



Disability Discrimination Act, Education Legislation Pre-16 and Implications for a Single Equality Act

Executive Summary

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Background

In February 2005, the UK Government established the Discrimination Law Review (DLR) to address concerns about inconsistencies in the current anti-discrimination legislative framework. In early 2007, the UK Government intends to publish a Green Paper that will lead to a Single Equality Bill following on from the findings of the DLR. As well as considering fundamental principles of discrimination legislation and its underlying concepts, the DLR is considering opportunities for creating a clearer and more streamlined legislative framework, which will be more 'user friendly' for the providers and consumers of services, including education. In this report, we review the operation of the pre-16 educational provisions of the Disability Discrimination Act (DDA) in Scotland. In addition to examining the impact of the DDA, the review considers the impact of the Education (Additional Support for Learning) (Scotland) (ASL) Act 2004 and its interactions with the provisions of the DDA. It should be noted that the ASL Act was implemented in November 2005, and most authorities are still at a relatively early point in this process. Therefore comments on its early impact should be treated as provisional.

Key questions

The overarching question considered in the review is the following:

- How effective are the two pieces of legislation (the DDA and the ASL Act) in ensuring that disabled children are protected from discrimination (i.e. are not treated less favourably and are provided with reasonable adjustments to enable them to participate fully in education)? In what ways might the legislation be tightened up to make it more effective and user-friendly?

Sub-questions include the following:

- What level of knowledge and awareness do professionals and parents appear to have in relation to the DDA and the ASL Act? Are there any obvious points of confusion which might be remedied?
- Do the two pieces of legislation dovetail adequately in terms of ensuring that educational providers are aware of the full range of their duties to pupils and prospective pupils,

including knowing which pupils are disabled under the terms of the DDA, briefing staff whilst respecting requests for confidentiality, informing parents of school policies and practices, putting in place reasonable adjustments and planning at local authority, school and individual pupil levels?

- Given the exemption of additional aids and services from the provisions of the DDA as these apply to schools, is the ASL Act sufficiently robust to ensure that all disabled children have access to the reasonable adjustments which they require?
- More specifically, in the context of the removal of the Record of Needs, are the new arrangements for ensuring that reasonable adjustments and additional support are provided by a range of agencies sufficiently robust? In particular, what are the early indications from local authorities with regard to the proportion of children receiving a Co-ordinated Support Plan (CSP) and what systems are in place to ensure that disabled children deemed not to qualify for a CSP have reasonable adjustments made for them? To what extent are Individualised Educational Programmes (IEPs) able to ensure that reasonable adjustments are made? Are there some disabled children who are deemed not to qualify for a CSP or an IEP and what systems are in place to ensure that the responsible body fulfils its duties to these children?
- Are parents aware of and satisfied with the various remedies provided for by the legislation in case of disagreement between parents and professionals, including alternative dispute resolution and access to more formal legal redress?
- What are the views of the Scottish Executive and local authorities with regard to amending the legislation to make it more effective?

Design of the review

The review consisted of the following elements:

Section 2: Review of legislative framework

This section provides an overview of the provisions of Part 4 of the Disability Discrimination Act as applied in Scotland, of the Education (Additional Support for Learning (Scotland) Act, and the

way in which these two pieces of legislation articulate with each other. An analysis is provided of the areas where some changes to the legislation might be helpful in ensuring the spirit of the law is applied, particularly existing exemptions in the reasonable adjustment duty with regard to the provision of auxiliary aids and services and adjustments to physical features. The fact that the Additional Support Needs Tribunal, set up as a result of the ASL Act, does not hear disability discrimination cases will also be considered.

Section 3: Views of key informants

Individual and group interviews were conducted with the following:
2 representatives of the Scottish Executive Education Department
3 Principal Educational Psychologists from geographically diverse areas (Highland, North Lanarkshire, Fife).

2 senior officers from geographically diverse areas (Perth & Kinross and Glasgow).

2 focus groups of practising teachers attending an MEd course at Edinburgh University in special and inclusive education. Teachers were from geographically diverse areas (Edinburgh, West Lothian, Orkney, Perth & Kinross, East Dunbartonshire, South Ayrshire, Fife). Four teachers participated in Focus Group 1 and ten in Focus Group 2.

Section 4: Views of Local Authority officers

A short questionnaire was distributed by e-mail to the Directors of Education in the 32 local authorities, who were asked to send it on to the relevant individual. A total of 18 were returned, yielding useful information about perceptions of the articulation of the DDA with the ASL legislation. This was a good response given the relatively early stage in the ASL implementation process, and the fact that questionnaires had to be returned less than weeks after they were sent out.

Section 5: Views of parents

Eight telephone interviews were conducted with parents of children with additional support needs. These parents had attended a consultation meeting organised by Enquire in connection with the Parents' Guide to the Additional Support for Learning Act and indicated that they would be willing to provide commentary on its operation in the future.

Review of the education and disability discrimination

legislation: Summary points

- The reasonable adjustment duty in Part 4 of the DDA as it applies to pre-16 education exempts auxiliary aids and services and alterations to physical features.
- The argument for this exemption when the legislation was initially drafted was that the education legislation ensured that such reasonable adjustments would be made. In Scotland, Records of Needs rarely quantified additional resources, unlike English Statements which generally did.
- Disabled children in Scotland with a Co-ordinated Support Plan are likely to have auxiliary aids and services clearly stated on their plan. Disabled children who do not have a CSP are much less likely to have their additional resource requirements recorded in the non-statutory IEP.
- The DSPER Act 2002 places a duty on local authorities to draw up accessibility strategies, but these are general plans which do not address individual disabled children's requirement for physical alterations.
- Disabled children who are deemed not to meet the criteria for a CSP are not entitled to access the ASN Tribunal, and the routes of formal legal redress which are available to them are less user-friendly and accessible.

Key informants: Summary points

- It was reported that that in some authorities a much smaller proportion of children were receiving a CSP compared with the proportion receiving a Record of Needs.
- Many disabled children would not qualify for a CSP on the grounds that all of their provision was being made by education, or that the additional support being supplied by another agency was unlikely to demand high levels of co-ordination. Many disabled children in special or mainstream schools would be disqualified from receiving CSP on one of these grounds.

- CSPs were precise in specifying the additional resources to be allocated and which agency would provide.
- IEPs, which are non-statutory documents, varied in form and content and focused on learning goals rather than additional resources. Local authorities were trying to standardize the format of IEPs and improve their quality and specificity.
- Practitioners and local authority officers were generally positive about lifting the exemption on the provision of auxiliary aids and services and alterations to physical features from Part 4 of the DDA. The Scottish Executive respondents were not convinced that this would be a positive move, because the key was to improve attitudes and provision.
- Practitioners and local authority officers were in favour of allowing the ASL Tribunal to hear disability discrimination cases. The Scottish Executive respondents said that there would be a review of the remit and operation of the Tribunal in 2007 where this matter would be considered. SEED was not in favour of widening access to the tribunal to all parents of children with additional support needs since they preferred approaches based on mediation and conflict resolution.

Local Authority officers: Summary points

- Eighteen of the thirty two Scottish local authorities responded, giving a rate of 56% - considered highly satisfactory given the tight deadline of two weeks.
- At least three authorities appeared to have appointed a senior staff member specifically to develop their response to ASL legislation and all authorities had a clearly designated individual with responsibility for the new legislation.
- Most respondents felt that there would be fewer CSPs than RoN administered within their authority, and most estimates for the proportion of pupils to have a CSP (under 1% of Scottish pupils) was half of the current Scottish average of RoN.
- Some Education Departments were uncomfortable with being accountable, in principle and financially, for the responsibilities

and decisions made by other agencies, under CSP mechanisms.

- In the past 10 months, there does not appear to have been much demand from parents for mediation, adjudication or reference to a tribunal.
- All authorities had organised independent mediation/conciliation services for parents/carers, however, many argued that these had not been utilised and so had been an expensive exercise.
- Two authorities questioned the mediation process arguing that it was 'over-elaborate' and could disengage some parents.
- Local authorities were more likely to declare a good understanding of the ASL legislation compared to the DDA Part 4: this may be a function of local authorities having designated ASL Development Officers.
- Suggestions for improving the Education (ASL) (Scotland) Act included the following: clarify cross-boundary issues; discontinue ASN tribunals because they are expensive and adversarial; clarify timescales – should school closures and holidays be included in the sixteen week CSP timescale?

Parents: Summary points

- Parents felt they had to fight for accurate information from local authorities about their rights and the educational provision to which their child was entitled.
- Every parent commented on their 'battle' with the education department to secure the additional learning support needed for their child.
- While the parents of children and young people placed in specialised units reported satisfaction with the current level of additional support for their children, they all commented on their struggle to get a suitable place for their child.
- Parents of children and young people in mainstream schools wanted the training needs of auxiliary staff to be properly addressed and expressed concern that the people charged

with providing additional support, although generally very willing and helpful, lacked experience and knowledge of their children's needs,

- The majority of parents had little knowledge of disability discrimination legislation and while the majority were satisfied with the ASL legislation they all expressed concern vis-à-vis its implementation.
- Parents were willing to complain to schools and local authorities if they felt their child's needs were not being addressed, but were less likely to use more formal routes such as mediation and the ASN Tribunal. However, these have been in place for a relatively short period of time and parents may become more willing to use them in the future.

Conclusions and implications

Use of CSPs

The ASL legislation has been in place for less than a year, therefore comments on its application must be regarded as provisional. It is believed by local authority officers and other key informants that far fewer children will receive a CSP than had a Record of Needs. This is because the criteria for the opening of a CSP are more stringent than those applied to a Record of Needs; children must have additional support needs arising from one or more complex factors or multiple factors. In addition, the child must be receiving significant additional support from education and another agency which requires a high level of co-ordination. The group of children with a CSP is likely to be different from those who were recorded, and may include a greater proportion of children with social, emotional and behavioural difficulties and a lower proportion of children with physical, sensory and cognitive difficulties. Disabled children in special schools receiving input from health, such as speech and language therapy, may be deemed not to qualify for a CSP because the input is timetabled and therefore does not require a high degree of co-ordination. Some authorities are using Level 4 Additional Support Plans rather than CSPs, although there was some evidence that parents preferred CSPs because of their legally-enforcable status.

CSPs are written with a high degree of specificity with regard to the nature of additional resources and the agency making the provision.

Use of IEPs

IEPs are non-statutory plans focusing on learning goals rather than additional resources (although these may be stipulated in some cases). Children who might have had a Record of Needs in the past are likely in the future to have an IEP or its equivalent. Local authorities are encouraging schools to adopt a common IEP format and to be more precise in their formulation.

Provision of auxiliary aids and services

Local authority and SEED respondents believed that education legislation was sufficiently robust to ensure that reasonable adjustments would be made when required. Parents who were interviewed, on the other hand, felt that it was a struggle initially to obtain information about their child's assessed needs and rights, and subsequently to get additional support in place particularly in mainstream settings. It was noted that accessibility strategies were couched at a general level, and were not intended to address individual pupil needs.

Mediation, Conciliation and Redress

Some local authority staff felt that new dispute resolution routes created by the ASL legislation were a positive development and would encourage local authorities to communicate much better with parents. Others felt that the routes were expensive, as yet little used and were in danger of fostering an adversarial climate. Parents were pleased with the new emphasis on discussion and negotiation. Those we interviewed were aware of formal routes of redress, including the new Tribunal, but were reluctant to make a reference due to the perceived effort. There were very low levels of awareness of the DRC's conciliation service amongst all those who were interviewed or who responded to the questionnaire.

Knowledge and awareness of legislation

All respondents had much greater knowledge and awareness of the education as opposed to the disability discrimination legislation. This was partly explained by the Scottish Executive's allocation of considerable funds to assist local authorities in their implementation of the additional support for learning legislation. In addition, there was an awareness that, because of the exemptions

to the reasonable adjustment provisions of Part 4 of the DDA, this piece of legislation was relatively weak. Some mention was made of the requirement to develop Disability Equality Schemes by December 2006, and it was felt that this would encourage schools and local authorities to identify disabled children amongst the wider group of children with additional support needs.

Implications for possible amendments to DDA Part 4

Most respondents felt that there were grounds for removing the exemption to the provision of auxiliary aids and services and alterations to physical features from Part 4 of the DDA, since this would strengthen the rights of disabled children and underline local authorities' responsibilities. This was felt to be particularly important in relation to disabled children who did not have the protection of a statutory document stating the additional support they required in order to benefit from education. Scottish Executive respondents, on the other hand, whilst not strongly opposing such a change, felt that careful consideration was needed to determine whether improvements in provision and attitudes would result.

Many respondents were in favour of changing the legislation to allow the ASN Tribunal to hear cases of disability discrimination. Some local authority staff, however, did not believe that the Tribunal was necessary at all and did not think it was fair that parents of disabled children should have greater access to legal redress than parents of other children with additional support needs who were not covered by the DDA. SEED respondents stated that the ASN Tribunal would be reviewed in 2007.