Legal Bulletin Issue 12
Legacy Edition

DRC Legal Achievements: 2000–2007

Disability
Rights
Commission

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DRC Legal Achievements: 2000–2007

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Editorial

Welcome to this special edition of the Disability Rights Commission's Legal Bulletin

In this, our twelfth and final issue, we mark the end of the Disability Rights Commission (DRC), which closes its doors on 30 September after more than seven years of working towards equality for disabled people. Specifically, we celebrate and reflect on the significant contribution of the DRC's legal work towards achieving the Commission's overall aim of a society where all disabled people can participate fully as equal citizens.

We are delighted that an array of distinguished commentators have taken this opportunity to share their thoughts on particular aspects of our legal strategy. Experts in the fields of employment, rights of access, education, interventions, human rights, formal investigations and mediation reflect on the DRC's contribution in these areas and consider the lessons that might be learned by the new Commission for Equality and Human Rights (CEHR), which takes up the reins on 1 October 2007. We hear fascinating perspectives of claimants, business, judiciary and lawyers on the achievements of the last seven-and-a-half years, and their thoughts on where we go next.

In addition, some twelve years after helping to pilot the original Disability Discrimination Act through Parliament, the former Minister for Social Security and Disabled People, The Rt Hon William Hague MP, reflects on progress. Plus, in a special feature, Justice Albie Sachs presents a remarkable insight into his experiences as a judge at the Constitutional Court of South Africa.

Of course, whilst celebrating progress, we remain acutely aware that the journey towards equality is unfinished and continues with or without a DRC. This is brought into sharp focus as we consider just a few of the many live issues that will roll over from the DRC to the remit of the CEHR from October – including the Disability Equality Duty, associative discrimination, and, of course, the Discrimination Law Review.

But it would be wrong if we did not take the opportunity that 1 October 2007 presents to take stock of where we are now and how we have arrived here. So, this final Legal Bulletin is very much about preserving the legacy of our legal work, celebrating successes and highlighting lessons learned. It includes summaries of key DRC cases over the life of the Commission, of our formal investigations and of the evolution of disability discrimination legislation since 1995. We have also added a catalogue of all articles from previous issues of Legal Bulletin. By capturing so much of our key legal work in one place, I'm sure you will find this publication will serve as a practical reference tool for future use after the DRC has dissolved – which is when the next leg of the journey begins.

Regards

Martin Crick
Editor

Foreword

Anne McGuire MP, Minister for Disabled People

As Minister for Disabled People, I welcome this opportunity to reflect on the DRC's progress against its remit of working to eliminate discrimination against disabled people and to promote equal opportunities and good practice. We have come a long way since April 2000 and, when the DRC hands over the baton to the CEHR in October, it will be doing so secure in the knowledge that its considerable achievements have brought us much closer to our shared vision of a society where all disabled people can participate fully as equal citizens.

The various elements of the DRC's work are all, to some extent, interdependent – informing and impacting on each other. The DRC has talked in the past about a 'continuum of enforcement,' starting with information and advice through to support for strategic legal cases. I would like to touch on some of the elements in that continuum.

- The DRC's **Codes of Practice**, which explain legal rights and requirements under the Disability Discrimination Act (DDA), have provided valuable practical guidance – particularly for disabled people, employers, service providers and education institutions, public bodies and others such as trade organisations. The Codes are not definitive statements of the law but courts and tribunals must take them into account. The Codes, therefore, influence, and will continue to influence, the application of the law.

- The Commission's **support for individual cases** has been of great importance, not just to the individuals concerned, but strategically, in testing, elucidating and raising awareness of the law. The *Archibald* case is but one of many notable examples. There have also been key interventions in human rights cases such as the *East Sussex County Council* case, which have helped demonstrate that the Human Rights Act can be a vehicle to increase disabled people's participation. This activity has made an important contribution to the developing body of case law, the impact of which will continue to be felt well beyond the DRC's lifetime.

- The Commission's highly successful use of its power to enter into **voluntary binding (section 5) agreements** with education providers, service providers and employers in the public, voluntary and private sectors has, for example:

  - led to institutional change, which has benefitted and will continue to benefit other disabled people and non-disabled people using the provider's service; and

  - facilitated the movement of organisations beyond compliance to a good practice culture.

  Moreover, as organisations successfully develop and implement their action plans, sharing their successes through relevant sectoral events and media, this will drive up standards more widely.

- The Commission's **formal investigations** have thrown the spotlight on the accessibility of websites and the health inequalities experienced by people with learning disabilities and people with mental health problems. As

I write, the Commission's 'Fitness Standards' formal investigation, which is looking at the barriers that disabled people face in trying to pursue careers in teaching, nursing and social work, is ongoing. I anticipate that this investigation will also lead to tangible outcomes that have a positive and lasting impact on the life chances of disabled people.

- The DRC is, of course, charged with **keeping the working of the DDA under review**. The legal work referred to above will have helped inform the Commission's review of the legislation: 'Disability Equality: Making it Happen'. This review and the Commission's ongoing input were of critical importance to the debate on the development of the DDA 2005 and the consequent extension of disabled people's rights. The Discrimination Law Review is, of course, still in progress, but the Commission's contribution continues to be critical to that debate.

Looking ahead to the CEHR opening for business, the Disability Committee, under Dame Jane Campbell's canny stewardship, will ensure that disabled people continue to steer the forward strategy as they do now in the DRC and that disability permeates all the CEHR's activities. The CEHR will, of course, develop its own ethos and strategies and will be able to draw on the remarkably strong foundation of the DRC's many achievements and powerful legacy, all underpinned by its legal work.

Anne McGuire

Chairman

Sir Bert Massie

When the DRC was being formed early in 2000, it was clear that disabled people had high expectations of the new organisation. One reason, amongst many, was that when the DDA was passed in 1995, the Government established an advisory committee rather than a Commission with enforcement powers. The DRC was created because disabled people needed support if they were to be able to enforce the rights that Parliament had given to them.

In April 2000, I said that the policy of the DRC would be to use the force of argument, but if people failed to listen we would use the argument of force. That is what we have done. Our Helpline (which has won national awards) has advised hundreds of thousands of disabled people on how to assert their rights in the face of discrimination. Our Conciliation Service has helped people to resolve issues without recourse to the courts. Through our Codes of Practice, our website, and our work with the public and private sectors, we have sought to ensure that ignorance of the law should never be a valid excuse for discriminating.

But none of this work would have been effective if the DRC had not had a clear legal strategy to enforce the law. We have used the nation's highest courts to test the law. We have shown that human rights principles can inform and strengthen equality law. We have proven that the DDA is not a paper tiger but has sharp teeth and strong jaws. But although the DRC is to end, the

struggle must not. There is still a long road to travel. The Disability Equality Duty remains untested. Others must take the reins and set the future direction. If they do so in the style of the DRC, disabled people will have the ability to use the DDA to free themselves from the curse of discrimination.

Bert Massie

Part 2 DDA: Employment

Why the DRC's legal strategy succeeded

Michael Rubenstein

Michael Rubenstein is a writer, lecturer and adviser on employment and discrimination law. He has edited 'Industrial Relations Law Reports' since its inception in 1972 and 'Equal Opportunities Review' since it was started in 1985. He is chair of the Disability Discrimination Act Representation and Advice Project, former chair of the Industrial Law Society, and a trustee of the Wainwright Equal Opportunities Trust. He has acted as a legal adviser to the DRC on the revision of the Part 3 Code of Practice.

In the cosy world of employment and discrimination lawyers, it is generally agreed that the DRC has been a great success story. A lot of this is due to outstanding leadership and excellent staff, but it is also, in no small measure, due to the Commission's legal strategy.

> 'It is generally agreed that the DRC has been a great success story'

As an informed observer, and sometime consultant to the DRC, I only saw one part of the picture, but from my perspective there are several factors that explained the success of this strategy, and the DRC's experience in this regard offers valuable lessons for the new CEHR.

The first lesson is the need for a commitment to shaping the law. From the outset, the DRC embraced its role as 'the guardian' of the DDA. The Commission's priority has not been on heavy-handed law enforcement, but on strategic involvement. The DRC rightly recognised that focusing on a selection of key cases at appellate level that will lead to binding precedents has far more impact in the longer term on the rights of disabled people than running or supporting hundreds of cases in the employment tribunal. This strategy has paid major dividends, most notably by taking Susan Archibald's case to the House of Lords, leading to a decision that gave a broad interpretation to the duty of reasonable adjustment.

A key component of this part of the DRC's legal strategy was its pioneering approach of seeking leave from the court to intervene in some of the most important test cases, on grounds that it was an organisation having an interest in the outcome of the proceedings. Until this role was accepted, the only way a statutory commission could have its voice heard was by taking on the claimant's case. The new approach allows the Commission to set out its opinion, as the expert body, on how the law should be interpreted without having to take a view on the detailed facts of an individual case. This important role has now been formalised by the Equality Act 2006, which gives the CEHR the statutory right to intervene in judicial proceedings. It is to be hoped that they will regard this power as a core part of their legal strategy.

'The first lesson is the need for a commitment to shaping the law'

The reason why this is so vital is not just because it is simply impossible for a statutory commission like the DRC – let alone the CEHR – to support more than a very small proportion of the thousands of discrimination claims brought each year. It is because the most effective way to enforce the law is not by seeking redress, after the event, for those who have been discriminated against, but to

> ‘the CEHR would do well to follow the DRC’s approach [to Codes] of setting out clearly what the law requires, with lots of user-friendly examples’

create a framework which minimises the likelihood of someone being unlawfully discriminated against in the first place.

A crucial component of that preventative framework is that those who must comply with the law need to know what is expected of them. Codes of Practice have a key role to play in this respect, and the DRC’s statutory Codes have been a model of their kind. The various disability Codes, such as those relating to employment and to access to goods, facilities, services and premises, have not hesitated to set out the Commission’s own interpretation of what the law means in practice. This has been done with outstanding clarity and with conviction and, quite frankly, is in marked contrast to some of the Codes of Practice produced by the other statutory commissions. It is, however, very much in keeping with the DRC’s perceived role as the guardian of its legislation.

Codes of Practice will be one of the first challenges to face the new Commission. There are no Codes covering religion or belief, sexual orientation or age discrimination. Should the CEHR produce separate Codes for all the strands, or should the new Commission be thinking in terms of generic Codes, anticipating a single Equality Act, such as a Code covering recruitment issues? Whatever decision is made, the CEHR would do well to follow the DRC’s approach of setting out clearly what the law requires, with lots of user-friendly examples.

As a single equality commission, it is to be hoped that the CEHR will have more clout with government than have had the individual Commissions acting on their own, and that this will facilitate the CEHR’s legal strategy. Two aspects come to mind. One relates to the European Court of Justice (ECJ). The UK government has the right

to intervene in all cases that come up before the ECJ from other Member States. It hardly needs emphasising that the outcome of these decisions can have a profound effect on our own discrimination law, yet the view put forward by the UK government as to how EU legislation should be interpreted has often not reflected the view of the expert statutory commission. Traditionally, in fact, the commission has not even been consulted!

Another problem was highlighted by the recent Court of Appeal case of *O'Hanlon v Commissioners for HM Revenue and Customs*, in which one of the arguments put forward by the Revenue was directly contrary to a key part of the DRC Code of Practice and led Lord Justice Sedley to comment that, if it was right, 'people would justifiably wonder what the point of the Disability Discrimination Act was'. The submission was unsuccessful, but it is to be hoped that the CEHR will be able to secure a more joined-up and strategic approach by government as to the correct interpretation of discrimination legislation.

Strategic litigation in enforcing the duty to make reasonable adjustments

Robin Allen QC

Robin Allen QC is head of Cloisters Chambers and has been a special legal adviser to the DRC since 2002. He has appeared in many of the leading employment, discrimination, public and human rights cases, including reported cases every year since 1978. He is the first person to have more than 100 reported cases in the Industrial Case Reports (ICRs). In 2006, he appeared in three House of Lords cases and one in the European Court of Justice. He acts for a very wide range of clients, from individuals to FTSE companies, major trade unions, charities and accountancy firms. Robin Allen QC took silk in 1995.

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Everyone knows that the DRC was created in response to the entirely justified demand of the disabled community to have its own national champion to complement the Equal Opportunities Commission (EOC) and the Commission for Racial Equality (CRE). Created by the Disability Rights Commission Act 1999, it was able to look at, and learn from, the long experience of these other bodies working with broadly similar powers. One key aspect of their experience over the previous twenty or so years was the use of strategic litigation. Anyone knowledgeable about legal work would be able to point to both the leavening role

of successful strategic litigation, but also the ghastly, deadening effects of cases that went wrong. Given the vital role of these Commissions in altering perceptions and in setting new normative standards for good practice, the risk of bad outcomes was a very serious one. It can take years of persuasion to get government to put an amending Bill before Parliament. Sometimes it requires prolonged pressure from Europe. Sometimes it is just not possible.

So given how hard won a victory the creation of the DRC was, it would have been entirely understandable for the new Commissioners and their key staff to decide to go slowly on the strategic litigation front, preferring to avoid litigation risks and to work solely on policy development. There was no doubt that when the Commission came into existence it was staffed with excellent policy staff, but its experience of strategic litigation was less. The key point is that the Commission did not shy at the challenges they were set.

‘it is one of the very greatest achievements of this Commission that Commissioners and staff did not feel overcome by the risk inherent in litigation’

Indeed, in my view it is one of the very greatest achievements of this Commission that Commissioners and staff did not feel overcome by the risk inherent in litigation, risks which can be equated to those inherent in love, war and the high seas! On the contrary, I have rarely seen such a combination of political confidence, deep analysis of what was wanted out of a piece of legislation (the Disability Discrimination Act 1995) and resolute determination to get it. It has been an unforgettable privilege for me to work with the Commission on this.

Firstly, it must be said that the Commission has never been reckless. There have been many strategic cases that have been taken by it during its life. Finding the right cases is often not easy, and the Commission has been careful not to just pursue a litigation strategy when other courses have

been open for it to secure change. However, when they have not been successful the Commission has not hesitated to act.

One very good example of this is the, as yet unresolved, litigation in *Coleman v Attridge Law* (see page 103). The Commission and other commentators could not understand why the Government, in proposing amending legislation to implement the European Employment Equality Framework Directive 2000/78/EC, chose not to protect persons who were discriminated against on the grounds of their association with persons who were disabled, in just the same way that those who suffered discrimination because of their association with persons of a particular racial group were protected.[1]

Initial discussions with Government were not fruitful. Yet rather than immediately move to a judicial review for non-compliance with European law, when the Government offered what later became the Disability Discrimination Bill 2005 to Parliament for pre-legislative scrutiny, the DRC proposed an amendment to secure equivalent protection. Yet, though the pre-legislative scrutiny committee could see the good sense of this, the Government did not adopt the proposal. Only then did the Commission consider itself forced to pursue strategic litigation.

When Mrs Coleman and her solicitors, following a decision by an Employment Tribunal to refer the issue of compliance to the ECJ, sought assistance from the Commission, they acted. Having failed in their non-litigation efforts to get amendments, the Commission were now ready to get involved. They have supported Mrs Coleman in resisting the appeal by the solicitors against the decision to refer[2] and have supported her in

1 See, for example, *Zarczynska v Levy* [1979] ICR 184, *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65, and *Weathersfield v Sargent* [1999] ICR 425.

2 See [2007] ICR 654, [2007] IRLR 88.

formulating observations for the ECJ. It is in one sense sad that this is unlikely to be resolved before the Commission ceases to exist at the end of September, but it will be a very important piece of legacy work for the new CEHR.[3]

Coleman is a case demonstrating how the Commission has chosen not to move precipitately to litigation when another way of resolving the problem presented. But often there is no other way and then the choice of cases is critical. Bad facts or inadequate findings at first instance can be the ruin of strategic litigation. So, when it is determined to go for a litigated solution to a problem, the very greatest care is needed in the selection of cases. On the other hand, you can wait a long time for the perfect case and, in any event, if the facts are too good, it may well be that the proposed opponent will not be up for the fight! So a little luck in the presentation of an adequate case or set of cases is always called for. Yet, when luck is with you, it is still necessary to have the boldness to take the cases.

Three cases which demonstrated these qualities, and with which I had the good fortune to be involved, are *Collins v National Theatre* [2004] IRLR 395, *Law v Pace Micro Technology plc* [2004] EWCA Civ 923 and *Archibald v Fife Council* [2004] IRLR 651.

Collins and *Law*

Collins was the first of these cases and it concerned the thorny problem of justification. To explain its significance it is necessary to recap on a little history.

In the run up to the proposals for the original Disability Discrimination Act, it was proposed that there should be two kinds of disability discrimination – disability-related discrimination and reasonable adjustment discrimination.

3 It is interesting to note that the report of the Discrimination Law Review recognises that there may have to be changes to better support those who suffer discrimination by association.

It was proposed that the former might be justified but the latter should not. However, Parliament, in perhaps a misplaced desire for symmetry, decided that it should be enacted that they should both be capable of being justified. Issues then arose as to how and to what standard should such justification take place.

> 'I have rarely seen such a combination of political confidence, deep analysis of what was wanted out of a piece of legislation and resolute determination to get it'

In *Jones v Post Office* [2001] ICR 805, a case not backed by the Commission, the Court of Appeal addressed these issues in a disability-related discrimination case. They reached the view that the test was akin to that in relation to the reasonableness of a decision to dismiss for unfair dismissal law.[4] This judgment was a classic example of a wrong turn in path-finding litigation. A justification test which enabled employers to escape liability for disability-related discrimination on the grounds that what they did was within the range of reasonable responses, obviously disabled the Employment Tribunal from setting standards. Worse, it left employers almost as sole arbiters, acting in their own interest, as to what the 1995 Act required. The DRC knew that this had to be confronted.

Collins provided the opportunity, though the facts were not, on their face, that promising. Mr Collins had worked for the National Theatre for many years as part of the stage crew, and had suffered a nasty accident in which he had lost the tip of his finger. He experienced hypersensitivity in that finger as a result. He wanted to come back to work even so. However, the National Theatre considered that he would not be able to work with power tools when working on the stages.

Prior to the 1995 Act, it might well have been thought that it would be dangerous for a person with a hypersensitive

4 See *Foley v Post Office* [2000] ICR 1283.

finger to work such tools and that their dismissal would obviously be justified. However, he asked for a simple reasonable adjustment – a trial run to see how he got on. The Theatre refused and so he sued. While he succeeded at first instance, the Employment Appeal Tribunal overturned the decision on the basis that even if it was a reasonable adjustment, the decision of the employers not to permit the trial was within the range of reasonable reactions and was so justified.

'Mrs Archibald's case presented dream facts for strategic litigation'

The DRC briefed Catherine Rayner and me to persuade the Court of Appeal that a different approach should be taken in reasonable adjustment cases from that in disability-related discrimination cases. Notwithstanding the similarity in the wording of the text dealing with justification in the two different kinds of discrimination, it was proposed to argue that they must mean different things, rather than to take on the judgment in *Jones*. To attack *Jones*, it would have been necessary to go to the Lords.

The argument which was accepted by the Court of Appeal was simple: notwithstanding the similarity in the wording of the Act, it was appropriate to recall in the case of reasonable adjustment discrimination, that the issue of justification arose only once the Employment Tribunal had decided, by reference to all the circumstances, that an adjustment should have been made. So, it was asked rhetorically, what legal space was left for justification arguments? The Court of Appeal saw the point and answered – very little space indeed; in fact, it was so little that no one could imagine what it might be! Thus the chilling effect of *Jones* on the development of anti-discrimination law for disabled persons was stalled. Shortly after, in the case of *Law,* a different division of the Court of Appeal agreed.

But the key remaining question was: how could this limit on justification arguments in reasonable adjustment cases be made to limit the effect of *Jones* in disability-related

discrimination cases? Mrs Archibald's case provided an answer to this, while at the same time being a strategic case of great importance – and indeed some controversy – in its own right.

Archibald

Mrs Archibald's case presented dream facts for strategic litigation. Her plight could not fail to engage sympathy; once known, the facts of her determination and feistiness in the face of her disability could not fail to engage profound admiration. Moreover, the Employment Tribunal seemed to have made a fair mess of the issues and the appellate litigation produced more heat than light.

Mrs Archibald was a street sweeper for Fife Council. She became disabled by simple bad luck when an injection in the course of one of her pregnancies led to her being unable to work. She realised that she could not push a broom again. So she retrained in IT work. She passed her retraining with flying colours. She then applied for over 100 jobs in the council so that she could continue her employment with them, but, though interviewed, she was never successful. However, she argued that a reasonable adjustment should be made to enable her to simply transfer without an interview. Fife refused and ultimately she was dismissed.

> '*Archibald* has meant that now, in almost all cases, the first issue for any litigant is whether or not there was a failure to make a reasonable adjustment'

The DRC took the case to the House of Lords. There, the argument was principally concerned with the issue of whether or not it was a possible reasonable adjustment for a Council to be asked, in a case such as this, to suspend its equal opportunities policy, which required that all appointment decisions be determined by competitive interview. In the process, the Lords were also required to consider whether *Collins* was correctly decided and therefore whether there was any

possibility that a decision not to make a reasonable adjustment could be justified. The House affirmed *Collins* in Opinions that explored in depth how the reasonable adjustment provisions of the 1995 Act worked. Most importantly it was acknowledged that these provisions were remedial positive action provisions.

‘reasonable adjustment may mean positive action’

The justification provisions in the original text of the 1995 Act, as they applied to discrimination in failing to make a reasonable adjustment, have now been removed. So the head scratching that the Court of Appeal had to undertake in *Collins* will never be necessary again. *Collins* exposed the logical inconsistency in Parliament's first attempt to legislate in this area, but it required the Commission's determination to explore, in strategic litigation, the apparent weakening of the rights of disabled persons that the Court of Appeal's judgments in *Jones* had exposed, to make this happen.

Archibald has meant that now, in almost all cases, the first issue for any litigant is whether or not there was a failure to make a reasonable adjustment. That is now the dominant issue in any case of employment discrimination. If there is, then it does not matter that there was also some disability-related discrimination. The obligation to make the reasonable adjustment is not qualified and cannot be stalled by a justification argument. Moreover, reasonable adjustment may mean positive action.

The legal team of the DRC has been rightly recognised for its determination to take *Archibald* to the Lords by *The Lawyer* magazine (see page 25). As for Mrs Archibald, she stood for Parliament at the last election. There seem to be few things she is not prepared to try and change; oh and yes, she has got a job with the Council!

A claimant's perspective: *Archibald v Fife Council*

Susan Archibald

Susan Archibald was the claimant in the case of *Archibald v Fife Council* [2004] IRLR 651. In this hugely significant case, discussed by Robin Allen QC on pages 15 to 22, the House of Lords explored how the reasonable adjustment provisions of the DDA worked and acknowledged that they might entail positive action.

Here, Mrs Archibald reflects on the case and what has followed since.

I would describe my case as a bit like running a marathon – it was a long, hard struggle but I got there in the end!

It began when I couldn't continue with my job as a road sweeper with Fife Council as complications following surgery in 1999 left me able to walk only with sticks. I had previously worked as an administration assistant and went for retraining to update my skills. However, under the council's redeployment policy I had to undertake competitive interviews to secure other positions and I applied unsuccessfully for over 100 posts within various departments. Eventually, the council dismissed me on grounds of capability. (Ironically, I later applied to Fife Council to become supervisor of a local community centre and got the job on my own merits – a job I still hold now!)

At the time, I got very depressed but the DRC then agreed to support my case. Three long years later, the DRC's Head of Scottish Legal Affairs, Lynn Welsh, and I ended up at the House of Lords, who ruled unanimously that I had been unfairly discriminated against under the

Disability Discrimination Act 1995. It was an amazing day. I will never forget when they read out the decision. I cried, not with sadness but relief, as I had justice at last. I swore that would be the last tear I shed for Fife Council.

> ‘I will never forget when they read out the decision. I cried, not with sadness but relief, as I had justice at last’

But the case was not the end for me, it was the beginning. I’ve since spoken at conferences and events all around Britain. I am a national speaker for Unison and was a key speaker on discrimination for The National Critical Lawyers Conference in Kent University this year. I am also an active participant in the Cross-Party Working Group for Mental Health in the Scottish Parliament and am soon joining the Disability Working Group. I appeared on the ‘This Morning’ TV programme to talk about my case last year, and have recently been approached to discuss making a film about my life before and after becoming disabled!

I hold several voluntary roles including Chair of my local Community Council, Trustee for St Ninians Trust and Chair of Directors of Leonard Cheshire's Academy Board, overseeing a pilot scheme to teach other disabled people about their rights and the democratic process, enabling them to lobby MSPs and MPs and to put Bills into the Scottish Parliament for the benefit of disabled people. I am now at the School of Social Entrepreneurs and in the process of starting up an organization called Accessability, an umbrella organization with a remit covering education, employment, counselling, training, conferences, peer support, care support, fundraising, equipment hire and advice. I have also just been picked from thousands of nominations as one of 12 finalists for the *Sunday Mail’s* Great Scot Award.

I was so grateful to the Lords, the DRC and my union representatives for backing me, as without them I had no voice. I didn’t do it for the money, but to fight for justice to

ensure that no-one would have to go through what I went through. Now the law is clearer and disabled people are hopefully in a stronger position to challenge any employer they feel is discriminating against them. Indeed, when I speak at conferences now, lots of people come up to tell me that they got a better job because of my court case. This is reward enough for me – knowing my case goes on to help others. When I talk about my experiences, it inspires others to get up and challenge things.

However there is still a long way to go – I also have heard from hundreds of people who were in similar situations to mine but who did not get help. So there remains plenty of work for the DRC – and the forthcoming Commission for Equality and Human Rights – to do!

DRC lawyers honoured with top award

The contribution of the DRC's Legal Team was recognised when it scooped a prestigious industry prize, winning 'The Employment Law Team of the Year Award 2005' at *The Lawyer* Awards in London.

The Awards, described by the co-chairman of the judging panel as 'honouring the elite of the legal profession', were open to private practice as well as in-house teams.

This remarkable success was reward for an outstandingly successful legal strategy, which established the DRC's legal team at the centre of the evolution of disability discrimination law and its application.

Part 3 DDA: Rights of Access

Roads and *Ross* revisited

Jenny White MBE

Jenny White is a Commissioner for the Disability Rights Commission. She was formerly Legal Adviser at the Electricity Association. Jenny chaired the CBI Disability Working Group when the DDA was enacted, and served on the National Disability Council. Previously on the Board of the Royal National Institute for Deaf People, she is currently a trustee of the Centre for Accessible Environments and a lay member of the research ethics committee for East London and the City.

Towards the end of 2004, the Court of Appeal heard two cases within the space of a few days that brought Part 3 of the DDA into centre stage: *Roads v Central Trains* [2004] EWCA Civ 1541 and *Ross v Ryanair Ltd and Stansted Airport Ltd* [2004] EWCA Civ 1751. Part 3 (access to goods, facilities, services and premises) had received little judicial guidance, so the judgments were particularly welcome.

Both cases concerned the duty of service providers under section 21 to make reasonable adjustments for disabled people. This includes the provision of a reasonable alternative method of service where a physical feature is a barrier to service (section 21(2)(d)).

The decisions have been comprehensively covered in legal journals including the DRC's Legal Bulletin: see 'Trains, Planes and… *Roads*: The Court of Appeal's first journey around Part 3 of the DDA' by Chris Benson and Louise Curtis (issue 7), and 'Adjustments to physical features of service providers' premises – legal and evidential issues' (issue 11/April 2007) by Sarfraz Khan. This is a personal reflection, based on my involvement at the time.

The *Roads* case

Mr Roads was unable to access the platform for Norwich at Thetford Station, either by the footbridge or (without great difficulty) via the alternative route of a rutted lane. He claimed that Central Trains, with sufficient notice, should have provided an accessible taxi to take him to the platform. Although the cost of the taxi was not an issue for Central Trains, they suggested that Mr Roads should travel to Ely, which was accessible, change platforms there and go back to Norwich (which would have added considerably to his journey). His claim for unlawful discrimination was dismissed by the County Court.

The Court of Appeal decided that Central Trains had not provided a reasonable alternative method of service. Because of the unusual facts, the case does not set a precedent for inaccessible stations, but Lord Justice Sedley made some telling observations about the duty to make reasonable adjustments and the underlying policy.

First, section 21(2) focuses on people with the same kind of disability as the claimant (eg wheelchair users as a class). Section 19, which provides a right of action, imposes a double test: does the feature impede people with particular kinds of disability, and does it impede the claimant? These observations, which apply equally to the other duties under section 21, underline the anticipatory nature of the duty of adjustment.

> ‘the policy of the Act is to provide access to a service as close as it is possible to get to the standard offered to the public at large’

Second, in terms of what constitutes a reasonable alternative method of service, if there is only one practicable solution it may have to be treated as reasonable even if it is demeaning. But if there are several options, a suggested solution may not stand up to scrutiny when a better one is available. That is because the policy of the Act is ‘to provide access to a service as close as it is possible to get to the standard offered to the public at large’. It is not merely to ensure that some access is available.

The *Ross* case

Lord Justice Sedley’s comments were adopted in the case of Mr Ross, a disabled person who was unable to walk long distances. He was charged £18 by Ryanair for the hire of a wheelchair at Stansted Airport. Both Ryanair and Stansted conceded that he should not have been charged but disputed who was liable. The County Court found against Ryanair, who appealed.

The Court of Appeal decided that because of the distance between check-in and departure – which was causing great difficulties for disabled people – both defendants had a duty to provide free wheelchairs as a reasonable alternative method of service. Stansted knew that Ryanair had abdicated responsibility but did nothing about it. They were both liable to Mr Ross and the damages were shared between them. Ryanair had also treated Mr Ross less favourably than others since wheelchair owners were not charged.

Significance of the judgments

Both judgments adopted a purposive approach to reflect the policy of the Act and (in *Ross*) to ensure that there is no gap in provision between two service providers.

At the time of Mr Roads' complaint, the physical features duty only included provision of a reasonable alternative method of service. The Court's guidance was directed at the way a service provider considers its options in making such provision. The physical features duty as a whole remains to be tested, but the guidance appears equally relevant to the way a service provider assesses the options of removing, altering or avoiding a feature or providing the service by an alternative method (the hierarchy point discussed by Sarfraz Khan in issue 11 of Legal Bulletin). The inclusive approach suggested in the revised Code of Practice (Rights of Access – services to the public, public authority functions, private clubs and premises, 2006) closely reflects the Court's advice.

The *Ross* decision established that where more than one service provider has duties in the same situation, it is important to agree how those duties are met. The Court's concern was to ensure that the duty is discharged one way or another. The case confirmed that physical features include the sheer scale of premises and that reasonable adjustments must be provided free of charge (new EU regulations will make airports responsible for assistance, the cost to be shared by the airlines).

> 'key messages need to be effectively communicated to the appropriate audiences'

Lessons for the future

What lessons can the CEHR draw from these cases?

First, they demonstrate the imperative of a strategic approach in selecting cases for support. Because of the way Part 3 operates, there is no equivalent to the specialist jurisdiction of the Employment Appeal Tribunal (EAT), so opportunities for appeal to the higher courts are even more critical.

Second, the strategic approach extends to teamwork. The policy lawyers worked alongside their colleagues in the

legal department, and several discussions took place with Counsel to tease out the key issues and ensure that the arguments reflected the policy intent. We were fortunate to have Counsel who were open to this kind of dialogue: Richard Lissack QC and Andrew Short in *Roads*, Jason Galbraith-Marten and John Horan in *Ross*.

Third, the key messages need to be effectively communicated to the appropriate audiences. Following the judgments, the legal department, policy advisers and publicity team agreed what points needed to be conveyed to whom, and how best to achieve that (eg through the website, Helpline briefing, articles in the legal press and changes to the Code of Practice).

The Court of Appeal's judgments have been of seminal importance in shaping and articulating the duty of adjustment on service providers. Further appeals at this level are needed to clarify some of the grey areas now that section 21 is fully in force.

Coda

There was an interesting twist to these cases. Both Mr Roads and Mr Ross had problems getting to the court to hear the appeals. When Mr Ross's difficulties were mentioned, the Court of Appeal requested a report from the DRC. This has resulted in some improvements in accessing the Royal Courts of Justice. In acknowledging the report, Lord Justice Brooke paid tribute to the quality of the DRC's assistance in *Ross*.

A claimant's perspective: *Ross v Ryanair Ltd and Stansted Airport Ltd*

Bob Ross

Bob Ross was the claimant in the case of *Ross v Ryanair Ltd and Stansted Airport Ltd* [2004] EWCA Civ 1751. His case, discussed by Jenny White on pages 26 to 30, was of seminal importance in shaping the duty on service providers under Part 3 of the DDA to make reasonable adjustments. Here, in discussion with Martin Crick of the DRC, he reflects on the dispute which culminated in a successful and significant outcome at the Court of Appeal.

The incident that gave rise to my disability discrimination case against Ryanair and Stansted Airport arose when I was travelling from Stansted to Perpignon, something I did about three or four times a year. I don't use a wheelchair all the time but needed a wheelchair to get me from the airport entrance to the aircraft as the distance was a problem. As somebody who has lived with disability all of my life, I was absolutely amazed to find that I had to pay a surcharge when I used an airport wheelchair and I felt that this was one indignity too many. What sharpened the issue for me was seeing an elderly lady who had not understood the procedure getting terribly confused, being asked to pay money that she obviously did not have to hand, and ending up in tears. So I thought something really needs to be done about this.

A lot of people were frustrated with the staff at Stansted because, at that time, it was the 'wheelchair-pushers' that had to collect the money. But, of course, they are employees like everybody else and my approach has

always been to try to change the policy. I contacted the DRC Helpline and that's where it all began. I was pleasantly surprised that they were interested and I got a call back to say that it had been discussed with the DRC's Legal Department and they thought that there was probably a case to answer.

Before speaking with the DRC, I didn't know what the exact legal position was, as I'm not a lawyer. I suppose that, like a lot of people, I felt that if there wasn't a legal point, there was certainly a moral point to be made. Naturally, I was apprehensive – I went to the barrister's chambers for an initial discussion and I suddenly thought, 'This is actually going to happen, it's going to go to Court – me up against two huge corporations!' But DRC's involvement along the legal route was very supportive, and both my barrister and solicitor were reasonably confident that we could take the issue forward. I don't think I could possibly have pursued the legal avenue without the DRC as the financial implications were potentially vast.

'I contacted the DRC Helpline and that's where it all began'

Initially, we went to conciliation, but it was obvious from that meeting that Ryanair took the firm view that they didn't feel that they had any responsibility to provide free wheelchairs. Inevitably, the litigation had to proceed and a date was set at the Central London County Court. At the hearing itself, I must admit that having a forty-five minute grilling by two barristers was a bit nerve-racking and I've never really been through anything like that before. However, from my point of view it wasn't complicated and the issue was quite clear – that I shouldn't be charged for having a disability.

At the time I was amazed that there was so much press interest in the case. Of course, there was particular interest when judgment was given in my favour, and I think it was then that I realised just how important the

judgment was going to be. However, it was also at that point that Ryanair announced that it was going to put a 50p levy on each ticket to pay for the wheelchairs. Not surprisingly, one or two people that I met in the street afterwards made a joke and said that they wanted their 50p back, but certainly I had a lot of general support. Lots of people that I met would stop and ask me about the case, so it had obviously captured the public interest in many ways.

> ‘the issue was quite clear – that I shouldn’t be charged for having a disability’

Subsequently, we moved on to the appeal hearing at the Royal Courts of Justice. The courts are quite intimidating anyway, but this was compounded by problems that I experienced gaining access. When I arrived at the building, staff couldn’t find a wheelchair for me to get from the front entrance to the Court itself. This meant that we were actually late for the start of proceedings. Consequently, the three Law Lords who were sitting demanded that there was an inquiry into why I was late for the Court and why a wheelchair hadn’t been available.

By the time judgment was handed down by the Court of Appeal, the case had been going on for nearly three years and I was beginning to feel a bit tired. But I was certainly very pleased with the outcome and DRC Commissioner Jenny White and Legal Officer Louise Curtis talked to me about how this was a really important case that would have implications for some time to come. I must admit, there was a time when I was travelling through Stansted shortly after my case, when I just sat there feeling great because people were coming, using the wheelchairs and they were not having to put their hand in their pockets for a charge that they didn’t expect.

In more general terms, I have seen improvements in access to services over the life of the DRC, but I do find that a lot of these changes are reluctant; it’s the force of the legislation with the backing of the DRC that has made the

> ‘it’s the force of the legislation with the backing of the DRC that has made the change’

change. Unfortunately, some people still have a negative attitude towards disability and while the battle for hearts and minds is not yet won, we do need to wave the stick, particularly where larger companies and corporations are concerned. It’s unfortunate, but I think that if people won’t change their attitudes and won’t willingly adapt their premises or do what they need to do to make services accessible, then we must use the law to make them change. I think cases such as mine are important as they really demonstrate what the legal implications are for businesses that fail to comply. They also say to everyone that people with disabilities are no longer prepared to put up with that sort of treatment.

A personal perspective on the role of the DRC

District Judge Gordon Ashton

Gordon Ashton is a District Judge, Deputy Master of the Court of Protection and Visiting Professor in Law at Northumbria University. A member of the Equal Treatment Advisory Committee of the Judicial Studies Board, he writes on topics concerning older and disabled people and the law. Books include 'Mental Handicap and the Law' (1992), 'Law Society's Elderly Client Handbook' (1994; 3rd edn 2004), 'Elderly People and the Law' (1995) and 'Mental Capacity – The New Law' (2006).

I was flattered to be invited to contribute to this final issue of the Legal Bulletin, but was then uncertain as to whether to do so as a parent, a solicitor or a judge.

A parent's perspective

As parents, my wife and I were so busy during the 1970s and 80s coping with a severely learning disabled child who displayed challenging behaviour, that we had little energy to take on issues. In those days, discrimination was accepted and acceptable. A disabled child meant a disabled family and when we emerged from the security of our home, we spent our time apologising for the inconvenience and alarm caused to others. How we wished to be like other couples enjoying a normal family life! We faced barriers in almost every sphere and desperately sought out those oases of support and understanding that did exist.

The DDA 1995 would have reassured us that we had rights and should not be apologetic about our presence in society, but without a body such as the DRC, the new

climate will not become a reality because people disabled by society need co-ordinated support if discrimination is to be eliminated.

A solicitor's perspective

As a solicitor, I became aware of the vacuum in legal material on disability issues. Those practitioners willing to take up these issues had to re-invent the wheel and few stayed the course. I took on many battles on behalf of my family and others with whom we became acquainted, and found the law to be a powerful weapon if used appropriately.

I wondered why disability charities did not place more emphasis on legal solutions, and started publishing my tentative strategies on the assumption that there were lawyers 'out there' who would put me right. Instead, I was inundated by people thanking me for my assistance and asking for more, and this fuelled the fire inside me.

The mainstream legal journals such as the Law Society's *Gazette* were not interested in those days, but *Legal Action* was always supportive. This added to my feeling that I was operating on the periphery of the law – when this was mainstream so far as my clients were concerned.

It took me five years to write my first book, 'Mental Handicap and the Law' (published 1992) and this was closely followed by 'Elderly People and the Law' (1995). My philosophy was that legal services should be structured so as to address the needs of client groups rather than on the basis of traditional legal subjects – I wrote 'The Elderly Client Handbook' for the Law Society which provoked the formation of elderly client practices. The DDA and the Human Rights Act 1998 have at last provided the spokes whereby disabled people and their families may achieve equality, but without a body such as the DRC, the wheel will never be complete.

A judge's perspective

As a district judge working at the coalface in resolving civil and family disputes and tackling the consequences of debt, I find many opportunities to recognise the impact of mental and physical disabilities. These may result in a disadvantage in society but should never become an obstacle to the attainment of justice, so judges and sheriffs need to be well-informed about the realities – especially that the issues are far more extensive than wheelchair access to the courtroom. The outcome of proceedings can be affected as well as the procedure that we adopt in getting there.

'A disability should never become an obstacle to the attainment of justice'

In 1998, the Ethnic Minorities Advisory Committee of the Judicial Studies Board became the Equal Treatment Advisory Committee (ETAC) and its remit was extended to include gender, children, sexual orientation, disabilities and litigants in person. I joined the Committee because of my involvement in disability issues, having regularly lectured to judges on this topic at seminars. I have subsequently been privileged to hear several cases under Part 3 of the DDA. I still find some of the concepts of this legislation difficult to grasp and the fact that some fairly basic issues have been taken to the Court of Appeal demonstrates either that I am not alone or that there is a reluctance to embrace the new approach for commercial reasons.

Some claims involve a challenge to the way that large well-resourced and defensive organisations conduct themselves, and a well-targeted and motivated body such as the DRC is essential if judges and sheriffs are to receive the assistance they need in interpreting and applying a law that provokes social change. There is also a need for DDA claims to be mediated because a trial is the last resort, and the DRC has been in a good position to facilitate imaginative outcomes.

An overview

It seems that regardless of the perspective that I adopt, the conclusion is the same – namely there is a need for a body such as the DRC. Should this be a stand-alone body or ought we to be addressing the social problem of discrimination in the round? In many ways, I have travelled this path before. Within ETAC, I was offended that the needs of people with disabilities were being treated as an 'add on' to issues involving minority ethnic communities and that the latter were seen as more important. I argued for a generic approach, addressing the skill of 'judgecraft,' but with the key challenging areas being identified. So for consistency of approach, I should support a Commission for Equality and Human Rights.

There is much to be said for putting all the initiative and influence in one body because there is a common thread and overlapping issues do arise. But will this water down the expertise and motivation that presently makes the DRC such a driving force? It all depends upon the 'politics' of the new organisation and the allocation of sufficient ring-fenced resources to a division that replicates the DRC.

Discrimination is prevalent throughout society and can only be tackled by increasing awareness, valuing 'difference', removing stereotypes and eliminating ignorance and prejudice. But disability discrimination goes further than this because special needs must also be identified and addressed, and if this is not done, no amount of understanding will enable disabled people to take their rightful place in society. Those who have fought for this for so long should not see the demise of the DRC as a defeat because it may have paved the way for a more enlightened approach with greater potential to introduce human rights issues. But none of us can afford to be complacent. Disability discrimination is still a Cinderella of the legal system.

Part 4 DDA: Education

Discrimination by schools and further and higher education institutions

David Wolfe

David Wolfe is a barrister who specialises in public law, particularly judicial review. He has particular expertise in disability law, health law, education law and community care law. He was instructed by the DRC in *A&B and X&Y v East Sussex* (manual handling), *Burke v GMC* (end of life decision-making) and *YL v Birmingham City Council* (meaning of public authority in the Human Rights Act). David is a part-time chair of the Special Educational Needs and Disability Tribunal and chaired the DRC's recent Formal Investigation into inequalities in health care.

Having only been introduced into the DDA by the Special Educational Needs and Disability Act 2001 with effect from 1 September 2002, the education provisions of the DDA Part 4 are a relatively recent addition to the overall DDA framework. Prior to then (and indeed even since then in relation to education providers such as independent nurseries), disability discrimination in education was only outlawed where it fell within the 'service provider' provisions of DDA Part 3.

Chapter 1 of Part 4 now proscribes discrimination by schools, with a residual obligation on Local Education Authorities (LEAs) in England and Wales and Education Authorities in Scotland. Chapter 2 proscribes discrimination by further and higher education institutions. Claims under Chapter 2 are essentially financial and brought in the County Court in England and Wales or the Sheriff Court in Scotland. The DRC has backed such claims, some with stark facts, but the nature of the claims and the institutions means that cases tend to settle and little of new legal principle has been established.

Clearer trends are emerging in England and Wales in relation to the schools' provisions of Chapter 1. The provisions proscribe discrimination against a disabled person in relation to admission, exclusion, and in the educational and associated services provided at the school.

Enforcement is complex. In Scotland, claims of unlawful discrimination are brought as civil proceedings in the Sheriff Court, a fact which, no doubt, contributes to a real paucity of cases under these provisions. However, the Government is presently considering whether disability discrimination school cases in Scotland should be transferred to the Additional Support Needs Tribunals for Scotland (see Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, p. 121). This would allow the issues surrounding the needs of a disabled child to be considered holistically and would allow discriminatory practices to be addressed without the expense and time involved in a Sheriff Court action.

In England and Wales, which I will focus on for the remainder of this article, claims of discrimination in admissions and permanent exclusions have been added to the workload of the existing local authority-based Independent Appeal Panel (IAP) regimes, which deal with

such challenges. Judicial Review challenges to some of the decisions in question, including several supported by the DRC, have exposed very elementary decision-making mistakes, with many decisions being quashed and remitted for reconsideration 'by consent' when challenged.

They suggest that the training and expertise of the panels in question is very variable. That is perhaps unsurprising given that IAPs are local authority-based, do not have lawyer chairs and, particularly in the case of exclusion appeals, have panel members who tend to hear relatively few appeals, of which only a small proportion will raise disability issues. There is a clear need, in my view, for training and other action to address this shortfall.

> 'There is clearly more to do to make people aware of their rights, and maybe to support them in bringing claims'

The problem is highlighted by the fact that other DDA claims relating to schools (such as the paradigm – refusal to take a disabled child on a school trip) and fixed term exclusions are dealt with by the Special Educational Needs and Disability Tribunal (SENDIST) in England or the Special Educational Needs Tribunal for Wales (SENTW) which are, relatively, much more expert bodies. Those Tribunals have a relatively small number of legally qualified chairs (approximately 70 in SENDIST and 4 in SENTW), who work with a relatively small number of 'expert' members (approximately 130 in SENDIST and 8 in SENTW). In the SENDIST, the 'expert' members all have experience of Special Educational Needs (SEN) appeals, and a core group hear DDA cases having received additional training. The initial practice of allowing all Tribunal members to hear DDA claims has ended.

But it remains notable that the volume of DDA claims to the SENDIST/SENTW is still low – approximately 75–85

claims were registered per year in total across England and Wales in the first three years of the new Part 4 provisions, rising to only about 128 last year. There is clearly more to do to make people aware of their rights, and maybe to support them in bringing claims.

It has also taken a while, and several DRC-funded appeals to the High Court from the SENDIST for legal principles well-established in other parts of the DDA (such as the approach to 'disability') to be read across into Part 4. But that is now happening.

> 'the DRC's support for leading Judicial Review challenges and statutory appeals to the High Court has been a powerful driver in the bedding down of the provisions of Part 4'

The most recent cases are also now focusing on issues specific to Part 4, such as the difficult interface between the Part 4 DDA regime and the SEN provisions of Part 4 of the Education Act 1996. That boundary will continue to pose challenges, particularly given that, at its heart, it is the distribution and deployment of resources as between a school (the responsible body under the DDA) and an LEA (which arranges the provision under a Statement of SEN) which comes into play when considering the 'reasonableness' of any proposed DDA 'adjustments'. Indeed, similar SEN/DDA issues arise when IAPs are dealing with permanent exclusions of children who are both disabled and have SEN.

The jurisdictional interfaces also creak where a child receives one or more fixed-term exclusions (appeals against which are dealt with by the SENDIST/SENTW) and then is permanently excluded (the appeal against which is dealt with by an IAP). Indeed, the DRC has supported some notable cases in this area, including where the different bodies have reached different conclusions on basic questions such as whether the child is disabled. In the long run, these boundary

questions will only be resolved if and when all of the various appeals are dealt with through a single enforcement regime and by a single appellate body.

In the meantime, there is no doubt that the DRC's support for leading Judicial Review challenges and statutory appeals to the High Court has been a powerful driver in the bedding down of the provisions of Part 4. I know from personal experience of training and talking to fellow SENDIST chairs quite how seriously they take the possibility of 'being appealed' and of the concern they put into decision-making to avoid it; the mere fact of bringing High Court appeals play a key part in maintaining and improving the quality of decision-making, even where the individual appeals do not, in the end, specifically advance the law.

Finally, on remedies, when Part 4 was introduced, many thought the absence of a financial remedy against schools (in Chapter 1) was a significant omission and that the possibility of an ordered apology was weak. In practice, 'sorry' has proved to be the hardest word. Several cases have made repeated trips from the SENDIST to the High Court and back again because a school is unwilling, even through gritted teeth, to apologise for discriminating against a disabled child in circumstances where writing a cheque would probably have proved no problem for them. The absence of a financial remedy has also, in my opinion, beneficially ensured a greater focus on the child and how they have been dealt with, rather than, as might otherwise have been the case, appeals being brought primarily for financial reasons.

It is now to be hoped that the CEHR will continue the good work started by the DRC in helping to bring the benefits of Part 4 of the DDA to disabled children in schools and disabled adults in further and higher education institutions across Britain.

The Wider Legal Context

Intervention – A success story

Tess Gill

Tess Gill is a barrister who practices principally in discrimination and human rights. She has extensive experience in equal pay, all strands of discrimination law, and employment status including fixed-term contracts and agency working. She is regularly instructed by the EOC, CRE and DRC. Most recently she appeared before the House of Lords in *St Helens BC v Derbyshire*, intervening on behalf of the EOC, DRC and CRE. She represented claimants before the ECJ in the two leading cases of *Allonby* and *Cadman* where the EOC intervened.

The role of the intervener in court proceedings is a very useful and important way to bring matters of general principle to the attention of the court and has been used with great effect by the DRC and the other statutory equality Commissions.

Whereas a party to proceedings will inevitably be seen as partisan – which can limit effectiveness when seeking to persuade the court to take a wide and principled view – the intervener, who is tied to neither party's position, is ideally placed to raise the general issues of principle with the court, and to put the particular facts of the case in a wider historical, factual and theoretical context.

The benefits of the commissions intervening were recently vividly illustrated in the case of *St Helens Borough Council v Derbyshire and others* [2007] ICR 841. This case concerned alleged victimisation of equal pay claimants arising from letters from the Council seeking the abandonment of their claims. The letters threatened that pursuing the claims would result in severe cutbacks in the school meals' service where they worked and large-scale redundancies.

> 'the intervener is ideally placed to raise the general issues of principle with the court'

The majority decision of the Court of Appeal overturned the finding of the employment tribunal which had been in favour of the claimants. On appeal to the House of Lords, the EOC, CRE and DRC intervened to assist the House of Lords in explaining the complex legal background under domestic and European law.

The decision to intervene was amply justified by the unanimous judgments, which not only found for the claimants but gave much needed guidance on the correct approach to determining victimisation claims – in particular where there are live court proceedings, but also more generally. It was emphasised that the same approach should be taken to all strands of discrimination.

Some of the main points to emerge were:

- contrary to the previous Lords' judgments in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 832, a case of victimisation under the Race Relations Act, it was not sufficient to defeat a claim that the employer has acted honestly and reasonably
- the right answer will be found by focusing on 'detriment' rather than on the words (which, in this case, are in section 4 of the Sex Discrimination Act 1975) 'by reason that'

- it is primarily the perspective of the alleged victim which is important in deciding whether or not any 'detriment' has been suffered.

The essence of the interveners' point was made cogently by Baroness Hale who found that this was a 'classic case of blaming the victims'. The actions of the Council were 'no ordinary attempts to settle' and 'the victims of long-standing and deep-seated injustice should not be made to feel guilty if they pursue their claims for justice'.

Other important cases where intervention has been proved to be of value are:

- *Igen v Wong* [2005] IRLR 258 CA – again, all three commissions intervened in conjoined appeals on the important issue of how to construe the statutory provisions on the shift in the burden of proof in discrimination cases. The view of the Commissions resulted in the court issuing guidelines which are now applied generally across the discrimination strands.

- *Essa v Laing Ltd* [2004] IRLR 313 CA – this intervention by all three Commissions was to give guidance on the issue of whether it was necessary in a discrimination case to prove that the loss claimed was reasonably foreseeable, as is the case with claims for personal injury and other claims in tort. The view of the Commissions – that it was sufficient to establish that the discriminatory act caused the particular type of loss, including personal injury, and it was not necessary to show that such consequence was reasonably foreseeable – was accepted.

All of these cases amply illustrate why interventions are an appropriate use by the Commissions of their powers, and can be of great assistance to the courts in reaching policy decisions which advance a purposive approach to discrimination law.

Achieving strategic change through formal investigations

Karon Monaghan

Karon Monaghan is a barrister practicing in the fields of discrimination and equality, human rights and EU law. She is regularly instructed by the EOC, DRC and CRE. She is a Member of The Bar Equality and Diversity Committee, the Equal Treatment Advisory Committee of the Judicial Studies Board (2003–11) and the Fawcett Commission on Women in the Criminal Justice System. She lectures widely on discrimination law and is a founder member and ex-Chair of the Discrimination Law Association.

The DRC, like the EOC and the CRE, has power to conduct 'formal investigations' for any purpose connected with the carrying out of its duties (section 3(1) and (2) Disability Rights Commission Act 1999).

These formal investigation powers have proved very important indeed for the DRC's work. Certainly, the formal investigation powers conferred upon the EOC and CRE were regarded by Government as key to their strategic enforcement role.[5] Indeed the Commissions' main functions were regarded as strategic, in the first place to 'identify and eliminate discriminatory practices' and then to 'promote equality of opportunity' (see *Home Office v CRE* [1981] 1 All ER 1042). Reflecting this, the White Papers which preceded the enactment of the Sex Discrimination Act 1975 and the Race

> 'formal investigation powers have proved very important indeed for the DRC's work'

[5] 'Equality for Women' (1974, Home Office), Cmnd. 5724, paragraph 110; 'Race Discrimination' (1975, Home Office), Cmnd. 6234, paragraph 109.

Relations Act 1976 envisaged that the formal investigation powers would account for much of the law enforcement work of the EOC and the CRE.[6]

Although by the time of the Disability Rights Commission Act 1999 (DRCA) the Government was less enthusiastic, taking the view that the exercise of these powers was generally limited to 'serious or complex situations and issues', they took account of the view of the CRE and EOC that the formal investigation powers were valued.[7] In fact, the powers to undertake formal investigations have been used by the Commissions more sparingly than was expected, most especially in recent years.[8] At least one reason for this might be found in the early hostility shown by the courts to the Commissions' use of their formal investigation powers.[9] But it seems too that there has been some reticence in the Commissions to use these important powers.

So, the DRC did not commence its first formal investigation until 2003, three years after its coming into being. This was an investigation into disabled people's access to the web – 'The Web: Access and Inclusion for Disabled People' (2004, DRC). Since then, however, the DRC have undertaken two further formal investigations. Commencing in 2004, the DRC's second formal investigation was into health inequalities – 'Equal Treatment: Closing the Gap, A formal investigation into

6 And see, for a similar approach in respect of the SDA, 'Equality for Women' (1974, Home Office), Cmnd. 5724.

7 'Promoting Disabled Peoples Rights – Creating a Disability Rights Commission fit for the 21st Century' (July 1998), CM 3977, paragraph 4.24.

8 See 'Teeth and Their Use – Enforcement by the Three Equality Commissions' (2006, PIRU), in which the outcome of a research study indicated that there was a lack of use by the Commissions of their enforcement powers more generally.

9 See 'Unnatural Justice for Discriminators' (1984) 47 MLR 334; *Hillingdon London Borough Council v Commission for Racial Equality* [1982] AC 779 and *R v CRE ex parte Prestige Group plc* [1984] ICR 472.

physical health inequalities experienced by people with learning disabilities and/or mental health problems' (2006, DRC).

It's third – and final – formal investigation, commenced in 2006, explores 'fitness standards' in nursing, teaching and social work. The report of the last investigation, 'Maintaining Standards: Promoting Equality – Professional regulation within nursing, teaching and social work and disabled people's access to these professions', will be published at around the same time as this Legal Bulletin, in September 2007 – shortly before the closure of the DRC. It is fitting that the end of the Commission is to be marked with the conclusion of a project rooted in the exercise of the important strategic powers of the DRC.

'These investigations have allowed for broad and detailed scrutiny of issues affecting disabled people's lives and resulted in compelling recommendations for change and improvement'

Each of the DRC's investigations has proved very significant indeed. They have demonstrated clearly the importance of the formal investigation powers. These investigations have allowed for broad and detailed scrutiny of issues affecting disabled people's lives and resulted in compelling recommendations for change and improvement.

The investigation into health inequalities found 'overwhelming evidence of inequalities' with people with learning disabilities and/or mental health problems experiencing a 'greater likelihood of major illness, developing health problems at an earlier age than the rest of the population, and dying earlier'.[10] Importantly too, the investigation found that the 'problems do not relate just to individuals: the inequalities are systemic'.[11] This led

10 See www.drc-gb.org.

11 Ibid.

to a detailed response from Government committing itself to action on health inequalities.[12]

The last of the DRC's formal investigations – into 'fitness standards' – following on from the model adopted for the health investigation, included the establishment of an 'inquiry panel'. I chaired that inquiry panel. The use of a panel to collect and examine evidence shows the flexibility of the formal investigation powers. The powers are widely drafted and, as mentioned above, allow the DRC to undertake a formal investigation 'for any purpose connected with the performance of its duties' (section 3(1) DRCA). These duties themselves are widely drafted and include working towards the elimination of discrimination against disabled people and the promotion of the equalisation of opportunities for disabled people (section 2(1) DRCA).

The terms of reference of the 'fitness standards investigation',[13] in summary, were:

- to investigate the regulatory framework that determines whether people are considered mentally or physically suitable to study, qualify, register or work within the occupations of nursing, teaching and social work
- to make recommendations for changes to the regulatory frameworks where these are considered not to be compliant with the DDA
- to investigate the implementation of these regulatory frameworks

12 'Promoting equality: Response from Department of Health to the Disability Rights Commission Report, "Equal Treatment: Closing the Gap"' (2007, Department of Health). For the DRC's initial response – 'Initial DRC response to Promoting Equality: Response from Department of Health to the Disability Rights Commission Report "Equal Treatment: Closing the Gap"' (2007, DRC) – see www.drc-gb.org.

13 For full terms of reference, see www.drc-gb.org.

- to make recommendations for changes to policy and practice in relation to decision-making
- to investigate the experiences of people with impairments and long-term health conditions studying or working within nursing, teaching and social work in relation to disclosing information about their impairments and long-term health conditions; and
- to make recommendations for changes to policies and practices on disclosure.

The breadth of these terms of reference illustrates the scope of the formal investigation powers and their usefulness in addressing systemic or institutionalised discrimination. Both law and practice were the subject of the 'fitness standards' investigation, and the recommendations that it is expected that the DRC will adopt will be wide-ranging and robust.

The way in which the DRC chooses to investigate is (subject to some preliminary formal obligations, in the case of some investigations, as to the giving of notice and the like) a matter for itself. It can, therefore, establish an inquiry panel, interview witnesses, scrutinise documents and commission research. In the 'fitness standards' investigation, the DRC took all of these steps. It commissioned research on the impact of the standards on disclosure,[14] the quality of assessments and decision-making relating to the fitness standards, and the regulatory context of these standards.[15]

The last piece of research demonstrated that there was 'a significant amount of primary and secondary legislation

14 'A Research Study to Inform the Disability Rights Commission's Formal Investigation into Fitness Standards', Nicky Stanley, Julie Ridley, Jill Manthorpe, Jessica Harris and Alan Hurst.

15 'Research into assessments and decisions relating to "fitness" in training, qualifying and working within Teaching, Nursing and Social Work', Jane Wray, Helen Gibson and Jo Aspland.

and guidance that is likely to impact on disabled people, including people with long-term health conditions, at various career stages, such as entry to education, registration or employment. Although the majority of the professional legislation, regulations and guidance reviewed came into force after 1995, it is significant there are so few references to the DDA, except within the regulatory framework for the teaching profession. There is no mention of the DDA in the legislation, regulations or statutory guidance relating to social work and only two references in all the nursing legislation and guidance (with additional reference in the new guidance about to be approved concerning good health and good character).' [16]

> 'The opportunities provided by formal investigations are vast and important'

The importance of the investigation, then, in addressing the impact of fitness standards on disabled people, was very clear. Until the investigation, most of the regulatory bodies had given no thought at all to the impact of their fitness standards on disabled people. We were able to receive and examine both documentary and oral evidence. What we found was that the impact was often severe and little was done by the regulatory bodies either to mitigate that impact by, for example, making adjustments to the standards, or even to recognise it.

The opportunities provided by formal investigations are vast and important. Individual cases will rarely identify systemic discrimination and the inquiries undertaken in the context of an individual case will always be limited by the terms of the actual dispute between the parties. Employment Tribunal and County Court or Sheriff Court

16 'Analysis of the statutory and regulatory frameworks and cases relating to fitness standards in nursing, social work and teaching' (2006, DRC), David Ruebain and Jo Honigmann, Levenes Solicitors; Helen Mountfield, Matrix Chambers and Camilla Parker, Mental Health and Human Rights Consultant.

cases will expose individualised discriminatory acts but are unlikely to reveal the sort of institutionalised, structural or widespread discrimination that demands strategic action in response.

The formal investigations are valuable, then, in their own right for what they can reveal. However, they have other purposes too. They provide a basis for making recommendations for change (schedule 3, paragraph 6, DRCA). Importantly too, where a formal investigation reveals unlawful discrimination, the DRC can serve a non-discrimination notice on the body responsible, requiring it to stop discriminating and to take related action (section 4, DRCA). Such a notice is enforceable (schedule 3, paragraph 12, DRCA). Formal investigation reports also provide an evidential basis for the drawing of inferences and otherwise proving discrimination in individual cases.

The new CEHR will have power to conduct formal investigations and will have novel powers to conduct 'inquiries'. The new 'inquiries' powers are intended to reflect the existing Commissions' general formal investigation powers but, unlike the existing Commissions, the CEHR will be able to examine issues cutting across different equality strands and human rights. The CEHR will also have power to conduct investigations comparable to formal investigations and serve non-discrimination notices, much like the existing Commissions can do now.

The importance of these powers cannot be overstated, as is clear from even the short history of their use by the DRC. Their value must be recognised by the CEHR if it is to be fully effective.

For summaries of the DRC's formal investigations, please see page 134.

A company's perspective – entering into a 'voluntary binding agreement' with the DRC

Dudley Westgate, Director
Heritage Attractions Ltd

The DRC's legal powers under the Disability Rights Commission Act 1999 (DRCA) include a power to enter into agreements with organisations it believes have been discriminating against disabled people (section 5 DRCA). 'Voluntary binding agreements' – also known as 'section 5 agreements' – are intended to create a framework for these organisations to address discrimination in the provision of goods and services, education or employment.

The DRC has made increasing use of this power in recent years and voluntary binding agreements now form an important part of the DRC's overall legal strategy. Here, Dudley Westgate, a Director of Heritage Attractions Ltd, which entered into a voluntary binding agreement with the DRC in September 2005, shares his thoughts on the experience.

Heritage Attractions Ltd owns and operates a diverse collection of attractions ranging from outstanding landmark destinations to theme parks. Its portfolio includes Snowdon Mountain Railway, Land's End, John O'Groats and Lightwater Valley Theme Park in Yorkshire.

The diversity of the company's attractions creates a major challenge in many aspects of management and operations.

Nonetheless, it was initially disappointing when, in the summer of 2004, the company became aware of an allegation that disability discrimination had occurred at one of its smaller sites, World in Miniature, Cornwall. The allegation related to the refusal of staff to allow a child with Down syndrome onto an elevated ride. Following the incident, the child's family contacted the DRC for advice and assistance.

As an investigation of the allegation proceeded, it became fairly clear that the site and/or the company did not necessarily have in place an appropriate audit trail to demonstrate that the decision that had been taken was reasonable and appropriate.

'it soon became very clear that the DRC approach to the whole process was extremely positive, proactive and helpful'

As a direct result of this, the company entered into a 'section 5 agreement' (also known as a 'voluntary binding agreement') with the DRC. This entailed agreeing to a process of reviews that would enable improvements to be made. The agreement incorporated a review of all advertising material including website and brochures, a review of the entire operating process of the site, a review of employment and training of staff, and consideration of the physical layout of the site itself. A totally independent disability audit has also been carried out by a competent consultancy company which has provided much material for consideration and action to ensure improved compliance with the Disability Discrimination Act 1995.

On reflection, whilst it is true that the early meetings with the DRC were approached with some trepidation, it soon became very clear that the DRC approach to the whole process was extremely positive, proactive and helpful in terms of advice and guidance. Indeed, Heritage Attractions Ltd actually took this opportunity to review and re-position the entire business and involved the DRC

with many aspects of the re-development of the site. Additional elements now added to the site include a petting farm which provides sensory experiences in areas of sight, sound, smell and touch. Meanwhile, several areas of the park that were originally not fully accessible have been made so, including an elevated walkway known as the 'Dinosaur Discovery Trail'.

'The results have benefited both our customers and the business'

Although the process began with a somewhat nasty jolt, the realisation that perhaps we had not got everything right in terms of facilities and services for our disabled guests has developed into a very positive learning experience with the DRC. The results have benefited both our customers and the business – the newly launched Miniatura Park is trading some 28 per cent up on anticipated budget and is now providing a better experience for all of its visitors.

Enforcing rights through mediation

Margaret Doyle

Margaret Doyle is a consultant and researcher on alternative dispute resolution and an independent mediator. She has worked with several voluntary sector organisations involved in access to justice, including the Advice Services Alliance, the National Consumer Council and the Public Law Project, as well as with the Ministry of Justice and the Council on Tribunals. She mediates in disputes involving special educational needs, disability discrimination and workplace and community conflicts. She is an independent director of The Ombudsman Service Ltd and the Office of the Independent Adjudicator for Higher Education.

The DRC has pioneered the use of mediation[17] in resolving discrimination claims relating to goods and services and to education, under Parts 3 and 4 of the DDA. With the new Commission for Equality and Human Rights due to start its work in a few months, it is a good time to consider whether the innovative model of mediation used in DDA cases should be used in a wider range of cases involving discrimination and human rights.

A new approach to vindicating rights

The argument that rights enforcement requires litigation is a powerful one, particularly in the context of human

17 The process used is 'mediation', although the legislation refers to 'conciliation', a term that is often used to refer to very different types of processes. For more on the debate about differences between 'conciliation' and 'mediation', see www.adrnow.org.uk.

> 'There are powerful arguments in favour of using alternatives to litigation for enforcing rights'

rights and discrimination. Such cases often involve a discrepancy in power and resources between the parties, especially where an individual is challenging a public authority. They also raise issues of importance to society: a public refutation of discrimination or abuse may be needed, there may be wider ramifications or there may be a need to prevent discrimination affecting another individual or group of individuals. In other words, justice should be seen to be done.

There are also powerful arguments in favour of using alternatives to litigation for enforcing rights. Individuals might be seeking a practical remedy rather than a legal determination. Not every case that raises issues of discrimination or human rights is a test case or has a public interest element.[18] Litigation can sideline claimants, who find they play a peripheral role in determining the process and outcomes of their case once the litigation bandwagon takes over. And, as discussed further below, alternatives to litigation, such as mediation, deliver far-reaching systemic change.

The wariness about using mediation in rights-based claims appears to be based on a misapprehension that mediation is about compromise, 'a confidential carve-up borne of an unseemly horse-trade'.[19] But it need not be, indeed should not be, so.

18 See Frances Butler, 'Mediation: A Tool for Mainstreaming Human Rights?', The British Institute of Human Rights, Evidence to the Joint Committee on Human Rights for the Parliamentary Inquiry on a Human Rights Commission, July 2001.

19 Michael Supperstone QC, Daniel Stilitz and Clive Sheldon, 'ADR and Public Law', *Public Law*, Summer 2006, pp. 299–319.

Working within a legal framework

Looking back on the past six years of providing independent mediation to resolve DDA claims, it is clear there are both causes for celebration and lessons to learn. A cause for celebration is the success that mediation has had in making rights enforcement accessible and with wide-ranging systemic changes. The independent Disability Conciliation Services or DCS (there have been two since 2000) have dealt with more than 500 cases referred from the DRC and, of these, more than 80 per cent have achieved a full and final legal settlement of the DDA claim. Although this figure is clearly a tip of the iceberg in terms of the everyday experiences of disabled people in accessing goods and services – and the potential claims arising from those – it is much higher than the number of such claims proceeding to court.[20]

‘The use of mediation in DDA cases is a prime example of the law and an alternative to the law working together, in complement’

The use of mediation in DDA cases is a prime example of the law and an alternative to the law working together, in complement. Mediation takes place only after the DRC has identified the issues raised in the claim and determined whether they might lead to an important test case. Alternatively, the case might be one that should not go to court because of the potential risk of an adverse outcome that could set an unfortunate precedent from a disability rights perspective. In those cases, the focus is not on a legal determination but on redress for the individual and procedural changes by the respondent.

20 The courts do not classify DDA claims as such so it is impossible to know accurately how many such claims have been taken to court. But we know that the DRC has funded less than 200 DDA Parts 3 and 4 claims since 2000, and many of these have settled either pre-issue or pre-hearing.

One of the lessons is that more needs to be done to raise awareness of the mediation option and how it fits with litigation and the dispute resolution landscape overall – in particular, engaging more actively with those who advise potential claimants. This is key so that individuals are making fully-informed choices about the route they take when seeking redress. DDA mediation takes place 'in the shadow of the law', in the sense that the legal right is protected by an extension of the deadline for issuing and parties understand that an unsettled claim can proceed to court. It is also in the law's shadow in the sense that court judgments can have an effect on parties' perceptions of the legal strength or weakness of their claim.

Rights-based mediation

What the DCS has developed is known as 'rights-based' mediation. The model requires mediators to be well informed about the DDA and to remind the parties of the rights and responsibilities it confers. The role of the mediators is not to promote settlement at any cost and it is very much the claimant's decision, at the end of the mediation, as to whether or not the case has settled. Claimants retain the option to go to court if the case is not settled.

Rights-based mediation encourages parties to exchange information and experiences, with the result that they can leave the mediation session with a greater understanding and awareness of the issues. This greater understanding can erode the attitudes and prejudices that give rise to discriminatory practice, much of which comes from ignorance rather than wilful discrimination.

Mediation cannot deliver a determination of discrimination, and there is no requirement that the parties accept that there has been a breach of the DDA. Indeed, there is often a vast grey area of unknowns in this respect – and the beauty of mediation is that it

allows the parties to move away from the strict legal interpretation of events into a discussion of how what happened affected those involved and how it can be put right. This can be a powerful experience for both parties.

Not every claim is suitable for mediation and not always because a legal ruling is needed. In some cases, the claimant wants a legal determination of discrimination; in others, the respondent is unable or unwilling to address the issues with the claimant in the open and frank way that mediation requires. It is, and must remain, a voluntary option; there is no point in directing people to mediate – at best this will be an exercise in frustration for all parties, but at worst it can exacerbate the injury felt by the claimant by adding insult.

> ‘The range of remedies available in mediation is wide and varied’

In my experience, this can happen when a respondent attends mediation but insists on addressing the issue as one of customer service failure rather than discrimination. Thankfully, it does not happen often. I have been surprised at the openness of some very large organisations and their willingness to accept responsibility for discriminatory behaviour, to provide redress for the claimant and to make wide-ranging (and sometimes very costly) changes. I have also been impressed by the very small respondents – the corner shops and family-owned restaurants – who take on board what they hear at mediation and appreciate the opportunity it gives to learn more about how they should treat their service users and how they can keep their custom.

Equally, I have been frustrated at the refusal of some respondents to engage with the claimant; I have found some higher education institutions and public authorities to be among the most defensive and slow to consider change.

Outcomes and enforcement

The range of remedies available in mediation is wide and varied. Outcomes include changes to practices, policies and procedures, explanations, commitments to staff training in DDA issues, apologies and compensation. Courts can give a determination, make a declaration and award compensation for financial loss, including injury to feelings. In some court proceedings, the disabled person may also seek an injunction (in Scotland, an interdict) to prevent the service or education provider repeating any discriminatory act in the future. However, court action will focus on the circumstances of the disabled person bringing the complaint, whereas mediation will often generate an outcome which requires the service or education provider to make changes aimed at benefiting a wider group of service users.

Not every claimant is seeking compensation, but for those who are, mediation can compare well to the courts. Amounts awarded in court for injury to feelings range from several hundred pounds to £1,500 and more, although in a recent Part 4 case, involving a university, the claimant was awarded £4,000[21] and in a Part 3 case against a hotel brought by two claimants, one was awarded £4,000 and the other £7,500.[22] Similarly, in mediation, compensation agreed ranges from goodwill gestures to payments of thousands of pounds, including several cases of £5,000 or more.

Another practical advantage of mediation is that it appears to be free of the enforcement problems that plague County Court judgments. It has been estimated that most small claims awards are not paid by the date

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21 *Potter v Canterbury Christ Church University*, Canterbury County Court, Claim No. 5CL14216.

22 *Hancock and Marlow v Webb and Webb*, t/a Cecil Court Hotel Aldershot and Farnham County Court, Claim No. 6MA11481.

> ‘mediation has the potential to bring about a culture change’

ordered by the court; one-third of claimants who were awarded a payment at small claims hearings failed to receive any payment at all.[23] In contrast, all DCS-mediated settlements have been complied with.

Human rights

I will end with a mention of human rights, because of course the fundamental objective of the CEHR is the protection and promotion of equalities and human rights. In a discussion paper produced in 2000, the Scottish Human Rights Forum argued that ‘many issues, including human rights, are by their nature not justiciable in the courts’. The British Institute of Human Rights argues that a human rights culture will not be achieved through litigation, and that mediation ‘has the potential to play a significant role in the protection and promotion of human rights’. It has also been argued that mediation actually stimulates the use of legislation, and this could be a huge benefit for human rights in particular.[24]

Not every case will be suitable for mediation, and this is a judgment call to be made very much with the legislation in mind. Yet mediation has the potential to bring about a culture change, within private-sector

23 Ruth Gosling, ‘Survey of litigants’ experiences and satisfaction with the small claims process’, DCA Research Series 9/06, December 2006, p. 32; see also John Baldwin, in evidence to the House of Commons Constitutional Affairs Committee, ‘The courts: small claims’, First Report of Session 2005–06, 22 November 2005.

24 See Frances Butler, ‘Mediation: A Tool for Mainstreaming Human Rights?’, The British Institute of Human Rights, Evidence to the Joint Committee on Human Rights for the Parliamentary Inquiry on a Human Rights Commission, July 2001; and Rosemary Hunter and Alice Leonard, ‘Sex Discrimination and Alternative Dispute Resolution: British Proposals in the Light of International Experience’, *Public Law*, Summer 1997, pp. 298–314.

service providers as well as public bodies. Human rights issues are issues of everyday life for many people, not rarefied or abstract legal concepts. Increasing individuals' involvement in vindicating their own rights through participative processes like mediation brings those rights home.

Note: This article reflects the author's personal views and does not necessarily represent the views of the Disability Conciliation Service.

European and international work at the DRC

Catherine Casserley

Catherine Casserley LLM is a barrister of 16 years call who is employed by the Disability Rights Commission as Senior Legislation Adviser. She provides legal advice on the Disability Discrimination Act and also deals with European legislation.

Over the past seven years, the DRC has made an increasing contribution to European and international developments in relation to disability rights and disability legislation.

Staff from the Commission have been asked to speak to conferences in Mexico, Argentina and Brazil, to name but a few places. As well as, for example, contributing to international discussions on physical accessibility and promoting the methodology and results of our formal investigations, advice has been provided to countries who are developing legislation on disability about what has and what has not worked in the UK context.

In addition, the DRC is a member of Equinet, which is a European network of equality bodies. Equinet operates an information exchange, which enables us to learn from experiences in other European countries, and allows other countries to share our experiences, case law, Codes of Practice and other aspects of our work.

In particular, we have contributed to the products of two of the working groups in Equinet – firstly, strategic enforcement and secondly, dynamic interpretation.

The former working group has produced three publications – one on formal investigations, looking at the different practices of some of the different European equality bodies, and two on mediation.

Meanwhile, the group on dynamic interpretation produced a report last year entitled 'European Anti-Discrimination Law in Practice'. For the purpose of that report, the group took a number of cases, including two on disability discrimination, and analysed responses from members about how those cases could be dealt with in their countries. Recommendations were made in the report for changes to legislation where it appeared that member states had not transposed the European employment framework directive fully.

Finally, we have to note the incredible achievement of the United Nations in finalising the Convention on the Rights of Persons with Disabilities in what was a relatively short time span. The DRC kept a watching brief on this convention, attending a number of meetings regarding its progress, and was delighted that it progressed so rapidly.

The UK Government signed the Convention on 30 March this year, although it has yet to sign the Optional Protocol which permits individual complaints to be brought to the Committee on the Rights of Persons with Disabilities.

Progress of disability discrimination legislation

Catherine Casserley

Catherine Casserley, Senior Legislation Adviser at the DRC, explores the development of the DDA – part of the legal policy work of the DRC.

The passage of the Disability Discrimination Act in 1995 was, in fact, only the first part of a developing body of disability discrimination legislation. Indeed, legislative change is an area in which the DRC has worked hard to secure improvements over its lifetime.

There were considerable weaknesses in the 1995 Act – the lack of an enforcement body and the exclusion of education, to name but two. In 1997, the newly-elected Labour government set up the Disability Rights Task Force (DRTF), a group comprising disabled people, trade unions and representatives from the business community, and chaired by the relevant minister. The Task Force was charged with considering comprehensive and enforceable civil rights for disabled people. One of its early recommendations was the creation of a Commission; the Disability Rights Commission Act of 1999 subsequently established the DRC.

The final DRTF report 'From Exclusion to Inclusion'[25] was published in December 1999, and it made over 150 recommendations for legislative change. The Government responded in 2001 with 'Towards Inclusion – Civil Rights for Disabled People', in which it accepted many of the Task Force's recommendations. Also in 2001, the Government passed the Special Educational Needs

25 See www.leeds.ac.uk.

and Disability Act (SENDA) which largely lifted the exclusion of education from the DDA.

Meanwhile, one of the DRC's first tasks was to conduct a review of the Disability Discrimination Act 1995. The Commission considered a range of evidence and, in particular, conducted analyses of DDA cases. The DRC's recommendations were published in May 2002 for public consultation and received considerable support. The Commission's final recommendations were published in 2003.

> 'one of the DRC's first tasks was to conduct a review of the Disability Discrimination Act 1995'

In the same year, the Government laid the Disability Discrimination Act 1995 (Amendment) Regulations 2003. These brought changes to the employment provisions of the DDA and implemented many of the recommendations of the DRTF and of the DRC's legislative review – including, for example, removing the small employer exemption and introducing broader victimisation provisions. Indeed, the DRC provided considerable comment on the scope and drafting of these Regulations during their development.[26]

However, the Commission continued to press for a Disability Discrimination Bill to implement the remaining recommendations from the DRTF and the DRC's legislative review. To this end, it drafted a Disability Bill which was introduced to the House of Lords by Lord Ashley. Although the Bill was unsuccessful, it kept those

26 The one area which the Commission raised which was not addressed was the scope of the discrimination provisions, and in particular DRC's view that the legislation should protect those who were subject to discrimination and harassment because of their association with a disabled person or because of a perception that they were disabled. The scope of the provisions, however, will soon be addressed in the DRC-funded case of *Coleman v Attridge Law*, which is due to be heard by the European Court of Justice on 9 October 2007. This case is explored by Paul Epstein QC on pages 103 to 106.

recommendations for changes to the DDA that were outstanding – such as the removal of the transport exemption, and the introduction of the Disability Equality Duty – high on the agenda.

> ‘The last seven years have seen considerable changes to the DDA’

Eventually, the Government introduced a Disability Equality Bill in 2004. This was the subject of a parliamentary scrutiny committee to which the DRC gave evidence and in respect of which we produced considerable briefings. As a result of the evidence it heard, the Committee made a number of recommendations for changes to the Bill, many of which the Government accepted. During the passage of what was to become the DDA 2005, the DRC worked hard – along with colleagues from other organisations – both behind the scenes and more visibly, drafting amendments and helping to secure many of the remaining recommendations from the legislative review.

The last seven years have seen considerable changes to the DDA. It is now a much-improved piece of legislation and the DRC is proud to have played a part in its development. However, as the article on page 107 highlights, there remain outstanding issues, and it is to be hoped that the Government will now seize the opportunity presented by the Discrimination Law Review to fully ensure comprehensive and enforceable civil rights for disabled people.

Key developments in the recent evolution of disability discrimination legislation

November 1995

The Disability Discrimination Act 1995 (DDA) receives Royal Assent.

December 1996

Part 2: unlawful for employers with 20 or more employees to discriminate against disabled employees. The Act covered disability-related discrimination and a failure to make reasonable adjustments (both of which could, in theory, be justified), and victimisation. (Harassment could be included under the 'any other detriment provision' although there were no specific harassment provisions.) It included provisions prohibiting discrimination against contract workers and by trade organisations.

Part 3: unlawful for service providers to treat disabled people less favourably for a reason related to their disability.

December 1998

Part 2: employment provisions extended to cover employers with 15 or more employees.

July 1999

Disability Rights Commission Act 1999 (DRCA) receives Royal Assent.

October 1999

Part 3: service providers must alter a policy, practice or procedure which prevents disabled people accessing a service, or provide an auxiliary aid or service, or provide a service by a reasonable alternative means.

April 2000

The DRCA abolished the National Disability Council and replaced it with the DRC which opened for business on 25 April 2000.

Part 2: unlawful for all employers (with the exception of the Armed Forces) to discriminate against disabled employees, regardless of the number of people they employ; new occupations such as police and partners in firms are covered; new relationships such as practical work experience are covered; claims in respect of employment services – already covered by Part 3 – are now taken in employment tribunals; new provisions covering qualifications bodies; new provisions on discriminatory advertisements; now four kinds of discrimination – direct discrimination, failure to make reasonable adjustments, disability-related discrimination and victimisation; justification is not relevant in cases of direct discrimination or failure to make reasonable adjustments; new provisions specifically prohibit harassment; post-employment discrimination is specifically covered.

Part 3: service providers must make reasonable adjustments to physical features of their premises to overcome barriers to access (or provide a reasonable means of avoiding them).

September 2002

April 2003

September 2003

October 2004

April 2005

Part 4 (amended by the Special Educational Needs and Disability Act (SENDA)): responsible bodies for schools, colleges, universities, providers of adult education and youth services are required to ensure they do not discriminate against disabled people. The provisions proscribe unjustified less favourable treatment and an unjustified failure to make reasonable adjustments (generally in the form of altering practices, policies and procedures).

Definition: People who are certified as blind or partially sighted are automatically deemed to be disabled for DDA purposes.

Part 4 (amended by the SENDA): post-16 education providers are required to make reasonable adjustments in the form of providing auxiliary aids and services.

Disability Discrimination Act 2005 receives Royal Assent.

June 2005

Part 3: narrower transport exemption introduced.

September 2005

Part 4: post-16 education providers are required to make reasonable adjustments to physical features of premises where these put disabled people at a substantial disadvantage.

December 2005

Definition: people with HIV infection, cancer or multiple sclerosis are covered by the DDA as soon as they have these conditions; the requirement that a mental illness must be 'clinically well-recognised' is removed.

Part 2: third party publishers (eg newspapers) are liable for publishing discriminatory advertisements; unlawful for locally-electable authorities to treat their members less favourably.

Part 3: unlawful for private clubs to treat disabled people less favourably.

February 2006

Equality Act 2006 receives Royal Assent.

September 2006

Part 4: post-16 provisions amended. The main changes were: a new direct discrimination duty, the removal of the justification defence for failure to make reasonable adjustments; a new harassment provision; the reversal of burden of proof; a new duty prohibiting discriminatory advertisements; a new duty prohibiting instructions or pressure to discriminate; new specific duties that apply after the relationship has ended; new specific provisions in relation to qualifications and competence standards.

Disability Equality Duty comes into force to tackle systemic discrimination and ensure that public authorities build disability equality into everything they do. The general duty applies to all public authorities; specific duties apply to those authorities which are listed in the regulations. Majority of those covered by specific duties must have their Disability Equality Scheme in place. New duty on locally-electable authorities to make reasonable adjustments.

Part 3: extended to include the functions of public authorities; new duties created for providers of premises and for providers of transport services, new duty for private clubs to make reasonable adjustments.

Deadline for primary schools in England to produce **Disability Equality Schemes.**

December 2006 | April 2007 | September 2007 | October 2007 | December 2007

Deadline for schools in Wales to produce **Disability Equality Schemes.**

CEHR is established and existing equality commissions (DRC, EOC and CRE) are dissolved.

Part 4: new provisions prohibiting disability discrimination by general qualifications bodies (GQBs) come into force, making four forms of discrimination unlawful for those conferring relevant general qualifications: direct discrimination, failure to make reasonable adjustments, unjustifiable disability-related discrimination and victimisation. In addition, it is unlawful for a GQB to harass a disabled person.

Please note: This chart presents a selection of key milestones in the evolution of disability discrimination legislation since 1995. It is not intended to be exhaustive. **Martin Crick, DRC.**

The DDA and lawyers: DDA Representation and Advice Project

Sandhya Drew

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On 2 December 1996, when the Disability Discrimination Act 1995 came into force, there was no statutory Commission charged with enforcement of the legislation. The gap was filled in part by lawyers, by disability charities and by trades unions.

The Disability Discrimination Act Representation and Advice Project (DDARAP) was set up to provide legal representation pro bono in early cases. In one such case of note, *O'Neill v Symm and Co*, the claimant, supported by DDARAP, succeeded before the Tribunal in establishing that Chronic Fatigue Syndrome/ME was a disability. However, the claim failed before the Employment Tribunal – and in the EAT before Mr Justice Kirkwood – on whether discrimination for a reason relating to disability was established, subject to justification, where the employer did not know of the disability itself. That case has now happily been overturned on the second issue.

Disability charities also supported cases; for example, The Royal National Institute for Deaf People funded a County Court claim against Butlins when their security guards ejected a group of deaf students for making 'threatening' signs – also known as British Sign Language! Realising the publicity was damaging their business, Butlins paid each student compensation. Finally, the unions also played a key role in identifying and supporting early cases in the employment field.

The 1997 elections meant that the introduction of a Commission was only a matter of time. After it came into operation on 25 April 2000, the DRC showed itself to have a particularly effective legal strategy. Always seeing anti-discrimination law as a means to an end – equality – the DRC has chosen litigation which will have maximum impact. It has used interventions and judicial review to move beyond the limitations of litigation by individuals.

However, it has also been willing to fund difficult cases by individuals where there is a plain injustice. For example, the DRC Commissioners took the courageous decision to fund *Jones v 3M Healthcare and others* [2003] IRLR 484 HL in which the House of Lords, disagreeing with both the EAT and the Court of Appeal, accepted that post-employment termination discrimination was covered by the DDA's employment provisions.

'Always seeing anti-discrimination law as a means to an end – equality – the DRC has chosen litigation which will have maximum impact'

The DRC has understood that law does not always mean litigation. It adopted a strong educative approach, with comprehensive Codes of Practice, a user-friendly website and public campaigns to explain the various amendments and additions to the legislation. It has made available a conciliation service, which, if used imaginatively, can obtain optimum results for clients (such as, in one case I acted in, admission onto a university course). The duty to promote disability equality has come

into force only recently but the DRC has already been monitoring compliance.

Despite these successes over the last seven years, there is continuing inequality in the area of goods and services in the public and private sector. Forty per cent of disabled people experience difficulty in accessing goods and services. However, there is little litigation under Part 3 of the DDA. This appears, in part, to be due to the cost and complexity of proceedings in the County Court (in England and Wales) or the Sheriff Court (in Scotland). There is also concern among advisers about the expertise among Sheriffs and County Court judges. Views are divided on whether the solution is that some employment tribunals should become Equality Tribunals (as the DRC, the other equality Commissions and others believe) or whether (as I believe) more resources should be aimed at training judges and sheriffs in the ordinary courts (and, I would add, in providing them with the expertise of assessors, as with race discrimination claims). Levels of damages are certainly low and injunctions awarded rarely.

That aside, it must be recognised that there is a second reason for the lack of litigation. However injured their dignity, people are less likely to litigate when turned away from a restaurant or shop or another service which they can access from a more welcoming competing service-provider. Even when the customer sues, damages awards alone are unlikely to alter the behaviour of those service providers, or to lead to a change in behaviour. In many cases, the service providers wrongly assume that there is inevitably a cost involved in making a reasonable adjustment. The real deterrent for the worst offenders must be the risk of a fall in business. At present, this can best be achieved through maximising awards and adverse publicity.

In a paper last year, I put forward a further option, which can only be summarised here. There is potential within the DDA to make regulations setting a minimum standard of

reasonable adjustments to be made by service providers. If the State takes action (through the licensing regime, trading standards or the competition commission) when a business is breaching the law in other respects, then there is, in principle, no reason why it cannot act to enforce the duty to make reasonable adjustments. The duty to promote disability equality provides a mechanism for the public sector to supervise the private sector. There are examples in other jurisdictions (Ontario and Australia, for example) of minimum standards for access which are monitored by the State. This would not simply entail taking action in the worst cases, but would be a preventive approach requiring service providers to make adjustments and to report on them. Benefits to the service providers would include a rebuttable presumption of accessibility. This would lead to equal service provision without long and complex litigation.

‘DDARAP will be reassessing its activities after October’

This October, the CEHR will take responsibility for all the existing equality strands and aims to do so holistically. This will be of obvious benefit in cases of multiple discrimination. To paraphrase the South African Judge Sachs J, whose further thoughts on the CEHR appear later in this journal, the rights will fit the people, not the people the rights. The Disability Committee will have a particular function to play.

Finally, DDARAP will be reassessing its activities after October. At present, it acts as a network of lawyers and policy workers, meeting at the DRC and exchanging expertise and information on disability law and practice. Later this year, that network will be developed and extended onto the internet through the launch of a DDARAP website. It remains to be seen how the practitioners on the network will best be able to assist in ensuring continued progress towards full equality for disabled people.

Interaction between equality and human rights principles

Geoffrey Bindman

Geoffrey Bindman is Chair of the British Institute of Human Rights. He is also a consultant at Bindman & Partners and a visiting professor of law at University College London and London South Bank University. He has conducted many leading cases in the fields of civil liberties and human rights. In 1999, he received the Liberty and Law Society's *Gazette* award for lifetime human rights achievement and, in 2003, the *Gazette* Centenary award for human rights. He is honorary president of the Discrimination Law Association and a trustee of the Wordsworth Trust, the Helen Bamber Foundation, and the One World Trust. In 2007, Geoffrey was knighted in recognition of his service to human rights.

Though by a long way the most recently-established of the anti-discrimination Commissions – until the CEHR opens its doors for business – the DRC has been the most imaginative and innovative in its development of legal remedies. That stems partly from the fact that the body of law which it administers is not, unlike those for which the CRE and EOC have been responsible, wholly restricted by the need to find 'comparators' in order to identify unlawful discrimination.

I recall that a number of years ago, when I was the CRE's Legal Adviser, we lost a case on behalf of an Asian bus driver in the Midlands who was denied the promotion that, by virtue of his skills and experience, he was clearly entitled to, though several less qualified white drivers were promoted. The case was *Singh v West Midlands Passenger Transport Authority*. It seemed an open and shut case of discrimination. The defence was that well-qualified white drivers had also not been promoted. They managed to

produce a small number of these. They said the failure to promote the claimant was caused by the inadequacy and incompetence of their system, rather than racial discrimination. The Tribunal and later the Court of Appeal upheld this.

The DRC has done much to challenge the idea that unjust treatment is outside anti-discrimination law if all are treated unjustly. Yet we have to admit that the thrust of the Race Relations, Sex Discrimination, and Disability Discrimination Acts is attacking situations where people are treated less favourably than others on irrelevant grounds.

While laudable efforts have been made by all the Commissions to raise standards for all within their jurisdiction, high standards are not inherent in the idea of equality. It is for this reason that a human rights approach and the focus and emphasis on human rights in the Equality Act 2006, and thereby in the responsibilities of the CEHR, are so important.

‘The DRC has done much to challenge the idea that unjust treatment is outside anti-discrimination law if all are treated unjustly’

The DRC has had some statutory encouragement to move beyond equality in section 1 of the 1999 Act, which requires the DRC ‘to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons’. And of course the DRC was just getting under way as an organisation as the Human Rights Act came into force.

At the outset, the DRC recognised the importance of using human rights to extend its ability to improve the situation of disabled people, and sought the power to fund and bring human rights cases where appropriate powers were not available under the DDA. Clearly, Article 8 of the European Convention on Human Rights, protecting the right to private and family life, and Article 3, conferring the right to freedom from inhuman and degrading

treatment, were potentially highly relevant to the needs of disabled people, particularly in their relations with health and social services.

Nick O'Brien, the DRC's Legal Director, gave a detailed and inspiring account of the importance of taking a human rights approach for the benefit of those whose interests it served in an article published in the summer 2006 issue of the newsletter of the British Institute of Human Rights. He describes not only the efforts of the DRC to raise human rights issues for disabled people in UK courts, but the impact of relevant judgments of the European Court of Human Rights. He describes the breakthrough achieved in the *East Sussex County Council* case,[27] in which two sisters with profound disabilities, who needed to be lifted to get out of bed or into the bath, had been denied the assistance of local authority carers able and willing to lift them manually on occasion. Central to the dispute was the fundamental difference of opinion between the family, on the one side, and the Council, on the other, as to whether the lifting should be done manually, as the family preferred, or, as East Sussex County Council would have it, with the use of hoisting equipment.

Using human rights principles, the judge was able to hold that the Council's policy failed to fulfil the value, central to the human rights approach, of human dignity: the claimants were entitled to have their needs as human beings respected by those responsible for their welfare. It would have been difficult to reach the same conclusion if one were applying a straight equality test; it was necessary to demand of the Council an objective standard of care, not necessarily to be found in any comparative situation.

The DRC deserves much praise for perceiving and developing the interaction between equality and human rights principles. Its innovative work in this area provides a strong foundation and launching pad for the CEHR.

27 *R v East Sussex County Council ex parte A, B, X and Y*, High Court CO/4843/01, DRC Intervener.

Delivering the DDA

The Rt Hon William Hague MP

William Hague was elected as Member of Parliament for Richmond, Yorkshire, at the 1989 by-election. He has held several posts in Government including Minister of State, DSS (with responsibility for Social Security and Disabled People) from 1994–95. He joined the Cabinet in 1995 and in June 1997 was elected Leader of the Conservative Party. He served as Leader until June 2001. In December 2005, Mr Hague was appointed Shadow Foreign Secretary and Senior Member of the Shadow Cabinet.

I will always be immensely proud to be associated with the anti-disability discrimination legislation that I, as Minister for Social Security and Disabled People, was able to pilot through Parliament with the help of many others in 1995. The longer I have spent in politics, the more I have realised that power is of a transitory nature and of far greater significance is the accomplishment of something worthwhile and enduring.

> ‘the manifestation of the Disability Discrimination Act was the result of tireless work over several years by countless organisations, individuals and members across all political parties’

During my time as the Minister responsible for this portfolio, I met with a large number of disabled people and organisations acting on their behalf. Whilst the subjects brought to my attention were incredibly different and wide-ranging, I soon discovered that the common denominators were a positive outlook in the face of adversity and a determination to get on, as demonstrated by these individuals and their families. Disabled people had long been fighting for recognition and equal opportunities in this country and the manifestation of

the DDA was the result of tireless work over several years by countless organisations, individuals and members across all political parties.

The Act set out a comprehensive package of anti-discrimination legislative proposals and measures in employment, access to goods, services and premises, transport and education, and was something of a landmark for its time. It was the first comprehensive provision for disabled people ever introduced by a British Government and paved the way in Europe towards the enactment of similar legislation to promote the rights of disabled people.

At the time of its introduction, the Act received criticism for not going far enough, but it was important to have a 'workable' definition of disability and I believe that it marked real progress, not just in principle, but also in practice. To me, it was not simply a matter of changing legislation or changing the rules; it was also a matter of changing attitudes.

During its passage through Parliament, the detail and implications of the Act were debated extensively and a great deal of discussion also took place beyond Westminster. It raised awareness of disability in a way that was very positive and encouraged millions of people to reassess their approach to an issue to which they had probably never given much thought or consideration. Given that the benefits extended beyond the scope of the actual legislation itself, the DDA 1995 was a huge step forward and I am pleased that further legislation was passed ten years later to extend the provisions in the original Act.

As a result, the UK has one of the strongest systems of disability discrimination law in the world, as was evident during the recent negotiations on the UN Convention on the Rights of People with Disabilities. However, the development of legislation to improve the rights of

disabled people is a continuing process: there is still room for improvement and many challenges lie ahead. How to improve matters in shipping and aviation, and ensure that disabled people are more easily able to initiate legal proceedings under the Act are outstanding issues.

The Government also needs to focus on the delivery of government services to disabled people: the social security system must deliver the assistance they require more effectively and help more disabled people into work and away from state dependency.

‘the development of legislation to improve the rights of disabled people is a continuing process’

Since its establishment in April 2000, the DRC has been a faithful steward of the DDA and, under the excellent leadership of Bert Massie, has worked indefatigably to ensure that disabled people are treated in an equal manner to those without disabilities. It has campaigned vigorously, lobbied Parliament and businesses, run education programmes, launched a successful advice helpline, commissioned groundbreaking research and, most important of all, improved the living standards and quality of life for literally thousands of disabled people in our country.

As the DRC prepares to hand over its work to the CEHR, I would like to take this opportunity to thank its Chairman and all its staff for their efforts over the past seven years. The DRC has worked extremely hard to champion the rights of disabled people in areas such as health, housing, employment, education and independent living and has had an incredible impact. I very much hope that its work will continue under the CEHR with the same commitment, enthusiasm and zeal, for it leaves behind a lasting legacy which is not only worthwhile, but enduring, of which all of us should be very proud.

Spotlight

Justice Albie Sachs

On turning six, during World War II, Albie Sachs received a card from his father expressing the wish that he would grow up to be a soldier in the fight for liberation.

His career in human rights activism started at the age of 17 when, as a second-year law student at the University of Cape Town, he took part in the Defiance of Unjust Laws Campaign. Three years later, he attended the Congress of the People at Kliptown where the Freedom Charter was adopted. He started practice as an advocate at the Cape Bar aged 21. The bulk of his work involved defending people charged under racist statutes and repressive security laws. Many faced the death sentence. He himself was raided by the security police, subjected to banning orders restricting his movement and eventually placed in solitary confinement without trial for two prolonged spells of detention.

In 1966, he went into exile. After spending eleven years studying and teaching law in England he worked for a further eleven years in Mozambique as law professor and legal researcher. In 1988, he was blown up by a bomb placed in his car in Maputo by South African security agents, losing an arm and the sight of an eye.

During the 1980s, working closely with Oliver Tambo, leader of the ANC in exile, he helped draft the organisation's Code of Conduct as well as its statutes. After recovering from the bomb, he devoted himself full-time to preparations for a new democratic Constitution for South Africa. In 1990, he returned home and as a

member of the Constitutional Committee and the National Executive of the ANC took an active part in the negotiations which led to South Africa becoming a constitutional democracy. After the first democratic election in 1994, he was appointed by President Nelson Mandela to serve on the newly-established Constitutional Court.

Justice Sachs talks to Martin Crick about human rights and equality in South Africa, and the challenges that lie ahead in Great Britain as we approach the CEHR.

The South African experience

Q **Justice Sachs, what are your hopes and fears for the single equality and human rights commission in Britain?**

A I think my big hope is that a number of gaps will be filled where there are areas that don't fall within the remit of the existing Commissions. There is a lot of crossover in thinking and values and ideas, and I think that with human dignity lying as the foundation of everything, something more coherent should come through. I don't think this is an area where one wants too much emphasis on technicalities and definitions. It's an area where the foundation of respect for human dignity should be pronounced and it could well be that the overall umbrella Commission will be better at achieving that. Certainly, there will be a sharing of experiences, both positive and negative.

The main danger, I suppose, is that some of the specificity – the focused attention on particular forms of discrimination or marginalisation – could get lost in a sort of 'bland

> ‘human dignity lies at the heart of everything’

cheeriness’. Sometimes, one needs to pay very specific attention to the particular ways in which the discrimination or exclusion plays itself out. The problems that face the disabled community all stem from a lack of equal concern and respect for everybody, similar to the problems that relate, for example, to gender discrimination or race discrimination. But in the case of disability discrimination it is usually indirect – it’s a failure to imagine and understand and create opportunities in a way that has the impact of just cutting out significant numbers of people in a very hurtful and unfair way.

Q **Some have expressed a concern that a single Commission may lead to a competition or hierarchy of rights. Do you share this concern?**

A I don’t think it will, though it’s always a danger. What matters is that all the rights are important and human dignity, as I repeatedly say, lies at the heart of everything. So one doesn’t want a competition of claims – they are all worthy, they all need respect and in some ways they flow into each other and stem from the same basic origin. But sometimes you have to make your voice heard in a particular area based on your special experiences. Then, what really is significant is the extent to which people are excluded, rather than the nature of the exclusion or the description that’s given to the exclusion. Sometimes it is the intensity of the infringement that can vary.

Q **What other lessons do you think we can learn from the experience of South Africa in respect of how you are healing a divided society?**

A I think one of the fundamental things – and it is not unique to us – is the right of marginalised communities or excluded communities to speak in their own voice and to break away from the sort of dependence in terms of which intermediates become the main spokespeople.

I know with the disabled community here the theme of ‘nothing about us, without us’ is significant. I remember that when I’d just got back from exile, I spoke to a group called ‘Concerned Social Workers’. It was wonderful to see a large hall, filled with social workers who saw their role as being more than just to help people with needs – it was to help the process of transformation in society. A few days later, I spoke to ‘Disabled People of South Africa’ and to them, the social workers were almost the biggest impediment – the blockage, the people controlling funding and speaking on their behalf.

I felt very torn and very divided but this was an important moment for me. I was then on the National Executive of the ANC and the Disabled People of South Africa said to me that they were happy that I’d been blown up and lost my arm because now I was joining the disabled community! I felt a bit wry about that but then they asked, ‘What should their strategy be?’ I said, ‘Well, what you must do…’ Then all of a sudden I stopped and said, ‘No, what we must do, what we must do…’. That was the first time I used the word ‘we’ in that particular context and I found myself very proud that I could identify with the community.

And in that community we really saw South Africa – black people, white people, there were people who’d lost arms and legs, there were people without sight, there were people without hearing, and there were men and women and young and old, and this was our nation. The phrase that came to me was ‘the great democracy of the disabled’. We are everyone and there was a sense of unity across lines of colour and class and gender, stronger in a way in the disabled community than in the able-bodied community.

This was 1990, four years before we got the new constitution. It was very powerful and very moving and

I felt really proud to belong to that grouping and to identify with it. Strangely enough, I hadn't regarded myself as disabled until then. I knew I had lost an arm and had decided not to use a prosthesis and that I was 'different' from other people in the community, in society, in politics, outside of politics. But that was the first time that I spoke about 'we'.

Q **Has the Constitutional Court yet had to tackle cases on disability?**

A We haven't had any actual cases reaching the Constitutional Court in which the question of disability, as such, has had to be dealt with. It has come up indirectly and, in fact, there is a case that we are dealing with at the moment on the theme of reasonable accommodation – a very hotly-debated issue. This case doesn't deal with disability; it deals with the right of a schoolgirl to wear a nose stud as part of her cultural/religious beliefs. The theme of reasonable accommodation was originally, I think, driven by the need to find accommodation for disabled people to an extent that is compatible with human dignity and basic rights, but didn't lead to exorbitant distortion of spending. That theme is now finding a considerable application in other areas reconciling cultural claims and rights, public interest and specific community interest and so on. So in that way, this theme of disability law has merged and become part of mainstream law.

Q **May I turn to issues around human rights, specifically? You'll be aware that this country faces particular challenges about the perception of human rights in some sectors of society. Why do you think that is and how can this be overcome?**

A It's amazing – the normal thing is to say, 'We are fantastic on human rights and we love them! We've got them all, so what's the problem?' What I found astonishing in Britain is

that the theme of human rights is seen as a kind of threatening thing. It's presented as always about rights for the wicked people as against the good people in society. We get that in South Africa as well – that it's rights for criminals as opposed to rights for the injured. So the problem is not unique to your country, but I think generally in South Africa – maybe because of our huge historic experience of marginalisation and oppression of the majority – very, very few people would denounce the human rights idea and project. They might just say it has got a bit out-of-hand or it's overbalanced.

'in South Africa very, very few people would denounce the human rights idea and project'

In Britain, I think there tends to be a sort of trivialisation of example – sometimes factually inaccurate or misleading, like the prisoner claiming that it's his 'human rights' to get pornography. Well he might have made that claim but, as far as I know, it was denied in practice. So it seems that some people have an agenda. Who knows, maybe what really distresses them are race issues. Or maybe what distresses many, many men – sadly – is a sense of patriarchy and that rights of women have gone 'too far'. It destabilises their whole view of life – but that is such tunnel vision.

I think it's a puzzle really. You have such hearts and souls that are open, that welcome diversity, that think that difference is a source of vitality in society, and then there are the more restrained individuals or sides to particular individuals. This is not peculiar to Britain, although one thing that is – and which looked increasingly odd – is the separate streams of internationally accepted human rights, with the European Convention, on the one hand, being applied its own track, and the specific interventions that the previous anti-discrimination laws required.

Q **That's interesting because equality and human rights seem so much more closely intertwined in the approach that the South African Constitutional Court has taken. Would you say that's fair?**

A Absolutely, we made equality number one in our Bill of Rights. In America, they speak about the importance of the first amendment – freedom of speech and free exercise of religion. And to the colonies becoming independent, that was number one. For us, number one is equality. That's against the backdrop of apartheid, of division, of using difference to keep people oppressed and to exclude them. Now the idea of equality is foundational to our new society and non-racism and non-sexism are expressly mentioned in our foundational principles. We speak about **achieving** equality – that it is something **to be achieved**. We speak of a constitution for transformation, for change – and maybe that's an important theme that can be universalised. So equality is not something that you've got that you mustn't depart from; equality is something you work towards.

'equality is not something that you've got that you mustn't depart from; equality is something you work towards'

It doesn't mean treating everybody in an identical fashion; it means treating everybody with equal concern and respect and doing so might require different treatment, preferential treatment, taking account of specificities. Men don't give birth to babies, so to allow for pregnancy to be seen as part of the perpetuation of the human race rather than a disease is not treating women with any special favour, but is taking account of pregnancy. The same, in a way, would apply to disability. In terms of access, it's not treating people with equal concern and respect to say, 'Well, it's tough luck that you are in a wheelchair, somebody can lift or carry you'. So that is a violation of equality.

> ‘equality means treating everybody with equal concern and respect and doing so might require different treatment, preferential treatment’

Equality really lies at the heart of the constitutional endeavour – that's if equality is understood as equal concern and respect, despite difference, and sometimes with reference to difference (and to the vitality that difference brings to society). I think that has been the key to South African legal thinking in terms of equality. And it extends very, very broadly – not just to overcoming decades, even centuries, of racial discrimination and even longer periods of patriarchy and male domination, but to disability, sexual orientation, marital status and so on. A whole range of factors that have been used to somehow keep people apart and to divide will now have to be subsumed under the general principle of equal concern and respect for everybody.

Q **Perhaps you would share your views on one particular case that came before the South African Constitutional Court, which I think is a powerful example of how that approach has actually changed lives in practice – the case of *Hoffmann v South African Airways*. How did you feel giving judgment in that case?**

A Yes, the anti-discrimination provisions don't expressly refer to medical status, but we had a very intense, moving case involving Mr Hoffmann.

Mr Hoffmann applied for a job as a steward on South African Airways. He passed all the exams with flying colours but, as it turned out, he was HIV positive. South African Airways said, ‘Look we'll employ you, there's no problem with that, but you'll be part of ground staff’. He said, ‘No, no, I want to be serving, I want to travel; this is the vocation that I seek to fulfil, I don't want to be selling tickets’. But the airline refused to take him on. I think they made reference to a particular major foreign international

airline which had let it be known that they don't employ people serving coffee or meals onboard if they are living with HIV. Mr Hoffmann went to the High Court and the High Court ruled against him, partly on the basis that commercial practices were a legitimate factor to be considered so it wasn't unfair discrimination. The case came on appeal to the Constitutional Court.

'there was total silence in Court and then, as we walked out, there was a huge cheer'

I still remember when we gave judgment. The Court was absolutely jam-packed with people wearing T-shirts saying 'HIV positive' and, again, here you saw the nation – young, old, black, white, male, female, HIV positive. There were also a number of journalists; there was great interest and a tremendous atmosphere in Court. My colleague, Justice Sandile Ngcobo wrote the judgment for the Court. We all, of course, made our inputs but it was his judgment, under his pen. I'm paraphrasing now but he more or less said this: we can't allow the commercial practices in foreign airlines to dictate the fundamental rights of South Africans and that if there is public prejudice against people living with HIV, it's the duty of South African Airways to help combat that prejudice, not to help perpetuate it. The treatment did amount to unfair discrimination and South African Airways were ordered to take Mr Hoffmann on as a steward. If, later, because of his HIV positive status, his health reached a stage where he wasn't able to perform his work properly, then, of course, he could be grounded and eventually his employment might be terminated depending on the nature of the illness. But he couldn't be excluded from being a steward onboard simply because of his HIV status.

I remember there was total silence in Court and then, as we walked out, there was a huge cheer. I was so overcome that I started crying. This wasn't just the impact of the HIV pandemic in our country, which has been very extensive. It was the knowledge that I belonged to a Court protecting a

constitution that defended the fundamental human dignity of everybody. And these were new forms of discrimination and marginalisation that had emerged analogous to the kinds of discrimination we had under apartheid and I felt very proud and overcome to be a member of a Court fulfilling that function.

A couple of years ago, I recall flying from Cape Town to London with South African Airways. An African woman, very, very elegant – your perfect prototype of a good steward – bent down and said to me, very quietly, ‘Thank you, Justice Sachs. It’s because of people like you that I have got this job.’ At first, I thought she was referring to my participation in the broad anti-apartheid struggle, but then my wife mentioned to me that it is because of the Hoffmann case. I thought about it – about why the lady had said it in that quiet way – and this made sense. Again, I felt exceptionally proud.

You must take people as they are rather than divide humanity into all sorts of groups, attaching stereotypes to them – what they can do, what they can’t do, what they should be allowed to do, what they shouldn’t be allowed to do. If you treat them as human beings, give them opportunity to express their personalities, to develop their skills, to participate in the life of the nation, then they contribute, they add something.

It might be that walking through the world with one arm instead of two – looking different – has given me a greater sensibility to these matters. It’s impossible to say how I would have been as a two-armed judge, but certainly the awareness of the need to accommodate difference has grown quite extensively in our country. It has helped that a number of our Members of Parliament are severely disabled. This helps raise and maintain consciousness amongst our law makers that maybe 10 per cent of our total population are fairly severely disabled – that’s several

millions of people. These people are part of the nation and we have struggled and struggled and struggled to get an inclusive nation. To that extent, the importance of justice for the disabled community is part and parcel of justice for the whole of our society.

Q **No doubt you feel that the law is a key tool to achieving that change?**

A The law is a very important tool. It is not the key as there isn't a single key; but it is one of the many mechanisms of opening doors.

Let me give an example concerning one of my colleagues at the Court, who is blind. His capacity to produce at the Court speeded up enormously when he was given a Braille typewriter and we all benefit from that. He was performing brilliantly beforehand and was very sharp, but it was as though his brilliance just intensified. He gets through so much more work, so we as a Court benefited from a relatively small investment and indeed the nation benefits. He can read far more widely and can write far more quickly than he could before. That is just a relatively small thing that's produced immediate results. You multiply that example into a thousand different areas of life and the nation benefits.

> 'the importance of justice for the disabled community is part and parcel of justice for the whole of our society'

I must tell you another little story here. We built our new Court in the heart of the old fort prison in Johannesburg. It's a very, very beautiful building, designed by extremely forward-looking architects. They wanted the Chief Justice to write something in the roof's concrete beams rather than using Roman lettering which was considered very formidable and intimidating. The Chief Justice invited the eleven judges to write in their own handwriting in

eleven different languages. And Justice Zak Yacoob, who has been blind since 16 months old and has never seen his own handwriting, wrote the words 'human dignity, equality, freedom' in one of the African languages. When we had a competition for designs for the signage for the Court, the people who won used Zak's handwriting as the foundation of a new font with some graffiti and street signs. They chose his handwriting because for them it is archetypal – the person making out the shapes is never seeing the shapes that he's made out himself. This is a very poignant feature of what's emerged as very beautiful signage for our Courts.

Q

You've referred there to the Court building, which I know is a remarkable structure with a rich collection of artwork that you yourself gathered over a number of years. Does this environment inspire you as a judge?

A

We have pictures, tapestries, some sculpture. We only had a budget of £1,000 so almost all of the art is donated by the artists. They were very happy to have their works in a building that represents constitutional democracy and so it is a collection that collected itself. It's very varied and includes works from people who don't even know that they are artists to others like Marlene Dumas and William Kentridge, who have a huge international reputation today. But the most interesting is what we call 'integrated art works'. That's things like the unique carpets, chandeliers, embroidery and the steel gates that serve as security gates, which, instead of just being heavy metal doors are crafted in metal with wonderful designs. We had competitions and got wonderful ideas sent in from all over the country, lots of them by rural people. And so the whole building has the feel of having been created by human beings, the human touch.

We also use the cool night air, which courses over ponds and gets trapped in cold rocks in the basement and pumped into the building during the day. So we have a very natural climate control rather than ordinary air conditioning. We

have lots of natural light coming through at carefully calculated angles so that we live in real time. We feel these are all features that lend to the humanising of the building.

'The law can be very cold, arid, clinical, artificial and remote or it can be very human-centred'

The law can be very cold, arid, clinical, artificial and remote or it can be very human-centred – concerned with discovering points of good in society, ways of moving forward, of respecting the autonomy of the individual and social solidarity and human interconnection at the same time. We found living and working in a building that somehow represents those qualities – physically, emotionally and literally in its light and shade – helps to humanise the work that we do. I wouldn't say the building has any direct influence on our decisions and judgments. But it is part and parcel of a vision and an approach to life that contributes towards achieving an intense sense of humanity and a strong preoccupation with human dignity as being at the core of everything we do.

Q **Would you like to share any final thoughts on the challenges that lie ahead for us as we continue to work towards achieving equality in Britain?**

A The issues are tough because they are tough in life. The question of achieving equality is not an easy thing in reality. The core problems don't lie so much in questions of definition and legal arguments, they lie in social reality – in all the contradictions of social reality – and what the law does is to try and find a principled and yet pragmatic and functional way of constantly working towards enlarging the theory that human beings can enjoy their full dignity.

Justice Albie Sachs was in discussion with Martin Crick of the Disability Rights Commission.

Work in Progress

The Disability Equality Duty

Catherine Casserley, Senior Legislation Adviser at the DRC, reflects on the Disability Equality Duty and the DRC's strategy for enforcement since the duty came into force.

The Disability Discrimination Act 2005 made some major changes to the Disability Discrimination Act 1995, most notably the introduction of a duty to promote disability equality. This duty – which requires public authorities to have due regard to the need to promote disability equality when carrying out their functions – will have a major impact on the way in which public authorities operate. This article looks at the duty itself and at how the DRC has enforced it so far.

'This duty will have a major impact on the way in which public authorities carry out their functions'

The general duty

Section 49A of the Disability Discrimination Act 1995, as amended (the Act), says that public authorities must, when carrying out their functions, have due regard to the need to:

- promote equality of opportunity between disabled people and other people
- eliminate discrimination that is unlawful under the Act
- eliminate harassment of disabled people that is related to their disability

- promote positive attitudes towards disabled people
- encourage participation by disabled people in public life
- take steps to take account of disabled peoples' disabilities, even where that involves treating disabled people more favourably than others.

The specific duties

The Act also gives the Secretary of State, or in Scotland the Scottish Ministers, the power to introduce regulations setting out more specific duties which may assist public authorities in meeting their general duty. These duties, known as the specific duties, are set out, in relation to England and Wales, in the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (SI 2005 No. 2966) and, in relation to Scotland, in the Disability Discrimination (Public Authorities) (Statutory Duties) (Scotland) Regulations (SSI 2005 No. 565). These duties apply only to the authorities which are listed in the regulations. The key aspect of the duties is the requirement to produce a Disability Equality Scheme.

The specific duties contained in the regulations require each of those public authorities that are listed to:

- publish a Disability Equality Scheme showing how it intends to fulfil its general duty and its specific duties
- involve disabled people in the development of its Scheme
- review the Scheme at least every three years.

The Disability Equality Scheme should include a statement of:

- how disabled people have been involved in developing the Scheme
- the steps which the authority will take to fulfil its general duty (the action plan)

- arrangements for gathering information about performance of the public body on disability equality
- arrangements for assessing the impact of the activities of the body on disability equality (impact assessments)
- arrangements for making use of the information gathered to assist in performance of the general duty and, in particular, in relation to reviewing the effectiveness of its action plan and preparing subsequent Disability Equality Schemes.

A public authority must also:

- take the steps set out in its action plan
- put into effect its arrangements for gathering and making use of information
- publish an annual report which includes a summary of the steps it has taken as set out in the action plan, the results of information gathering and the use it has made of such information.

Compliance and enforcement

The DRC can enforce compliance of the specific duties by means of issuing a compliance notice. The notice can be enforced in the County Court (or Sheriff Court in Scotland) (sections 49E and F of the DDA). A breach of the general duty can be litigated by means of judicial review in the same way as any other breach of statutory duty.

In the run up to the implementation of the duty, the DRC conducted extensive promotional activity. In addition, the Commission produced two statutory Codes of Practice (one for England and Wales, and one for Scotland) and 18 pieces of guidance.

Once the duty came into force, the focus shifted to enforcement. The initial focus was on key government department Disability Equality Schemes, given the strategic importance of these bodies. They were subject to detailed

analysis and the analyses were sent to the government departments concerned. A report has been produced – 'Up to the Mark? How have government departments responded to the new Disability Equality Duty?' – providing an overview of performance in relation to the various aspects of the specific duties. In addition, the correspondence between the DRC and those departments has been published, alongside the report, on the DRC website at: www.drc-gb.org.

'Once the duty came into force, the focus shifted to enforcement'

Shortly after the duties came into force, the Office for Disability Issues (ODI) conducted research into all public authorities in England and Wales, with the exception of schools, to establish whether they had a Disability Equality Scheme. The results of this research were passed over to the DRC. In May 2007, nine compliance notices were issued against public authorities who had failed to produce a Disability Equality Scheme. Details of this action can also be found on the DRC website. At the time of writing, it has not proved necessary to issue court proceedings in relation to these compliance notices.

The duty has also been raised in a case in which the DRC is intervening and which, at the time of writing, has yet to be heard. In the interim, the duties were raised in the case of *Eisai Ltd v National Institute for Health and Clinical Excellence (NICE)* [2007] EWHC 1941 (Admin), in relation to a decision by NICE on the use of a particular drug for the treatment of early stage Alzheimer's. In that case, one of the grounds of challenge to NICE's decision was that there was a failure by NICE, both in its Appeal panel and in the drafting of its guidance, to consider its anti-discrimination obligations and its obligations under the equality duties, both in relation to disability and race (in particular, as the guidance discriminated against those with learning difficulties and whose first language is not English).

Whilst the case failed on the majority of grounds, the court did hold that the approach of the Appeal Panel was flawed, in that no proper consideration was given to NICE's duties as a public authority to promote equal opportunities and to have due regard to the need to eliminate discrimination. It was unreasonable and unlawful to overlook that responsibility. A similar view was taken of the guidance, particularly as there was no evidence that, before issuing the guidance, the 'due diligence' duties were considered or complied with, or that any thought was given to present or imminent obligations under anti-discrimination law. The Court ordered NICE to revise its guidance.

In Scotland, a similar survey of authorities to that conducted by the ODI was carried out by DRC's Scottish office. As a result, three compliance notices were issued in respect of a failure to produce a Scheme. Again, details are available on the DRC website.

Meanwhile, work is ongoing in the health and education sectors, and we are responding – with compliance action where appropriate – to complaints from individuals who have exhausted their local complaints procedures. In addition, lessons learnt so far from the implementation of the duty will also be shared via publications and seminars. In particular, the DRC has commenced research on the implementation of the Disability Equality Duty and this will be available before the DRC ceases in October 2007.

The DRC has also commissioned research into the views of Directors General and other staff across five Government departments[28] regarding the benefits gained from developing Disability Equality Schemes. Overwhelmingly, they felt that the process had been positive and productive, particularly the requirement to involve

28 Department for Skills and Education; The Department for Trade and Industry; The Department for Work and Pensions; The Department for International Development; and The Department for Communities and Local Government.

disabled people. It is for this reason that the DRC is particularly concerned about the Government's proposals to weaken the duties – as outlined in the article at page 107.

A vast amount of work has been done by the Commission so far in relation to the duties, and they have proved to be a powerful tool in mainstreaming disability equality through the work of public bodies. Whilst considerable work remains to be done, we look forward to the duties going from strength to strength as they continue to 'bed down' and as awareness of them is raised.

Associative discrimination: *Coleman v Attridge Law and anor*

Paul Epstein QC

Paul Epstein QC is a barrister at Cloisters. He is a leading employment and discrimination law specialist who has appeared in a wide variety of reported and high profile cases. His clients are wide-ranging and diverse. They include low paid catering staff, cleaners, care assistants as well as high paid chief executives of PLCs, and multinational organisations, public bodies, local authorities and many others. His international practice includes work in the ECHR. Paul took silk in 2006.

Facts

Is associative discrimination prohibited by the Equal Treatment Framework Directive 2000/78/EC (the Directive)? We know that under the DDA it is unlawful if, without justification, I discriminate against you, or harass you, on the ground of **your** disability, but is it unlawful if I discriminate against you, or harass you, on the ground of **your association** with a person with a disability?

Miss Coleman resigned from Attridge Law alleging, amongst other things, that she was not granted flexible working opportunities compared to parents of non-disabled children employed by the company. She claimed unlawful 'associative discrimination' and constructive unfair dismissal against her employer. Her son is disabled. She is not.

The London South Employment Tribunal (Chairman Ms M. E. Stacey) referred various questions to the European Court of Justice (ECJ) on whether the Directive covers associative discrimination. The Respondents took the unusual step of appealing the decision to refer, but the EAT (HHJ Peter Clark)

dismissed their appeal (see [2007] IRLR 88). The EAT accepted the arguments of Robin Allen QC for Miss Coleman (who was supported by the DRC) that it is not clear whether the Directive does or does not prohibit such associative discrimination, and the further argument that the DDA is capable of being interpreted so as to prohibit such discrimination if that is the meaning of the Directive.

Discussion

It is likely that the ECJ will, in due course, find that the Directive prohibits associative discrimination. The interpretative and policy arguments in favour of such an approach are far more compelling than the arguments against.

As far as literal interpretation is concerned, where the Directive seeks to limit its protection to persons who have a particular disability, it says so expressly. Articles 1, 2(2)(a) and 2(3) in broad terms state that less favourable treatment or harassment has to be on the grounds of disability whereas, by contrast, Articles 2(2)(b) and 5 make reference to 'particular disability' and 'person with a disability'.

As for social policy, and a purposive approach to the Directive, the Directive's Recitals illustrate that its intended aims include the promotion of social protection, raising the standards of living and quality of life, economic and social cohesion and solidarity. Such aims would be better achieved by the ECJ by prohibiting associative discrimination. Moreover, the European Commission's Annual Report of 2005 on Equality and Non-discrimination states that discrimination on the grounds of race or ethnic religion, religion or belief, age, sexual orientation or any disability applies equally to anyone who is discriminated against because they associate with a person with those characteristics. Submissions in the case from various EU member states support the associative approach.

If the ECJ produces this expected answer, the next question will be whether the UK Tribunals and Courts will find the DDA capable of supporting this interpretation – ie whether the DDA has correctly implemented the Directive. In relation to direct discrimination, the cause of action under section 3A is for 'treatment on the ground of the person's disability'. The cause of action for harassment under section 3B is for 'subject[ing] a disabled person to harassment [...] for a reason which relates to the person's disability'.

Though it is not difficult to conclude that the words 'on the ground of' in section 3A are wide enough to include associative discrimination (after all the same words in the Race Relations Act 1976 have long been interpreted this way: *Zarczynscka v Levy* [1979] ICR 184; *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65; *Weathersfield v Sargent* [1999] ICR 425), the problematic question is whether the words 'the person's disability' can be read down so as to apply to some person other than the person bringing the complaint. It was accepted on behalf of Miss Coleman in the EAT that these literal words protect from discrimination only those who are themselves disabled, and that words will need to be interpolated into the sections to prohibit associative discrimination.

Will the Tribunals and Courts do this? There are already precedents for interpretative flexibility. In *Litster and Others v Forth Dry Dock and Engineering Co Ltd and anor* [1989] 2 WLR 634 the House of Lords took the then very unusual step of interpolating additional wording into UK legislation in order that it be read compatibly with EU law (it read the words 'immediately before the transfer' into the Transfer of Undertakings (Protection of Employment) Regulations 1981), although, admittedly, that interpolation is less marked than the one that will be required here.

Moreover, section 3 of the Human Rights Act 1998 (HRA), which requires a Court to read UK legislation as compatible with the HRA 'so far as it is possible to do so',

has already led to an increased willingness on the part of Courts to reach interpretations that, to common law judges more than two decades ago, would have seemed outlandish.

This willingness is shown in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, where the House of Lords stated that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character and 'may require a court to depart from the unambiguous meaning the legislation would otherwise bear'. Importantly, in applying section 3 HRA, the focus by the Courts is no longer on the precise statutory words used in a specific section of the legislation. Instead, 'Since section 3 relates to the "interpretation" of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration.' In that case the words 'as his or her husband or wife' were interpreted to apply to a same-sex couple.

Since the DDA must be interpreted so as to give effect to the Directive, if the Directive is held by the ECJ to prohibit associative discrimination, by a process of interpretation similar to that used with the HRA in *Ghaidan*, the DDA is likely to be held to have correctly implemented that prohibition.

Miss Coleman is supported by the DRC but the case is highly unlikely to be resolved during the remaining lifetime of the DRC. Indeed, at the time of writing, the case is scheduled to come before the ECJ on 9 October 2007. As Robin Allen QC stated in his article on page 15, this is likely, therefore to be an important piece of legacy work for the new CEHR.

The Future

Discrimination Law Review:

A summary of the DRC response to the Green Paper – 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain'

In June 2007, the Government published its long-awaited review of discrimination law – 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain'. The Green Paper is the first public consultation following the Government's announcement of the Discrimination Law Review (DLR) in February 2005. Whilst the paper does contain some specific gains in relation to disability discrimination legislation, as well as some proposals for 'levelling-up' across the strands, the DRC has considerable concerns about the content of the Green Paper.

The Discrimination Law Review

The DLR set out some key – and welcome – terms of reference when it was first established in 2005.
These were:

- a consideration of the fundamental principles of discrimination legislation and its underlying concepts, and a comparative analysis of the different models for discrimination legislation
- an investigation of different approaches to enforcing discrimination law so that a spectrum of enforcement options can be considered

- an understanding of the evidence of the practical impact of legislation – both within the UK and abroad – in tackling inequality and promoting equality of opportunity
- an investigation of new models for encouraging and incentivising compliance
- consideration of the opportunities for creating a simpler, fairer and more streamlined legislative framework in a Single Equality Act.

The DLR also stated that it was to be grounded in a comprehensive analysis of the efficacy of Great Britain's current equality enactments and the requirements of European equality legislation. Unfortunately, this grounding does not appear to underline the paper.

The DRC's view of the Green Paper

Progress towards substantive equality for disabled people is far too slow and in some areas we are drifting backwards. For example, according to the Equalities Review, at the current rate of progress, employment equality will simply never be achieved for disabled people. Meanwhile, three out of every ten disabled adults of working age are living in poverty in Britain – a higher proportion than a decade ago and double the rate among non-disabled adults.[29]

> 'the DRC has considerable concerns about the content of the Green Paper'

The state of anti-discrimination legislation is partly to blame. It is complex, full of holes and does not provide us with the right set of tools to root out systemic inequalities. An historic opportunity lies ahead with the promise of a Single Equality Act within the lifetime of this Parliament. Clear, comprehensive and **effective** new equality legislation is vitally needed to

29 'Monitoring Poverty and Social Exclusion in the UK', Joseph Rowntree Foundation, 2005.

inject new momentum into the battle for real equality for disabled people, older people, women and men, transgender people, lesbians and gay men and people of different religious beliefs.

> 'overall we believe that the Green Paper has failed to meet its brief'

The Green Paper should be setting out proposals for an equality law which is fit to address the challenges and embrace the opportunities of the 21st Century. It fails to measure up.

Fails to meet its brief

Whilst it addresses, to some extent, the issue of simplification of the law, overall we believe that the Green Paper has failed to meet its brief. It fails to put forward any substantive improvements in securing compliance or achieving better methods of enforcement. In particular, there are no plans to address the continuing failure of the private sector to tackle discrimination or embrace equality.

Missed opportunity

The proposals fail to address some of the gaps in protection and the deep-seated problems regarding the way in which disability and other equality laws work – particularly in relation to access to justice, and effective means of tackling persistent discrimination.

Undermines the Disability Equality Duty in three fundamental ways:

1. The principle underpinning all three equality duties at present is 'mainstreaming'; the duties require equality issues to be taken on board in everything that public authorities do. The Green Paper proposes narrowing this duty so that authorities are required to set equality objectives – and take proportionate action to achieve these objectives. The DRC opposes this because it breaks completely with the mainstreaming requirement which is at the heart of the equality duties. This proposal would remove the requirement for equality

impact assessments. Instead, we think the gender duty is a good basis for the future development of equality duties; it requires due regard to gender equality in all the actions of a public authority and also requires equality objectives to be set.

2. At present, most public authorities have to produce three-year Schemes with detailed requirements, including requirements relating to monitoring and to showing what steps the authority will take to promote equality. Public authorities must also involve disabled people in these Schemes. The Green Paper instead proposes a far less specific requirement which will be far harder to enforce and far harder for disabled people to use to hold authorities to account. It proposes 'principles' to 'underpin effective performance of public sector duties'. The involvement of disabled people will be a 'principle' instead of a legal requirement.

3. At present any interested party can challenge a public authority decision on the basis that it fails to give due regard to disability equality. It is proposed that this will no longer be the case, with only the CEHR being able to take enforcement action on the basis of failure in relation to the specific objectives.

'There are some positive steps on disability'

Positive steps

There are some positive steps on disability – particularly the proposal to require landlords to allow tenants to make changes (such as installing chair lifts). We approve of the proposed re-drafting of the disability discrimination provisions. However, these gains are small in relation both to the outstanding problems and, more particularly, to the impact of weakening the Disability Equality Duty.

We also welcome proposals that will benefit other groups: to prohibit age discrimination in goods and services, to extend the duty to promote equality to all groups covered by the Single Equality Act and to loosen restrictions on

positive action (disability discrimination is distinctive in not imposing any restrictions on positive discrimination).

What the DRC would like to see in the Single Equality Act

(a) Stronger enforcement mechanisms: equality tribunals, group and representative actions and effective sanctions

The DRC believes that jurisdiction to hear goods and services cases should be transferred to the employment tribunal, as recommended by the July 2000 Hepple Report – an independent review of the enforcement of UK anti-discrimination legislation.[30] We also support group and representative actions. Further details of these issues are provided in our full briefing available on our website at: www.drc-gb.org.

Effective sanctions: employment tribunals

Where individuals do successfully challenge discrimination in the courts, the impact of this success should be maximised. In particular, employment tribunals should have the power to recommend to employers changes to their practices to avert future cases of discrimination. Tribunals are not, at present, allowed to make policy recommendations to an employer except where there is direct benefit to the complainant. The great majority of discrimination cases are brought by ex-employees and, in these cases, tribunals cannot make such recommendations. For example, if an applicant establishes that they were discriminated against

‘jurisdiction to hear goods and services cases should be transferred to the employment tribunal’

30 See ‘Equality: A New Framework – Report of the independent Review of the Enforcement of UK Anti-Discrimination Legislation’ published by the Cambridge Centre for Public Law and Judge Institute of Management Studies in the University of Cambridge authored by Professor Bob Hepple QC, Mary Coussey and Tufyal Choudhury, July 2000.

by being harassed because of their disability and they resign as a consequence, a tribunal cannot, at present, make a recommendation that the employer adopt an anti-harassment policy as that would bring no benefit to the former employee.

‘employment tribunals should have the power to recommend to employers changes to their practices’

This issue has recently, and without any notice, been taken outside of the remit of the Discrimination Law Review. The Department for Trade and Industry’s ‘Success at Work: Resolving Disputes in the Workplace’ Consultation, launched in March 2007, states at paragraph 4.25: ‘The policy aim underlying the idea of spreading good practice and helping employers to understand their obligations under the law is a good one. However, the Government has concluded that widening the scope of the power to make formal recommendations is not the most appropriate way of achieving this, since the policy aim can be better addressed through advice and guidelines for employers on employment law’.

The three statutory equality Commissions produce extensive Guidance for employers, as do other bodies. Our common view is that the power of tribunal recommendations would make a significant contribution to countering poor practice by those employers who are found by a tribunal to have discriminated.

(b) Extended and strengthened duty to promote equality: one that applies to all strands, retains the requirement on most authorities to produce public equality schemes and explicitly applies to public procurement

(c) A clear statement in the Act of its purpose

This purpose should be not merely to eliminate discrimination but to enhance dignity and participation and achieve substantive equality through positive action, where

required. Such a clause would improve public understanding and guide courts, tribunals, and everyone else dealing with the legislation as to how it should be applied and interpreted.

(d) Banning all disability discrimination: ships, planes, volunteers and armed services

(e) Stronger protection against discrimination in education

The DRC recently consulted on its proposals in relation to education. These proposals received overwhelming support and are detailed in our full briefing available at: www.drc-gb.org. One of the areas that the Commission consulted on, in particular, was the issue of compensation in schools cases heard in the Special Educational Needs and Disability Tribunal (SENDIST) or Special Educational Needs Tribunal for Wales (SENTW). In cases brought under race or gender legislation (or, more recently, sexual orientation or religion or belief legislation), a child can claim compensation for injury to feelings or any other damages incurred as a result of the discrimination. In cases brought under the DDA, however, compensation is explicitly ruled out.

In England and Wales, the SENDIST/SENTW have a broad range of powers to order schools to take action to address discrimination, such as having disability awareness training. However, these powers may not provide an effective remedy to disabled children who are about to or have just left the school concerned.

Whilst responses to the DRC consultation on this issue were sharply divided, the majority were in favour of paying compensation. Those who did not support the payment of compensation raised concerns that it might have an effect more generally on education, and that there was a need to focus the school on addressing the discrimination, rather than on paying money. These

arguments can, however, be made in relation to any publicly-funded organisation against whom a claim of discrimination can be made – such as an NHS trust, or a local authority social services department. The Commission was not convinced that this argument carried sufficient weight, balanced against the very strong feelings expressed by respondents that disabled young people should have parity of treatment with those claiming discrimination on the basis of any of the other grounds.

‘there should be a tiered approach to remedies in pre-16 education cases’

The DRC, therefore, believes that there should be a tiered approach to remedies in pre-16 education cases. The main focus of remedy should be aimed at addressing the discriminatory act – for example, for the policy to be changed, an apology to be given etc. If that does not achieve an equitable outcome, then compensation should be payable. This power would need to be exercised very carefully by tribunals, and guidance would be needed in respect of this.

(f) A simpler, better definition of disability

(g) Protection for those discriminated against because they are associated with, or perceived to be, a disabled person (this would benefit carers, people working with HIV positive people and many others) and a fairer approach to disability discrimination per se (protecting anyone discriminated against on grounds of impairment)

(h) Protection against discrimination on grounds of genetic predisposition

(i) Clear protection against multiple-discrimination

Many of the weaknesses in the current proposals apply with equal force to other forms of discrimination. We have

produced shared briefing notes with the CRE and the EOC on:

- public sector duties
- the need for a Single Equality Act to contain a clear statement of principles or purpose.

These are available, along with a copy of our full briefing, on our website at: www.drc-gb.org. Copies of the Green Paper are available from the Department for Communities and Local Government website: www.communities.gov.uk. The consultation period on the Government's proposals ran from 12 June 2007 to 4 September 2007.

In Brief

DRC Key Cases

DDA: Definition of disability

***Kapadia v London Borough of Lambeth* [2000] IRLR 699 Court of Appeal**

The Court of Appeal decided that counselling can be treatment for purposes of the provisions relating to 'deduced effect' (the effect that it can be deduced that the impairment would have without the treatment or correction measures). The DRC later secured a settlement of £120,000 for the client.

***Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24 Court of Appeal**

The DRC backed this case in the Court of Appeal. This resulted in the respondent abandoning the Court of Appeal proceedings. Consequently, the judgment of the EAT, which was a helpful one, remained good law. The case established that the evaluation of whether a person's condition impacts on their ability to carry out normal day-to-day activities can involve consideration of the impact on those activities within the workplace as well as outside work.

***McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] IRLR 711 Court of Appeal**

The DRC intervened in this case as an interested party, and established the principle that it is the effect of a person's impairment, rather than its cause, which is important for the purposes of meeting the definition of disability – essentially a social model approach.

Kirton v Tetrosyl Ltd [2003] IRLR 353 Court of Appeal

The Court of Appeal held that when considering whether a progressive condition has some effect on a person's ability to carry out normal day-to-day activities, and is therefore covered by the DDA, the effect need not be directly caused by the underlying condition, and could be an effect resulting from treatment for the condition.

Swift v Chief Constable of Wiltshire [2004] IRLR 540 Employment Appeal Tribunal

This case established that for a mental illness to be a recurring condition, the key question is whether the substantial adverse effect of the illness will recur, rather than the illness itself.

Hewett v Motorola [2004] IRLR 545 Employment Appeal Tribunal

It was decided that an employee with Asperger's syndrome was covered by the statutory definition of disability, because limited social interaction impacts on the ability to carry out normal day-to-day activities in relation to one of the specified statutory categories – the ability to understand.

Millar v Commissioners of Revenue and Customs [2006] IRLR 112

The Court of Session ruled that it is possible to find that a person has a physical impairment without knowing the cause of that impairment. The cause of a condition, whether that cause is psychological or physical, is irrelevant where a tribunal is satisfied a claimant's physical symptoms are sufficient to restrict his ability to carry out normal day-to-day activities. An impairment can be something that results from an illness as opposed to itself being the illness.

DDA Part 2 (Employment)

Jones v 3M Healthcare Ltd and three others [2003] IRLR 484
House of Lords

These cases established that post-employment termination discrimination was covered by the DDA's employment provisions. The cases were heard with similar cases concerning the operation of the Sex Discrimination Act and the Race Relations Act. This was the first time the House of Lords had considered the DDA.

Paul v National Probation Service [2004] IRLR 190
Employment Appeal Tribunal

This case established that the duty to make reasonable adjustments can extend to giving thought to making adjustments to a job to overcome difficulties identified by an adverse occupational health assessment.

Collins v Royal National Theatre Board Ltd [2004] IRLR 395
Court of Appeal

This case established that the possibility of justifying a failure to make reasonable adjustments is very restricted. It therefore moderated the impact of an earlier, much criticised, Court of Appeal decision concerning justification of less favourable treatment (*Jones v Post Office* 2001 IRLR 384). It also foreshadowed the changes to the employment provisions of the DDA on 1 October 2004, which removed the provision allowing justification of failure to make reasonable adjustments.

Law v PACE Microtechnology Plc [2004] EWCA Civ 923
Court of Appeal

This case was on the same point as *Collins*, and was conceded by the respondent in the Court of Appeal, because of the outcome of *Collins*. The respondent was refused permission to appeal to the House of Lords. The case settled for £50,000.

Archibald v Fife Council [2004] IRLR 651 House of Lords

This was the first case where the House of Lords had to consider the operation of the DDA, as compared to other anti-discrimination legislation. In a key judgment which was very widely reported, and will be used by courts and tribunals for years to come, the House of Lords unanimously allowed Mrs Archibald's appeal. The judgment contains some very important principles. The House of Lords stressed that the DDA is different from the Race Relations Act and the Sex Discrimination Act, and may require a difference in treatment to attain equality of outcome. The reasonable adjustments provisions are the mechanism for achieving this. The judgment made it clear that the reasonable adjustments provisions are very broad in scope. They cover the situation where a person becomes incapable, through disability, of carrying out his or her job. Employers may have to make adjustments to their usual policies (such as a redeployment policy requiring competitive interviews). The 'merit principle' which applies to local government appointments is subject to the DDA's reasonable adjustments duties. The House of Lords also said that the question of justification of less favourable treatment cannot be determined until a determination has been made about reasonable adjustments. This was an important finding, and built on the decision on *Collins*, thus further limiting the scope of *Jones v Post Office*.

Nottinghamshire County Council v Meikle [2004] IRLR 703 Court of Appeal

This case further developed the principles established in *Archibald*. The Court of Appeal's judgment makes very clear the importance of the reasonable adjustments provisions in relation to the question of justification of less favourable treatment. This case established that constructive dismissal is covered by the DDA's discrimination provisions, and that the payment of sick pay is subject to the reasonable adjustment provisions. On the facts of the case – Mrs Meikle

would not have been off sick if reasonable adjustments had been made by her employer – the Court of Appeal held that reduction of sick pay in line with the respondent's sick pay policy was both a failure to make a reasonable adjustment and unjustifiable less favourable treatment. Mrs Meikle accepted compensation of £196,000.

BUPA Care Homes (BNH) Ltd v Cann and *Spillett v Tesco Stores Ltd* [2006] IRLR 248 Employment Appeal Tribunal

These joined cases established that section 32(4) Employment Act 2002 is no absolute bar to a tribunal considering a discrimination complaint where a grievance was submitted more than four months after the act of discrimination complained of. The tribunal is still entitled to exercise its general discretion under the DDA to consider a discrimination complaint outside of this time, where it is just and equitable to do so.

Smith v Churchills Stairlifts Plc [2006] IRLR 41 Court of Appeal

This case clarified the proper approach to take to a DDA reasonable adjustments claim and provides particularly useful guidance concerning identifying the correct comparator when assessing whether the duty arises. The Court of Appeal held that firstly it is necessary to identify the arrangements (or, since October 2004, the provision, criterion or practice) which place the disabled person at substantial disadvantage and this should be given a very wide meaning. Next, identify the proper comparator by reference to the disadvantage caused by those arrangements. The DDA does not require comparison with the population generally; instead, focus on the disadvantage. Then decide if it's reasonable for the employer to have to take any particular step by way of adjustment. This is an objective test; ultimately it is the tribunal's view of what is reasonable that matters.

Morrison v Emma's Country Cakes **[2006] (settled)**

This case, which settled prior to a hearing, was the first DRC-supported legal case involving direct discrimination to achieve a positive outcome. Mrs Morrison was dismissed from her job as a bakery assistant after her manager discovered that she had diabetes. Her employers felt that her medical condition made it too dangerous to allow her to continue to work on the premises. The employer admitted discrimination and paid Mrs Morrison £5,368 in full and final settlement.

Tudor v Spen Corner Veterinary Centre Ltd and anor **[2006] Manchester Employment Tribunal Case No. 2404211/05**

This was the first direct disability discrimination case supported by the DRC to be considered by the employment tribunals. Following a stroke, Miss Tudor was told that she had a visual impairment. After her employer was informed of this, she was dismissed. The Tribunal was satisfied that generalised and stereotypical assumptions were made about the claimant, the duration of her disability and its effects. Her claim of direct disability discrimination was successful.

Latif v Project Management Institute **[2005] Reading Employment Tribunal Case No. 2701121/2005 Pre-Hearing Review**

At a Pre-Hearing Review, it was held that DDA claims against a qualification body which is incorporated in another country and has no place of business in Great Britain can be heard by a tribunal if the place where the claimant experienced alleged less favourable treatment is within Great Britain. This was the case even though the acts and decisions of the qualification body took place outside of Great Britain.

Project Management Institute v Latif **[2007] IRLR 579 Employment Appeal Tribunal**

This was the first appeal decision concerning the

qualifications bodies' provisions of the DDA. It was held that the qualifications body failed to make reasonable adjustments to the arrangements provided for sitting an examination. The EAT accepted that the proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases not even until the tribunal hearing. In certain circumstances, it would be appropriate for the matter to be raised by the tribunal itself.

***Attridge Law and anor v Coleman* [2007] IRLR 88 Employment Appeal Tribunal**

This is the first case concerning the DDA to be referred to the ECJ. Miss Coleman argued that discrimination by association with a disabled person is covered by Directive 2000/78/EC (which prohibits discrimination 'on the grounds of' disability), and that the DDA (as amended by regulations to give effect to the Directive) must also be construed in this way. An employment tribunal referred questions to the ECJ for a preliminary ruling on whether associative disability discrimination is covered by the Directive. The employer appealed against that reference order. The EAT held that the tribunal had been entitled to make a reference to the ECJ and that reference is now proceeding. It is scheduled to come before the ECJ on 9 October 2007.

***Hay v Surrey County Council* [2007] EWCA Civ 93 Court of Appeal**

Although this case did not expressly resolve the conflict of EAT authorities on the issue of whether an assessment is a separate and distinct component of the duty to make reasonable adjustments under the DDA (see *Mid-Staffordshire NHS Trust v Cambridge* [2003] IRLR 566 and *Tarbuck v Sainsbury's Supermarkets* [2006] IRLR 664), in practical terms, it is clear that employers should consult with the disabled person and assess what adjustments may be required.

DDA Part 3 (Rights of Access: Goods, facilities, services and premises)

D and W **[2002] (settled)**

The DRC supported two Part 3 cases relating to internet banking. The cases both settled on good terms and led to beneficial changes across the banking sector for disabled people and their lawful attorneys.

Tom White v Clitheroe Royal Grammar School **[2002] Preston County Court Claim No. BB002640**

This case was brought under Part 3 of the DDA, because the education provisions of Part 4 of the DDA were not then in force. It was decided that a pupil with diabetes was disabled for the purposes of the DDA. The case also established that school trips of a non-educational nature could fall within the scope of Part 3.

Roads v Central Trains **[2004] EWCA Civ 1541 Court of Appeal**

This was the first Court of Appeal case relating to the operation of Part 3 of the DDA. In an important judgment, the Court of Appeal decided that the underlying purpose of the DDA requires that a service should, wherever possible, be provided to a disabled person in the same way as for a non-disabled person. The policy of the Act is to provide access to a service as close as it is possible to get to the standard offered to the public at large. It is not merely to ensure that some access is available. The Court of Appeal accepted that the reasonable adjustment provisions of Part 3 are anticipatory in nature, and thought that the extent of reasonable adjustment required would depend on the foreseeability of the difficulty that a disabled person would experience.

Ross v Ryanair Ltd and Stansted Airport Ltd [2004] EWCA Civ 1751

This was another important Court of Appeal judgment relating to Part 3 of the DDA. The Court of Appeal decided that Ryanair and Stansted Airport Ltd were jointly liable for discriminating against Mr Ross, by charging him for the use of a wheelchair. The Court of Appeal accepted that the size of the airport gave rise to a reasonable adjustment duty for Mr Ross, and that the cost of meeting that legal responsibility should not have been passed on to him. Where more than one service provider has duties in the same situation, it is important to agree how those duties are met.

Kirwan v Spirit Group Limited, trading as Shirley Inn [2006] (settled)

This case was one of the first successful outcomes relating to the physical features duties under Part 3 of the DDA, which were introduced in October 2004. Ms Kirwan was unable to access toilet facilities at her local public house. The case settled for £2,500, the claimant received an apology and, importantly, work was to commence on accessible toilet facilities at the premises.

Jackson v Debenhams Plc [2006] (settled)

Mr Jackson, a wheelchair-user, had been unable to access part of the menswear section in Debenhams, Derby. The part he found inaccessible was situated at mezzanine level and could only be accessed by two routes, both of which required customers to climb four steps. Following the commencement of legal action by Mr Jackson, Debenhams signed a voluntary binding agreement with the DRC (under the framework of section 5 of the Disability Rights Commission Act 1999) to improve access in its retail stores in England. The agreement committed Debenhams to have in place suitable means for disabled customers to access previously inaccessible mezzanine floor areas in 16 of its

stores, within six months from the date of the agreement. Under the terms of the agreement, the County Court claim brought by Mr Jackson was withdrawn. The improvements which Debenhams committed to included the installation and maintenance of an accessible platform lift to the mezzanine floor area in their Derby store – which Mr Jackson had previously been unable to access.

DDA Part 4 (Education)

Ford-Shubrook v St Dominic's Sixth Form College **[2003] Manchester County Court Claim No. MA315699**

This was a case alleging discrimination on the basis that the college failed to admit the claimant, in the belief that certain classes could not be made safely accessible to him because he was a wheelchair-user. The County Court provided injunctive relief by compelling admission pending the hearing of the substantive claim. The Court was especially concerned that, given the balance of available evidence and the likely outcome of the substantive hearing, the interim denial of admission would cause disproportionate disadvantage to the claimant, whose course of studies was due to commence within a couple of days of the interim hearing. The case settled prior to the full hearing and the claimant was able to continue his studies at the college of his choice.

Chan v Bradford University **[2004] (settled)**

This case settled when the university agreed to enter into a section 5 agreement with the DRC (the first such agreement obtained). The university committed to auditing its policies, practices and procedures, with the aim of making courses and teaching materials more accessible for disabled students.

The Governing Body of PPC v DS and others [2005] EWHC 1036 (Admin)

This appeal to the High Court is one of very few cases to date to consider the correct interpretation of certain key sections of Part 4 of the DDA. The High Court judgment confirms that the duty not to discriminate requires that reasonable adjustments are considered as an alternative to exclusion or in order to avoid exclusion. This is the case even though Part 4 of the DDA is drafted in such a way that the reasonable adjustments duty makes no express reference to exclusions. Furthermore, the less favourable treatment (ie the exclusion) cannot be justified if there were reasonable adjustments which could have been made but which were not made.

Knell v Sunninghill Preparatory School [2006] (settled)

The school insisted that the parents of a six-year-old pupil who has diabetes provide a full-time carer to assist the boy in the management of his condition whilst at school. The prohibitive cost of this requirement left the parents with no option but to withdraw their son from the school. The DRC supported a claim of disability discrimination and the case settled. The school agreed to apologise, change practices and protocols, train staff, refund the pupil's school fees and make a contribution towards uniform costs at his new school. The case raised the profile of the duties on schools under the DDA.

Potter v Canterbury Christ Church University [2007] Canterbury County Court Claim No. 5CL14216

This was one of the first cases brought under the higher education provisions in Part 4 (chapter 2) of the DDA to proceed to a hearing. Mr Potter, who is a wheelchair-user, was unable to access the main stage at his graduation ceremony at Canterbury Cathedral. His claims of less favourable treatment and failure to make reasonable

adjustments under the DDA succeeded. The case highlighted the anticipatory nature of the duty to make reasonable adjustments and resulted in a significant award of £4,000 for injury to feelings.

Compensation

Purves v Joydisc Ltd [2003] IRLR 420 Court of Session

This case established that the same principles apply to compensation for injury to feelings in relation to Part 3 DDA cases, as they apply in Part 2 cases and discrimination cases generally. The lowest possible award is £750.

Essa v Laing Ltd [2004] IRLR 313 Court of Appeal

This case involved a joint intervention by the three statutory Commissions (DRC, EOC and CRE) on the question of compensation. The Court of Appeal agreed with the submissions made on behalf of the interveners, that the reasonable foreseeability test does not apply to unlawful discrimination damages; all that is required is that the damage must have been caused by the discriminatory act.

HM Prison Service v Beart (No. 2) [2005] IRLR 171 Court of Appeal

In this case, the Court of Appeal upheld the Employment Tribunal and Employment Appeal Tribunal's judgments that the prison service could not rely on its own intervening wrong (unfair dismissal) to limit compensation for disability discrimination. The Employment Tribunal had awarded in the region of £400,000 by way of compensation to Mrs Beart, to reflect the fact that her ability to work and employment prospects had been badly affected by the discrimination that had taken place. Settlement discussions are ongoing.

Monk v Jordan Dean t/a Body Creation [2007] Preston County Court Claim No. 6MA05622

The claimant in this case received additional damages of £1,500 for 'several aggravating factors which caused unnecessary distress… and diminished [the claimant's] self-worth.' The defendant, who is the proprietor of a tattoo business, refused service to the claimant and then telephoned his father, who he claimed was his boss. The father came to the shop and, according to the judge, adopted a highly discriminatory attitude and offered gratuitous insults. As well as the £1,500 additional damages, the judge awarded damages of £1,000 for the initial act of discrimination in declining to provide the service. The judge commented that had he found that the father was a partner in or employee of the business and thereby acting in the course of the business, the total damages would have been in excess of £3,000.

Hancock and Marlow v Mr Webb and Mrs Webb t/a Cecil Court Hotel [2007] Aldershot and Farnham County Court Claim No. 6MA11481

The first and second claimants were awarded what is believed to be record compensation for injury to feelings for a claim under Part 3 of the DDA. The District Judge awarded Mrs Marlow £7,500 and Mr Hancock £4,000 after they brought successful claims of unlawful disability discrimination (including claims under the Part 3 'physical features duties') against a hotel which failed to provide accessible facilities. The judge stated their injury to feelings had been worsened by the failure of the defendants to provide a written apology or even a refund of the monies that had been paid.

Interventions

Disability and human rights

R v East Sussex County Council Ex parte A, B, X and Y **(DRC – Intervener) [2003] CO/4843/2001 High Court**

This case involved a challenge to a local authority's manual handling policy, on the basis that it amounted to a no lifting ban and was unlawful. In a comprehensive decision the judge made reference to a wide range of relevant case law and statutes, as well considering a substantial amount of evidence. He considered domestic and EU law on health and safety, human rights legislation and other legislation concerning the rights of disabled people. He concluded that a lifting policy is most unlikely to be lawful which, either on its face or in its application, imposes a blanket ban on manual lifting.

During the course of the hearing, the DRC and the parties were able to agree the wording of a model manual handling policy which was approved by the Court. The DRC has since carried out promotional work to ensure that local authorities (and others) develop and operate policies which ensure a proper balance is struck between meeting the needs and rights of disabled people on the one hand, and ensuring a safe environment for staff working with disabled people on the other.

R (on the application of Burke) v General Medical Council **(DRC and others – Interveners) [2005] EWCA Civ 1003 Court of Appeal**

Although the DRC was disappointed at the outcome of this case – the Court of Appeal did not consider GMC's guidance to medical professionals concerning the withdrawal of artificial nutrition and hydration to be unlawful – important principles of patient autonomy and choice were recognised. A competent person's wishes must be respected (apart from

a right to demand a particular treatment) and withdrawal of life-prolonging treatment contrary to a competent patient's expressed wishes would be murder. Further, the Court stated that GMC guidance should be understood and implemented at every level of the medical profession to ensure people are treated properly and not patronised because of their disability.

In the earlier High Court proceedings, the judge made reference to the role of the DRC in his judgment. He said: 'The DRC was able to deploy, to the great assistance of the Court, a particular and highly relevant informed expertise which none of the other parties could bring to the task in hand'. He also referred to, 'The important role that, in appropriate cases, bodies such as the DRC have to play in litigation, affording our courts the kind of valuable and valued assistance that courts in the United States of America have for so long been accustomed to receiving from those filing amicus curiae briefs'.

YL (by her litigation friend the Official Solicitor) v Birmingham City Council and others **(DRC and six others – Interveners) [2007] UKHL 27 House of Lords**

The House of Lords held that that a private care home providing accommodation to elderly residents under contract with a local authority was not itself exercising 'functions of a public nature' for the purposes of the Human Rights Act 1998. Consequently, the care home was not bound under section 6(1) of the HRA to act in accordance with rights protected by the European Convention on Human Rights. Nine out of ten care homes are privately run and local authorities are increasingly arranging for private companies to provide care and accommodation which the local authority has a statutory duty to provide. All of the interveners had argued that the Human Rights Act should directly bind private and voluntary care homes providing residential care under contract to a local authority to people such as YL. The decision has increased pressure on the

Government to plug the loophole that means that people in private and voluntary sector care homes continue to be denied effective human rights protections. DRC and others have continued to work to help fund a solution.

Interaction of Part 3 of the DDA with housing law

Manchester City Council v (1) Romano and (2) Samari **(DRC – Intervener) [2004] EWCA Civ 834 Court of Appeal**

The issue the Court of Appeal had to consider was the lawfulness of eviction of a tenant for anti-social behaviour, where the behaviour concerned was disability-related. The DRC intervened to make submissions on the interaction of the DDA and eviction proceedings, and to bring to the attention of the Court the wider concerns raised by such cases. Evidence was adduced to show that disabled people with mental health problems find it more difficult to find accommodation and to retain accommodation than the population generally, and that the percentage of homeless people with mental health problems is high. The DRC argued that mental health problems can sometimes cause behaviour which can be perceived to be anti-social. This could result in eviction, when the better course of action for a local authority would be to facilitate access to mental health and community care services.

The Court of Appeal decided that the particular evictions which were the subject matter of the case were lawful but concluded that to evict someone because of behaviour caused by mental health problems would constitute less favourable treatment for a disability-related reason under Part 3 of the DDA, and would need to be justified on health and safety grounds.

London Borough of Lewisham v Malcolm **(DRC – Intervener) [2007] EWCA Civ 763 Court of Appeal**

The Court of Appeal ruled that local authorities run the risk of unlawful discrimination when seeking to evict disabled

tenants who breach their tenancy agreement for a disability-related reason. Mr Malcolm, a council tenant, succeeded in using the DDA to defend himself against a mandatory possession order from Lewisham Council for sub-letting his council home. The DRC intervened in the case because of its legal importance.

Lady Justice Arden ruled that where it is mandatory for the courts to issue possession orders to evict tenants who breach the terms of a secure tenancy agreement, the Council were also under a duty, under the DDA, to examine whether the breach could be related to disability. If the reason for the breach is disability-related, then, unless it can be justified under the DDA, it will be unlawful to evict.

This was the first time a case had dealt with a possession order where it was mandatory for the Court to make an order. The case demonstrates the extent to which the premises provisions of the DDA impact upon, and operate within, housing law.

Cases exploring general discrimination law principles

(see also *Essa v Laing* referred to above)

Igen Ltd v Wong and two other cases **(DRC, EOC, CRE – Interveners) [2005] IRLR 258 Court of Appeal**

The DRC and the other statutory Commissions (the EOC and CRE) intervened in this case, to argue for some consistent principles on the reversal of the burden of proof, which would be of application to all direct discrimination cases. The Court of Appeal accepted and endorsed the principles put forward by the interveners. This is a very important judgment and will be extensively referred to by courts and tribunals.

The DDA was amended last October, to introduce the concept of direct discrimination in the employment field. This case will

assist people who are bringing DDA cases involving allegations of direct discrimination.

St Helens Borough Council v Derbyshire and others **(EOC, DRC, CRE – Interveners) [2007] UKHL 16 House of Lords**

This House of Lords judgment explored the victimisation provisions in discrimination legislation. The judgment provides a clear warning to employers to avoid doing anything that might make a reasonable employee feel that she is being unduly pressurised to concede a discrimination claim. It was recognised that an employer can take steps which are a reasonable means to avoid prejudicing its legitimate interests in litigation, such as negotiating settlements or pointing out the possible consequences of a claim succeeding. However, an employer must not seriously jeopardise the employee’s right to pursue her claim. It is the employee’s interest in pursuing the claim that provides the test of what is and what is not ‘reasonable’. Although the case concerned victimisation arising from an equal pay claim, the outcome will have implications across all fields of discrimination.

Other interventions

Penumbra v City of Edinburgh Council **Appeal to Scottish Executive Inquiry Reporters Unit [2207] P/PPA/230/862 and P/LBA/230/166**

The DRC intervened in this appeal by a mental health organisation against refusal of permission to allow works to improve access to a building which they wanted to use as a crisis centre. The DRC intervened in order to ensure that the planning process takes appropriate account of the interests of disabled people. The appeals were allowed subject to conditions which were acceptable to Penumbra. In its submissions, the DRC had highlighted the duties on both the planning authority and on the Reporter hearing the appeal, under the Disability Equality Duty.

DRC Formal Investigations

The Web: Access and Inclusion for Disabled People

In 2004 the DRC published the report of its first formal investigation, into website accessibility for disabled people. We found that most websites (at the time) failed to satisfy the most basic industry standards for web accessibility, and we recommended that urgent action was needed to improve the usability of web-based services for disabled people. Following the investigation, we sponsored the British Standards Institute (BSI) to produce a Publicly Available Specification 'Guide to Good Practice in Commissioning Accessible Websites'. This specification (PAS78) is available for download through BSI licence from the DRC website. A total of 54,000 downloads have been made over the past 18 months.

In September 2007, work will begin to convert PAS78 into a Full British Standard. The CEHR, in replacing the DRC as sponsor, will be invited to participate as a key participant in this process. Conversion of PAS78 will require a full open consultation lead by BSI. It is estimated that a Full British Standard will be produced in 2008, and early indicators are that BSI will wish to use the British Standard as a key UK contribution to the development of European e-standards.

Equal Treatment – Closing the Gap

Our second formal investigation was completed in 2006. This was a wide-ranging investigation into the health inequalities experienced by people with learning disabilities and/or mental health problems. The investigation provided important new evidence that people

within these groups are more likely to experience major illness, to develop serious health conditions at an earlier age and to die of them sooner than other people. Yet they are also less likely to receive some of the important evidence-based treatments and health checks than others with the same condition (but without a mental health condition or learning disability). They also face real barriers to accessing services.

Our report argued for a clear shift in approach – not only to root out unequal treatment but also explicitly to target these very high risk groups for health checks and follow-up treatments. This will prevent the extra costs of serious ill health being passed on to other parts of the National Health System and enable these groups to be healthier and to participate fully in society.

Since publishing our report, there has been some progress on particular aspects of our recommendations, especially in relation to tackling practice issues through professional learning and development. The investigation has also had a noticeable impact on raising awareness of health inequalities experienced by disabled people. It also generated a considerable amount of goodwill amongst some of the key professional organisations, such as the Royal College of General Practitioners and the British Medical Association. Nevertheless, in a number of areas – health checks, provision of accessible information, and prescribing, to name but three – there remains a clear need to translate this goodwill into specific actions.

Maintaining Standards: Promoting Equality

The report of our third, and final, formal investigation is hot off the press – having been published in the DRC's final month. This year-long investigation into the regulation of professionals' health in nursing, teaching and social work has concluded that great swathes of the

public sector are effectively 'no go' areas for disabled people. Not a 'what can you contribute?' culture but a 'what's wrong with you?' culture for nurses, social workers and teachers who are disabled or have long-term health conditions.

Protection of the public is of the highest importance. However, the mass of regulations and guidance which govern health standards do nothing to protect the public and may indeed offer a false sense of security. Nevertheless, these regulations have a chilling effect on disabled people, deterring them from applying or remaining in these professions.

Consequently, we recommend the repeal of the legislation, regulations and statutory guidance laying down requirements for good health or fitness of professionals. Instead of generalised health standards, we consider that a framework of professional standards of competence and conduct, coupled with effective management and rigorous monitoring of practice, is the best way to balance the aspirations of disabled people to make their contribution to British life and the protection of the public.

Statistical Analysis: DRC's Legal work 2000–07

Unless otherwise specified, for the purpose of these statistics:

'Employment'	means a case under Part 2 of the DDA
'Services'	means a case under Part 3 of the DDA
'Education'	means a case under Part 4 of the DDA

A. Legal Services: Cases supported by the DRC

Number of cases funded

	Employment	Services	Education	Judicial review/ Intervention	Total cases
2000–01	28	13	0	0	**41**
2001–02	41	23	0	1	**65**
2002–03	34	20	2	2	**58**
2003–04	23	6	19	2	**50**
2004–05	12	12	22	4	**50**
2005–06	21	17	13	4	**55**
2006–07	14	20	12	4	**50**
1 April 2007– 29 Jun 2007	3	4	1	2	**10**

Outcomes of cases funded by the DRC

Case Outcomes 1 April 2007–29 June 2007
Total Cases Completed 13*

	Won	Settled	Lost
Employment	1	2	/
Services	2	5	/
Education	/	1 (post-16)	1 (schools)
Total	**3**	**8**	**1**

*Note: funding was withdrawn on one Part 4 schools case.

Case Outcomes 2006–07
Total Cases Completed 31*

	Won	Settled	Lost
Employment	4	4	2
Services	2	10	0
Education	3 (2 schools, 1 post-16)	5 (4 schools, 1 post-16)	0
Total	**9**	**19**	**2**

*Note: funding was withdrawn on one Part 2 employment case.

Case Outcomes 2005–06
Total Cases Completed 33

	Won	Settled	Lost
Employment	5	8	0
Services	0	9	0
Education	2 (2 schools)	8 (5 schools, 3 post-16)	1 (1 schools)
Total	**7**	**25**	**1**

Case Outcomes 2004–05
Total Cases Completed 42

	Won	Settled	Lost
Employment	7	7	2
Services	3	8	2
Education	2 (2 schools)	11 (7 schools, 4 post-16)	0
Total	**12**	**26**	**4**

Case Outcomes 2003–04
Total Cases Completed 46

	Won	Settled	Lost
Employment	9	15	4
Services	2	4	1
Education	4	7	/
Total	**15**	**26**	**5**

Case Outcomes 2002–03
Total Cases Completed 38

	Won	Settled	Lost
Employment and Services	9	27	2
Total	**9**	**27**	**2**

Note: The first two years' figures are not available in a comparative breakdown format.

B. DRC Helpline

Records of general queries about the DDA etc*

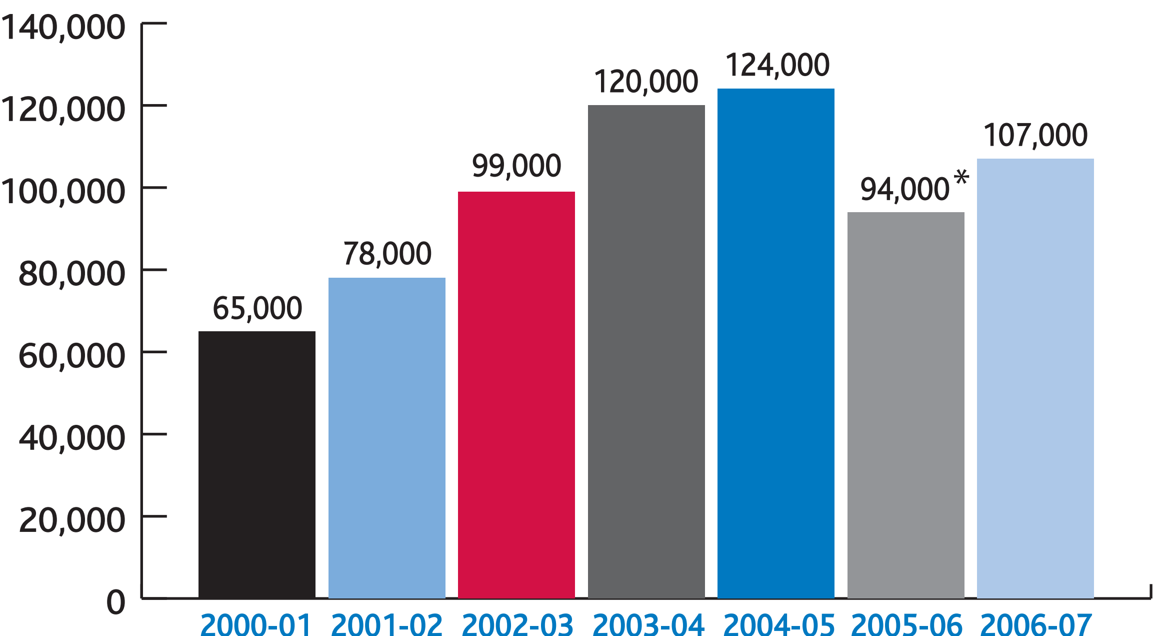
	Apr 07–Jun 07	Apr 06–Mar 07	Apr 05–Mar 06	Apr 04–Mar 05	Total
Access to Goods, Facilities and Services	1,014	3,367	3,946	7,607	**15,934**
Definition	171	733	840	662	**2,406**
Disability Equality Duty	122	590	N/A	N/A	**712**
Education	190	882	787	785	**2,644**
Employment	2,155	5,376	4,476	3,194	**15,201**
Land and Property	149	552	481	703	**1,885**
Other	469	1,928	3,124	4,867	**10,388**
Overview of Act	56	176	500	575	**1,307**
Transport	61	170	204	216	**651**
Total	**4,387**	**13,774**	**14,358**	**18,609**	**51,128**

Records of potential cases of disability discrimination*

	Apr 07– Jun 07	Apr 06– Mar 07	Apr 05– Mar 06	Apr 04– Mar 05	Total
Employment	3,688	15,710	8,590	7,546	**35,534**
Access to Goods, Facilities and Services	2,236	10,441	7,198	5,242	**25,117**
Education	962	3,284	2,111	1,864	**8,221**
Premises	478	1,745	890	822	**3,935**
Total	**35,534**	**25,117**	**8,221**	**3,935**	**72,807**

*Note: These figures represent the number of issues for which records were created, rather than the number of contacts to the DRC Helpline. This distinction is important because the same person can have a number of different issues to discuss with us or may contact us on a number of occasions about the same issue. (Figures prior to April 2004 are not available in comparative breakdown format.)

Enquiry volume for each year



Total number of contacts to DRC Helpline since April 2000 was 713,000 contacts.

*Note: Towards the latter end of the financial year 2004–05, the Commission invested in marketing resources to make clear what the Helpline cannot provide as well as what it routinely delivers. This was an effort to reduce the amount of contact outside of the Commission's remit. The reduction in contact – and, in tandem, queries outside of the DRC's remit – between 2004–05 and 2005–06 demonstrates the success of that strategy.

C. Voluntary binding agreements

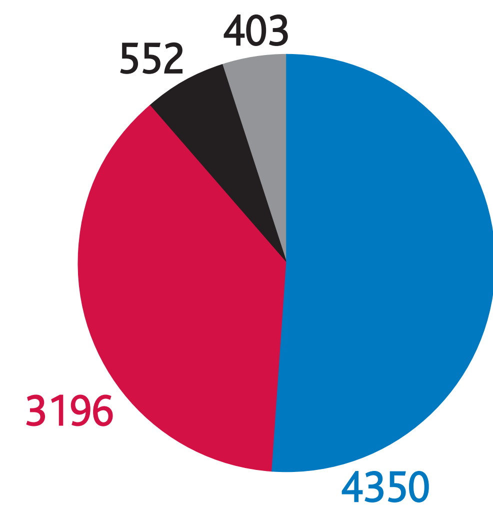
	Part of DDA under which DRC had reason to believe unlawful act was committed			
Date agreement entered into	**Employment**	**Services**	**Education**	**Total**
1 April 2004–30 March 2005	/	1	1	2
1 April 2005–30 March 2006	/	2	/	2
1 April 2006–30 March 2007	/	1	1	2
1 April 2007–31 July 2007	/	4*	1	5
Total	**/**	**8**	**3**	**11**

*Note: One did not proceed.

D. Casework

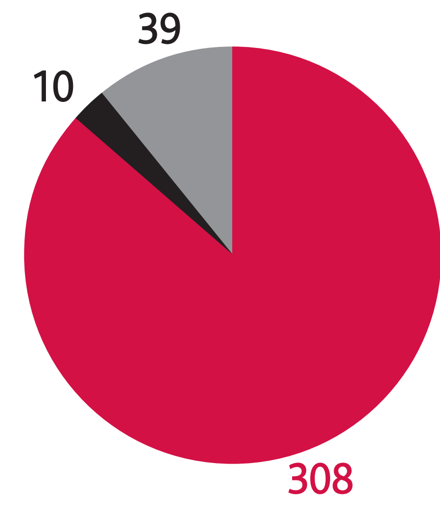
The Casework Department received **8501** cases between April 2000 and October 2005:

Employment cases
Services cases
Education schools cases
Education post-16 cases



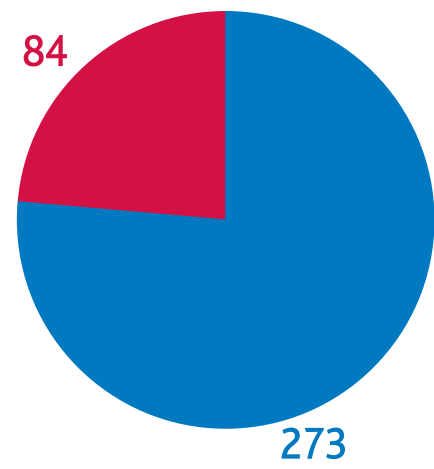
Between 1 March 2001 and October 2005, the Casework Department referred **357** cases for Conciliation:

Services cases
Education schools cases
Education post-16 cases



Of these **357** cases:

- reached a full and final settlement
- reached no settlement



The **Scotland Casework Department** handled **837** cases between April 2000 and July 2007 (including 93 cases under unspecified Parts of the DDA which are not included in the breakdown below).

Employment cases: 364

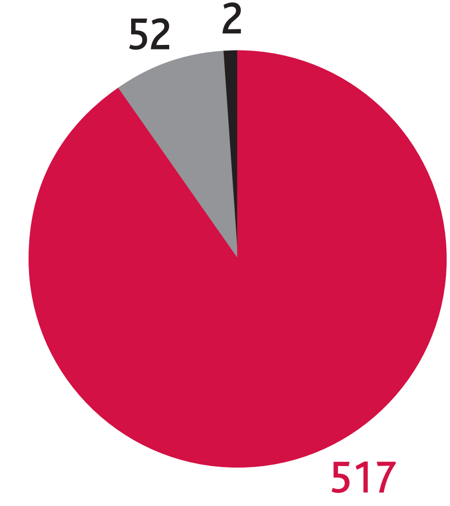
Services cases: 251

Education cases: 129 (schools and post-16)

E. Conciliation Management Unit (CMU)

Since its inception on 1 September 2005 to 25 July 2007, the CMU has received **571** new cases, of which:

- Services cases
- Education post-16 cases
- Education schools cases



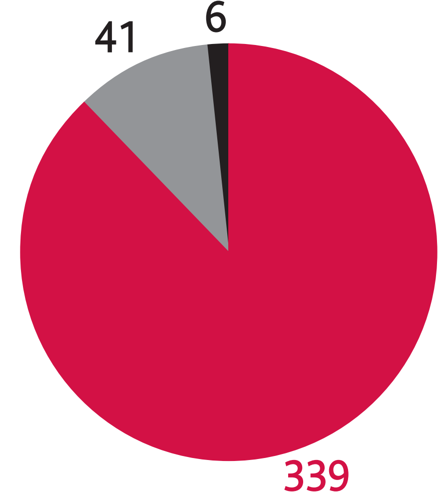
Note: Of these cases, **247** have been received in 2007.

In the same period, the CMU has referred **386** new cases for conciliation, of which:

Services cases

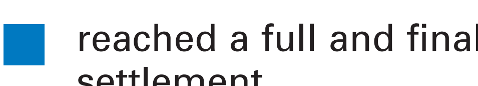
Education post-16 cases

Education schools cases



Note: Of these cases, **134** have been referred in 2007.

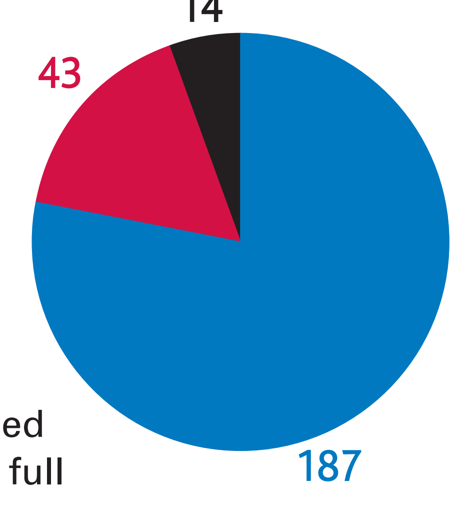
In the same period, the Disability Conciliation Service (DCS) has closed **244** cases, of which:



reached a full and final settlement

reached no settlement

were closed when parties withdrew before the meeting



Note: Of the **230** cases that reached a meeting, **81 per cent** reached a full and final settlement.

Since January 2007, when Mediation Works commenced delivery of the DCS contract, **86 per cent** of cases have reached a full and final settlement.

DRC's Legal Bulletin: Catalogue of articles from previous issues

Previous issues or articles from issues may be downloaded from: www.disability-archive.leeds.ac.uk

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Final Reflections

Nick O'Brien, Director of Legal Services, DRC, and Caroline Gooding, Special Adviser and Director of Legislative Reform, DRC

The first DRC Legal Bulletin, published in December 2001, noted that, 'Securing legal rights in practice means making the law work for disabled people, not engaging in legal activity for its own sake. Legal enforcement is a means, not an end; and it is just one of many means'. It was also clearly recognised that the challenge was one of transcending the limits of law: 'if the legal resources available to the DRC are to be used most effectively, their application must be strategic, informed by broader policy and communication initiatives, rather than merely reactive'.

> 'Legal enforcement is a means, not an end; and it is just one of many means'

In the intervening years, the DRC has remained faithful to that vision. Previous editions of the Legal Bulletin have charted the landmarks of real impact:

- the development of the law itself, both through legislative reform and the establishment of well reported case precedent in the higher courts
- the development of conciliation as a form of dispute resolution and of agreements in lieu of enforcement as an instrument of organisational and sectoral change
- the potential of public interest 'interventions' in litigation, especially in human rights cases

- the increasing acceptance that 'access to justice' means taking seriously the distinctive needs of disabled people
- the importance of using the law not just in employment disputes but in matters relating to commercial goods and services, health and social care, and transport
- the use of Codes of Practice in setting standards and in establishing the DRC as an authoritative voice, not just another combatant in the struggle for social justice
- the launch of general investigations, whether into website accessibility, health inequality or professional accreditation, as a means of identifying structural and systemic patterns of inequality
- the emergence of the Disability Equality Duty, with its emphasis on prevention rather than retrospective cure.

What have been the consequences of this approach for the role of the DRC's lawyers, for the positioning of the DRC's legal work, and for the character and impact of the DRC as a whole?

Being 'strategic' means being attuned to the extra-legal context, to the broader policy priorities of the Commission, to the need to spread the legal word beyond the confines of just the legal world. That approach in turn entails the resistance of a narrow approach to legal work and the embrace of a vision that privileges the full mobilisation of the law rather than its mere enforcement or promotion. Legal professionalism should properly covet its distinctive standards and rigour, but not at the expense of impact and credibility.

'Being 'strategic' means being attuned to the extra-legal context'

The cross-functional approach is easier aspired to than achieved. An Equality Commission does, though, provide an exceptionally fertile environment in which to practise law of a kind that goes beyond the confines of ordinary legal

practice, whether private, public or voluntary sector: general investigations and Codes of Practice demand linkage with general policy initiatives; litigation needs to find a purpose that is communicable to the non-legal world; conciliatory approaches to dispute resolution require the legal equivalent of homeopathy and not just the surgical knife of conventional litigation. The role is that of the Renaissance Lawyer, humane, broad-minded and alert to the bigger equality and human rights picture.

Much is still contested in the world of equality and human rights. The general environment is one of struggle rather than easy acceptance of universally acknowledged sweetness and light. The temptation is for an Equality Commission to become just another combatant, to replicate the strategies of others, to become a surrogate law centre, campaign outfit or provider of legal aid. Resistance to that temptation entails conscious positioning somewhere else, a refusal to accept the marginalisation that ultimately awaits imitation.

Employment law is sovereign in the world of anti-discrimination and its importance is hard to decry. It is all the more important then to remain attentive to developments in other sectors, to take cases that are not just about the workplace, and to make use of legal powers that are not straightforwardly litigious at all. Setting standards, interpreting and nurturing the law, and offering authoritative guidance become just as important as assuming the daily mantle of David in the face of a real but not always uniformly malevolent Goliath. The upshot is legal work as a form of regulation, but not quite as you know it.

The consequences for the DRC as a whole have not always been comfortable. The DRC is the product of the disability movement, and the movement is rightly impatient for decisive action. The stick of litigation and overt enforcement is a more immediate sign of engagement than the slower-burning regulatory fuse. Yet the DRC's approach

has not diminished its support of cases: at a time when the other Equality Commissions have been reduced to annual single figures, the DRC has weighed in with an average of 55 fully-funded cases per year, plus nearly 100,000 beneficiaries of helpline advice, and hundreds of claimants referred to free conciliation, in-house casework support or supported law centre representation.

But the support of individuals has not been seen as an end in itself. The challenge has always been to get beyond the circumstances of the individual case, not because those individual circumstances are unimportant, but because they are frequently too important to entrust to the courts and tribunals or to confine in their potential impact. An Equality Commission has a privileged role in speaking with an authoritative voice, in being the guardian of its core legislation and in defining for itself a niche role in enabling social change of a kind that is consistent with human rights principles and with real equality. To discount that distinctive position would be to let pass by a unique opportunity.

‘no one body can succeed if it is the sole effective channel for legal redress and strategic progress’

Perhaps one of the clearest lessons emerging from the DRC’s work is that no one body can succeed if it is the sole effective channel for legal redress and strategic progress. Instead, the structures of the legal system itself need to be changed to provide better access to justice for individuals, and to enable other actors to make strategic use of the law to promote equality. Since the DRC’s Legislative Review in 2003, for example, the DRC has called for new equality tribunals to hear all discrimination cases (not just employment disputes), providing simpler, cheaper recourse for individuals who experience discrimination in relation to services. Tribunals could also achieve a more strategic impact if they were given the power to make recommendations for improving employment practices whenever they judged appropriate. The DRC would also

like to see the process for bringing a legal challenge made easier for those representing groups rather than single individuals.

Despite the discouraging start provided by the Discrimination Law Review and the resulting Green Paper (A Framework for Fairness), the DRC hopes and anticipates that these critical issues will be addressed by the long-promised Singe Equality Act. On the dissolution of the DRC in October 2007, attention will turn to the CEHR, with its enlarged remit and new set of challenges. Much will be expected of it, and of its statutory Disability Committee. It will be easier for the CEHR to resist operating as a surrogate law centre or equivalent if the law, and indeed the funding of legal representation, are changed to allow meaningful access to justice.

If the DRC leaves a sustainable legacy, it surely includes a model of legal work that strives to make the extra-legal connections, to transcend the limits of law and to embrace a form of humane professionalism that is itself a manifestation of a human rights ethos in action. Disabled people themselves, and indeed those others who look to the CEHR for progress, will be the judges of whether it is a legacy worth preserving. Whatever the verdict, it has certainly been a privilege.

Note: Unless stated otherwise, the views expressed in the articles in this publication are those of the respective authors and are not necessarily representative of the views of the Disability Rights Commission.

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The Disability Rights Commission (DRC) was created in April 2000 pursuant to section 1 of the Disability Rights Commission Act 1999 (the 1999 Act). Its aim is to create 'a society where all disabled people can participate fully as equal citizens'. Section 2(1) of the 1999 Act requires the DRC: (i) to work towards the elimination of discrimination against disabled persons (ii) to promote the equalisation of opportunities for disabled persons (iii) to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons and (iv) to keep under review the working of the Disability Discrimination Act 1995 and the 1999 Act.

You can contact the DRC Helpline by voice, text, fax, post or by email via the website. You can speak to an operator at any time between 08:00 and 20:00, Monday to Friday.

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From October 2007, the Commission for Equality and Human Rights will cover all equality issues. Visit the website **www.cehr.org.uk** for contact details.