

| Health and Safety Commission Paper |                | HSC/05/54         |                  |
|------------------------------------|----------------|-------------------|------------------|
| Meeting Date:                      | 5 April 2005   | Open Gov. Status: | Open             |
| Type of Paper:                     | Below the line | Paper File Ref:   | SASD/220/1030/04 |
| Exemptions:                        | None           |                   |                  |

## HEALTH AND SAFETY COMMISSION

### Consultation on Disability Rights Commission Code of Practice: The Duty to Promote Disability Equality.

A Paper by Geoff LLOYD

Advisor(s): John Roberts, Giles Denham and Donald Goodhew

Cleared by Jonathan Rees on 22 March 2005

#### Issue

1. The Chair will wish to respond to consultation by the Disability Rights Commission (DRC) on their draft Statutory Code of Practice. Officials in HSE are trying to clarify some inconsistencies with other documents. Once these have been investigated a draft response will be circulated, in case Members of the Commission wish to comment before it is sent.

#### Timing

2. The deadline for a response to the DRC on the Code is 22 April 2005.

#### Recommendation

3. The Commission is invited to:

- a) note the possible implications for HSC/E of the draft Code and areas of concern (see paragraphs 8-9);
- b) agree that a response to the DRC's draft Code of Practice should be submitted to the Chair once consultation within HSE on the nature of the response is complete.

#### Background

4. The Disability Discrimination Act includes a general duty on public sector bodies (such as HSC/E) to eliminate unlawful discrimination and harassment and promote equality of opportunity for disabled people and provide for the making of regulations which set out specific duties to help comply with the general duty.

5. Last year HSC broadly supported DWPs proposals for putting these new duties into effect. The Chair's response then is attached (Annex 1).

6. One key point in the reply was to support the need to apply to the new duties, the existing defence justifying **less favourable treatment or a failure to make reasonable adjustments on health and safety grounds**. The example provided then was the case where an employee was unable to wear protective equipment because of psoriasis (see **highlighted** text in Annex 1). Although the reply made clear we expect this defence to be used sparingly, there would be limited circumstances where it would be needed.

7. The draft Code of Practice on which DRC is now consulting can be found on DRC's website ([www.drc-gb.org](http://www.drc-gb.org)), but a summary of the content is at Annex 2

## **Argument**

8. It is not clear from the current consultation exercise that DRC have adequately addressed the point outlined in paragraph 6, as the draft Code contains no guidance on this issue. We believe our response should suggest that the Code should incorporate guidance on this issue.

9. **A second point causing concern is the suggestion in the Code that audit or inspection public authorities are bound by the duty to promote disability equality.** As drafted the guidance appears to suggest that HSE (as an inspection agency) would need to check whether other public bodies (such as hospitals) – which are also subject to the new duty - are complying with that duty. While HSE clearly has a role under the duty to promote equality *through* its work to protect the health and safety of all, we do not believe that it is appropriate for that duty to extend to checking, for example, that public sector bodies have a Disability Equality Scheme which complies with the general and specific duties under DDA. We have checked this with DWP and the guidance as drafted was intended to apply more to audit agencies such as the Audit Commission or OFSTED; they saw a rather more limited role for HSE. Nevertheless, we (and DWP) believe the guidance in the Code needs to be clarified and our response should raise this issue.

10. There are also some inconsistencies between the DRC's two current draft codes, for England and Wales and for Scotland. These are being investigated.

11. A draft response will be prepared and circulated by eMail in case HSC Members wish to comment.

## **Consultation**

12. Contacts in Personnel, Policy Group, BSD, FPU and FOD have been consulted (and will be consulted on the draft response).

## **Presentation**

13. Not applicable.

## **Costs and Benefits**

14. Work on the costs and benefits of implementing a Disability Equality Scheme will be carried out at the time we bring forward specific proposals for such a scheme. However, eventual benefits could include better engagement with stakeholders and is in line with HSC's strategy that health and safety should be a cornerstone of a civilised society and make a contribution to social justice and inclusion. Costs will all be incurred by HSE: see paragraph 15.

## **Financial/Resource Implications for HSE**

15. The best indicator of costs is a comparison with those for the existing Race Equality Scheme. These have been estimated at around £200,000 per year based on a small proportion of the time of staff in HSE who take forward the Scheme as part of divisional,

regional or sectoral plans, plus a larger proportion of the time of staff in Personnel and the Diversity Policy team and the cost of research commissioned. But the Race Equality Scheme appears to need fundamental revision, and addressing Disability may be more complex.

### **Environmental Implications**

16. None.

### **Other Implications**

17. None

### **Action**

18. The Commission is invited to:

- a) note the possible implications for HSC/E of the draft Code and potential areas of concern (see paragraphs 8-9);
- b) agree that a response to the DRC's draft Code of Practice should be submitted to the Chair once consultation within HSE on the nature of the response is complete.

**Chair's response to DWP consultation, 20 October 2004**

Sue Hammond  
Disability Discrimination Bill Division  
Department of Work and Pensions  
6<sup>th</sup> Floor, The Adelphi  
London WC2N 6HT

Dear

**DWP Consultative document: Delivering Equality for Disabled People.**

As Chair of the Health and Safety Commission (HSC), I am writing in response to the request for comments on the proposals contained in the above Consultation Document (CD). The following reflects the views of both HSC and the Health and Safety Executive (HSE).

We support the measures referred to in the CD to extend the Disability Discrimination Act (DDA) to cover the functions of public authorities, and to impose a general duty on public bodies to eliminate discrimination and harassment, and promote equality of opportunity for disabled people. We also support the proposals for regulations to be made under the amended DDA requiring public bodies to comply with specific duties.

From our perspective, these proposals dovetail with one of our strategic aims to make a contribution to greater social justice and inclusion through our role as a sizeable employer and our work to ensure that people's health and safety is protected through the proper control of risks in the workplace.

More specifically, the proposals should help provide greater focus to our work to ensure dutyholders regard compliance with health and safety requirements and the duties of anti-discrimination law as confluent in most cases. A workplace that is safe and accessible for people with disabilities is also safer and more accessible for others. In addition, modelling the specific duties on those for race equality will also help us in our aim to deal with issues at the interface of health and safety and social inclusion matters in a more coherent way.

Our more detailed comments are set out in the Annex to this letter. I hope this response is helpful.

Yours sincerely,

BILL CALLAGHAN  
Chair HSC

## **Detailed comments on Consultative Document: Delivering Equality for Disabled People.**

### **Introduction**

1. Our response below sets out our comments in order of the chapters in the CD containing the detail of the proposals and indirectly to many of the questions specifically raised in those chapters. But, before doing so, it might be helpful to briefly set these comments into the context of the purpose and role of HSC and HSE.

2. The Health and Safety at Work etc Act 1974 led to the setting up of the Health and Safety Commission (HSC) and the Health and Safety Executive (HSE). As well as setting out general duties on employers, employees and the self-employed, the Act gave HSC/E a number of roles in relation to health and safety at work including the preparation of regulations and the provision of advice and guidance to help dutyholders comply with their duties. In particular, our Employment Medical Advisory Service (EMAS) advises employees, employers, unions and others about such matters as fitness for work, disability and rehabilitation. The Act also provided for the enforcement of health and safety requirements through both HSE's own staff (our inspectors), but also through oversight of the work that local authorities do in relation to the health and safety of particular workplaces.

### **Chapter 2. Eliminating discrimination: extending the DDA to public functions**

3. HSC/E exercises important public functions to which the proposed extension of the DDA will apply. We already recognise that in carrying out our enforcement and promotional roles, we need to promote equality by ensuring that health and safety responsibilities do not, as far as possible, become or continue to be a barrier to employment of people with disabilities. We therefore welcome the clarification and certainty that the proposed extension of the DDA to all of the activities carried out by public bodies will provide. We nevertheless support the need for the continuation of a justification defence as referred to in paragraph 2.21 of the CD. Although we anticipate that there are likely to be few occasions when health and safety law will need to take precedence over anti-discrimination requirements, there may at times be circumstances where health and safety considerations may justify less favourable treatment or a failure to make a reasonable adjustment. A recent example is the Employment Appeal Tribunal (EAT) case *Lane Group plc v Farmiloe* which found that the employer had not acted unlawfully in dismissing an employee who suffered from psoriasis and was unable to wear safety footwear and therefore not able to comply with the Personal Protective Equipment Regulations. In circumstances such as these the justification defence will be necessary for public bodies carrying out their functions. But it needs to be allied to guidance on the limited extent and circumstances in which this justification might be used. We intend liaising with the Disability Rights Commission on this issue.

### **Chapter 3. Changing cultures: the duty to promote equality and promoting equality in practice.**

4. We support the proposal for the introduction of specific duties for public bodies under the general duty to promote equality for disabled people and welcome the inclusion of HSC/E as one of the bodies subject to the proposed duties. Our experience of operating a Race Equality Scheme suggests it is an effective way of concentrating minds on how we

might meet the general duties to eliminate discrimination and promote equality. Modelling the proposed Disability Equality Scheme on the existing one for race also helps us in our aim to approach matters in relation to all the various strands of social inclusion in a more coherent way.

5. However, we also welcome the flexible approach to the framing of these duties. Our experience of operating the Race Equality Scheme points to the need for a “living”, practical document which allows us to review and revise the scheme in the light of our experience of what works in seeking to embed equality in our policies and practices. The duties should therefore be expressed in a way which allows bodies such as ourselves to pursue actions which work in terms of promoting equality.

6. The CD specifically asks for views on the necessary content of guidance relating to procurement. While our experience is that it is relatively straightforward to place a contractual requirement on those who supply us directly, it is less easy to promote best practice and/or compliance further down the sub-contracting chain. Guidance might therefore usefully look at how best to promote awareness and compliance in the supply chain, for example using the tender process to require tenderers to demonstrate policies and practices that make effective use of sub-contractor firms which employ disabled staff.

#### **Chapter 4. Promoting equality in practice**

7. We support the pragmatic approach taken to the issues raised in this chapter. On involving disabled people, we would envisage consulting both our internal network of disabled staff and outside organisations representing the needs of disabled people before finalising our Disability Equality Scheme. However, there may need to be some co-ordination of public bodies in consulting outside organisations to avoid overloading their resources.

8. We support the idea of bringing in the requirements to assess the impact of our principal activities as one of the actions in a Disability Equality Scheme, rather than requiring such assessments to be made before the Scheme is published. We already provide for policies and procedures to be assessed for their impact across all the strands of social inclusion. But our experience of carrying out these assessments, particularly in relation to race issues, is that doing so is not straightforward. We are reviewing our practices in the light of this experience and will also do so in relation to the new disability requirements. As a result, there may be a need to adopt different approaches. Flexibility in finding out what works would be welcomed.

9. The need for flexibility extends also to the comments contained in the CD on planning and acting to promote equality. We support the approach taken in the CD of closely tying the Disability Equality Scheme to the strategic priorities of the organisation. This dovetails with our *Strategy for workplace health and safety in Great Britain to 2010 and beyond* which we published earlier this year. This focuses our work more closely on our priority programmes and we envisage gearing the actions in the Scheme to link with these priority programmes.

#### **Chapter 5: Gathering evidence and reporting progress.**

10. While accepting that monitoring needs to be carried out, our experience is that it is not straightforward. We monitor numbers of staff who have assessed themselves as disabled

and report on progress against targets set for the proportion of disabled staff in each grade. But the accuracy of these figures depends entirely on the willingness of people to identify themselves as disabled. The problem of collecting accurate information will also impact on the need to monitor the extent to which our services and functions take account of the needs of disabled people. We therefore support the preferred approach in the CD to create a flexible system that allows individual public bodies to tailor their monitoring activity to their particular circumstances. HSC/HSE will need to give some thought to striking the right balance between generating useful information and asking intrusive questions.

11. We have no objection to annual reporting about monitoring arrangements as part of a Disability Equality Scheme. HSE/HSC already covers diversity issues in our Annual Report and extending this reporting to issues covered under the Disability Equality Scheme should present little problem.

### **Chapter 6: Implementing the new duties.**

12. HSC/E supports the proposed implementation timetable.

## **Further details of Proposed Guidance in DRC Statutory Code of Practice: The Duty to Promote Disability Equality**

1. The draft Code of Practice explains how placing this new duty on the public sector should be used to improve equality for disabled people. The following paragraphs give a brief guide to the Chapters in the Code.

### **Chapter 1. Introduction**

2. This Chapter sets the scene. The aim of the new duties are to promote disability equality by placing positive, proactive responsibilities on authorities (such as HSC/E) to work towards a more equal society by mainstreaming disability equality into the way in which they carry out their functions. This can be done as part of a more general equality strategy, but the Disability Equality Scheme needs to be a clearly identifiable part of that strategy.

### **Chapter 2. The General Duty**

3. Sets out guidance on the general duties which require every public authority (in carrying out its functions) to have due regard to:

- The need to eliminate discrimination that is unlawful under the Act
- The need to eliminate harassment that is unlawful under the Act
- The need to promote equality of opportunity between disabled persons and other persons; and
- The need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.

4. The guidance covers in particular the scope of the new duty and guiding principles which should govern public bodies' efforts to comply (proportionality, effectiveness, involvement and transparency).

### **Chapter 3: Specific Duties**

5. The specific duties are intended to assist public authorities in meeting the general duty. The guidance suggests that in order to ensure that the operation of the duties is successful, public authorities should ensure that the Disability Equality Scheme demonstrates commitment at the highest level of the authority, by, for instance, a board member or equivalent, taking overall responsibility for the disability equality duty.

6. The main specific duty on public bodies (including HSC/E) will be to produce and publish a Disability Equality Scheme. This will need to state how bodies:

- have involved disabled people in developing the scheme;
- will assess the impact of their activities on equality for disabled people;
- will improve outcomes for disabled people;
- will monitor whether the outcomes are improving for disabled people; and

- will use the results of monitoring

Progress on the Scheme will need to be reported on annually. Authorities should ensure that the information is published in accessible formats such as large print or Easy Read.

#### **Chapter 4: Public authorities**

7. This contains guidance on which public authorities are covered. Both the general and specific duties apply to HSC/E. Also includes guidance on partnership working and procurement in complying with the duties.

#### **Chapter 5: Enforcement of the Disability Equality Duty**

8. This sets out the DRC's promotional and enforcement powers which will apply to its work on the duty to promote disability equality. DRC will work with public sector organisations (including inspectorates) to develop and spread good practice. If a public authority does not meet its general duty, its actions, or failure to act, can be challenged by means of a claim to the High Court for judicial review. If a public authority does not meet any of its specific duties, it could face enforcement action by the DRC who can serve a compliance notice on that authority.

9. This chapter also points out that agencies that audit or inspect public authorities are bound by the duty to promote disability equality in all aspects of their work. It suggests that these agencies will need to ensure that how well the authority meets the disability duty becomes part of the inspection/audit process. They will need to ensure that disability equality is built into their inspection regimes. In particular they will need to outline the action they intend to take to:

- review inspection and auditing methods to ensure that they have due regard to the duty and identify whether bodies are effectively complying with the duty;
- advise public bodies on developing effective Disability Equality Schemes and monitoring arrangements;
- identify and disseminate best practice in respect of the duty to promote equality; and
- improve research surveys and data collection in order to provide useful data for public bodies to consider when analysing their performance of the duty.