

**Institute for Public Policy Research**

# **Equal Rights for Disabled People**

**The case for a new law**

**Ian Bynoe, Mike Oliver and Colin Barnes**

## **INSTITUTE FOR PUBLIC POLICY RESEARCH**

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## **INTRODUCTION AND SUMMARY**

These papers were commissioned by IPPR as part of a wider project to develop strategies for a modern welfare system. One of the main components of this work has been to build a framework of enforceable citizens' rights, as the basic structure around which welfare services and facilities can be organised. It reflects the view that health and social services (as well as other public services) should not be seen as privileges conferred upon the public as patients or clients, according to the views of 'experts'; nor should they be seen as goods selected by the public as customers, according to their individual means. Rather, they should be based upon rights claimed by the public as equal citizens.

We begin with the assumption that there are two main goals for a modern welfare system. The first is to promote greater equality - meaning not uniformity, but equal life chances. The second is to give people greater personal autonomy and more control over their own lives, within an acknowledged framework of social and economic interdependence. These goals exist to ensure that, as far as possible, everyone is able to participate in society, to enjoy its fruits and to realise their own potential.

Inherent in this assumption is the understanding that people do not start out as equals. Some start out with disadvantages, which may be unavoidable or avoidable, depending on the nature and causes of the disadvantage. An important function of a welfare system is, therefore, to find ways of eliminating avoidable disadvantages and compensating for those that are unavoidable. The papers in this book propose one particular strategy for tackling the disadvantages experienced by people who have a disability: that is, to enact a new law against unfair discrimination.

In the first paper, Mike Oliver and Colin Barnes examine the way in which the post-war welfare state approached issues of disability and how, ultimately, it failed disabled people. They describe the background to the current campaign for a new law. And they explain why disabled people in general, and the British Council of Organisations of Disabled People in particular, are so strongly committed to anti-discrimination legislation.

The failure of the British welfare state has not been simply one of omission. Some of its central concepts and strategies have compounded the disadvantages associated with disability - by instituting segregation, by providing services on the basis not of rights, but of needs determined by others, and by encouraging a sense of powerlessness and dependency.

There are three main factors behind the growing campaign for a new law. The first arises from the civil rights movement in the United States, from which lessons have been learned about the social construction of disadvantage, the importance of citizens'

rights, and the politics of liberation. The second is the enactment in the UK in the 1970s of laws against discrimination on grounds of sex and race: this established a useful precedent, encouraged disabled people to demand something similar for themselves, and helped to create a climate of opinion opposed to unfair and prejudicial treatment of disadvantaged groups. The third, and possibly the most important, has been the emergence of an assertive new political culture among disabled people themselves, which marks a radical departure from the philanthropic mode of traditional disability politics: it favours self-determination and self-organisation, and demands fair and equal treatment as of right.

The campaign, which now has the support of many established organisations for disabled people as well as organisations and groups run by disabled people themselves, draws on a wealth of evidence about the extent of discrimination and its effect on their lives. What is at issue, beyond doubt, is more than a collection of unfavourable acts by prejudiced individuals. General patterns of attitude and behaviour, which have built up over time, are now deeply entrenched - in the workplace, in schools and colleges, in the organisations of local and national government, in public facilities and services, and in health and welfare institutions.

The evidence has been available to British governments since (at least) 1979, when an official committee reported that discrimination was widespread and that legislation was required to counteract it. So far, government ministers have been unwilling to contemplate legislation as a means of tackling discrimination; they argue instead for strategies of encouragement and persuasion to change individual and institutional practice. What they lack is sound evidence that this strategy will work within an acceptable timescale (if at all). Meanwhile, the pressure for legislation is mounting - fuelled most recently by the Americans with Disabilities Act, passed by the United States Congress in 1990 and due to come into force in 1992.

In the second paper, Ian Bynoe provides a lawyer's analysis of the case for anti-discrimination legislation. He examines different kinds of discrimination, and a range of options for dealing with them. He shows how UK law condones discrimination against disabled people. He reviews legal rights and remedies in North America, Australia and France, initiatives in the European Community, and current UK government policy. Finally, he sets out proposals for a new law. The following questions are addressed:

- What is disability and how is it defined?
- What is discrimination and how is it defined?
- What activities will be covered by the law?
- How will the law be enforced?

There are two main elements to disability.

- One belongs to the individual and is usually unavoidable; it results from an impairment, which may be physical, mental or sensory.
- The other is socially constructed and often avoidable; it results from difficulties presented by the physical and social environment, which prevent the individual playing a full part in the life of the community.

There are three main forms of unfair discrimination.

- Direct discrimination: treating some individuals less favourably than others, purely because of their disability.
- Indirect discrimination: making something (such as a job, service or facility) available subject to a condition which makes it harder for disabled people to qualify than for those who are not disabled.
- Unequal burdens: failure to take reasonable steps to remove a handicap imposed by an individual's social or physical environment.

The first two are common to discrimination on grounds of race and sex, and can be dealt with by similar legal means. The third is particular to disability and requires a further dimension to the legislation, to secure the removal of socially constructed handicaps, where it is reasonable and practicable to do so.

There are useful examples of anti-discrimination legislation in the United States, Canada and Australia, which can be drawn upon. The scale of a suitable Bill for the UK should not be under-estimated. Ideally, it should cover a wide range of activities: employment, education, housing, contracts, services, access to the built environment and to transport, and access to telecommunications. This would require a long and complex Bill. The alternative would be to hive off one activity - employment - and deal with it separately in the first instance. But disabled people argue persuasively that their experience of discrimination is spread across many aspects of their lives and therefore the legislation cannot be carved up in this way. For example, there would be little point in outlawing discrimination in employment for people using wheelchairs if those same people were prevented from reaching the workplace by inaccessible public transport.

To enforce the law an approach could be adopted similar to that introduced by the laws against sex and race discrimination. This involves industrial tribunals for claims under the employment section, the county courts for claims under other sections of the law, and powers enshrined in a specially designated commission to enforce the law and promote equal opportunities for disabled people. The new Bill should take

account of the experience of the Equal Opportunities Commission and the Commission for Racial Equality over the last decade and a half, and build in, as appropriate, suggestions for strengthening the enforcement process. It may also need additional, custom-made enforcement machinery to deal with access to the built environment, transport and telecommunications. One proposal is for an Architectural and Transportation Access Tribunal. Above all, it will be important to ensure that disabled people are able to claim their rights under the new law. They should have the right to legal aid and advice, either directly from existing schemes, or through the new commission.

We do not regard this proposal as a magic formula which will sweep away all forms of unfair discrimination, let alone all the disadvantages associated with disability. But we do regard it, in the context of contemporary law and practice in the UK and elsewhere, as an essential part of that framework of citizens' rights which should form the basis of an effective modern welfare system.

**Anna Coote**  
**Series Editor**



# **DISCRIMINATION, DISABILITY AND WELFARE: FROM NEEDS TO RIGHTS**

**by Mike Oliver and Colin Barnes**

There is now overwhelming evidence that disabled people experience severe economic deprivation and social disadvantage: it comes from research commissioned by the Government, from the findings of research institutes and academics, and from disabled people themselves. But while the evidence is no longer in dispute, other issues remain unresolved. Why do disabled people suffer so much disadvantage? What is the role of public welfare in compounding or alleviating their predicament? And what can be done about it?

Disabled people have identified institutional discrimination as the main problem, and anti-discrimination legislation as the most promising way of tackling it. In this paper, we shall attempt to explain why, in late twentieth century Britain, disabled people are demanding legal protection from discrimination. We first examine the failure of the welfare state to ensure a decent life for disabled people. Next, we consider other reasons why demands have grown for anti-discrimination legislation. We reflect on the experiences of disabled people in the context of the re-structuring of state welfare in the 1980s. Finally, we describe the present circumstances of disabled people and their attempts to explain their unequal economic and social status as the product of institutional discrimination.

## **The Welfare Background**

It needs to be said at the outset that, had the mammoth and imaginative project to establish a welfare state, which would provide 'cradle to grave' security for all its members, been successful, then the current demands for anti-discrimination legislation would not have materialised. Not only has state welfare failed to ensure the basic human rights of disabled people, but it has also infringed and diminished some of these rights. It has done this, for example, by providing segregated residential facilities which deny some disabled people the right to live where they choose, and by imposing assessment procedures which deny some disabled people the right to privacy.

This failure can be traced back almost to the foundations of the welfare state during the second world war. Although different language was used at the time, the philosophy underpinning the Beveridge Report was that of active citizenship within a framework of entitlements.

However, in translating this philosophy into practice, the welfare state created passive rather than active citizens[1] and nowhere is this more clearly illustrated than in the experience of disabled people.

The first Act of Parliament to treat disabled people as a single group was the Disabled Persons (Employment) Act 1944 which attempted to secure employment rights for disabled people.[2] The Education Act 1944, underpinned by an egalitarian ideology, specified that disabled children should be educated alongside their peers in primary and secondary education.[3]

However, it was the concept of 'need', first introduced in 1946 in the Regulations concerning the Education Act, which opened the way for the professional domination of welfare provision. Subsequently, Section 29 of the National Assistance Act 1948 laid a duty on local authorities to 'arrange services' for people, rather than enabling them to meet their own needs. It also became clear that implementation of the Disabled Persons (Employment) Act was more concerned with the attitudes of employers than with the rights of disabled people seeking employment.[4] And the Education Act 1944 became the legal mechanism for establishing a huge infrastructure of segregated special education based around eleven medical categories.

The retreat from active to passive citizenship and from rights-based to needs-based welfare provision has been masked since the late 1950s by the attempts of successive governments to reduce the numbers of people living in segregated institutions. The shift towards community based services took a decisive turn in the early 1960s when the Government announced its intention of halving the number of beds in mental hospitals. In spite of the accompanying rhetoric of community care, the reality for many previously incarcerated people was that living in the community bestowed no rights, other than perhaps the right to starve, to freeze or to die alone.

By the late 1960s attempts were made to rationalise the resulting chaos. As far as disability services were concerned, the Chronically Sick and Disabled Persons Act 1970 was to be the vehicle for this rationalisation. The Act was heralded by two non-disabled commentators as a 'charter (of rights) for the disabled'. [5] In fact, it was no more than an extension of the National Assistance Act 1948. [6] The only extra duties imposed on local authorities under the 1970 Act were the duty to compile a register and the duty to publicise services. The former produced little information of value [7] and the latter was widely ignored. [8] The Act listed services to be provided, but only where it was 'practical and reasonable' to do so. For most local authorities it wasn't, so they didn't. [9] In short, the 1970 Act gave disabled people no new rights but instead re-emphasised needs-based provision; even so, it proved ineffective in meeting needs, however defined. [10]

Some benefits have been derived from needs-based provision. Most disabled people now have more access to more services and, on the whole, are less likely to end up in a segregated institution. However, they generally pay a price for those services - for example, invasions of privacy by a veritable army of professionals and having to

accept services that the state thinks they should have or can afford, rather than those they know they need.

There is often a further price to pay: being socialised into dependency - because services are provided for rather than with disabled people, of because the special education system instills passivity and because some voluntary organisations continue to promote negative images of disability, accentuated by recent media events such as Telethon and Children in Need.[11] One study found that disabled young people appear to have been conditioned into accepting a devalued role as sick, pitiful and a burden of charity'.[12]

There has been no reversal of this general trend during the 1980s, in spite of much talk about integration, community care and rights. Neither the Education Act 1981 nor the Disabled Persons (Services, Consultation and Representation) Act 1986 has added substantially to the rights of disabled people; nor have they addressed the problem of institutional discrimination which is part of everyday life.

To sum up, the twin ideals of active citizenship and of rights were tentatively incorporated into the initial legislation which laid the foundations of the post-war welfare state. However, everything that has happened since has been a retreat from those ideals - including dependency creating approaches to service provision, the interventionist nature of professional practice, and the language in which it is all described.

The very language of current and proposed welfare provision continues to deny disabled people the right to be treated as fully competent, autonomous individuals. 'Care in the community', 'caring for people', providing services through 'care managers', 'case managers' or even 'care attendants': all these phrases structure the welfare discourse and imply a particular view of disabled people. By 1986, disabled people were calling for an abandonment of such patronising and dependency creating language.[13] Organisations controlled and run by disabled people including the BCODP, the Spinal Injuries Association and the newly formed European Network on Independent Living have led the move to a language of entitlement, emphasising independent living, social support and the use of personal assistants.

### **Catalysts for change**

As well as the growing disillusionment with welfare provision, three other key factors have influenced the growing demand for legislation to outlaw discrimination against disabled people in Britain. While these can be analysed separately, they are interconnected and have all affected each other.

The first was the civil rights movement in the United States which developed around the struggles of black people in the 1950s to achieve basic rights to vote, to hold elective office and to be tried by a jury of one's peers. As these rights were gradually achieved, the movement became concerned with social rights generally and acted as a catalyst for other groups, including women and disabled people. Its influence was significant for two main reasons: first, it reconceptualised unequal treatment of such groups as a human rights issue; second, it demonstrated the possibility of achieving social change. As one commentator has put it:

The Civil Rights Movement has had an effect not only on the securing of certain rights but also on the manner in which those rights have been secured. When traditional legal channels have been exhausted, disabled persons have learned to employ other techniques of social protest, such as demonstrations and sit-ins.[14]

These techniques of social protest stood disabled Americans in good stead when forcing Section 504 of the Rehabilitation Act (1973) onto the statute books despite a fainthearted government. More recently, they played no small part in the passage of the Americans with Disabilities Act (1990). These and other laws attempt to address the issue of institutional discrimination against disabled people in the USA.

A second major influence has been the passage of Acts through the British parliament to outlaw discrimination on the grounds of race and gender. The Sex Discrimination Act 1975 and the Race Relations Act 1976 encouraged disabled people to demand similar legislation. The new laws acknowledged the existence of unfair discrimination and he made it clear that it was unacceptable. In addition both Acts attempted to deal with indirect as well as direct discrimination. Disabled people want similar treatment to other groups before the law. They also want legal recognition of the fact that discrimination is more than just the intentional acts of prejudiced individuals.

However, the principle of equality for disabled people has not yet been enshrined in the law. This suggests both a failure to acknowledge discrimination against disabled people and a low priority attached to notions of equal opportunity. The problem is compounded for disabled members of the gay community as well as for black people and women with impairments.[15]

A third factor which has influenced the demand for anti-discrimination legislation has been the move by disabled people to form their own organisations.[16] This has fostered a growing collective consciousness amongst disabled people. It began a process of reformulating the problems of disability, shifting the focus away from the functional limitations of impaired individuals towards contemporary social organisation with its plethora of disabling barriers. It also set in train a political divergence between organisations for the disabled and organisations of disabled people.

Many of the traditional organisations for the disabled had advised the government that discrimination was not a problem for disabled people and that legislation was unnecessary. Yet in 1979, the Silver Jubilee Access Committee drew attention to a number of 'blatant acts of discrimination against disabled people. The official committee which investigated the allegations was unequivocal in its findings: discrimination against disabled people was widespread and legislation was essential.[17]

The campaign for equal status, spearheaded by organisations of disabled people intensified in the 1980s. The formation of Voluntary Organisations for Anti-Discrimination Legislation (VOADL) was a sign that many organisations for the disabled had been converted to views articulated by disabled people themselves. However, there remain, perhaps inevitably, significant differences between the philanthropic and liberationist elements of the disability lobby.

## **The 1980s**

The contribution of self-organisation goes well beyond spearheading the campaign for legal rights. Organisations of disabled people have been in the forefront of campaigns for economic, social and political rights as well; they have attacked inappropriate service provision and professional practice, and pioneered the demands from disabled people to live independently. Indeed, it was the idea of independent living which gave a focus to the struggles of disabled people to organise themselves, initially in the United States and subsequently elsewhere, including Britain. [18]

The British Council of Organisations of Disabled People was formed in 1981 - to harness this growing consciousness of disabled people, to redefine the problem of disability, and to give a focus to campaigns for independent living and against discrimination. Its success in the subsequent decade has been entirely an achievement of disabled people themselves.[19] It was conceived and developed without extensive financial support from government or from traditional organisations for disabled people. It now represents more than 75 organisations of disabled people and some 200,000 disabled individuals.

The move towards self-organisation has prompted increasing numbers of disabled people to adopt a shared political identity, which in turn has helped to build a new mood of confidence. Disabled people no longer ask for change but demand it. They are prepared to use a whole range of tactics in pursuit of their demands, including direct action and civil disobedience. It is because of this growing collective self-confidence that disabled people are forcing the issue of institutional discrimination onto the political agenda, and demanding legislation as a remedy.

During the last ten years there have been nine attempts to get such legislation onto the statute books.[20] Successive governments have prevented the passage of these bills, arguing that there is little if any widespread discrimination against disabled people. Indeed the current Minister for Disabled People is still arguing, just as previous ministers have done before, that discrimination against disabled people is not widespread.[21] Such denials fly in the face of the experiences of disabled people, highlighted recently by the government's own research, published in a series of five reports by the Office of Population Censuses and Surveys.

### **Discrimination in the 1990s**

After more than a century of state-provided education, disabled children and young people are still not entitled to the same kind of schooling as their able-bodied peers; nor do they leave with equivalent qualifications.[22] The majority of British schools, colleges and universities remain unprepared to accommodate disabled students within a mainstream setting. Thus, many young disabled people have little choice but to accept a particular form of segregated 'special' education which is educationally and socially divisive, and which fails to provide them with the skills necessary for adult living. By producing educationally and socially disabled adults in this way, the special educational led system perpetuates the view that disabled people are somehow inadequate, and thus legitimises discrimination in all other areas of their lives.

Disabled people have consistently experienced higher rates of unemployment than the rest of the adult population. This is not because they are unable to work. It is due to the discriminatory behaviour of employers, who have failed even to try to meet their legal obligations under the quota system,[23] and to the lack of political will to insist upon enforcing the law.[24] As a result, disabled people are currently more likely to be out of work than non-disabled people. They are out of work longer than other unemployed workers, and when they do find work it is more often than not low paid, low status work with poor working conditions.[25] This in turn accelerates a downwards spiral of disadvantage.

The majority of disabled people and their families, therefore, are forced into depending on welfare benefits in order to survive.[26] Yet the present disability benefit system does not cover impairment related costs and so discourages many who struggle for autonomy and have financial independence. Their enforced dependence is compounded by any the values and practices of health and welfare services, most of which are dominated by the interests of the professionals who run them [27] and guided by the assumption that disabled people are incapable of running their own lives. Disabled people are denied opportunities to live autonomously and deprived of independence within personal and family relationships.

The evidence of disadvantage and deprivation is so overwhelming that it is not in dispute, although the precise dimensions may be.[28] But why do disabled people have a quality of life so much poorer than everyone else? There are two possible explanations. One is that disability has such a traumatic physical and psychological effect on individuals that they cannot ensure a reasonable quality of life for themselves by their own efforts. The other is that the economic and social barriers are so pervasive that disabled people are prevented from ensuring for themselves a reasonable quality of life.

The former has become known as the individual model of disability and is underpinned by personal tragedy theory. It has come under severe attack in recent years and is now generally recognised to be an inadequate basis for understanding disability. The latter has become known as the social model of disability and has shifted the focus away from impaired individuals, towards restrictive environments and disabling barriers. This has been widely accepted, to the extent that it has almost become the new orthodoxy.

Now that the cause of the problem has been identified, the question remains - what should be done to solve it? Successive governments have taken the view that it is best dealt with through the provision of professional services coupled with a strategy aimed at persuading the rest of society to remove their disabling barriers, and to change their restrictive environments. The current Minister for Disabled People recently stated:

Nor would I deny that discrimination exists - of course it does. We have to battle against it, but, rather than legislating, the most constructive and productive way forward is through raising awareness in the community as a whole.[29]

As we have argued, professionalised service provision in a needs-based system of welfare has amplified existing forms of discrimination and created new ones: these include the stigma of segregated services such as day care, professional assessments and practices based upon invasions of privacy and a language of paternalism which can only enhance discriminatory attitudes.

Policies of persuasion have proved costly and ineffectual. Disabled children are still directed into segregated special schools, the numbers of disabled people who are unemployed increases, and the number of disabled people living in poverty continues to expand. Yet it is now clear that disabling barriers rather than personal limitations are to blame; it is also clear that previous attempts to dismantle barriers have been based on a misunderstanding of the nature of discrimination: it exists not simply in the prejudiced attitudes of individuals, but in the institutionalised practices of society.

## What can be done about it?

Institutional discrimination can be addressed only by changing organisational, social and individual behaviour - and this requires legal prescription. To paraphrase Martin Luther King, legislation may not change what's in people's hearts but it can change what they do about what's in their hearts. Anti-discrimination legislation can address some institutional discrimination in a number of ways.

First, it can send out a clear message to society that discrimination is unacceptable. Second, it can accord disabled people equal treatment has with other groups who experience discrimination. Third, it can offer disabled people redress against those who failed to remove disabling barriers or adapt restrictive environments. Finally it can force the pace of change towards forms of welfare provision which are no longer discriminatory, but instead are truly enabling.

We have argued that discrimination against disabled people is institutionalised throughout society and that welfare provision has compounded rather than alleviated that discrimination. The connection between welfare and citizenship was reaffirmed recently by the Speaker's Commission on Citizenship:

The Commission recommends that a floor of adequate social entitlements should be maintained, monitored and improved when possible by central government with the aim of enabling every citizen to live the life of a civilised human being according to the standards prevailing in society.[30]

The great majority of disabled people are not accorded the entitlements of citizenship and it is legitimate to ask, therefore, how long will disabled people continue to accept the obligations and responsibilities of citizenship?

Already some parts of the disability movement have begun to adopt tactics of the civil rights movement. They have taken direct action to confront the pedestrianisation of some city centres, to insist that transport systems cannot claim to be public while they force a form of apartheid on more than a million people with mobility impairments, and to challenge the degrading stereotypes presented by the mass media.

The American disability movement has used such tactics to good effect in the past twenty years: its most recent convert claimed, after signing the Americans with Disabilities Act 1990 which outlawed discrimination, '*Let the shameful walls of exclusion come tumbling down*'. [31] Will Britain's Minister for Disabled People undergo a similar conversion? His current equivocation suggests not: '*I am not sure whether blanket anti-discrimination legislation ... is the appropriate way to proceed*.' [32]



Politicians may not be certain that anti-discrimination legislation is the way to proceed, but disabled people are. When the new law reaches the statute books, perhaps the walls of exclusion really will begin to tumble.

# THE CASE FOR ANTI-DISCRIMINATION LEGISLATION

by Ian Bynoe

## INTRODUCTION

The year 1992 marks the conclusion of the United Nations Decade of Disabled Persons. The Decade was intended to mark ten years of greater efforts towards social integration and equity for disabled people, and it remains to ask how much has been achieved, beyond stirring the odd conscience. The same year will usher in the European Community's single market. The UK labour market will undergo profound changes and disabled people are likely to face increased competition for jobs. What protections will be needed to prevent their being pushed even further into the margins?

Discrimination on grounds of disability is the subject of this paper. Its purpose is to examine how the law can define when such discrimination is unreasonable and unfair, and provide the person affected with individual means of redress or prohibition.

This is an appropriate time to consider the issue. For 1992 is also the year in which the Americans with Disabilities Act of 1990 comes into force in the United States.[1] In no other country has legislative protection from the unfair discrimination faced by disabled people been so comprehensively and meticulously formulated. At the time of its passing, the Act was referred to as the 'most comprehensive civil rights measure in the past two and a half decades. ...a Civil Rights Act of 1964 with respect to persons with disabilities'.[2] It was eased onto the statute book by a US President who put himself on record as being committed to 'bringing persons with disabilities into the mainstream'[3]- which would seem to augur well for the allocation of the resources necessary to make some of the new rights work in practice.

By contrast, in the United Kingdom, 1992 marks the tenth anniversary of the publication of the Report of the Committee on Restrictions against Disabled People (CORAD).[4] This is the only report on disability and discrimination ever to have been received by a UK government. It found discrimination to be commonplace in the experience of disabled people and recommended anti-discrimination legislation. Its proposals were dismissed by the government of the day and there has since been no evidence of a change of mind to revive hopes that the CORAD proposals might be implemented. The Conservative government's recent Consultative Document on Employment for People with Disabilities [5] deals with the idea in two short paragraphs, dismissing it as impracticable, ineffective and too expensive. Yet the 1990s have witnessed growing support for increased personal legal rights and protections -reflected in the new Citizens' Charters produced by each of the major political parties. Some protagonists favour over-arching declarations of the human rights defining opportunity and individual freedom.[6] Others restrict their aspirations

to a commitment to specific legislative measures designed to increase and improve the rights of individuals in particular circumstances, including 'equal opportunities'.<sup>[7]</sup> Meanwhile, as economic and financial barriers are lifted between States in the European Community, there is a growing recognition that some groups will be rendered increasingly vulnerable and therefore in need of greater social protection. The EC Charter of Fundamental Social Rights for Workers <sup>[8]</sup> promises a significant extension of individual legal rights, guaranteeing such protection.

Discrimination can arise from many causes. Social bias can be intended or unintended; malicious or well intentioned; calculating or ignorant. To imagine discrimination as something which defined individuals do deliberately and for their own benefit is to restrict both the usefulness of the term and our understanding of the experience of being disabled.

This paper explores the nature of discrimination from a lawyer's point of view. It then examines the legal historical background within the United Kingdom and looks at developments abroad where anti-discrimination legislation has been introduced. It describes the policy of the present UK government, and recent attempts to introduce legislation, mainly by Private Member's Bills. It concludes with a proposal for legislation.

It concentrates on the law in England and Wales. It deals primarily with 'private' rights in the field of employment, housing, services, transport and communications. There are separate legal systems in Scotland, Northern Ireland, the Channel Islands and the Isle of Man, and although certain principles have general application, reference should be made to the specific laws in force in these areas.

## **1: MEANINGS AND REMEDIES**

Discrimination on grounds of disability can be very different from distinctions made because of a person's race or religion: in those situations, a person's functional abilities are usually irrelevant. Differentiation based on sex or age provide a closer comparison, because here *perceptions* of ability often enter into the reasoning associated with discrimination. However, disability adds other dimensions. It uniquely raises issues to do with the functional capacities of the person, which, if inequality is to be redressed, may require changes - not necessarily expensive ones - to adapt or alter the workplace, shop, cinema or telephone system. It also concerns a status which a person can fortuitously acquire or lose during a lifetime, greatly expanding the potential numbers affected.

Once it is accepted that the unequal burdens faced by people with disabilities in unadapted environments results in their experiencing discrimination, then it will be realised that discrimination remains both well established and largely tolerated. Any

reluctance to regard such treatment as 'discrimination' arises out of a preoccupation with the morals and motives of the discriminator, rather than with the experience of segregation, exclusion or disadvantage felt by the person discriminated against. This logic is more readily accepted in legal systems where 'human rights' are regarded as part and parcel of law, than in those (including the UK's) where they are not. [1]

## **TYPES OF DISCRIMINATION**

There are four main types of discrimination which can arise between the provider of a job, service or facility and an individual with a disability which restricts or inhibits participation.[2]

- Unfair 'direct' discrimination, or the 'less favourable treatment' barrier
- Unfair 'indirect' discrimination, or the 'neutral condition/disparate impact' barrier
- 'Unequal burdens' discrimination, or the 'failure reasonably to accommodate' barrier
- Discrimination on fair and reasonable grounds either directly, indirectly or by refusing to accommodate the disability of the person: the 'uncrossable' barrier.

### **Direct discrimination**

This is the most easily understood, since it occurs when the disability of the person (actual or perceived) is taken as a reason for less favourable treatment which would not be shown towards an able-bodied person in comparable circumstances. ('Less favourable treatment' is a somewhat euphemistic term since it can amount to hostility or total rejection.) In all other respects the person in question must be qualified for and capable of performing the work, obtaining the service, using the facility, etc. Thus, if an employer screens out at short-listing stage all job applicants disclosing a past history of mental illness or who state that they have controlled epilepsy or who are in a wheelchair, and does so for those reasons, this would amount to direct discrimination.[3] Were such an applicant to be appointed and later dismissed when the employer discovered one of these facts, that too would constitute direct discrimination. A publican's refusing admission to a group of people with Down's Syndrome, or an airline company's reluctance to carry a passenger with a physical disability would also come within this category if, in all other respects, the individuals concerned were suitably qualified.

## **Indirect discrimination**

This occurs when qualifying for employment, a service or a facility is made subject to a condition which appears, on the face of it, to be neutral but which has an indirect and disproportionate effect upon those with a disability who find that they cannot meet the condition. The discrimination is regarded as unfair when it is recognised that the condition is not essential to the satisfactory performance of the work or use of the service or facility. Thus, when an employer requires all employees to participate in a non-contributory private health insurance scheme as a condition of employment and insurers only admit persons with a 'first class life', those who cannot meet that criterion are indirectly discriminated against *since this requirement may have no effect at all upon their ability to perform the work*.<sup>[4]</sup> Employers who set unnecessary age limits for appointments do the same, since people with disabilities are statistically shown to be older when they enter the labour market.<sup>[5]</sup> Requiring a job applicant to possess a driving licence, would undoubtedly discriminate against those with certain physical impairments and would be unfair if such a requirement were not relevant and essential to the work involved.

## **Unequal burdens**

This type of discrimination applies even when the employer or service provider avoids directly or indirectly discriminating, if an artificial barrier exists which prevents a disabled person from benefiting from an opportunity enjoyed by an able-bodied person. In the case of direct or indirect discrimination, the disability or incapacity of the person is irrelevant; the person is treated unfairly because the discriminator gives this a significance which it does not merit. In the case of 'unequal burdens' discrimination the person's disability becomes the reason the person cannot get the job, service or facility. This type of discrimination is unfair *because the employer or service provider fails to render it irrelevant by reasonably adapting the environment of the disabled person to remove the handicap*. This is seen most often in relation to people with communication or mobility impairments, where there has to be 'accommodation' of the impairment within the workplace, facility or organisation before the person can enjoy any chance of doing the job or using the service or facility. Examples might include providing an interpreter or helper services, physically adapting premises, laying on special means of transportation or communication, or providing flexible working arrangements. Failure to make such adjustments would be judged unfair if the expense, disruption and changes necessary were considered reasonable, bearing in mind the size and financial viability of the organisation and whether or not conforming would cause it undue hardship.

## **Fair discrimination**

This occurs when a person is refused a benefit or right because of their disability and this is properly judged to affect their capacity to perform the work or receive the service in question, and it is not reasonable for the organisation to 'accommodate' the disability. It raises an insurmountable barrier. For example, airlines would not be required to employ blind pilots; piano manufacturers would not have to take on deaf piano tuners; someone with a contagious disease could be prevented from visiting a hospital's intensive care ward.

## **POLICY OPTIONS FOR DEALING WITH DISCRIMINATION**

Recognising these patterns of discriminatory behaviour and wishing to reduce or eliminate them, a government would appear to have the following options:

### **Education to change behaviour**

Educational initiatives may be aimed at training the relevant employers, bodies and organisations to adopt better practice by making them realise the unfairness of discrimination and its adverse effects. This may be done in combination with assistance and advice from government officials, voluntary codes of practice,[6] financial incentives and grants to assist integration.[7] Accountability for the effectiveness of these measures will remain entirely political, since no legal obligations are created which can lead to individuals or agencies enforcing compliance.

### **Imposing general statutory duties**

Government may impose upon bodies responsible for known discrimination general statutory duties to take into account the needs of an individual or group with a disability.[8] By this it is hoped that, over time, planning for those needs will remove any discriminatory features, so that people with disabilities are no longer treated unfairly.

### **Contract compliance**

Central government and local government agreements and contracts may include clauses designed to prohibit discrimination. For example, a contract to construct a public building might include a clause which specifies that the contracting company must follow equal opportunity employment practice, and must construct the building in such a way as to ensure full accessibility; or public finance for new railway carriages might be conditional upon their being made accessible to disabled passengers.

## **Specific statutory duties**

Government may impose a statutory duty which is far more specific than the general duties described above, and which may be related to an enforceable code of practice or regulations (for example, to ensure equal opportunity in employment or access to transport or buildings). Here an important issue will be enforceability: if this is restricted to action by government officials alone and their discretion is wide, the duty may prove unenforceable if sufficient resources are not devoted to inspection and other compliance activities. This has been the fate of enforcement of the Disabled Persons (Employment) Act 1944. Mencap's evidence to the House of Commons Employment Select Committee's First Report for 1990-91 referred to only 10 prosecutions ever, for failure to meet the quota resulting in seven fines averaging £62, the last in 1975.'

## **Individual rights**

Government may enact a statute which lays down precise legal definitions of conduct amounting to unlawful discrimination, and confers upon individual citizens a right-to seek appropriate redress. Such provision would clothe the insubstantial sense of unfairness or breach of human rights felt by an aggrieved person, which remains unsatisfied by any of the proposals above. It creates a distinct 'civil right' to be protected from proscribed discrimination. Mandatory or prohibitory orders may be provided, and a body established to adjudicate on questions of enforcement, which may also be granted power to award compensation.

## **Criminal sanctions**

Lastly, there is the option of creating sanctions which render unlawful discrimination, as defined by statute, a punishable criminal offence. These sanctions might stand alone or be combined with any of the contracts proposals mentioned above.

This paper is mainly concerned with individual rights. In passing, reference will be made to other policy options, but this will be in the context of examining the usefulness and potential effectiveness of anti-discrimination legislation for the UK. First it is necessary to look at what the law says now about discrimination on grounds of disability.

## **2: ENGLISH LAW AND THE RIGHT TO DISCRIMINATE**

'Discrimination' in the pejorative sense is a mid-20th century word. However, in order to investigate the origins of individual and public rights, we need to explore some older legal concepts.

The regulation of fairness in transactions between citizens was for many centuries left to the judges, who developed the principles of common law and equity. These reflected the prevailing economic and political arrangements, and gave rise to the concepts of crime, tort, contract and trust. Such concepts were designed principally to serve the interests of certain powerful groups in society. One of the most fundamental and also most illustrative for our purposes is the concept of 'freedom of contract': the freedom to choose whether or not to make a particular agreement, with whom, and when. For example, in present day society it:

- ◆ permits an employer lawfully to refuse to engage a job applicant (not being a 'registered' disabled person)[1] who uses a wheelchair or has controlled epilepsy
- ◆ allows a house vendor, lawfully, to refuse to sell a property to a health authority intending to use it as a home for ex-hospital patients[2]
- ◆ enables a leaseholder to insist on 'single family occupation' for housing which may be suitable as a 'group home'
- ◆ condones a holiday camp which bans a group with cerebral palsy from booking a week's holiday in high summer
- ◆ permits a coach hire company to refuse to carry a person in a wheelchair.

The law says a person is both free to make a contract and free to refuse. It lays down no obligation on a party to enter a transaction if they do not wish to do so on the terms suggested, regardless of the demonstrably unequal bargaining position which often exists between parties.

This concept has had a profound impact on a wide range of civil legal relationships concerning employment, goods and services. Lord Davey, in a case in 1898, accurately summarised its application to recruitment law when he said that an employer could refuse someone a job 'from the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him.'[3]

As far as race[4], gender[5] and (for Northern Ireland) religion[6] is concerned, the concept no longer applies to employment and other contracts. But it holds true for distinctions based on disability.

Discrimination as to who can benefit from which opportunities takes many forms. In property law, for example, it is reinforced by the freedom to restrict by means of covenant the use to which land is put. Although decisions about land use were initially limited to contractual agreement, the law now holds that 'restrictive covenants' can bind later purchasers who were not privy to the original contract.[7]



Since 1925, statutory powers and procedures have existed to modify the effect of such restrictions - recognising that they can interfere with legitimate public and private interests.[8] However, they have fallen far short of deterring cultural bias or preventing prejudiced behaviour. An illustration is provided by a 1955 case, involving an application to convert a children's home to one for use by adults with a learning disability.[9]

As the law allowed, the property was affected by a covenant preventing use of the house 'as an asylum for the insane or for the purposes of a hospital for contagious diseases'. An application to cancel the restriction was turned down by the Lands Tribunal. Its reason was that public prejudice existed against the prospective occupants and that this would adversely affect the property values of the adjoining owners who had objected and who should continue to enjoy the benefit of the protection provided by the covenant. The Tribunal President provided the following justification:

The very act of imposing such a covenant discloses the universal abhorrence felt by ordinary folk for the 'mental case' and while that revulsion may derive from ignorance and be justly stigmatised as prejudice it is no less poignant for being unjustified.[10]

Thirty-six years later, there is still no rule or principle preventing a property owner from refusing the sale to or occupation of land by 'persons with a mental illness, mental disability or who have formerly received treatment in a psychiatric hospital'. A recent decision by the Court of Appeal[11] used less offensive language, but made clear the law's support for a property developer who wished to exclude certain occupiers from its new houses.

Yet in the law of contract there is a concept of 'public policy'. Does this afford any opportunity to cut down such discriminatory restrictions? Judges have found certain contractual arrangements to be against 'public policy' and therefore illegal. For example, an agreement to do something which is itself illegal will not be enforced. However, the courts have intervened only on limited grounds, which have never included discrimination arising out of prejudice relating to race, gender, religion or disability. It would, in any case, be unrealistic to expect that, without modification by Parliament, the law could provide the principles and remedies needed to redress such discrimination. There are three main reasons for this. First, much of the law is built around the very principles which allow people to discriminate. Secondly, the English judiciary is inherently conservative and reluctant to 'make law', particularly in a controversial social field. Thirdly, there is nothing to suggest that the English common law could be adapted to provide *mandatory* remedies for redressing these civil wrongs. There is no prospect, for example, of employers or service providers being ordered under common law to enter an employment contract with a disabled person or

render a transport system accessible to people who use a wheelchair: the common law simply declines to provide such remedies.

So far we have concentrated on private law. But would a search through public or constitutional law prove more fruitful?

No written constitution embodies the fundamental rights and freedoms of citizens -and in this, the UK is rare among modern industrialised nations. Furthermore, although the UK government has signed numerous international instruments declaring human rights,[12] and one in particular which sets out the 'rights' of 'disabled persons' acknowledged by the UN Assembly including the freedom from discrimination,[13] not one of these has been incorporated into the legal systems of the United Kingdom.

Enforceable individual 'human rights' of redress for UK citizens are provided only by the European Convention on Human Rights and Freedoms.[14] This Convention does not appear to include rights which would clearly prohibit or provide redress for discrimination on grounds of disability, and whether it can be adapted to offer protection to AIDS sufferers has recently been questioned.[15] Such rights as it does offer are available only by proceedings in a distant Commission and Court. Successive governments have refused to incorporate Convention rights into UK law to permit their application by UK judges. The House of Lords has recently reaffirmed the principle, consistent with this position, that government ministers need not have regard to provisions of the Convention in their decision-making.[16] For it to hold otherwise, the Court judged would amount to incorporation by the 'back door.

British political resistance to the EC's draft Social Charter may arise not simply from a dislike of its contents but also because, in the social field it may encapsulate just such general rights for enforcement through the community's judicial system. EC law is mainly associated in the public's mind with commercial and intergovernmental disputes.

However, individual EC citizens may be or become the objects of substantial rights and protections capable of enforcement by action in the European Court of Justice. EC jurisprudence is already familiar with adjudicating complaints of unfair discrimination in relation to pay differentials between men and women and employment conditions (such as pension rights). Its actual and potential application to this field is considered in greater detail below.

The undeveloped state of both constitutional and common law means that any enforceable measures to prohibit or redress the effects of discrimination must be by statute. Some measures have already emerged. There has been statutory intervention to provide the right not to be unfairly dismissed;[17] the right of access to written medical information which may influence a prospective employer or insurance

company,[18] and a statutory duty on London Regional Transport to include the needs of people with disabilities in their planning.[19] We have seen statutory intervention to establish duties not to discriminate on grounds of race, sex or (in Northern Ireland) religion - and here many of the concepts and enforcement mechanisms are modelled on North American laws.[20] Since 1973, in order to tackle the discrimination suffered by people with a criminal record, detailed laws have limited the extent to which information can be sought by employers and others and used by them to influence their decisions:[21] this amounts to a limited form of protection from discrimination.

One modest form of anti-discrimination provision, which is unique within the UK, can be found in Northern Ireland, where the concept of 'civil rights' is accorded greater political interest than in Great Britain –possibly, some will argue, because the need has been greater. Under Article 9 of the Mental Health (Northern Ireland) Order 1986, a person can be admitted for up to 14 days to a psychiatric hospital in Northern Ireland for assessment of a possible 'mental disorder'. It is open to those responsible for the care and treatment of the person so admitted to extend their detention beyond this period by applying other Articles of the Order. When this does not happen and the person ceases to be detained by virtue of the Order then he or she acquires certain rights under Article 10. The effect is to protect those individuals from being required, in any situation, to disclose details of the admission assessment when being asked about their health history. Further, under sub- paragraph 4 it states:  
The fact that a person to whom this Article applies has been detained in hospital for assessment or any failure to disclose that fact shall not be a proper ground for dismissing or excluding that person from any office, profession, occupation or employment, or for prejudicing him in any way, in any occupation or employment.

However, the Order provides rights without, at the same time, establishing a means of enforcing them. Models for enforcement can be found in the anti-discrimination measures introduced in North America and Australia.. It is these provisions that we must now examine before considering further the potential for changes in UK law.

### **3: NORTH AMERICA, AUSTRALIA AND FRANCE**

#### **United States**

In the United States there are numerous law-making bodies and many states have adopted their own human rights, equal opportunity and protective legislation. Forty five states and the District of Columbia have passed laws dealing with discrimination on grounds of 'handicap' and covering the private as well as the public sector. They have taken their cue from civil rights legislation passed by Congress, particularly the seminal Civil Rights Act 1964, and, in the field of disability rights, from the 1973 Rehabilitation Act which prohibits discrimination by federally funded schemes or organisations against 'otherwise qualified handicapped persons'. Section 504 of the 1973 Act is the source of this principle:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6), shall solely by reason of his handicap, be excluded from the participation in, be denied any benefit of, or be subjected to discrimination under any programme or activity receiving federal financial assistance.

'Handicapped individual' is defined as meaning:

any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment.

Regulations define impairment with reference to a list of disorders and (for physical impairment) specified body systems. The Act was amended in 1978 to specify the means of enforcement. In particular, it made available all the remedies and procedures provided by the Civil Rights Act 1964 to individuals claiming to be victims of discrimination under the Rehabilitation Act.

The universal, even vague, nature of the provision caused some criticism, as did the fact that it was not clear where the money would come from to ensure compliance.[1] However, the legislation emerged from a culture which was conscious of the struggle for civil rights and accustomed to using the courts to extend such rights, and which was also historically uninhibited by the prospect of legal suits to obtain redress.

The Federal Department of Health, Education and Welfare took the view that the new legislation required resources to be devoted to modifying programmes and facilities, in order to accommodate the needs of 'otherwise qualified handicapped persons'; it issued regulations accordingly.[2] However, this view was not shared by all and litigation followed on the extent and force of the legislation.

In the case of *South Eastern Community College v Davis*,<sup>[3]</sup> which involved a deaf student seeking a place on a nurse clinical training programme, the US Supreme court recognised its own difficulties in enforcing a law which offered little guidance to the court:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear.<sup>[4]</sup>

' In that case, the Court decided that the student's disability was so severe that it raised an insurmountable barrier that the College could not be expected reasonably to remove. It stated:

Nothing in the language or history of section 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.<sup>[5]</sup>

What is unique about disability when compared with gender or race issues is that it can sometimes demonstrably limit a person's ability to function in certain environments but especially those unadapted to 'accommodating' the disability. As a result, the discrimination which will be faced by the disabled person may involve differentiation on grounds far wider, simply, than social bias or prejudice. The question faced by US courts was whether or not section 504 clearly imposed a duty on federal programmes to 'equalise' the burden suffered by those with a disability by requiring the service provider or employer to finance adaptations at their own expense to achieve an environment in which disabled people were on a par with non-disabled. This would address the 'unequal burdens' type of discrimination referred to earlier.

Some courts were persuaded that this was the proper approach.<sup>[6]</sup> Judges would then have to decide what financial and other burdens it was reasonable to impose on the programme or agency in pursuit of equal opportunities and fairness. The case of *South Eastern Community College v Davis* became the authority for the principle that accommodation was not reasonable - and therefore not legally necessary - 'if it either imposes undue financial and administrative burdens' or requires 'fundamental alteration in the nature of the program'.

Many cases involved claims that transportation systems should be made accessible to people with disabilities. The Metro system in Washington DC was rendered more accessible, directly following actions under the Act: elevator buttons are now marked with raised printing and braille, warning lights on the platform tell deaf people of approaching trains and discounted fares reduce the costs for disabled people requiring companions. More importantly, a 'public' service no longer excludes a significant section of the public.

Elsewhere, the rights conferred by the Act have required colleges to provide deaf students with interpreter services[7] and in the leading case on AIDS discrimination of School Board of Nassau County, Florida v Arline,[8] the Supreme Court held that the dismissal of a person with AIDS amounted to unlawful discrimination. Individuals who have contracted even infectious diseases, the Court held, were 'otherwise qualified' for employment and protected from discrimination if they did not pose a significant risk of passing on the disease to their fellow employees. (In the United States legal protection from dismissal has to be linked to discrimination, since there is no general law against 'unfair dismissal'.)

However, there were many difficulties with enforcement of the law and doubts about its coverage and effect. The public sector in the United States is much smaller than in many other countries and the fact that the law was restricted to federally funded schemes meant that its effect would be greatly limited, especially when contraction of government spending simply removed the necessary link. In due course, proposals were formulated for federal legislation which would complement the general measure with more detailed and prescriptive legislation, reaching for the first time into the private sector. This is now to be found in the Americans with Disabilities Act (ADA) which completed its passage through Congress during 1990 and received the President's signature in July of that year.[9] It will come into force in 1992. It followed many of the principles established in relation to discrimination in housing and property by the Fair Housing (Amendments) Act of 1988, which remains in force.[10]

Much has been claimed for the ADA. Senator Edward Kennedy, who chairs the influential Senate Labour and Human Resources Committee, referred to it as 'a bill of rights for the disabled', adding that 'America will be a better and fairer nation because of it'.[11] President Bush was committed to it - indeed, this was largely the reason it passed into law - and White House support together with highly effective lobbying from grass roots organisations combined to produce a case for legislation that appeared unstoppable even by the giants of the American commercial and service sectors.

The Act was promoted as a measure dealing with human rights rather than one calling for the selective deployment of resources for the special needs of a 'deserving' minority. This is probably why the US Chamber of Commerce lobbyist, Nancy Fulco, could say, 'No politician can vote against this bill and survive'.[12] Senator Tom Harkin, a Democrat and ardent supporter of the measure, declared: 'Costs do not provide the basis for exemption from the basic principles in a civil rights statute'.[13] Attempts were made to exclude AIDS and HIV-infected persons from the Bill but in the end the excluded categories were few and people with my or AIDS were not among them.

In four main areas - employment, public services including transportation, private sector 'accommodations' and services, and telecommunications - detailed provisions have been introduced. These partly build on the law developed from the 1973 Act which remains in force, and they promise to make a considerable impact over time.

## **Employment**

The Act prohibits US employers (those with 25 or more workers from 1992 and those with 15 or more from 1994) from discriminating against 'a qualified individual with a disability'.<sup>[14]</sup> A person is 'qualified' if they can perform the 'essential functions' of the job in question.<sup>[15]</sup> The employer's judgement of what this amounts to will be considered, so also will the contents of a job description prepared before the recruitment process started. But, as with section 504, employers will be expected to make 'reasonable accommodation' - and, to assist in understanding the term, the Act <sup>[16]</sup> says that this may

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers and interpreters, and other similar accommodations for individuals with disabilities.<sup>[17]</sup>

In its definition of unlawful discrimination, the Act sets out clearly the circumstances in which this will occur -including direct and indirect discrimination - and particularly defines the circumstances when deficient testing or medical assessment procedures will constitute discrimination.

An employer who fails to make reasonable accommodations to the known physical or mental limitations of the individual will discriminate unless the employer can show that 'the accommodation would impose an undue hardship on the operation of the business'<sup>[18]</sup> or will cause a 'direct threat' to other employees or a health risk to the public. <sup>[19]</sup> Some of the factors to be considered in judging the former defence are detailed in the Act, including the financial implications of the accommodation and the resources of the employer.<sup>[20]</sup>

## **Public Services**

In relation to public services, the Act provides <sup>[21]</sup> that:

... no qualified individual with a disability, shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[22]

A person is 'qualified' by being an individual:

...who with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[23]

The Act requires the Attorney General to promulgate detailed regulations to establish and enforce the standards required in public services by this section. At the time of writing, the Justice Department is well advanced in this process, prior to implementation.

In relation to rendering the means of public transportation accessible, lengthy and complex provisions are introduced which will have the effect of requiring bus, train and coach operators to accommodate to the needs of individuals with disabilities including those who use wheelchairs, on both fixed routes and specialised services, and in relation both to facilities and to services.[24] In relation to some but not all obligations, a service provider will escape the duty if it can show that compliance will impose 'an undue financial burden' or, for technical reasons, is impracticable.

### **Private Sector Services**

In relation to discrimination within the private sector, the Act defines what it terms 'accommodations' classed as 'public' since they provide services or goods to the public, albeit they are privately owned and run.[25] What is meant here are shops, cinemas, restaurants, schools etc. and the section details the discriminatory acts or omissions which are rendered unlawful. Denial of participation, participation in unequal benefit, and unjustified segregation of services are prohibited and there are specific bans on unnecessary screening practices; failure to modify the service so as to make it available (where this would not fundamentally alter the service); failure to remove architectural barriers where this is 'readily achievable' or to provide appropriate 'auxiliary aids' such as qualified interpreters, where this would not fundamentally alter the service or result in an 'undue burden'.[26]

### **Telecommunications**

Lastly, the Act makes detailed provisions amending the Communications Act of 1934 requiring the adaptation within the timescale dictated of telecommunications



equipment so that it can be used by hearing impaired and speech impaired individuals.[27] Already, the technical adaptation of services and provision of relay facilities to TDD ('Tele-communications Device for the Deaf') users is far more advanced than , in the UK.

## **Exemptions and implementation**

Certain types of status -including illegal drug users and homosexuals - are specifically (and properly) excluded from the definition of disabled.[28] There is explicit recognition that the calculation of insurance risks cannot be restricted by the Act if conducted in an otherwise lawful way;[29] state regulation of insurance is already tighter in the USA than in the UK.

The Attorney General is specifically charged with assisting implementation, since a formal plan must be developed to aid in that process.[30] The Act has yet to come into force and it is therefore too early to judge the effect of its detailed provisions. However, its comprehensive and prescriptive nature has raised the hopes of disability rights lobbyists and attorneys, who believe the ADA and its counterpart in the housing field will make a significant impact.[31] So long as the necessary resources are available in public and private sectors to afford changes needed without 'undue financial burdens', the legislation promises to help individuals with disabilities enter the mainstream of US life. As to the question of resources, protagonists argue that over time the Act will pay for itself: redressing employment discrimination will raise tax revenues and lower welfare payments; ensuring access to goods and services hitherto denied disabled people will significantly expand demand within the national economy.

## **Canada**

Anti-discrimination law in Canada has developed in quite a different way. In 1973 British Columbia became the first Canadian province to formulate a Human Rights Code. Since then other provinces have introduced similar measures, including articles prohibiting discrimination. Amendments were added later by some provinces to cover discrimination on grounds of disability or handicap.

Thus New Brunswick added 'physical disability' to its code in 1976; Manitoba, the word 'physical handicap' in 1977. Quebec has incorporated additionally the concept of 'mental deficiency' and as of June 1982 the Ontario Human Rights Code 1981 has protected people with 'handicaps' from discrimination in certain circumstances. In the latter case, the protection covers the provision of services, goods and facilities, accommodation, contracts, employment and the membership of vocational associations and trade unions. It will not be discriminatory to treat a person differently because his or her impairment makes it impossible to perform the 'essential duties' of

an employee or service recipient/consumer.[32] There is a specific prohibition on the use of employment application forms which require information about a person's physical or mental condition.[33] By itself, failing to provide physical access to premises will not constitute an act of discrimination under this Code. The Ontario Code provides a right to complain to the Ontario Human Rights Commission who may undertake an inquiry and attempt conciliation (most provinces have a similar procedure). If it does not settle the matter then the complaint may be referred to a Board of Inquiry for adjudication on the case. If this is found justified it can lead to enforcement measures and the award of compensation.[34]

Over time, therefore, an extensive body of case law has built up in relation to the rights granted by such provincial Codes. Cases in Saskatchewan have concerned recruitment procedures for the mining industry,[35] and a hospital visitor who claimed that the special arrangements she had to make for her guide dog were discriminatory.[36] One case in Manitoba concerned a man with a pre-existing back injury:[37] the law which had to be interpreted was as follows:

The provisions of this section [of the Code] prohibiting the discrimination against a person for a position or employment by reason of the physical handicap of the person do not apply where the nature and extent of the handicap reasonably precludes or renders the person incapable of satisfactorily discharging the duties of that position.[38]

The complainant lost his case but the decision is authority for the rule that people with a disability should receive individualised assessment and treatment, and 'reasonable accommodation' of their disability.

Human rights legislation has also been introduced at a national level. The Canadian Human Rights Act 1985 established freedom from discrimination on grounds of physical handicap[39] and established a Human Rights Commission to which complaints of discrimination can be made.

The most recent Report of the Commission[40] states that, 'Complaints of discrimination on the basis of disability are more and more frequent'. Those accepted in 1989 numbered 246 out of a total of 726 (33.8 per cent). Eighty-two per cent were made in relation to employment discrimination and 18 per cent in connection with the provision of services. Many complaints concerned the way in which employers or service providers treated individuals with less than complete vision, with diabetes and with epilepsy. Investigations concentrated on establishing the true reason for the alleged discrimination: was it arbitrary and unjustified or was there a valid reason, such as a risk of danger being caused to the health or safety of others?

Thus in *Fontaine v Canadian Pacific Ltd* [41] the complainant lost his job at a Canadian Pacific road camp when he confided to a co-worker that he had been tested for HIV and found positive. It was held that there was no 'Bona Fide Occupational Requirement' that a person for this job be HIV free and the sacking was held to amount to discrimination. Damages were awarded to the complainant

In *Rosin v Canadian Armed Forces*, [42] the complainant, who had only monocular vision, was prevented from completing a course because a regulation required that he had full vision. This, it was judged, was unjustified, and the CAP were ordered to amend the regulation.

In *Thiffault v Quebecair*, [43] the complainant had been prevented from boarding a plane because his uncertain movements and the presence of a companion made staff think he was drunk, although he was in fact blind. This act was held to have been discriminatory and he was awarded damages to include a sum for the humiliation which he suffered.

Lastly, in *Israel v Department of Transport*, [44] the Department agreed to make sure that transportation for disabled people to and from airports is available at the same cost as for non-disabled people.

## **Australia**

Australia, at a Commonwealth level, there is the Human Rights Commission Act 1981, to which is scheduled the International Convention Civil and Political Rights and the two UN Declarations relating specifically to disabled persons.[45] These include the Declaration on the Rights of Disabled Persons, which states that such persons should be afforded 'protection from discriminatory treatment'. Simple complaints can be made to the Human Rights and Equal Opportunity Commission, established under the 1981 Act, which will informally investigate them. There are, however, no provisions in this or any other measure which create at a national level enforceable rights of redress for disability discrimination.

The Human Rights and Equal Opportunity Commission has nevertheless taken more than a passing interest in the subject of discrimination faced by people with disabilities. For example, it has commissioned research on their rights and in June 1990 commenced a major national inquiry concerning the human rights of people with a mental illness.[46] It is significant that one of the terms of reference of this inquiry is to 'consider ... any discrimination on the basis of mental illness in Commonwealth laws or programs; ...any discrimination in employment, occupation, accommodation or access to goods and services on the basis of mental illness'. Clearly the process may lead to proposals for better civil rights for this group.

Four states have legislated to provide such protections: New South Wales,[47] Victoria,[48] South Australia [49] and Western Australia.[50] All states cover discrimination on the grounds of physical disability. New South Wales, Victoria and Western Australia also include intellectual impairment and in Victoria and Western Australia mental disorder is also encompassed.

The whole scheme of protection is similar in each state. The types of discrimination covered are broadly the 'direct', 'indirect' and 'unequal burdens' discrimination found elsewhere. There are some additional features, as in South Australia, where it is a criminal offence for a service provider or employer to require a person to be separated from his/her guide dog.[51] All the statutes are complaints-oriented with a strong emphasis on conciliation, which is to be sought by the Board or Commissioner assigned statutory powers and duties under the legislation. One Australian commentator considers that the informal nature of the process may significantly contribute towards a better chance of settlement when compared with more formal systems of adjudication.[52]

Statistics drawn from recent reports of the enforcement agencies show that complaints of discrimination on grounds of disability make up a significant proportion of the total received.[53] In New South Wales during 1985/86 such complaints amounted to 181 (14 per cent of the total); in 1989/90 physical impairment complaints were 114 (9 per cent). Victoria's report for 1989/90 showed that enquiries about disability discrimination amounted to 1,102 out of 8,961 (12.3 percent of the total). Complaints registered were 160 out of a total of 633 (25.28 per cent), the breakdown of categories being employment (66.25 per cent of disability complaints registered), goods and services (26.25 per cent), clubs and sports (1.25 per cent) and education (6.25 per cent). South Australia shows that in 1988/89 there were 48 impairment-related complaints registered, compared with 67 in 1989/90. These figures may seem small, but they appear more significant when the relatively small populations of these states are considered, as well as the many practical factors inhibiting the reporting of discrimination including ignorance of the right to seek redress.

Although in many respects the various statutes are similar, there are some important differences. The latest statute (in Western Australia) appears to have avoided some of the drafting difficulties which have rendered other states' laws partially ineffective or ambiguous.[54] In New South Wales, the definition of 'handicap' has produced some surprising and unforeseen results;[55] this state's law has been shown to rely too heavily on the employer's perceptions of 'reasonableness', where an objective test is essential.[56] All state laws omit the means to seek pre-emptive action before discrimination has occurred so as to prevent its happening. Such a remedy would be available in the United States and would be especially important in relation to the construction of inaccessible premises or facilities.[57] Generally, there is a need in all the statutes (save Western Australia) for clearer guidance on weighing the cost of

achieving equal opportunity against the financial burden on the employer or agency. Western Australia now adopts the concept of unjustifiable hardship'. Examples of cases in which the statutes of Australian states have been applied include the following:

The Victorian Equal Opportunity Board in the case of *O'Neill v Burton Cables* [58] decided that a man whose employment application was rejected due to his pre-existing back condition was discriminated against. In the words of the Board:

...no employer is required to employ a person who cannot undertake the duties of the position they are seeking to fill. But an employer must investigate each particular case and cannot apply a general rule that would exclude a whole class of persons because some members of that class may not be suitable employees.[59]

The case of *Garton v Hillcrest Hospital Inc.*[60] concerned discrimination against a blind job applicant seeking work as a telephone switchboard operator. The interviewing panel incorrectly assumed that the complainant could not carry out all the duties of the office and therefore unlawfully discriminated against the applicant by refusing employment.

In *McKenna v Recreation Ply Ltd and Others* [61] the complainant wanted to use the facilities of a leisure centre which refused him membership because of his physical disability. After analysing the adaptations which would be required to accommodate his needs it was held that he had been unlawfully discriminated against since the costs of such alterations and accommodations were reasonable for the centre to bear. However, in another access case, *Blair and Others v Venture Stores*,[62] a retail store was not ordered to render its upper floors accessible to three customers in wheelchairs, because the cost was considered too great. And in *Ellis v Metropolitan Transit Authority*,[63] a potential user of a new light rail system failed in her access claim when it was decided that the specialised transport system created as a substitute for the non-accessible rail system was sufficient.

Finally it should be noted that the statutory protections in New South Wales include an 'affirmative action' approach to public service employment. This state has appointed a Director of Equal Opportunity in Public Employment, who oversees the preparation and implementation of equal opportunity management plans, including target figures designed towards eliminating discrimination. Surveys of staff and of recruitment and appointment practices are undertaken. Recent reductions in the level of financing of such action has, however, compromised its effectiveness.

## **France**

An example which appears unique in the European context is the French Penal Code, which includes provisions which render it a criminal offence to discriminate against a person on grounds of race, sex, nationality and religion in the provision of goods, services and employment etc.[64] To these was added by a law passed in July 1990,[65] discrimination on grounds of health or handicap where this is unjustified. Breach of the Code is punishable by imprisonment from two months to one year or a fine of F2,000-F20,000, or both.

#### 4: THE EUROPEAN COMMUNITY

In addition to its own domestic law, the UK is subject to EC law and to the jurisdiction of the European Court of Justice. Is there any sign within the Community of concern to tackle the problem of discrimination on grounds of disability?

The Treaty of Rome and the law making institutions constituted under it are distinct and highly significant sources of UK law in the social field. EC law is usually thought of as predominantly governing commercial agreements, product quality and environmental standards. However, the Directives and Regulations emanating from Brussels can provide tangible and enforceable rights for individuals. This point is graphically illustrated by one UK citizen's recent challenge to discriminatory occupational pension rules:[1] having no means of redress under UK law against pension arrangements which treated men and women differently, the claimant had resort to the EC Equal Pay Directive, which outlaws gender based pay discrimination; the claim was upheld by the European Court of Justice. Now the UK government is trying to limit the financial effects of the judgement (estimated to cost the pensions industry £40-£50 billion) by arguing that the ruling cannot be applied retrospectively? [2]

The European Commission is constitutionally assigned a limited role. Under Article 117, for example, it has 'the task of promoting close co-operation between Member States in the social field, particularly in matters relating to employment, labour law and working conditions and basic and vocational training ...' Its interventions have therefore traditionally concentrated on employment related topics. The advent of the Single European Act and corresponding amendments to the Treaty of Rome have given an impetus to extending the legislative role further into the social field -and the greatest opportunity lies in the implementation of the Community Charter of Fundamental Social Rights for Workers.[3] This Charter was agreed by all member states except the UK at a Council of Ministers' meeting in late 1989. Although it is no more than an expression of political aspiration, it has already produced a proposal which directly addresses one aspect of the discrimination experienced by people with a disability -namely, the physical and organisational barriers preventing their easy travel to and from work.[4]

The proposal is a Draft Directive and will be considered in detail later. If it passes into EC law it will represent a radical innovation, as the first attempt by the EC to legislate to redress discrimination due to disability. Previously, attempts to tackle the problem have focused on a 'Social Action Programme', to fund schemes for employment projects in member states, and on a non-enforceable 'Recommendation' agreed by the Council of Ministers in 1986.[5] In the early 1980s, research was commissioned in order to establish data on the restrictions experienced by disabled people in the job market, including their experience of discrimination. Three reports were published [6]

which recognised the need for legislative proposals to redress individual and group discrimination: a Directive, being mandatory, was the means suggested. However, this was not taken up by the Commission or Council of Ministers, who seemed content with only a Recommendation.

Established under Article 235 of the Treaty, this Recommendation aimed to encourage EC member states to adopt policies which would promote fair opportunities for 'disabled people', defined to include 'all people with serious disabilities which result from physical, mental or psychological impairments'. Member states were enjoined to introduce measures to promote fair opportunities for disabled people in the field of employment and vocational training, and to adopt policies to eliminate negative discrimination and promote positive action in relation to the employment of disabled people. For example, to eliminate negative discrimination, States would have to limit: ...exceptions to the principle of equal treatment in access to ... employment to the cases justified on the ground of a specific incompatibility between a particular activity forming part of a job ... and a particular disability; if necessary it should be possible to have this incompatibility confirmed by a medical certificate; any such exception should be reviewed periodically in order to establish whether it continues to be justified.

EC governments would also have to seek:

...to ensure that disabled people can go before the competent . bodies to establish their rights and can receive the necessary assistance to do so in accordance with national law and practice.

On 'Positive Action', the Recommendation urged States firstly to adopt a 'quota' system to encourage percentage targets for the employment of disabled people in public and private enterprises, and secondly to formulate and disseminate a Code of Good Practice for the employment of disabled people and to monitor employer compliance with this.

As required by the Recommendation, the Commission in 1988 reported to the Council of Ministers on its implementation with a report which detailed the various legislative protections and provisions in operation in EC states.[7] It sought to compare the existing laws with the proposals recommended in 1986. Apart from 'quota' schemes, most states had no special laws to provide for equal treatment for disabled, workers. A few had generalised constitutional protections which were not enforceable by the aggrieved individual. The most advanced approach has been developed in the Netherlands. There, employers and trades unions are legally bound to encourage equal opportunities for everyone (whether or not disabled) as regards 'occupational (re)integration'. Special protections from dismissal exist for the person who has been



affected by an 'incapacity' in the workplace, with the Regional Employment Office deciding whether dismissal is justified.

It became clear that harmonisation of domestic law in this area would be highly complex. However, shortly after the Commission reported, the Social Charter was published. At Point 26, Title 1, its reference to the rights of disabled people prefigures the potential for further developments in the EC in the creation of enforceable rights for individuals with disabilities. The Charter states:

All disabled persons whatever the origin and nature of their disablement must be entitled to additional concrete measures aimed at improving their social and professional integration.

The Charter proposes that measures be taken by the EC to ensure the fullest possible integration of disabled people into working life. Specific reference is made to vocational training, 'professional reinsertion' and readaptation, improvement of mobility, and means of transport and housing. A particular 'concrete measure' envisaged in a note to the Charter is the passing of a Directive on assistance for the mobility impaired worker. This reflects a radical innovation in the Commission's approach when compared with its previous reluctance to introduce community wide individual legal rights.

A Draft Directive was published in February 1991. It states that the law would be made under Article 118a of the Treaty of Rome - that dealing with protecting the health and safety of the worker. The significance of this is that it only requires a qualified majority for it to come into force and any opposition to it from the UK government may therefore prove ineffectual. The Directive is on '... minimum requirements to improve the mobility and the safe transport to work of workers with reduced mobility',[8] which term is to include any worker 'who has special difficulty in using public transport owing to serious handicap of a physical or mental origin'.[9] It is estimated that 12 million EC citizens will be affected by the Directive's provisions, which are intended, according to Article 1 within it, 'to facilitate the safe travel of workers with reduced mobility in order to assist them in gaining access to the place of employment'.

Considerable flexibility is provided within the terms of the Directive permitting compliance in ways that take account of the cost and difficulty of its being implemented.[10] In particular, specialised services or employer run facilities may provide the means of transport necessary rather than expensively adapted publicly available fixed route systems; however, if this happens then the alternative means must have an effect equivalent to that of public transport.[11] There may be a danger that this will encourage more rather than fewer segregated services.

Member states will be obliged, according to a set timescale ending in 1999 and with reference to prescribed general minimum standards, 'to ensure that means of transport are provided and are accessible' or that measures are taken which have the equivalent result. States also have to take steps to promote training, information and advice, and to ensure that before the end of 1994 there are measures in place which enable a disabled person requiring a travelling companion or attendant to do so without additional transport costs. EC States will have to incorporate the Directive's requirements into domestic law by the end of 1992.[12]

The proposal described is, of course, only in draft and has been published for consideration by the governments of Member States, the European Parliament and the Council of Ministers. Nevertheless, if it were to pass into law it would make a major impact on the 'unequal burdens' discrimination faced by disabled people seeking work or in employment. If the UK government failed adequately to implement the Directive, then it would be open to aggrieved individuals to petition the European Court of Justice for a declaration to enforce their rights. The United Kingdom government could then be ordered to comply and domestic law might have to be altered.

However, the potential for the development of more extensive disability anti-discrimination law at the European level will be limited by the need, in many instances, for such proposals to be agreed unanimously by Member States. Since the Single European Act agreement by a 'qualified majority' has been possible but only in relation to law made under certain articles of the Treaty. Discussions are underway on further revision of the Treaty, but in the meantime, while the UK government continues to reject legislative measures in this field, there will be little chance of progress being made - for example, by turning the 1986 Recommendation made under Article 235 into a Council Directive.

If it is UK government policy generally to reject legislative solutions, what is the basis for this policy and how is it expressed?

## 5: UK GOVERNMENT POLICY

Since the mid-1970s there has been a growing appreciation among disabled people's organisations of the need for a civil rights philosophy in fighting for social and economic improvement. Labour and Conservative governments have been challenged to introduce anti-discrimination law. In 1978, MIND wrote to Labour's Employment Secretary calling for an early introduction of equal opportunities law to redress the unfair burdens experienced by those with past or present mental health problems. In his initial reply in January 1979, Labour's Junior Employment Minister doubted that there was enough discrimination of this sort to warrant introducing law and was sceptical that legislation was the best way to encourage employers to behave fairly. His position had been adopted without the benefit of research data, but MIND had presented 40 case histories of discrimination for the government to consider.[1] Before a full reply could be formulated, Labour was out of power.

As far as physical disability was concerned, the Labour government was at least keen to gather the necessary data before deciding on its policy. An opportunity arose when the Silver Jubilee Committee on Improving Access for Disabled People presented its closing report early in 1979.[2] This recommended a wide ranging survey of barriers to access and the government responded by setting up the Committee on Restrictions Against Disabled People (CORAD), to investigate the extent of discrimination (though not including discrimination on grounds of mental ill-health or learning disability). The Committee's terms of reference were:

To consider the architectural and social barriers which may result in discrimination against disabled people and prevent them from making full use of facilities available to the general public; and to make recommendations.

On taking power later in 1979, the Conservative government was prepared to keep the Committee going and received its report in February 1982. The Committee, chaired by Peter Large, found that experiences of unfair discrimination were still part and parcel of the lives of many disabled people. Segregation and exclusion, less favourable treatment and indirect discrimination all occurred in the field of education, transport, physical access, employment and the provision of services. The Committee was under no illusions as to why this should be so. As Large wrote later that year:[3]

The lives of disabled people are plagued by the tolerance those of apparent goodwill show towards the restrictions that too often accompany disability. Too many people in this country will not recognise that disabled people have the same rights as others; and far too few accept this to the extent of ensuring that they are enabled to enjoy these rights.

The Committee took the view that legislation was a useful way to redress discrimination. Here would be an opportunity to create the individual civil rights which could redefine the disabled person's relationship with a hostile or simply disinterested community. Thus, the CORAD Report called for a new law to prohibit certain types of unfair treatment and to provide aggrieved individuals with the opportunity to enforce their rights. Employment and access problems were particularly highlighted as demanding this approach. The Committee recognised the importance of a strong enforcement agency and the need to match resources to the standards required by the new law, but commented:

...while not being a universal panacea, legislation does have an extremely important part to play in combating discrimination and in providing a framework on which to base an integrated society.' (para 4.29)

These ideas found no favour with the Conservative government. Its reaction to publication of the report was openly dismissive.[4] Since then, Ministers have been entirely unreceptive to the idea that an individual citizen might have the right to pursue a complaint of discrimination by claiming it was a breach of the law. Insofar as the government has acknowledged unjustifiable inequality, it has favoured strategies which seek, by education and persuasion, to change practice, in the hope that over time barriers will be removed. An exception has been the introduction of revised Building Regulations to render certain newly constructed or altered buildings at least partly accessible to people with certain disabilities.[5] However, an individual who wants to claim a breach of these regulations has no personal means of redress.

A useful illustration of this 'voluntary' approach is seen in the government's employment policy and particularly in the role assigned to law in implementing the policy. 'Practical measures' are preferred: to legislative ones; the government is reluctant to impose legal duties of any sort on employers; it refuses to recognise 'unequal burdens' as unfair discrimination requiring legally enforceable 'reasonable accommodation'; and it retains an overriding belief that direct and indirect discrimination are experienced by disabled people only to an insignificant extent - and certainly not sufficiently to require legal prohibition.

The Disabled Persons (Employment) Act 1944 is the main source of current law in the field and establishes a 'quota' system with employers engaging more than twenty employees having a duty to fill at least three per cent of jobs with registered disabled people. The scheme has never been administered rigorously. Many employers are officially exempted and surveys have regularly shown many others, including most government departments, failing to meet the quota. In March 1991 the House of Commons was told that the proportion of registered disabled people employed in government departments ranged from 0.32 per cent in the Home Office to 3.2 per cent

in the Department of Employment. But the latter was the only department to reach the target and in most others the proportion was less than 1.5 per cent.

During the 1980s there was a growing awareness among some employers, unions, voluntary organisations and government agencies that the scheme would have to be reformed or replaced if disabled people were to stand a chance in the labour market. In 1981, the Manpower Services Commission reviewed the scheme,[6] decided that it was not effective and proposed that modern equal opportunity legislation be introduced instead, together with a statutory Code of Practice. This remained the Commission's view when it examined the issues in a joint working party, with unions, employers and voluntary organisations, reporting in 1985.[7] Employers' organisations were generally against statutory standards of good practice, but in 1984 agreed with the Manpower Services Commission and the TUC to the terms of a voluntary Code of Practice.[8] The government preferred to leave the law unchanged and throughout the latter part of the decade promoted the voluntary Code of Practice as the best way to proceed. A 'Fit for Work' award scheme was created by the Department of Employment to give recognition to 'good practice' employers. The effectiveness of measures such as this Code have since been considered in the Government's Consultative Document, *Employment and Training for People with Disabilities* published in 1990[9] following a review of the Employment Department's services to meet the needs of disabled people. The document specifically - but with extraordinary brevity - touched on the potential of anti-discrimination legislation in the employment field.[10] It made no reference to the 1986 Recommendation of the EC Council of Ministers - and indeed if it had, it would have drawn attention to the fact that the UK had conceded only limited compliance with the Recommendation. Claiming for government the role of encouraging employers to adopt good practice, it said that anti-discrimination legislation would be 'unlikely to be effective in achieving policy objectives and might be counter-productive by making a constructive approach by employers less likely' (para 5.15). Michael Howard, the Employment Secretary, confirmed this view when giving evidence to the House of Commons Employment Committee in December 1990. He said that the Government 'approached the matter with a predisposition that a convincing case [for such legislation] has not been made out'.[11]

The report stated that, instead of 'new legislation aimed at securing good practice through sanctions', the government preferred an entirely voluntary approach -even suggesting that retention of the ineffective quota scheme was necessary because its abolition might 'send employers the wrong signals about society's expectations of them'. In 1990, the Department of Employment launched a new campaign for better practice in recruitment and workplace treatment, the 'Two Ticks' Campaign: this takes a wholly benign approach towards offending employers and coincides with the Government's abolition of the only objective assessment of good practice -the 'Fit for Work' award scheme.

The purpose of the initiative is to encourage employers to adopt and use the 1984 Code of Good Practice and, if they do so, to indicate this by including the campaign logo - literally two ticks -on their literature. But as a campaign leaflet candidly states:

The use of the Symbol is entirely voluntary. It is for employers to judge for themselves whether their practices meet the criteria, to ensure implementation by their organisations, and to show, by their example, the effectiveness of good practices.

The 'good practice' criteria include what appear to be commitments not to discriminate and to accept the need to accommodate a person's disability by, for example, the provision of special equipment, if that person is otherwise qualified to work. Case histories described in the departmental press notice at the time of the launch certainly revealed occasions when employers had been willing to make accommodations in the physical environment of the workplace which seemed reasonable to them. There is no reference to job restructuring, to the efforts which employers could make to accommodate any mental health or learning disability, or to what disabled people can do if an employer discriminates unfairly or fails to accommodate their disability.

Having judged anti-discrimination law to be impracticable, because of the professed difficulties of deciding what is a 'reasonable' accommodation, the government has now built its campaign for voluntary good practice around the principle that 'reasonable' means whatever an employer will agree to. One can see that it would be impolitic for any government to enshrine that doctrine in law.

Meanwhile, the government continues to provide employers with short-term wage cost subsidies under the 'Job Introduction Scheme'. Between 1,000 and 2,000 such grants were made in each year during the 1980s.[13] In addition, grants for the adaptation of premises and equipment can be sought by employers wishing to accommodate a person's disability. During the 1980s such grants rose from 94 in 1979/80 to 247 in 1988/89.[14] 'Sheltered' places in mainstream employment under the Sheltered Placement Scheme totalled just under 6,500 at the end of March 1990,[15] and the costs of segregated sheltered employment for approximately 14,000 are substantially met by the Department of Employment.[16]

This indicates the shape of government policy. A report commissioned by the Employment Department, *Employment and Handicap* (SCPR 1990) found that among self-declared economically active people with disabilities, some 22 per cent, or 285,000, were not in work but wanted to be. Yet there is currently no legal means by which an unemployed or disadvantaged disabled person can require employers to change their practice.

The 'voluntary' approach is reflected in other aspects of government policy. British Telecom has been passed from public to private ownership ostensibly to improve its

services in the public interest. Much was claimed for the regulations with which its privatised operations would have to comply. Its profit for 1990/91 has totalled £3 billion. Yet BT's efforts to adapt its services to the needs of hearing and speech impaired consumers - by creating relay services for example - are minimal when compared, say, to those of US private operators, even before the 1990 Act. One reason is that the Department of Trade and Industry will not promote *law* to require organisations like BT to do more.

Much of public transport, even where it is financed or regulated by central government, remains inaccessible for disabled passengers. The fact that some wheelchair users still have to ride in the guardsvan of British Rail trains, along with the racing pigeons and bicycles is by no means an isolated example. Although some transport providers have been placed under a statutory duty to take into account the needs of disabled travellers, the generalised and non-prescriptive nature of this obligation renders it virtually unenforceable by the disabled individual. And the duty would be further weakened by deregulation or privatisation.

The scheme to ensure, by regulating licensing, that all new London taxis are wheelchair accessible seems commendable. But this should be compared with US cities, where public buses in routine operation are fully accessible, or with Lille in France, where the underground railway system is similarly accessible. In those places, the aim has been to create not segregated facilities but totally integrated ones and the technical feasibility of doing so is clearly demonstrated.

Physical access to the built environment has been the subject of some regulation during the 1980s. The process began not with a government initiative but with an amendment to a Private Member's Bill -the Disabled Persons Bill -in 1981. Two sets of amendments to the Building Regulations have been introduced and a third will come into force in 1992. They are designed to have an impact when a new building is constructed or alterations are made to an existing one.[17] The procedure to ensure compliance is, again, one that avoids the involvement of potential or actual disabled users who are meant to benefit from the regulations. A central Committee has the role of adjudicating on disputes between owner/developer and local authority, the latter having the role of representing the interests of disabled people who may use the building. The protracted wrangling over access requirements for the Museum of the Moving Image building on the South Bank revealed the weaknesses of both the current regulations and the model of enforcement. The regulations sometimes have only limited scope - access to a building's entrance or ground floor, not its entirety - and there exists no law, nor any proposals to introduce one, which would, like the Americans with Disabilities Act, require all premises to be adapted to render them accessible, where this would be easily achievable'.

For housing, public or private services such as education, insurance or broadcasting, entertainment provision, the membership of professional bodies and clubs, or participation in citizenship duties such as jury service, there are no regulations to prevent discrimination against disabled people. Nor do the respective government departments admit any intention of providing aggrieved individuals with the right to pursue a complaint.

Throughout the 1980s various attempts were made in Parliament to secure such rights and, before outlining a desirable framework for government legislation in this field, we shall look at proposals which have been made by individual MPs or Peers.



## 6: THE CAMPAIGN FOR LAW REFORM

On 6 July 1982, not long after publication of the CORAD Report, Jack Ashley MP moved the Disablement (Prohibition of Unjustifiable Discrimination) Bill.[1] This was a short measure without any chance of becoming law. In the next session, the same six clause Bill was taken up by Donald Stewart MP, who had won a high place in the ballot for Private Member's Bills. It sought to make 'unjustifiable discrimination' on grounds of disablement unlawful. The Equal Opportunities Commission would investigate complaints and seek to resolve them by means of conciliation. The categories of disablement and the activities to be covered were to be defined later by the EOC.

The Bill had its Second Reading on 11 February 1983.[2] The government opposed the motion to allow it to pass into Committee, with the Minister speaking for fifty five minutes to ensure that it did not. In the debate many MPs referred to the continuing discrimination experienced by disabled people - although in fact this Bill made no attempt to address the issue of barriers or the right to reasonable accommodation. The Government's position was the same as it had been on publication of the CORAD Report in the year before the way to eliminate discrimination was through education, persuasion and assistance, not through the granting of rights.

The main difficulties with this and other short Bills were that important provisions were left to be defined later by regulation, and that the definitions included in the Bill lacked sophistication or were incomplete. Robert Wareing MP introduced a similar Private Member's Bill during the next parliamentary session. This sought to amend the Chronically Sick and Disabled Persons Act to outlaw discrimination on grounds of physical, mental or sensory disability. It proposed that a Disablement Commission be set up to eliminate discrimination, promote integration, investigate individual complaints and keep the Act under review. Later regulations would determine the categories and activities to be covered, as well as the powers of the Commission. Discrimination was defined in the Bill and individuals were given the right to seek redress.

Again, the debate[3] concentrated on examples of unjustified treatment due to unwarranted or ignorant assumptions about disability, particularly in employment. There was no scope to develop ideas about reasonable accommodation since the Bill made no claim to include the principle. The Bill's promoter referred to the wide ranging support for the measure and the results of a Gallup Poll which endorsed the idea of a law to combat unfair treatment. Again the Government successfully opposed the Bill reaching committee. Minister Tony Newton decried its 'essentially negative' concept and its lack of clear definitions. The Bill was reintroduced by Lord Longford in the House of Lords and made satisfactory progress until it failed to secure a Third Reading on 3 April 1984. In the same session, a less radical Disabled Persons Bill,

introduced by Lord Campbell of Croydon reached a Third Reading on 5 April but, faced by opposition from the government, it was not moved in the Commons. The Bill would have established a Disablement Commission to investigate and review discrimination experienced by disabled people.

There has not been another full debate in either House on the subject since 1984, although the idea has been kept alive with debates in the Commons under the Adjournment and Ten Minute Rule procedures, and with various amendments tabled in the Lords. On 16 October 1989, Baroness Seear moved a new clause to the Government's Employment Bill in its Lords Committee Stage, to outlaw discrimination by employers against disabled people.[4] Lord Strathclyde, opposing the amendment, repeated the Government's preference for 'securing the voluntary commitment of employers through providing information, advice and where necessary practical and financial help. On the same day, Baroness Turner, a former Equal Opportunities Commissioner, moved an amendment which would have rendered unlawful discrimination in the workplace on grounds of HIV infection.[5] The government opposed this clause as well, preferring to rely on public education and the fact that some employees already enjoyed legal protection from unfair dismissal.

The House of Commons Employment Select Committee recently considered, for the first time, the case for legislation to promote and protect equal opportunities for disabled people. It did so in the course of examining the Department of Employment's consultative document mentioned above. After taking extensive evidence, inter alia, from organisations calling for anti-discrimination legislation, the Committee included in its First Report for Session 1990-91[6] the recommendation that:

The Government should explore urgently the possibility of equal opportunities legislation for the employment of people with disabilities and report to Parliament on its potential effects and costs in the labour market. (para 23)

More recently, in an adjournment debate,[7] in which specific reference was made to the Americans with Disabilities Act of 1990 and to the Select Committee's recommendation, the Minister for Disabled People, Nicholas Scott MP, repeated the Government's opposition to legislative means of redressing discrimination. He acknowledged that discrimination occurred and said he had 'no doubt that some employers' recruitment practices discriminate unfairly against people with disabilities'. Nevertheless, he repeated the familiar theme that 'the most constructive and productive way forward is through raising awareness in the community as a whole'.

Outside Parliament, the Manpower Services Commission has recommended that enforceable duties be imposed on employers, requiring non-discriminatory practice. The National Advisory Council on Employment of Disabled People (a statutory body) has also called for statutory duties backed by a statutory code of practice to replace the

quota scheme.[8] It specifies that individuals protected by the provisions of the code should have the right to seek enforcement, if they believe themselves to be victims of discrimination. Such a suggestion would make these statutory provisions virtually indistinguishable from anti-discrimination law.

The TUC Annual Congress in 1987 called on the Advisory Council to establish a Bill of Rights for disabled people, to have the same effect as the Council's recommendations. A consultation document describing options for anti-discrimination law was published in 1989.[9] The Labour Party, in its 1983 election manifesto committed itself to introducing a law to prohibit discrimination on grounds of disability; in its more recent policy review it promised when doing so to 'draw on the effects' of the Americans with Disabilities Act.[10]

Since 1984, voluntary organisations of and for disabled people have formed a committee known as VOADL (Voluntary Organisations for Anti -Discrimination Legislation) which has, when the opportunity has arisen, pressed for the introduction of such law. One of its members, The Spastics Society, published research in 1986[11] and in 1990[12] establishing that in a high proportion of cases, before shortlisting job applicants, employers will simply screen out those who declare a disability (cerebral palsy in the case of this research).

Finally, the British Council of Organisations of Disabled People (BCODP) - entirely constituted of groups and organisations whose members have a disability - plans during 1991 to launch a national campaign seeking comprehensive rights legislation to redress discrimination.

## **7: A PROPOSAL FOR LEGISLATION**

It should be clear by now that there is a powerful case for introducing new legislation to give disabled people rights to protection from discrimination and the means of individually enforcing such rights. The argument has two distinct strands. The first is concerned with concepts of human or civil rights. The second looks to the context in which the laws will operate and concentrates on the practical effect of using them as part of a wider political and educational strategy to change attitudes and practice.

### **Rights and citizenship**

'Human rights' reasoning stresses the need for a society's laws not only to reflect but also to reinforce the values which govern public relationships between citizens. If the predominant view holds that those relations are to be ruled by principles of dignity, equality, fairness and a respect for individuality and diversity then, according to this argument, the law must ensure that such beliefs are clearly defined and properly upheld. Behaviour which is prejudiced, devaluing, arbitrary and degrading has to be condemned by law not just to improve conduct but to determine the boundaries of acceptable behaviour. This argument will hold good whatever may be the law's efficacy as an agent of social or attitudinal change. If this were not so, a society which has laws prohibiting assault, or theft or non-payment of dues would have to consider dismantling them when times become more violent or dishonest. In addition, the 'human rights' view claims for the law a role in helping to define what is 'the community' and what is 'citizenship'.

How do these general principles apply to the specific problems of redressing discrimination on grounds of disability? Two main types of unfair treatment have been described. The first arises when a person's disability, though irrelevant, is considered, intentionally or inadvertently, a sufficient reason for less favourable treatment. The second is where a person's disability requires them to shoulder an unequal and unfair burden compared with someone who is not disabled. Far from having equal access to jobs, telecommunications, public services such as transport, or private rights like enjoyment of the arts, disabled people find that many of these are inaccessible or are only obtained with great difficulty or recourse to demeaning 'special' programmes. From the 'human right' to equality is derived the principle that a disabled person's difference should not justify differential treatment where the dissimilarity is immaterial. This provides a basis for outlawing status distinctions based on false or prejudiced assessments of ability, skill, preference or choice, and for measures which ensure ability is investigated thoroughly and fairly before perceptions become settled and distinctions are made on the basis of them. It will insist that the effects of discriminatory behaviour are recognised as potentially devastating as well as insulting, and that they are adequately compensated for. Another 'human right' - to autonomy and self-determination - justifies legislation to remove the barriers preventing full

participation in society, in order to reduce dependency, particularly on social security payments, voluntary assistance and special programmes.

Proponents of the 'human rights' approach endorse the view that the community should share the effects of disability. Thus, the community must make reasonable accommodations to ensure that the rights, freedoms and opportunities it provides are accessible to disabled people. Socialising the 'burden' of disability is seen, according to this principle, neither as 'charity nor as goodwill. It simply constitutes citizens' legitimate expectation of a society in which they participate, and where it is their other attributes and achievements which should give them visibility, not the disability which they just happen to have.

Critics of the proposal say the law will be counter-productive because it will alienate rather than integrate disabled people by according them special status. The present government claims that the sanctions which would attach to the new civil rights would threaten the goodwill currently felt towards disabled people.[1] As we have argued, goodwill that can so easily evaporate cannot be relied upon as an agent of change or guarantee of fairness.

### **Pragmatic persuasion**

Other arguments for anti-discrimination legislation are more pragmatic. Legislation is welcomed for the part it will play in aiding progress towards the social goals of integration and participation, and in enhancing and strengthening education and voluntary persuasion. Pragmatists point out that anti-discrimination measures must not be excessively costly for taxpayers, businesses or consumers, since this could be counter-productive - but, in any event, it need not be so. Many changes will cost little compared with the benefits they will release. If disabled people are protected from discrimination, many more will work, earn, pay taxes and go shopping. In the United States, this was the argument which won over the telecommunications corporations to the rigorous requirements of new laws: they appreciated that 'reasonable accommodation' could raise an army of new consumers.

The pragmatists also argue that, while anti-discrimination law is not a panacea which alone can change practice and equalise burdens, it can nevertheless help to create a climate for change. On the one hand, government says it wants to persuade employers that it is in their interests to employ disabled people and adopt good working practices. On the other, the law allows employers to embark on unskilled and generalised inquiries into a prospective employee's medical history, and to screen out job applicants who declare their disability. For example, in June 1991, the National Federation of Self-Employed and Small Businesses issued a leaflet to its 50,000 members recommending that all potential employees be asked to complete a medical questionnaire. The leaflet stated:

Whether or not the medical record influences the decision to employ an individual, it is right that employers should be aware of the possible future liabilities that might occur.[2]

A law prohibiting such practices (and more) would provide a sound and rational base for the process of education and persuasion. It is consistent with this pragmatic philosophy to welcome the chance of disabled people having individual means of enforcement and redress - since it is from their experiences that society will judge the efficacy of measures designed to give them greater power over their lives.

### **The scope of a new law**

It is beyond our brief to draft the contents of a Bill. The purpose of this final section is to develop an appropriate framework. The following key questions must be addressed:

- ◆ What is disability and how is it defined?
- ◆ What is discrimination and how is it defined?
- ◆ What activities will be covered by the law?
- ◆ How will the law be enforced?

### **What is disability?**

'Disability' has two main elements.[3] The first is the functional limitation caused to a person by impairment, such as an inability to read conventionally printed matter. An 'impairment' may be physical, mental or sensory and is frequently described by a familiar medical term (such as blindness). 'Handicap' is the second element and this relates to the circumstances or environments in which disabled people find themselves. It defines the relationship they have with their surroundings, which may or may not handicap them. A blind student clearly has a handicap if her college refuses to provide her with a reader and she is unable to obtain braille texts. But if she secures such assistance, she may have little or no handicap.

Whilst the first element is generally applicable, the second will depend on the context and may differ from one field of activity to another. This must be borne in mind when proposals are formulated.

It will be important to include within the definition people who are *perceived* as disabled even though they have no functional impairment. For example, someone who is diagnosed as my infected may strictly speaking have an 'impairment' of one of the body's systems, but may not experience any functional limitation - for many years. Nevertheless, some employers test for the infection and refuse to employ anyone

found to be seropositive, in one case, according to the company, 'because it was not certain how many days off sick [the prospective employee] would demand'.[4]

It will also be important to include those who have a *record* of a disability which they no longer experience, for example a past history of medical treatment for a severe mental illness: this may render them as vulnerable to discrimination as they might have been if still revealing the symptoms. Those who are perceived as disabled because of a *misdiagnosis* should also be covered.

Critics of the proposal for anti-discrimination law stress the difficulties of defining disability. Yet existing legislation includes definitions which have been shown to be effective. The present government's new Disability Working Allowance to be introduced in 1992 will benefit a person who 'has a physical or mental disability which puts him at a disadvantage in getting a job'.[5] There is no evidence that this definition will prove uncertain or ambiguous in its application.

### **What is discrimination?**

The definition of discrimination will depend on the categories of human activity which are the target of the law. It may be worth formulating specific requirements (regarding, for example, the acquisition and treatment of medical information in recruitment and employment practice) and then providing that a breach of any of these requirements will amount to unlawful discrimination unless a statutory defence is established. This is the approach of the US legislation and some of the Australian statutes and, clearly, legislation gains in effectiveness from a sophisticated application to specific practices or conventions within the field in which disability may cause a handicap. The Americans with Disabilities Act and Fair Housing (Amendments) Act treat activities quite separately and with good reason. They define fairly precisely the different situations - rented housing, sale of land, employment, transport, services, etc - where a person may experience discrimination. Then they specify and prohibit the types of discrimination which are peculiar to those situations. This underlines the inadequacy of the short Private Member's Bills which have been introduced in the UK Parliament and which could legitimately be criticised for uncertainties in their meaning and application.

The definitions will have to encapsulate the direct, indirect and 'unequal burdens' types of discrimination outlined above and exemplified in the laws which have been cited. Victimisation of a person who complains of discrimination must be prohibited. Defences to discrimination - involving considerations of expense and technical viability and threats to the health or safety of employees, to other consumers or to the public - will need to be carefully specified. The experience of other jurisdictions is that in the unfamiliar process of judging what is or is not a 'reasonable accommodation' an employer, service provider, enforcement commission or court will

be assisted by knowing detailed factors to take into account. For example, the ADA provides in Section 101(10)(B) four detailed factors to be considered when judging whether an 'accommodation' for an employee will cause a business 'undue hardship'. These cover, amongst other things: the nature and cost of the accommodation; the number of its employees; the operations and financial resources of the business; and the effect on its operations, in particular when the facility affected is only part of a larger organisation.

Codes of Practice may also help in illuminating how the statutory concepts are to be applied in practice. As mentioned above, some employers are at present prepared to make such accommodations, and government assistance by ways of grants for this purpose is already provided, so the ground has been prepared for formulating requirements to apply to all employers. Telephone switchboard adaptations, provision of specialised seating, workbench or electronic communications devices, and the use of motorised transport to speed mobility, are all held up by the Department of Employment as illustrating such good practice.

What activities will be covered?

It will be a complex operation to introduce extensive and detailed legislative proposals on employment, housing, contracts, services, access within the built environment, within transport and to the telecommunications network. For reasons which should be clear from the above discussion, these laws would have to tackle areas of definition and procedure far beyond the current laws concerning sex and race discrimination. There would be the need to define and explain the concept of 'reasonable accommodation', the defences permitting discrimination where 'undue hardship' would be caused to an organisation or where there would be an unjustifiable threat to the health or safety of other employees or consumers. The minimum standards for access to the built environment, to transportation systems and to the telecommunications network would need to be established with detailed implementation and transitional provisions.

How much can be contained within a single parliamentary Bill? Although there are common principles, the application would bound to differ according to the situation envisaged by the law - be it the workplace, the private restaurant, the public bus or telephone. There is no one formula which could serve each of these areas. The UK legislation, rather like the ADA, would need to be seen in several distinct parts dealing separately with employment, education, contracts and services (including housing), access, transport and telecommunications. Clearly, it would be preferable for all the necessary changes to be made at once by these parts being combined in one comprehensive measure. This was partly the approach of the Americans with Disabilities Act, although discrimination in housing and real property was not included in the Act and the detailed enforcement machinery needed had already been



created by earlier laws. It would be artificial and misconceived to imagine that partial or incremental legislation is at all desirable. For someone with a disability, the experience of discrimination is rarely confined to one particular area of activity. Often, it is a burden felt in many different ways. For example, if employment discrimination were to be prohibited alone, this would not help the wheelchair user unable to travel on inaccessible public transport - to and from work, or the speech impaired person seeking information by telephone about a job vacancy, but from an employer whose office has no suitably adapted phone system. There is also the danger that passing a law on one aspect of discrimination will create the illusion of having dealt with the whole problem and delay any further progress.

How will the law be enforced?

The mode of enforcement can be built on established approaches to redressing discrimination, but it will also require innovations reflecting the new law's radical departures from existing British anti-discrimination law. The legal systems of the UK and Northern Ireland are familiar with the powers, procedures and responsibilities of bodies responsible for enforcing these anti-discrimination laws: the Commission for Racial Equality, the Equal Opportunities Commission and (in Northern Ireland) the Fair Employment Commission. The new law would require a similar body, with similar powers. Some argue for combining all enforcement bodies into one commission. This might save money, but there are disadvantages - including the difficulty of ensuring that in a combined commission disability discrimination is given a sufficiently high profile and an adequate share of resources. (It is not always appreciated that in England and Wales the funding of the two separate commissions is already vastly favourable to the CRE. Spending in 1989/90 by the CRE was £11,727,606; while the EOC spent in that year a total of £3,955,763.)

It will be essential for a strong, statutory body, representative of disabled people's views, to be created alongside an individual's new rights to seek legal redress. In general terms the legislation will fail unless its provisions become widely known and understood and those who decide to register complaints of discrimination are supported and encouraged to do so. It is already hard enough to find lawyers able and willing to deal with discrimination litigation. What if, in addition, the potential client finds the solicitor's office, Legal Aid Board, and County Court all unadapted to accommodating their disability? Many such forms of discouragement will arise immediately and the commission's role must be to seek to redress them where possible.

Its more formal duties will be to work towards the elimination of all forms of discrimination against disabled people and to promote their equal opportunity with non-disabled people. It would have responsibility for keeping the legislation under

review, reporting on its effectiveness and suggesting necessary amendments to the government.

The powers of the commission would need to be extensive. They could be modelled on the statutory powers of the present bodies, so long as the new law took into account detailed proposals from the CRE and EOC, based on years of experience, for expanding their powers to improve their effectiveness. Some means would have to be found for the commission to identify and seek suitable amendment to law which itself was judged discriminatory. It would, like the other enforcement bodies have the following duties: undertaking research, producing and publishing Codes of Practice, which the principal legislation should make enforceable, investigating - and conciliating if possible - complaints of discrimination, and obtaining information, and serving notices requiring specified discrimination to cease. The commission would have the power itself to bring proceedings alleging a breach or breaches of the legislation and would be able to provide all necessary financial and professional support to individual complainants seeking redress by legal proceedings. It should not have to limit this support to test case litigation.

Those legal proceedings, with modifications, could reflect the present arrangements for race and sex equality cases. It is likely that, apart from access issues, many complaints would concern employment related discrimination and it would be sensible to extend the jurisdiction of the industrial tribunals to adjudicate such disputes, ensuring that on the panel will be someone appointed who is qualified specifically to represent the interests of disabled people. Litigation can be woefully protracted and therefore a rapid means of obtaining rulings on measures necessary to ensure fair recruitment practice and to achieve a 'reasonable accommodation' for an employee would be advantageous.

The tribunal's declaratory, compensatory and mandatory powers will be easily adaptable to the new jurisdiction. However the law is often reluctant to compensate adequately for injury to feelings. A *minimum* basic award should therefore be defined to compensate for this loss, to which can be added further compensation as the circumstances warrant it. For example, the tribunal should have the power in its award of compensation to include an 'exemplary' element if it judges that the employer's disregard for the law was a calculated and deliberate avoidance of its known obligations. It would be important for legal aid to be available to complainants before the tribunal, even though there is no precedent for this, since otherwise the newly-won rights of disabled people would be merely illusory. The only alternative would be to resource the new commission adequately, so that it can guarantee assistance whenever this is required. (The same argument could be made for extending legal aid or commission-funded legal support to individuals seeking redress for sex or race discrimination.) Appeals could be made, as now, to the Employment Appeal Tribunal and thereafter to the Court of Appeal.

Discrimination in other fields, such as contracts, services, housing, insurance, clubs and appointment to public offices, would properly be the province not of the industrial tribunal, but of the local county court with the disabled person's right to sue for compensation being defined either as a 'tort' or more simply a breach of statutory duty. It would probably help if a compulsory conciliation stage were to be required before proceedings could be commenced. Again, the new commission would be able to bring proceedings in its own name or provide legal representation for an individual litigant. When it comes to discrimination amounting to refusal of access, new institutions may be required. There is a case for establishing a specialised Architectural and Transportation Access Tribunal. This would adjudicate on disputes concerning the detailed regulations granting new rights of access to the built environment and to public transport. The tribunal should be so constituted as to have the power, particularly, to make declaratory and mandatory orders *prior* to the construction or use of a building or of facilities, if the complainant establishes that, on the basis of what is planned, discrimination will occur when that has happened. It would operate regionally rather like the Traffic Commissioners and would replace the Access Committee for England as far as the built environment was concerned. Local planning and transportation regulatory authorities, and organisations of and for disabled people, should also have the right to apply to the tribunal for an adjudication or order where necessary compensation awards should be available. There would be a right of appeal to the High Court from decisions of this tribunal.

Responsibility for enforcing measures relating to accessible telecommunications systems should rest in the first instance with the Office of Telecommunications (OFTEL). Whether or not this proves effective will depend not only on the detail of the law, but also on whether the Department of Trade and Industry is prepared to pay for adequate enforcement. Clearly, OFTEL can be required by law to investigate a complaint made to it, and to report on its findings to the Secretary of State. But the regulatory body should not be the final adjudicator. Therefore, an individual complainant who is dissatisfied with the findings or actions of OFTEL should have a statutory right of appeal to the Secretary of State. Thereafter judicial review would be available to challenge the Secretary of State's ruling.

Giving to individuals the right to pursue a complaint of discrimination may be the key to the effectiveness and vigour of these proposals. Creating new obligations but leaving enforcement in the hands of a government agency or agencies would seem to repeat the shortcomings of past approaches, which many consider to reflect condescension and paternalism, rather than a will to listen to and empower disabled people.

## **Conclusion**

'I wonder whether we should be doing disabled people, who have enough to contend with in life, a wrong if we were to invite them into such seas of uncharted and uncertain litigation.' These were the words of Hugh Rossi MP, speaking for the Government in the Second Reading on the Bill introduced by Donald Stewart MP in 1983. We have argued that the proposals set out in this paper would be far from unwelcome and uncertain. On the contrary, there is every chance that the provision of the twin civil rights - firstly to be protected from unfair discrimination and secondly to enjoy all reasonable access - would receive unqualified support from disabled people. Disability is ubiquitous and its effects can be devastating. In social policy, as in any political endeavour, risks have to be taken. Here, the argument that changes will come fast enough and extend far enough without the law's intervention appears increasingly untenable with every year that passes.

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## **PART TWO**

### **Introduction**

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3. Marlin Fitzwater, spokesperson for President Bush, quoted in *ibid.*
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8. The Community Charter of Fundamental Social Rights for Workers, May 1990, Commission of the European Community, Brussels.

## **1: Meanings and Remedies**

1. Examples are USA, Canada, Australia
2. This approach owes much to that adopted by Martin, M E, in *Accommodating the Handicapped: the meaning of discrimination under s.504 of the Rehabilitation Act*, *New York University Law Review*, (1980) vol. 55, pp. 881-906
3. See, for example, Fry, E, *An Equal Chance for Disabled People? A Study of Discrimination in Employment* (1986) The Spastics Society, London
4. Example reported to MIND in November 1990 and quoted at para. 20 House of Commons Session 1990-91. *Employment Committee First Report Disability and Employment* (1990) House of Commons Paper 35. HMSO, London
5. *Code of Good Practice on the Employment of Disabled People* (October 1984), p23. Manpower Services Commission, Sheffield
6. Such as the voluntary code mentioned in note (5) above
7. E.g., *Adaptations to Premises and Equipment Scheme* or *Job Introduction Scheme*, Department of Employment
8. E.g., *London Regional Transport Act 1984*, s.2(7)

## **2: English Law and the Right to Discriminate**

1. Registration is under the *Disabled Persons (Employment) Act 1944*
2. See 'The Fight against Nimbys', *Community Care*, 13 September, 1990
3. *Allen v Flood* [1898], 1 AC 172
4. *Race Relations Act 1976*
5. *Equal Pay Act 1970*; *Sex Discrimination Acts 1975 and 1986*
6. *Fair Employment (Northern Ireland) Acts 1976 and 1989*
7. *Tulk v Moxhay* (1848), 2 Ph. 774
8. *Law of Property Act 1925* (as amended by *Law of Property Act 1969*), s.84
9. *Re. Dr Barnardo's Home National Incorporated Association's Application* [1955] 7 P&CR 176

10. Ibid, p.179
11. [1990] The Times, 9 November
12. E.g., Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
13. Declaration on the Rights of Disabled Persons (1975)
14. This convention was ratified by the UK on 22 February 1951. In 1966 the Government accepted the jurisdiction of the European Court of Human Rights and the right of individual petition to the European Commission on Human Rights
15. R v Secretary of State for the Home Department, ex parte Brind and Others, [1991] The Times, 8 February. This is the case involving a challenge to the Government ban on media interviews with IRA members.
16. Speech of Mr. Rolv Ryssdal, President of European Court of Human Rights on 2 June 1990 at 7<sup>th</sup> International Colloquy on the European Convention on Human Rights, Copenhagen.
17. First introduced in the Industrial Relations Act 1971: now found in the Employment Protection (Consolidation) Act 1978. But cf. O'Brien v Prudential Assurance Co. Ltd [1979] IRLR 140 (EAT), for limitations of protection where employee failed to disclose past psychiatric history to the employer. This amounted to a perceived disability.
18. Access to Medical Reports Act 1988; Access to Health Records Act 1990.
19. London Regional Transport Act 1984, s.2(7)
20. Particularly the Civil Rights Act of 1964.
21. Rehabilitation of Offenders Act 1973.

### **3: North America, Australia and France**

1. 'Like the road to hell, its paved with good intentions. It also represents one of the cheapest, cruelest contricks in politics, namely the passing of grandiose sounding legislation that promises everything to everybody but fails to fund it.' McCay Vernon, Professor of Deaf Studies, Gaullaudet College, Washington DC. Quoted in 'American Dreams Come True', Social Work Today, 1 March 1990.
2. 45 CFR, pts 84 & 85 (1979), 34 CFR, 104.12
3. 442 US, 397 (1979), US Supreme Court Reports 60 L. Ed. 2d, p.980
4. 442 US, 397 at 412
5. Ibid.
6. E.g., Courts ordered participation by children with a disability in school activities or programmes; the adaptation of transportation systems; and employment for persons with a disability, particularly teachers in federally funded education.



7. *Camenisch v University of Texas* 616 F.2d (5<sup>th</sup> Cir. 1980), vacated as moot and remanded, 49 K.S.L.W. 4468 (US, Apr.28, 1981)
8. 107 S. Ct. 1123 (1987)
9. 104 Stat, 327, Pub. L. No. 101-336
10. 102 Stat. 1619 (1988) Pub. L. No. 100-430
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14. Americans with Disabilities Act, 1990 (ADA), sec. 102(a).
15. ADA, sec. 101(8)
16. ADA, sec 101(9)
17. ADA, sec. 101(9) (A) and (B)
18. ADA, sec. 102(b)(5)(A)
19. ADA, sec. 101(3) and sec. 103(b)
20. ADA, sec. 101(10)(B)
21. ADA, Title II, secs. 201-246
22. ADA, sec. 202
23. ADA, sec. 201 (2)
24. ADA, secs. 221-246
25. ADA, Title III
26. ADA, sec. 302
27. ADA, Title IV
28. ADA, sec. 508 (transvestism), sec. 510 (illegal drug users), sec. 511 (homosexuality and bisexuality), sec. 511(b) (other 'conditions').
29. ADA, sec. 501(c)
30. ADA, sec. 506(a)
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38. Human Rights Act (as amended) SM 1977, c.46, s 6(10)
39. Canadian Human Rights Act SC 1976-77, c.33, s. 20

40. Covering its activities during 1989
41. Referred to in 1989 Report
42. Ibid
43. Ibid
44. Ibid
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58. (1986) EOC 92-150
59. Ibid
60. (1984) EOC 92-101
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3. See note (8) to Introduction above
4. Com(90) 588 Final – SYN327, Brussels 28.2.91
5. Council Recommendation 86/379/EEC OJ No. L225/43
6. Croxen, M, Overview: Disability and Employment (1984) Commission of the European Communities: Luxembourg; Vogel-Polsky, E, The Economic Integration of the Disabled: An analysis of measures and trends in member States (1984) Commission of the European Communities: Luxembourg; Albeda, W, Disabled people and their Employment (1985) Commission of the European Communities: Luxembourg
7. Comm(88) 746 Final, 15 December 1988, Commission of the European Communities, Luxembourg
8. These words appear in the title to Com(90) 588 Final
9. Draft Directive Article 2(a)
10. Draft Directive, Preamble and Article 3
11. Draft Directive Article 3(b)
12. Draft Directive Article 8

#### 5: UK Government Policy

1. Nobody Wants You: 40 Cases of Discrimination at Work (July 1978) MIND: London
2. Can Disabled People Go Where You Go? (1979) Silver Jubilee Committee on Improving Access for Disabled People
3. Large, P. 'Taking Disabled People Seriously', Contact, Autumn 1982
4. See remarks of Rt Hon Alf Morris, MP in 2<sup>nd</sup> Reading Debate on Disablement (Prohibition of Unjustifiable Discrimination) Bill, 11 February, 1983 (Official Report, col 1266)
5. The Building (Fourth Amendment) Regulations 1985; the Building (Disabled People) Regulations 1987
6. A Review of the Quota Scheme for the Employment of Disabled People (1981) Manpower Services Commission
7. Summarised in 'Employment and Disability', Social Work Today, 14 April 1986
8. See note 5 to chapter 1, above
9. See note 5 to Introduction, above
10. Employment and Training for People with Disabilities, paras 5.14 and 5.15. These references total eighteen lines of text
11. Para 17, House of Commons Session 1990-91, Employment Committee. First Report Disability and Employment, H of C Paper 35
12. Employment and Training for People with Disabilities, para 5.23
13. Tim Eggar, MP, Junior Employment Minister, in Written Answer, 13 November 1989 (Official Report, col 56)
14. Ibid

15. Employment and Training People with Disabilities, para 8.5
16. Ibid. paragraph 8.7
17. See note 5 above

## **6: The Campaign for Law Reform**

1. House of Commons Official Report, 6 July 1982, cols 151-152
2. Ibid, 11 February 1983, cols 1242-1301
3. Ibid, 18 November 1983, cols 1089-1152
4. House of Lords Official Report, 16 October 1989, cols 762-765
5. Ibid, cols 662-671
6. House of Commons Session 1990-91. Paper No 35
7. House of Commons Official Report, 28 March 1991, cols 1145-1151#
8. Press Notice, 3 January 1991
9. Legislative Protection for Disabled People: Strategy Paper. Trades Union Congress (August 1989)
10. Opportunity Britain, The Labour Party, April 1991, p 42
11. See note 3 to chapter 1
12. An equal chance or no chance? (1990) The Spastics Society, London

## **7: A Proposal for Legislation**

1. See House of Commons speeches of Hugh Rossi MP and Tony Newtwn MP on 11 February and 18 November 1983, respectively, opposing anti-discrimination legislation. See note 2 and 3 to chapter 6 above.
2. 'Disabled lobby alleges small firms encouraged to sack sick' in The Guardian, 22 June 1991
3. The definition of 'Disability' from the Constitution of Disabled People's International, the global disability rights organization, is: 'Whereas disability has too long been defined as a problem of the individual and not the relationship between the individual and his/her environment, it is necessary to distinguish between: disability, the functional limitation within the individual caused by physical, mental or sensory impairment, and handicap, the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical or social barriers.'
4. 'HIV carrier sues firm in employment law test case', Observer, March 1990
5. Disability Living Allowance and Disability Working Allowance Act 1991, s.6(4)

## **Conclusion**

1. House of Commons Official Report, 11 February 1983, col 1276

Three quarters of people believe disabled people need caring for. This "benevolent prejudice" is perhaps the most prevalent. There are still many, well-meaning people, who believe disabled people need to be looked after, protected from the world, and supported in a way which means they are detached from mainstream society. The Special Educational Needs and Disability Green Paper set out far reaching changes to improve the support that young disabled people get from birth to adulthood. we think disabled people should be intitled to heating allowance the same as the elderly we also want a change in disabled badges we think that the photo should be displayed so as to make it easier to catch the people who abuse the system eg use other peoples badges there should be points on anyones licence they would soon stop then we. still do not have access to alot of shops dispite the law that came in they should be fined and made to give disabled access we are still treated as second class citizens we want to be treated as equals we want shops to do more about the disabled badge abuse eg (k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world, (l) Recognizing the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries The NHS is built on the principle that we are each equal in dignity and worth. It expresses our commitment to protect one another's right to life and to health, no matter who we are. We recognise that the NHS faces unprecedented pressures. We are concerned that the rights of disabled people, of all ages, as set out in the Human Rights Act (1998), the Mental Capacity Act (2005), the Adults with Incapacity (Scotland) Act (2000), the Equality Act (2010) and the United Nations Convention on the Rights of Persons with Disabilities (2006) and the Convention on the Rights of.