

## **Office for Disability Issues Consultation 'Improving Protection from Disability Discrimination' – The UNISON response.**

UNISON is the UK's largest public services trade union with more than 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include front line staff and managers working full or part time in local authorities, the NHS, the police service, universities, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector. We have had, from our creation in 1993, an embedded autonomous structure for under represented groups (disabled, black, women and lesbian, gay, transgender and bisexual) members. This extends to all levels of our structures. Nationally we have a bespoke structure of disabled members who advise the union on policy matters, it is unique in that it deliberately involves members who are disabled and black, lesbian gay bisexual and transgender, women and deaf people (who's first language is British Sign Language); our members were involved in this consultation.

We welcome this important consultation and the accompanying discussion events, both have been promoted to our members, especially our disabled members. It is unfortunate that only 12 weeks were allowed for the consultation period as more of our members could have secured time off work to attend and take part in the discussion events, been more directly involved in our internal consultation on matters raised and, in turn, provided us with even more evidence for the union's national response.

Whilst we applaud much that is being proposed to address disability discrimination in the Equality Bill we are concerned that the proposal to introduce indirect discrimination may weaken protection from discrimination for those who struggle to meet the existing definition of a disabled person because the extent of their impairment is argued to fall short of affecting day to day activities. We urge the Government to consider undertaking an equality impact assessment specifically in relation the impact of indirect discrimination on the definition of a disabled person. The current definition is divisive, it legitimises discrimination against some disabled people and sets an unreasonable hurdle for disabled people who are trying to challenge systemic oppression. The definition is viewed by our members as a form of apartheid between disabled people.

We support the proposals to extend and harmonise protection from disability discrimination across all grounds including goods, facilities and services. As a trade union we are particularly interested in learning about how the proposed changes to legislation will impact on the trade organisation aspect of the Equality Bill, especially in relation to the shift in interpretation from *Clark v Novacold* to *Lewisham v Malcolm*. We have a proud tradition of taking progressive steps that go beyond our legal duties to ensure that our disabled members enjoy opportunities to exercise their right to choose to be involved and active in their union, we also have mechanisms in place that positively promote our disabled members policy interests to the wider union.

Democracy, involvement and inclusion are central to the ethos of our union and we would welcome the opportunity to share examples of positive action steps we have taken to achieve the reputation of an exemplar membership organisation including the work we have undertaken to build on existing arrangements for equal access to democracy and participation for our disabled members.

Another concern raised by our disabled members is that drawing a contrast between indirect discrimination against disabled people and that of gender and race may over simplify the unique and marked difference of exclusion experience. Disability discrimination has different roots, most notably entrenched in the legacy of 50 years of the Employment (Disabled Persons) Act 1944 which legitimised quotas, perpetuated low skilled and low paid work and reserved occupations for disabled people. Underpinned by this are the physical and environmental barriers, inaccessible technology, inadequate and unregulated professional service provision, the linguistic and cultural experience of Deaf people (whose first language is British Sign Language) and the historic widespread institutionalisation of disabled and Deaf people; similar expressions of systemic forms of exclusion are difficult to establish as correlative examples to learn from and it is for this reason we would urge the Government to be cautious about investing in a single solution to comprehensive anti discrimination legislation measures for all protected characteristics.

**Question 1 – Do you agree that the Equality Bill should adopt the concept of indirect discrimination for disability?**

We support the inclusion of indirect disability discrimination but believe that explicit clarification is required to make it useful for disabled people.

Including provision for Indirect discrimination will be useful where discriminatory exclusion affects a wider number of disabled people or people who have different impairments but similar adjustments as set out in the example in paragraph 37 which highlights the case of a restaurant banning guide, hearing, working and assistance dog users.

We hope that, if used properly, the existing provisions that require public authorities to meet their Disability Equality Duty will go some way to address indirect or institutional discrimination against disabled people. Should systemic discrimination be identified and remedied, the need for a specific provision for indirect discrimination should be lessened however, the Duty is not afforded to the majority of the private sector and we urge the Government to consider introducing new provisions as an additional protection against disability discrimination.

We agree that provision for indirect discrimination will enable the Government to comply with the European Union Directive (should it be adopted). We are extremely alarmed that despite being one of the first of 137 countries to sign up to the United Nations Convention of Rights of People with Disabilities that

ratification has not been achieved during 2008, we hope the Government will set out publicly its concerns and invite disabled people to be part of involvement exercises with regard to immigration, education and the armed forces.

Including provision in the Equality Bill for indirect discrimination will have clear benefits but is not an adequate substitute for preserving provision for disability related discrimination, but without the need for a comparator (which should deal with the Malcolm case). Disability discrimination is complex and we are concerned that the need for a comparator will over complicate matters for disabled people and those who have duties. To some extent the consultation document recognises the difficulties faced by disabled people should comparators be required. For example, in the case of a blind person would the comparator be sighted people, other blind people in the general population, people with the same visual impairment, people with the same degree of visual impairment and same condition, or people who need the same adjustments for barrier removal regardless of the cause or degree of impairment? On a more practical level, there is insufficient base line data for disabled people to draw from to establish evidence of appropriate comparators, generally they feel they would not have the resources to gather their own evidence and there is concern that those who are not in paid work will be even further disadvantaged by the additional cost of disability in seeking to establish reliable data.

Paragraph 33 refers to the 'modern' approach on the issue of comparators and goes on to propose that evidence used is on the basis that discrimination is 'more likely'. It is difficult to see how disabled people will find this solution more useful as the notion of probability will still need to be established before a case can be measured for potential success; current arrangements for disability related discrimination can be much more easily applied in such a scenario.

In point C of paragraph 30 the housing scenario example is employed to promote an interpretation of how indirect discrimination could be used as a gain, this is interesting but if fails to take account of other factors that might bear some influence in a case. UNISON has well established policy that supports disabled people's control and independence, particularly through Direct Payments and Individual Budgets. We do however, still have some reservations regarding what resources are available for disabled people to construct decent pay and conditions for those workers contracted by them to provide services. In our members' experience there has been a growth in choice and control due to the advent of personal assistance delivering opportunities for greater independence. However, we believe that the role of such workers has not been fully taken into account, in particular for people with learning difficulties and those with mental ill health, should the issue of sub letting tenancies be under question.

To draw comparisons with existing provisions in sex and race discrimination over-simplifies the complexity of disability discrimination, which manifests in

many forms beyond attitudinal discrimination to include, as stated earlier, the built environment and other barriers.

We have consulted our activists about the types of cases on which they are currently providing representational support including alleged instances of disability discrimination in public services. An outline of these cases is summarised as appendix A to our response, our members are concerned that their ability to make successful challenges to employers' and others' actions might not be feasible should they have to rely on indirect discrimination alone. We urge the Government to take forward the existing provision for disability related discrimination into the Equality Bill in order that trade union activists can continue to resolve disability related disputes speedily at a local level rather than further overload the work of Employment Tribunals and of course support our members in the wider world of citizenship matters.

**Q2 – Do you agree that the Equality Bill should include provision that requires a duty holder to fulfil the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination?**

We agree that duty holders should be required to make reasonable adjustments before indirect discrimination can be objectively justified. In agreeing this point we would add the need to expand resources through the Access to Work Scheme (AtW). Further we propose that action should be taken to regulate or license services used by disabled people such as language service professionals (sign language interpreters, lip speakers, speech to text transliterators), Braille providers and personal assistants etc.

AtW is viewed by our disabled members as an absolute lifeline to their continued employability and they are concerned that not enough publicity is given to the Scheme; we propose that consideration should be given to increasing publicity of the Scheme (as well as increasing resources), publicity could correspond with recent Government sponsored radio advertisements on asbestosis, car seat belt use and flu immunisations in addition to advertising in national newspapers and using Ceefax and Teletext.

**Q3 – Do you agree that the assumptions underpinning the regulatory impact assessment are realistic?**

We disagree.

Paragraph 5.1 states that 'The proposed policy is not relevant in the context of **encouraging the participation of disabled people in public life.**' There are numerous examples of policies, criteria and practices which, in effect, prevent disabled people from securing public life appointments such as school governors, trustees, board members, parliamentary office etc. If the policy proposal to introduce indirect discrimination as an alternative to disability related discrimination is deemed to be irrelevant there must be a failing as any

new policy or legislation proposal should be actively seeking to promote the current arrangements for positive action for disabled people in public life as is currently seen in the use of disability related discrimination on public appointment matters.

The consultation document states that 'Disability does not affect one ethnic group more than another. Therefore the proposed policy change is not relevant to the promotion of racial equality'. It then acknowledges 'that certain conditions are more prevalent within certain ethnic groups' and proposes that additional work will be undertaken to establish what data may be available on conditions such as Sickle Cell. We found these statements contradictory and unhelpful, we suggest that a comprehensive equality impact assessment is undertaken before a definitive statement is agreed, in particular with regard to the relevance of racial equality to the Equality Bill. Our members, particularly our black women members, report a disproportionate impact on disability discrimination when race and gender, both separately and together have an interface with disability. In particular our black disabled women members who have a genetic history of the condition Lupus report the multiple experience of discrimination within the workplace in respect of time off work for treatment or, in the instance where a family member, such as a child, has Lupus time to negotiate appropriate school arrangements.

Our disabled members are willing to assist with evidence gathering and involvement exercises should these be deemed helpful.

We believe further work also needs to be undertaken with regard to assumptions in the correlation between disability and gender and disability and faith.

Our members in Scotland are concerned that the RIA summary of analysis and evidence appears to have failed to take into account the particular impact on citizens, especially women, with Multiple Sclerosis, in the geographic coverage of the policy option.

With regard to faith, our members repeatedly report that their experience of exclusion is similar to that considered in Malcolm. Their most frequent experience is in relation to taxi services where guide, hearing, working and assistance dogs are refused carriage on the basis of the drivers' faith. Accessible transport is one of the core civil rights demanded by our members as the key to economic activity and personal independence. We propose that the interface between faith and disability is given further consideration and remedies sought to promote the mobility of disabled people whilst preserving the rights of those to practice faith choices.

## **Appendix A; UNISON case studies of resolved and ongoing disability discrimination claims; Is indirect disability discrimination the sole solution to Malcolm?**

An education member with clinically diagnosed paranoid psychosis has had an extended period of sickness absence directly related to his condition. The joint employer/union agreement makes provision for a flexible return to work over a five week period, this has been abandoned by management in favour of a one week return with conditions that the employee will remain under scrutiny for sickness absence for a period of three months. If any sickness absence is taken, in relation to the mental health condition or for other purposes the employee will be instantly dismissed.

A local government employer is proposing to offer reduced hours to existing staff with the surplus hours being elongated at a lower rate of pay to accommodate new, low paid, low skilled ghettoised employment for disabled people. No regard has been given to the cause of why existing staff might want to reduce their hours, including for disability related reasons or if the policy proposal complies with the Disability Equality Duty. The expected outcome is low paid work, with few career prospects for newly recruited disabled people.

An employer has decided to introduce a uniform for all front line staff who work on a rotational basis between various local authority sites. The uniform is an 'off the peg' style, it takes no account of the orthotic needs of existing staff who have ped- mobility difficulties or of those staff whose body shape is different from 'average'. No alternative arrangements have been considered in the action plans within the employer's Disability Equality Duty.

A member's son who is a Deaf British Sign Language user was wrongly charged with actual bodily harm as a result of the use of an unqualified police interpreter who during interview mis 'interpreted' "I was hungry and wanted to eat" for "I was angry and wanted to fight". The member lost two days' work trying to sort out the error at the local police station and preserve her son's good character. She feels that a similar situation would be difficult to resolve using the concept of indirect discrimination, she used arguments based on disability related discrimination in her discussions with the local police force.

A number of ambulance service members who have Insulin dependent Diabetes are being offered desk duties as an alternative to their regular 'blue light' jobs because their impairments are perceived as a safety risk; neighboring police and fire personnel with Diabetes are not facing redeployment on the basis of the nature of their medical condition.

Performance related pay, measured against criteria such as attendance and sickness absence is impacting on a members income and the level of

harmony in workplaces especially where group performance is measured. Disability leave, in relation to disability related absence is being negotiated by our branches as the solution to this problem.

A disabled employee on medication that affects her concentration is facing competency and capability procedures and stands to lose her job. Managers are bullying and intimidating her and discounting disability related discrimination. The Occupational Health Consultant has supported the employee with evidence that that the type of medication the member is taking causes memory impairment.

A refuge unit has a policy of supporting only women fleeing domestic violence and is unwilling to provide services to women who directly employ male personal assistants for support to remove barriers, negotiations are under way to amend the organisation's policy.

A hearing impaired school caretaker's workshop was relocated to a different site on the school grounds and his employer failed to recognise the importance of transferring his text telephone both as his reasonable adjustment and as his means of communication in the event of a breach of health and safety.

Deaf, hearing impaired and speech impaired member continue to express their frustration about emergency telephone services not being available in an accessible text format.

A significant number of our members report additional difficulty in persuading some elements of the medical profession that as disabled people they should be offered medical interventions and treatment that are routinely made available to non disabled patients.

Four cases of work related stress where members experience depression as a result of treatment in the workplace and long term medication and a range of different adjustments are being negotiated with employers.

A member who is off sick frequently and late for work due to her condition. She was facing disciplinary proceedings and possible dismissal. Following extensive investigation by the UNISON branch she was diagnosed as in need of surgery to both hips. Following her union representative's advice (in collaboration with the occupational health provider), the employer has arranged for adjustments to the member's job and work environment.

Cuts in services have also had an impact on the way disabled staff have been able to carry out their own duties and respond to the impact on services as a result of unfilled posts. Members have been obliged to undertake additional duties where specialist posts have been lost. This has, in some cases, had a profound effect on health conditions and exacerbated disability status.

**UNISON Contacts:**

**Liane Venner - Head of the Membership Participation Unit**

**Gloria Foran – National Officer (Disability Policy)**

**UNISON**

**1 Mabledon Place**

**London WC1H 9AJ**