Disability Rights Commission Issue 8

Legal Bulletin

Disability Discrimination in Education – lessons still to be learned

Beth Coxon, Legal Officer at DRC, explores the duties on education providers under Part 4 of the DDA.

Contents

6–10 The Right to Independent Living

11–15 Preparation, Support and Profiling for Vulnerable Witnesses in Criminal Court Proceedings

16–22 Disability Conciliation Service in Action

23–27 News in brief

Although the education provisions of the DDA have been in force for over three years, there have been very few reported cases. For the optimist this may suggest that disability discrimination in education has almost been eradicated. However, the real reason for the lack of legal cases may be due to lack of awareness amongst parents and students, ineffective remedies and issues around general access to justice.

Post-16 education

To date there have been no reported Post-16 cases and the DRC is only aware of a couple of cases which have proceeded to trial – both with students acting as litigants in person. The arrival of the duty to alter and remove physical features – introduced in September 2005 – may bring a small flurry of cases, as anecdotal evidence suggests many education providers have not made the necessary preparations to meet this duty.

September 2006 will bring a radical overhaul of the Post-16 provisions with the introduction of direct discrimination, the removal of the justification defence for failure to make reasonable adjustments, the introduction of a new definition of harassment and a reversal of the burden of proof. These changes are coming about as a result of Article 13 of the EU Employment Directive (2000/78/EC) which covers vocational training. The Department for Education and Skills (DfES) is currently consulting on the Disability (Education) (Amendment) Regulations 2005, which create these changes. The consultation is taking place online and can be accessed at: **www.dfes.gov.uk/consultations**.

Meanwhile, the DRC is currently drafting a new Post-16 Code of Practice and a consultation draft will be available from March 2006.

Schools

The schools duties are often considered to be weaker than the duties on Post-16 education providers; they don't require the provision of auxiliary aids and services or the removal/alteration of physical features. The remedies may also be less of a deterrent as there is no financial compensation available. However, this has not prevented a considerable number of claims being taken to the Special Educational Needs and Disability Tribunal (SENDIST) or independent appeal panels, and a fair number proceeding to High Court appeals.

A remedy commonly ordered by SENDIST is for the school to apologise to the disabled child and family. This is proving a much stronger remedy than anticipated; we are aware of one independent school which has spent over £30,000 in legal fees rather than apologising to a disabled child whom the Tribunal determined it had discriminated against. Another school has appealed against a SENDIST decision on the grounds, amongst others, that the remedy is perverse and disproportionate – the remedy was an apology!

A high number of schools cases relate to the exclusion from school of disabled pupils – either formal fixed-term or permanent exclusions or informal exclusions from certain lessons, activities or

trips. With the inclusion agenda under scrutiny again, it seems clear that there is much more to inclusion than being on a mainstream school roll. The consequences of permanent exclusion from school can be life-long, and there is clear evidence that the majority of pupils who are excluded from school are disabled.

It is puzzling and worrying that DDA claims against permanent exclusions are heard by Independent Appeal Panels (IAPs), whilst fixed-term exclusions are heard by SENDIST. Much concern has been raised about IAPs' ability to deal with DDA claims. Indeed, in 2003, the Council on Tribunals expressed serious concerns about IAPs' ability to deal with exclusions at all and recommended that exclusion appeals should be heard by SENDIST. It is our understanding that few IAPs are able to properly deal with DDA claims and some ignore the claims made by parents, dealing only with the exclusion appeal.

The two issues which seem to cause education providers and SENDIST/IAPs the most difficulty are the comparator for less favourable treatment and the requirement to make reasonable adjustments before being able to justify less favourable treatment. The High Court has dealt with these matters in the few cases it has heard.

The correct comparator

So often schools say 'but we would have excluded any child who did that, even if he wasn't disabled'. This demonstrates a misunderstanding of the disability-related element of less favourable treatment. The comparator point was clarified in **McA Catholic High School v CC&PC and SENDIST [2003] EWHC 3045 (Admin)** where the High Court held that, as with Part 2 cases, the comparator is someone to whom the reason did not apply – ie a child who had not 'misbehaved'.

The court also clarified, by applying **Clark v TDG Ltd t/a Novacold [1999] IRLR 318 CA** the meaning of 'disability-related':

'it should be noted that the expression 'for a reason which relates to the disabled person's disability' in sections 5(1)(a) and 28B(1)(a) has broadened the descriptions of the causative links from the links used in other discrimination Acts. It therefore includes causative links wider than

those which would have fallen within the expressions of 'on the ground of' or 'by reason of' the disability.'

This concept seems to cause particular difficulties for IAPs, who often say that disabled pupils were not excluded 'because of their disability', rather than looking at the correct test of 'for a reason which relates to the disability'.

VK v Norfolk County Council and SENDIST [2004] EWHC 2921 (Admin) dealt again with the comparator issue. The High Court held that the correct comparator for a child who was out of school and receiving home tuition was a child receiving full-time education. This prevented the LEA from defending their actions by saying it was not discrimination to provide him with inadequate education, as all out of school pupils received inadequate education. The case also helpfully confirmed that provision of education for children who are out of school is within the ambit of Part 4 of the DDA.

Duty to make reasonable adjustments before excluding

For those cases where the parents manage to persuade the Panel or Tribunal to correctly apply the comparator and reason-related tests, there is then the justification hurdle. This has been a much vexed issue in the employment context since **Jones v The Post Office [2001] IRLR 384**, although it was recently clarified in **Collins v The Royal National Theatre Board Ltd [2004] IRLR 395**.

SENDIST and IAPs have routinely determined that the exclusion of a child who has 'misbehaved' is less favourable treatment, but can be justified as there is a material and substantial reason, such as maintaining the discipline of the school. However, two recent High Court cases have dealt with the issue of justification for less favourable treatment in the form of exclusion, and confirmed that there is a further matter to be considered in relation to this defence.

T v The Governing Body of OL School and SENDIST [2005] EWHC 753 (Admin) confirmed that there are two hurdles to overcome before less favourable treatment can be justified. One hurdle is that a material and substantial reason for the treatment must be shown. In this case, the Tribunal decided that there was a

material and substantial reason for the exclusions – the school was under a duty to protect other pupils, to prevent further injury and to maintain discipline. The other hurdle, however, is the requirement to make reasonable adjustments to prevent the exclusion. In this case, the Tribunal decided there were no further reasonable adjustments the school could have made.

A few days later in the case of **The Governing Body of PPC v DS and CAS and SENDIST [2005] EWHC 1036 (Admin)**, the High Court further clarified the need to make reasonable adjustments before being able to justify the exclusion of a disabled pupil.
In this case, the school had argued that the reasonable adjustments duty did not apply to exclusions, and therefore the only hurdle to overcome was that of a material and substantial reason.

The High Court dismissed the school's appeal and held that:

- although Part 4 of the DDA is drafted in such a way that reasonable adjustments are not applicable to an exclusion as such, this does not mean that the requirement to make reasonable adjustments does not apply as an alternative to exclusion or in order to avoid exclusion
- there is no need to seek to disentangle failure to carry out reasonable adjustments as a cause of action in its own right (subject to a justification defence) from the anticipatory reply to a justification defence in relation to a cause of action for less favourable treatment
- the appropriate test for a claim concerning both less favourable treatment and a failure to make reasonable adjustments is that set out in Collins v Royal National Theatre Board.

These decisions together serve as a useful reminder to schools, IAPs and SENDIST that even when there is a material and substantial reason that would, in other circumstances, justify an exclusion, if there has been a failure to make reasonable adjustments, even an exclusion following the most violent or serious incident is likely to be unlawful. Perhaps the question schools should be asking is not 'surely we should be able to exclude a child who behaves this way?' but 'what can we do to prevent this child from behaving in a way that makes us want to exclude him?'

The Right to Independent Living

Camilla Parker, Mental Health and Human Rights Consultant, explores how the Human Rights Act 1998 can promote independent living.

Introduction

While there are numerous variations of the description of independent living, they all tend to focus on four key values, namely – choice, control, freedom and equality. The essence of independent living is that disabled people should have the same opportunities as non-disabled people. A human rights perspective on disability shares similar goals to that of independent living: to promote the equal status, inclusion and full citizenship of disabled people. Both are underpinned by the social model of disability which identifies the barriers to participation, rather than an individual's physical or mental capacity.

This article explores the implication of the Human Rights Act 1998 (HRA) on the following four areas, which are central to independent living:

- promotion of community living in place of institutional care
- provision of support which facilitates social inclusion and participation
- ensuring that the delivery of social care maximises choice and control
- addressing the barriers to social inclusion and participation.

1. Promoting community living in place of institutional care

Too many people are receiving residential care, when alternative support might be more appropriate. Two factors contributing to this situation are the financial incentive towards residential care and the inadequate review mechanisms for residential placements. Both have clear HRA implications:

Inappropriate placements

Requiring a person to move into residential accommodation will have a significant impact on that person's private and family life and must therefore be justified under Article 8 (respect for private and family life) of the European Convention on Human Rights (ECHR).

In order to comply with its obligations under the HRA, the social care agency recommending a residential placement must demonstrate 'both that a pressing social need for justifying the restriction exists and the measures actually adopted are proportionate to that need'.[1] In **Khana (by the Official Solicitor) v the Mayor and Burgesses of Southwark (2001)**, the Court of Appeal stated that where there is a choice between care packages, 'very full account' should be taken of the users' wishes, with a fundamental aim of the care plan being to preserve the user's independence. On this basis it has been suggested that it will not be enough for agencies to argue that the residential placement is justified because it is the cheaper option: 'they will need to demonstrate…that the residential package is the most suitable to meet the user's eligible needs. Avoidable or unnecessary institutionalisation will be vulnerable to a challenge involving Article 8'.[2]

In the light of the United States Supreme Court judgment in **Olmstead v LC (1999)** which held that the unjustified segregation of disabled people was a form of discrimination, local authority funding policies which are skewed towards institutional care may be susceptible to challenge on the basis that this violates disabled people's rights under Article 8

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[1] K. Starmer, European Rights Law: The Human Rights Act 1998 and the European Convention, Legal Action Group, 1999, 4.61

[2] L. Clements, Community Care and the Law, Legal Action Group, 2004, 5.23

in combination with Article 14 (freedom from discrimination).

Inadequate review

Apart from the right of individuals who are detained in hospital under the Mental Health Act 1983 to have an independent review of their detention, there is no statutory requirement to review the appropriateness of institutional placements. Although guidance issued by the Department of Health expects the care plan of each care home resident to be reviewed at least every six months, there are concerns that such reviews are not taking place as required.

Article 5 (the right to liberty) sets out safeguards for those individuals who are detained, including a right to have the decision to detain to be reviewed by an independent body. This was considered in **HL v United Kingdom (2004)**, which concerned Mr L, a man who lacked capacity to agree, but had not objected to his admission to hospital to receive treatment for his mental disorder. The European Court of Human Rights (the ECtHR) held that Mr L had been detained and that his right to liberty under Article 5 had been violated because there were insufficient safeguards to protect him from arbitrary detention and there were inadequate means for him to challenge his deprivation of liberty. In March 2005, the Department of Health, recognising that the implications of the ECtHR's decision may extend to people who lack capacity and who are living in non-hospital settings such as care homes, issued a consultation paper entitled 'Bournewood Consultation', seeking views on the approach to take in response to this judgment.

While Article 5 is only engaged when an individual is detained, it is arguable that Article 8 would require an assessment of the individual's need on a regular basis to ensure that the residential placement continues to be justified.

2. Providing support which facilitates social inclusion and participation

The current social care system is built on concepts of 'vulnerability' and 'need for care' and increasingly 'risk' (whether to self or others), rather than focusing on enabling disabled people to participate in society.

To date ECtHR jurisprudence concerning States' responsibilities to take positive steps to provide support, has tended to relate to individuals who are in custody and/or particularly vulnerable, focusing on Article 2 (the right to life) and Article 3 (freedom from torture). However, recent cases concerning Article 8 highlight its potential for promoting independent living. For example, in **Kutzner v Germany (2002)** the removal of children from parents with mild learning disabilities was found to have breached Article 8 as there were insufficient reasons for such a serious interference with the parents' family life. The ECtHR questioned whether the authorities had given sufficient consideration to providing additional measures of support as an alternative to the 'most extreme measure' of separating the children from their parents.

3. Ensuring that the delivery of social care maximises choice and control

Assuming an inability to make decisions for themselves, an over-emphasis on risk and the insufficient use of Direct Payments are just a few examples of issues that impact on disabled people's ability to exercise choice and control over their lives. This is another area in which Article 8 is engaged and any interference must be justified by showing that there are lawful grounds for the interference and it is proportionate to the risk identified. For example, in **Matter v Slovakia (1999)**, the court held that being deprived of legal capacity is also a 'serious infringement' of Article 8 and while this may be justified, it would be appropriate to review it after a period of time, particularly if the person requests this.

4. Addressing the barriers to social inclusion and participation

Disabled people face a range of barriers such as the design or delivery of services hindering, rather than enhancing, independent living (for example, lengthy delays in the provision of services) and the lack of advocacy. Charging for services can have a serious adverse impact on disabled people; for example, they may have to either make regular economies in order to accommodate the cost of their care, or withdraw from the

services they had been assessed to need. One difficulty in considering whether such barriers to independent living could amount to breaches of ECHR rights, is that there is relatively little ECtHR case-law relating to disabled people. However, as discussed above, Article 8 encompasses a wide range of issues. Thus, the manner in which services are provided to people, the availability of advocacy services (particularly for those requiring assistance in communication) and the adverse impact of charging policies may all fall within the scope of Article 8.

Conclusion

It is clear that changes are required to ensure that disabled people are given the same opportunities as everyone else to live their lives as they so wish. The Department of Health's Green Paper (2005), 'Independence, Well-being and Choice – Our vision for The Future of Social Care for Adults in England'; sets out proposals for future social care which should 'help maintain the independence of the individual by giving them greater choice and control over the way in which their needs are met'.

The comments by Denise Platt, Chair of the Commission for Social Care and Inspection, in her key note presentation at the DRC's public debate on the right to independent living in March 2004, highlight why such changes are not just a matter of good practice, but are necessary to ensure respect for disabled people's human rights:

'The choice of where to live and how to live your life is a fundamental human right and we should do all we can to support it not thwart it.'

A full version of Camilla Parker's paper 'Independent Living and the Human Rights Act 1998, (December 2004)', is available electronically at **www.drc-gb.org**

Preparation, Support and Profiling for Vulnerable Witnesses in Criminal Court Proceedings

Kirsten Foster from the Crown Prosecution Service's Policy Directorate examines the CPS's 'witness profiling' initiative.

The DRC and the Crown Prosecution Service (CPS) have formed a partnership to help promote the CPS's 'Witness Profiling' initiative, the aim of which is to give those with a learning disability equal access to justice. This is achieved by support being offered to the most vulnerable witnesses to enable them to give evidence in criminal proceedings, resulting in justice being done in individual cases where, previously, prosecutions may not have been brought.

The DRC and the CPS Policy Directorate are working in partnership to encourage awareness and use of witness profiling. The joint work will be linked to the DRC's 'Access to Justice' programme, which has previously been centred around the civil court system.

Background

In June 1998, the Government published 'Speaking up for Justice'. The report covered the findings of an inter-departmental working group on the treatment of vulnerable or intimidated witnesses (including children) who become involved, either as victims or witnesses, in the Criminal Justice System (CJS).

The report made recommendations aimed at providing appropriate support and assistance for vulnerable and intimidated victims and witnesses to enable them to give their best evidence.

During March 2000, the Department of Health published 'No Secrets', which provided guidance on the development of multi-agency policy and procedures to protect vulnerable adults from abuse. In January 2002, the Home Office issued the guidance material 'Achieving Best Evidence in Criminal Proceedings'.

The witness profiling initiative addresses the contents of these reports and encourages the CPS and relevant agencies to work together to increase access to justice.

Witness support, preparation and profiling

Witness profiling was, and continues to be, pioneered in Liverpool. The initiative is the result of the CPS Policy Directorate working with the Investigations Support Unit of Liverpool City Council. CPS Policy Directorate supports the work of the Investigations Support Unit (ISU).

To promote equal access to justice, the ISU provides an in-depth support and preparation programme for witnesses with learning disabilities and vulnerable witnesses. At the investigation stage, an assessment of the individual's potential to be a credible and competent witness in the trial is carried out. This detailed work is undertaken to enable the witness to be prepared to be able to give evidence and a witness profile is generated. The profile is served on the court, the prosecution and the defence, in accordance with an agreed protocol.

The witness profile prepared by the ISU staff includes details such as the functional skills and powers of concentration of the witness. Additional information in the form of advice to counsel on how to ensure the witness is able to give his/her best evidence and strategies to minimise or resolve potential problems are also included. This enables counsel to consider how to formulate questions at a level the witness will understand. Additionally, the witness profile can provide the judge with information as to the specific requirements of the witness, which may lead to the judge giving directions as to any

assistance the witness may need in the courtroom.

The application of the witness profiling initiative has resulted in significant benefits to all concerned. The success of witness profiling is illustrated by the feedback received from the areas operating the initiative. Experience has shown that, in Liverpool, the use of witness profiling has resulted in increased effectiveness of trials, (the success rate in terms of trials resulting in a conviction is 94 per cent).

Promotion of awareness

To promote awareness of the witness profiling initiative, CPS Policy Directorate inform and actively encourage the CPS Areas, located throughout England and Wales, to consider implementing a scheme in their area similar to that operated by the Liverpool ISU. The scheme requires effective inter-agency work, particularly in respect of the local Social Services working with the Prosecution Team.

CPS Policy Directorate has asked the CPS Areas to host, or co-host on an inter-agency basis, a Vulnerable Witness Preparation, Support and Profiling Event. At the event, representatives from Liverpool ISU, the relevant CPS Area, police, Social Services and other key agencies make presentations to the delegates. The presentations are followed by an opportunity for the delegates to discuss how the initiative might be taken forward in their area. The success of the event is dependent upon the co-operation of all agencies involved. Following the event, it is hoped that local agencies and organisations will explore ways of developing a witness profiling scheme to operate in their individual area.

To date, CPS Policy Directorate has assisted 14 of the 42 CPS Areas to arrange and hold a Vulnerable Witness Preparation, Support and Profiling Event. All events have been well received, resulting in some CPS Areas and their inter-agency colleagues developing witness profiling protocols. Other CPS Areas have expressed interest in hosting similar presentations.

Inter-agency working

The success of the witness profiling initiative depends upon effective inter-agency working. In addition to working closely with the Liverpool ISU,

CPS Policy Directorate has requested the assistance of the Local Criminal Justice Boards to promote awareness of the initiative. It is hoped that, by engaging the support of the relevant regional criminal justice agencies and their local authority partners, the witness profiling scheme can be extended to, and operated in, more locations.

CPS Policy Directorate is also liaising with a county-based office of Victim Support, in order to raise awareness in that county of witness profiling, with an emphasis on vulnerable and intimidated witnesses.

Increasing witness satisfaction in the criminal justice system

The witness profiling initiative has many links with Criminal Justice Reform. The scheme supports the 'No Witness, No Justice' aspect of the Criminal Case Management Programme and links with the implementation of special measures, in particular the special measure provision of Intermediaries. The operation and resulting success of the initiative must also be considered in the context of the Public Service Agreement (PSA) target to bring more offenders to justice. Additionally, the initiative contributes to the PSA target to increase public confidence in the ability of the CPS, and CJS, to deliver justice.

As part of the programme of criminal justice reform, the National Criminal Justice Boards have published a booklet, 'Increasing Victims' and Witnesses' Satisfaction with the Criminal Justice System'. The booklet has been issued to all Local Criminal Justice Boards and details seven priorities of work. Examples of the priorities include offering emotional and practical help to victims, seeking and using victims' views in the CJS process and ensuring vulnerable witnesses' needs are met and intimidation is tackled. The witness profiling initiative links to these and the unquoted priorities and therefore is of great relevance to both the Local and National Criminal Justice Boards.

Recognition of success

The witness profiling scheme has been commended by both HM CPS Inspectorate and HM Inspectorate of Constabularies. Lord Justice Judge wrote to

the then DPP, Sir David Calvert-Smith, commending the scheme and asking him to examine ways in which the scheme could be extended across the country. The present Director has also spoken with approval of the scheme. Further, the success of the scheme with regard to narrowing the justice gap has been recognised; this was marked at the CPS Equality and Diversity Recognition Awards (2004–05), when CPS Policy Directorate and Liverpool ISU received a commendation.

Scotland

In Scotland, further to the Vulnerable Witness (Scotland) Act 2004, the Crown Office and Procurator Fiscal's office are also progressing work to support vulnerable witnesses in criminal proceedings. The Scottish Executive, in partnership with various stakeholders, is currently drafting guidance to practitioners on how best to support adult vulnerable witnesses, including those with 'mental disorders' as defined by the Mental Health (Care and Treatment) (Scotland) Act 2003. This guidance, which is due to be implemented in April 2006 and complements their existing guidance on 'the use of special measures for witnesses with special needs', aims to assist practitioners in identifying specific vulnerabilities, and will help ensure the justice system supports those witnesses effectively.

The future

CPS Policy Directorate is to continue promoting awareness of witness profiling, with the intention that the initiative will be rolled out and operated by the CPS and relevant inter-agency partners in all 42 CPS Areas. CPS Policy Directorate's continued support, promotion and co-ordination of the witness profiling initiative will enable prosecutors to proceed with prosecutions involving vulnerable and intimidated witnesses, thereby benefiting the individual concerned, the CPS, the CJS and society as a whole.

CPS Policy Directorate, working with the DRC, will actively seek opportunities to work in partnership to extend the use of witness profiling throughout England and Wales, with the intention of increasing the equality of access to justice.

Disability Conciliation Service in Action

Helen Crowther, Contracts and Conciliation Manager at the Disability Rights Commission, explores an alternative to litigation for DDA Part 3 and 4 cases.

When disputes arise, thoughts often turn to court action as the means to achieve a resolution. However, alternative methods of resolving disputes are available, and in many cases these will offer benefits over litigation to both parties.

The Disability Conciliation Service (DCS) offers a uniquely accessible and empowering alternative to court action, which enables people to exercise their rights under Parts 3 and 4 of the Disability Discrimination Act 1995 (DDA).

The DCS is an independent service, funded by the Disability Rights Commission's Conciliation Management Unit, and run by Mediation UK.

What is conciliation?

Conciliation is a way of resolving disputes which helps those involved to reach agreement with the help of an impartial third party – the conciliator. Conciliation is a 'win/win' approach – it is about finding a solution which satisfies everyone.

The DCS's task is to liaise between disabled people and those defined as providers of goods, services and education by Parts 3 and 4 of the DDA.

It is an assertive, rights-focused process that aims to enable the complainant to exercise his or her rights in law, and to secure a satisfactory resolution to a particular incident of alleged discrimination.

Conciliation differs from mediation as the process is not premised on equality between the parties, but on the fact that rights and obligations exist between them. The DCS puts the rights of disabled people as a non-negotiable issue within the conciliation process. The conciliator must be active to ensure that the complainant's issues are addressed, be active in suggesting ways in which the education or service provider might meet their obligations, and be clear as to whether a proposed solution would uphold the complainant's rights.

Who are the conciliators?

The independent conciliation service is provided by Mediation UK, a registered charity which promotes and supports community mediation. Conciliators are all highly experienced and qualified experts, who hold a recognised professional mediation qualification and have at least two years post-qualification experience.

What issues does the Disability Conciliation Service cover?

Currently, the DRC will consider referring for conciliation issues arising under Part 3 (rights of access – goods, facilities, services and premises) or Part 4 (education) of the DDA. Employment disputes under Part 2 of the DDA are not currently within the scope of the DCS service, although conciliation for these matters may be available through ACAS.

Why use the DCS?

Independent research shows that disabled people would often prefer to avoid costly and sometimes confrontational litigation and would prefer to settle disputes through conciliation, achieving, in the process, settlements that lead to lasting change for disabled people and not simply compensatory payments.

As a viable alternative to litigation, conciliation can offer a number of benefits:

- The service is free of charge to both parties.
- A negotiated outcome is more likely to be satisfactory to both parties.
- Discussions at the conciliation meeting are confidential, and information

about discussions which took place during the process would not be admissible in subsequent court action.

- It can take less time than a court case – cases at conciliation normally progress to a meeting within eight weeks of being referred by the DRC.
- The process empowers the disabled person and can achieve a wide range of outcomes, such as an apology, an explanation, compensation, or a commitment from the respondent to change policies and procedures.
- It can also lead to real social change. Education or service providers who engage in conciliation are enabled to learn about disabled people and their rights and the process can encourage them to make lasting changes voluntarily. Court action will focus on the circumstances of the single disabled person bringing the complaint, whereas conciliations often generate an outcome which requires the education or service provider to make changes aimed at benefiting disabled people generally.
- Conciliation also leads to a high level of successful outcomes – nearly 80 per cent of cases dealt with by the DCS result in full and final settlement of the complaint.

How does the process operate?

1. Referral from Disability Rights Commission

Cases can only be referred to the DCS by the Disability Rights Commission (DRC). An individual who is disabled and who feels that an education or service provider has unlawfully discriminated against him or her, should initially contact the DRC Helpline (see back cover for details) who can provide further information about conciliation, and discuss whether the process may be appropriate in a particular case.

Several factors can influence whether an individual is able to access the DCS, including whether the disabled person satisfies the DDA definition of disabled, when the incident took place, the age of the complainant, whether there is a justifiable basis for taking out a case, and whether conciliation appears to be the best way forward.

Cases which appear to be suitable for conciliation will be referred initially to the DRC's Conciliation Management Unit. If appropriate, a conciliation caseworker will obtain further

details about the complaint and request the individual's consent to using the DCS. If this is forthcoming, the conciliation caseworker will contact the service or education provider, setting out the complaint and inviting them to try to resolve the matter through conciliation. Only if both parties agree to take part in conciliation will the case be referred from the DRC to the DCS. The DCS is not open directly to the general public for self-referrals.

2. The Disability Conciliation Service

When a case is referred to the DCS from the DRC, the DCS will arrange to discuss the problem with the disabled person and the service or education provider, and attempt to provide a solution.

A conciliation co-ordinator will be appointed to support the participants and to work with the parties to ensure they understand the process throughout. The co-ordinator will help agree matters such as who will attend the conciliation meeting and what will be discussed. Conciliation works best with the right people there; if the complainant wants the service provider to agree a major policy change across many outlets, for example, it is important that a senior policy director attends. The complainant is encouraged to bring along a supporter, whose participation will be managed by the conciliator.

Commonly, the parties are encouraged to engage in a single, one-off meeting (which can be face-to-face, or by telephone or any other agreed method) with the help of the conciliator. This conciliation meeting, which usually lasts around 2 to 4 hours, is voluntary and allows both parties to voice their feelings, share their experiences, learn about the other's point of view and to try and find a mutually acceptable way forward. The DCS cannot impose a settlement.

What if conciliation is unsuccessful?

If the conciliation meeting does not lead to an acceptable resolution (or indeed if the education or service provider refuses to become involved in the conciliation process at all), then the disabled person still has access to the courts to enforce their rights, in exactly the same way as they had before the process began. As the process is voluntary, it may be stopped at any time by either party.

When both parties agree to conciliation, the disabled person is afforded a two month extension to the six month less one day time limit, allowing more time to resolve matters.

Accessibility

DCS works extremely hard to meet everyone's needs with regards to accessibility, communication, support and empowerment. To this end, conciliations are flexible enough to be adapted to fit the circumstances. Accessible information will be provided and services such as personal assistance, advocacy and assisted communication are available. Language interpreters can be arranged for those whose first language is not English.

The DCS will try to arrange face-to-face meetings at the nearest neutral accessible venue to the disabled person's home. If a face-to-face meeting is not the preferred means of communication, other options – such as telephone conferencing, email and fax – will be explored.

What is a typical settlement?

Both parties decide together what the agreed resolution will be. The conciliator, working towards the principles of mediation, facilitates these decisions.

The most common outcome – sought by complainants in over 75 per cent of cases – is a commitment from the respondent to change policies to prevent the situation arising again. Agreements may also include an apology, an explanation, and/or compensation.

At the end of the conciliation, complainants are asked to decide whether they consider that their case has reached a 'Full and Final Settlement' or a 'No Settlement'. If they opt for the former, the matter is regarded as fully resolved to the satisfaction of the disabled person, and the case is then closed.

The future for DCS

The number of cases referred to the DCS since April 2005 shows a significant increase on the same period last year. Moving forward, the DRC plans to promote the value of conciliation to stakeholders, and hopes to expand the maximum annual referral volume by increasing the investment in the service. In view of the plans to enhance the conciliation provision, it is anticipated that the number of referrals will continue to increase into 2006.

Examples of conciliation in action

Case 1:
A disabled customer with NatWest received £5,000 compensation after complaining for four years that he was unable to get inside his local bank.

Kevin Caulfield, who uses an electric wheelchair, had been undertaking transactions on the pavement outside his bank in West London because a large step at the bank's entrance had stopped him from getting inside.

Mr Caulfield used the DRC's Conciliation Service to negotiate an agreement with NatWest to pay him £5,000 compensation for the poor service he received.

In January 2005, the bank made a portable ramp available to Kevin and other disabled customers, after their application to the council for permission to build a permanent ramp was turned down. NatWest, who expressed their commitment to making their premises as accessible as possible, apologised to Mr Caulfield and said that the compensation offered partly reflected their consistent failure to answer the customer's correspondence over a four year period.

As well as representing a satisfactory resolution for Mr Caulfield, the agreement also means that more disabled people can use the bank's services.

Speaking after the agreement was announced, DRC Chairman Bert Massie said: 'It's gratifying that this has been resolved outside the courtroom without the stress and cost of legal action. It shows how conciliation can produce positive results, not just to those directly involved but to the wider community.'

Case 2:
A, a wheelchair user, complained that a local council's parking meters were not accessible, despite its policy to apply car-parking charges to blue badge holders. The settlement demonstrated how conciliation can achieve wider policy change. The Council committed to:

- set up a working group on access issues and to undertake a wider consultation process with disability groups
- review the distance between parking bays and meters and take action if necessary
- ensure any future pay machines would be within the recognised disability standard

- amend car park signage to reflect the range of exemptions
- aim to bring the car park where the problems were experienced in line with the DDA as soon as possible
- undertake a review of the allocation and location of disabled parking bays in all Council car parks
- seek legal advice about the mandatory/advisory aspects of certain sections of the DDA in relation to allocation of disabled parking bays
- review its charging policy and ensure literature about charging was clear
- explore and implement disability awareness training throughout the Council.

Case 3:
R, who was studying for a degree at an educational establishment, had experienced difficulty meeting coursework deadlines due to periods of depression. She was awarded an Aegrotat (rather than an Honours) degree due to her failure to submit her thesis on time. Despite other students obtaining longer extensions, she had only been granted an additional two weeks in which to submit her work.

Conciliation facilitated a full and final settlement which included commitments that:

- R would have the opportunity to complete her research, so that her degree could be examined under the Honours system
- a location and a supervisor for this work would be provided, and a support system for R would be devised
- the establishment would consider how to raise awareness about mental health issues amongst staff, and would re-examine its provision of personal tutor training, disability awareness training and the way it supports students
- the need for an apology would be discussed, and the conciliated outcome of R's complaint would be fed back to the Academic Progress Committee.

To discuss a potential incident of Part 3 or 4 disability discrimination and the potential of conciliation, please contact the Helpline with full details of the complaint. Contact details are provided on the back cover of this bulletin.

Further information about the Disability Conciliation Service is available electronically at **www.dcs-gb.org**

News in brief

Burke v GMC

We reported in issue 6 that the DRC had intervened as an interested third party in the case of Burke v GMC, and that the High Court judge had expressly adopted DRC positions on a number of issues relating to giving and withholding of life-saving treatment.

The Court of Appeal has now allowed an appeal by the GMC and overturned the High Court decision. The DRC is disappointed at this outcome, and in particular at the Court of Appeal's reluctance to grapple with the wider issues in order to provide judicial guidance on a difficult area – life and death decision-making in respect of someone who cannot express their views on their own best interests.

However, the Court of Appeal did recognise the important principles of patient autonomy and choice, stressing that a competent person's wishes must be respected (apart from in respect of a right to demand a particular treatment). Indeed, the Court helpfully emphasised the need to embed the message throughout the health service that people should not be ignored or patronised because of their disability.

Tough line on remedy

Employment tribunals are increasingly recognising that acts of disability discrimination by employers can lead to devastating consequences.

A survey by Equal Opportunities Review, published in August 2005 (issue no 144/11), showed that the average total compensation award made by employment tribunals in cases of disability discrimination increased from £15,634 in 2003 to £28,889 in 2004. The median award (the midpoint between the highest and lowest awards) more than doubled from £5,310 to £10,712.

During 2004, DDA claims also topped the awards for discrimination cases generally. The average total award for disability discrimination was more than double that for either race or sex discrimination. Comparatively high awards were made in disability cases for future loss of earnings and injury to feelings.

It would appear that when tribunals are considering future loss of earnings, they increasingly understand that it may be very difficult for disabled people to get back into the workforce following a tribunal claim. Higher awards for injury to feelings suggest that tribunals are also considering the profound impact that disability discrimination can have on an individual's confidence and sense of wellbeing.

Disability Rights Commission extends capacity-building programme

The Disability Rights Commission has recently re-organised some of its operational functions in order to ensure it continues to make the most of its distinctive powers in the service of disability rights generally.

The DRC recognises that to stand the best chance of making a real difference, it must develop the ability of other advice agencies to deliver legal advice and representation to disabled people at local and regional level in a sustained way, funded to outlive the DRC's existence.

To this end, the DRC is redeploying its casework capacity to transfer expertise to mainstream advice agencies. Although the casework team provided a high quality service, the delivery of that service was

very costly and resource-intensive, was unlikely to wholly outlive the DRC and could only benefit a tiny minority of disabled people. The casework function ceased from 14 October 2005.

In addition, the DRC will:

- enlarge its capacity to make the most of successful strategic litigation, formal investigations and other key agreements with business by conducting more follow-up work
- work with organisations to which disabled people turn when seeking to resolve problems more generally, for example, primary care structures, local authorities, library services and others, ensuring that they are aware of where disabled people can obtain qualified advice that will enable them to exercise their rights
- retain and develop its independent conciliation service, detailed earlier in this edition of the bulletin, so that it is available to more potential litigants, and
- retain the ability to accept cases from its Helpline and other external organisations seeking legal representation, to support disabled people who have experienced particularly shocking discrimination and who remain unsupported.

In Scotland, the Commission will be developing its established transfer of expertise work to enhance the support available to disabled people across the country. In addition, the DRC maintains the capacity to accept cases in Scotland, due to the continuing gaps in advice provision across the country.

New DRC web guide: Using Your Rights at work

The DRC has recently launched a new step-by-step guide which provides disabled people and employment rights advisers with up-to-date advice and information about disability discrimination in the workplace.

Entitled 'Using Your Rights', the guide explains the rights that disabled people have at work, and examines the different types of unlawful discrimination. It provides practical advice on how claimants can try to resolve workplace problems, without resorting to legal action. Guidance on the statutory grievance procedures is also included.

For matters that proceed to an employment tribunal, Using Your Rights will help claimants or their advisers to prepare their case thoroughly. It provides a step-by-step guide from collecting evidence to requesting an appeal.

As well as advice and information, Using Your Rights also contains practical resources for claimants and their advisers, such as an example of a grievance letter or a copy of the DL56 questionnaire form.

The guide is available electronically at **www.drc-gb.org/ usingyourrights**.

Equal treatment investigation – interim report

Issue 7 of the Legal Bulletin featured an article exploring the DRC's formal investigation into health inequalities experienced by people with learning disabilities or mental health problems in England and Wales.

The investigation is a collaborative project, launched in December 2004, which sets out to work with practitioners, policy makers and the disabled people who are the focus of this inquiry. It is being conducted because of the overwhelming weight of evidence pointing to disparities in physical health outcomes experienced by people with learning disabilities and people with long-term mental health problems.

New evidence for this investigation finds that today in England and Wales, people with mental health problems or learning disabilities are significantly more likely to experience some serious physical illnesses than other citizens. In some cases these inequalities in health are reflected in further inequalities – in the health services they receive. For instance, people with learning disabilities, especially more severe learning disabilities, have much lower rates of cervical screening, mammography and other routine tests than other citizens.

Over half of those who responded to our consultation said that as people with a mental health problem or learning disability, they faced difficulties when trying to use the service provided by their health centre or doctor's surgery. A small number

reported not being registered or being struck off a GP's list, for instance for being 'too demanding'. We have also, however, identified many impressive examples of good practice and responsive primary care. Our Inquiry Panel will be assessing how best to generalise the good practice in order to close the gaps of inequality.

The investigation started in December 2004 and its interim report is now available electronically at **www.drc-gb.org/health**

DRC honoured with top awards

And finally, staff at the Disability Rights Commission have been honoured with two prestigious awards recently.

David Sparrow, DRC's library and information services manager, was selected as the best Specialist Library Legal Information Professional at the recent Awards for Excellence, hosted by the British and Irish Association of Law Librarians and LexisNexis Butterworths.

The awards celebrate the dedicated work conducted by legal information professionals.

In addition, the DRC's Legal Team 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 is reward for an outstandingly successful year, during which the DRC's legal team has been at the centre of the evolution of disability law and its application.

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

If you require this publication in an alternative format and/or language please contact the Helpline to discuss your needs. All publications are available to download from the DRC website: **www.drc-gb.org**

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