

Definition of disability

Consultation document

We want to know your views on defining disability; please complete the Definition of Disability questionnaire.

Please return your completed questionnaire by 28 February 2006 to:

Disability Rights Commission

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Consultation on definition of disability in anti-discrimination law

Why are we doing this?

Government discrimination law review

1. The Government has announced a discrimination law review, looking towards producing a Single Equalities Act (SEA), which would apply to six dimensions of equality (religion, race, gender, age, sexuality and disability). The review is likely to set the legal framework for the next generation of equality law.
2. The DRC has warmly welcomed this review, and supports the objective of producing a legal framework which is both fairer and easier to understand. It is of fundamental importance that this review leads to no reduction of existing rights. In this context we expect this review to retain distinctive treatment of particular types of discrimination wherever appropriate.
3. Much progress has already been achieved since the Disability Discrimination Act (DDA) was passed in 1995. We have now nine years of experience in the operation of the legislation. The DRC believes that it is important as part of this review process to test the key elements of disability discrimination law.

We want to ensure that they operate as effectively as possible both to protect against disability discrimination and to promote disability equality. We are clear that we would not wish to recommend any changes which would weaken the present legal protection. This Consultation concerns one central element of the DDA: the definition of disability.

4. One of the most distinctive features of the DDA, compared to other equality laws, is that it only provides protection for a discrete and tightly-defined section of the population.

Other anti-discrimination laws are 'even-handed' in that they provide protection for anyone in the population if it is 'on the grounds of' race, gender, sexual orientation or religion. For example, men have the same degree of protection as women.

5. The DDA approach has the benefit that positive discrimination in favour of disabled people is not unlawful, so that employers are free, for example, to target recruitment campaigns solely at disabled people without fear of legal

challenge. However, this approach also makes the DDA more difficult for individuals to use because they must first of all prove that they are disabled within the precise terms of the DDA (the single most common reason for claims under the DDA to be dismissed is that the claimant has not established that they are disabled).¹ (1 Research showed that applicants lost in 16 per cent of decided cases on the basis that they had not proved themselves to be disabled: S. Leverton, *Monitoring the Disability Discrimination Act 1995*, Phase 2, DWP, February 2002)

This Consultation

6. This Consultation concerns the desirability or otherwise of a change to the DDA's definition of disability, broadening it so that the law provides protection against discrimination on the grounds of impairment, regardless of the level or type of impairment. The proposed change is described in paragraphs 33–38. Such a change would move the disability discrimination law closer to, but not identical with, the approach of other discrimination laws.

7. This Consultation is open-ended. The DRC has not taken any position at this stage on the desirability of change. We will make a decision on the basis of the responses to this Consultation. After examining these responses in Spring 2006 we will publish on our website, and send to all respondents, a note of our conclusions. If we consider a change is appropriate we will make this recommendation to the Government. Any change would be introduced as part of a Single Equality Act, and the timescale is likely to be about 2010.

8. The chief advantage of such a change to the definition would be to shift the focus of attention from the medical condition of an individual to a consideration of whether or not discrimination is occurring (a full discussion of potential benefits and concerns is found in paragraphs 49–67).

For example, Mrs Gittins was a nurse who was denied employment on the basis that she had Bulimia Nervosa. The hospital Trust concerned did not seek to defend their decision against the charge of discrimination. Rather, they successfully argued that since Mrs Gittins' condition did not constitute a disability under the DDA she was not legally entitled to challenge their decision.² (2 *Gittins v Oxford Radcliffe NHS Trust* EAT/193/99)

9. Framed as it is in a way which requires evidence of the negative effects of an impairment, and the drawing of negative comparisons with 'normal' persons, the definition can seem ill-fitted to an anti-discrimination statute. This is illustrated by the case of Mr Vatcher who has Tourette's Syndrome.³ (3 Vatcher v Kelly Services unreported, ET Case No. 1200634/98)

This means that he has a facial tic and disrupted speech. The decision in his case refers to evidence of the hostility and prejudice encountered by Mr Vatcher as a result of his condition, including a number of incidents when he had been insulted in public, and noted the impact on his confidence. However, the decision concludes that because Mr Vatcher carries out the 'normal' range of 'day-to-day activities' he does not qualify as 'disabled' (see paragraphs 18–26 for DDA definition of disability).

The tribunal expressed the hope that Mr Vatcher would welcome this ruling 'because to have ruled to the contrary might have indicated to him that he was by his speech, or by something to do with him, impaired from normal everyday living'.

We have no indication in the decision of the nature of the discrimination about which Mr Vatcher sought to complain precisely because the tribunal were not permitted to consider this issue once he had been determined not to be disabled under the Act.

Does this Consultation affect how disability is defined in other laws?

10. This Consultation is only about the definition of disability in the DDA (or any Single Equality Act that may be passed). This definition is not an absolute one. There are different definitions of 'disabled people' which are used in other laws (eg social welfare or state benefits) or statutory programmes. Merely because a person is entitled to protection under the law from disability discrimination does not mean that they are entitled to programmes designed to meet a particular need. A change to the DDA definition will therefore have no impact on other policy areas where narrower, more targeted definitions are appropriate.

11. The definition of disability employed will vary according to the particular purpose of the scheme or legislation. It will continue to be appropriate for narrower definitions of disabled persons to be used as eligibility criteria to target

finite social resources at those in greatest need. Thus, for example, entitlement to a Blue Badge is based on criteria designed to identify the need for additional parking on the basis of restricted mobility. Having an inappropriately broad eligibility criteria would mean that those who most needed the spaces were less likely to be able to access them. Not being able to park next to the entrance of a building might prevent some people from using a service altogether.

What is required from a definition of disability in the DDA?

12. The goal of a disability discrimination law is to reduce the prejudice, disadvantage and discrimination that has historically been associated with disability by eliminating discrimination and taking action to promote inclusion and participation.

- The definition should function to promote these changes in attitude and actions.
- It should facilitate both the promotion of good practice and the enforcement of rights.
- It needs to be clear, since the easier it is to understand the easier it is for those whose attitude and behaviour needs to change to know what is expected of them.
- The definition also needs to be credible in the eyes of stakeholders, in order to mobilise the support that is needed to take forward the necessary social change.

In so far as the focus of the DDA is to counter prejudice and stereotypes, and challenge exclusionary practices, this does not in principle require a targeted approach. However, certain elements of the DDA (notably the duty to promote disability equality and those aspects of the reasonable adjustment duty which require additional expenditure) may require the need to focus resources and activity. This may in turn have implications for the definition of disability. We discuss this issue later in paragraphs 68–71.

It is against this purpose, and these requirements, that we will measure any proposals for change to the definition.

Background to the Consultation

13. The DDA has been amended and greatly strengthened over the years, most recently by the Disability Discrimination Act 2005 (DDA 2005).

A Parliamentary Scrutiny Committee reported on this Act, taking extensive evidence from a wide range of interested parties.

14. This Committee considered that the focus of anti-discrimination legislation should be on the extent and nature of discrimination, not on the extent and nature of impairment, and therefore preferred the 'social model approach'.

The Committee recommended that the DRC should consult on this issue.

15. The social model of disability identifies 'disabling barriers' rather than 'impairment' as the problem to be tackled. Disabling barriers are the attitudinal, economic, and/or environmental factors preventing certain people from experiencing equality of opportunity because of an impairment or perceived impairment. The term 'disability' is used to describe a social experience. A disabled person might say, therefore, "My impairment is the fact that I can't walk; I am disabled by the fact that the bus company only provides inaccessible buses".

By contrast the medical model focuses on impairment as being the cause of limited opportunities and life chances. The social model not only provides the foundation for the modern disability rights movement, but also provides the basic premise for any law prohibiting disability discrimination.

16. Ever since the DDA was passed there has been a strong body of criticism about its definition of disability on the basis that it derives from the medical model, focusing as it does on the functional limitations of an individual. The consultation on the DRC's review of legislation ('Disability Equality: Making it Happen' 2003) produced a strong body of responses urging the revision of the definition of disability to reflect the 'social model', despite the fact that the review did not itself propose a fundamental change to the definition of disability.

17. Many of these responses were from campaigners for disability equality. There was also a substantial body of support from public authorities. In general the private sector was more cautious about any extension of coverage of the definition of disability. Their concerns centred on the potential for abuse of the legislation and damage to its credibility (these concerns are explored later in paragraphs 57–63).

The present definition

18. The DDA provides protection from discrimination to anyone who has, or has had, a disability. A person has a disability for the purposes of the DDA if s/he has a physical or mental impairment which has a substantial and long term adverse effect on his or her ability to carry out normal day-to-day activities. This core definition is then modified in a number of ways.

19. Long term means that the disability has lasted or can be expected to last at least 12 months (or for the rest of the person's life if this is shorter). People with fluctuating and recurring conditions, who have an individual episode involving substantial adverse effects which last less than 12 months but which is likely to recur are also covered by the Act's definition.⁴ (4 Schedule 1 Paragraphs 1 and 2 DDA)

20. An impairment's effect on normal day-to-day activities must be substantial, interpreted in the statutory Guidance as meaning 'something more than minor'.

21. For an impairment to be treated as affecting the ability of the person to carry out day-to-day activities it must affect one or more of the categories of listed activities: mobility; manual dexterity; physical co-ordination; continence; ability to lift, carry or move everyday objects; speech; hearing; sight; memory; the ability to learn, understand or concentrate; the perception of risk or physical danger. (Schedule 1 Paragraph 4 (1) DDA)

22. The DDA makes special provision for progressive conditions. Where such a condition results in an impairment which has an effect on an individual's ability to carry out normal day-to-day activities,

but that effect is not substantial, the person is nevertheless deemed to have an impairment which has a substantial adverse effect if the condition is 'likely' in the future to have substantial effects. (Schedule 1 Paragraph 8 DDA)

This will remain even if the symptoms disappear ie the person goes into remission.

23. Impairments whose effects are controlled or corrected by the use of medication, prosthesis, an aid or otherwise, still count as a disability if they would have a substantial effect on a day-to-day activity, but for the fact that the effect is reduced by this treatment. (Schedule 1 Paragraph 6 DDA)

24. A person who has cancer, HIV infection or multiple sclerosis (MS) will automatically be deemed to be disabled. A

severe disfigurement is deemed to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

25. The following impairments are specifically excluded by regulations (Disability Discrimination (Meaning of Disability) Regulations 1996) from bringing a person within the protection of the DDA:

- Addiction to or dependency on nicotine, tobacco, any drug or other substance (other than those which are medically prescribed).
- Hayfever (or seasonal allergic rhinitis).
- Any tendency to set fire to property (pyromaniacs), steal (kleptomaniacs), physically or sexually abuse others, exhibitionism and voyeurism, even where such tendencies arise from a mental illness.

26. This definition extends protection to over 11 million people in Great Britain and covers people with a wide range of impairments.

Criticisms of the present definition

27. As discussed above, a key criticism of the present definition is its focus on an individual's medical condition, rather than enquiring into the allegation of discrimination. All applicants who consider that they have been discriminated against have to begin a case by describing all the functional restrictions arising from their physical or mental condition – emphasising all the things that they can't do.

The negative connotations of the present definition (with its emphasis on establishing that someone is unable to participate in 'normal' day-to-day activities) are at odds with its role in an anti-discrimination statute.

28. In addition, the current definition, with its various elements, exceptions, and exemptions is difficult to understand and has led to extended legal arguments, requiring expensive medical reports and long, stressful litigation. This process is both burdensome for the individual, and a distraction of energy for the employer (or service provider).

For example, Mr Kirton had terminal cancer, and experienced severe incontinence as a result of an operation to stem the progress of the cancer.

His case had to go to the Court of Appeal to determine that he was protected by the DDA. (Kirton v Tetrosyl Ltd (2002) IRLR 840)

29. The present definition creates uncertainty. In the vast majority of cases the only way to definitively determine whether a person is disabled is to go to tribunal. Merely because previous cases have established that someone with, for example epilepsy, or repetitive strain injury, is within the DDA definition, does not mean that other people with this condition will similarly be protected by the law.

30. There is evidence that the present definition creates a significant barrier to justice, even for those who fall within it. '[D]efendants in disability discrimination litigation have every strategic reason and encouragement to challenge the status of the claimant as a disabled person. This not only adds to the potential length and cost of litigation, but has a considerable psychological effect upon the willingness of a disabled person to mount or to continue litigation under the 1995 Act.' (Reform of the Disability Discrimination Act: Professor Brian Doyle, Working paper 4 for the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, University of Cambridge 1999)

31. The current definition also creates anomalies, by which people whose impairment has a substantial impact on their lives, and/or attracts significant social stigma, have been excluded from protection by the legislation because of the definition of disability. In one DRC case a man who had attempted suicide, and had his job offer withdrawn as a result, was held not to be disabled because he could not establish that the substantial effects of his depression were likely to last 12 months or more. (*Compton v Bolton Metropolitan Borough Council*, Case No. 2400819/00)

32. Those with minor impairments who would benefit greatly from a small amount of flexibility or resources in terms of adjustments, are denied them under the DDA – not because the adjustment needed is 'unreasonable', but because the person fails to qualify as disabled. Mr Quinlan's case illustrates the problem. *Quinlan v B&Q plc* EAT 1386/97

The applicant – a garden centre assistant – had undergone open-heart surgery and was unable to lift heavy objects. The tribunal found that he had a physical impairment but that this impairment did not affect his ability to carry out normal day-to-day activities. Mr Quinlan was not therefore entitled to any reasonable adjustment to enable him to keep his job.

The proposed alternative

33. The Scrutiny Committee asked the DRC to consult on whether, and if so how, the law could be amended to provide:

- a. protection against discrimination on the grounds of impairment, regardless of level or type of impairment and
- b. entitlements to the removal of disabling barriers, and to submit its recommendations to the Government.

What form would the new definition take?

34. We believe that the first step is to consider whether the shift in approach proposed by the Scrutiny Committee is desirable in principle. If it is, then we would consider at a later date how technically it should be worded. We are, however, very interested in comments on this point.

35. It would be possible to simply use the term 'impairment' (or an alternative term with the same meaning), without further elaboration. However, the absence of a definition might lead courts to impose a more restricted interpretation than intended, (as has happened in USA, see paragraphs 83–84).

36. It may, therefore, be preferable for courts and those with rights or duties to have a clearer indication of what is meant by the term 'impairment' (the term 'impairment' is part of the present definition but the weight of determining whether or not someone is covered is carried by other elements of the definition, chiefly the need to show long term, substantial adverse effects). The Irish or Australian definitions might be taken as a model (see paragraphs 81 and 85).

What would this mean in practice?

37. If the law were to be extended in this way it would be greatly simplified in that there would be no need to establish whether a person's impairment has a long term or substantial functional impact. Anyone with any level of 'impairment' would receive protection from discrimination and entitlement to the removal of disabling barriers.

For example, a person with a broken leg or short term depression would be protected from discrimination on this basis.

38. Such a definition will be broader than the common concept of a 'disabled person'. Indeed the DDA's current definition of disability already includes many people who are

not generally considered (and do not consider themselves) to be disabled. Nevertheless such people will derive significant benefit from the law's protection against discrimination in the form of unwarranted assumptions and unfair treatment.

39. It may be helpful to move away from thinking about the DDA as being concerned with 'disabled people', and instead think of it as being about 'disability discrimination'. Being protected against disability discrimination would not make a person 'disabled' any more than being protected against race discrimination means that everyone is a member of an 'ethnic minority'. Some people experience more substantial disadvantage than others on the basis of their impairment. Such people might be considered to be 'disabled', in that they experience significant social exclusion on the basis of their impairment. A far wider group of people could be protected from potential disability discrimination.

40. The majority of people with impairments with no long term or substantial impact will not experience discrimination, particularly if the implementation of the law succeeds in its goal of changing attitudes and behaviour. It may nevertheless be right that they should be able to invoke the law's protection if they do encounter prejudice or unreasonable attitudes.

Discrimination on the grounds of perception and association

41. The phrase 'on the grounds of' would also include people who were discriminated against on the basis of a perceived impairment: for example, because someone is mistakenly assumed to be HIV positive. It would also cover those who are discriminated against because of an association with a disabled person: for example, a carer who is refused a job because they have a disabled child and the employer believes they will require too much time off (this approach has already been adopted in other anti-discrimination laws).

42. Discrimination on the basis of false perception that someone is disabled, or on the basis of an association with a disabled person, is not currently prohibited under British law. In contrast, some legal entitlement to 'adjustments' already exists for some people with caring responsibilities.

The Employment Relations Act 1999 creates the right to ask for (unpaid) time off work. It would seem preferable to address the need for forms of reasonable adjustments for those with caring responsibilities (such as use of a telephone during working hours for reasons stemming from their caring responsibilities) by an extension of this existing provision.

This would ensure that the needs of all those with caring responsibilities would be addressed in a consistent fashion (adjustments would not, of course, be required by people who only had a 'perceived' impairment).

43. The DRC considers that the European Framework Directive (Directive 2000/78) establishing a general framework for equal treatment in employment and occupation 2000 which requires disability discrimination in employment to be prohibited, already requires the UK law to be revised to prohibit discrimination on the basis of association and perception of disability. The Government has not accepted this interpretation (see paragraphs 75 and 76).

How would an alternative definition work in the DDA?

44. The alternative definition would represent a radical reformulation of the law, addressing the issue from a completely different direction. It would be much closer to the way in which people are protected from other types of discrimination. As with other discrimination laws, the focus would be on the act of alleged discrimination, rather than the personal characteristics (ie extent of impairment) of the individual.

45. The right of non-discrimination is however formulated differently in connection with disability and we would therefore need to think through the particular implications of such a shift in the definition of disability for the particular operation of the DDA.

46. The DDA contains within it the distinctive concept of 'disability-related discrimination'. This approach to defining discrimination does not appear in other anti-discrimination laws. It is broader in some ways and narrower in others than the concept of 'direct discrimination'. In other discrimination laws applying to gender, race, religion and sexuality the question would be: Was the person treated less favourably because of their own (or someone else's) gender, race, sexuality, or religion? Under the disability-related discrimination provisions of the DDA the questions would be: Was the reason for the disadvantageous treatment related to the person's disability, and if so was that reason fair? (in legal terms 'can it be justified?'). To illustrate, a tenant has Tourette's syndrome. This causes him to use obscene language in a way which he is unable to control. His neighbours complain and the landlord threatens to evict him. This would be less favourable treatment for a reason related to his disability and would constitute discrimination unless it could be justified under the DDA (for example, if his

behaviour had a significant impact on the health and safety of his neighbours this would be a legitimate justification).

47. Another key distinction is that other discrimination laws do not adopt the same approach of creating individual entitlements to 'reasonable adjustments'. Extending the right to reasonable adjustments to anyone on the grounds of impairment raises distinctive issues.

48. This paper considers at paragraphs 64–71 how the 'social model approach' might work in these distinctive forms of discrimination, and what problems it might entail.

Positive aspects of an all-embracing approach

49. By broadening the definition to cover anybody with an impairment, the focus shifts from the individual's condition onto the need or otherwise for a reasonable adjustment and whether treatment is fair.

50. A broader, 'social model' definition would also address the other problems identified above, giving greater clarity, less barriers to individual access to justice and creating less apparently unfair distinctions.

51. As well as addressing the problems with the existing definition a wider definition might, more generally, bring a more positive approach, encouraging a more systemic approach to change and to the removal of barriers. Shifting the approach to definition would have the significant advantage of bringing the law in alignment with best practice. Interestingly, most significant practitioners in the field (such as the Employers Forum on Disability) have taken the position since the Act's introduction, that good practice is to assume that a person meets the definition, and focus on taking reasonable steps to resolve the problem, and determining whether the treatment is fair.

52. Even under the present definition businesses rarely enquire about the precise details of a customer's disability to establish eligibility under the DDA (although they may need some details to establish whether less favourable treatment is unwarranted or which adjustments can be provided). Indeed, it would generally be considered poor customer service to adopt such an attitude.

53. Best practice in the design and construction of buildings, and indeed in the provision of services more generally, is to adopt an 'inclusive approach'. This requires, as far as possible, ensuring that buildings and services cater for everyone, avoiding wherever possible the need for

special provision for disabled people. The proposed shift to a 'social model approach' to defining disability supports this best practice approach far better than the present definition.

54. In employment, best practice is again to ensure that work stations, equipment and practices meet the needs of all employees to enable them to be as productive as possible and to avoid any risk to health or safety. For employees who develop impairments or health conditions good practice is to respond to any problems as soon as they become apparent, not, for example, to allow lengthy periods of sick leave to elapse before enquiring whether or not steps can be taken to enable an employee to return to work. In such cases waiting until it is clear that an employee meets the DDA definition (an impairment which has a substantial adverse impact for 12 months or more) before putting in place reasonable adjustments undermines the chances of a successful outcome.

55. In education, the Special Educational Needs and Disability Act 2001 set in place a right of non-discrimination for disabled children, alongside the existing rights under the special educational needs framework. Interestingly the special education needs law adopts an approach which in principle (if not always in practice) bears much more similarity to the proposed 'social model approach'. It provides entitlements to additional support through a 'statement' process. The allocation of such support is not based on the severity of impact of a child's impairment in the abstract but rather relates to the degree of mismatch between the school and the particular child. For example, a child who uses a wheelchair may need substantial extra help in a school which is badly designed but none in one which is designed in an inclusive way.

A 'social model' DDA definition would chime with the broader special educational framework, again simplifying and streamlining.

56. Of course there is nothing to stop employers or service providers adopting best practice and ignoring the current definition of disability. However, ideally a definition would support rather than contradict good practice – all other things being equal. We will now examine below whether some of the potential negative effects of adopting a new definition would counter-weigh its positive features.

Possible concerns

57. Without prejudging the merits or otherwise of the proposal, we set out here some of the concerns which we have identified, and some potential answers to them.

58. A major concern is that adopting this much broader approach to disability would diminish credibility and trivialise disability rights. Might broadening the definition in the way proposed by the Scrutiny Committee 'open the floodgates'? This concern would not only come from the business/public sector, but would be shared by some disabled people on the basis that it might open the DDA to abuse, and therefore discredit it.

Abuse or trivialisation

59. Australia and Ireland both have very broad definitions (set out in paragraphs 81 and 85), in effect providing potential protection to most of the population. In neither country has this broad definition of disability led to high numbers of claims, or reported difficulties with the operation of the definition of disability. In Australia the Human Rights and Equal Opportunity Commission receives fewer than 500 disability discrimination complaints per year and in Ireland less than 400 disability discrimination cases have been lodged per year. This compares with 4,942 DDA employment claims in 2004–2005 British claims each year (down from 5,655 the previous year). The population of Britain is 15 times that of Ireland.

60. The Irish Equality Authority reports that: '[It] is exceptional for disability to be contested (or for claimants to be required by respondents to produce medical evidence to substantiate their disability, or to demonstrate to what extent the disability interferes with their daily life). Normally disability is accepted by the respondent without demur, because the definition in the Equality Acts is so wide, and the focus of the case is simply on whether the respondent has treated the complainant less favourably than a person without a disability in similar relevant circumstances, based on the disability, or has failed to provide reasonable accommodation to the extent required by the disability.'

61. Most of the cases appear to involve the same types of disability as under the DDA, but they are likely to involve a broader spectrum of severity or duration of those conditions. For example, in 2004 Irish Equality Tribunal decisions on the disability ground related to conditions including arthritis, multiple sclerosis, learning disabilities, use of crutches following an accident, use of crutches following surgery, back injuries or hernias impairing capacity to bend or lift at work,

recovery from surgery for ulcerative colitis, and stress-related illness.

62. Whilst reassuring, this evidence of the absence of a flood of trivial claims by no means conclusively refutes concerns about how a broader definition would operate in the British context. The different legal and institutional frameworks and cultural contexts could influence the way in which disability discrimination law operates. British people may be more litigious, or other systems may better facilitate informal conflict resolution, or offer additional legal routes for resolving problems such as stronger general employment protection. This consultation provides the means for the DRC to collect informed opinion about how the proposed alternative approach to defining disability in the DDA might operate in practice in the British environment.

Credibility

63. There have been criticisms already of the breadth of the DDA definition along the lines of 'it's a nonsense to say that 11 million people in Britain are disabled'. The proposed approach might lead to further criticism on the basis that 'we are all disabled now'. This would make it all the more important to reconceptualise the DDA (as in paragraphs 39–40) as being concerned with 'disability discrimination', and clarify that not all of those who might be able to invoke protection of the law against disability discrimination would be 'disabled people'.

Would extending legal protection to more people in practice weaken it for those already covered?

64. This might happen if cases brought on trivial grounds resulted in restrictive interpretations of the law, which are then applied across the board. The DRC is interested in views from lawyers and others about this point.

65. The wider definition of disability may place additional strain on other aspects of the definition. For instance, the example regarding neighbours' concerns about the behaviour of a person with Tourette's syndrome would apply to a much wider range of mental health conditions. This will place renewed importance on a clear articulation of when less favourable treatment for a disability-related reason can be justified.

66. Similarly, widening the scope of those who can ask for reasonable adjustments might lead to an increased focus on providing evidence that an impairment necessitated the provision of an adjustment. To take a possible example of trivialisation, if an employee sought to argue that he needed the walls of his office to be painted a bright colour rather than institutional grey because this was making him depressed, he would need to establish a causal connection between the decoration scheme and his depression before an employer would need to consider making the change. In the terms of the DDA the employee would need to establish that the colour scheme placed him at a 'substantial disadvantage' (the legal 'trigger' for adjustments in employment).

Courts might react to a broader definition by closer scrutiny of whether such a disadvantage existed.

67. A shift to the 'social model definition' would not mean that everyone with an impairment could claim whatever change they wanted. They would still need to establish that the legal 'trigger' applied, and care would need to be taken to ensure that this trigger was appropriately worded to deter trivial claims.

Is there a need to target resources within the DDA?

68. As we have seen (in paragraph 12) the goal of a disability discrimination law is to reduce the prejudice, disadvantage and discrimination which have historically been associated with disability by eliminating discrimination and taking action to promote inclusion and participation. In so far as this involves stopping prejudiced behaviour or doing things in a less exclusionary way this does not require resources, and therefore there is no need for 'rationing' via a restrictive definition.

69. However, in so far as the DDA requires positive additional action to counter exclusion or social disadvantage there may be concerns that the proposed shift of definition might lead to a loss of focus on those who really need this.

Reasonable adjustments

70. In relation to reasonable adjustments there may be concerns that extending the right to request these to a broader group may diminish their availability for those who most need them. To use a simple example, if parking spaces are limited then giving one to a person with a mild mobility

impairment might mean that one was not available to someone with a more severe impairment. It may be that the mechanisms within the legal duty to make reasonable adjustments are already sufficient to deal with this issue: for example, the requirement of a threshold of need ('substantial disadvantage' or 'unreasonable difficulty') and indeed the mechanism of reasonableness. Alternatively it may be that an additional mechanism is needed within the reasonable adjustment duty to require prioritisation to ensure that those who would most be disadvantaged by the absence of an adjustment are provided with one. We invite comments on this point.

Public sector duty to promote disability equality

71. The DDA 2005 introduces a duty on public authorities to promote equality for disabled persons. Broadening the approach to defining disability may require the duty to explicitly refer to the need for public authorities to concentrate attention on those that evidence demonstrates are experiencing the greatest levels of inequality. Again views are invited on this point.

Would the legal ability to positively discriminate be lost?

72. One final concern relates to an atypical feature of the DDA within British equality law: the fact that it places no restrictions on positive discrimination. Disabled people can be given preference over non-disabled people since non-disabled people do not have protection against discrimination.

This asymmetry is viewed by the DRC as an important feature, assisting those who seek to combat the entrenched social exclusion experienced by many disabled people.

73. This asymmetrical approach would be retained with any shift to the 'social model definition', provided that the statute was worded to make it clear that only discrimination on the grounds of an impairment would be prohibited – not on the grounds of the lack of an impairment (at present the DDA makes this clear by prohibiting discrimination on the 'grounds of a disabled person's disability').

74. In this way the legal ability to take positive action would be retained. However, the broadening of the definition of disability would lead to a much wider group to whom any 'positive discrimination' would apply, and might require a re-

consideration of practices. In practice, employers or others wanting to undertake positive action would sensibly use a more targeted definition of disabled people to ensure that their efforts were focused on those who most need them, experience most social exclusion etc. The approach of defining disability broadly in respect of protection against discrimination could be accompanied by legal provision making it clear that positive discrimination in favour of a more narrowly defined, targeted group of disabled people was lawful.

Appendix

International definitions of disability in discrimination laws

European Union

75. An EU Directive in 2000 prohibited discrimination 'on the grounds' of disability. The Directive did not define disability. It is likely that the European Court of Justice will be asked to develop, probably through a piecemeal approach, a European definition.

76. 'On the grounds of' has been interpreted in the race context as including people who experience discrimination on the mistaken basis that they belong to a particular ethnic group or because of their association with someone from a particular ethnic group (eg because they are married to such a person). The DRC argued that the Directive required the UK law to be revised to prohibit discrimination on the basis of association and perception of disability. The Government has not accepted this interpretation.

77. Whilst most EU countries have now introduced disability discrimination laws, generally these are very recent, and are untested by caselaw or in practice. A wide range of approaches to definition has been adopted.

78. The Belgian Act to Combat Discrimination (For an excellent discussion see Lisa Waddington's chapter, Implementing the Disability provisions of the Framework Directive in 'Disability Rights in Europe, from theory to practice' ed. A. Lawson and C. Gooding (Hart 2005)) does not define disability, on the basis that any definition would result in an exclusion of that which was not mentioned. (See above reference for discussion of rationale)

However, the Parliamentary discussion did make it clear that the intention was to interpret the concept of disability very broadly. Some commentators argued that, given this intention, it would have been more appropriate to have included a definition, or legislative guidance, on this point so as to ensure that the term 'disability' was not interpreted in the way common in daily use.

79. The Dutch Act on the Equal Treatment on grounds of Disability or Chronic Illness (2003) also does not provide a definition of disability. The legislation covers discrimination

on the grounds of 'a real or supposed disability or chronic illness'.

80. In contrast the Spanish 'law for equal opportunities, non-discrimination and universal accessibility for disabled persons', excellent in many other ways, states that 'disabled persons shall include all those who have a grade of handicap of 33 per cent or above', linking the definition to welfare benefits law (this definition is being challenged as overly restrictive before the European Court of Justice).

81. The Irish laws prohibiting disability discrimination (alongside discrimination on other grounds) predate the Directive, and therefore there is more indication of how they operate in practice. The Employment Equality Act 1998 and Equal Status Act 2000 both define disability as: 'the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body, or

i. the presence in the body of organisms causing, or likely to cause, chronic disease or illness, or

ii. the malfunction, malformation or disfigurement of a part of a person's body, or

iii. a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or

iv. a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.'

82. The Act also states that it shall be 'taken to include a disability which exists at present, or which previously existed but no longer exists or which may exist in the future or which is imputed to a person'. Discrimination by association is also covered.

USA

83. The Americans with Disabilities Act 1990 contains a definition which has proved in practice to be narrower than that in the DDA:

a) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual

(b) a record of such an impairment (this means 'has a history of, or been misclassified as having a mental or physical impairment that substantially limits one or more of the major life activities'); or

(c) being regarded as having such an impairment.

84. This is broadly similar to the British definition's approach. It has, however been interpreted by the Courts in a much more restrictive fashion and is widely credited with undermining the policy intention behind the otherwise seminal ADA.

Australia

85. The definition of disability in the Australian Disability Discrimination Act 1992 is the model for the Irish legislation and is identical with it. The Productivity Commission (established by the Australian Government to improve laws) produced a Review of the Disability Discrimination Act 1992 in 2004.

The Commission expressly contrasted the Australian Act's definition with the UK definition.

It noted that the UK law had taken up significant legal resources identifying who is disabled, and contrasted this with the Australian focus on whether a discriminatory act has occurred. The report cited only one significant case regarding the coverage of the definition of disability (in *Purvis v State of NSW (Department of Education and Training)* 2003 the High Court of Australia ruled that 'disturbed behaviour' that is a consequence of a disability is part of the disability for the purposes of the DDA).

86. The report concluded that the definition of disability was working well but made three recommendations for improvement and clarification. The definition should be amended to ensure that it is clear that

it includes:

- medically-recognised symptoms where the underlying cause is unknown
- genetic predisposition to a disability that is otherwise covered by the Act.

A note should be added to the Act to explain that behaviour that is a symptom or manifestation of a disability is part of the disability for the purposes of the Act.

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