolves the Departments of considering their own public sector equality duties in making such a significant change. No additional funding has been provided to universities to reflect this change nor does there appear to have been any substantive consideration on whether disabled students will be able to hold universities to account if the university fails to make reasonable adjustments in a timely and effective way.

5.4 We have similar concerns about inspection bodies such as Ofsted and the equivalent education inspection bodies in the nations, and other inspection bodies such as the Care Quality Commission. For example, the Special Educational Needs and Disability Act enables Ofsted in England to monitor and inspect the adequacy of accessibility plans and strategies. As far as we are aware this is rarely done which itself raises questions about the extent to which inspection bodies comply with the public sector equality duty in their own work. Furthermore, the most recent annual report from Ofsted contained only a very brief reference to children with disabilities or special educational needs. Similar concerns apply in other parts of the UK.

5.5 We recommend that more guidance is made available on what it means to have “due regard” for the impact of a decision, under the public sector equality duty. It is established that a public body does not always have to produce an equality impact assessment. However, it is less clear that what a public body **does** have to do to demonstrate that it has had due regard.

**6. 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?**

6.1 No response.

*Oversight and enforcement*

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

7.1 Possibly. We feel that the knowledge of the Equality Act varies from department to department and among civil servants. It is also unclear to what extent the Minister for Disabled Persons has responsibility for championing the Equality Act 2010 within government and ensuring that all government departments, including those in the nations, achieve best practice in applying the public sector equality duty. As set out earlier, the Department for Work and Pensions, in which the Minister is based, does not always appear to have a good understanding of the public sector equality duty in relation to its own work. This can make it more difficult for NDCS to, for example, challenge other bodies to ensure that deaf young people are able to contact them using a range of mediums, including email, text messages and online forms, when the Department seem reluctant to offer this in relation to a benefit claimed only by disabled people.

**8. 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?**

8.1 We feel that the Commission has had mixed success. The clear guidance produced by the Commission on how the Equality Act should apply to different bodies has been helpful. In addition, cases that the Commission has pursued has also helped to develop good case law, which has wider benefits.

8.2 However, the Commission is limited by the fact that it no longer gives public advice on how to apply the Equality Act 2010. Although the EHRC Helpline was replaced by the Equality Advisory Support Service (EASS), this is an entirely separate body to the EHRC. Having direct contact with the public gave the EHRC the benefit of picking up on trends in cases which could be responded to through casework with a wider public interest or guidance to statutory bodies. EASS has also limited impact as it does not give legal advice. We also note that the number of cases that the Commission now pursues is much lower than it was before 2010. We feel that the impact of cuts to the Commission's budget has had the practical effect of silencing the Commission.

8.3 The failure to give all of the Commission's guidance statutory enforcement status has also caused confusion to bodies and, in some cases, has resulted in guidance simply being ignored or overlooked. The guidance for employers is extremely useful and it is clear to employers that this is guidance which must be followed as it has statutory enforcement in the Employment Tribunal. However, this is not the same for the guidance for schools, which are often unaware of the Commission's guidance.

8.4 We are aware of one case where a school only became aware of the guidance during the course of Tribunal proceedings. In this case, NDCS represented a 15 year old deaf pupil who had been chosen by his school to join a school ski trip. However, he was told by the school that he would not be allowed to attend unless his parents paid for a sign language interpreter to go with him. This case was taken to the Special Educational Needs and Disability Tribunal who ruled that the school should pay for the interpreter as their duty to make reasonable

adjustments and that the school should have undertaken equality awareness training. It would have been far more useful and may have avoided proceedings had the school been aware of and taken heed of EHRC guidance beforehand.

## **9. 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?**

9.1 Yes. We believe that Ofsted and equivalent bodies in Scotland and Wales should do more to consider whether an education provider or local authority is compliant with its duties under the Equality Act as part of its ongoing inspections. Ofsted, for example, already has a range of powers in this area but it does not seem as if they are exercised to any great degree. We recommend inspection bodies review and change its approach to inspection in light of this.

9.2 We note that the relevant Select Committees and their equivalents across Great Britain rarely seem to scrutinise the work of the departments they shadow in terms of the Department's compliance with the public sector equality duty. We recommend that consideration be given to asking each committee to hold one session a year on to what extent the Department has successfully taken steps to promote equality and eliminate discrimination.

## **10. Are the current enforcement mechanisms available to private individuals accessible for people with disabilities, employers and providers of goods, facilities and services?**

10.1 In practical terms, changes to legal aid mean that it is harder for private individuals to challenge badly made decisions and ensure that the law is enforced. Whilst children are still eligible for legal aid in many areas, it can still be challenging, complicated and time-consuming to apply for and receive funding. We also find that the decision on legal aid can be arbitrary. We are aware of cases whereby a family has been rejected on their first application for legal aid and then accepted on their second, without any change to their circumstances. We recommend that action be taken to improve and streamline the legal aid application process.

10.2 It can be difficult for people to obtain legal advice on a discrimination claim. The technicalities around submitting a claim (such as understanding what type of discrimination you may have suffered) and knowing where to take a claim can be very difficult for a lay person to understand. For example, a claim for failure to make reasonable adjustments in education in England may be against a school or local authority, or in some cases both. Claims against schools are heard by the Special Educational Needs and Disability Tribunal which has no jurisdiction over local authorities. Claims against local authorities must be taken through the County Court. In some cases, families face the potential in having to lodge more than one claim for the same issue.

10.3 Most charities do not have the benefit of legal casework departments. Although individuals can contact the EASS, this advice and support is limited as it does not give legal advice. The Civil Legal Advice Gateway for legal help in discrimination is also problematic and inaccessible. There is a lack of face to face support whilst the paperwork and documentation involved can militate against the most vulnerable potential litigants being able to get past the initial assessment stage. Individuals are therefore left either trying to obtain funding, paying for legal advice or working their way through the complexities of a challenge themselves.

10.4 Another concern is the length of time that it can take for some claims to be heard and for a resolution, particularly outside of education where parents have recourse to Tribunals. We recommend that the inquiry consider if the County or Sheriff Courts could be able to hear claims to help ensure there is quicker relief and remedy.

10.5 We also feel that the powers of the Courts need to be strengthened in some areas so that they can order public bodies to take action to remedy a failure to meet their duties under the

Equality Act 2010. We understand, for example, that where a court would find a university had failed to make reasonable adjustments, the Court would have no power to direct the university to then make the necessary reasonable adjustments.

10.6 We are aware that many families may not attempt to challenge a decision, fearing that there will be negative consequences for themselves or the child, especially if they are unsuccessful. We recommend that steps are taken to make the system less adversarial. In particular, we would welcome a formal mediation service being introduced (as opposed to the current informal service offered by EASS) that families can pursue in advance of any claim. Mediation has been introduced in England to appeals relating to the statutory assessment process for Education, Health and Care plans under the Children and Families Act 2014, and we believed that may provide a model for wider claims under the Equality Act 2010.

## **11. Are there other legislative or non-legislative measures that would improve implementation of the Equality Act 2010 in respect of disability?**

11.1 Yes. As well as a duty to set an equality objective, NDCS feels that public bodies should be also be required to set a mandatory objective in relation to disability. We also feel that a four year review period is too long, creating a risk that any objectives set would quickly be forgotten or that a situation where the objective is clearly not being met would be allowed to continue for too long.

11.2 Separately, NDCS notes that while public bodies have had to have due regard to the impact of their decisions during policy formation, there is no duty to review the impact of a decision once it has been made and implemented. This removes any obligation for the public body to consider if their decisions have unintended consequences or have been more severe than originally anticipated.

11.3 One specific issue in which we recommend clarification be issued relates to regulation 4 of the Equality Act (Disability) Regulations 2010. The regulations exclude some conditions from the Equality Act including, for example, a tendency to physical violence. We are concerned that the courts and tribunal are inappropriately applying the legislation in cases coming before them by not properly considering if a child's disability and how others meet (or fail to meet) those needs may be a trigger for physical violence and a manifestation of an underlying protected characteristic. This might include a child who is frustrated at not being able to hear or understand what is being said within the classroom. We do not agree that it was Parliament's intention to separate out the excluded conditions where they are manifestations of a protected disability and recommend that regulation 4 be amended.

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