

Disability Rights Commission

Learning lessons:
Enforcement or
persuasion –
tensions in the
DRC's approach?

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Executive summary

The Learning Narratives project contributes to the broad legacy strategy of the Disability Rights Commission. It considers what the DRC has learnt through its various activities since 2000 and focuses on specific activities or overarching themes where the DRC has had direct involvement.

Each narrative responds to questions such as 'why did we, the DRC, try to do what we did?', 'what worked?' and 'what didn't work and why?' and draws on a range of data sources, not least of which is the experience and expertise of DRC staff, both past and present.

This narrative considers the DRC's work on the new Disability Equality Duty, which came into effect in December 2006, and the tensions between its initial role of persuading public bodies to comply with their legal duties to its later role as the body responsible for enforcing those duties.

Enforcement or persuasion: key lessons

- An organisation with statutory responsibilities needs to fully understand the scope of its powers and the different methods it can use to fulfil its responsibilities from the outset. An appropriate organisational design to best implement these responsibilities needs to be created accordingly.
- An organisation needs to recognise that internal communication regarding responsibilities and boundaries is paramount. This is to ensure appropriate relationships with partners can be established from the outset without risk of compromise at a later date.

- Specific training on issues, and their implications, will need to be provided to all staff, and not just those directly involved in delivering.
- Where an activity involves elements of both persuasion and enforcement it is strongly recommended that teams with the required range of skills are established from the outset.
- An organisation with GB responsibility needs to recognise the nation-specific issues and implement different strategies accordingly.
- When publicly providing information about other organisations, ensuring correct data is used is critical. This is equally important when this information is received from secondary sources, as incorrect information severely undermines the whole strategy.
- Planning from the outset is critically important, particularly when there are distinct phases to the strategy, to ensure appropriate resources and time are given to each phase.
- Establishing 'champions' who have credibility in their particular sector is a key method of gaining acceptance and ownership of the issue.
- Using a wide range of promotional tools is an effective way of reaching a target audience in a variety of different ways.
- The balance between the 'carrot and stick approaches' needs to be fully understood from the outset, and implementation planned accordingly.
- It is useful in communications to demonstrate an understanding of competing pressures that a

particular sector/authority may face and yet give clear examples of how the duty may be effectively implemented, often with little expense and to the business advantage of the authority.

- A steering group with representation from across the organisation is a powerful way of guiding a long-term project/programme and ensuring 'energy' levels are maintained.
- Approaches to implementation and delivery need to be focused differently for each sector to maximise impact and effectiveness.
- An organisation needs to establish a continuous monitoring mechanism to inform ongoing activities, and which enable timely changes to be made where necessary.

Introduction

The Disability Discrimination Act (DDA) in 1995 made it unlawful for employers and service providers to discriminate against disabled people. The amendment to the DDA passed in 2005 introduced a new Disability Equality Duty (DED) for public authorities, which extended their obligation to disabled people beyond simply avoiding discrimination. In particular, public authorities now needed to have due regard to the need to:

- Promote equality of opportunity between disabled and non-disabled people
- Eliminate discrimination and harassment
- Promote positive attitudes towards disabled people
- Encourage the participation of disabled people in public life
- Take steps to take account of a person's disability, even where that involves treating disabled people more favourably than others.

Since December 2006 almost all public authorities had to have in place a Disability Equality Scheme (DES), which details how they plan to implement the new Disability Equality Duty.

Since the amendment to the DDA was passed in 2005, there has been a significant amount of promotional work undertaken by the DRC to ensure that public bodies are suitably prepared to put in place their DES – work that has involved the production of Codes of Practice, guidance, working with pilot local authorities and a subsequent toolkit, running training events and campaigns, and speaking at conferences. As a result of this successful work, the vast

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majority of public bodies produced a DES by the required time. Since then, the DRC's role has moved from largely persuading public bodies to comply with the DED to enforcing the Act through ensuring that public bodies have written legally compliant Disability Equality Schemes.

Preparing to enforce the DED

The 18 months that passed between the Amendment to the DDA and the new DED coming into force were spent by the DRC undertaking a large amount of work to ensure that relevant statutory bodies were aware of the DED and their requirements under it. One of the most successful ways of promoting DES in England was through the identification of a number of 'champions' from leading organisations. The role of the champions was, in the run up to the December deadline, to provide a high profile, targeted way of increasing awareness of DES through speaking at conferences, sending out targeted emails, fronting articles in trade journals, and providing quotes for DRC leaflets and publications.

Promoting the DED

Identifying 'champions' is just one way that the DED was promoted. The DRC also undertook a very wide range of promotional activities. These included developing a large database of public sector bodies and individuals, to whom regular email bulletins were sent. Some 20 conferences were also organised across Great Britain in order to promote the DED, with the DRC also attending other conferences – both approaches being designed to speak to as many people as possible about the DED. Events were also held with disabled people and disabled people's organisations to inform them about the DED, their role in developing Disability Equality Schemes and to provide information on how they themselves could scrutinise their local public bodies. Finally, nearly 20 pieces of detailed guidance were produced in order to go as far as possible to ensure everyone that needed to know about the DED could get the information they needed.

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Not only was such promotion effective in each individual piece of promotional work done, but the joint effect of many different forms of promotion helped to ensure the promotional work was more than just the sum of its parts. Thus, the target audience for the promotional work was reached in a variety of different ways.

This promotional work, though undoubtedly successful, as evidenced by the number of public sector bodies producing a DES by the December deadline, also meant that less time was spent preparing for the reality of enforcing the Duty after the December deadline.

This was a real issue, particularly in England: there are a greater number of public bodies affected by the DED – partly as a result of a larger public sector overall, but also due to the extension of the DED to schools. In total, the DED team in England was working with 1,750 bodies, all of whom needed to be informed of the DED and their responsibilities under it. With this requirement came the busiest period of the year for promotional work – an amount of work that affected the team's ability to prepare for enforcement:

We didn't seriously think about enforcement until summer of 2006. This was hard going because it was also the busiest time for promotion. As such, the demand for us at conferences escalated hugely. It is fair to say that we threw everything at promotion – and while we may have done some things differently – out of 1750 bodies that we were dealing with, only 10 don't have a Scheme so they have got the message!.

Member of DRC staff, London

In DRC Scotland, staff felt that they were able to focus on enforcement earlier on, but that this was partly as a consequence of working with a smaller number of organisations – around 250 in total. Those in Scotland were

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able to spend less time promoting the DED, and more time sending out the enforcement message:

The public sector in Scotland is much smaller than in England and as a result we were able to give a stronger enforcement message – we ratcheted this up eight to nine months before enforcement date.

Member of DRC staff, Scotland

After December – cross-national differences

Scotland

The approaches to enforcement have taken on different guises across the three nations. In Scotland, in addition to training events and conferences such as Fair For All, DRC Scotland conducted an in-house survey which looked in detail at all the published DES in terms of factors such as the level of involvement of disabled people, and whether they were separate or integrated DES.

DRC Scotland used the detailed information from their survey to conduct a public 'naming and shaming' of organisations that had not completed their DES through a press release. Perhaps unsurprisingly, public sector employees in Scotland were fairly shocked by this move, but it had the desired effect – almost all non-compliant bodies then submitted a DES. This has even served to have a positive impact upon the work of other commissions:

[The naming and shaming] was the first public move that we made – and served as a sign that the DRC was changing its role from advisor to enforcer. The public sector in Scotland were really shocked by that: some were angry, but virtually all held their hands up and have since done what they needed to do. We've been told since then the ripples spread out to the other equality commissions – the Equality Opportunities Commission are finding that organisations are going to them and saying 'please don't name us. **Member of DRC staff, Scotland**

The approach in Scotland, however, also placed a keen emphasis on assessing, following up and taking forward compliance work. Behind the enforcement work, there has also been close working with audit and inspection bodies in order to build the DED into their monitoring schemes, as well as considerable time and effort invested in work with disabled people so that they have a full picture of the DED and know what it can do for them.

Wales and England

Wales's approach to enforcement has taken the lightest touch. DRC Wales followed up on data from an initial survey – similar to that carried out in Scotland – conducted by the Office for Disability Issues by checking websites to see if a Disability Equality Scheme had subsequently been published before writing to the few remaining authorities threatening enforcement unless a Scheme was immediately forthcoming. As a result of this activity, every authority was found to have had produced a Scheme. In view of this ostensible success, no particular cases were put forward in Wales for enforcement. However, the active enforcement work taking place in England and Scotland proved a useful reference point, which made for convincing evidence of a willingness by DRC to take matters to law if necessary.

England's approach to enforcement has been tougher, but still with more of an emphasis on 'soft touch' for enforcement: ensuring that the profile of the DES is raised through targeted work with various government bodies, universities and inspection and health bodies.

Nevertheless, the carried out by the Office for Disability Issues led to a press release was thus circulated naming 65 public bodies in England that did not appear to have DES. Unfortunately, the outcome from this was not quite as positive as in Scotland: largely due to the greater numbers of public bodies in England compared to Scotland, some of the

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information was incorrect and as a result some of the bodies named in the press release had schemes in place, but had neglected to respond to enquiries by the ODI or the DRC of their existence.

In addition to this, detailed assessments of the 15 government departments' schemes and a clear indication of which departments have produced the weakest schemes have been placed on the DRC website. Further work was then undertaken with these departments – the majority of whom quickly agreed to revise their schemes.

Striking a balance with enforcement

It is to some extent inevitable that some public bodies are likely to see the DRC as more of a persuader than enforcer at this relatively early stage of the DED (ie just after the new Duty has come into force). This is in part due to the context of a long lead-in time to prepare for the DED and the consequent extensive work that has been undertaken by the DRC to ensure that public bodies are aware of the need to produce a DES. This, combined with the history around the Race Relations Act – which many feel was not enforced as much as it could have been – means that it was important for the DRC to strike a balance between enforcement and continued persuasion.

We learned from the Commission for Racial Equality that we don't want to make the same mistakes as [the Race Duty] – ie great in theory but if there is no one enforcing it, no-one will actually bother.

Member of DRC staff

If a public sector body produces a DES which is not compliant with the DDA, the DRC could begin legal action against them. There is therefore an extremely important need to ensure that a balance is struck between making sure that relevant bodies are aware that compliance with the DDA will be enforced, whilst being encouraging and supportive where possible when genuine efforts have been made to create a DES:

... Initial assessment of a DES is a judgment a lot of the time. The DES assessments have to go through two or three people to be consistent but it is often a judgement call. It is not always about having a perfect Scheme – it's about making a difference. You have to look at the whole package – an organisation

may have done a great job in one area but a bad one in other. **Member of DRC staff, London**

The need to ensure that the legislation is followed and enforced, as well looking at cases on an individual basis, extends beyond the DES themselves and into the final stages of enforcement. Much like the legal cases that the DRC takes forward, which aim to set legal precedents, it is important to consider the broader implications of each DED enforcement action that is taken forward. While there have not been any cases taken to date, it will be important to look at the background to each case and make an overall judgement based on that, as opposed to taking all non-compliant bodies to court regardless:

We have realised that we can't be zealous about every single DES. People who have produced a middling DES we are prepared to help... but we are also prepared to take forward and enforce against those in the bottom category... we will need to pick our targets carefully. **Member of DRC staff**

Using powers of enforcement is not always the most constructive way of making improvements to a DES, though this can ultimately lead to tangible improvements for disabled people. Producing detailed reports on the DES, and then meeting with the relevant government department to discuss and to secure agreement on the actions included in their DES, has proved more constructive than simply issuing them with an enforcement notice (which can result in protracted legal discussions). However, in order to ensure that people knew the DED was being taken seriously, this 'softer' approach has to be adopted in conjunction with wider publicity around the work – including stating which government department DES were really good and which ones were poor. In those cases where an organisation does not have a DES or will not take on board advice from the DRC, legal action is clearly more appropriate, alongside publicity about this.

Changes to external working relationships

Striking the right balance in working with those organisations with duties has been a powerful learning experience for staff at the DRC, and for the most part is felt to have been successful. Prior to the December deadline, and due to the high level of work that was undertaken with public bodies, close working relationships were inevitably established. However, given the move to enforcing the legislation, a level of distance had to be subsequently initiated and maintained to ensure that individuals are not given specific advice regarding their DES.

On the whole, this shift has been fairly straightforward to manage with individuals from public bodies understanding the need for distance and respecting that the DRC are no longer able to offer specific advice:

There is no such thing as a Chinese Wall in the DRC as we would not have a discussion with individuals about the ins and outs of their Scheme – at the moment there is no conflict of interest. We have to say “I am sorry – you will have to ask someone else”. I feel fine doing it, and people get it... in general the public sector understands.

Member of DRC staff, London

However, in Scotland, while a professional distance has been maintained between DRC staff and representatives from the public sector affected by the DED, the close working relationships has inevitably meant that the message has been harder to get across:

We put a statement together on the web and sent it to different partners telling them we were an enforcement body and we wouldn't talk to them about how to respond to their Duty. We didn't get much response. We still get approaches from public authorities asking for help with their Schemes and then have to refer them to the statement.

Member of DRC staff, Scotland

Cultural change within the DRC

One key issue the DRC faced around its DED work was the difference in mindset between promoting the DED and then enforcing it. On the whole, the work that was undertaken with public bodies around preparing for their DES was by its very nature often done on an informal, ad hoc basis. This informal approach meant that notes from meetings and clearer lines of responsibility were not always formalised. This became a consideration later on as work moved into the enforcement phase and public bodies realised they had a different, more formal relationship with the DED team, as colleagues note:

When we looked at one body in December they delivered a hugely non-compliant Scheme. When we told them about it, their immediate response was, 'You had lots of meetings with us and you never told us before' – even though the meetings were about other things. In hindsight, we should have been better about documenting meetings.

Member of DRC staff, London

There is a practical reason for giving more consideration the documentation of meetings needing to be tighter: it helps to ensure that cases against public bodies are as watertight and strong as possible if needed. For example, a service provider could theoretically contact the DRC Helpline and ask if it was necessary to produce information for visually impaired people on a cassette as well as in Braille. If the advisor responds with the advice that on cassette only would be adequate then, if we end up taking them to court, they can argue that they had a 'legitimate expectation' that their actions were complying with the legislation.

We have to be so careful about what we say to people about their Schemes. The administration is a nightmare, and we should have had a Project Manager to design systems and should have also increased the size of team, we needed more of mixed skills base, rather than a team solely with skills based on the previous role.

Member of DRC staff

Some DRC colleagues felt that the boundaries between enforcer and persuader were not as clearly demarcated as they should have been in terms of their relationships with representatives from the public sector. Making a clearer distinction between the advice that could be given before the DED came into force and the work that could be undertaken externally after the act was enforced, would have helped staff within the DED team to have a better understanding of what was required of them within the role:

We needed to say from the outset what our role will be when the Duty comes in, and establish clearer boundaries on what we can and can't do. This would have been useful to make it easier for all staff... to understanding their role and the boundaries it brings.

Member of DRC staff

A wider issue?

For some DRC staff members this is a wider issue than just around the DED – there is a feeling that more work should have been done throughout the lifetime of the DRC to ensure that effective systems were in place to ensure that the legal implications of any advice given are properly considered and understood:

There is a cultural issue within the DRC where people don't always understand the legal implications of what they are doing. What would happen if someone from the DRC met with a

government organisation and there was a discussion on impact assessments and then we took that department to court? We need to think about the legal impact of what we are doing all the time – this requires quite a big cultural shift for some people and also a thorough understanding of the Duty and its legal requirements. **Member of DRC staff**

The need to ensure thorough training of staff across all departments – including the Helpline – around the DED, the implications of giving advice and liaising with government departments is therefore crucial. Some of this training could have been offered in-house, and would have provided DRC staff with the information they need to ensure that cases against non-compliant bodies are as strong and watertight as possible. In this respect, there are therefore some issues around the need for broader cross-organisational learning.

Most staff don't work with the law very much and there are training issues – people need to know what a legal case is eg the fact emails can be disclosed, that people have said a policy is fine in a meeting and then we've turned round and issued a compliance notice.

Member of DRC staff

This said, alongside the learning around becoming better at documenting meetings, and increasing the understanding of legal implications more widely, there is still a need to retain the approachability of the DRC to ensure that one of the DRC's most valued aspects is not lost. Feedback from a recent survey of opinion formers, including representatives from central and local government and other public sector bodies, pointed to the fact that the DRC is perceived to be particularly approachable and easy to ask for advice.

The DRC are constantly striving to improve and are very reliable and professional, friendly and approachable. **Public Sector representative**

The role of staff in the DED

Promoting and enforcing the DED has been a major strand of work at the DRC and could only have been achieved through a dedicated and effective team.

During the early phases of enforcement, assessing schemes and sending enforcement-related letters constituted the main part of the role for DED colleagues. This work, however – and especially assessing Disability Equality Schemes – is very mechanistic and process-driven, and is underpinned by complex administrative procedures. Thus, having a variety of work across the team was seen to be important, in order to help maintain interest and focus of staff on the DED as a whole.

Members of staff did notice a difference in their experiences of working on the DED, based on differences between the wide-ranging promotional work and the subsequent enforcement work. Overall, however, having a mix of staff and skills within the team – such as those with legal and casework backgrounds or those with marketing and policy skills – meant there was enough diversity and expertise within the team to ensure DED work remained effective and professional throughout its entire duration.

Capturing the gains

As the DED work has progressed, the team has started to target its work at government departments and other public bodies to help improve their DES. Since the initial enforcement phase, the DRC has also undertaken some work on 'capturing the gains' made under the DED. This has included research undertaken with central government

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departments and other public authorities looking at the changes and positive impact of involving disabled people in DES. Not only does such work highlight examples of good practice for other government departments and local authorities to learn from, but it is also helps promote the diversity of work that is needed when assessing schemes is so intensive a process:

Enforcement work is very intensive – drafting compliance notices is a very lengthy business and so is assessing Schemes if you want to do it properly. We were breaking new ground in this respect and this takes time and resources... there needs to be some variety otherwise there are retention issues.

Member of DRC staff, legal team

‘Capturing the gains’ of the DED work shows that persuading public bodies to engage positively with the DED, as well as enforcing it, are not mutually exclusive – the gains of both processes are for everyone:

I see persuasion and enforcement on a continuum – they are not diametrically opposed.

Member of DRC staff, legal team

Concluding remarks

The dedication and work of the small team of staff involved across England, Scotland and Wales on the Disability Equality Duty resulted in wide-ranging and effective work in promoting and implementing the Duty.

There have been a number of key lessons learnt as a result of this work:

- Using peers and their networks to promote the DED has been a successful approach
- Producing guidance on the DED rather than providing individual support has been a better use of the limited resources available to the DRC
- Ensuring the right number of dedicated staff are available is absolutely key in ensuring the success of work on the DED
- With enough dedicated staff, enforcement of the DED could be planned more effectively
- Publishing reports about performance with regard to meeting the Duty might be a more effective route, rather than taking enforcement action against public bodies that have not made their Disability Equality Scheme exactly right.