

DISABILITY DISCRIMINATION ACT 1995

***Guidance on matters to be taking into account
in determining questions relating to the
definition of disability:***

Evaluation report

January 2006

Consultation Report: Introduction

Background

The Disability Discrimination Act (DDA) 1995, as amended, prohibits discrimination against disabled people in a range of circumstances, including in employment and occupation, education, transport, and the provision of goods, facilities and services.

Only those people who are defined as disabled in accordance with section 1 of the Act, and associated schedules and regulations, are entitled to the protection that the Act provides.

Under section 3 of the Act, as amended by the Disability Discrimination Act 2005, the Secretary of State has the power to issue guidance on matters to be taken into account in determining whether a person is a disabled person for the purposes of the Act.

The guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law. However, section 3(3) of the Act requires that an adjudicating body (such as a court or tribunal) which is determining whether a person is a disabled person for the purposes of the Act, must take into account any aspect of the guidance which appears to it to be relevant.

Revision of the guidance

The current guidance was published in 1996 (when the Act first came into force), and has not been amended since. As a result of various legislative changes since 1996, including the Disability Discrimination Act 2005 (which provides automatic coverage for people with HIV, cancer and MS from the point of diagnosis, and removes the requirement for a mental illness to be 'clinically well recognised'), the guidance now needs to be updated.

It also needs to take account of developments in case law to reflect key court and tribunal cases, which have helped to improve understanding of how the definition works in practice.

Finally, it needs to take account of commitments that the Government gave during the passage of the Disability Discrimination Act 2005 through Parliament that it would consider how the guidance might be

revised in order to make clear how people with a mental impairment can be covered by the Act.

With these aims in mind, the guidance has been redrafted.

Consultation exercise

The revised text was subject to a consultation exercise, which took place between 5 September and 31 October 2005. The purpose of the consultation was to seek views on the revisions made and to establish whether the proposed revised guidance would further assist adjudicating bodies to determine who is a disabled person for the purposes of the DDA, but also assist other users to understand how the definition of disability under the Act operates.

The following report provides both statistical information about the replies received to the consultation, and a summary of the key comments made by respondents. It highlights some of the varied suggestions for changes to the text.

A number of respondents made comments about matters that were outside the scope of this consultation. For example, some respondents queried or disputed the policy underlying the legal definition, while others requested that a statement about the social model of disability should be included. There were also some suggestions that information and explanations about the operation of duties under the Act, such as the provisions relating to reasonable adjustments, should be included.

None of these matters was appropriate to either the guidance or the consultation exercise. In line with the powers given to the Secretary of State under section 3(3) of the DDA the guidance only concerns those matters to be taken into account in determining whether a person is a disabled person for the purposes of the Act. The aim of the consultation was not to seek views on how disability is, or should be, defined in the legislation, but to ascertain the extent to which the guidance was helpful in achieving its purpose of explaining how the existing legal definition operates. Guidance or illustrations of how those with duties under the DDA might respond to their duties are matters that are properly dealt with in the Codes of Practice which are published by the Disability Rights Commission.

Whilst not all suggestions made could be accepted, thanks are extended to those who responded to the consultation.

Consultation Report: Chapter One

The Consultation Document

The Consultation document consisted of a brief explanation of why the consultation exercise was being undertaken, together with a draft of the proposed revised text of the '**Guidance on matters to be taken into account when determining questions relating to the definition of disability**', and an accompanying Questionnaire, which respondents were asked to complete.

The document was sent to around 100 people and organisations, covering key stakeholders including the Disability Rights Commission; bodies, such as the Employment Tribunal Service and the Special Educational Needs and Disability Tribunals, representing the interests of adjudicating bodies; major organisations of, and representing, disabled people such as MIND, the National Autistic Society and the British Council of Disabled People; organisations representing business and employee interests, such as the Confederation of British Industry and the Federation of Small Businesses, and the Trade Union Congress; as well as professional bodies representing the medical and legal professions.

The Consultation document was made available through The Stationery Office and was also placed on the internet. As a result, a number of additional organisations and individuals were able to obtain a copy of the Questionnaire, and take part in the consultation. A full list of respondents is provided at [Annex 1](#).

Responses to the Consultation

Chapter two of this report provides an analysis of the responses based on replies to the Questionnaire. Statistical information is given, regarding the number and type of responses received to the individual questions. In addition, a summary of views expressed in relation to each of the questions asked in the consultation questionnaire is provided.

A number of respondents did not use the Questionnaire, but provided comments in narrative text. A summary of their views is provided in Chapter three. These responses are not included in the statistical analysis, but all the comments made were considered and taken into

account when the guidance was revised following the consultation exercise.

Statistical analysis

A total of 47 responses were received, including four from individual respondents. Overall, 30 respondents used the Questionnaire format, and a full breakdown is provided in Table 1.1 below.

Table 1.1

Type of Respondent	Number
Professional body	7
Disability organisation	11
Advisory body	1
Individual	2
Other	9
TOTAL	30

An analysis of respondents who completed the Questionnaire was completed, and a summary is provided in Table 1.2 below. Each question was looked at in terms of whether the response was positive (i.e. it was favourable, or endorsed the proposed approach), or negative (it suggested a change or an alternative approach). Not every respondent replied to each question, thus the results do not all total 30.

Table 1.2

Question	1	2	3	4	5	6a	6b	7	8	9	10
Positive	28	26	22	20	17	20	11	26	9	19	19
Negative	1	3	7	10	9	4	15	3	18	11	10

The overwhelming majority of responses were positive: 217 compared to 91 negative comments. Of the replies recorded as negative, most were not unduly critical, but offered constructive suggestions for improvements to the text which, where appropriate, have been reflected in the drafting of the final text.

A total of 17 respondents did not use the Questionnaire format for their responses and thus have not been included in the statistical analysis above, but a summary of the key points raised is provided at the end of Chapter two.

Consultation Report: Chapter Two

Summary of responses

Question 1: The Government would like to know whether you think this structure is the right one. If no, please explain why.

In total, 29 respondents commented on Question 1. Of these, 28 were positive responses and one was negative.

The majority of respondents stated that overall the structure was the right one, but some did offer suggestions for improving the text. In particular, it was suggested that examples should be highlighted, that a proportionate number of males to females should be used in the examples, and the use of italics should be avoided as this makes it harder for some people with a visual impairment to read the text.

In response, italic formatting has been removed wherever possible and the use of gender in the case study examples has been revised. In addition, the document has been revised to ensure that the genders are not depicted in a stereotypical way in the case studies. With regard to highlighting examples, in the published document a range of formatting styles will be used to ensure that the text and the boxed examples are sufficiently distinct.

One respondent suggested that an appendix should be attached listing those impairments which are already deemed to meet the definition of disability. However, it is not possible to provide a list of impairments that are covered by the Act, as this will vary depending on the longevity and severity of the effects of each impairment. A full explanation is provided in section A of the revised guidance.

The Disability Rights Commission commented that they were content with the structure, but suggested that a 'mission statement' which explained the rationale for the Disability Discrimination Act should be included in the introduction. The text provided was not considered to be appropriate for inclusion in the guidance, the purpose of which is to provide an explanation of the definition of disability for the purposes of

the Act and not explain the policy principles which underlay the legislation as a whole.

One respondent suggested that the document was too lengthy and required a summary, whilst some others proposed the inclusion of a flow chart or single page overview. The inclusion of a summary or flowchart was considered, but rejected on the basis that it is important for users to understand that the decision making process can involve a number of different steps, and there can be a range of factors to be taken into account. Adjudicating bodies in particular will find that it is necessary to read and be familiar with all parts of the guidance. It is not possible to capture some of the special rules (for example in relation to people deemed to be disabled, or who have progressive conditions) in a summary or flow chart and there would be a risk that by referring only to a simplified summary or flow chart, some users would not consider all the factors to be taken into account in deciding whether a person maybe disabled for the purposes of the Act.

Question 2: The Government would like to know whether you think this format helps towards an understanding of how the individual elements of the definition of disability interrelate. If no, please explain why.

A total of 29 respondents commented on Question 2. Of these, 26 were positive and three were negative.

The majority of positive responses stated that the format worked well. In particular, the Royal College of Practitioners commented that the 'different types of disability and their interrelationship are clear.' Leonard Cheshire commented that 'the current format does seem to adequately address the need to understand the interrelation between elements of the definition of disability.'

One respondent commented that there appeared to be a contradiction between those parts of the text that dealt with the effects of behaviour, environment, and treatment (section B), and paragraphs on recurring conditions (section C). A number of other organisations, including Leonard Cheshire, and the Law Society, made similar comments at various points throughout the Questionnaire. In response, the text in the appropriate paragraphs has been redrafted to make clearer how these various factors interrelate. Also, an additional example has now been

provided at paragraph B15 to illustrate the point about taking account of treatment that cures an impairment.

Question 3: The Government would like to know whether you think the text is clear enough in its explanation of how the definition of disability works. If no, please explain why.

A total of 29 respondents commented on Question 3. Of these, 22 were positive and seven were negative.

Whilst the significant majority of responses were positive, a number of suggestions for revision were received. For example, Leonard Cheshire suggested that it may be helpful to include references to case law.

While the revised text and the case studies do take account of the principles of developments in case law, it was decided not to include references to specific cases as these may become out of date as case law continues to develop.

Several respondents, including the Royal College of Physicians of Edinburgh, sought clarification concerning the provisions for people with progressive conditions. As a consequence, the relevant paragraphs have been amended.

In response to comments made by several respondents, including the Disability Rights Commission and Bexley Council, we have made some amendments to section A, including adding references to epilepsy, acquired brain injury, and learning difficulties.

The Law Society suggested that it should be made clear that the list of progressive conditions in paragraph B18 was not an exhaustive list and this has been amended accordingly.

Question 4: The Government would like to know whether you think there are any parts of the text that are hard to understand. If so, please tell us what they are.

A total of 30 respondents commented on Question 4. Of these, 20 were positive and ten were negative.

A number of respondents found the text helpful in explaining this complex piece of legislation. The RNIB (Royal National Institute for the Blind) stated 'it is all well explained with good use of examples that clarify any remaining lack of understanding from the text.'

However, the British Stammering Association made a number of detailed comments and in response several amendments have been made, including adding 'social embarrassment' to the list of factors that may cause a person to avoid doing certain things; and including the term 'health professionals' where reference is made to medical practitioners, to make clear that medical advice from people such as speech therapists is covered.

Leonard Cheshire made some suggested amendments to the text in various parts of the document, and many of these have been implemented. For example, we have clarified parts of section C relating to the effect of an impairment over a given period, and the effect of treatment that cures an impairment. Text in section D relating to day-to-day activities in a work environment has been made clearer. Also in section D, text relating to how the age of a person might be taken into account has been amended.

A number of negative comments related to matters that were not applicable to this consultation (see information above in the Introduction: consultation exercise, on page 2).

Question 5: The Government would like to know whether it is equally clear how a person with a mental impairment is covered compared to a person with a physical impairment. If not, please tell us what you think.

A total of 26 respondents commented on Question 5. Of these, 17 were positive and nine were negative.

There was a range of very positive specific comments, including from leading disability organisations and professional bodies. For example, the RNIB stated ‘The relevant sections and examples set out in detail how a person with a mental impairment may be covered, and provide detail equal to that of the explanation and examples for physical impairments.’ The Royal College of General Practitioners commented that mental impairment ‘seems to be included at all opportunities as well as stand alone sections and the examples are useful here.’

The Royal College of Physicians of Edinburgh stated that they found the example in section C of a woman with depression a little unclear, (this is used to illustrate the provisions relating to ‘long term’). This example has now been amended to make the position clearer.

In response to comments from MIND¹ and others, including the Law Society and the Royal College of Psychiatrists, reference to bipolar affective disorder, obsessive compulsive disorder and personality disorders have been included in the list of impairments at paragraph A6, and in the examples. In addition, ‘learning difficulty’ has been listed separately from other mental impairments.

One respondent queried whether the definition of disability, particularly as it applied to mental impairment, ought to be read ‘alongside clinical well-recognised definitions or if the DDA sets out to replace these.’ Concern was also raised about the term ‘mental impairment’ which has a different meaning in mental health legislation. Other respondents raised similar points regarding the inter-relationship of the DDA definition of disability with other definitions.

¹ Note that MIND did not complete the Questionnaire so their responses are not included in the statistical summaries. Chapter three provides some analysis of those respondents who did not use the Questionnaire format.

The guidance has not been amended in these respects, since the Introduction makes clear that the definition set out in the Act and described in the guidance is only applicable where a decision is being made on whether a person is disabled for the purposes of the Act. References to disability or to mental impairment in the context of other legislation are not relevant to determining whether someone is a disabled person under the DDA.

Question 6: (a) The Government would like to know whether you consider that examples have been used appropriately, and (b): would other parts of the text benefit from examples? If yes, please say where.

A total of 24 respondents commented on Question 6a. Of these, 20 were positive and four were negative. 26 respondents commented on Question 6b. 11 were positive and 15 negative.

The positive responses included a range from significant organisations. For example, the Royal College of Practitioners commented that ‘the examples are appropriate’ while the RNID were generally supportive of the draft guidance, but did suggest the addition of an example illustrating the impact of Menière’s disease, which has been included.

Dr Sharon Swain commented that the examples ‘illustrate the wide range of symptoms that need to be considered’ but suggested including a reference to head injuries, which has been incorporated.

The Disability Rights Commission made a number of helpful suggestions regarding the drafting of various examples in section D. The majority of these have been taken on board and changes made as a result. For example the inclusion of the example at D25 of a person with bipolar disorder who, during high periods becomes over-excited and irrational, making it difficult for others to understand what he is saying. And at D26 the replacement of the example of a person who is unable to write a cheque, with the example of someone who has persistent and significant difficulty with reading.

Leonard Cheshire suggested that an example be provided to illustrate the text in B3 regarding the way an activity is carried out. An example concerning a person with obsessive compulsive disorder has now been added.

Several respondents, including The Royal College of Psychiatrists, commented that the example at paragraph C5 (recurring and fluctuating conditions) was confusing. This has been amended to make the position clearer.

Many respondents requested additional examples to be included at various places throughout the text. Where possible these have been accommodated, but the number of examples had to be limited to ensure that the guidance did not become too lengthy a document.

Question 7: The Government would like to know whether the examples are helpful in adding to an understanding of the related text. If no, please explain why.

A total of 29 respondents commented on Question 7. Of these, 26 were positive and three were negative.

Of the positive comments received, the Bar Council Equality and Diversity Committee stated that ‘the new guidance represents a useful improvement on the previous code’, while the Royal College of Psychiatrists commented that ‘The examples of people with mental ill-health (including that of Asperger’s Syndrome) already included in the text are helpful...’, the RNIB said ‘the examples in many cases bring the text to life and give it additional resonance where the concepts being discussed are complex.’

David Croft, a disabilities consultant, commented that the example at D9 illustrating the point about whether activities carried out at work are normal day-to-day activities was confusing, and this has been reviewed and amended.

A few respondents made suggestions for amending the examples in Section D. In response, a number of changes have been made. For example, the example at D11 of a woman with sciatic pain has been amended; in the section on Manual Dexterity the example of ‘difficulty in dealing with buttons and fasteners when dressing and activities associated with toileting’ has been added; and in the section on Physical Coordination the ‘inability to place a key in a lock without unusual concentration or requiring assistance’ has been included.

Question 8: The Government would like to know whether there are particular points which you consider might usefully be illustrated by examples. If yes, please explain what these are.

A total of 27 respondents commented on Question 8. Of these, nine were positive and 18 were negative.

Of those offering positive comments, the RNIB stated 'We believe that adequate use of examples is already made as the guidance currently stands' while the Royal College of Physicians commented that 'in general this is a very helpful document covering a definition that people sometimes struggle to understand.'

David Croft, a disabilities consultant, commented that the examples at D23 of what would be reasonable to regard as having a substantial adverse effect on mobility might include difficulty in travelling short distances in a vehicle because the person has a frequent need for a lavatory. This has now been included. Amendments have also been made to the example relating to a person who stammers, in response to comments by the British Stammering Association.

The majority of respondents to this question offered negative comments: that is they considered that there were other areas which could be illustrated by case studies. For example, Rethink commented that the concept of 'reasonable adjustment' might be covered, particularly in relation to people with mental impairments. Sarah Jones (responding as an individual) made similar comments and asked for more information about how disabilities affect people in the workplace. The Royal College of Physicians of Edinburgh suggested that the issue of disability as a risk to the disabled person and to others should be considered, 'for example it would not be appropriate to employ someone with a respiratory problem in a dusty atmosphere.'

It is, however, inappropriate to address such points in the guidance on the definition of disability as they go beyond the scope of the document and are more relevant to the Codes of Practice, published by the Disability Rights Commission.

Question 9: The Government would like to know whether the distinction between ‘capacities’ and ‘normal day-to-day activities’ has been made sufficiently clear. Please tell us what you think.

A total of 30 respondents commented on Question 9. Of these, 19 were positive and 11 negative.

The substantial majority of responses were positive, with some organisations, such as The Bar Council Equality and Diversity Committee welcoming ‘the use of the distinction between capacities and normal day-to-day activities...’. Others, like Epilepsy Action and Essex County Council Disability Partnership agreed that the distinction had been made sufficiently clear.

Among the negative responses, there were comments by the British Stammering Association that the text in section D should make clear how speech can be a normal day-to-day activity. This section has been amended accordingly.

Many of the negative responses concerned suggestions for different or additional examples, covering other impairments such as epilepsy, learning difficulties, and bipolar disorder, which have been dealt with under other sections of the Questionnaire.

Question 10: The Government would like to know whether the bullet point examples are clear enough and whether they help to illustrate the concept of a substantial adverse effect on day-to-day activities. Please tell us what you think.

A total of 29 respondents commented on Question 10. Of these, 19 were positive and 10 negative.

Among the positive comments, Warwickshire County Council stated that ‘the bullet point examples clearly give guidance as to what is and what is not something having a substantial adverse effect on day-to-day activities.’ Epilepsy Action agreed that the use of bullet point examples

was 'very useful', while the Royal College of Practitioners stated 'Yes. This is a good document...'

In response to suggestions by the Law Society and by the Disability Rights Commission, an example has been added to illustrate how a person with schizophrenia may experience problems with speech. In addition, an example has been added at D26 to illustrate the effects on a person with bipolar disorder.

Leonard Cheshire suggested that Section D be prefaced with a statement making it clear that the examples are illustrative and not prescriptive. This has been done.

A number of respondents made suggestions for minor amendments to the bullet point examples. Where possible these changes have been made; for example in response to comments by the RNIB, reference to monocular vision has been included in section D.

Consultation Report: Chapter Three

Summary of responses not provided in Questionnaire format

A total of 17 respondents did not use the Questionnaire. Below is a summary of some of the key points raised in their responses.

MIND commented that ‘the lay out and ordering of the guidance is both clear and accessible’. They welcomed the opening statement which makes clear that adjudicating bodies must take into account any of the guidance that appears to them to be relevant. Nevertheless, they made a number of drafting suggestions and in response a number of amendments have been made to the text, including the addition of two new examples, relating to obsessive compulsive disorder, and stress-related anxiety at work, while the list at A6 has been revised to include more mental illnesses such as bipolar disorder.

Skill: the National Bureau for Students with Disabilities, and The Special Education Needs and Disability Tribunal (SENDIST) made a number of comments relating to the parts of the text concerning education. In response we have made a number of amendments, including clarifying the coverage of the Special Educational Needs and Disability Act, and making clear in the Introduction, that ‘a child who has been identified as having special education needs is not necessarily disabled for the purposes of the Act.’

In response to comments by **The National Aids Trust**, the text relating to people with HIV has been amended to make clear that they are deemed to be disabled effectively ‘from the point of diagnosis’ following changes to the definition contained in the Disability Discrimination Act 2005.

The National Autistic Society stated that the ‘use of case studies aids the understanding of the text and we support the inclusion of case studies in the guidance.’ They supported the clarification that people with an autistic spectrum disorder can come within the definition of a disabled person if the adverse effects of their impairment are substantial and long term. In response to specific drafting comments some changes have been made to the text, including to the examples at paragraphs D12 and D26.

In response to comments by several organisations, including **Macmillan Cancer Relief**, the position regarding people with cancer (and HIV and MS) has been made clearer. The text has been amended to clarify that such people are effectively covered from the point of diagnosis.

List of respondents

1. Respondents who used the Questionnaire (30)

Disability organisation (11)

Asthma UK
British Stammering Association
The Dene Centre
DIAL
Epilepsy Action
Leonard Cheshire
MS Society
Rethink
RNIB
RNID
Dr Sharon Swain (details of organisation not given)

Advisory Body (1)

Disability Rights Commission

Professional bodies (7)

Disability Law Service
General Council of the Bar
Law Society
Royal College General Practitioners
Royal College of Psychiatrists
Royal College of Physicians
Royal College of Physicians of Edinburgh

Other (9)

Bexley Council
British Association for Supported Employment
Coventry Council
Department for Constitutional Affairs
Durham County Council
Essex County Council
LB Hammersmith & Fulham
Leicestershire County Council
Warwickshire County Council

Individuals (2)

Ms S Jones

Mr D Croft, Croft Consultants

2. Respondents who did not use the Questionnaire (17)

Organisations (15)

Association of Directors of Social Services (ADSS) Disabilities Network

British Deaf Association

Confederation of British Industry

Discrimination Law Association

Judicial Services Board

Macmillan Cancer Relief

MENCAP

MIND

Motor Neurone Disease Association

National AIDS Trust

National Autistic Society

President of the Council of Chairmen of Employment Tribunals

Skill: National Bureau for Students with Disabilities

Special Education Needs and Disability Tribunal (SENDIST)

The Law Society of Scotland

Individuals (2)

Mr C Jaques-Newton

Professor Phillip Leith, School of Law, Queen's University, Belfast