

# DISABILITY RIGHTS COMMISSION ACT 1999

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Section 1: The Disability Rights Commission*

This section establishes the DRC and abolishes the NDC.

*Subsection (2)* provides for the DRC to be funded by the Secretary of State (out of money provided by Parliament), though some of its expenses can be recovered out of charges under section 2(4) and by recovery of costs under section 8.

*Subsection (3)* introduces *Schedule 1* which sets out provisions relating to the constitution of the DRC; its members (the commissioners) and their tenure of office; the tenure of office of the chairman and the deputy chairman; remuneration, pensions etc of commissioners; appointment of staff; regulation of proceedings; powers of delegation; finance; and preparation of annual reports. In particular:

- paragraphs 2(2) and (3) require that a majority of the commissioners appointed to the DRC are disabled or persons who have had a disability, but provide flexibility with regard to the order of the first three appointments;
- paragraph 6(2) provides for either the chairman or a deputy chairman of the DRC to be a disabled person or a person who has had a disability;
- paragraphs 15 and 16 require the DRC to prepare annual accounts and reports and to submit them to the Secretary of State. The DRC is required to include within its annual report an account of work done with other organisations; and
- paragraph 17 requires the DRC to maintain a list of the organisations it has consulted in connection with its functions and to make the list publicly available.

The Act leaves the DRC free to set up offices wherever it thinks best to enable it to fulfil its functions, but administrative arrangements will be made to ensure that it operates at least one office in each of England, Scotland and Wales.

#### *Section 2: General functions*

*Subsection (1)* sets out the general duties of the DRC. Later in the Act the DRC is given a number of specific functions, but its general duties and powers, set out in *subsection (1)* and *subsection (2)*, will enable the DRC to undertake a wide range of activities, for example, to run conferences, seminars and workshops; to provide advice and assistance on making reasonable adjustments; and to devise guidance specifically for employers and service providers in particular sectors.

*Subsection (2)(a)* provides that the DRC can give advice to the Government on any aspect of the law or proposed changes to the law for any purpose connected with the elimination of discrimination and the performance of its other functions. In this context, *subsection (3)* requires the DRC to make proposals or give advice when asked to do so by the Government. *Subsections (2)* and *(3)* would enable advice to be sought from or

given by the DRC upon amendments to the DDA 1995, implementation of any relevant Directive issued by the European Union and of the Human Rights Act 1998, or upon legislation on such subjects as housing where the needs of disabled people might be relevant.

*Subsection (2)(b)* provides that the DRC can give advice to any Government agency or other public authority on the practical application of any law for any purpose connected with the performance of the DRC's functions.

*Subsection (2)(c)* provides that the DRC can carry out research and provide information and advice, again for any purpose connected with the performance of its functions. It also enables the DRC to support other people to undertake these activities.

*Subsection (4)* provides that the DRC can charge a fee for any facilities or services it makes available, such as attendance at a conference which it has arranged.

*Subsection (5)* provides (in keeping with the DDA 1995) for the DRC's work to embrace both disabled people and people who have had a disability. It also defines the types of discrimination which the DRC must work to eliminate as those set out in Parts II and III of the DDA 1995 which cover discrimination in the areas of:

- employment;
- the provision of goods, facilities and services; and
- the management and disposal (selling, letting etc) of premises.

### ***Section 3: Formal investigations***

This section gives the DRC the power to conduct formal investigations and requires it to do so if asked by the Secretary of State.

- A general investigation may be undertaken to find out what is happening in a particular sector of society or in relation to a particular kind of activity.
- A named party investigation may confine the investigation to the activities of one or more named persons (individuals or organisations). This is the form of investigation which must be used if the DRC wants to investigate a case where it has reason to believe that a person has committed or is committing an unlawful act (see paragraph 3 of Schedule 3). For the purposes of a named party investigation, an unlawful act means discrimination which is made unlawful by Part II (employment) or Part III (access to goods, services, facilities and premises) of the DDA 1995 or any other unlawful act which may be prescribed by the Secretary of State in regulations. Among acts which might be considered for inclusion in regulations are acts breaching section 6 of the Human Rights Act 1998 which affect disabled persons.
- A formal investigation may also be undertaken to monitor whether a person is complying with any requirements in a non-discrimination notice or in an action plan (see section 4), or with any undertakings in a statutory agreement (see section 5).

*Subsection (4)* enables the DRC to nominate one or more commissioners, with or without one or more additional commissioners, to conduct a formal investigation on its behalf and to delegate any of its functions in relation to the investigation to the persons nominated. It is for the DRC to make the decision to initiate an investigation. It is also for the DRC to decide on the extent of the delegation. This might include setting the terms of reference and making decisions about progressing at each of the statutory steps in the investigation process dealt with in sections 4 and 5 and Parts I, II and III of Schedule 3.

*Schedule 2* sets out provisions relating to the appointment, tenure of office, remuneration, pensions etc of additional commissioners appointed for a formal investigation. Additional commissioners may be appointed by the DRC with the approval of the Secretary of State.

Part I of *Schedule 3* sets out the detailed procedure to be followed in conducting a formal investigation. The key stages are:

- for every formal investigation, the DRC or the Secretary of State must draw up terms of reference. In the case of an investigation requested by the Secretary of State, the Secretary of State will draw up terms of reference after consulting the DRC. In all other cases, the terms of reference will be drawn up by the DRC itself (paragraphs 2(1) and 2(2));
- the DRC must publish or give notice of the holding of an investigation. Where the DRC has reason to believe that a person may have committed, or may be committing, an unlawful act, it is required to inform the person in advance of its intention to investigate the matter and to offer him the opportunity to make representations (paragraph 3(4));
- the DRC may serve a notice on any person requiring him to give information orally or in writing or to produce documents. If the investigation is into unlawful discrimination by a named person and it is that person who has failed to comply with the notice, the DRC may serve the notice on its own initiative. If the information or documents required are in the hands of others the DRC must first obtain authorisation from the Secretary of State. Where a person fails to comply with a notice requiring information or documents, or where the DRC has reasonable cause to believe that he intends not to comply with it, an application may be made to a county court or the sheriff for an order requiring compliance (paragraphs 4 and 5); and
- the DRC must prepare and publish a report of its findings in any formal investigation. When it is able to do so consistently with its duties and the object of the report, the DRC must exclude any prejudicial material about an individual's private or business affairs (paragraph 7).

#### ***Section 4: Non-discrimination notices***

When the DRC becomes satisfied in the course of a formal investigation that a person is committing, or has committed, an act of unlawful discrimination, this section gives it the power to issue a non-discrimination notice giving details of the unlawful act and requiring the person to cease committing that act and not to act in the same way in the future.

Such notices may be issued in respect of any act made unlawful by Part II (employment) or Part III (access to goods, services, facilities and premises) of the DDA 1995. *Subsection (5)* contains a power for the Secretary of State to extend the scope of the provision by making regulations prescribing that it is to apply to any other unlawful act. Among acts which might be considered for inclusion in regulations are acts breaching section 6 of the Human Rights Act 1998 which affect disabled persons.

*Subsection (2)* gives the DRC the power to recommend changes which it considers the person needs to make to address the unlawful act. Such recommendations would not be binding.

Part II of Schedule 3 sets out detailed arrangements connected with issuing a non-discrimination notice. In particular:

- paragraph 8 requires the DRC to give the person concerned notice that it is considering issuing a non-discrimination notice and to take account of any representations made as a result before a non-discrimination notice is issued;
- paragraph 10 enables the person concerned to appeal against any requirement imposed by a non-discrimination notice, after it has been issued, to an employment tribunal or to a county/sheriff court;
- paragraph 12 enables the DRC to apply to the court for an order to enforce compliance with a non-discrimination notice if the notice has become final (see paragraph 11) and the

recipient of the notice fails to comply with it or the DRC has reasonable cause to believe that he intends not to comply with it; and

- paragraph 13 requires the DRC to maintain a register of non-discrimination notices which have become final and to make it publicly available. It also requires the DRC to put a permanent note on the public register when the requirement in a non-discrimination notice to produce an adequate action plan has been met.

*Subsection (3)* gives the DRC the power to require a person to produce an adequate action plan which would address the unlawful act. An action plan is legally binding once final and its implementation is enforceable by the DRC through the courts.

Part III of Schedule 3 sets out detailed procedures for agreeing an action plan. The time limits which apply to the stages will be set by the Secretary of State by regulations. The key aspects of the process are:

- paragraph 16 allows the DRC to comment on a draft action plan prepared by the person concerned and to provide further recommendations to him if it considers the action plan to be inadequate to address any unlawful acts identified in a non-discrimination notice. If the DRC remains dissatisfied with the adequacy of the action plan, paragraph 17(1) allows it to make an application to the courts to determine the adequacy of the action plan and it allows the courts to issue an order requiring the person to revise his proposals and serve an adequate action plan on the DRC;
- paragraphs 15 and 17(2) give the DRC the power to apply to a county court or sheriff for an order if a person who is required to produce an action plan either fails to do so at all, or fails to produce a revised action plan. Paragraph 23 relates to the enforcement of these court orders. It enables the DRC to apply to the courts for repeated fines in the case of a person who persistently fails to comply with an order issued under paragraphs 15 and 17(2);
- paragraph 20 allows the DRC to monitor the implementation of an action plan for up to five years after it has become final. If during that time the DRC considers that the person has failed to carry out any action that is specified in his action plan, it may apply to a county court or sheriff for an order requiring compliance; and
- paragraph 21 allows the DRC to obtain information so that it can verify whether the person has taken the action specified in the action plan.

Paragraph 26 of Schedule 3 gives the Secretary of State the power to make regulations supplementing Part I (formal investigations) or Part II (non-discrimination notices) of Schedule 3, or amending Part III (action plans) of Schedule 3. This may include, for example, regulations specifying any time limits to apply to the various stages through which both the investigation process and the issue of a non-discrimination notice pass.

### ***Section 5: Agreements in lieu of enforcement action***

Many of the powers which this Act gives to the DRC are similar to powers which the Sex Discrimination Act 1975 and the Race Relations Act 1976 give to the EOC and the CRE. But there is no equivalent under those Acts for the agreements for which this section provides. It gives the DRC the power to enter into a legally binding written agreement with a person if it has reason to believe that he may have committed, or may be committing, an unlawful act. The unlawful acts covered in this section are the same as those described in section 4 in relation to non-discrimination notices and, in common with section 4, section 5 contains a power for the Secretary of State to extend the scope of the provision by making regulations prescribing other unlawful acts. Among acts which might be considered for inclusion in regulations are acts breaching section 6 of the Human Rights Act 1998 which affect disabled persons.

*Subsection (2)* provides that when a statutory agreement is entered into the DRC will agree not to take any relevant enforcement action in relation to the unlawful act in question. In return, the named person will undertake not to commit any further

unlawful acts of the same kind and to take any action that is specified in the agreement. These undertakings are binding and enforceable through the courts (for enforcement by the DRC, see *subsection (8)* and paragraph 23 of Schedule 3). Under *subsection (4)* “relevant enforcement action” means beginning or continuing a formal investigation or taking further steps towards issuing a non-discrimination notice.

*Subsection (6)* provides for an agreement to include supplementary matters, such as action that may be taken in the event of a breakdown of the agreement or the circumstances in which either party may terminate the agreement. It also allows the parties to consent to vary or revoke the agreement.

*Subsection (7)* allows the Secretary of State to make regulations authorising other terms to be included in an agreement which are not to be enforceable by an order under *subsection (8)*. Those terms might relate to agreeing to take action which would be considered to be good practice.

### ***Section 6: Persistent discrimination***

This section gives the DRC the power to seek an injunction or, in Scotland, interdict, against a person, if it believes that without that injunction or interdict, the person would commit further unlawful acts. This would apply to a person against whom a non-discrimination notice had become final or who had had a court or tribunal judgement against him under section 8 or section 25 of the DDA 1995. The injunction could cover further unlawful acts and would not be confined to the acts which had been the subject of the original non-discrimination notice or court or tribunal hearing. Similar provisions already exist for the EOC and the CRE.

*Subsection 6(4)(b)* allows the Secretary of State through regulations, to extend beyond section 8 and section 25 of the DDA 1995, the range of unlawful action for which the DRC can apply for an injunction or interdict to prevent persistent discrimination.

### ***Section 7: Assistance in relation to proceedings***

This section gives the DRC the power to give assistance to individuals in relation to actual or potential legal proceedings. *Subsection (1)(a)* allows the DRC to give assistance in respect of all proceedings brought under Part II (employment) and Part III (access to goods, facilities, services and premises) of the DDA 1995. Such disputes can include cases where a non-disabled person alleges he has been victimised for a reason set out in section 55 of that Act. The DDA 1995 makes it unlawful for a person to be victimised for:

- bringing, or giving evidence or information in connection with, proceedings under the Act;
- doing anything else under the Act; or
- alleging that someone has contravened the Act.

*Subsection (1)(b)* gives the Secretary of State a power to extend by regulations the list of proceedings in relation to which the DRC can provide assistance under this section.

*Subsection (2)* sets out criteria for the DRC to take into account when deciding whether to give assistance to an applicant in relation to proceedings.

*Subsection (3)* deals with the range of assistance the DRC may provide.

*Subsection (5)* enables the DRC to delegate to its employees any of its functions under this section.



### ***Section 8: Recovery of expenses of providing assistance***

When a person who has been assisted by the DRC becomes entitled to have relevant costs repaid to him by another party, for example under a court order or as part of a settlement, this section entitles the DRC to recover its expenses out of the amount repaid.

### ***Section 9: Codes of practice***

At present the Secretary of State and the NDC share the task of preparing and issuing codes of practice. This section inserts a new section 53A in the DDA 1995 to replace sections 51 to 54 of that Act. The result is that the Secretary of State will no longer have the power to issue or revise codes of practice containing practical guidance in the field of employment or to ask the NDC to prepare proposals for a code on any matter. Instead the DRC will be able to replace codes issued under the old section 51 or 53 with its own codes.

*Section 53A(1) and (6)* enable the DRC to issue and revise codes of practice in the fields of employment and access to goods, facilities, services and premises and *Section 53A(2)* requires the DRC to do so when asked by the Secretary of State. The codes of practice can give practical guidance upon the provisions contained in Part II and Part III of the DDA 1995. *Section 53A(8)* requires a court or tribunal to take into account any provision of a code which appears to it to be relevant to the question in hand but makes it clear that failure to observe any provision of a code does not of itself make a person liable to any proceedings.

*Section 53A(3)* requires the DRC to publish for consultation proposals for any code of practice. Where the Commission is revising part of an existing code, it need not consult about parts which are not being revised (*Section 53A(7)*).

*Section 53A(4)* prevents the DRC from issuing a code of practice unless it has been approved first by the Secretary of State and then laid before Parliament.

### ***Section 10: Conciliation of disputes under Part III of 1995 Act***

This section amends section 28 of the DDA 1995. The Secretary of State will no longer have the power to make arrangements for the provision of advice and assistance to promote the settlement of disputes arising under Part III of the DDA 1995. That power will be replaced by the DRC's power to make arrangements for the provision of conciliation services in this area.

The section provides that the DRC should have regard to the desirability of securing (so far as reasonably practicable) that conciliation services are available to all those who want them for disputes arising under Part III of the DDA 1995. The section does not make conciliation mandatory or rule out other alternative dispute resolution methods. Nor does it prevent an individual taking steps in proceedings at the same time as or before conciliation.

The DRC may make arrangements for the provision of conciliation services with an individual conciliator or with a body which will secure that others fulfil that function. It will not be able to provide these services itself through its members or employees (*subsection (3)*).

The DRC will be required to ensure that any arrangements made include safeguards to prevent the disclosure to members or employees of the DRC of information which is communicated to a person providing conciliation services, except by consent or for the purpose of monitoring the arrangements (*subsection (4)*). Any information communicated during the consultation process will not be admissible in evidence in any proceedings without the consent of the person who communicated it. Subsections (3) and (4) will help to maintain the independence of the conciliation service from the DRC's function of assisting parties.

Paragraph 3 of Schedule 4 amends paragraph 6(2) of Schedule 3 of the DDA 1995. The result is that, as has been the case with conciliation arranged by the Secretary of State, the period within which proceedings can be taken (normally 6 months) will be extended by 2 months where an individual considering taking proceedings under Part III of the DDA 1995 consults an organisation appointed under the new section 28 of the DDA 1995.

The Advisory, Conciliation and Arbitration Service (ACAS) will continue to provide a conciliation service in the field of employment.

***Section 11: Procedure for amending s.7(1) of the 1995 Act***

This section amends subsections (3) to (10) of section 7 of the DDA 1995 (exemption for small businesses). Section 7(2) of that Act enables the Secretary of State by order to amend the threshold exempting small businesses from Part II of the Act (the current threshold is 15). The effect of the amendment is that the requirement for the Secretary of State to conduct a review before making an order to amend the threshold will be replaced by a requirement for the Secretary of State to consult the DRC and, as at present, employer and disability organisations. Before any changes are made, the Secretary of State will be required to publish a summary of the views expressed to him in consultations.

***Section 12: Regulations***

This section provides for any regulations made under the Act to be subject to Parliamentary scrutiny through the negative resolution procedure. This means that the regulations will be shown to Parliament but only be debated if a Member or a Peer seeks such a debate.

***Section 16: Short title, commencement and extent***

This section provides for provisions of the Act to be brought into force by one or more commencement orders. In accordance with usual practice, such orders will not need to be shown to Parliament.