Enforcing rights through mediation

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The DRC has pioneered the use of mediation[17] in resolving discrimination claims relating to goods and services and to education, under Parts 3 and 4 of the DDA. With the new Commission for Equality and Human Rights due to start its work in a few months, it is a good time to consider whether the innovative model of mediation used in DDA cases should be used in a wider range of cases involving discrimination and human rights.

A new approach to vindicating rights

The argument that rights enforcement requires litigation is a powerful one, particularly in the context of human

17 The process used is 'mediation', although the legislation refers to 'conciliation', a term that is often used to refer to very different types of processes. For more on the debate about differences between 'conciliation' and 'mediation', see www.adrnow.org.uk.

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rights and discrimination. Such cases often involve a discrepancy in power and resources between the parties, especially where an individual is challenging a public authority. They also raise issues of importance to society: a public refutation of discrimination or abuse may be needed, there may be wider ramifications or there may be a need to prevent discrimination affecting another individual or group of individuals. In other words, justice should be seen to be done.

There are also powerful arguments in favour of using alternatives to litigation for enforcing rights. Individuals might be seeking a practical remedy rather than a legal determination. Not every case that raises issues of discrimination or human rights is a test case or has a public interest element.[18] Litigation can sideline claimants, who find they play a peripheral role in determining the process and outcomes of their case once the litigation bandwagon takes over. And, as discussed further below, alternatives to litigation, such as mediation, deliver far-reaching systemic change.

The wariness about using mediation in rights-based claims appears to be based on a misapprehension that mediation is about compromise, 'a confidential carve-up borne of an unseemly horse-trade'.[19] But it need not be, indeed should not be, so.

18 See Frances Butler, 'Mediation: A Tool for Mainstreaming Human Rights?', The British Institute of Human Rights, Evidence to the Joint Committee on Human Rights for the Parliamentary Inquiry on a Human Rights Commission, July 2001.

19 Michael Supperstone QC, Daniel Stilitz and Clive Sheldon, 'ADR and Public Law', *Public Law*, Summer 2006, pp. 299–319.

Working within a legal framework

Looking back on the past six years of providing independent mediation to resolve DDA claims, it is clear there are both causes for celebration and lessons to learn. A cause for celebration is the success that mediation has had in making rights enforcement accessible and with wide-ranging systemic changes. The independent Disability Conciliation Services or DCS (there have been two since 2000) have dealt with more than 500 cases referred from the DRC and, of these, more than 80 per cent have achieved a full and final legal settlement of the DDA claim. Although this figure is clearly a tip of the iceberg in terms of the everyday experiences of disabled people in accessing goods and services – and the potential claims arising from those – it is much higher than the number of such claims proceeding to court.[20]

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The use of mediation in DDA cases is a prime example of the law and an alternative to the law working together, in complement. Mediation takes place only after the DRC has identified the issues raised in the claim and determined whether they might lead to an important test case. Alternatively, the case might be one that should not go to court because of the potential risk of an adverse outcome that could set an unfortunate precedent from a disability rights perspective. In those cases, the focus is not on a legal determination but on redress for the individual and procedural changes by the respondent.

20 The courts do not classify DDA claims as such so it is impossible to know accurately how many such claims have been taken to court. But we know that the DRC has funded less than 200 DDA Parts 3 and 4 claims since 2000, and many of these have settled either pre-issue or pre-hearing.

One of the lessons is that more needs to be done to raise awareness of the mediation option and how it fits with litigation and the dispute resolution landscape overall – in particular, engaging more actively with those who advise potential claimants. This is key so that individuals are making fully-informed choices about the route they take when seeking redress. DDA mediation takes place 'in the shadow of the law', in the sense that the legal right is protected by an extension of the deadline for issuing and parties understand that an unsettled claim can proceed to court. It is also in the law's shadow in the sense that court judgments can have an effect on parties' perceptions of the legal strength or weakness of their claim.

Rights-based mediation

What the DCS has developed is known as 'rights-based' mediation. The model requires mediators to be well informed about the DDA and to remind the parties of the rights and responsibilities it confers. The role of the mediators is not to promote settlement at any cost and it is very much the claimant's decision, at the end of the mediation, as to whether or not the case has settled. Claimants retain the option to go to court if the case is not settled.

Rights-based mediation encourages parties to exchange information and experiences, with the result that they can leave the mediation session with a greater understanding and awareness of the issues. This greater understanding can erode the attitudes and prejudices that give rise to discriminatory practice, much of which comes from ignorance rather than wilful discrimination.

Mediation cannot deliver a determination of discrimination, and there is no requirement that the parties accept that there has been a breach of the DDA. Indeed, there is often a vast grey area of unknowns in this respect – and the beauty of mediation is that it

allows the parties to move away from the strict legal interpretation of events into a discussion of how what happened affected those involved and how it can be put right. This can be a powerful experience for both parties.

Not every claim is suitable for mediation and not always because a legal ruling is needed. In some cases, the claimant wants a legal determination of discrimination; in others, the respondent is unable or unwilling to address the issues with the claimant in the open and frank way that mediation requires. It is, and must remain, a voluntary option; there is no point in directing people to mediate – at best this will be an exercise in frustration for all parties, but at worst it can exacerbate the injury felt by the claimant by adding insult.

'The range of remedies available in mediation is wide and varied'

In my experience, this can happen when a respondent attends mediation but insists on addressing the issue as one of customer service failure rather than discrimination. Thankfully, it does not happen often. I have been surprised at the openness of some very large organisations and their willingness to accept responsibility for discriminatory behaviour, to provide redress for the claimant and to make wide-ranging (and sometimes very costly) changes. I have also been impressed by the very small respondents – the corner shops and family-owned restaurants – who take on board what they hear at mediation and appreciate the opportunity it gives to learn more about how they should treat their service users and how they can keep their custom.

Equally, I have been frustrated at the refusal of some respondents to engage with the claimant; I have found some higher education institutions and public authorities to be among the most defensive and slow to consider change.