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Promoting Disability Equality

Advice for Unions on the 2006 Public Sector Disability Equality Duty
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Introduction

Despite the best efforts of Government, the unions, the voluntary sector and of disabled peoples' organisations, the proportion of disabled people who can work but who are out of work remains stubbornly at twice the rate for non-disabled people, and the proportion of disabled people living their lives in poverty remains unacceptably high. The bleak overall statistics conceal the even worse reality that for many groups of disabled people, such as people with visual impairments or with mental health issues, the unemployment rates are much higher still.

In January 2005, the Government's Strategy Unit published a far-reaching paper called *Improving the Life Chances of Disabled People*. This report, largely welcomed by the TUC and many others, laid out an ambitious objective of ending discrimination against disabled people in Britain by the year 2025.

The obstacles in the way of turning such a vision into practical reality are numerous and powerful, and they are present across the whole of society. Disabled people face disadvantage and discrimination from the moment they become disabled. They face it at work, and in finding work in the first place, but even before then they face it in education and training.

Among the many improvements introduced by the present Government, the Disability Discrimination Act 2005 (DDA 2005) contains a section that offers the single most important opportunity yet for public bodies to make a radical difference to the life chances of disabled people in Britain. From December 2006 (2007 for some schools) a Disability Equality Duty (DED) will come into force across all public bodies. The potential of these new duties to transform the lives of disabled

people is immense: but if this is to be achieved, the duties will have to be approached with the right intentions. Merely acting to comply with the law will not bring the changes that might otherwise be obtained.

Trade Unions have been in the forefront of campaigning for disabled peoples' rights. The new duties provide the opportunity for an unprecedented step forward. This advice is provided to unions to suggest ways in which they can ensure, by working in partnership with employers, that the potential of the new laws to challenge the disadvantage faced by the millions of disabled people in Britain is fully exploited.

Part I: the DDA 2005

The Disability Discrimination Act 2005

The Disability Discrimination Act 2005 (DDA 2005) was enacted after long consultation, and introduces many important improvements to the original DDA 1995. These include extensions to the definition of disability, such that conditions such as cancer and HIV are now automatically covered from diagnosis, and a less stringent test for “mental illness as opposed to disability”, which no longer has to cross the hurdle of being “clinically well recognised”.

The DDA 2005 introduces a public sector duty to promote disability equality. This has been modelled on the similar duty on public bodies to promote race equality (the Race Relations (Amendment) Act 2001) that followed on from the findings of the Stephen Lawrence enquiry, and was important for identifying (in this case) the existence of institutional racism. The duty created by the DDA 2005, similarly, was established because it was recognised that discrimination against disabled people is not only caused by individual acts of prejudice or ignorance, but is actually deeply rooted in the system. To tackle the discrimination, therefore, makes it necessary to go beyond the disabled person’s right to challenge discrimination against them as an individual established by the DDA 1995, to a situation where organisations have the responsibility for ending discrimination against disabled people in general.

That is why the new DED is so important, and why its potential to achieve dramatic changes is so great.

The DED creates two types of duty on public bodies:

- A general duty; and
- A specific duty.

The Disability Equality Duty, in both its forms, comes into effect for public bodies from 4 December 2006. (For primary schools, community special schools and foundation special schools maintained by a Local Education Authority, the duty to publish disability equality schemes comes into effect on 3 December 2007 – there are different dates in England and Wales).

The Code of Practice

The Disability Rights Commission (DRC) prepared a detailed Code of Practice that came into force in December 2005. This Code, which is available from the DRC's website, www.drc-gb.org, was published in order to enable public bodies time to prepare for the introduction of the DED in December 2006. While it is not in itself a statement of the law, it is a statutory code and must be taken into account by courts and tribunals where relevant. It offers detailed and practical advice on the purpose of the Disability Equality Duties and how to carry them out.

The General Duty

All public bodies are subject to the general duty to promote disability equality from December 2006.

In the words of the Act, the duty requires that every public authority "shall, in carrying out its functions, have due regard to the need to:

- Promote equality of opportunity between disabled persons and other persons;
- Eliminate discrimination that is unlawful under the Act;
- Eliminate harassment of disabled persons that is related to their disabilities;
- Promote positive attitudes towards disabled persons;
- Encourage participation by disabled persons in public life; and
- Take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons".

As the Code of Practice makes clear, the first of these is the main and overriding duty: the others are all part of the overall duty to promote equality of opportunity, and by working to deliver them all, will contribute to that objective.

Who is disabled? – the DDA answer, and the Social model

The public body's disability equality duties apply to anyone who is a disabled person within the definition of disability provided by the Disability Discrimination Acts 1995, as amended by subsequent changes.

The TUC position is that the model of disability upon which the DDA has always been based is flawed. By focussing on someone's impairment(s), the law emphasises what someone *cannot* do, rather than taking an approach that the real cause of the disability faced by someone with an impairment is not necessarily the impairment itself, but the barriers created by society. The law is based on a medical model of disability. The TUC supports the disabled people's movement in arguing the importance of the alternative, social, model. In this model, the disadvantages faced by disabled people are not the result of impairments themselves, but of the barriers placed in their way. These include physical obstacles, but are chiefly barriers set up by the attitude that disabled people are less capable of being full citizens or are "charity-cases", leading to a culture of discrimination and second-class status which only serves to reinforce the exclusion from society that confronts so many disabled people.

The DED offers the chance for unions in negotiating with the employer to advance practical proposals that will, in reality, encourage approaches based on the social model, and thereby lead to measures that are more effective in overcoming disability discrimination and achieving equal opportunity. There is more on this point in Part two below.

Who is subject to the General Duty?

The DDA 2005 defines a public body in the same way as the Human Right Act 1998, which is to say that it covers every public authority including "certain of whose functions are of a public nature". The law does not provide a list, in contrast to the approach of the Race Relations (Amendment) Act, but the Code of Practice makes it clear that bodies listed in that Act will be included. The Disability Rights Commission Code of

Practice lists the following as types of body that are certainly included:

- Ministers, government departments and executive agencies;
- Local authorities;
- The National Assembly for Wales;
- Governing bodies of further and higher education colleges etc;
- Governing bodies of educational establishments maintained by local education authorities;
- NHS trusts;
- Police authorities and the Crown Prosecution Service
- Courts and tribunals;
- Inspection and audit bodies and agencies; and
- Certain publicly funded museums.

Equivalent public authorities in Scotland are also covered by the general duty.

The provision concerning “functions of a public nature” is an important addition, as it means that otherwise private sector organisations can also be covered by the DED if they find themselves exercising such a function. The Code of Practice indicates that examples would include private companies running schools or prisons, to the extent that the work related to that public function (and not, therefore, to other activities of the private company that did not). But it can also be extended, in some circumstances, to private companies that win contracts for relevant operations of a public body. This is, potentially, a very important element of the DED, as it offers a means whereby disability equality policies can be extended to parts of the private sector through the contracting process. There is more on this in Part four below.

What are the DED specific duties and what bodies do they cover?

The specific duties established by regulations made under the DDA 2005 are more detailed than the general duty. They are, potentially, the most important element of the law. They create obligations on public bodies and require them, by law, to undertake specific practical steps to promote disability equality. Once these duties are put into effect, they provide for the essential measures to bring about genuine and significant improvement in the lives of disabled people. Unions will want to focus very much on the steps laid down by the specific duties when negotiating with public sector employers.

As the Code of Practice states, the specific duties are designed to create a framework in which public bodies can plan, deliver, evaluate and report on their performance in carrying out the general duty outlined above.

The Disability Equality Scheme

At the heart of the specific duties is the requirement on a public body to produce a *Disability Equality Scheme* (DES), to carry it through, and to report on it. The DES needs to set out precisely how the public body plans to carry out its disability equality duties. It requires the public body to involve disabled people in the development of the Scheme (and to report how this involvement has taken place), to show how impact assessment will be carried out, and to propose a series of steps in order to accomplish its general duty. It also requires the public body to put measures in place – and then to report on – what it has done to gather information regarding employment, service provision, (and education where appropriate) and to show what it is doing to review and if necessary adjust the plans. There is a time limit of three years for the achievement of the steps described in the DES, and it must publish a report describing the actions taken, on a yearly basis. The DES of December 2006 will be the first in a continuous series of Disability Equality Schemes, each building on the achievements, and learning the lessons, of the previous scheme.

Unlike for the general duty, there is a list of those public bodies that are covered by the specific duties, set out by regulation. This list is published as an appendix to the Disability Rights Commission's Code of Practice. All bodies covered by the general duties as listed above are included, and others may be added (or removed) by future regulation.

Deadline for the first Disability Equality Scheme

All public bodies (except for the primary schools (etc.) granted a further twelve months to do this – different for Wales) must publish their first DES by 4 December 2006.

Enforcement of the law

While it is to be hoped that it will not be necessary to challenge legally the actions (or perhaps more likely, lack of action) of a public body under the DED, the TUC has expressed concern as to whether the measures put in place to enforce the law are adequate. It will be seen from the following that legal routes to enforce the Duties are narrow, reinforcing the importance of securing implementation by agreement.

If a public body fails to comply with the general duty, anyone with an interest (for example, a disabled person or group of disabled people, or the DRC) can make a claim to the High Court for judicial review of the public body's actions.

If the public body fails to carry out its specific duties, enforcement action can be taken by the DRC, which can serve a compliance notice upon the organisation, and if it still fails to comply, or to supply requested information to the DRC within a reasonable time, the DRC can apply to the county court or sheriff court for an order requiring the public body to comply.

It will be seen that individuals or organisations such as trade unions cannot themselves seek enforcement action on specific duties, but would need to request the DRC to act.

The DRC itself will cease to exist with the creation of the Commission for Equality and Human Rights (which the Government plans to achieve in 2007), and this new body will inherit the DRC powers in this area.

Part II: Unions and the disability equality duties

Potential of the DED

From the description already given, it will be apparent that the DDA 2005 offers unions the chance to become part of a dramatic transformation of the lives of disabled people. Any disabled person working or wishing to work for a public body, any disabled person using services provided by a public body, or undergoing education or training from a body that is thereby exercising a public function, should find that radical improvements are made. The specific duties additionally call for activities aimed at challenging ignorance and prejudice about disabled people more widely, thus contributing to the process of tackling social exclusion.

Whereas until now, an individual who found themselves discriminated against by an employer or service provider might be able to challenge that discrimination in tribunal or court, and obtain an individual remedy, the DED means that public bodies are under an obligation to plan their practices and services so that they deliver disability equality to all disabled people. By this approach, institutional discrimination can be challenged such that both present and future disabled workers or service users find that barriers have been removed before they encounter them.

Of course, in reality, getting to this point will not happen easily or quickly, even where the public body genuinely wishes to do so. Unfortunately, as unions know, many public bodies currently display no such enthusiasm to challenge inadequate policies or bad practices, particularly if they have not yet been challenged under existing disability law. Others do not yet see disability as an important issue of equality.

That is why the role that trade unions can play in promoting disability equality with the public body with which they negotiate may well be critical in moving the organisation's attitude from being one of reluctant compliance with what may be seen by some as "yet another government-imposed

burden”, to one of genuine identification with the goal of disability equality. At the same time, by pressing an organisation to ensure that they, so far as possible, extend their duties to those to whom they contract any of their services, unions will also be able to help extend both legal compliance, and good practice, to the private sector.

Basic Principles

It is important to act promptly. With the first Disability Equality Schemes having to be published in December 2006, now is the time for unions to press their claim to a say in the preparation of the public body’s DES, and for unions to themselves gear up for the detailed discussion necessary – crucially, by drawing on the experience of their own disabled members.

The rest of this section will explain the principles that ought to underlie the trade union approach to the DED, while part III will look in more detail at the particular issues that unions may need to argue for with the body with which they negotiate.

Essential principles underlying the union approach to negotiations with the employer on a DES will include the following key elements, that are explored here, and need to be borne in mind when considering the specific elements of a Disability Equality Scheme in the following section:

- Outcomes, not compliance

As the Code of Practice indicates, adopting an approach of mere compliance, of doing the minimum necessary to stay within the law, will actually most likely lead to a failure to deliver the objectives. It would be very easy to adopt a “tick-box” plan, with superficial statements of principle but lacking any intention of achieving real changes in the lives of disabled people. No one benefits from such an approach. Unions will want to ensure that a public body focuses not on processes, but on outcomes. The other basic principles proposed here all relate to this starting point.

- Leadership from the top

Success or otherwise in securing the wholehearted commitment of the public body to securing the outcomes required by the DED, and continuing to invest them with the appropriate degree of seriousness and priority for a long period, will almost certainly require a strong lead from the top

of the organisation. Unions will want to impress on those with whom they negotiate that chief executives, board members and senior managers need both to commit themselves to effective implementation of the DED, but also to be seen to do so on an ongoing basis. Personal, and practical, endorsement of the objectives of the DES from the very top of an organisation may help inspire those who have responsibility for managing the necessary changes to recognise both that this is important to the organisation, but also to understand the need to integrate it into their mainstream priorities.

- Social Model

As explained above, unions will want to press the public body to adopt (and to understand) the social model, as representing the best foundation for preparing and implementing a DES. Reference to the Code of Practice will support this approach, as it is explicit in placing its advice in a social model context. But unions can also go further in arguing for higher standards than the minimum laid down by the law. If a public body genuinely wants to achieve the objectives of the general duty, it will see the good sense of adopting this approach to its practical activities.

- Equality rather than awareness

The heading of this paragraph refers to types of training that are on offer to organisations, but follows directly from understanding the reasons for adopting the social model, and applying them in practice. The take-up of training on disability issues has grown rapidly with the enactment of the DDA. Many agencies now offer courses to employers and service providers, and with the arrival of the DED, there are already many providers encouraging organisations to buy their training product. Any training that reflects accurately what the DDA says and how to respond is, of course, a positive step.

But it is important to get managers to *understand* the principles that underlie the new duties. That is why the TUC urges unions to argue that employers and service providers should run *Disability Equality* rather than *Disability Awareness* training. This is not merely a difference of terminology, but of approach. Awareness training, traditionally, does not challenge the medical model of disability. It looks at disability through promoting understanding of impairments, and how non-disabled people should respond to them. Equality

training, in contrast, leads to an understanding of the roots of discrimination, and to challenging attitudes and behaviour. Delivered by disabled people, it is well suited to developing the particular comprehension of disability issues that should underlie an effective DES. In other words, the public body needs to know not only what it is doing, and how to make adjustments to premises and practices, but why, if it is to be able to deliver the objective of promoting disability equality.

- The role of the unions ...

Unions will want to impress upon the management side that they represent a valuable resource for the success of the organisation in establishing, measuring and achieving their objectives. In part, this may be because of the unions' role in educating their members about disability equality, and in knowing the real issues in the workplace, and in part it may be because the unions themselves have structures for disabled members that can be used as a source of expert information. The Code of Practice explicitly recognises the potential contribution that unions can make.

- Involvement of disabled people

The DRC Code of Practice rightly stresses the importance of involving disabled people at all stages in the life of a DES, and the Code offers much helpful advice on how to do this. Unions will want to promote and explain why this approach is both right from a moral point of view, and also at a practical level is the best way to ensure that a DES sets the right objectives and takes the best steps to achieve them.

Unions' own disabled members can play a major part in this.

Involvement needs to be genuine and transparent. It may also need to take particular care to be inclusive. Many consultations fail to reach all of those with an interest, and may sometimes pick and choose which of the responses to listen to. Such an approach to involvement will not be effective. But it is easier to talk to the same people every time (the "usual suspects"), even if they are not really representative or accountable. Unions may need to encourage and assist public bodies to re-examine their normal consultative procedures and to try something different, in order to reach more – or more representative – disabled people. This may also involve urging that the public body assist in developing the capacity of local organisations of disabled people in order to achieve this

improved representativeness (see below in Part three for more on this).

- Treating disabled people more favourably

UK disability laws are not the same as the other anti-discrimination laws with which unions will be familiar, in that they apply only to one group of people, i.e. disabled people, and they are based not on treating people *the same*, but recognise that in order to treat disabled people equally, it is sometimes necessary to treat them *more favourably* than non-disabled people. This principle, which underlies the “reasonable adjustment” provision of the DDA 1995, applies no less forcefully in the DED. Unions may need to be conscious of this when negotiating action plans for the DED with public bodies that have not, in the past, paid detailed attention to the position of disabled people. Once again, ensuring that the focus is on outcomes rather than processes will show the necessity of this approach, which might otherwise appear contrary to usual equality arguments. The Code of Practice explains this issue very clearly.

- Securing the widest and deepest application of the Duties

Unions will want to ensure that in approaching their responsibilities under the DED, public bodies cover all possible areas of activity (see advice on audit and information gathering in the next part) in order to maximise their effectiveness and reach.

The DED calls for public bodies to give “due regard” to disability equality in all its activities, and this is the provision whereby organisations can be pressed to undertake a thorough review of what they do, rather than assume, in advance, that they know which of their activities has significance for disabled people, and which do not, and can therefore be ignored. In truth, on examination, there may be very few activities at all of most public bodies that do not have some impact on disabled people.

At the same time, though, as widening the reach of the DES to cover all relevant areas of activity, the organisation will need to mainstream its disability work. Each organisation will be different, but unions will need to be aware that to be effective, a DES has to succeed both in highlighting specific disability-related plans of action, but also has as one of its objectives getting disability equality embedded in the mainstream of the organisation’s work and structures. This will

require firm leadership and clear objectives laid out from the top management of the organisation.

Preparing the union itself

Union negotiators will need to be equipped with relevant information. If the union or the TUC are providing a training course on the DED in the region, they would be advised to ensure that this opportunity is taken up. At the least, anyone who will be negotiating with the public body needs to familiarise themselves with the DRC publication, *The Duty to Promote Disability Equality: Statutory Code of Practice*.

There are important issues to be grasped in relation to disability, that differ from those with which unions might already be familiar with from dealing with other equality issues. These include the particular questions that arise regarding monitoring disability. As this will necessarily be part of a public body's DES, it is vital that unions are aware of the issues, and the good practice recommendations. If a union does not provide its own specific advice on disability monitoring, for example, recourse should be had to the advice published by the TUC. This is available separately as *Monitoring Disability*, or as part of the 2006 publication, *Disability and Work*, both available on the TUC website, www.tuc.org.uk/equality. There is more on monitoring policies in Part three below.

Part III: specifics of a Disability Equality Scheme

In the previous section, advice was given on the principles that ought to be borne in mind when unions discuss Disability Equality Schemes (DES) with public bodies. In this section, advice is given on the specific components of a DES where union input may be vital in ensuring that the resulting scheme is based on the best possible approach. The purpose of the advice is to try to ensure that the DES adopted by the public body achieves the best possible outcomes in advancing equality for disabled people, in line with the broad statement of objectives set out in the General Duty previously listed.

The Code of Practice spells out what the law requires of a public body. These include statements of:

- The way disabled people have been involved in the development of the scheme;
- The authority's methods for impact assessment;
- Steps to be taken towards fulfilling the general duty (known as the "action plan");
- Arrangements for gathering information in relation to employment, service delivery (and education where appropriate); and
- Arrangements for putting the information to use.

This section concentrates on particular questions where unions will want to have an input into the public bodies' preparation for meeting these requirements, but is based on the matters that will need to be included in an organisation's planning and implementation across all the areas listed above.

Involving disabled people

The need for a public body to involve disabled people in identifying barriers they face, setting priorities, assisting planning, monitoring progress and evaluating the outcomes

represents a fundamentally important starting point for a DES. The requirements are the best guarantee that a public body's actions are based on a proper understanding of what needs to be done, and how to do it.

The term "involvement" has been chosen deliberately, and the Code stresses that it is intended to mean a much more active role than "consultation". The Code advises in detail on a range of criteria that should be used in deciding how to set about the task of involving disabled people, and the steps needed to support this happening, including establishing new forums, providing support for disabled people to take part, etc.

Under this heading, unions will want to press for involvement to reach out as well to disabled people who may not be immediately visible, or involved in existing organisations relied on by the body for consultation in the past. In planning the form of involvement to be set in place, particular attention may be required to ensure that the voices of people with mental health issues, or learning disabilities, are effectively heard. Similarly, particular effort may be needed to reach out to disabled people from minority communities. Such steps are very likely to require a public body to provide additional resources to establish suitable forums. It may also be necessary to find the resources needed to enhance the capacity of existing disability organisations to function. For example, it would be wrong to expect that disabled people should give freely of their time and expertise to advise the public body.

Unions can play a critical role in providing a ready-made and easily-accessible source of expert information on many of the aspects of a DES. Most obviously, if a union has its own disabled members' group, it would be reasonable to expect a public body to involve this in its work, and unions would need to negotiate that (for example) members of the group were allowed paid time off work to take part in such exercises.

It is important to remember, of course, that union members may be in a good position to comment not only as workers for the public body, but also as users of any services it provides. Union members, disabled and non-disabled, may also have disabled relatives and friends who are service users, and who could be alerted to forthcoming opportunities for involvement.

In preparing for discussions with the public body, therefore, unions are advised to alert members, and especially disabled members, to what is intended to happen, and to begin to

establish their own channels of communication with disabled members as a matter of urgency.

Employment practices: audit and action

It is obvious that the first stage of any DES must involve an audit of what already exists. This will include both the services provided by the organisation, and its employment practices.

Evidence collected by the Disability Rights Commission (during 2005) suggested that many public bodies are already working on improving their service provision, and are conscious of disability issues, but that they have paid very little attention to employment practices. While some organisations are already collecting data on the proportion of disabled people among their workers, many are not, and it is not clear that much use is made of the information gathered even by those where such monitoring is already in place.

Therefore, it is likely that unions will need to press the organisation strongly to recognise not only that their Duties include duties to their workers, but that their equality schemes must address these issues with effective and practical measures.

The specific duty requires a public body to state what arrangements it has made to gather information, including information on the recruitment, development and retention of disabled staff. Unions will want to press, therefore, for the organisation to include within its scheme the measures required to review the disability content of its existing *policies* for recruitment, development and retention, and then to check what the reality is, that is, existing *practice*. This is a critical distinction: there can be a big difference between a policy made at senior level, and its actual implementation by managers responsible for putting it into practice. There is much evidence collected by unions to confirm that there may be little understanding of an organisation's overall disability policies at line manager level. The DES provides a vital opportunity to work with the employer to overcome such gaps.

There will be key issues on which information will need to be collected. Unions should first consult with local representatives, and in particular with their own disabled members, to ensure that all areas of employment policy and practice that are relevant to disabled people are included in

the review. From existing experience, it is possible to say that this is likely to include some or all of the following questions:

- How many disabled people work for the organisation, and does this represent a proportionate number relative to the local community? This simple question will in turn raise important issues about definitions, for which see the advice on monitoring starting on page 24.
- Does the organisation have a policy of encouraging the recruitment of disabled people? If so, how does it make this known to disabled people in the community? Does it subscribe to the *Two Ticks* scheme that states its compliance with good practice standards for employing disabled people such as guaranteed interviews for suitably qualified disabled applicants, and if so, what does it do to confirm that it complies in practice?
- How does the organisation review the recruitment process? Does it monitor recruitment statistically? What, exactly, does it measure? If it does count numbers of disabled applicants, what does it do with the results of the monitoring?
- Does the organisation have a means of monitoring the progress of disabled people once they have become employed? Does it know the proportion of disabled people by grade, and does it know if disabled people are over- or under-represented in higher grades?
- Does the organisation check the take-up of training and development opportunities by disabled staff, and whether this is the same, worse or better than for non-disabled staff? The same question then applies to career progression through promotions, etc.
- If the organisation operates performance-related pay or similar schemes, does it measure, specifically, the performance of disabled people compared with non-disabled staff? Has the design of such schemes taken into account issues such as the adjustments that may be required by some disabled workers?
- How are disabled staff treated when it comes to grievance and disciplinary procedures, and capability procedures, by

comparison with non-disabled staff?

- Is the number of disabled staff taking early retirement, or being selected for redundancy or redeployment proportionate?
- Does the organisation know the retention rate for disabled workers, and whether this is the same as, worse than or better than that for non-disabled staff?

Once the data has been assembled (see the advice on monitoring below for details about how this should be carried out), the key step then will be to agree with managers what needs to be done to bring about measurable improvements in all areas in which it has been shown that disabled workers are suffering from the discrimination, the elimination of which is one of the key components of the General Duty.

These measures are likely to include such elements as:

- Setting targets for percentages of disabled workers in the organisation as a whole with a timetable for implementation and review;
- This must include targets for recruitment, and at the various stages of the plan over the three-year duration of each scheme;
- Identifying any particular “hot spots” where unacceptable discrimination appears to be taking place in the organisation, and taking remedial action, which will probably include ...
- Specific, mandatory, training for managers and staff in those sections of the organisation where discrimination has been identified, with review periods agreed with the union. It is likely to be useful to make a senior manager responsible for overseeing the improvement required. It is also likely that specific training in what the DED is about, both in principle and in the practical measures contained in the DES, may be the best way to obtain understanding and progress across the organisation as a whole.
- Specific steps to put right any failures at the level of policy, which may be errors of omission, by the adoption of new or revised policies; and

- Where policies are in place, but are not being implemented properly, appropriate resources from management to correct this, with review as appropriate to make sure that the agreed steps are being taken.

Priorities

Remember, all these elements are necessary in a successful employment policy aimed at achieving the outcomes called for by the DED and they all need to be spelt out in the organisation's DES. This does not mean, however, that they all have to be achieved at once, and this may not be a feasible objective. But the DED requires the organisation to have a view on everything that needs to be done, and to establish priorities, and timetables with milestones, that should be reflected in their action plans. It is also required to explain on what basis it has decided on its priorities (see the Code of Practice recommendations on impact assessment for this). Unions will want to play their part in agreeing with the employer where the priorities are for each successive phase of the plan when it comes to employment policies and practices, and for helping bring about the changes laid out in the plan.

Monitoring Disability Equality Schemes

It will be clear from what has been said about the audit process above that measuring must be an essential tool for the employer in deciding on priorities for action, and for evaluating the success or otherwise of the measures adopted. Public bodies may already have monitoring schemes in place for race and gender, and some will already have established disability monitoring. It will be necessary to review existing schemes to check that they are appropriate for the purposes to which they are required to be put if the DES is to be effectively implemented. In the event that there is no current monitoring, then an entirely new scheme will need to be devised. The TUC recommends that it follows certain guidelines.

An elementary question, but one that is frequently overlooked, is to be clear what the collected information will be used for. A public body genuinely wishing to give effect to its duties under the DED may still need to consider carefully what kind of information it needs to collect, and how it will use it. Having established one form of monitoring at the beginning of a DES, it will not be sensible to modify it before the end of the life of

the DES without risking invalidating the scheme itself, therefore it is essential to be certain the monitoring scheme fits the task from the outset.

A monitoring scheme will be of no value unless it achieves a consistently high rate of return. However, experience shows that historically, many disabled people do not respond to questions about disability on monitoring questionnaires. This may be because they fear discrimination if their impairment is exposed, it may be that they simply regard it as a purely personal matter, and it may be (as studies have established) that a high proportion of people who are in fact legally disabled (using the DDA definition) do not see themselves as disabled. Unions can assist public bodies to prepare monitoring based on the direct input of union members, and in particular disabled members, as to what will work best.

Detailed advice on monitoring and information-gathering will also be published by the Disability Rights Commission, and by equality and diversity bodies working in various areas of the public sector, and employers will usefully be encouraged to consult this advice as well.

The TUC advice on monitoring offers some general advice as a starting point:

- First consult with existing groups of disabled employees and service users, to explain why monitoring needs to take place, and what will be done with the collected data, and to establish from disabled people how the exercise could be carried out most effectively;
- This initial phase of the exercise needs to be done as part of a general promotion of the DES to everyone who is affected, throughout the organisation and its service users. By this means, workers and users can be made aware that the organisation is planning to make serious steps towards the elimination of inequality for disabled people, providing the framework in which the particular elements of the DES, including information-gathering, will fit.
- The training that will be required for managers throughout an organisation if it is to successfully carry through its DES plans should include a section explaining the monitoring process. This should also be explained to all staff through briefings. This will be very important in encouraging many

disabled workers (and most obviously the many with “invisible impairments”) to complete the survey, as well as being an opportunity to explain the definition of disability being used.

- For almost all purposes, a monitoring question need only ask “do you consider yourself to be disabled?” with a “yes/no” answer. This approach will enable the organisation to carry out statistical measurement and to compare the results with the proportion of disabled people overall. It also enables all the other areas highlighted above that require measurement, to be studied on a reliable comparative basis, and for progress over a number of years to be examined.
- Previously, it was common for monitoring questionnaires to ask people to identify themselves from a long list of impairments. This approach is strongly discouraged. It is rooted in the medical model, and from a practical viewpoint it reveals nothing about the measures that would need to be taken to remove barriers in individual cases, and it forces those who decide they should respond to put themselves into a medical category, where in fact they might not easily fit into any of those listed.
- To tackle the problem that so many people who are legally covered by the DDA do not consider themselves disabled, it is recommended that the monitoring include a summary of the definition of disability used in the DDA, as well as that this is covered in briefings for all workers.
- Generally, the TUC advice is that the monitoring should be both anonymous and confidential, and that a guarantee of this should be clearly highlighted. The reason for this is to ensure the maximum response levels, without which the exercise may prove costly and futile.
- Organisations may decide they wish to use some kind of monitoring specifically to identify barriers, so that they can be dealt with. It would be difficult to achieve this outcome through a monitoring questionnaire, and at the same time preserve anonymity for the respondent. It is therefore recommended that separate systems be put in place for this exercise. One option would be to provide a contact in the

organisation to whom information about barriers can be sent confidentially. Of course, it will be necessary that the person receiving the information has authority to follow up with steps to remove the barrier identified.

- In larger public bodies, there *may* arise the question not only of whether a proportionate number of disabled people are working for the organisation, and are being treated equally through all its different systems and procedures, but also of whether there are particular groups of disabled people who are still not being reached or included. A public body with the intention of implementing its duties to the maximum may wish to know whether, for example, people with visual or hearing impairments, or people with mental health issues or learning difficulties, who are known to be particularly excluded from employment at a national level, are benefiting from the measures being taken by the organisation.

However, there is no simple way to collect statistical information reliably by asking people questions about their impairment groups, and the TUC recommends this is not done. Instead, and with the advice and assistance of the unions and (for services and employment) of local organisations of disabled people, the organisation might better undertake qualitative surveys. These could cover its recruitment and retention procedures, looking at ways in which (for example) recruitment advertising might be targeted at particular groups of disabled people. For this to work, however, it will have been necessary first of all for the public body to have put in place suitable changes in practice to ensure that people from these impairment groups are enabled to participate as workers in the organisation. The consultation recommended should aim to provide the body with the information needed to set about such steps.

- An organisation's Human Resources department is likely to be aware of the requirements of Data Protection Act when it comes to storing and using personal information. The necessary restrictions of this Act on storing and using personal information provide another reason for ensuring that monitoring is anonymous.

- A DES will entail making an annual report on progress: data collected from monitoring will provide an essential component, but only if it is properly analysed, then used to influence the next steps in the DES. Unions will want to negotiate with employers the appropriate action to be taken when the data is collated and reveals where problems currently exist.
- When reviewing the findings of a monitoring exercise, organisations will need to be alert to the possibility that absence of data from particular areas may conceal problems, rather than reveal the absence of problems. If people with hidden impairments decide not to identify as disabled on a questionnaire, it may be because they fear (whether or not this fear is justified) that they run the risk of being exposed, and that there will be adverse consequences for them, their career prospects, etc. Their decision not to respond therefore reveals that actually there is a serious problem in that area, rather than that there are no disabled workers there. In these circumstances it would be prudent to cross-check the overall findings of a survey with a qualitative survey, in which (for example) the individual and anecdotal responses of members of a union's or an employer's disability network may help pinpoint particular problem areas.

Part IV: Procurement

Introduction

Over the years, much use has been made internationally of public procurement processes to extend the reach of anti-discrimination measures as well as good employment practice generally, and more recently such issues as fair trade, into the private sector. What can and cannot be done is bound by fairly complicated EU and UK legislation. Overall, while the legal limitations on the extent to which procurement can be used to advance social issues have been reduced recently, the best summary statement of what can and cannot be done by a public body is that to use public procurement to advance disability equality through the DED is permitted, and may be the most effective way to meet the duty, but is not expressly required by the legislation. This adds weight to the importance of unions taking a lead in pressing public bodies to decide to go as far as they are permitted in using this potentially vital lever on the private sector. As contract decisions and negotiations may be lengthy, it is urgent that unions turn their attention to it without delay. This section offers an outline of what is permissible and some suggestions for what unions might propose. It is not intended as a definitive statement of the law and public bodies will need to check carefully whether their proposals to use procurement to advance disability equality are legal.

Legal considerations

(a) Private bodies carrying out public functions

The Disability Equality Duties apply only to public bodies, but the large number of organisations carrying out public functions, even though they are themselves private companies (or voluntary sector bodies) are included within the scope of those liable to the DED where (but only where) they are exercising their public functions. Unions recognised by such private or voluntary sector organisations may be able, by voluntary negotiated agreement, to extend the public function duties to the rest of that organisation's operations, using the argument of consistency across the whole organisation, the good practice and good employer reputation that can be

established, and the “business case” for diversity that recognises that employing disabled people is not a burden, but may contribute to the success of the enterprise. They cannot however claim that this argument is supported by any legal obligation (beyond the employer’s existing obligations under part II of the DDA 1995 as extended by the DDA 2005).

(b) Private bodies contracted to supply to Public Bodies

Where private sector organisations contract to provide services to, or supply the needs of, a public body, it is possible to use that contractual relationship to extend, in some (limited) respects, the DED to those organisations by incorporating into the contract various elements of the DED that will serve to improve the policies and practices of the private sector organisation. To achieve this end, it will be necessary for the public body to include these within the contract specification. What can, and cannot, be taken into account during the procurement process is determined by law. It will be no good to try to add such conditions afterwards.

The precise legal obligations that apply in these circumstances change from time to time, and Government legislation on the procurement process that relates to this issue was issued from the end of January 2006 (The Public Contracts Regulations 2006). These regulations are the secondary legislation introduced to transpose into UK law two EU directives dealing with public utilities (Directive 2004/17/EC) and public procurement generally (Directive 2004/18/EC). The Office of Government Commerce has issued guidance on taking social issues into consideration in the procurement process.

Carrying out a public function: interpreting the law

The DRC Code of Practice advises that where a private body has contracted with the public body to carry out a public function, then the contractor will be bound by the general duty in relation to the carrying out of that function, while the public body will still be responsible for complying with the duty both in the procurement process itself, and in monitoring the performance of the contract.

Public bodies will therefore need to begin to revise their standard terms and conditions to include information about the DDA 2005, including a requirement that the contractor complies with the anti-discrimination provisions of that law. The public body may also need to specify what information it

will require the contractor to collect in order to demonstrate that it is complying with the DED.

The government guidance offers the example of contracting out the management of a leisure centre, which is being under-used by women from the local Asian community. It states that it would be legitimate in this instance to require the successful contractor to make the facility more accessible to this group of people. By extension of this example, similar provisions could be built into contracts for making services more accessible to disabled people, and thereby contributing to the public body's DED.

It will be of critical importance that public body staff responsible for dealing with procurement are properly trained in the law, and in understanding the public body's DES. It will be reasonable to argue as well that organisations winning contracts to provide services (etc.) should be included within such training. If this can be established, it will make the subsequent delivery of the contract far more likely to lead to positive outcomes. But clearly, in order for this to happen, early discussion and agreement with the contractor will be necessary. Unions will need to encourage the public body to include this element when preparing the contract conditions, not leave it until afterwards. It will not be possible to add it on later, after the contract conditions have been finalised.

Reaching into private/voluntary organisations

Government advice specifies that public procurement must be based on "value for money" but it also makes clear that this can include "social issues", a term which explicitly covers such topics as employment for disabled people. Government advice is clear, therefore, that "value for money" is not the same as "lowest price". Although there is no legal obligation to include social issues, the approach in the guidance is to encourage the contracting body to do so, and unions will be able to build on this in negotiations. If the public body has demonstrated a positive attitude towards the DED, then it should be easier to win the argument for adopting this approach to contracting as well. However, if the public body is unwilling to take this approach, as previously stated, it will not be possible to compel them to do so by reference to their legal obligations.

The guidance recommends that social issues are addressed from the start of the procurement process. It will be legally necessary for the public body to prove that the criteria it uses

for preparing the contract conditions are relevant to the service (etc.) that it is contracting out.

A little thought will show that a very large percentage of contracted services will be relevant to disabled people, and to their position in the community, some directly and some less so; or that particular services or products have an important disability angle. The guidance cites the obvious case of contracting to supply IT software, in which the accessibility of the resulting system to disabled people will need to be established from the outset, as part of the contract specification. *To the extent that the requirements for the service can be related to the public body's DES, then they can be included in the specification for the contract.* Clearly, therefore, the greater the range and scope of the DES in the first place, the greater the opportunities for the public body also to apply this to its contractors.

The guidance specifically includes trade unions in the list of organisations that may have an interest in the process and should be consulted on the preparation of the specification. It may be necessary to press for the public body to follow this approach, pointing out the benefits to all of obtaining informed advice from inside the organisation.

However, it is important to be aware that the scope for imposing compliance with a public body's DED in the procurement process is strictly limited, by EU law, to the service or product itself: it cannot be used to enforce the DED on the way the supplier runs its own business, unless this can be made a legitimate term of the contract.

It is essential, therefore, to get the specification right in the first place, and to insert disability equality into the service or product to be provided to the extent that is possible, taking into account the need for it to be relevant to that service or product or that it is specified in the public body's DES.

As an exception to the restriction on adding obligations to the rest of the contractor's business, it has been agreed that compliance with anti-discrimination laws is exempt from this approach and can be cited in contracts. Naturally, this includes the DDA 1995 as extended by the DDA 2005. Even though (of course) the contracting companies are already bound by these laws, this exemption to allow them to be mentioned specifically in contracts creates an opportunity to encourage good practice by such organisations even when they are not legally bound to comply with the DED section of the DDA

2005. This leads to two possible additional steps in the contracting process:

1) Where it can be shown to be directly relevant to the contract, it will be legitimate for candidate contractors to be asked to present their own equality policies as part of their bid for the contract. Clearly, the more strongly the specification of the contract covers disability, the more relevant and therefore the more useful in extending disability equality issues this will be.

2) Private/voluntary sector organisations that have been found guilty of breaching anti-discrimination law, including specifically the DDA, can legitimately be excluded by a public body from a list of candidates. The organisation concerned, the guidance recommends, should be allowed the opportunity to explain what steps it has taken to correct the problem, so this consideration might also be useful as a lever to encourage better compliance with the DDA from private sector organisations.

Supported Employment

There is specific provision in the law covering supported employment, as a result of articles in both EU directives, replicated in the UK government regulations. This gives to public bodies the option of reserving contracts for "organisations providing supported employment opportunities to disabled people". These are specified as organisations employing at least 50% disabled people. This arises from the provision that governments are permitted to include corporate social responsibility as one of the criteria for contracting, and that this specifically includes the advancement of employment for disabled people.

Supported Employment organisations should be well aware of the potential market these provisions open up for them: certainly the unions that organise workers in the supported employment sector have been pressing for this opportunity to be grasped. The guidance recommends that public bodies first establish that such suppliers are able to meet the specification of the contract; and then that all such bodies are allowed to tender for the contract. This specifically must include supported employment providers from other EU states.

Unions representing members working in supported employment have been working towards this and will want to

establish the possibility of having appropriate contracts ring-fenced for supported employment enterprises to apply for, in line with this important provision of the law. Unions working in public sector bodies, in turn, will need to play their part in arguing that the body follows the guidance and gives proper consideration to ensuring that at least one of their contracts is reserved for applications from supported employment employers.

The key to the successful use of this opportunity will be to ensure that the public body has clearly identified the connection between the contract and its DES and has set this out in the initial contract specification; and that Supported Employment providers have prepared themselves for being able to apply for reserved contracts.

Conclusion

The laws covering procurement are complicated and cover many different requirements. Public bodies may well seek appropriate legal advice in deciding what criteria they are allowed to apply to their contract specifications, and to the contracting, award and monitoring processes. Unions will need to acquaint themselves with the detail of what is, and is not, permissible by law in these processes. But it will be important from the outset to obtain inclusion for unions amongst those being consulted on the design and contents of specifications, relying on the argument that unions can offer clear ideas based on experience of the workplace, of labour standards, and of the potential to extend good practice in the employment of disabled people, the provision of services to disabled people in the community, and the inclusion of disabled people, through far-sighted use of the procurement processes. If a public body starts from the viewpoint that they are prevented by European law from doing anything related to equality in their procurement policies, unions will need to begin by challenging this as a misconception. Once a culture of using what the law permits to promote equality has been established, it will be much easier to exploit the possibilities outlined in this advice.





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