Consultation Response: Accessibility of public sector websites and apps: new duties and regulations

Information page

To evaluate responses properly, we need to know who is responding to the consultation and in what capacity. We will therefore only consider your response if you complete the information page. Any personal data (such as your name, address and any other identifying information) will be processed securely and in accordance with the Data Protection Act 1998. Do you wish to continue completing this response form? **[Yes]**

Do you wish your name to be published in the government evaluation of responses? (If 'no', the response will be treated as confidential). **[Yes]**

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Is this a personal response or an official response on behalf of your organisation? **[Yes]**

Organisation name: **The Industry, Technology & Innovation Team of Policy Connect**

Type of responding organisation: **[Other type of representative group or interest group]**

Type of representative group or interest group **[Other (please specify)]**

Policy Connect is a non-profit, cross-party think tank improving people's lives by influencing policy. Policy Connect provides the secretariat services for the All-Party Parliamentary Group for Assistive Technology (APPGAT). For more information on Policy Connect and APPGAT see the appendix to this document).

Consultation

1 - Do you understand the definition of 'public sector bodies'? If not, please explain your reasoning. [no]

2 - Would you benefit from further guidance on this definition? [yes]

The definition of 'public sector bodies' is not sufficiently clear. We note that, according to the draft Instrument, an organization counts as a public sector body if it is governed by public law, using the same definition of 'governed by public law' as EU procurement law (Directive 2014/24). The ongoing debates over which institutions are governed by public law for the purposes of procurement law demonstrate that this definition could be further clarified.[1] We propose that the Instrument clarify the definition of 'public sector bodies' by harmonizing it with the Equality Act 2010. In addition to the current definition, an organization should also be counted a public sector body if it appears in schedule 19 of the Equality Act (2010),[2] wherein is listed all those bodies which are subject to the Public Sector Equality Duty (Section 149).[3] For example:

"public sector body" means—

(a) the State;

[1] See, e.g. Dideon, Andrea. and Snchesz-Graells, Albert (2016), 'When Are Universities Bound by EU Public Procurement Rules as Buyers and Providers? – English Universities as a Case Study', Ius Publicum, 2016, No 1. [online] (available at: http://www.ius-publicum.com/repository/uploads/14_03_2016_9_04-Gideon_SanchezGraells_DEF.pdf)

[2] Available online at https://www.legislation.gov.uk/ukpga/2010/15/schedule/19

[3] Available online at https://www.legislation.gov.uk/ukpga/2010/15/section/149

(b) regional or local authorities;
(c) bodies governed by public law;
(d) bodies listed in Schedule 19 (Public authorities) of the Equality Act (2010).
(d) associations formed by one or more of the authorities in paragraph (b) or one or more of the bodies in paragraph (c)**, or one or more of the bodies in paragraph (d),** if those associations are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character

This change would make the Instrument clearer, since organizations, could confirm that they are public sector bodies by consulting the list in Schedule 19. Moreover, the proposed change would bring the Instrument into closer harmony with the Equality Act (2010), since organizations that are subject to the Public Sector Equality Duty should already take accessibility into account in their websites and apps (e.g. they must take 'steps to take account of disabled persons' disabilities'[4]). The Instrument could, therefore, help these organizations by making their existing duties more precise.

3 - Do you understand the types of bodies that will be exempt? [no] [further comments]

The list of exempt bodies is not sufficiently clear. First, we note that it is proposed that schools, nurseries and kindergartens will be exempt. Unless 'schools' is more clearly defined for the purposes of the Instrument, this exemption could lead to uncertainty in the education sector. The Instrument should give a definition of 'schools' in its definitions section. This definition should be such that further education colleges and higher education providers are not counted as 'schools'. We note that Schedule 19 of the Equality Act gives separate listings for 'further education' and 'higher education' and schools.

Second, the partial exemption for non-governmental organizations (NGOs) is unclear. We note that NGOs are not exempt if 'they provide services that …

[4] Available online at https://www.legislation.gov.uk/ukpga/2010/15/section/149

specifically address the needs of, or are meant for, persons with disabilities'. This could give some non-governmental public sector bodies the impression that they are exempt because they are not a specialist service for disabled people. However, the Equality Act (2010) Public Sector Equality Duty requires that all Schedule 19 organizations promote social inclusion for disabled people; this is a positive duty as opposed to a requirement not to discriminate.[5] To make this clear, the Instrument should explicitly rule out Schedule 19 organizations from the NGOs exemption. For example:

> 3.— (1) These Regulations apply to a website or mobile application of a public sector body, except a website or mobile application of—
>
> […]
>
> (b) non-governmental organisations, unless they provide services that—
>
> (i) are essential to the public; or
> (ii) specifically address the needs of, or are meant for, persons with disabilities; or
> (iii) are listed in Schedule 19 (Public authorities) of the Equality Act (2010), or are associations formed by a body listed in Schedule 19

[5] e.g. 'promote understanding' between disabled and non-disabled people and encourage disabled people 'to participate in public life or in any other activity in which participation by such persons is disproportionately low'. The relevant section of the Equally Act is online at https://www.legislation.gov.uk/ukpga/2010/15/section/149

4 - Would your organisation's website or apps fall under this exemption? [Not applicable]

5 - Do you agree with the exemption for schools, nurseries and kindergartens? Please explain your answer. [no] [further comments]

The partial exemption for schools should be reconsidered. It is justified where there would be a disproportionate burden on the school, but since there is already an exemption for disproportionate burden, the separate partial exemption for schools may not be necessary. Moreover, it cannot be presumed that all schools would qualify for the disproportionate burden exemption since schools vary greatly in respect to the tests for disproportionate burden, e.g. size.

Furthermore, the partial exemption for schools should, if it remains, be clarified. We note that the exemption is made 'except for the content of their websites or mobile applications relating to essential online administrative functions'. Where school education is delivered in part through a website or mobile application, the relevant web and app should be regarded as 'performing essential online administrative functions'. E.g. even in the case of schools, virtual learning environments and blended learning web portals should comply with the accessibility requirement. This should be explicit in the text of the Instrument. For example

> (c) schools or nurseries, except for the content of their websites or mobile applications relating to essential online administrative functions**, and the content of their websites or mobile applications which are used in the course of teaching and learning.**

6 - Do you understand the content exemptions and whether they apply to content held by your organisation? [no]

7 - If you don't understand, please explain what further information or guidance might assist you to determine whether content is exempt from the Directive.

We would like to highlight the following partial exemption:

> "office file formats [such as PDFs, MS Office documents or equivalent] published before 23rd September 2018, unless such content is needed for active administrative processes relating to the tasks performed by the public sector body concerned".

Office file formats are made available as part of websites both to support 'tasks performed by the public sector body concerned' and to support tasks that the service user must perform to access the relevant service. For example, a university student may be directed to the university's virtual learning environment in order to access some data that she must analyse as part of her coursework assignment. The file containing the data should be accessible. To make this clear, the Instrument could read

> "office file formats published before 23rd September 2018, unless such content is needed for active administrative processes relating to the tasks performed by the public sector body concerned **or needed for processes performed by members of the public in order to engage with the public sector body**".

In addition, the Instrument should include a definition of 'third-party content'. It is common for public bodies to contract private organisations to develop some or all of their websites. Clearly, content developed in this way should not be counted as 'third party' and should remain subject to the accessibility requirement; the definition of 'third-party content' given in the Instrument should make this clear.

Lastly, we take it that some kinds of content have been made exempt because it is difficult to make them accessible using current technology. As technology progresses, the regulations should expand to cover some of these forms of content, e.g. live time-based media. Government should carry out a review of content exemptions, starting at the end of the implementation timeline for the regulations as presently formulated, i.e. starting in June 2021.

8 - Do you understand the concept of a 'disproportionate burden assessment'? If not, please explain any concerns or difficulties you have with this definition.[Any comment]

There is a risk that, in some cases, public sector bodies will mistakenly judge that compliance would pose a disproportionate burden, when in fact the burden would not be disproportionate. To minimise this, we propose the following.

First, the government should set out clear guidance on making a disproportionate burden assessment. As far as possible, the guidance should harmonise the consents of 'disproportionate burden' and 'reasonable adjustment' as used in the Equally Act (2010): where meeting accessibly requirements would be a 'reasonable adjustment' it cannot also be a 'disproportionate burden'. In addition, the guidance should include the point made in the consultation document that 'Lack of priority, time or knowledge are not relevant considerations for the purposes of this assessment'.

Second, where a public body exempts all or some of its web or app content after a disproportionate burden assessment, the assessment itself - its reasoning and conclusions - should be made public and be included in the accessibility statement, along with the details of 'the parts of the accessibility requirement that could not be complied with'. The government's consultation document hints at the same proposal: 'If, on the basis of its assessment, a public body decides it would impose a disproportionate burden to meet the accessibility requirements, **it must explain this** in its web accessibility

statement' (emphasis added) but this is not clear from the text of the draft Instrument. Greater clarity on this point could be achieved as follows:

> (4) If, following a disproportionate burden assessment, a public sector body determines that compliance with the accessibility requirement would impose a disproportionate burden, it must—
> (a) publish its disproportionate burden assessment in its accessibility statement, including details of the parts of the accessibility requirement that could not be complied with and the reasons why these parts of the accessibility requirement could not be complied with

Third, the public body should report its use of the disproportionate burden exemption (by means of sending a link of its accessibility statement) to the Government's reporting and monitoring body (e.g. Government Digital Service) and the enforcement body (e.g. the Equality and Human Rights Commission). After six months or a year of such reporting, the data on disproportionate burden assessments could be used to help improve implementation of the Directive. The Government should use the data to develop a strategy to support public bodies to develop their capacity to more fully comply with the accessibility requirement. E.g. if a particular kind of content is frequently exempted after disproportionate burden assessments, the government explore ways to make it easier for public bodies to make that content accessible. Furthermore, the enforcement body should use the data to conduct a review of the use of the disproportionate burden assessment. This review would identify cases of misuse, and instruct the relevant public bodies to make a new assessment; the review could also inform an update to guidance on carrying out disproportionate burden assessments.

Finally, the government should consider employing an alternative phrase to 'disproportionate burden'. The Instrument's use of this phrase may be taken to suggest that accessibility is an additional burden outside of the normal functioning of digital services, rather than something that improves digital services for disabled people and all users. An alternative phrasing for the assessment might be 'organisational capacity assessment', and the exemption could be referred to as the 'insufficient organisational capacity exemption'.

9 - Does your organisation currently publish an accessibility statement?

Policy Connect has not published an accessibility statement. We are in the process of drafting a statement alongside wider improvements to our website, including for accessibility.

10 - If yes, what does the statement include? [N/A]

11 - Do you think the content of the accessibility statement above will help users to better access content and services? [yes] [further comments]

In our answer to question 8, we suggest that the accessibility statement include any 'disproportionate burden assessment' that the public body has made. In addition, we would suggest that accessibility statements provide guidance to users about how to take advantage of the accessible design of the website. E.g. if a website allows users to customise the background colour, the accessibility statement should direct users to this feature.

12 - Do you anticipate that you or your organisation will need guidance and/or training in order to meet this Directive? [N/A]

13 - If yes, what guidance and/or training will you or your organisation need? [Free text answer]

Whenever possible, public bodies should be supported to get it right first time so that enforcement is needed only in a small number of cases. In this connection, we note the government's intention to 'use the monitoring and reporting body (GDS) to raise awareness, produce guidance and, where appropriate, provide training.' We recognize the expertise of GDS in this area and welcome plans for GDS to provide these much-needed services to ensure that the Directive is implemented successfully. However, GDS should not take a one-size fit all approach to awareness raising, guidance and training. Difference public sector bodies use very different kinds of websites and apps,

and for different purposes: e.g. an NHS trust website is quite different and serves a different function to that of a university's virtual learning environment (e.g. the latter will contain more time-based media but fewer still images). For this reason, the government should take a sector-by-sector approach. GDS should consult with stakeholders to identify a range of sectors, e.g. health and care, education, local authority, government, etc., and engage trusted institutions in each sector (e.g. The Local Government Association, NHS Digital, etc.) to help deliver training, guidance and awareness raising.

14 - Do you have any comments on proposed enforcement of the Directive?

We note that the proposals on enforcement are incomplete: the enforcement section of the draft Instrument has been left blank. However, we recommend that the enforcement mechanism be proactive and not place undue burden on disabled people. An enforcement mechanism that relies on disabled people to engage in lengthy complaint processes or even litigation is both unfair to disabled people and fails to act as a deterrent to organisations that would neglect to comply with the regulations. It is right that disabled people have the opportunity to refer cases to the enforcement body, but this should not be the only route by which enforcement is triggered (we cannot assume that if no one is complaining all is well) and, where a referral is made to the enforcement body, that body must take the issues forward without relying on the disabled person themselves to give up substantial time and energy. For example, when a public body comes to the attention of the enforcement agency for failure to comply, the enforcement agency should give the public body a timetable in which to comply and monitor adherence to that timetable. We note the governments statement that it is 'considering the potential to use the existing equality structures and legislation for enforcement of these obligations where possible.' The enforcement of the Equality Act (2010) has placed too high a burden on disabled people and relied too heavily on civil litigation[6]; this failing should not be replicated in the enforcement of the new web accessibility

[6] See, e.g. Lords' Select Committee on the Equality Act 2010 and Disability (2016) 'The Equality Act 2010: the impact on disabled people [online] (available at https://publications.parliament.uk/pa/ld201516/ldselect/ldeqact/117/117.pdf)

regulations. Because the web accessibility regulations set standards and make precise requirements they lend themselves to pro-active enforcement and the government should take this pro-active approach.

We further note that the Directive states that 'Member States shall ensure that an enforcement procedure, such as the possibility of contacting an ombudsman, is in place to guarantee an effective handling of notifications' but that the Government states that it does not 'intend to develop a new oversight body for enforcement, as this may potentially lead to confusion with the existing arrangements'. If the government does nominate an existing enforcement body, e.g. the Equality and Human Rights Commission, that body should be empowered to allow it to take steps appropriate for the enforcement of the new regulations: enforcement should not be limited by the existing powers of an existing body. If an existing body cannot be given powers appropriate to the enforcement of the regulations, a new body should be established with those powers.

In addition, we note the government's statement that

> In respect of any proposed sanctions for failure to comply with the accessibility requirements, we do not currently intend to introduce new fines.

It is disappointing that this is the only explicit reference that the consultation makes to sanctions. Sanctions are a well-established part of effective enforcement mechanisms and should be a part of enforcement of the present regulations. Furthermore, because the web accessibility regulations set technical standards and place clear requirements on public bodies, they are well suited to an enforcement mechanism that includes fines; the government should reconsider the option of introducing fines.

Lastly, we recommend that, once the UK withdraws from the European Union, the reporting body instead report to parliament and make this reporting public. This will help ensure that implementation of the Directive receives adequate public scrutiny.

15 - Are the obligations in the regulations clear and easy to understand? If there is anything you do not understand, please advise.

In our answers to the questions above we suggest several ways in which the regulations could be clarified. Thank you for considering our response to the consultation.

Appendix: the All-Party Parliamentary Group for Assistive Technology (APPGAT)

Policy Connect provides the secretariat services for the APPGAT. The APPGAT is made up of MPs and Peers who are interested in the opportunities presented by assistive technology; it is chaired by Seema Malhotra MP and Lord Holmes of Richmond. The APPGAT is designed to facilitate discussion between the sector and Parliament and make policy interventions on issues surrounding assistive technology (AT).

The APPGAT works by holding events in Parliament, bringing experts and politicians together for roundtable discussions, symposia, and receptions; we use the findings from these policy events to develop briefings, term papers and research reports, to inform and influence Parliament, Government and civil society.

Policy Connect is supported by member organisations that both fund our work and provide valuable expertise from across the relevant sectors of our policy work. In connection with our work on accessibility, we would like to thank, in particular, Jisc and the associate member organisations of the APPGAT: