

- democracy - civil rights - inclusion -

- THE END OF THE BEGINNING -

an analysis of the first decade of the Disability Discrimination Act employment provisions (1995-2005)

(executive summary)

Full Report Includes:

- Analysis of - tribunal cases; legislation, codes, and guidance; documents from employers and government departments; and semi-structured interviews.
- Identification and assessment of factors which appear to have limited the Act's success.
- Consideration of the likely impact of the 2005 amendments.
- Proposals for further reducing employment discrimination.

Some Reactions and Coverage:

"Piru analysed 85 employment cases and employment policy documents from 40 public authorities" (Personnel Today, 8 November 2005).

"The Disability Discrimination Act has failed to adequately tackle employment discrimination ... according to The End of the Beginning" (The Guardian, 9th November 2005).

"Legal Lip Service" (The Times, 8 November 2005)

"The report calls on the Welsh Assembly Government to press the UK government to replace the act with new, more effective legislation" (BBC News OnLine).

"The DRC, which closed its case work department last month, was unwilling to comment on the report's findings" (Disability Now, December 2005).

R. Harwood (2005)

London: Public Interest Research Unit

CD copies of the full 200 page report are available (tel. 01559 370 395). We would be happy to produce an audio copy of this summary if requested.

INTRODUCTION

In the tens years since its enactment, the Disability Discrimination Act (DDA) 1995 has enabled several thousand people to gain some financial redress, at the Employment Tribunals, for employment discrimination. In 2004-2005, for example, 236 DDA claimants won their cases (Employment Tribunals Service, 2005).

However, only a small percentage of actions which constitute 'discrimination', within the meaning of the Act, result in a claim being instituted; the great majority, 4,437 in 2004-2005 (ibid: p. 29), of instituted claims are abandoned or fail at tribunal; and the DDA provides no redress at all (except with regard to victimisation) for individuals who suffer discrimination, however serious, but who are not deemed to meet the statutory definition of 'disabled'.

Of more fundamental concern, it is not at all clear that the DDA has been a great success in deterring employment discrimination or in encouraging good practice. Employment differentials,

between those with and without disabilities, remain wide; instances of discrimination are frequent; and a significant degree of institutional discrimination is apparent in most organisations (including in the public authorities we studied).

With these problems in mind, we attempt, in this exploratory report, to identify some of the factors and processes which help to explain the limits to the success of the Disability Discrimination Act; and consider whether the 2005 amendments are likely to significantly improve its effectiveness.

In addition to a literature review, this has involved an analysis of :

- statutes and secondary legislation;
- tribunal and court judgments in 85 cases;
- HM Government papers;
- evidence to, and reports from, parliamentary committees;
- documents from tribunal cases, including originating applications and notices of appearance, correspondence, and proofs of evidence;
- policies, procedures, memos, minutes of meetings and other documents from employers; and

- a limited number of interviews with lawyers and other advice providers, claimants, charities and campaigns, trade unions, and employees and employers.

The next report in this series (due in 2006) will discuss, evaluate, and propose measures - both legislative and non-legislative - to further reduce discrimination. It is inevitable, however, that some possibilities for improvement will be implied (and sometimes made explicit) in the critiques of the existing situation provided in this first report.

EXECUTIVE SUMMARY

bibliographical note

The numbers in brackets refer to the paragraphs, in the full report, from which the summarised information was drawn.

In order to increase the usefulness of this summary, and acknowledge authors relied upon, we have included the complete bibliography, and have attempted to integrate the references from the full report. This integrating (or squeezing-in), however, has inevitably resulted in omissions, compromises, and some clumsiness. We, of course, apologise for this; welcome suggestions for changes; and would be happy to send a CD of the full report for research

purposes.

CHAPTER 1. THE NATURE OF DISABILITY DISCRIMINATION IN EMPLOYMENT (see para. 1.1 in full report)

Discrimination against people with disabilities can be traced back to the ancient Greeks (Barnes, 1996a and 1997), including, for instance, the widespread infanticide of children with imperfections (Garland, 1995); and has, it could be argued, become institutionalised in many areas of modern culture (Barnes, 1996b; Barnes 1992; Doyle 1999; Lewis et al 2004) including, of particular relevance to this report, education, employment, and the justice system (Moss, 1996).

What appears to underlie discrimination is negative prejudice. This exists in relation to people with disabilities as a whole, but appears to be most intense in relation to certain less favoured conditions (e.g. Baldwin and Johnson, 1995). Foremost amongst these is mental illness (e.g. Tringo, 1970; Gordon et al, 2004), which is quite often assumed, for instance, to be an excuse for malingering (e.g. Disability Compliance Bulletin, 1998) or an indicator of violence or deviance.

Prejudiced assumptions alone, however, do not sufficiently explain instances of

discrimination. There might be other individual factors, such as personal objectives; group factors, such as group norms; organisational factors (eg Morgan, 2004: para. 5.1; Audit Commission, 2001, p. 3), such as personnel procedures; and wider factors, from legislation and its enforcement to 'global interpretive frames' (Anderson, 1980). It might, for instance, take an inadequate sickness procedure to turn an assumption about malingering into an unlawful dismissal.

the nature of disability discrimination in employment (see para. 1.2)

Levels of unemployment are higher (e.g. Martin et al, 1989; Johnson and Baldwin, 1993; Kidd and Sloane, 2000; DRC, 2004a), and wages (Baldwin and Johnson, 2000; National Assembly for Wales, 2003) and occupational status (e.g. Hirst et al, 2004: para. 3.5; Goldstone and Meager, 2002; DRC 2004a: p. 12) lower, among individuals with disabilities. A significant percentage of this difference appears to be attributable to discrimination (e.g. Berthoud et al, 1993); including, in particular, in recruitment, training, promotions, dismissals, and in the form of harassment.

Not surprisingly, employment discrimination can also have a devastating impact upon job

satisfaction, health, and general quality of life (e.g. Smithers, 2000).

recruitment (1.2.2)

Discrimination in recruitment (e.g. Bunt et al, 2001) is evident in the wording of job advertisements and specifications; in the selection of candidates for interview (Ravaud et al, 1992); in the interview themselves (Duckett, 2000; Edwards et al, 2000); and in the subsequent decision making (Jackson, 2000; Honey et al, 1993).

In the case of *London Borough of Hammersmith and Fulham v Farnsworth*, (2000) IRLR 691, for instance, Ms Farnsworth's job offer was withdrawn when the council's occupational health doctor concluded, on the basis of past mental health problems, that her attendance might well be poor. The Employment Tribunal, however, determined that this constituted discrimination, as 'there was no reason to assume that her attendance would be poor'; and it pointed out that her 'glowing reference' had indicated that she had lost no days through illness.

Our interviews for this report (Local Authority 1, Staff Interviews, with PIRU in 2004) suggested that a substantial percentage of staff at the council receive

some training in serving customers with disabilities, but most received little or none in working with employees or potential employees with disabilities.

staff development, retention and dismissal (1.2.3)

Discrimination against those already in employment has included, in particular, unequal access to training (Hirst et al, 2004: para. 3.5); restricted promotion; failures to make reasonable adjustments (e.g. Roberts et al, 2004); the wording and interpretation of sickness and absence procedures; harassment (e.g. Ravitch, 1994; Holzbauer, 2002); and abusive work environments (Stefan, 2002: pp. 113-115).

In some cases, of course, discrimination will result in employment being terminated (e.g. Baldwin and Schumacher, 2002; Kennedy and Olney, 2001), either because someone is dismissed for a reason relating to their disability; or resigns as a result of discrimination, in which case the resignation could, as happened in *Meikle v Nottinghamshire County Council*, (2003) WL 22187704, be determined to have constituted constructive dismissal.

Meikle, a teacher, had resigned after failing to persuade her school to make a number of reasonable adjustments to accommodate her sight problems, such

as, for instance, providing an enlarged time-table that she would be able to read.

Our interviews with advice providers (Advice Provider Interviews, with PIRU in 2004) indicate that negative attitudes towards individuals on sick leave might be a quite common reason for people with disabilities leaving their jobs. In particular, there appears to be a focus on trying to cut sick pay as soon as possible, and trying to dismiss workers for frustration of the contract, rather than on the statutory duty, and good management practice, of helping individuals with disabilities to get back to work .

CHAPTER 2. THE EMPLOYMENT PROVISIONS OF THE DDA 1995 (A BRIEF PRIMER).

Not summarised.

CHAPTER 3. THE IMPACT OF THE DDA ON DISABILITY DISCRIMINATION IN EMPLOYMENT

The wording and interpretation of the Act (3.1)

a restrained attempt based upon an individual model of disability

a restrained attempt (3.1.1)

It is not clear that the driving force behind the Disability Discrimination Act 1995 (DDA) has been a determination to

end discrimination in employment.

Instead, the wording of the legislation, and its interpretation by the courts, appears to reflect a restrained attempt to do something significant for people with disabilities, while, at the same time, not undermining the freedom of managers to act in the best interests of their organisations.

an individual model (3.1.2)

A fundamental weakness of the Act, we would argue, is that it primarily draws upon an 'individual' and 'medicalised', rather than 'social', model of disability. As the Joint Committee on the Draft Disability Discrimination Bill point out (2004: para. 36), it is not "the experience of disabling barriers which brings someone within the remit of the legislation but the nature and level of impairment". In other words, however much discrimination someone suffers, there is no redress (except in the case of victimisation) unless he or she meets the definition of 'disabled' provided in the Act.

Those protected under a more social model of disability might include, among other groups (see PIRU, 2006), people with impairments who do not meet the legal definition of 'disabled'; those

associated with 'disabled' people; those with genetic dispositions for a disabling condition (e.g. Equality Commission for Northern Ireland, 2002: 3.12); and those wrongly identified as being 'disabled'

The National Aids Trust, for instance, has argued that there is discrimination against groups with whom HIV is associated in the public mind, such as gay men, black Africans, and family members of those with HIV (reported by the Joint Committee on the Draft Disability Discrimination Bill, 2004: para. 104).

A more social model is evident, as Monaghan points out (2005: p.18, note 3) in the DDA's coverage of past disabilities and severe disfigurements. In addition, the duty to make reasonable adjustments (including to what might be called 'disabling barriers') arguably represents a significant 'nod in the direction' of the social model. It is, however, subject to substantial limitations; including its restriction, in line with the individual model, to those who meet the definition of 'disabled' (3.1.2.1).

institutional discrimination (3.1.2.3)

Another important weakness of the DDA 1995, we would argue, is that it contains nothing equivalent to the provision against indirect discrimination in the Sex Discrimination Act (see, for example,

Hampson v Department of Education and Science (1989) ICR 179; and London Underground v Edwards, (1995) ICR 574) and the Race Relations Act. Consequently, in some respects at least, it does not have the same potential for addressing institutional discrimination.

the definition of disability (3.1.3)

In addition to redress being restricted to those defined as 'disabled' (with the exception of victimisation), the definition of disabled is, itself, narrow; based, in places, on little apparent knowledge of relevant illnesses and conditions; and appears to exclude many individuals who, one assumes, Parliament would not have meant to have been excluded.

clinically well recognised (3.1.3.1)

It also appears to have discriminated against individuals with mental health problems. In particular, prior to the Disability Discrimination (Amendment) Act 2005, a mental illness could only constitute a 'mental impairment', and, therefore, form the basis of a disability, if the illness was 'clinically well recognised' (e.g. Blackledge v London General Transport Ltd, UKEAT 1073/00/0308; Morgan v Staffordshire University, (2002) IRLR 190; Fraser v Scottish Ambulance Service, appeal no. EAT/0032/02). There has, however, been

no such requirement in relation to physical impairments (e.g. Howden v Capital Copiers (Edinburgh) Ltd, ET case no. S/400005/97) or, indeed, learning difficulties (e.g. Walton v LI Group Ltd, ET case no. 1600562/97).

normal day to day activities (3.1.3.2)

In addition, if an impairment is to be taken to affect the 'ability to carry out normal day-to-day activities' (another definitional requirement), it must affect one of a list of eight functional capacities in schedule 1 to the Act (see table 3.2 in full report), including, for instance, 'speech, hearing, and eye sight'. Mental health impairments, however, quite often have a devastating impact on the ability to carry out normal day-to-day activities without having a clear affect on one of the specified, gateway, capacities.

In *Davis v Couetts and Co* (EAT/ 938/99 and EAT/ 940/99), for instance, the Employment Appeal Tribunal felt moved to state, at paragraph 46 of the judgement, that "We cannot leave the subject of disability without expressing some concern that one can have a person put at a huge disadvantage such as, for example, being unable to sleep or in frequent pain who yet, for want of being within one of the boxes of

paragraph 4(1)(a) to (h) must be taken not to be disabled but that is a matter for the legislation rather than for us”.

Despite the opportunity presented by the Disability Discrimination Bill in 2004 (which became the 2005 Amendment Act), however, the 'boxes' remain unchanged.

long term and substantial (3.1.3.3 and 3.1.3.4)

Problems have also arisen (see, for example, *Candappa v Newham Health Care Trust*, EAT/452/00; *Cruickshank v VAW Motorcast* (2002) IRLR 24; *Mills v London Borough of Hillingdon*, EAT/ 0954/00), and concerns been raised, in relation to the 'long term and substantial' elements of the definition.

A particular problem with the requirement that the adverse effect be 'long term' is that it tends to disadvantage those with impairments which have episodic adverse effects. For instance, someone with 'major depression' (APA, 1994) might find it impossible to communicate at meetings, concentrate on documents or even get up in the morning; and, as a result, might be dismissed. The depression, however, could clear-up after a couple of months, making it hard to fulfil the long term criteria.

Problems with the 'substantial' requirement have included it being for the unqualified tribunal, not a medical expert, to determine whether it has been met (*Abadeh v British Telecoms plc* (2001) ICR 156; see also, for example, *Kirton v Tetrosyl Ltd*, (2002) IRLR 840; *Vicary v British Telecommunications*, (1999) IRLR 680). Furthermore, the tribunal, when making this assessment, is able to give weight to its observations of the claimant (*Ekpe v Commissioner of Police for the Metropolis*, (2001) IRLR 605). Observable symptoms at the hearing, however, might be entirely uncharacteristic and, therefore, misleading. It also appears to mean that someone with, for instance, an anxiety disorder, who is representing them self, might be ruled not to be 'disabled' if the presentation is effective but might lose the case if it is ineffective.

proving that the definition has been met (3.1.3)

Meeting the definition of 'disabled' is not, of course, sufficient; the fact must also be proved to the satisfaction of the tribunal. In many cases, the stress, indignity and cost of doing so - including being 'poked at and prodded' (*Hurstfield et al*, 2004: para. 4.3.2) by a doctor other than the claimant's own and paying £1,000 or more for the privilege - has forced individuals to withdraw or settle.

In many other cases, individuals, who might well have met the definition, were unable to prove the same. Some unrepresentative claimants, for example, had wrongly assumed that their GP records would be sufficient to determine a diagnosis.

It is not surprising, perhaps, that the most common reason for a disability discrimination case to fail, according to the Disability Rights Commission (2003), is the claimant being found not to have met the legal definition of disabled.

'disability related discrimination' (2.2.3 and 3.1.4)

In determining whether there has been what was section 5(1) discrimination, and is now section 3A(1) discrimination and referred to in the employment Code of Practice as "disability related discrimination" (DRC 2004d), three questions need to be addressed.

There has, however, been a good deal of confusion, and consequently inconsistent judgements, with regard to the proper meaning of these questions. In addition, the preferred interpretation of the justification defence appears to have undermined the significance of the entire section.

question 1: Was the treatment of the disabled

person for a reason which related to his or her disability? (3.1.4.1)

The primary problem, with this question, has been determining how strong the causal relationship between the disability and the reason for the treatment needs to be, for it to be accepted as 'a reason which relates to the disabled person's disability' (section 5(1)(a)).

In *Rowden v Dutton Gregory Solicitors*, for example, the Employment Tribunal accepted that being on sick leave was related to Rowden's disability, but also appeared to accept the Respondent's argument that being on sick leave was the trigger for the treatment not the reason. It concluded, therefore, that there had been no section 5(1) discrimination. The Employment Appeal Tribunal (EAT/1116/00), however, were unconvinced and stated that "Section 5(1) does not require that the reason which relates to the person's disability has to be the only reason for the less favourable treatment so long as it has a significant influence on the outcome ...". The reversal of a section 5 (1) decision at appeal (see also, for example, *Shrubsole v Governors of Wellington School*, EAT/328/02/DA) might suggest that the system is working. Most questionable judgements, however, are not appealed.

Consequently, a significant number of claimants, and respondents, are likely to have suffered as the result of incorrect, and sometimes inept, interpretations of this and other sections.

The other problem with question 1 (above) has concerned the role of knowledge. Specifically, in *O'Neill v Symm and Co Ltd*, (1998) IRLR 233, the EAT appeared to conclude that the 'reason' cannot relate to the person's disability unless the employer has knowledge of the disability "or at least the material features of it ...".

In *HJ Heinz Co Ltd v Kenrick*, (2000) ICR 491, however, the EAT stated that "the applicable test should be the objective one of whether the relationship exists, not whether the employer knew of it"; something which most subsequent tribunals appear to have understood.

question 2: If so (see question 1 above), was he or she treated less favourably than the employer would treat others to whom that reason does not or would not apply? (3.1.4.2)

Up until the Court of Appeal decision in *Clark v Novacold*, (1999) ICR 951, tribunals appear to have considered 'that reason' to include the person being disabled. Therefore, it was considered acceptable for the comparator (to whom 'that reason' should not apply) to be

someone in circumstances not materially different from the disabled person, so long as the comparator was not disabled.

The original Employment Tribunal in *Clarke* (1801661/97), for instance, determined that the correct comparators were those absent from work for reasons other than there being a disability; and concluded that Novacold would not have treated them any more favourably than Clark. Specifically, they too would have been dismissed for the length of their absence.

The Court of Appeal in *Clark*, however, found that 'that reason' was, in this case, "being incapable of performing the main functions of his job". Therefore, someone to whom 'that reason' did not apply would be someone capable of performing the main functions of their job (including on account of not being on sick leave). A person capable of performing the main functions of their job would not be dismissed for not being capable of performing the main functions of their job. Mr Clark was, therefore, treated less favourably than this correct comparator (see also derivative decision in *Baynton v Suarus*, (1999) ICR 375).

question 3: Can the employer show that the

treatment in question was justified? (3.1.4.3)

Treatment can be justified (under what was section 5(1)(b)), and, therefore, not amount to discrimination, if the employer can show that the reason for it was "both material to circumstances of the particular case and substantial" (so long as the requirements of section 5(5), now s.3A(6), have been met). The 'material' and 'substantial' requirement, however, has come to be interpreted in such a way that successfully justifying less favourable treatment has not, in general, been a particularly demanding exercise.

In *Heinz v Kenrick*, (2000) ICR 491, the EAT determined that it was sufficient, rather than necessary, to show that the reason for the treatment was 'material' and 'substantial'; precluded the need, at least as a matter of course, for a balancing act between the interests of the employer and employee; and recognised - and therefore helped establish - that the threshold for justification is a 'very low' one.

Later, the Court of Appeal's reasoning, in *Jones v Post Office*, (2001) IRLR 384, appeared to mean that justification cannot fail when the employer is able to show that the reason for the treatment is:

(1) based upon a properly conducted

risk assessment or investigation or upon a properly informed expert opinion;
(2) both material and substantial; and
(3) is not irrational.

Assuming that criteria (1) and (3) are met, it appears that it is for the employer, not a tribunal, to determine whether its own reason is 'material' and 'substantial'. It might, for instance, be able to determine that avoiding a minor inconvenience was sufficient reason for it causing a disabled person substantial detriment.

Consequently, as Hurstfield et al. (2004: 9.2.11) point out, the quality of risk assessments and investigations, and of expert opinion, have assumed a 'central significance'.

In *Joy v Connex South Central* (EAT/975/01), for instance, the Claimant, on appeal, argued that the employer had not established the justification defence, in that it had not obtained up-to-date medical evidence from a cardiologist. The EAT, however, held that this had not been necessary - as it was clear from the GP's certificate that the Claimant was unfit to work, and there was no evidence before the Employment Tribunal to suggest that the GP's assessment had not been properly

conducted. A problem with this judgment is that it appears to mean that an assessment can be 'properly conducted' even if the person conducting it is not suitably qualified. It has to be wondered, for instance, whether a GP without the specialist equipment, training or expertise, is able to provide a reliable prognosis of a complex cardiological problem.

Of greater concern, however, has been the tendency to interpret *Jones* as if it had not required that the reason for the treatment be based upon a properly conducted assessment (see, for example, *Smith v Churchills Stairlift*, UKEAT/0674/04/CK; and Court of Appeal's comments at paragraph 14 of its judgement in *Collins*, (2004) EWCA 144). In other words, the question of what constitutes 'properly conducted' has not been reached.

the duty to make reasonable adjustments (3.1.5)

The duty to make reasonable adjustments is neither general nor notably proactive. Assume, for instance, that an office has extremely heavy front doors, which the employer knows is causing serious problems for staff with impairments and discouraging applications from individuals with disabilities. These factors would not, in

themselves, establish a duty to make reasonable adjustments.

The duty would (pursuant to what was section 6(6)) only apply if the employer knew, or could reasonably be expected to know, that a particular employee, or applicant, was disabled within the meaning of the Act and had been placed at a substantial disadvantage. In addition, the duty would not be to change the door for the benefit of all staff, but to make any reasonable adjustments that would reduce or eliminate the substantial disadvantage which the disabled employee was placed at. This might, for instance, involve allowing him or her to use the executive entrance.

Even where a duty does apply, the duty is only to take such steps as it reasonable to take. Consequently, doing little or nothing will often be acceptable.

the role of knowledge (3.1.5.1)

There have, we would argue, been serious problems with the reasoning that tribunals have applied in relation to section 6(6) (now section 4A(3)). In *Farley V HM Prison Service* (EAT/359/01), for instance, the Prison Service successfully argued that advice from its occupational health advisor, that

Farley was not disabled, meant that it could not reasonably be expected to have known that she was disabled. This was despite the fact that Farley had disclosed that she had a disability when she applied for her job.

This appears to imply that 'could not reasonably be expected to know' (section 6(6)) means 'could not reasonably be expected to know in the given organisational context'. It does not mean 'could not reasonably be expected to have known in an organisation with staff and procedures appropriate to ensuring a reasonable likelihood that a disability will be correctly identified'.

It appears to follow from this that the less organisational provision (such as confidential meetings), for identifying whether individuals with disabilities are being placed at a substantial disadvantage, the greater the likelihood of 'getting off the hook', on the basis of section 6(6). The EAT's interpretation in *Farley* could, therefore, encourage institutional discrimination.

Another possible consequence of the EAT's approach is that it will further discourage disclosure of disabilities. If it's asserting that disclosure will not provide protection if the occupational

health advisor, in an uncorroborated and incorrect opinion, states that there is not a disability, the potential disbenefit of being refused a job after disclosing might well outweigh the potential benefit of obtaining reasonable adjustments if and when in a job.

what steps are reasonable (3.1.5.2)

The nature of the factors specified in section 6(4) (now section 18B(1)) means that, in determining whether it would be reasonable 'to have to take a particular step', regard shall be had 'in particular' to the benefits to the individual disabled person and the costs to the organisation; but not to any benefits to other individuals (whether disabled or not) or to the organisation as whole (see table 3.5 in full report). This inevitably militates against substantial adjustments, including those which involve organisational change.

In addition, determining, under the Act, whether an adjustment is reasonable - and, therefore, whether not making it constitutes (what was) section 6 discrimination - does not require that 'regard shall be had, in particular, to' how substantial the disadvantage is that the adjustment is meant to address (since this is not in section 6(4)). It does, however, require that it be had to 'the

financial and other costs which will be incurred' (since this is in section 6(4)). Consequently, acts which cause the greatest detriment could be the least likely to constitute discrimination.

For instance, not making adjustments to enable a 'disabled' person to continue working, and so not be dismissed, might not constitute discrimination (since the cost could be substantial); but, in contrast, not making adjustments to enable a 'disabled' person to go on a short training course, and so gain some extra skills, might well constitute discrimination (since the cost could be small).

Another consequence is that 'disabled' workers will tend to enjoy less protection, under the Act, in financially troubled companies; and companies which haven't begun implementing equalities practices, and which, therefore, would find it harder (and more costly) to begin making adjustments for those with disabilities.

There have also been apparent problems with the way in which some tribunals have interpreted and applied section 6 in the determination of reasonableness.

Problems with interpretation have included, for example, some tribunals (see, for example, *Fu v London Borough of Camden*, (2001) IRLR 186) appearing to consider whether the employer's decision that an adjustment was not reasonable was within the range of reasonable responses (perhaps wrongly importing the criteria, set out in *Jones*, for section 5(3) justification); rather than, considering, as they should have, whether the adjustment was, adjudged objectively, reasonable. In addition, some tribunals have wrongly assumed that, because of section 6(7), there was no duty to make an adjustment which would constitute more favourable treatment (e.g. *EAT in Archibald v Fife County Council*, EATS/0025/02).

Problems with application have included, in particular, a tendency for tribunals to accept, without supporting evidence, a Respondent's assertion that it had thoroughly considered the reasonableness of possible adjustments; and, in addition, to assume that the results of any such considerations were reliable, conclusive, and honest.

In *Morse v Wiltshire County Council*, (1998) ICR 1023, for instance, Bell J, at 1035, paras G-H, appears to indicate

that the Employment Tribunal might have given undue weight to the reported opinion of the panel of Wiltshire councillors (who heard Morse's internal appeal against dismissal) that there were no reasonable adjustments that could be made. The panel's assertion appears to us, from the information provided in the EAT judgement, to have been unsubstantiated and unexplained; and to have, perhaps, evidenced little more than the councillors' wish to bring the matter of Morse to a close.

determining which adjustments to consider under section 6(4) (3.1.5.2d)

Many tribunals have assumed that the duty on the employer was quite limited with respect to identifying possible adjustments (for assessment as to their reasonableness under section 6(4)). The EAT in *Cosgrove v Ceaser Howie*, (2001) IRLR 653, however, stressed that the section 6 duty was 'upon the employer', meaning that it was the employer's, not the employee's, responsibility to identify possible adjustments; while, later, in *Mid Staffordshire General Hospitals NHS Trust v Cambridge*, (2003) IRLR 566, it determined that "a proper assessment of what is required to eliminate a disabled person's disadvantage is a necessary part of the duty imposed by

s6(1)".

Despite this judgment, however, the need for a proper assessment - along the lines suggested in *Cambridge* (see table 3.6 in our full report) - does not appear to have been effectively established, or understood, as a prerequisite to the section 6 duty being complied with. For instance, in *Morrison v Key Housing Association* (EATS/0107/03), the EAT's reasoning appears to have been (relying heavily upon *British Gas Services Ltd v McCaull*, (2001) IRLR 60) that a proper assessment would have concluded that nothing could be done to help Morrison back to work; and that, therefore, a proper assessment would have made no difference, and should not be considered to have been essential for the section 6 duty to have been complied with. It is not at all clear, however, that a proper assessment would have concluded this, nor that it was possible to reliably determine the issue without a proper assessment.

justification of a failure to make reasonable adjustments (3.1.5.3)

There appears to have been an important failure to establish whether the words "material to the circumstances of the particular case and substantial" meant the same in the justification

defence for less favourable treatment (section 5(3)) as in the justification defence for a failure to make reasonable adjustments (section 5(4)); and whether, consequently, the threshold for justification was as low in relation to the latter as it had been determined to be in relation to the former.

With no guidance provided in *Jones*, (2001) IRLR 384, tribunals were left to reach their own conclusions. A considerable number of these appear to have regarded there as being little or no substantive difference between the meanings or thresholds (e.g. *Wright v (1) Governors of Bilton High School (2) Warwickshire County Council*, (2002) ICR 1463; and *Wroe v Bradford and Northern Housing Association Ltd*, EAT/ 41/01); and, therefore, tended to find that failures to make reasonable adjustments were justified.

In *Beart v HM Prison Service*, (2003) EWCA Civ 119, the Court of Appeal appeared to further weaken the requirements for successfully justifying a failure to make reasonable adjustments. The judgment in *Jones* suggests that the reason for the treatment would need to be one that the employer genuinely believed was both material and substantial. The judgment in *Beart*,

however, suggests, at paragraph 48, that, because “the justification must be viewed objectively by the Tribunal, it is open to the Tribunal to find justification, even if the employer has not given direct evidence on the reason for the failure to comply with the duty under section 6”. Read in the context of the rest of the judgment, this appears to mean that the Tribunal can find justification even if the Respondent has not suggested that there is a material and substantial reason.

The combined effect of *Jones* applied to reasonable adjustments, and *Beart*, appeared to give Claimants the worst of both worlds. It was for the employer not the Tribunal to decide whether its reason, for not making reasonable adjustments, was material and substantial, since materiality and substantiality are not to be judged objectively. However, if the employer doesn't do this, it was open for the Tribunal to make an objective judgment that there was a material and substantial reason.

It was not until its decision in *Collins v Royal National Theatre Board Ltd*, (2004) EWCA Civ 144, delivered shortly before the section 5(4) justification defence was removed, that the Court of

Appeal directly addressed the section 5(4) issue. Even this judgement, however, was far from enthusiastic about its proffered interpretation; and, perhaps, regarded it as a makeshift solution to a problem of declining practical importance.

Arguably, the justification defence was never going to be clear, as it contained a fundamental contradiction. If an adjustment is determined to be reasonable, it follows that not making it must be unreasonable. If not making it is unreasonable, it shouldn't be possible to justify not making it - since an implied reasonableness is central to the concept of justification.

enforcement of the Act

individuals unlikely to request or enforce rights (3.2.2)

The low level of awareness of the DDA among employees (e.g. Williams et al, 2003; Meager et al 1999; Hurstfield et al, 2004; RNIB research reported in Paschkes, 1996) appears to partly explain why so few request or enforce their rights under the Act. Work related contributions to this lack of awareness include, for example, organisational ignorance (e.g. Meager et al, 2001: 4), problems with internal communications and training, and 'disabled workers networks' not

engaging with the wider workforce; external contributions include, for instance, failures to adequately teach rights awareness in school, and different media priorities.

Among those who become aware of their rights, most will not submit a claim. The often related reasons appear to include, in particular, problems getting initial advice and support (Self-help-group Interviews, with PIRU in 2004); the effect of a disability or illness on the ability to prepare and submit a claim, including within the short time limit (3.2.3.3); concerns about the possible financial and other costs, including the impact upon health; fear of victimisation; and low expectations of success.

In one case, for instance, a Unison member wrote to his union requesting 'urgent legal advice' (documents provided to us and member interviewed in 2005). Four further letters and over two months later, he received a response stating that Unison was unable to help.

complainants unlikely to succeed (3.2.3)

The chances of a claimant winning a case are relatively small. For instance, according to Employment Tribunals Service figures (quoted in Hurstfield et al, 2004: table 4.1), 4% of the cases that

ended during the year 2001-2002 were successful at tribunal; 13% were unsuccessful; 36% were withdrawn; and 42% were settled through ACAS (see also 2004-2005 Employment Tribunals Service figures, quoted at para. 3.2.3.1 of our full report).

lack of legal advise, representation and support (3.2.3.1)

Many claimants, through lack of funds and the limited availability of free provision, will have no professional legal help or representation. This will, of course, in general, make it harder to effectively found a claim, prepare the case, and present it at the tribunal hearings (e.g. Donovan, 2000; Leverton, 2002). In contrast, the majority of Respondents are able to afford specialist lawyers; and, in the case of large employers, will have their own legal departments.

The problem of representation includes lack of effective representation. In particular, there might be difficulties with non-legal representatives, including some CAB advisors (see, for instance, references to the CAB in Marks and Spencers v Williams Ryan, UKEAT/1045/04/SM) and trade union officials; but also with inadequate legal representation, such as from recent graduates or non-specialist solicitors.

Contributing to these difficulties, and arguably breaching Articles 6 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, the 'legal representation' level of Community Legal Service funding is not available for cases in Employment Tribunals (telephone conversation with Legal Services Commission official in 2005).

The Disability Rights Commission can, at its discretion, provide representation. However, since the number of cases involved are small, and there is a concentration on those considered to be of strategic importance (DRC, 2001; DRC 2002b), there appears little reason to conclude that it is providing representation for a significant percentage of those most in need of assistance.

In 2004-2005, for example, the DRC says (Robb, 2005) that it "supported 12 clients who complained about discrimination in the employment field to bring their cases to Employment Tribunals, the EAT, Court of Appeal or House of Lords". While the help is likely to have been important or essential for the 12 who received it, this figure should, perhaps, be set against figures which indicate the extent of potential

need during the same period. For instance, during 2004-2005, 4942 DDA claims were submitted to the Employment Tribunals (Employment Tribunals Service, 2005)

It also appears that there might be greater problems for individuals seeking legal help in Wales. Williams at al (2003), for instance, found that 'advice provision in Wales is fragmented, disjointed and sparse, with few trained specialists in this complex area of law'. It also seems that the situation might not have improved since their report. For instance, there is just one law centre in Wales (Community Legal Service Direct, 2005a and b); and, in our survey of three welsh counties in 2005, we were only able to find one employment advice provider with a contract with the Legal Services Commission.

insufficient legal and procedural knowledge and tactical skills (3.2.3.4 and 3.2.3.5)

There appears to be a quite widespread belief that tribunal cases are decided more on the basis of 'common sense' than legal argument; and that, therefore, those without detailed legal knowledge, usually Claimants representing themselves, will not be greatly disadvantaged.

It might be unfair to dismiss this as a

convenient myth, which helps further excuse the effective absence of public funding for Claimants. It does, however, appear, on occasions, to be an interested argument, which fails to reflect the reality of disability discrimination cases.

We have come across, for example, a significant number of cases in which unrepresented Claimants have unsuccessfully alleged (what was) section 5(1) discrimination, when it appears clear, and the tribunals have sometimes implied, that an additional claim of failure to make reasonable adjustments would have stood a much greater chance of success.

A good understanding of procedure, and a sound tactical and strategic sense, would also appear to be of considerable importance. As with legal knowledge, however, the Respondent will, in general, have greater access to these attributes than the Claimant. The majority of Respondents, for instance, will use demands for a medical examination (even when it is certain that the person will be found to be 'disabled), and the threat of costs, to try and pressurise Claimants into dropping a case (Law Firm Interviews, with PIRU in 2004).

the legislation and case law (3.2.3.2)

Aspects of the legislation and case law, we would argue, put the Claimant (with or without proper legal advice and representation) at an unfair disadvantage in getting redress for what would, in everyday and academic discourse, be regarded as discrimination.

Some of these aspects are discussed in this report, including, for instance, the definition of disabled; the very low threshold for justifying less favourable treatment; and the criteria for determining the reasonableness of a possible adjustment.

impact of disabilities on the ability to pursue the case (3.2.3.6)

The impact of disabilities can make it impossible to continue or difficult to win. The main indirect impact will occur when a Claimant is unable to work, and, therefore, unable to afford legal representation. Without legal representation, the direct impacts begin to make themselves felt. Someone with a severe, non-specific, learning disability, for instance, might well be unable to complete the originating application.

Many of the services which a tribunal

provide will fall within Part 3 of the DDA (DRC, 2002c). It would need, for instance, to consider whether it is providing literature in accessible formats. There will, however, often be a substantial difference between what a tribunal should be doing and what it is doing (Claimant Interviews, with PIRU in 2005). It is also questionable whether someone, who has taken a case against their employer to a tribunal and lost, will have much enthusiasm for embarking on a disability discrimination case against the tribunal in the county courts (which is where claims under Part 3 must be instituted).

In addition, the Act does not apply to the performance of a tribunal's judicial functions; which would need, instead, to be the subject of an appeal (DRC, 2004c). Some of these judicial functions, however, will have as much to do with enabling basic access, for individuals with disabilities, as the non-judicial functions; such as, for instance, when it decides whether to agree to postpone a preliminary hearing when a Claimant is too ill to attend. Indeed, one interviewee (Claimant Interviewee E) said that the tribunal had refused such a postponement, despite having provided them with a GP's letter in support.

the selection and attitudes of tribunal members
(2.3.2. and 3.2.3.7)

The system for selecting tribunal panels (see table 2.1 in full report) helps to determine what attitudes are present among tribunal members; which, in turn, can have a significant influence on the outcome of cases.

The selection of persons for the tribunal panel under Regulation 5(1)(a), of the Employment Tribunal Regulations (see table 2.1), appears comparable to the selection of judges, to the extent that the individual must be legally qualified. The most significant problem with this arrangement appears to be a failure to ensure that these members have, or gain, sufficient knowledge of discrimination law.

The real problem, however, lies with the members selected for the other two tribunal panels (who make up 2 of the 3 members of each tribunal). They are not selected randomly as in jury trials, and there is no requirement that they be legally qualified. Instead, selection, in practice, appears to be, to a substantial degree, on the basis of assumed partialities, albeit partialities framed as the balancing perspectives of employees and employers. This, it might be argued, is closer to Mussolini's simulative corporatism than the best

traditions of British justice.

To begin with, it is not clear that the members, selected under Regulation 5(1)(b), come close to being representative of employees or to sharing their perspectives. It is, for instance, the Secretary of State, not representative organisations, who appoint the panels; and he or she does so after consulting with organisations of his or her choosing. Furthermore, when the Secretary of State does consult with organisations 'representative of employees', it will tend to be with senior national officials; who, in important respects, have more in common with employers than with employees. There might, of course, be comparable problems in relation to the panels selected, under 5(1)(c), after consultation with organisations 'representative of employers'.

Even if panels were, in some ways, representative of employees and employers, it is not clear why this is assumed to help ensure that justice is done. The justice system is meant to protect individual rights under the law. It is not about representing the interests or preferences of particular social or economic groupings.

There appear to be two main practical problems which result from the selection arrangements. The first is the greater potential for legal ignorance and consequent misdirection; the second is the greater potential for bias, including the subtle influence of established beliefs.

There might, in relation to the latter, be particular problems for Claimants without union representation or support. A panel member from the 'union side' might assume that the Claimant is a non-union member; or, alternatively, assume that the union decided not to support the case on the grounds that it had no reasonable prospect of success. Either way, there might well be a negative effect on the assumptions that underpin the panel member's assessment of the case.

It has not been possible, within the constraints of this report, to reach any reliable conclusions about the nature and extent of any bias on the part of tribunals (for cases that concern alleged bias, see, for example, *Fraser v London Borough of Richmond upon Thames* UAEAT/0888/02/DA and *UKEAT/0069/03/DA*; and *McLachlan v The Chief Constable of the Cambridgeshire Constabulary*, UAEAT/0947/03/DM). We

did, however, come across a significant number of cases in which tribunals appear, without there being sufficient reason, to have given much greater credence - when a matter of fact is disputed and there is no convincing evidence - to the assertions of one of the two parties. Furthermore, the preference appears, in most of these cases, to have been for the Respondent's version of events (e.g. *Farley v HM Prison Service*, appeal no. EAT/359/01).

interlocutory hearings (3.2.3.8)

After submission of the originating application (which institutes the claim), interlocutory hearings are often the next point at which the lack of proper legal help and knowledge seriously, and often fatally, disadvantage a Claimant. At one case management conference we studied, for instance, the tribunal determined in favour of the Respondent's choice of 'joint' medical expert (to examine the Claimant). It also agreed to the Respondent's terms of reference; which meant that the Respondent decided what questions the expert would address (some of which appear to have been leading or misleading); and what medical information was provided to him as background. The Respondent, for instance, included the first GP medical

report (which appeared more supportive of its case) but not the second (which appeared more supportive of the Claimant's case).

pressures to settle or withdraw (3.2.3.9(1))

Many of the pressures to settle or withdraw will grow as the case progresses. These might include, for instance, mounting legal costs, and diminishing finances (e.g. Hurstfield et al, 2004: para. 4.3.4); the continued failure to obtain legal advice or representation, combined with a realisation of the problems involved in fighting alone; the damage to health and relationships; pessimism about the chances of success; and fears about the consequences of failure, including the possibility of legal costs being awarded. It is into this psychological environment that the Respondent might make an offer to settle; which a substantial percentage of Claimants, with little left and desperate to bring the whole process to an end, will reluctantly accept. It also seems that advisers might frequently put considerable pressure on applicants to accept (Claimant and Self-help-group Interviews with PIRU).

no effective enforcement agency (2.3.5 and 3.2.3.9(2))

The Disability Rights Commission

(DRC) does not appear to constitute a sufficiently effective enforcement agency for Part 2 (employment field) of the DDA. Its enforcement powers are quite limited, and it makes limited use of those which it has (see forthcoming PIRU report, 2006b).

A particular weakness is that, unlike agencies in a number of other countries, it has no power (except in quite limited circumstances, such as in relation to 'instructions and pressure to discriminate') to take individual employment discrimination cases to court (as opposed to supporting claimants in so doing).

employers unlikely to be deterred (3.2.4)

unaware of obligations (3.2.4.1)

Many employers are not aware of the existence of the DDA employment provisions; wrongly assume that they do not apply to them; or have little knowledge or understanding of the details (e.g. Hirst et al, 2004: para. 4.4).

The majority of employers, for instance, have an overly narrow definition of 'disabled' (e.g. Goldstone and Meager, 2002; Roberts et al, 2004), and therefore, of who is protected under the Act; and a restricted concept of what might need to be done when an employee is identified

as 'disabled', such as regarding reasonable adjustments as being about no more than adaptations to buildings (Stuart et al, 2002).

unable or unwilling to comply with legislation
(3.2.4.2)

Discriminatory incidents tend not to be isolated and aberrational; but, instead, arise from particular organisational cultures, structures and processes. Reducing and preventing discrimination could, therefore, require making changes to these contextual elements - something which might be assumed to be too difficult, disruptive, expensive, or prolonged.

In addition, however, many employers appear to have an exaggerated notion of how much it will cost to meet the relatively limited requirements of the Act. In deed, section 18B helps ensure that an adjustment which would put a substantial strain on an organisation's finances would be unlikely to be regarded as reasonable; and, therefore, there would be no requirement to make it.

In a substantial percentage of cases, however, the problem might be more to do with political perspectives, management cultures, or personal

animosities, than with concern about direct costs. There might, for instance, be a hostility to 'political correctness', outside interference, and regulation (e.g. Personnel Officer Interviews, with PIRU in 2004-2005).

**limited prospect of claim being made ,
succeeding, or hurting** (3.2.4.3 and 3.2.4.4)

It was noted earlier that employees are unlikely to make a claim; to persist if one is made; or to win if one is persisted with.

The theoretical potential of being called to account might, therefore, do little or nothing, in itself, to deter many employers. It might, however, tip the balance for an employer who is also, to some extent, persuaded of the moral or economic (or both) arguments for not discriminating.

Even if a case does go to tribunal, and the Respondent loses, the compensation paid will not have a substantial impact on the finances of most Respondents; and might well be regarded as an acceptable business expense. There is, however, no upper limit in discrimination cases; and awards can be substantial. There will also be the sometimes greater costs of fighting the case, including the possible damage to an organisation's reputation (e.g.

Carvel, 2005).

THE DISABILITY DISCRIMINATION (AMENDMENT) ACT 2005 (3.3)

Baroness Holliss (reported at column 665, UK Parliament, 2004), for the Government, asserted that the Disability Discrimination Bill 2005 would complete the task of delivering comprehensive civil rights for disabled people. There appears, however, to be little evidence or other support for what might, in fairness, have been more of a rhetorical extravagance than a considered opinion.

There are some improvements to the definition of 'disabled', such as removing the requirement that a mental illness be 'clinically well recognised'; and the new 'duties on public authorities' should help encourage the mainstreaming of disability equality.

The amended DDA, however, continues to be based upon an individual model of disability; the changes to the definition of 'disabled' appear inadequate and, in places, haphazard; and it is not clear what the 'duties of public authorities' require, or that there is an effective mechanism to enforce whatever emerges as having been required.

meaning of disability (3.3.1)

conditions taken to be disabilities as a matter of law (3.3.1.1)

The 2005 Act provides that someone with cancer (unless of a prescribed description), HIV or multiple sclerosis is protected under the Act as soon as diagnosed. It might be wondered, however, why all progressive conditions, including, for instance, Motor Neurone Disease, and dementias, are not deemed to be disabilities as a matter of law, since all could result in discrimination at the earliest stage.

Someone with asymptomatic HIV, for instance, will be protected from harassment in the workplace but someone with asymptomatic Hepatitis C will not. This is despite the fact that Hepatitis C is also a blood borne virus, albeit more infectious; and can be chronic, progressive, incurable and terminal; and therefore, one imagines, might generate comparable, or more intense, fears, prejudice and discrimination.

'normal day to activities' and 'long term' (3.3.1.3 and 3.3.1.4)

Baroness Wilkins, on the Joint Committee on the Draft Disability Discrimination Bill, had noted (Joint Committee, 2004b: Q747) that the current

list of capacities in paragraph 4(1) of schedule 1 "is criticised for its very poor coverage for people with mental health problems"; and the Joint Committee went on (Joint Committee, 2004: paragraph 85) to recommend that the following capacities be added:

- ability to care for oneself
- ability to communicate and interact with others; and
- perception of reality.

The recommendation, however, was rejected; as was the recommendation (ibid: paragraph 99) that "people experiencing separate periods of depression totalling six months over a two year period should be considered to meet the long term requirement".

a more social model of disability (3.3.1.4 and 3.3.1.2)

The Joint Committee made a number of recommendations (not so far taken up) that would introduce a more social model into the legislation. These included (Joint Committee, 2004b: para. 109) amending the DDA "to prohibit direct discrimination and harassment against people who are associated with a disabled person or are perceived to be disabled".

The Joint Committee also

recommended (ibid: para. 50) that the Disability Rights Commission "should consider and consult on whether, and if so how, the law could be amended to provide (a) protection against discrimination on the grounds of impairment, regardless of level or type of impairment and (b) entitlements to the removal of disabling barriers, and submit its recommendations to the government".

duties of public authorities (3.3.2)

"Positive duties" in the DDA 2005, according to the Equal Opportunities Commission (Equal Opportunities Commission, 2004: para. 3), "represent a step change from requiring individuals to challenge instances of discrimination, to requiring public sector bodies to adopt a proactive approach to promoting equality and eliminating discrimination and harassment ...". It is not clear, however, that this theoretical "step change" will necessarily bring about dramatic, or even substantial, reductions in disability discrimination across the public sector.

The potential impediments to success include, in particular:

- the loose, ambiguous, and incomplete wording of the provisions;
- the reliance upon regulations to fill

- some of the gaps;
- the number and nature of bodies not subject to the duties;
 - the continued focus upon individuals who meet the definition of disabled, rather than upon discrimination;
 - the failure to include the setting of objectives among the specific duties;
 - the difficulties involved in determining compliance; and
 - the weakness of the enforcement powers.

bodies subject to the duties (3.3.2.3)

determination of bodies subject to the general duty (3.3.2.3a)

All bodies which meet the definition of 'public authority' in Part 5 of the DDA are subject to the general duty.

Considerable concern, however, has been expressed with regard to this definition.

First, the existence of a definition, as opposed to a list of bodies to which the duty applies, and the insufficient clarity provided in the definition, is likely, it has been argued (including in evidence to the Joint Committee on the Draft Disability Discrimination Bill, 2004b: paras 208-219), to lead to uncertainty as to which bodies are included.

Second, it seems probable that the definition might, as has apparently

happened in the case of the Human Rights Act (upon which the definition in the DDA is based), be applied in a restrictive manner (Joint Committee on the Draft Disability Discrimination Act, 2004: para. 210).

determination of bodies subject to the specific duties (3.3.2.3b)

Only those authorities contained in the regulations will be subject to the specific duties (see table 2.3 of full report). Since the specific duties are, according to the draft Code of Practice (DRC, 2004b: para 3.2) "intended to assist public authorities in meeting the general duty", it seems probable that, in general, those not made subject to the specific duties will find it harder, and be less likely, to effectively meet the general duty.

bodies partially subject to duties (3.3.2.4c)

A non-public authority will only be subject to the general duty in relation to any functions of a public nature i.e. in the performance of which it is, in effect, 'standing in the shoes of government'. This might include, for instance, a local charity providing community care services under contract to a health authority.

There is particular concern, however, that this appears to mean that that the duty will not apply to employment

practices within the organisation (e.g. Discrimination Law Association, 2004: para. 5).

bodies subject to no duties (3.3.2.4d)

There is no general duty, whatsoever, on non-public authorities carrying out no 'functions of a public nature'. This, it might be argued, is neither entirely logical nor desirable. In particular, if the rationale is to encompass those organisations which have the greatest impact on people with disabilities (see, in particular, para. 1.6 of consultation, HM Government 2004c), and are most able to bear the financial cost of the duty, it might be appropriate to also include companies over a certain size.

the duty on public authorities to promote disability equality in their suppliers (3.3.2.4b)

A public authority would need, as part of its general duty, to promote disability equality in non-public authorities from which it procures goods or services. It might, for instance, make good practice, in the employment of people with disabilities, a condition of granting a contract. The general duty, however, is likely to generate far less pressure on a public authority to ensure good practice in a supplier than in its own organisation.

problems with the general duties

(3.3.2.5)

the meaning of 'equality of opportunity'

(3.3.2.5a)

Section 49A (the general duty) appears imprecise, unclear, and lacking in completeness. It might, in particular, be wondered how a 'public authority' will be found to have not had due regard to 'equality of opportunity', when there is no definition, or other clear indication, of what this contested term should be taken to mean (see, for example, ambiguous usage at para. 2.9 of draft Code of Practice, DRC 2004b).

If an accepted meaning is to be arrived at, it will require several years of contradictory court decisions, appeals, and the accumulation of case law. Since Parliament are unlikely to have intended this, it might be wondered whether the assumption is that (as with the Race Equality Duty) there will be few court cases, and that the meanings will not need to be tested.

Instead, section 49A might have been intended more as a guide (albeit with a theoretical legal recourse) to improving practice over-time. It is far from clear, however, that de facto guidance will be sufficient to realise the government's stated ambitions.

determining relevance of an issue to disability

equality (3.3.2.5b)

Disability Equality, according to the Draft Code of Practice (DRC 2004b: para. 2.2) "should be factored into all functions in proportion to its degree of relevance to the issue." However, without proper impact assessments (which are not required of those not subject to the specific duties), it seems likely that there will be an over-reliance upon established, unexplored, and often incorrect, assumptions in deciding whether disability equality is relevant to a particular function or issue.

(c) the need to eliminate discrimination that is unlawful under the Act (3.3.2.5c)

The duty provided for in section (49A(1)(a)) is to 'have due regard to - (a) the need to eliminate discrimination that is unlawful under the Act'. It might be argued that this is unnecessarily restrictive; and that it would have been more appropriate to require 'due regard to the need to eliminate discrimination, including that which is unlawful under the Act.'

It would not have required a different, and, therefore, conflicting, definition of disabled. Rather, it would have provided for additional groups, such as those suffering discrimination on the basis of association with a disabled person, to be covered under Section 49A. These

groups would not be brought under the protection of the rest of the Act; and, in particular, discriminating against them would not have become unlawful.

Another possible problem with subsection 49A(1)(a) is that, despite the proactive nature of the duties having been lauded, it refers to the 'need to eliminate discrimination ..' rather than the 'need to prevent and eliminate' it. While it might be thought that 'eliminate' means 'prevent and eliminate', it is not clear that everyone will interpret it thus. In particular, the draft Code of Practice uses the two terms together (para. 2.11, DRC 2004b); therefore, suggesting their possible distinctiveness.

little or no foundation for affirmative action (3.3.2.5d)

There appears to be no support for affirmative action in section 49A. The 'general duty' does include the 'need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons'. This, however, appears likely to require no more, in the case of employment, than is sometimes required under the existing section 4A 'duty to make reasonable adjustments'.

Whereas the duty to make reasonable

adjustments only arises where a provision, criterion or practice, or feature of the premises, place a particular disabled person at a substantial disadvantage, affirmative action might also be aimed at addressing disadvantage which arose from factors which are no longer operating (i.e. historical disadvantage), and disadvantage which is more general.

For instance, an individual might, as the result of past discrimination (including from other organisations), be in a far lower grade than employees with comparable qualifications. It might, therefore, be considered equitable, and good for the organisation, to facilitate his or her promotion to a more appropriate level. He or she could, for example, be sent on training courses, and enabled to gain experience through acting-up to a higher level.

no duty to promote good relations (3.3.2.5e)

The Joint Committee on the Draft Disability Discrimination Bill recommended (2004: para. 241) that the duties should include a duty to promote good relations between disabled and non-disabled people; which would be comparable, in some respects, to the duty to promote good relations in the Race Relations (Amendment) Act.

The Minister for Disabled People, however, rejected this recommendation. According to the Joint Committee's report (ibid: para. 231), she "said that one of the reasons why the draft bill did not contain a duty on public authorities to promote good relations was because 'I do not think it is at all obvious that there are not good relations '. But the Committee has heard a great deal of evidence that disabled people do face widespread harassment and bullying in their communities".

The Minister also said, according to the Committee's report (ibid: 237), that "we would not want somebody who was not disabled to challenge the blue badge scheme on the grounds that giving disabled people the advantage of being able to park where they cannot works against good relations". This argument, however, appears disingenuous. The blue badge scheme is, in essence, about making a reasonable adjustment so that people with disabilities, who have been placed at a substantial disadvantage, are more able to access (through being able to get to) services on equal terms.

Two new elements were added (subsequent to the Committee having reported) to sub-section 49A (1). These

were '(e) the need to promote positive attitudes towards disabled persons'; and '(f) the need to encourage participation by disabled persons in public life'.

We would suggest, however, that good relations is more inclusive of positive attitudes than positive attitudes is of good relations. It would, therefore, be easier to promote positive attitudes without promoting good relations, than it would be to promote good relations without also promoting positive attitudes. This is because good relations is, as we understand the term, about both attitudes and behaviour.

Arguably, the requirement to have due regard to the '(e) need to encourage participation by disabled people in public life' addresses part of this deficiency. Its sphere of concern however, appears far narrower than the all embracing 'good relations'. In particular, it is not clear that 'public life' means 'in all normal aspects of life', rather than those involving a public profile, such as, for instance, standing as a local councillor.

In addition, the words 'to encourage participation' might be understood to suggest that disabled people are not prepared to be involved; and are, therefore, the problem.

problems with the specific duties

(3.3.2.6)

Taken together, the specific duties do not add up to a comprehensive or coherent approach.

incomplete strategic planning (3.3.2.6b)

Since the specific duties are about achieving particular aims - such as 'promoting positive attitudes' - it might be thought that this should be approached in the manner that organisations have found to be effective in achieving their aims. In particular, it might include a variation on strategic planning.

The specific duties, however, require some elements of a strategic planning approach, such as 'arrangements for gathering information' but, without explanation, fail to require some of the most important elements, such as, for instance, an overall vision, goals, objectives and targets, and arrangements for organisational control.

Of particular concern is the failure to require that an organisation sets objectives, without which it will tend to have a confused, and inadequately arrived at, idea of what it wants to achieve, and little idea as to whether it has achieved it. Regulation 2(3)(c) does

provide that the Disability Equality Scheme shall include a statement of "the steps which that authority proposes to take ...". Such steps, however, should be directed at achieving objectives; they would not, in themselves, constitute objectives.

One of the steps might, for instance, be 'to interview all staff on sick leave'. Without objectives to which it is directed, however, it could promote and facilitate equality or discrimination. Some managers, for example, might use the interview to gather evidence that an employee will not be able to return to an unchanged work situation within a reasonable time, and should, therefore, be dismissed. Others might, in contrast, use it as an opportunity to discuss reasonable adjustments that could enable an employee to return to a changed work environment.

enforcement (3.3.3)

The Government has said that "The enforcement model for the duty to promote (disability) equality is designed to replicate that in place for the enforcement of the duty to promote race equality" (HM Government, 2004: para. 6.20). This is a matter for some concern, since the Race Equality Duty (in force since 2001) appears to have suffered,

perhaps disastrously, from inadequate enforcement powers, mechanisms and intent.

The limited research available also suggests that significant positive outcomes, from the Race Equality Duty, are not obvious or apparent across the public sector. The Audit Commission (2004: para. 42) states, for instance, that "many organisations we spoke to found it hard to say what improved outcomes had been delivered".

If anything, the intent in relation to the Disability Equality Duty appears to be even weaker. According to the Joint Committee on the Draft Disability Discrimination Bill (2004: para. 250), for instance, The Minister for Disabled People "noted that the point of the duty to promote was to spur public authorities into thinking about how they undertake their activities. Therefore, the focus might be less on rights of action before courts, and more on trying to work together to eliminate problems."

Spurring "public authorities into thinking about how they undertake their activities", it might be argued, appears to be a rather modest ambition; and one which is not commensurate with the efforts involved in passing a major piece

of legislation, or which is a sufficient response to addressing institutional discrimination. Furthermore, it seems surprising for a government to couple the passage of legislation with a strong indication that it might do little to enforce it.

the general duties (3.3.3.1)

The Act makes no provision for enforcement of the 'general duty', except in so far as it makes provision for enforcement of the 'specific duties'. It, therefore, makes no provision for enforcement in the case of the thousands of public authorities which are not subject to the 'specific duties'. In addition, there appears no good reason to assume that compliance with 'specific duties' will guarantee, or even make likely, compliance with the 'general duty'. For instance, an authority is required, under the specific duties, to gather some 'information on the effect of its policies and practices' on the recruitment of disabled people, but is not required to make improvements to its policies and practices.

The draft Code of Practice does note the possibility of Judicial Review. There are serious doubts, however, as to whether judicial review is an appropriate or sufficient means to

enforce the general duty; whether the DRC will be energetic or effective in its use; and whether many individuals will risk the possible £20,000 (Public Law Project, 2005) in costs to fill the gap that DRC might well leave.

In assessing these matters, the experience of the Commission for Racial Equality (CRE) with the Race Equality Duty might be of some relevance. In particular, the Joint Committee on the Draft Disability Discrimination Bill reports (2004: para. 248) that "The CRE told the Committee that they were unable to enforce the RRA general duty very easily through the mechanism of judicial review available to them. They also noted that in their experience it was difficult to monitor 44,000 public authorities to ensure compliance with the duty".

It is also not clear that the CRE made a great effort to enforce the duty 'through the mechanism of judicial review'. In particular, in the more than four years since the general duty came into force, the CRE states it has "not so far led on a judicial review action relating to whether and if so how, a listed public authority has paid 'due regard' to the Duty under the Act" (personal communication, from CRE, 2nd September

2005). It has, however, intervened in one judicial review action (ibid).

the specific duties (3332)

Only the Disability Rights Commission (DRC) can institute legal proceedings for an alleged failure to comply with the specific duties. It does not, however, appear to have the resources to monitor the thousands of public authorities subject to the duties; to investigate all the possible breaches likely to be brought to its attention; and to take action when it is satisfied that a breach has occurred. There also appears to be a degree of understanding, on the part of the DRC and government, that enforcement in the courts will rarely be necessary or desirable (note, for instance, the failure to mention 'enforcement' in the press releases, DRC 2005a and b, welcoming passage of 2005 Act or in the standard letter inviting views on the draft code of practice, DRC 2005c). Instead, the emphasis appears to be on the DRC helping public authorities to meet the duties .

Two important questions arise from what appears to be the DRC's attitude to enforcement - will there be much enforcement activity; and can a high, or even acceptable, level of compliance be achieved without a significant or

substantial use of enforcement powers? Again, the CRE's experience, with the Race Equality specific duties, might be of some relevance.

The CRE has only issued four Compliance Notices (since 31 May 2002), and has never got to the stage of court proceedings. The reason, it has told us (personal communication, from CRE, 2nd September 2005), is that the "rigour and effectiveness" of its "preliminary work", in engaging "over 200 listed public authorities in its compliance process", made it unnecessary to do so. In other words, there has been pre-enforcement activity but no enforcement action.

Unfortunately, the CRE's assertion appears to be unsubstantiated and wishful. The research which has been done, and, in particular, the Audit' Commission's 'Journey to Race Equality' (2003), appears to indicate a high level of non-compliance, from which, we would suggest, it appears to follow that the CRE's 'preliminary work' has not been sufficient to ensure a reasonable level of compliance. The report found, for instance, that, in relation to the Race Equality Duty, "local agencies are more likely to be in the intending and starting groups, with very

few in the achieving groups".

The findings of the other major piece of relevant research are, perhaps, even more disturbing. Bright (2004), reporting on the interim report of the CRE's investigation in the Police Service, writes:

"Institutional racism is still rife in police forces across Britain five years after the inquiry into the death of black teenager Stephen Lawrence, which ordered senior officers to root it out A report from the Commission for Racial Equality to be published tomorrow will show that all but one of the 43 forces and authorities in England and Wales are failing in their legal duty towards ethnic communities".

With the CRE having taken no court action to act as a potential deterrent, and just four Compliance Notices having been issued, most non-compliant organisations, it might be imagined, will assume that they can continue to be non-compliant without there being a significant likelihood of any action being taken at all; and will also assume that, in the unlikely event of being issued with a non-compliance notice, it will be relatively easy to make sufficient changes, such as to the Disability Equality Scheme, to ensure that no

further action is taken.

Arguably, the DRC will have learnt from the problems with the Race Equality Duty, and will be more forceful in ensuring that the Disability Equality Duty is complied with. There appears, however, little reason to assume this. In deed, it seems that there might be even less government pressure on the DRC to perform than there was on the CRE. The initial pressure might, therefore, need to come from elsewhere.

progress to date in Welsh public authorities (taken from Wales edition of the PIRU report) (3.2.2)

In some sections of some of the 20 public authorities in Wales we looked at, there appeared to be substantial, and well informed, enthusiasm for tackling discrimination against staff with disabilities. Quite often, however, the ambitious intent of some individuals - including, in particular, equalities officers - did not appear to be reflected in the written employment procedures of the organisations concerned, or in the attitudes and practice of managers and personnel officers.

In deed, indications of significant, or substantial, levels of institutional discrimination, in the area of

employment, were apparent in all the public authorities studied. Further, there appeared, in the documents obtained, to be no clear evidence that specific preparations were being made for the coming into force of the public authority disability duties (probably in December 2006).

a. general policies not translated into procedures

The equal opportunities policies, which appear on the 'corporate' websites and might be regarded as the public presentation of an authority's approach to equality issues, contained, in most cases, quite impressive general commitments. Frequently, however, organisations lacked procedures appropriate to helping to ensure that practice was consistent with, and supported the achievement of, these general commitments.

(b) slowness in responding to legislation

Despite the DDA having been passed ten years ago, a substantial percentage of the respondent organisations still do not appear to have properly considered, or addressed, its requirements. It was only in 2003, for example, that one organisation committed itself to review its policies and procedures in the light of the DDA 1995.

(c) problems in understanding

With one exception, all the organisations demonstrated, in the documents provided, what appeared to be significant or serious misunderstandings as to what the provisions of the Act require. A policy from one authority, for example, in defining discrimination, makes no reference at all to the 'failure to make reasonable adjustments', despite this, arguably, being the form of discrimination which has the greatest impact on employees with disabilities.

It is also notable that a significant number of the organisations have policies which address 'race' and gender harassment, but not disability harassment (possibly on the basis of the incorrect assumption that the DDA did not, at the time, cover harassment).

(d) focus on recruitment but not on development and retention

Many of the respondent organisations appeared to have given considerable attention to the relevance of the DDA to recruitment, but little to its relevance to development and retention. One organisation, for instance, had an equality policy on 'recruitment and selection' but did not have one on development or retention; and a substantial percentage of authorities

appeared to monitor the recruitment of staff with disabilities but not, for instance, the turnover of staff with disabilities.

In effect, the needs of individuals with disabilities appear to be given substantial attention until the individual concerned has joined the organisation.

(e) sickness and absence procedures

Sickness and absence procedures are, we would argue, a central factor in determining the retention or otherwise of staff with disabilities. It is also notable that a substantial number of successful tribunal cases concern discrimination in the application of such procedures.

A significant number of the respondent organisations, however, appear to have written their sickness and absence procedures as if the DDA had never been passed or as if they had little or no understanding of what it required. The tenor of such documents appear to be about reducing sickness absence through disciplining, and threatening to dismiss, individuals whose absence might become 'excessive'. There appears to be nothing in them about the need to make changes to facilitate the continuance in, or return to, work of individuals with disabilities. It seems

highly likely that authorities following such procedures will be quite frequently discriminating against employees with disabilities (whether or not either party is aware of this).

The procedure of one authority, for example, states that 'in analysing absence' (with a view, it seems, to whether or not to take disciplinary action), account should be taken of a number of factors, including, for example, whether the absence is due to a work related illness or an assault by a member of the public. Remarkably, however, it does not include disability amongst these factors. This is despite the fact that the council has a clear legal requirement, under the DDA, to do so.

Arguably, these authorities, in addition to acting unlawfully, are failing to realise that their approach to disabilities is likely to increase the length of sickness absence (since individuals with disabilities will not be helped back to work) and also the level of dismissals and resignations (such as when individuals are dismissed on account of having been on sick leave for a particular period of time).

(f) limited consultation with staff

There was no evidence that more than a

couple of the public authorities were consulting directly with staff on disability issues. This is, arguably, regrettable, as such consultation (especially when confidential and with the option of being anonymous) appears to be an effective way of improving disability equality across an organisation.

(g) limited or no information provided to staff

Despite having specifically asked most public authorities for copies of DDA information provided to staff, just three did so. If the majority, of those that didn't, had no information to provide, this might help to explain the apparent low level of awareness of the DDA among staff in Wales.

(h) incorrect 'levelling' on the equality standard for local government

Local councils in Wales appear to have placed considerable importance on having decided to work within the framework of the 'Equality Standard for Local Government in Wales' (Employers' Organisation for Local Government, 2002b). The documents we received, however, suggest that, in relation to the framework, disability issues have, in general, been given far less attention, and less useful attention, than race equality issues (perhaps, to some extent, on account of race equalities duties having been provided for in

statute).

In addition, some authorities have put themselves on a higher level than appears to be justified. For instance, self-assessment as being on level 2 requires engagement in 'employment equality assessment of the local labour market', but one council, which put itself at level 2, explained that it had not yet begun this process (but that it would in the near future).

It is also worth noting that, according to the Audit Commission (Audit Commission, 2001: paras. 28 and 30), Welsh local authorities were slower than English ones to adopt the equality standard for local government, and were also slower to reach level 2. There is some evidence, however, that, in the case of some Welsh authorities studied, the gap might have been more than closed.

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