



Doing the Duty – The Disability Equality Duty – impact so far and legal enforcement

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Conference Report

In partnership with



**Equality and
Human Rights
Commission**



Office for Disability Issues
HM Government

Foreword

In order to celebrate the second birthday of the Disability Equality Duty (DED) Radar organised a major conference to look at the impact that this relatively young piece of legislation has been having.

The DED is a new approach to legislation. It requires public bodies proactively to consider how they promote Disability Equality and eliminate institutional discrimination. In technical terms it requires them to have due regard to things like eliminating unlawful discrimination, promoting equality and encouraging disabled people to participate in public life. In doing all of this they can treat disabled people more favourably. In practical terms for most key public bodies this has meant involving disabled people in putting together a Disability Equality scheme and action plan, focused on outcomes and improvements for disabled people.

What has impressed RADAR is how much difference this legislation is having two years on, as the involvement of disabled people is fed through into public service reform and real outcomes. From increased fire safety for people with every type of impairment to increased employment rates for disabled people, we have found examples of excellence. However, there are also organisations lagging behind, where disability organisations need to hold public services to account. RADAR believes that by promoting disability equality we improve public services for everyone; and we will be working with partners over the next year, to share good practice both amongst public services and amongst disability groups, so all can become effective champions for equality.

This conference was incredibly popular, unfortunately we ended up turning people away and on the day the room was absolutely packed with well over 150 people. There was a real buzz all day with people wanting to tell stories about how they had been involved in the duty or how it had made a real difference in their area or even their concerns about how future legislation could water all this down.

Set out in this report are the details of the incredibly informative presentations we had from a prestigious speakers, the contributions of both disabled people and those from the public sector and through those voices the strengths, the outcomes and the potential of the Disability Equality Duty in making a real difference for disabled people.

Liz Sayce, Chief Executive, RADAR.

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1. Introduction

RADAR hosted a major conference in London on January 7, 2009 to examine the impact of the Disability Equality Duty two years on and the implications of recent legal cases. The conference was supported by the Equality and Human Rights Commission, the Office for Disability Issues and the Improvement and Development Agency.

The event was chaired by Liz Sayce, Chief Executive of RADAR. Throughout the day we were fortunate to have a prestigious array of speakers. This included Richard Timm, Deputy Director of the Office for Disability Issues, Patrick Diamond Director of Policy and Strategy at the Equality & Human Rights Commission, Angela Mason who leads the work on equality at the Improvement & Development Agency and leading lawyers such as Cathy Casserley from Cloisters Chambers.

The audience comprised over 150 invited delegates, of whom just under half were from public authorities. A significant number of these were from local authorities from around the country; there were also representatives from housing, education, regulatory bodies and government departments/agencies. There was equal representation from disabled people, including individual disabled campaigners and activists (many of whom have been involved in developing Disability Equality Schemes) and national disability organisations. We also had representatives from legal firms and media organisations.

Key messages from the Conference were:

- The Disability Equality Duty is having a significant impact with identifiable outcomes across the public sector. It has further potential to secure very significant outcomes and improvements in a range of areas from social care to transport.
- The Disability Equality Duty has huge strengths – the requirement to involve disabled people, the policy changes arising from impact assessments and the actions coming out of Disability Equality Schemes—all of these have the potential to transform public services.
- While there is evidence of the DED changing the culture of many public authorities and of the benefits of involving disabled people, there are still unacceptable levels of complacency. Strong enforcement and transparent monitoring by the Equality and Human Rights Commission will be key, as will activism by disabled people.

- Public authorities need support around training in equality impact assessments; successfully involving disabled people and linking the DED in with their performance framework; if they do not this will cost them dearly.
- Recent legal cases under the DED and the Race Equality Duty demonstrate the seriousness with which the courts view non-compliance with the Duty and failure to carry out proper disability equality impact assessments.
- Disabled people and their organisations are ready and willing to enforce the Duty themselves. To maximise this they need greater resources to get and stay involved, to monitor performance and challenge authorities who do not do the duty.
- A Single Equality Duty could pose a real threat to disability equality unless the DED is strengthened and built on. The benefits we have already seen could so easily be lost and the potential for further outcomes could be diminished. The key elements of the DED must be maintained and extended.

The report which follows is a summary of the key discussions. For a full transcript and copies of powerpoint presentations used by speakers please go to www.radar.org.uk and follow the links to our Disability Equality Duty pages.

RADAR would like to thank

- our partners whose support made this conference possible: the Equality and Human Rights Commission, the Office for Disability Issues and the Improvement and Development Agency;
- Caroline Gooding for inspiring it;
- Marie Pye for setting the agenda and making it all happen;
- all the speakers and delegates who shared their expertise and
- Emma Hutchinson and Nisha Patel for their delegate and venue management and for helping to draft this report.

2. Impact on public services

“ The Disability Equality Duty is at the heart of the Commission’s strategy for achieving change in public services that will lead to improved outcomes for disabled people and for communities as a whole.” Patrick Diamond, EHRC

Delegates heard a lot of evidence that the Disability Equality Duty (DED) is helping to create better public services. **Richard Timm**, Deputy Director (Policy) of the Office for Disability Issues (ODI) cited recent ODI commissioned research into the impact of the DED in 35 public authorities and how it has influenced outcomes for disabled people.

Positive impacts included:

- greater priority being given to disability equality issues within the bodies;
- examples of mainstreaming disability equality in policy-making;
- improved perceptions and increased respect for disabled colleagues within the workplace;
- better understanding of disabled people’s support requirements and
- an increase in self-reporting of disability by the employees of the authority.

Timm cautioned that progress is far from uniform with too many public bodies focusing on process rather than monitoring actual outcomes.

There is also evidence of effective involvement of disabled people in the recent Secretary of State reports according to Timm. ODI promoted this heavily and several Departments explicitly acknowledged the benefits of this. The reports themselves highlight real progress in some areas. Several departments were very open about where the equality gaps are and what action they propose to take to close them.

Patrick Diamond from the Equality and Human Rights Commission was very clear that the DED is central to EHRC’s strategy for delivering better public services and is starting to focus public authorities on delivering better outcomes.

In spite of continuing equality gaps in employment, poverty, education and access to services, there is no doubt that the DED is starting to impact positively on public services, said Diamond. Research recently

undertaken for the Commission has also illuminated what makes the specific disability equality duties effective. It found that:

- Genuine involvement of disabled people has had a major impact across all sectors.
- The Secretary of State duty to report on disability across each sector has created a significant shift in the understanding and response of Government
- The duties are most effective where equality and diversity are embedded in the assessment criteria of audit and inspection regimes.

He highlighted three types of response to the duties by public authorities. There are leaders or 'trailblazers' who have led the way in effectively implementing the DED and putting it at the heart of effective delivery. Then there are 'fence-sitters' who may comply fully or partially with the letter of the law, but are often reluctant and treat the equality duties as an 'add-on' rather than a strategic opportunity to improve the delivery of public services to the whole community. Finally, there are 'laggards' who are often non-compliant, formally in breach of their statutory responsibilities, and in denial of their equality obligations.

Richard Timm agreed on the importance of public bodies acknowledging equality objectives when procuring services and goods.

Issues around equality being in the heart of public services were focused on by **Angela Mason**, from the Improvement and Development Agency. This was the key challenge to improving performance, service delivery and engaging local communities. Angela focused on IDeA's work on the new equality standard for local government which has attempted to relate equality much more closely to the performance and improvement framework local authorities operate under.

She thought the involvement requirement was having an impact on changing the culture within local government— disabled people's activism would also be key to driving change. Much more work needed to be done on training every local government officer on how to do equality impact assessments and increasing access to good practice she thought.

Marie Pye, Chair of the DEFRA's (Department for Environment, Food and Rural Affairs) Disability Equality Scrutiny Advisory Group explained how her group had not just been 'involved' they had been able to

scrutinize progress under the Department's Disability Equality Scheme, challenge the Department's assessment where necessary and ask for further action. DEFRA have taken all this on with incredible enthusiasm, and resourced the group properly. Marie set out how this group of disabled people was able to have an impact on the ability of this large government department to deliver improvements on disability equality. She hoped this would encourage more disabled people to become engaged with public bodies and support them to achieve positive outcomes.

Caroline Gooding noted research by the consultancy firm Schneider-Ross one year post the DED coming into effect. This found that seventy-two per cent of respondents said that the involvement of disabled people contributed to the successful implementation of the DED. The researchers were also struck by the progress on disability equality compared to progress on the race duty which had been in force for five years.

Peter Purton of the TUC expressed the frustration of trade union members at the length of time it was taking for some public authorities to do the duty effectively. There could be no room for complacency. He noted that large sectors such as health and education were failing to provide information on the duty and there was little evidence of public procurement being used as a tool to promote equality.

3. Recent legal cases – what do they tell us?

“The courts are taking an increasingly bold approach to a breach of equality duties by public authorities; a decision that is made without a proper equality impact assessment having been carried out may well be quashed.” Catherine Casserley

There was a strong focus throughout the day on the recent legal cases. Frequent references were made to the cases relating to both Harrow and Ealing Councils in both the general sessions and in the specific session around legal cases.

The Harrow case involved a group of disabled people legally challenging a decision by the council which related to social care. It was found that Harrow Council acted unlawfully in not paying due regard to eliminating disability discrimination and promoting disability equality within the equality impact assessment of their policy in relation to social care. In particular the relevant local councillors responsible for the decision had not had the Disability Equality Duty or the possible impact of the new policy adequately brought to their attention.

In Ealing a case was taken under the Race Equality Duty by a group of women who used the services of a voluntary organisation dealing with domestic violence, Southall Black Sisters. The result was that Ealing Council was deemed to have acted unlawfully. This was because they decided that the provider of services to residents experiencing domestic violence should be a single source of services to all throughout the borough before a full race equality impact assessment had been undertaken.

Angela Dias from Harrow Association of Disabled People and **Louise Whitfield** from the Public Law Project highlighted the lessons from the ‘Harrow judicial review’ where disabled residents, working with the Public Law Project successfully used the DED to stop the local authority restricting social care support to those with critical needs only.

Whitfield said the evidence gathered by HAD and other voluntary groups (Mencap, Mind, Rethink, Help the Aged) on the impact of the proposed change had been critical in demonstrating the adverse impact it would

have and challenging Harrow's own flawed disability equality impact assessment. A second key reason for success was the fact that the councillors making the decision had not seen the impact assessment and did not have it brought to their attention. This meant the council could not possibly have had due regard to disability equality, the judge ruled.

As a result of this case, the council abandoned its plans for cuts in support. The judgment has also warded off other councils from restricting eligibility and generally raised awareness of the DED among local authorities. Dias highlighted positive spin-offs from the case:

- councillors had been given disability equality training;
- a Disability Forum was set up (funded by the Council), providing a mechanism for disabled people to feed into decision-making processes and
- HAD has been approached by many other councils asking for advice on involving disabled people.

Taking legal action had been really positive and resulted in the Council learning to listen.

Catherine Casserley from Cloisters Chambers (and Chair of the Discrimination Law Association) drew out the implications for public authorities of recent legal cases under the DED and the Race Equality Duty:

- The courts are taking an increasingly bold approach to a breach of equality duties by public authorities; a decision that is made without a proper equality impact assessment having been carried out may well be quashed.
- Decision makers have to consider the duties fully when they are making a decision – it is not enough for there merely to be a reference to the fact there may be an impact under the Disability Equality Duty.
- The duty to have due regard to the need to promote equality applies at the time a policy is considered and there needs to be a record of it having been considered to demonstrate you have had due regard.
- The DED applies to decisions about individuals as much as to policies (this Casserley noted means that in cases of eviction,

post the Malcolm judgment, a judicial review may be the most effective option for legal redress).

- The duty to promote equality of opportunity applies to all areas of a person's life and is about what needs to be done to achieve real equality, rather than just asking whether there has been a breach of the principle of non-discrimination.
- Public authorities may only depart from the statutory code of practice where they have a clear and cogent reason and would also have to justify any departure from non-statutory guidance on the duties.

4. Doing the Duty – what works?

“One of the best things about the DED has been the duty not just to consult but to involve. That I think, for local authorities, has begun to create a change in attitude.”
Angela Mason

Delegates discussed the **strengths** of the Disability Equality Duty and what has worked well about the Duty in table discussions. Key strengths identified were:

- the requirement to mainstream disability equality across all the functions of public authorities which has put disability on their agenda;
- the way the General Duty reflects the distinctive nature of disability, requiring attention to positive action and more favourable treatment for disabled people where required to deliver better outcomes;
- disability equality impact assessments which have proved to be an effective tool in producing actions and outcomes to promote disability equality
- the requirement to involve disabled people (rather than just consult) in devising Disability Equality Schemes and action plans;
- the fact that public authorities have to implement their Disability Equality Schemes, demonstrate progress against their action plan and report annually – this is starting to produce real outcomes;
- the fact that there have been successful legal cases which have made a real difference to disabled people’s life chances (especially the Harrow Case) or helpfully developed principles for effective DED implementation;
- the fact that disabled people have the opportunity to hold public authorities to account for failing to do their duty and
- the Secretary of State reporting duty has really helped change the culture of Government departments and focus minds on where action needs to be taken.

5. The importance of strong enforcement

“It is not just the EHRC looking to enforce the DED, the Harrow Case shows that there are disabled people and organisations out there who can and will use the law if necessary to secure compliance,” Marie Pye.

Patrick Diamond said the EHRC intends to enforce the DED strongly. A new task force encompassing the policy and legal teams at the Commission has been set up to enforce the DED and it has proved to be successful. Diamond highlighted the EHRC’s intervention in the Southhall Black Sisters case where they intervened to prevent the loss of public funding, invoking the race equality duty towards the local authority concerned.

EHRC will also be providing accessible and practical guidance through their website and supporting materials, alongside engaging in effective collaboration with sector bodies, regulators and inspectorates to ensure that equality is at the core of improvements in service standards. They also plan to trial a new interactive data collection website enabling the Commission to monitor the compliance of all 44,000 public authorities in England.

Tough enforcement against ‘laggards’ will be the order of the day. There is a desire to deliver more legal cases on the DED in the upcoming year, to test the scope and reach of the equality duties and more details will appear in the EHRC strategic plan. EHRC is entering into legal proceedings against three major Whitehall departments, and has compliance actions on the DED underway in relation to a range of strategic public bodies including three Whitehall agencies, two unitary local authorities, three District Councils, two NHS trusts and one Scottish local authority with other cases in the pipeline.

Caroline Gooding, former Director of Legislative Change at the Disability Rights Commission and now RADAR Special Adviser said it was imperative for EHRC to step up enforcement activity. Good cases convince public authorities they need to take the law seriously. The absence of cases and the absence of enforcement leads public authorities to think they don’t need to comply with the law.

The Commission should look at whether key public authorities have actually done the things they set out in their action plans. She emphasised the importance of visible, transparent enforcement. The DRC took a very visible, robust approach: it analysed where key public authorities' Disability Schemes were lacking, the information was placed on the web and that had a real impact on public authorities. Disabled people could also use this information to strengthen their lobbying.

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Disability equality campaigner **Susan Archibald** called for much stronger advocacy and advice for disabled people seeking to bring DED cases, recognising the EHRC can only support a fraction of cases. Patrick Diamond pledged that EHRC's future grant programme would address this and that the Commission would raise the need for capacity building with Government.

6. Doing the Duty – how disabled people can use the DED

“Where you feel there is an issue under the Disability Equality Duty, rope in a larger organisation to help you pursue it. Be persistent!” Moira Fraser

Moira Fraser from RNIB set out how disabled people and local groups can use the DED to positively influence change without resorting necessarily to legal action. RNIB has invested in awareness training for blind and partially sighted people.

It has used the DED to challenge:-

- Detrimental changes to concessionary travel schemes
- Lack of accessible information provision
- Libraries ending talking books subscriptions

Next on the agenda will be using it to address cycling policies and the negative impact of wheelie bins and A boards left out on the street.

Moira said people could do simple things like:-

- ask for copies of authorities' schemes
- grill them on how they involve disabled people and whether their arrangements are really accessible.

If you think there is an issue a public authority has neglected or got wrong, pursue it –and badger big disability organisations for support in this.

Delegates probed on what disabled people and their organisations could do to challenge policies which mitigate against disability equality without necessarily having to resort to a legal case.

Angela Dias said the Harrow case can be cited by disability organisations to support the case for a thorough disability equality assessment and to caution councils against pursuing policies detrimental to disability equality without having followed the DED requirements.

Louise Whitfield signaled that the Public Law Project was keen to assist small voluntary organisations. She emphasised it is important to get a copy of council's policies and then compare their performance against this, drawing on the experiences of disabled people locally. If a

person feels that a equality impact assessment has been poorly done or not at all, then the project can assist with drafting letters and advising on legal arguments. If it becomes a important legal challenge then the project can help with finding representation to bring the case.

Angela Dias and **Angela Mason** agreed it was vital to make common cause with other local groups to create added pressure.

A delegate from a Local Access Group raised an example in relation to whether the DED could be used to challenge restrictions on the use of say free bus passes for disabled and older people on community transport in the event of public transport not being accessible.

Catherine Casserley advised that the DED may be useful in such cases since questions could be raised over the impact that the exclusion of community transport has on disabled people who can't use inaccessible public transport. The DED may also be relevant because as it is free transport this in itself is a benefit specifically aimed at disabled people therefore would it is easier to use the duties in that kind of context when there are restrictions on equality of opportunity as a result of a decision. Casserley also recommended asking whether or not an impact assessment had been done.

Louise Whitfield added that in this kind of situation it would be worth also investigating the extent to which the potential impact had been considered and asking

- had the public authority sought views from relevant local groups or users?
- were they aware of the impact on disabled people? and
- was this taken into account when they made that decision?

RADAR plans to make resources available for our members in regard to using the DED. Meanwhile there are useful resources for disabled people on www.dotheduty.org

7. Building on the Duty

Delegates discussed ways in which the DED should be strengthened. They identified these key points:

- there needs to be much more enforcement action;
- there must be better monitoring of schemes;
- there is a need for centralised best practice (note this will be addressed by RADAR's current DED project which will result in a Handbook and interactive toolkit);
- there should be compulsory DED training for the public sector;
- the duty must be explicitly applied to procurement - many also feel there should be an extension of the duty itself to the private sector and
- schools must be made to carry out Disability Equality Impact Assessments and develop and implement Disability Equality Schemes.

Angela Mason wanted to see greater collaboration under the DED across public authorities. This would help smaller district councils, for example, who have a poorer record on implementing the public duties.

One delegate said there needed to be greater involvement of people with learning disabilities in monitoring the DED and action to make it easier for people to be involved. **Liz Sayce** added that the DED is a vital means of gaining knowledge about the experiences of different groups of disabled people as it is well known that those with learning difficulties and other groups of disabled people are less likely to have jobs. In the current economic climate, it becomes imperative that monitoring of disabled people takes account of differences in groups such as ethnicity, impairment etc. this allows action to be taken where it is most needed.

One delegate asked if authorities who produced combined equality schemes were doing justice to disability equality. **Patrick Diamond** said that public bodies which have undertaken single schemes tend to be high performing authorities in relation to equality. Therefore they have been able to preserve the specific disability-related aspects of the duty in the single schemes. However, there was not unanimity on this and **Caroline Gooding** disagreed. The single equality schemes she has

seen have tended to be very bland and not meaning anything in particular.

A local authority delegate said a big challenge was engaging disabled people locally, her council had found that difficult. **Liz Sayce** said there needs to be more local support and resources to support participation. A representative from the Shaping Our Lives network was concerned that disabled people who are paid for their involvement would risk having their benefits being cut. This will reduce the number of people who are able to be involved. Could the DED help challenge this? **Liz Sayce** said the Disability Rights Commission had used the DED to secure increases in how much disabled people can earn without losing benefits.

8. Towards a Single Equality Duty

“Getting the formulation of the Single Equality Duty right will be critical – we must preserve the distinctive aspects and strengths of the DED and make it even better”

Caroline Gooding

The Government plans a new equality duty for the public sector covering all the existing strands as part of the forthcoming Equality Bill which will harmonise existing legislation. Speakers and delegates were united on the importance of retaining the distinctive elements of the Disability Equality Duty and strengthening them in a future single equality duty. There was general and significant concern at the risk of the DED being watered down in the Equality Bill.

A Single Equality Duty that delivers on disability equality: results of delegates’ discussions:

- No watering down of the existing DED requirements.
- Retain and build on the best of the DED: involvement, action plans, equality impact assessment.
- Must make someone in each public authority truly accountable.
- More capacity and support for legal advice.
- Specific duties should be extended to town councils
- Strengthened enforcement.
- Involvement requirement should be extended to other equality groups.
- Look at how to extend this to the private sector.

Caroline Gooding set out how the new single equality duty must retain:

- The requirement to have due regard to “the need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled person more favourably than other persons”; this is a fundamental underpinning principle of the DED which must not be lost.
- The requirement to involve disabled people.
- The requirement to implement schemes and action plans.
- Secretary of State Reports on progress on disability equality in their policy sector, including actions to improve co-ordination.

Gooding and other speakers agreed that the Single Equality Duty should strengthen the DED, namely by:-

- explicitly covering procurement;
- a requirement to set targets alongside the mainstreaming principle; and
- giving an explicit role in monitoring and enforcement to inspectorates and regulatory bodies – supplementing the role of EHRC.

Gooding, Catherine Casserley and others called for vociferous lobbying to ensure the general and specific duties in a future single are up to scratch. There will be opportunities to influence the framing of the general duty when the Bill goes through Parliament; the specific duties will be fleshed out by secondary legislation.

9. Where from here?

Patrick Diamond specifically committed the EHRC to a tough programme of enforcement. They are entering into legal proceedings against three major Whitehall departments, and have compliance actions on the DED underway in relation to a range of strategic public bodies including three Whitehall agencies, two unitary local authorities, three District Councils, two NHS trusts and one Scottish local authority with other cases in the pipeline.

The IDeA are about to launch the new Equality Standard for local government which will help to tie disability equality into the performance framework of local authorities.

RadAR now have a strong body of evidence from disabled people and public sector organisations in relation to the outcomes from the DED and what is working well as well as areas which need to be strengthened. Learning from the conference has fed into RADAR's policy and campaigning on the Equality Bill and will be drawn on for RADAR's work in developing a Handbook and toolkit on the DED. This is part of an EU-funded project to disseminate latest best practice and enable those with duties and those with rights to use the Duty effectively.

The Conference ended with a call to action to defend and build on the DED – RADAR will be setting up a campaigning coalition on the Equality Bill to do just that.