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Web Accessibility and the DDA

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Abstract

There are many legal issues currently raised by the growth in e-commerce and e-learning, but one of the least discussed is that of Web accessibility. As a result of the increased use of proprietary technologies and a failure to follow guidelines when designing Web sites a large percentage of the Internet remains inaccessible to many parts of the disabled community. As a result, the effect has been to exclude a significant section of the population from fully benefiting and participating in the increased use and reliance on e-commerce and e-learning.

The purpose of this paper is to explore, in light of events and experiences elsewhere in the world, whether and to what extent the disability rights legislation in the UK might apply in such a scenario. It also considers the effect of the recent Special Educational Needs and Disability Act 2001 on the previously excluded area of education.

Keywords: Disability Discrimination Act 1995, E-commerce, disability discrimination, Web accessibility, WAI, Internet, education, distance learning, SOCOG v Maguire, Special Educational Needs and Disability Act 2001.

Preface

> *'The power of the Internet is in its universality. Access by everyone regardless of disability is an essential aspect.' Tim Berners-Lee*

The issue of web accessibility and the law is one that seems to arouse comments which would appear to suggest some knowledge of the subject. Yet, when asked, very few people actually understand what it involves, let alone the legal implications. Despite recent developments in other countries, this problem of apparent ignorance seems set to continue. It is therefore the purpose of this dissertation to explore to what extent the current provisions of UK law under the Disability Discrimination Act 1995 can be adapted to deal with this question, in light of experiences and application of the law in the United States and Australia.

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The text is based on the law as the present writer saw it at March 12 2001 when the original paper was submitted, with minor additions and amendments made on June 27 2001.

1. What is Web Accessibility?

1.1 The Evolution of the Web

The World Wide Web (WWW or Web) is comprised of millions of pages stored around the world on servers composed in a relatively simple and straightforward language known as Hyper-Text Mark-up Language (HTML) - the standards for which are now set by the World Wide Web Consortium (W3C). This most famous branch of the Internet was developed in 1992 by the British physicist Tim Berners-Lee whilst working at the CERN research centre in Switzerland. Since then, the growth of the Internet, and the Web in particular, has been phenomenal to the extent that in November 2000 there were estimated to be around 407 million users worldwide. Having started off as a purely text-based system, advances in HTML and the introduction of proprietary technologies and plug-ins have allowed Web pages to become heavily influenced in graphics and become true multimedia experiences.

Whilst this may allow a designer to make their site ever more dazzling and colourful, there is also a downside. When Berners-Lee designed the concept he intended it to be truly accessible to everybody:

The power of the Internet is in its universality. Access by everyone regardless of disability is an essential aspect

The original design of the Internet was for a platform-independent system for sharing information that could be accessed from any computer - as long as it could run a simple browser program that could interpret HTML. However, as these new technologies have been introduced, access has been limited to ‘those that have’ and this is leaving out a small, but significant community.

1.2 Disability on the Net

Disability can lead to several problems when accessing the Internet. Aside from visual impairments, hearing, dyslexia and motor problems can also cause a person to encounter difficulties when using a computer. These problems can usually be overcome via the use of assistive technologies. For instance, a visually impaired person can use a text-based browser such as Lynx and a screen reader to ‘speak’ the text that appears on the screen or a Braille display to feel the words. On the other hand, captioning of video and audio clips can allow a user to read what is being said, in much the same way as subtitles on television. It is also possible for someone who suffers from motor problems to use the keyboard or special input device to navigate his way around the screen without having to use a mouse.

However, as a result of the previously mentioned plug-ins, and ignorance of these issues on the part of many designers to correctly use HTML, the technologies that can be used to enable accessibility are increasingly unable to correctly interpret the pages accessed. Despite the acknowledgement of these problems by the W3C and its Web Accessibility

Initiative (WAI) - which has culminated in the release of guidelines for designers - awareness of the problem within the industry has remained very low. In a survey by PC World.com in the US, out of a poll of more than 30 Web sites only a handful admitted an interest in the issue, and far less had actually taken any action. This figure, which includes not just e-commerce operations, but also essential government Websites, shows how a large proportion of the disabled community could be needlessly isolated and left behind by the Internet generation.

Perhaps the biggest irony here is that the disabled community has potentially the most to reap from embracing the Internet. For instance, home shopping services such as those offered by Tesco could prove invaluable to a blind housebound person unable to visit the supermarket. Yet until recently, Tesco's site remained inaccessible to many users due to its failure to follow the W3C guidelines. However, in May this year an accessible version of the site, Tesco Access, was introduced and has the honour of being the first Web site to receive the Royal National Institute for the Blind's 'See It Right Accessible Website' logo. On the previous site a visually impaired person using a screen reader would be told that their browser is inadequate and thus would be unable to navigate the site - a clear breach of the guidelines.

The problems with the old Tesco site were primarily caused by the use of frames (where the window is split into separate 'frames', for example to allow a navigation bar). Even Government's new Citizen's Portal, UK Online does not escape, as although it offers a text only version, the search engine that it uses is in frames, thus defeating the previous good work.

The lack of 'ALT' tags (textual descriptions that are displayed instead of an image on a text-based browser) can also cause problems, especially where that image is used to link another page - by using graphical representation, it is necessary to include alternative text so that those using a text based browser or a screen reader know where the link leads to. The use of an 'image map' (where there is just one large graphic on the page, but different areas to click on) often causes problems but, by correctly using ALT tags can easily be made accessible.

Other areas where accessibility problems can arise include the use of portable document files (PDFs), tables, colour schemes, incorrectly coded links, plug-ins such as Javascript and Flash to name but a few. Even a correctly coded Web site which does not use frames and includes ALT tags on all its images could be inaccessible to certain people if it has yellow text on a white background or only includes the 'skip intro' button for the Flash movie within the movie itself. Finally, video clips of interviews or news Webcasts will be meaningless to someone who cannot hear, unless there are subtitles or captions.

1.3 Commercial Benefits

The issue of accessibility does not just affect users with disabilities. By alienating those without the latest technology, Web sites are also alienating those who access the Web using older systems or software and those using devices such as Wireless Application Protocol (WAP) enabled mobile phones and Personal Digital Assistants (PDAs).

Likewise, it is also common to find that experienced computer users find keyboard shortcuts quicker to use (something which a person with motor impairments may have to do out of necessity) and this too can also be restricted by poor design practice.

There is therefore also a compelling economic argument for ensuring accessibility in that an accessible site means more people can visit and use the service. The disabled community alone in the UK is estimated to possess a spending power of £33 billion and adding WAP and PDA users will increase this figure further. In rudimentary terms, more visitors equate to more potential customers and thus a clear economic advantage can be derived from producing an accessible Web site.

2. Could the Act Apply to Web Accessibility?

2.1 The Act and the Obligations

The Disability Discrimination Bill was introduced to the House by the then Minister for Social Security and Disabled People, William Hague. This followed earlier backbench attempts to introduce similar rights for disabled people to those contained in the Sex Discrimination and Race Relations legislation and led to the passing of the Disability Discrimination Act 1995 (DDA). The right conferred under Part III (Discrimination in Other Areas) was described as

A universal, all embracing right of non-discrimination against disabled people...applicable to all providers of goods, facilities and services to the general public, with the specific exclusions of transport and education [and] will not only prohibit discriminatory behaviour but also require positive action which is reasonable and readily achievable to overcome the physical and communication barriers that impede disabled people's access

Thus it can be seen that the Act is *prima facie* fairly wide-ranging in its application and the introduction of Part III of the Act took place on October 1 1999. This was accompanied with the 'flesh' in the form of a Code of Practice ('the Code') and regulations - echoing the approach taken with the introduction of Part II, which deals with employment, some years earlier. The Code's primary function is to provide guidance for both service providers and disabled people and whilst not an authoritative statement of the law, there is a requirement that the court consider any part of the Code which seems relevant. It is also designed to prevent illegal action in the first place by suggesting and encouraging good practice and early or alternative dispute resolution. The Act has also led to the creation of the Disability Rights Commission (DRC). The DRC will play a critical role in drawing up future codes of practice and advising parties of their rights as well as generally encouraging the advancement of disability rights.

Under s.19, there are four ways in which a provider of services can discriminate against a disabled person, three of which are relevant to the issue of Web accessibility:

- in refusing to provide, or deliberately not providing, to the disabled person any

service which he provides, or is prepared to provide, to members of the public;

- in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service;
- in the standard of service which he provides to the disabled person or the manner in which he provides it to him;

Under the Act, anyone who is considered a disabled person can claim protection from alleged discrimination. The definition of 'disability' is set out under ss.1-2 and sch.1-2 of the Act and is defined as 'someone who has a physical or mental impairment which has an effect on his or her ability to carry out normal day-to-day activities'. This impairment must be substantial, adverse and long term. It is therefore clear that the majority of disabilities related with Web accessibility (i.e. hearing and visual impairments, motor problems and mental impairments) come within the scope of the Act. It could even be argued that someone who has learning difficulties, and therefore struggles to read long and complicated passages of text, may in certain circumstances be offered protection.

2.2 E-Commerce Sites and Online Services

Before considering the finer points of the Act, it should be noted that by the nature of the Act's drafting in 1995 reference to modern technology is vague. Whilst the Code does make a passing reference to accessible Web sites as a possible auxiliary aid or service, there is no mention of a Web site as an example of a service. We are therefore left unsure as to whether a Web site can be a service in itself, as opposed to just a possible auxiliary for a telesales ordering service. Indeed, this is further confused by the DTI/DCMS' recent Communications White paper which mentions that the Government 'support the work undertaken by the [W3C] on making the Web accessible to people with disabilities' but gives no mention to even the possibility of a legal requirement under the DDA.

In considering whether a Web site could be considered under the Act it is interesting to consider the American case of *Carparts* brought under the Americans with Disabilities Act of 1990 (the ADA). On appeal the Court of Appeals for the First Circuit held that 'public accommodations' (the equivalent of a service provider under ADA) are not limited to physical structures. It was held that

it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result

Following on from the *rationale* of this case it is proposed that public accommodations under the ADA naturally now extend to included Web sites. In the absence of any UK authority on this matter, it is submitted that this reasoning could be persuasive and applied to the provision of services in the UK. It would otherwise seem anomalous to differentiate between a customer who visits a travel agent and another who wishes to use its online booking facility.

It is also irrelevant whether the service is provided free of charge or for a fee - thus even free-use Web sites for promotional use or advice purposes may come within the remit of 'a service'. This is given further strength by the *SOCOG* case, concerning the official Sydney Olympics Web site - which will be considered in more detail later, when the Commission said that

> [t]he respondent in creating its own website sought to include in it a considerable body of information to which any person could have access. The provision of the Website was a *service* relating to the provision by the respondent of information relating to the largest and most significant entertainment or recreation event in the history of this country [emphasis added]

It is further suggested by the present writer that in light of the material on this site - i.e. timetables, news and results - that it would be impossible to consider this site to be purely promotional. It would be difficult to see what SOCOG were promoting, given that tickets sold out in advance and results are by their very nature retrospective and thus impossible to quantify as 'promotional' information for what was a one-off event.

2.3 Product versus 'Information Service'

The closest the DDA comes to mentioning the Internet is under s.19(3)(b) and (c) when access to and use of 'means of communication' and 'information services' are given as examples of services. Reference to *Hansard* for enlightenment as to what is intended by these terms is of little help and perhaps confuses the reader even further: these have been included to 'reflect the importance of communication and information services to disabled people'. Whilst this may suggest that online information services such as railway timetables and perhaps even Internet Chat facilities will come within the Act, this is complicated by further reference to *Hansard*. The Act only applies to the *provision* of goods, facilities and services, rather than the actual product itself. Lord Mackay (the Minister of State) further qualified this in the Lords when he stated that

This is the case even where the product could be regarded as 'information'; for example, newspapers, books and television programmes. There will therefore be no requirement for those items to be made available in an accessible format.

There is therefore a question as to how an online version of a newspaper would be interpreted. Is it a product or an information service? And if it is an information service, does that mean that the information requested is the product and hence does not require to be produced in an accessible format? The present writer would argue that to differentiate between Web sites and attempt to categorise them into products and services (information or otherwise) would just lead the law into a further muddle. Problems would inevitably be encountered with a Web site which for instance offered information and online shopping - the latter it is argued would undoubtedly fall under the 'access to goods' category. It seems in this area at least that the Act is in hindsight ill prepared for the advent of the Internet.

In reality, it may be best to ignore the words of Lord Mackay. Further interpretation of

'television programmes' may lead to a situation such as that in the *Shetland Times* case. Here a Web site was shoehorned into the definition of a 'cable broadcast' for the purposes of the Copyright, Designs and Patents Act 1988, and following a similar argument might lead to the inference that the Internet is a product. Although perhaps correct in principle, it is submitted that the way in which the result was achieved sets a dangerous precedent when dealing with the Internet and if anything reflects the problems experienced when trying to accommodate it within existing statutory provisions. As such, further advancement of a connection between television and the Internet would be wholly unsatisfactory.

Whilst it is admitted that printed media does indeed fall outside the scope of the Act by virtue of it being a product, the present writer would argue that by its nature an online newspaper should be treated differently. This is based on the wider services offered by such Web sites and the problems that, as suggested above, would be caused by any different treatment. It could also be argued that by the nature of its evolution throughout a given day, and the fact that the information is provided to the user upon demand, it is a service. It is up to the individual user to access the information and it is only when it appears upon his screen that it becomes a 'product'.

3. The Duties under ss.19(1)(a) and (c)

3.1 Unreasonable Treatment

Having established that a Web site would probably come within the scope of a service under the Act, the next step is to consider whether the provision of an inaccessible site constitutes discrimination. Discrimination is defined as taking place under s.20. Under s.20(1), discrimination occurs if for a reason related to his disability the service provider treats a disabled person less favourably than a non-disabled person and he cannot justify this treatment. This less favourable treatment must be related to the disabled person's disability and the Code gives the example of a football supporter with cerebral palsy who is the only visiting fan refused access to a football stadium, where the club can offer no other justification.

Therefore, to analogise this with a Web site, if the only people who are being refused access to the Web site are disabled and it is because of the design of the site that this is happening, it is argued that this less favourable treatment will amount to discrimination.

However, it is also noted that in the Code that there is a difference between bad treatment and less favourable treatment. Thus if all the visiting fans are refused access to the football stadium then the person with cerebral palsy is being treated no differently to his contemporaries and there is no incidence of discrimination. This is of course subject to the proviso that the reason for turning back all the fans was not to do with there being one with cerebral palsy. Following this argument, it is possible to suggest that since it is merely people who, for instance, use older software that are being denied access and therefore discrimination is not taking place. The fact that disabled people are amongst this number is irrelevant.

The present writer would argue this point by suggesting that whilst this is true, it should be remembered that the Code is not legally authoritative and thus need not be accepted by the court as an accurate statement of the law. In the employment tribunal case of *McDonald v Ealing BC* brought under Part II of the Act it was held on appeal that the tribunal had 'not erred in its approach by failing to have regard to the Code of Practice' and need not refer to it in its reasoning.

Therefore, it would appear that the Code is open to interpretation by the courts. Following on from this, it is contended that as most people who encounter accessibility problems *are* disabled, it would be unreasonable to follow the example in para 3.5 regarding 'bad treatment' to the letter. Whilst this may be acceptable where the disabled person forms the minority of the group discriminated against, it would be unjust to apply the same reasoning to a group where the disabled make up the majority as this would be effective or *de facto* discrimination.

3.2 Duty under s.19(1)(a)

It is suggested that the duty under s.19(1)(a) not to refuse to provide or deliberately not provide a service will include the case where a service provider has considered accessibility when creating the site but has decided not to make the site accessible so as to allow it to 'look better'. Here it would be clear that a breach of the Act would be taking place.

However, it is submitted that this would be as far as s.19(1)(a) could be applied by virtue of it applying to a 'refusal' or deliberate non provision - both of which are positive actions. Thus the service provider would have to at least consider the provision and then decided against it to discriminate under this ground. An example here would be the US clothing retailer Gap who are quoted as saying 'we're aware of the technologies but have no plans to implement them,' when asked why they were denying access to their e-commerce facility by disabled people. This quite clearly demonstrates a straightforward deliberate or positive non-provision.

3.3 Duty under s.19(1)(c)

The duty under s.19(1)(c) is to not to discriminate in the standard of service or manner in which it is offered to a disabled person An interesting example of this is given in the Code: a bookshop that offers an ordering service, but refuses to order a large print book for a visually impaired customer. It is submitted that this could be analogous to a retailer who offers an online shopping service available outside normal opening hours of its 'bricks and mortar' store but does not make his site accessible to disabled people. Following s.19(1)(c), this would be a case of the disabled person being offered a lower standard of service as they would be unable to use the Internet facility.

It is therefore proposed that under this section the provision of Tesco's home shopping service, which offers the additional service of delivery of your groceries to your house,

potentially discriminates against disabled people and as such potentially constitutes a breach of the Act. Likewise, online banking facilities in the UK offer higher rates of interest. On Radio 4's *Money Box* programme, the Chief Executive of Internet bank Egg was asked by a blind customer, who was unaware of the accessibility guidelines, how she could use the service. The response was that she would have to find someone to help her use the service or use the telephone-based service, which offers a lower rate of interest for savings - and thus clearly a lower standard of service.

3.4 Justification

Under s.20(3) of the Act a service provider can justify his actions. Justification can be shown under four grounds, the first two applying to both a refusal of service and provision of a lower standard of service:

- health and safety
- incapacity to contract
- that the service provider would otherwise be unable to provide a service to the public (refusal of service only)
- that the treatment was required in order to allow the service to be provided (lower standard of service only)

It is difficult to envisage where these grounds could be claimed in relation to Web accessibility. There is clearly no health and safety ground relevant here and likewise the visually impaired and deaf are perfectly capable of contracting. Whilst it is probably true that this is not the case in relation to certain mental impairments it would seem that the scope of this justification is narrow.

Again in relation to the third ground, an accessible site does not make the Web site inaccessible to non-impaired users. In fact, as stated above the site will become accessible to a far wider community than the disabled - for instance those using handheld or portable browsers. If properly implemented, an accessible site should still be able to be as graphically impressive as a non-accessible site. This ties in with the fourth category - it would be impossible to argue that an online shopping service could only operate if the corporation's logo was animated by way of a Flash animation upon accessing the site. The present writer can think of no technologies that are required as part of an e-commerce facility that would by default lead to an inaccessible site - all can be surmounted.

Having said this, the Code states that 'the lawfulness of what a service provider does or fails to do will be judged by what it knew (or could reasonably have known), what it did and why it did it **at the time** of the alleged discriminatory act' [the Code's emphasis]. Thus it would be possible for a service provider to claim that they were unaware that their site was inaccessible and thus unaware that a duty existed under the act. However, unlike the earlier code, following the case of *Rose v Bouchet* there is now a requirement on the service provider to make enquiries, seek advice and come to a considered position in light of the circumstances.

On top of this subjective test there is however an objective test where the court considers whether the view of the service provider was reasonably held. Thus it is submitted that if the service provider failed to take advice on legal issues affecting a Web presence the court could consider that it ought to have.

On the other hand, if advice had been sought and accessibility had been omitted from this advice the court could consider that the view was reasonable because the service provider had made efforts and it was through no fault of his own that he held the wrong opinion. However, it is submitted that once the service provider was made aware of the issue, i.e. when the disabled person first raised the complaint, the duty would then exist. Whilst this may avoid the payment of damages for harm before this point, the pursuer could still ask the court to make a decree ordering compliance. Like many of the propositions put forward in this paper, we will have to wait for the issue to be considered by a court of law before any definite presumptions can be made**.**

4. 'Reasonable Adjustments' under s.21

An alternative definition of 'disability' is given under s.20(2). This section states that a service provider will discriminate against a disabled person if he fails to comply with a duty imposed under s.21 and cannot show that this failure is justified. If the failure to comply with these duties leads to the service being impossible or unreasonably difficult to use by a disabled person then discrimination will take place under s.19(1)(b). In relation to s.19(1)(b) duty to the Code suggests an interpretation for 'unreasonably difficult' as including consideration to time, inconvenience, discomfort and effort which may be considered unreasonable by other people.

The duties imposed under s.21 apply to the provision of 'reasonable adjustments'. Therefore the next question to be considered is that of what a reasonable adjustment is. As an inaccessible Web site would be unreasonably difficult or impossible to use, it is clear that the s.21 duties must be considered. Thus it must be asked whether it would be a reasonable adjustment to modify a Web site so that it becomes accessible. At this stage it is of relevance to consider developments elsewhere in the world as to the approaches taken there when considering such questions.

4.1 Maguire v Socog

4.1.1 The Facts

During the research for this dissertation an important hearing took place in front of Australia's Human Rights and Equal Opportunities Commission (HREOC). The plaintiff, Bruce Maguire, who has been blind since birth, brought an action under the Commonwealth Disability Discrimination Act 1992 (Cth DDA) alleging that the Sydney Organising Committee for the Olympic Games' (SOCOG) Web site was inaccessible and thus infringing the Act.

Maguire, a highly experienced computer user who accesses the Web via a refreshable

Braille display and a Web browser, originally brought the action in June 1999 along with a complaint regarding the failure to provide ticket booklets in Braille and a failure to provide Braille versions of the souvenir programme. The issue regarding the ticket books was the subject of a Directions Conference on 27 and 28 September and the Commission ruled in favour of the plaintiff. However, resolution of the other two issues was unsuccessful and subsequently adjourned to a later date. This took place on 27 March 2000 and it was set down that the inquiry into the allegedly inaccessible Web site would take place on 3 and 4 July 2000.

On 29 April 2000, the complainant delivered a statement in compliance with directions on 27 March asserting that although some changes had been made to the site it was still inaccessible on 17 April 2000 and requested that the Commission order that:

- SOCOG include ALT text on all images and image map links on the Web site;
- SOCOG ensure access from the Schedule page to the Index of Sports; and
- that SOCOG ensure access to the Results Tables on the Web site during the Olympic Games

In its defence, the respondent stated that the lack of ALT tags had been cured by further changes to the site and that access to the Index of Sports had always been possible by entering the Uniform Resource Locator (URL) for each sport directly into the browser. For the third matter - the results tables - the respondent's witnesses argued that compliance would cause unjustifiable hardship.

The statutory provisions under the Australian Act are very similar to those of the UK DDA. Under s.24 it is unlawful for a person who provides goods, facilities or services to discriminate on the grounds of disability by:

- refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to another person; or
- in the manner in which the first mentioned person provides the other person with those goods or services or makes those facilities available to the other person

The complainant alleged that as the service is only accessible in full by a fully sighted person, this is discrimination on the grounds of a disability and thus the provision of an inaccessible Web site is a breach of s.24.

In response, SOCOG claimed that to comply with the complainant's request they would encounter unjustifiable hardship under s.24(2). This is defined under s.11 and is determined by considering:

- the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and

- the effect of the disability of a person concerned; and
- the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- in the case of the provision of services, or the making available of facilities - an action plan given to the Commission under section 64.

4.1.2 The Commission's Findings

The Commission firstly dealt with the question of whether an act of discrimination under the Act had taken place. In doing so, the Commission referred to the W3C Content Accessibility Guidelines and the respondent's argument on 18 June 1999 that by 5 May 1999 when they were released the site had already undergone 'substantial implementation' and planning. Thus, to retrospectively apply these guidelines unjustifiable hardship would be caused. The Commission noted however that the respondent's site had been, and at the time of the hearing, still was under continual development and alteration and this could witnessed by the provision of ALT text - which IBM expected to be completed by 8 August.

The Commission further noted that in relation to the Index of Sports, the respondent's assertion that one could enter the URL directly for each sport went against the way that the Internet worked - i.e. by using links to avoid having to know the correct URL for each page. Indeed, the URLs did not even follow a coherent structure and were essentially in code. For instance, 'canoe/kayak slalom' was /sports/CS/home.html whereas 'canoe/kayak sprint' had the URL /sports/CF/home.html - yet this method of accessing the site was actually advanced by SOCOG and its IT partner IBM as realistic alternative.

Thus on the question of discrimination, the Commission held that this had indeed taken place in reference to all three areas that the complainant had asked to be remedied. It further held that through the act of creating a Web site, SOCOG was 'intending to offer a service to the public' - that is the provision of a wide body of information related to the Games. As a result of the way in which this information had been made available, whilst it was perfectly accessible to a sighted person, the information was not available to a blind person, on a account of the latter's disability. It thus followed that the blind person was treated less favourably and thus there was a clear breach of the Act.

The Honourable William Carter QC went on to add further sociological reasons to his findings by stating that the Olympic Games were unique event of great cultural significance. Thus

[i]t is a primary consideration that as far as possible all Australians should have the capacity to share equally in an event of this significance; an alternative source which makes available the same amount or body of information is simply not available. And finally, it is clear that the complainant is not nor is he able to comply with the relevant requirement or condition

With regard to the second issue of unjustified hardship under s.11 the Commissioner

considered this a question of fact between the assessments of the work involved by either sides expert witnesses. There were also large differences between the views of the witnesses called by SOCOG, Mr Brand and Mr Smeal (consultants based in Sydney) and those of the complainant, Ms Triviranus (an academic and W3C chair) and Mr Worthington (an architect of the Commonwealth Government's Internet and Web strategy). Whilst Ms Treviranus and Mr Worthington suggested that the cost involved in compliance would be modest and take a small team four weeks, the defendants argued that it would require an additional Au $2.2m of infrastructure and 368 working days. In giving this evidence, Ms Treviranus further suggested that a fully accessible site could have been achieved within 1% of the total time taken to create the site had the issue been considered from the start.

In favouring the complainant's evidence, the commission noted that the defendant's witnesses had been engaged only days prior to the hearing - when it was realised that a case for defence *would* have to be formed - and as such limited access to both the site and information regarding it. By contrast the complainant's witnesses had been engaged in the issue for several months. The experience and authority carried by the complainant's witnesses was also held to be highly persuasive.

The Commission went on to consider these facts in light of s.11. Whilst the potential benefit of compliance with the Act would be of immense benefit to the complainant, the detriment incurred by the defendant would be moderate and if the issue had been considered in the planning stages negligible.

Thus, it was held that the claim of unjustifiable hardship was unfounded. Further comment was made to the defendant's constant procrastination by attempting to delay or stop the proceedings at every possible opportunity by suppressing information about the site on the grounds that it was 'highly commercially sensitive information'. The Commission felt that this effectively acted as a bar against the use of the unjustifiable expenditure defence. Had compliance been carried out when the complaint was first made in June 1999, the time taken to implement the changes would be irrelevant and likewise the costs absorbed over a greater period compared to those one month before the Games. Therefore, even if Mr Worthington and Ms Treviranus's evidence not been accepted, the defence would still have been rejected.

4.1.3 The Relevance to the UK DDA

As has already been stated, the provisions of the UK DDA and the Cth DDA are very similar and it is thus submitted that the *SOCOG* case is of potentially huge relevance when considering Web accessibility under the DDA. It is clear from the case that expert witnesses considered compliance costs to be modest even for a Web site the size of SOCOG's. Interestingly, one factor suggested in the Code as relevant when considering whether an adjustment will be reasonable is the size and financial resources of the company concerned. The issue of financial backing was also mentioned in *SOCOG* as increasing the expectancy on the organisation to make the necessary adjustments.

The duties that are imposed under s.21, include a duty to take all steps that are reasonable

to change any practice, policy or procedure which makes it 'impossible or unreasonably difficult for disabled persons to make use of a service.' Likewise, under s.21(2(d) there is a requirement to provide a reasonable alternative method for a physical feature (which comes into force in 2004) and under s.21(4) to provide an auxiliary aid or service if this would help the disabled person to use the service.

It is proposed that Web accessibility could come under several of these duties. Firstly, if a service provider is considering (re)developing a Web site and has a policy regarding the style and content of its Web site which inhibits accessibility, it would probably be reasonable to adjust this. Likewise, 'practice' is defined in the Code as 'what a service provider actually does' and thus in the case of a proposed site or redevelopment it might be considered a reasonable adjustment for this to be carried out with accessibility in mind.

More significant is the duty to take reasonable steps to provide auxiliary aids and services. Under s.21(4), as mentioned, the Code of Practice does suggest that the provision of accessible sites may be reasonable, however, this it should be remembered, is not an authoritative statement of the law. An auxiliary aid or service can take the form of various aids and examples of audio guides on tape or a sign language service are given in the Code.

Therefore, as the code suggests, the provision of an accessible Web site would come within the scope of a reasonable adjustment by way of an auxiliary aid or service. However, these reasonable adjustments need only be taken if they can be termed as reasonable steps to take in the particular circumstances. There is also provision for the service provider to justify not providing the reasonable adjustment which is the same as that for s.19(1)(a) and (c) as explained above.

In interpreting 'reasonable steps' the Code suggests factors that that might affect this include:

- the type of service on offer
- the effect of the disability on the individual disabled person
- the extent to which it is practicable for the service provider to take the steps
- the financial and other costs of making the adjustment
- the extent of any disruption which taking the steps would cause
- the extent of the service provider's financial and other resources
- the amount of any resources already spent on making adjustments
- the availability of financial or other assistance

In light of *SOCOG* it is proposed that it would be a reasonable adjustment to upgrade an inaccessible Web site so that it became accessible. It is clear from the expert testimonies that the cost of compliance is modest, despite SOCOG's protests. It is also indicated that the fact the site was still being developed after the introduction of the W3C accessibility guidelines means that there is a higher expectation for compliance.

Interestingly, this last point should make little difference to the issue of reasonable steps

under the UK DDA. The Code states that

> [s]ervice providers should not wait until a disabled person wants to use a service which they provide before they give consideration to their duty to make reasonable adjustments…They should anticipate the requirements of disabled people and the adjustments that may have to be made for them.

It is also clear that the duty is a continuing obligation and requires the service provider to continually review their duties. Specifically, 'technological developments may provide new or better solutions to the problems of inaccessible services.'

It is therefore argued that even if a site is designed prior to the introduction of the W3C guidelines, of which strong emphasis was placed in *SOCOG*, the evolving nature of the duty means that these should be considered as and when they are introduced and updated.

Another argument that may be offered in defence by a service provider is that in light of the service he offers it is not reasonable to make adjustments for disabled persons. The most obvious example here is that of an online car retailer such as jamjar.com. Here, the service provider might argue that as it sells cars, and visually impaired people cannot by law drive a car, it would not be reasonable to expect him to make an adjustment to allow blind people to use its service. However, it is easy to discount this argument by remembering that there could be everyday cases where a blind person is required to buy a car. For instance, a company's managing director might ask his personal assistant, who is blind, to make arrangements for a business trip. This could quite conceivably require the blind person to book the MD a hire car from an online rental agency. By considering situations like this it is submitted that there will be precious few Web based services that will be able to claim that the adjustment is not reasonable.

It is also clear from texts such as Jakob Nielsen's *Designing Web Usability* and the expert testimonies in *SOCOG* that the process of making a site accessible neither causes disruption or is impractical. Indeed, it could be argued that at the rate that corporate Web sites are redesigned and made-over that it would be perfectly reasonable to expect accessibility to be included in this - such is the continuing duty to keep abreast with possible reasonable adjustments.

A final argument may be used to suggest that a Web site is a 'physical feature'. Under SI 1999/1191 regulation 3, a physical feature is designated to include 'any fixtures, fittings, furnishings, furniture, equipment or materials'. A Web server is therefore certainly a physical feature under the Act and it may therefore be argued that the Web site held on it is therefore a physical feature. However, this argument could easily be defeated as an 'accessible Web site' is included under 'auxiliary aids and services' in the Code and under Regulation 4 of SI 1999/1191 permanent alterations to physical features are not included within the definition of auxiliary aids and services, therefore excluding this possibility.

5. Remedies under the Act and Negligence

Assuming that a dispute cannot be resolved without resorting to legal proceedings, as advocated by the Code, the remedies available to the pursuer in a successful action under Part III of the Act are set out in s.25 of the Act. Under this section, a claim 'may be made the subject of civil proceedings in the same way as any other claim in tort (or in Scotland) in reparation for breach of statutory duty.' These remedies are those available in a civil action in the High court/Court of Session, despite the action being requirement that the action be brought in the County Court/Sheriff Court. It is proposed to limit discussion in this chapter to the remedies available under Scots law. Thus, damages can be claimed for injury to feelings and financial loss but also, and more significantly in the case of Web Accessibility, the power to grant an interdict/decree *ad factum praestandum* exists.

5.1 Decree ad factum praestandum

The remedy of granting a decree *ad factum praestandum* is one that can be used to order the defender who is under a legal duty to carry out or perform an act to do so. This duty includes statutory duties, thus this remedy can be used to order the defender to comply with the Act - i.e. not to discriminate - by enforcing him to make his Web site accessible. However, due to the punitive sanctions available for non-compliance the decree sought must be suitably specific. Indeed, the case of *Fleming & Ferguson v Paisley Magistrates* could be considered particularly analogous to the instance of Web Accessibility. The pursuer in this case was attempting to enforce an alleged obligation that required the defender to maintain a navigable channel. In considering the application for a decree, Lord President Cooper observed

> [w]hen the pursuers use in their conclusion the word 'navigable,' they must surely indicate by what the channel is to be navigated, for a specification of the beam and length of the ships to be accommodated is just as important for determining the dimensions of the channel and the radius of the curves as the draught. These are not idle questions. An answer is indispensable to the remedy sought.

It is thus submitted that a simple declaration for a Web site to be 'made accessible' would be too vague in the sense that a channel be 'navigable' was held to be - accessible by whom? And to what extent? Whilst the duty under the Act is one to the whole disabled community, only the person who is discriminated against can bring an action under the DDA and thus any remedies sought must be specific to him and the alleged discrimination against him. Therefore, to return to our maritime analogy, the remedy sought would have to be to allow the complainer's boat to navigate the channel - rather than all boats. Thus the remedy must specifically fix the pursuer's accessibility problem - although if this is such that it fixes all accessibility problems then that is an added bonus. It is here that it is useful to turn to the W3C WAI guidelines for help and inspiration. Under these guidelines, there are three levels of conformity:

- Priority 1or 'A' - which is described as things that *must* be done
- Priority 2 or 'AA' - things which *should* be done
- Priority 3 or 'AAA' which is things that *may* be done

In the *SOCOG* case much reference is made to the WAI guidelines in general and indeed this set a worldwide precedent as this was the first time that they had been considered to have any formal standing in a court of law. In evidence from Ms Treviranus reference is made as to how Level A compliance could be reached in four weeks and indeed it would appear that Level A is the accepted in standard required for compliance with the Cth DDA from the dialogue of the Commissioner. This is backed up by a public quote from the Deputy Commissioner, Graeme Innes, who states that

> the view of the Commission is that if you comply with [the W3C guidelines] you'll be complying with the Disability Discrimination Act

In America, there have been no Web Accessibility cases that have come to court under the ADA. This has in the main been due to the general informal acceptance of a requirement for accessibility, which has led to any disputes that have occurred being settled out of court. However amendments to s.508 of the Rehabilitation Act 1973 have finally come into force which require all Federal agencies ensure that their electronic and information technology is accessible to people with disabilities. This naturally includes Web sites and on December 21 2000 standards drawn up by the Access Board were released. These standards, which must be complied with by all Web sites created or revised after June 21 2001, are broadly similar to and based on the W3C WAI WCAG guidelines Level A and thus introduce an accessibility requirement to Federal agencies' Web sites.

It is therefore submitted that the level of compliance required by the courts in the United States for ADA compliance, which requires 'effective communication' would be the same as that for section 508. This notion is based on the influence that the Rehabilitation Act has previously played in interpreting the ADA in respect to other issues and there is no reason to assume that the courts will take a different view here.

Likewise, the European Union seems to be advocating a similar standard. Under the *e*Europe Initiative launched in December 1999, the Commission has committed the Member States to 'make all public web sites and their content accessible to people with disabilities' through the adoption of WAI Guidelines by the end of 2001. Although this is a non-legal requirement and only applies to public sector Web sites, there is also a commitment to review legislation and standards - which could see the initiative extended to outside the public sector. Despite the Member States' compliance being required by the end of 2001, it is not clear as to which level of the WAI Guidelines the Commission is advocating. However, in its recent Communications White Paper (*supra* note32 above) at para 7.6.3 the UK Government, although making no mention of the Commission's initiative, states that 'our core guidance will recommend that our online services are at minimum WAI - A compliant.'

Even if the Commission were to recommend Level AA, it is submitted that Level A would be a realistic and clear standard for the Courts to set as an initial benchmark for DDA compliance. This would hence be suitably specific for a decree *ad factum praestandum*. The guidelines in themselves are very comprehensive and although

complex should leave the defender in no doubt as to what his duties are under the decree.

5.2 Damages

Although no damages were awarded as part of the original determination, SOCOG's subsequent failure to comply with the determination of the Commission in time for the start of the Games led to a hearing for an award of damages being held on November 6 2000. At this hearing, the Commissioner considered the award of pecuniary damages under several grounds - in respect of injuries for hurt and feeling; legal expenses and aggravated damages.

In considering the loss or damage suffered by the complainant reference was given to his expectations at being able to access the information and the dismissive attitude of such a prestigious body as the respondent when these concerns were raised. The suggestion that he find a sighted person to aid his access to the Web site was held to be 'wholly inconsistent with his own expectations.'

The Commission further held that the public statements made by the respondent after the hearing and its subsequent non-compliance further aggravated the hurt caused. Thus, after concluding that the purpose here was not to punish 'an apparently financially resourceful respondent', but rather to award a figure that was reasonable under the circumstances, a figure of Au $20,000 was awarded.

Whilst this figure is of limited use when considering a UK DDA challenge as a result of the aggravated element, the reasoning behind the award is. Under Scots law, the successful pursuer is entitled to damages for pain and suffering (or solatium) and any derivative economic loss. Thus, it is open to the court to award a figure based on the former taking into account anything which reduces the quality of the pursuers life or leads to a deprivation of amenity and hurt to feelings. It is outwith the scope of this dissertation to propose how this would be interpreted in the present case other than to say that there are many instances where Web Accessibility can lead to a loss of amenity. For instance, the use of a home shopping service for a visually impaired person where he can 'hear' what is on the shelf and have it delivered without having to go through the trauma of visiting the supermarket or arrange for someone to visit on his behalf could be invaluable.

In terms of derivative economic loss there is a potential for a claim too. For instance, the interest rates offered by Internet banks like Egg and Cahoot compare very favourably to those available on the High Street and indeed this forms a key part of the formers' advertising. Thus the demonstration of any derivative economic loss here would be relatively straightforward to calculate. Likewise, the savings offered by other online services such as shopping - especially for cars - would also be of relevance when calculating the damages that should be awarded for breach of the Act.

It should be added however that the present writer feels, in the case of a continuing service at least, that it will be a court order ordering compliance with the statutory duty that will be the remedy most sought by potential claimants. Whilst an award of damages is satisfying in a monetary sense, the purpose of the Act is surely to instigate a change in

the psyche of service providers towards the disabled community and thus command improvements in the quality and enjoyment of life of the people discriminated against. It is submitted that this can only be achieved by a successful test case that forces a change in attitude.

5.3 Breach of Contract and a Negligence Claim

In most cases the defender in an action under the DDA will not actually be the one who created in the Web site. In many cases this work will have been contracted out to a specialised Web design agency in view of the expertise offered by the agency. In some cases, if the operation of the Web site is contracted out then there may be a case of joint liability. However, it is more likely that once the design phase has been completed that the contracting company maintains the Web site.

As well as any losses as a result of damages paid out following a successful action, a defender will also incur compliance costs and as a result of negative publicity may, depending on their public standing, incur a substantial loss of reputation as a result. For instance, if a blue chip company like Tesco or Virgin was to lose an action then as a company with a fairly good public image the prospect of front-page headlines describing the company as discriminatory against disabled people could be devastating. There is therefore a possible claim under breach of contract and/or delict.

Under Scots law, there is a history of case law concerning implied terms in contract with regard to quality of work. It is implied that a service provider will undertake to exercise the ordinary standard of care and workmanship of a practitioner of that trade when carrying out his service. The case of *Jameson v Simon* further suggests that work should be carried out with reasonable care with regard for the circumstances which, as MacBryde comments, means that the court may hold that the legal standard of care is *higher* than that generally accepted within the profession.

This is similar to the opinions of institutional writers who state that a builder has an implied contractual obligation to use the skill and care of a competent workman and to execute the work in good and workmanlike fashion. There is further common law authority that suggests that a contractor is obliged to follow recognised standards and practices when providing his services

It is submitted that there is a definite correlation between the services of a builder and that of a Web site designer - especially in light of the potential legal requirements of the DDA. Therefore it is argued there is an implied contractual duty upon Web designers to carry out their work in a competent manner using ‘the skill and care of a competent workman.’ Further, the obligation to follow ‘recognised standards and practices’ would surely include a requirement to design the Web site with WAI Guidelines compliance. Even if a court were to consider that the trade standards did not include compliance, a strong argument is presented by *Jameson v Simon* to impose a higher standard.

Whilst a breach of contract claim would allow the pursuer to claim damages, these can only compensate for losses actually encountered as a result of the breach. The losses

sought must also satisfy tests of causation and remoteness. Thus the damages should relate only to losses that were a necessary consequence of failure or those that are could be considered as reasonably arising from the said breach. Whilst damages payments, compliance costs and loss of business reputation can all be said to stem from a potential breach, the question regarding remoteness is a little more complicated.

With regard to compliance costs, it is argued that these satisfy the remoteness test by reason of their being a direct consequence of a failure of statutory duty and the requirement that this failure be fixed. With regard to damages paid out and legal expenses incurred as a result of a successful action against the service provider the problem here is that a duty to mitigate exists. Thus the pursuer in an action for damages must take steps to limit the losses that he incurs and only those losses that could not be prevented can be claimed. It is therefore submitted that the defender in an action under the DDA may be better advised to accept liability and fix the Web site before the case comes to court and an order for damages is made, rather than trying to fight the case and claim justification of its action under s.20(3). This is on the basis that the defender to the damages claim could argue that the pursuer was unlikely to succeed in the discrimination case, following the arguments set out above, and that it was reasonably foreseeable that the action would fail. As such, losses should have been mitigated by accepting liability. The difference with compliance costs is that the latter *cannot* be mitigated as they will still arise even if the action is settled out of court.

Finally, there is much doubt about whether loss of business reputation can be claimed under breach of contract. Walker suggests that this may be possible, however the cases cited appear to suggest that this head of damage is too remote to claim. The present writer feels that this is something of an anomaly as there is a definite causal chain resulting from the breach and it is as a result of the trust and confidence placed in the contractor that the service provider will incur a loss of reputation. Further, the implied terms regarding standards and competence should surely enhance the grounds for this potentially large claim. The cases cited by Walker both date from last century and earlier this century when, it is argued business reputation was no where near as important as it is in the media orientated 21st century. In *Millar v Bellvale Chemical Co,* which concerned the supply of defective golf balls, it is arguable that the loss of business reputation was only amongst those who bought faulty balls. In the case of an online service operated by a large corporation it is argued that the causal link is far greater and it would be difficult to argue that the losses could be considered too remote. Indeed, the greater the standing of the company, the greater the potential losses.

An alternative approach for a claim for damages lies in delict. It could be argued that there is a duty of care owed by the contractor and thus a claim in negligence. However, this would then lead to a claim for pure economic loss, a subject of much debate as to its competence in Scots law, which unfortunately remains outside the scope of this dissertation. There is also a question as to whether, as in England, there can even be a claim in delict when a contract exists.

6. Education

6.1 Current Provisions

Although education and 'certain ancillary services' are excluded from the ambit of the DDA by virtue of s.19(5)(a), this does not mean that educational establishments are completely exempt from the Act. For instance, Part III will still apply to the provision of many of the non-educational services provided by such organisations. These would include the letting of school halls to a parent for fundraising, catering and welfare facilities *et cetera*, university promotional material, corporate conference facilities and other commercial services. As student Unions are probably private clubs they are probably exempt to a certain extent from the Act under s.19(2)(b), although again hiring out of the venue and commercial services would be covered.

Thus, in consideration of Web Accessibility, it would appear probable that the 'public' aspects of a university's Web site would be covered by the Act. Although there is no case law on this, the present writer would support this claim by reference to the ad-hoc system that applies to transport. The actual provision of transport itself is outwith the Act, however services such as a buffet in a ferry terminal and other infrastructure services are covered.

Advancing this argument it would seem clear that educational establishments at present *do* have an obligation, at least in certain areas, similar to that of more general service providers. It could be further argued that this duty probably extends to the majority of pages on a university Web site - since only those that *are* actually solely used by present students would definitely be exempted by the Act. Thus, information for prospective students, press information, information regarding commercial services offered and recruitment pages may all need to be provided in an accessible form.

The issue of library services and online catalogues is a little less clear cut. Under SI 1996/1836, it is stated that 'the provision of facilities for research' is outwith the Act. Therefore, although many university libraries are available for use by the general public, it would seem under a conventional reading of the Statutory Instrument that research carried out by such persons would not be covered by the Act.

However, what about leisure reading? It is hard to see how SI 1996/1836 could be interpreted to include leisure reading by a student, member of staff or the public even though 'research' is not defined. Considering a dictionary definition of both 'research' and 'leisure', it would appear that the former is a 'systematic investigation to establish the facts' whereas the latter is 'when one has free time.' Thus it would seem difficult to deny a difference between leisure and research. Indeed, even if it was held that the difference only existed for a student, rather than the public, it is submitted that in practice it would be impossible to differentiate between these as if accessibility is required for one group then by default it will be provided to all groups.

It is therefore the present writer's opinion that it would be possible for either a student or member of the public to make a claim regarding library catalogue accessibility on the grounds that they were being unreasonably discriminated against with regard to their access to leisure reading services. It would also seem that by the very nature of library

catalogues being relatively simplistic in their design and operation, and thus relatively simple to make accessible, that there would be no grounds to justify the discrimination.

It may even be considered the Internet/email provision within a university is itself an ancillary service and thus require the provider itself to provide an auxiliary aid *et cetera* as mentioned under the Act. For instance the provision of email services is arguably more a leisure facility than an academic provision and a trip to any university computer lab would back this claim up. Whilst email is rightly playing an increasing role in department-to-student communication, and vice-versa, on average the majority of usage is probably leisure-related and thus the provision could be considered a *de facto* ancillary service. In a similar vein, it is also suggested that the majority of Internet usage by students is not in the least connected to academic research or education and could thus be considered ancillary.

Whilst auxiliary aids and services do not include those which necessitate a permanent change to 'the physical fabric of premises, fixtures fittings, furnishings, furniture, equipment and materials' it is argued that the installation of, for instance, a screen reader would not be included in this. There have already been several incidents in the United States on the issue of Internet access in colleges and this has led to the issuing of Department of Education, Office of Civil Rights letters, which have the effect of being legally binding.

6.2 The SEN and Disability Act 2001

In reality these arguments may be of limited consequence. The Special Educational Needs and Disability Act 2001 has recently received Royal assent and has the effect of conferring similar rights upon disabled students as those available to disabled people against service providers under Part III of the 1995 Act. It is generally considered that the reason behind the original exemption of education was a cost based measure - in that the Government would ultimately be the left to pick up the tab for upgrading the infrastructure. It was also stated by Lord Henley during a debate in the Lords on the subject that

The practical effects of inclusion would be to undermine the strategic role that the further and higher education funding councils already play.. [this] would lead to unplanned and piecemeal arrangements causing scarce resources in the sector to be wasted.

However, the change in Government in 1997 led to proposals for civil rights legislation and the education exemption has been noticed as a peculiarity. Thus after earlier consultation the current Bill was introduced to Parliament through the Queens Speech last December.

Under Part II of the Act, educational establishments will have duties similar to those under the DDA to:

- not treat disabled students or pupils less favourably without justification; and

- make reasonable adjustments so that students or pupils are not at a substantial disadvantage compared to those who are not disabled (with an exception for schools regarding the removal or alteration of physical features or with regard to the provision of auxiliary aids and services)

As with the 1995 Act, there will also be a new code of practice prepared by the Disability Rights Commission.

In an age where the Internet is increasingly being used in Higher education as a teaching tool it would appear that accessibility issues might well arise under the 2001 Act. For instance, distance learning projects such as the proposed 'e-University' will rely heavily on Internet/Intranet resources and as such will have to be available in an accessible form if disabled students are to be able to learn this way. Indeed, as with online shopping, it could be argued that disabled students stand the most to gain from such a proposed development if properly initiated.

Likewise, online projects such as that used by the Glasgow Graduate School of Law are also of increasing importance. The Ardcalloch project is a virtual community that allows Diploma of Legal Practice students to take part in assessed projects based entirely online using web-based office/mail facilities, Internet telephone and virtual negotiation. However, any disabled student would clearly be unable to take part in this course if accessibility was not kept in mind during its design. Indeed, as the system specifically requires Internet Explorer 4.0x or above and a set screen resolution it is clear that accessibility problems will exist.

Under s.26 of the 2001 Act, a new s.28R will be inserted under the 1995 Act which will provide that it will be 'unlawful for the [higher/further education institution] to discriminate against a disabled student in the student services it provides, or offers. Under the new s.28S discrimination will occur if the body treats him less favourably and cannot justify the treatment or the disabled student is placed at a substantial disadvantage in relation to the services offered.

The justification and reasonableness requirements under the new s.28T are likewise similar to those that exist under the DDA and therefore revolve mainly around monetary concerns. As stated in relation to the DDA and in *SOCOG,* compliance costs would be modest and indeed any system set up post-WAI guidelines would, it is submitted, be negligent if it were to ignore these.

It can therefore be seen that the proposed new provisions are broadly similar to those that exist under the current DDA. As stated, there is no express exclusion of the provision of auxiliary aids and services, unlike the provisions for schools under Part II chapter I of the Act. Thus it would seem clear that in its present standing the Act will introduce a clear obligation on higher/further education institutions to provide auxiliary aids along the lines of speech readers or Braille pads when providing Internet access. It is also submitted that this duty will also mean that teaching methods such as the Ardcalloch project and the proposed e-University will have to be made accessible to disabled students. Anything less would surely constitute less favourable treatment.

7. Conclusion

In conclusion, it is hoped that it has been demonstrated that the accessibility of Web sites provided by service providers does fall within Part III of the DDA and compliance with the W3C guidelines, Level A being the suggested initial legal standard, would be deemed a reasonable adjustment. The developments in Australia and, to a certain extent, the United States have been critical in allowing for a foundation for this argument, but considering the provisions of the Act it seems clear to the present writer that a disabled person could bring an action under the Act.

Whilst this may seem relatively straightforward on paper, in practice there are greater problems. The nature of the Act and in particular the Code of practice is to encourage dispute resolution before a case reaches court. Thus, like the in US, it may be that the courts are never given a chance to make an express judgment on the issue. Whilst in the recent case of *Hooks v Okbridge Inc* the Justice Department submitted a friend of the court brief arguing that the ADA applied to Web sites, the appeal was rejected on different grounds. However, at least a definite position has now been set out in the US.

This attempt to avoid legal action combined with a lack of knowledge about disability rights in the disabled community means that many sites will carry on, often in ignorance, to be inaccessible. There have already been calls for the Act to be reformed by the Institute of Employment Rights because it was felt many employers are ignorant to the provisions in Part II - and these have been in force since 1996. It can therefore be assumed, and indeed a quick scan of various corporate sites will prove this, that the situation is similar for Part III.

This problem is compounded by the powers of the DRC which, like its Sex Discrimination and Race Relations counterparts, has no real teeth. Whilst they may support and provide legal assistance to disabled persons certain criteria have to be met regarding the complexity of the case. There is also no provision for the Commission to bring an action on its own or even to put forward its view in any cases that do come to court. This is in stark contrast to the situation in the United States, as in *Hooks v Okbridge*, or even the European Court of Justice where interested parties are allowed to make submissions on issues of principle (in the latter case the European Commission is automatically consulted on every case).

The provisions being of a civil rather than a criminal nature also hamper the influence of the court. Hence, at least in Scotland, there cannot be any punishing element in the court's determination. This lack of a deterrence means that service providers will view the potential application of the provisions with disdain (witness GAP's approach) until a successful test case is brought that reaches court and forces them to take notice. At this stage, it would seem that any service providers aware of the provisions do not really expect a case to be brought and any that are could easily be paid off before reaching court - which will be far cheaper than paying the Web design agencies to 'redo' their site. Although it could be argued that pursuers may take a more principled approach and refuse to settle out of court, the recent case involving the National Federation for the Blind and

AOL would tend to suggest otherwise - with a large rights based organisation accepting an agreement with a single company rather than establishing an important legal principle.

The issue of cost is also relevant. Whilst legal aid may be available for claims over £1,000, many claims will arguably be for less than this and rather for a court order. Even with legal aid, the high costs incurred by an individual to take on a blue chip company could prohibitive as the defendant with deeper corporate pockets can afford to appeal the case further and further.

Despite these concerns, there may however be a more positive outlook. The Royal National Institute for the Blind has been active in encouraging the adoption of accessibility policies, such as that by Tesco, and the DRC has also suggested that it will be highlighting this area in 2001 - although there is no evidence of this as yet. Indeed, the RNIB seem to share the present writer's view that it is only through the power of the media and potential damage to a high profile service provider's goodwill that a culture change will actually be initiated and an accessible Web site will become the expected standard.

Bibliography

Legislation

United Kingdom

Court of Session Act 1988
Disability Discrimination Act 1995
Disability Rights Commission Act 1999
Law Reform (Miscellaneous Provisions) (Scotland) Act 1940
Special Education Needs and Disability Act 2001
Disability Discrimination (Commencement Order No.6) Order 1999 SI 1999/1190
Disability Discrimination (Services and Premises) Regulations 1996 SI 1996/1836
Disability Discrimination (Services and Premises) Regulations 1999 SI 1999/1191

Australia

Disability Discrimination Act 1992

United States

Americans with Disabilities Act of 1990
Rehabilitation Act of 1973

Cases

British Westinghouse Co v Underground Rly Co [1916] AC 673
Millar v Bellvale Chemical Co (1898) 1 F 297
Carparts distribution Center Inc v Automotive Wholesaler's Association of New England Inc 37 F.3d 12; 1994 US App. LEXIS 28319; 131 ALR Fed 637; 3 Am. Disabilities Cas. (BNA) 1237
Cazalet v Morris and Co 1916 SC 952
Clark v TDG t/a Novacold [1999] IRLR 318

Cointat v Myham [1913] 2 KB 220
Davidson v Macpherson (1889) 30 SLR 2
Dickson v Hygienic Institute 1910 SC 352
Dunford and Elliot v MacLeod (1902) 4 F 912
Erie Gas Co v Carroll [1912] AC 105
Fleming & Ferguson v Paisley Magistrates 1948 SC 547
Hadley v Blaxendale (1854) 9 Exch 341
Hinshaw & Co v Adam & Son (1870) 8 M 933
Holland and Hannan and Cubitts (Scotland) Ltd v Alexander MacDougall & Co (Engineers) Ltd 1968 SLT (notes) 91, OH
Hooks v OKBridge 232 F.3d 208 (unreported)
Jameson v Simon (1899) 1 F 1211
Janal v Moolla & Co [1916] 1 AC 175
McArthur v Lawson (1877) 4 R 1134
McDonald v Ealing BC, Independent May 15, 2000 (C.S.)
Macintosh v Nelson 1984 SLT (Sh Ct) 82
Mackay v Stitt 1988 GWD 22-931, OH
Maguire v Sydney Organising Committee for the Olympic Games H99/115 http://www.hreoc.gov.au/disability_rights/Maguire_v_SOCOG2.htm and http://scaleplus.law.gov.au/html/ddadec/0/2000/0/DD000200.htm (damages hearing)
Marshall v Callander Hydro Ltd (1896) 24 R 33
Middleton v Leslie (1892) 19 R 801
Mills v Simpson 1987 GWD 37-1322, Sh Ct
Morrison's Associated Companies Ltd v James Rome & Sons Ltd 1964 SC 160
Munro v Balnagowan Estates Co Liqr. 1949 SC 49
O'Neill v Symm & Co Ltd [1998] IRLR 233
Rose v Bouchet 1999 SCLR (1) 1004; [1999] IRLR (2) 463; 1999 GWD (3) 20-958
Salaried Staff London Loan Co Ltd v Swears and Wells Ltd 1985 SC 189
Shetland Times Ltd v Wills 1997 S.C. 316; 1997 S.L.T. 669; 1997 S.C.L.R. 160; [1997] F.S.R. 604; [1997] E.M.L.R. 277; [1997-98] Info T.L.R. 1; [1998] I.T.C.L.R. 49; (1997) 16 Tr. L.R. 158; [1998] Masons C.L.R. 159; 1997 G.W.D. 1-5
Stewart v Kennedy (1890) 17 R (HL) 1
Terret v Murphy 1952 SLT (Sh Ct) 51
Wilson v McKellar (1896) 24 R 254

Official Publications (codes of practice, press releases et cetera)

DFEE *SEN and Disability Rights in Education Bill Consultation* (March 2000) http://www.disability.gov.uk/senbc/index.html
DFEE *Service Delivery Agreement - F: Electronic Government* (Jan 2001) http://www.dfee.gov.uk/sda2000/e_gov.shtml
DFEE *Special Educational Needs (Special Edition)* 0346/2000 (December 2000) http://www.dfee.gov.uk/sen/pdf/SPECIAL.pdf
DRC/DFEE *Consultations on a new Code of Practice, Regulations and Practical Guide* DLE 17 (April 2000) http://www.disability.gov.uk/consultation.html
DRC *Delay in Publishing Education Bill - DRC Reaction* (June 21 2000) http://www.drc-gb.org/drc/informationAndLegislation?NewsRelease_000627.asp

DRC *Frequently Asked Questions* http://www.drc-gb.org/drc/InformationAndLegislation/Page311.asp
DRC *Historic Day for Disabled Pupils and Students* (December 6 2000) http://drc-gb.org/drc/InformationAndLegislatioon/NewsRelease_001206.asp
DRC *Overview of the Disability Discrimination Act* http://www.drc-gb.org/drc/InformationAndLegislation/Page321.asp
DRC *The provision of legal assistance by the Disability Rights Commission…* http://www.drrc-gb.org/drc/InfornationAndLegislation/Page371.asp
DTI/DCMS *A New Future for Communications* (December 2000) http://www.communicationswhitepaper.gov.uk
European Commission *eEurope 2002: An Information Society for All* (June 19 2000) http://europa.eu.int/information_society/eeurope/action_plan/index_en.htm
National Disability Council/DFEE *Code of Practice: Rights of Access to Goods, Facilities, Services and Premises* (1999) also available from http://www.disability.gov.uk
Scottish Law Commission Discussion Paper No 109 *Remedies for Breach of Contract* (April 1999)
Ten Downing Street *Special Educational Needs (SEN) and Disability Bill Fact File* http://www.number-10.gov.uk/default.asp?PageID=2963

Textbooks

Cooper, Jeremy (ed.) *Law, Rights and Disability* Jessica Kingsley Publishers (2000)
Edwards, Lilian & Waelde, Charlotte (eds.) *Law & the Internet* Hart Publishing (1997)
Farnsworth, E Allan *An Introduction to the Legal System of the United States (3rd edition)* Oceana (1996)
Lloyd, Ian J *Information Technology Law (3rd Edition)* Butterworths (2000)
MacBryde, WW *Contract* W Green and Son (1997)
McManus, Francis & Russell, Eleanor *Delict* Wiley (1998)
MacQueen, Hector L & Thomson, Joe *Contract Law in Scotland* Butterworths (2000)
Neilsen, Jakob *Designing Web Usability* New Riders (2000)
The Law Society of Scotland *Stair Memorial Encyclopaedia* Vol. I and III Butterworths
Thomson, Joe *Delictual Liability (2nd Edition)* Butterworths (1999)
Walker, David M *The Law of Civil Remedies in Scotland* W Green and Son (1974)
Walker, David M *The Law of Contracts and Related Obligations in Scotland* T & T Clark (1995)
White, Robin M & Fletcher, Michael J *Delictual Damages* Butterworths (2000)
White, Robin M & Willock, Ian D *The Scottish Legal System (2nd Edition)* Butterworths (1999)

Refereed Articles

Casserley, Catherine 'Disability Code of Practice' *Legal Action* (1999) Sept 24
Chung, P *et al* 'A Defence of Plain HTML for Law: AustLII's Approach to Standards' 2000 (1) JILT http://www.warwick.ac.uk/jilt/00-1/chung.html
Corlett, Sophie 'The Human Rights Act 1998, Disabled People and Post-16 Edu…' EPLI 1998 3(3) 50

Fairclough, Nick 'Disability Discrimination: the October Revolution' SJ 1999 143(36) 878
Guthrie, Sally A 'Making the World Wide Web Accessible to All Students' JMCE 2000 55(1) 14
Hamilton, Jennifer ''Disability' and 'Discrimination' in the Context of Disability Discrimination Legislation: The UK and Australian Acts compared' IJDL (2000) 4(3) 203
Jobe, Margaret 'Guidelines on Web Accessibility for the Disabled' *Colorado Libraries* 1999 25(3) 45
Lamb, Brian 'New Rights for Disabled Children in Education' *Childright* (2000) 167 5-7
Mason, Michael 'Does the ADA Apply to the Web?' *Washington Technology Online* (2000) 5(13) http://www.wfonline.com/vol15_no13/federal/1815-1.html
Rubenstein, Michael 'Give the Commissions a Right to Intervene' EOR (1999) 84 48
Tucker, Katherine 'Disability Discrimination in 1999: the lessons so far' Emp. Law (1999) 35 21
Waddell, Cynthia D 'Is Your Site ADA Compliant.. or a Lawsuit-in-Waiting?' *Internet Lawyer* Issue 4.11 Nov 98 and ICDRI Web site http://www.icdri.org/is_%yoursite_ada_compliant.htm
Waddell, Cynthia D 'Will the National Federation of the Blind Renew Their ADA Web Complaint against AOL?' *National Disability Law Reporter* 2000 18(5) 9 and ICDRI Web site http://www.icdri.org/aol_nfb.htm
White, Jenny 'DDA: Service Providers' Duty to Make Reasonable Adjustments' EOR (1999) 88 33

Web-based Articles and Lectures

Booth, Paul 'Legal Issues for Web Sites and Resources in Higher Education' (Oct 10 1999) http://www.disinhe.ac.uk/library/article.asp?id=21
Contenu 'Reader's Guide to Sydney Olympics Accessibility Complaint' http://www.contenu.nu/socog.html
Corlett, Sophie 'Disability Legislation and Implications for Technology in Higher Education' (March 27 1999) http://www.disinhe.ac.uk/library/article.asp?id=15
RNIB 'Get the Message Online - Making Internet Shopping Accessible to the Blind and Visually Impaired User' (Dec 11 2000) http://www.rnib.org.uk/digital/webshop.htm
RNIB 'Hint's for Designing Accessible Websites' (April 4, 2001) http://www.rnib.org.uk/digital/hints.htm
Waddell, Cynthia D 'An Overview of Law and Policy for IT Accessibility' (June 8 2000) http://www.icdri.org/SL508overview.html
Waddell, Cynthia D Presentation to the American Bar Association: 'Applying the ADA to the Internet: A Web Accessibility Standard' (June 17 1998) http://www.icdri.org/applying_the_ada_to_the_internet.htm
Waddell, Cynthia D 'Understanding the Digital Economy' (May 25 1999) http://www.icdri.org/the_digital_divide.htm

Newspaper/Web News Service Articles

CNN.com 'Analysis: Web Sites are Locking Out the Disabled' (August 7 2000 11:27am EDT)
http://www.cnn.com/2000/TECH/computing/08/07/web.site.accessibility.idg/index.html
Computing 'Access for the disabled - or else' June 29 2000, p1
Fairfax IT (Sydney Morning Herald) 'Discrimination Blast on Games Site' (November 21 2000) http://www.it.fairfax.com.au/e-commerce/20001121/A63564-2000Nov20.html
Fairfax IT (Sydney Morning Herald) 'SOCOG Makes Unflattering History' (November 21 2000) http://www.it.fairfax.com.au/e-commerce/20001121/A96-2000Nov21.html
Industry Standard 'SOCOG Faces Damages over Web site' (September 28 2000)
http://www.thestandard.com.au/articles/article_print/0,1454,11264,00.html
PC World.com 'AOL Promises Access for Blind' (July 27 2000 1:45pm PDT)
http://www.pcworld.com/shared/printable_articles/0,1440,17855,00.html
PC World.com 'Wanted: A Web for All of Us' (June 30 2000 6:26am PDT)
http://www.pcworld.com/shared/printable_articles/0,1440,17505,00.html
The Independent 'It's a hard Act to follow through: The new Disability Bill will lack the necessary support network' Oct 25 1995, Law p11
The Scotsman 'Web designers face penalty of hindering access for all' July 13 2000, Business p5
The Scotsman 'Report calls for Disability Act reform' November 13 2000, Business p2
Wired 'AOL Settles Accessibility Suit' (July 28 2000 3:00am PDT)
http://www.wired.com/news/print/0,1294,37845,00.html
Wired 'Smart biz: Enabling the Disabled' (November 3 2000 2:00am PST)
http://www.wired.com/news/print/0,1294,39563,00.html

Independent Published Reports

Digital Media Access Group, University of Dundee (Sloan, *et al*) *Accessible Accessibility* (2000)
Frontend.com *Accessibility & Usability for e-Government.* (November 2000) also available from http://www.frontend.com/accessibility_paper.html

Radio Programmes

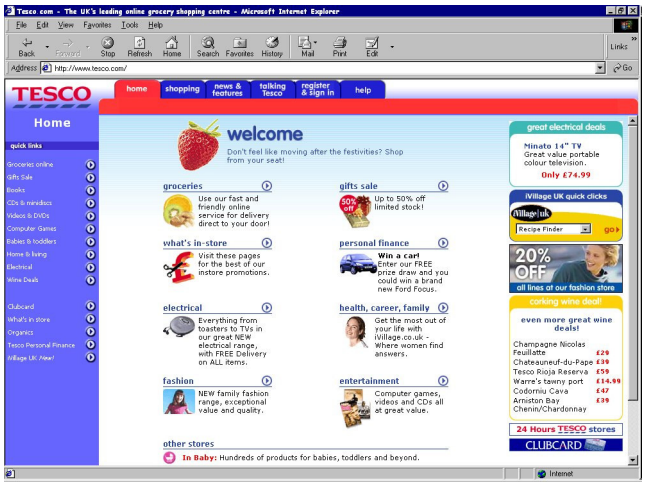
BBC Radio 4 *Money Box Live* December 4 2000, 1500-1530. Transcript available from:
http://news.bbc.co.uk/low/english/audiovideo/programmes/moneybox/newsid_1056000/1056446.stm

Web Sites of Interest

Access Board (Federal Agency concerned with equal access): http://www.access-board.gov
Australian Human Rights and Equal Opportunities Commission:
http://www.hreoc.gov.au
Digital Media Access Group (DMAG):
http://www.computing.dundee.ac.uk/projects/dmag/

Disability Rights Commission: http://www.drc-gb.org
Disability and Information Systems in Higher Education (DISinHE): http://www.disinhe.ac.uk
Federal IT Accessibility Initiative (section 508): http://www.section508.gov
Government Disability Site: http://www.disability.gov.uk
International Center for Disability Resources on the Internet (ICDRI): http://www.icdri.org
National Federation of the Blind (NFB): http://www.nfb.org
NUA Internet Surveys: http://www.nua.ie/surveys/index.cgi
Royal National Institute for the Blind (RNIB): http://www.rnib.org.uk
Tesco Access: http://www.tesco.com/access
W3C Web Accessibility Initiative (WAI): http://www.w3c.org/WAI/

Appendix A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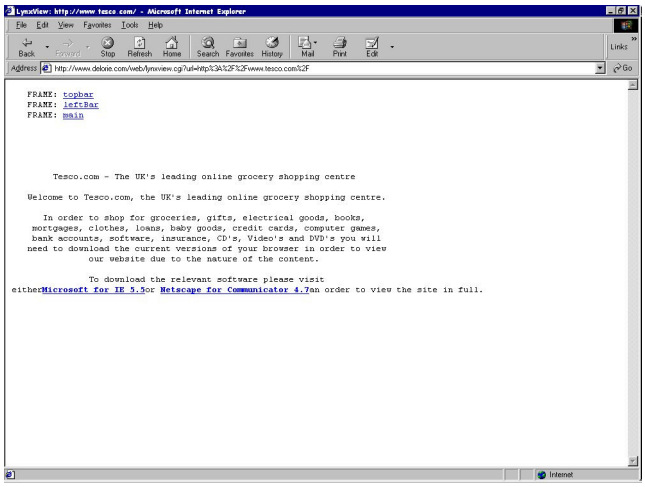
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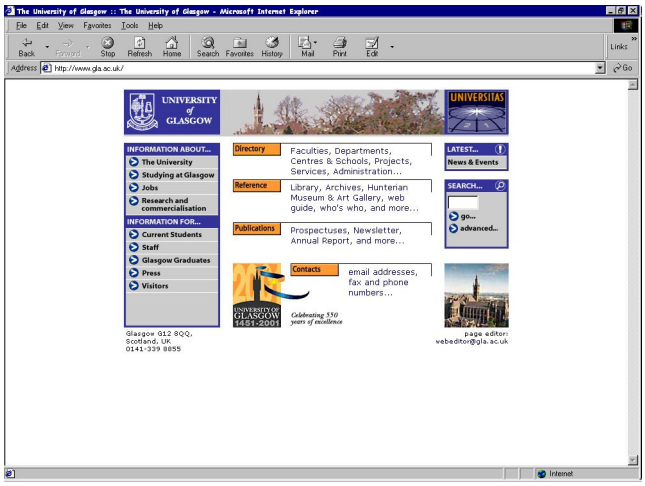
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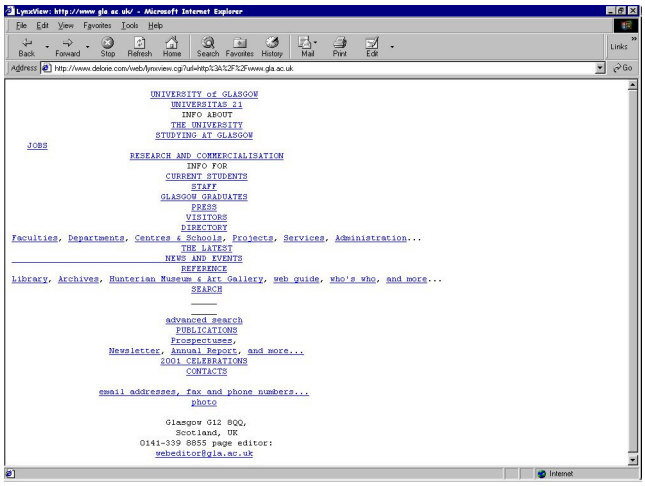
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