

Definition of Disability Questionnaire

THE DISCRIMINATION LAW ASSOCIATION

RESPONSE TO:

DISABILITY RIGHTS COMMISSION CONSULTATION ON THE DEFINITION OF DISABILITY

Introduction

1. The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.
2. The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 400 members. Membership is open to any

lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

3. We are a company limited by guarantee.
4. DLA welcomes the DRC's consultation on a new definition of disability. Our response to the questions raised in the consultation are set out below.

Consultation response

1. Do you think that the way in which 'disability' is defined in the Disability Discrimination Act 1995 should be changed?

A: The Discrimination Law Association is extremely supportive of a change to the definition of disability. It is DLA's view that the current definition is not only restrictive but also extremely complex. This complexity, and the regularity with which respondents raise as a preliminary issue whether or not someone meets the definition, mean that the court or tribunal focuses not on the lawfulness or otherwise of the behaviour but rather on whether or not an individual fits within a restrictive, medically based, definition of disability. This is in our view in no-one's interest.

Such challenges to whether or not a claimant meets the definition of disability also waste both time and costs. It is costly for claimants to establish that they fall within the definition as it is not only a highly complex legal area –which may require representation which is often only available at a cost – but there is usually a requirement by the tribunal that expert evidence be called to establish a particular condition or effect of a condition. In the employment tribunal there is often a separate hearing on the

question of definition – adding considerably to time and costs not only on the part of the claimant but on the part of the defendant as well.

It is also our view that the present definition of disability does not comply with the European Employment Framework directive. It is clear that less favourable treatment “on grounds of”, as set out in the directive, would encompass less favourable treatment of an individual because they are associated with a disabled person or because they are perceived to be disabled. This is not reflected in the present definition.

2. If yes – do you think it should be changed to the approach set out in para. 33 i.e: anyone with an impairment, regardless of severity or duration should be protected from discrimination and entitled to the removal of disabling barriers. (This approach will be described as ‘Scrutiny Committee proposal’)?

A: DLA would support changing the definition to the approach set out in paragraph 33 - that anyone with an impairment, regardless of severity or duration, should be protected from discrimination and entitled to the removal of disabling barriers.

Or to some other approach? (If this option please give further details)

3. (Paras. 34-40 and Annex 1)

If the Scrutiny Committee proposal were adopted which would be better:

- Simply stating that discrimination in relation to ‘impairment’ is prohibited without further definition of ‘impairment’ or
- Further elaboration of the meaning of impairment along the lines of the Australian and Irish definitions (paras.81-82 and 84-85) or
- Some other way please state

A: DLA would support further elaboration of the meaning of impairment along the lines of the Australian and Irish definitions. Whilst this might appear to be an overly medicalised approach, DLA is concerned that if impairment is not defined, the “battleground” will move from long-term, substantial adverse effect

to whether or not something constitutes an impairment. For the sake of clarity, not only for tribunals and disabled people but also for employers and service providers, we would welcome an approach as set out in the Australian and Irish definitions. It seems clear from looking at cases brought before the Irish Equality Tribunals that whether or not an individual falls within the definition of disability is not generally the issue – rather it is the nature of the treatment itself, and the reason for it, which is at issue.

It is important, though, that regulatory making powers in any primary legislation enables additional “impairments” to be added to the list to ensure that no new emerging conditions are inadvertently excluded from the definition.

4.(Paras. 49-56)

If the Scrutiny Committee proposal were adopted what would you see as the main benefits?

Might it make it easier for disabled people, employers, service providers etc to understand who is protected and what is required under the law?

A: as indicated above, DLA believes that it would make it easier for everyone to understand who is protected and what is required under the law. This would inevitably lead to reduced costs and time-wasting in the courts and tribunals, as well as obviating the need in some cases for a tribunal hearing at all (for example, where an employer is uncertain as to whether or not an individual fits within the definition of disability, he may await a tribunal decision on it – this would not be the case if it was clearer that an individual was covered).

Might it better support good practice approaches? Examples?

A: DLA is aware that there is a number of progressive employers who do not take a DDA-restricted view of disability, but who focus on what an employee needs to ensure that they can do their job most effectively. A revised definition would support such an approach. As indicated above, a revised definition would also prevent employers spending time and energy determining whether or not someone is disabled, for the purposes of deciding whether or not adjustments are required, rather than just making adjustments as necessary.

Might it make it easier for individuals to resolve disability related problems?

A: We would hope that a revised definition of disability, one which enables both employers and disabled people to see much more easily whether or not they meet the definition, should mean that more time is spent in the workplace resolving any issues which have arisen rather than in the tribunal arguing about whether or not an individual meets the definition of disability. It should also make it easier for those representing disabled people in the workplace – such as trade union representatives – to use the DDA more effectively without having to reach a determination as to whether or not a member falls within the definition or not. A common example might be that of a person suffering from back pain, who would normally fall outside the current definition but who, without adjustments, would not be able to do their job. Such an approach would also chime with the government's intention to ensure that those who are on incapacity benefit have the fullest opportunities to get back into work.

OTHER?

5.(Paras. 57-68)

If the Scrutiny Committee proposal were adopted what would you see as the main risks?

Might broadening the definition lead to a weaker legal interpretation of non-discrimination rights?

Might it discredit or trivialize disability discrimination law?

OTHER?

Have you any suggestions for minimizing these risks?

A: It is our view that broadening the definition should not lead to a weaker interpretation of non-discrimination rights. However, it has to be acknowledged that the courts have taken the purposive approach to the legislation that they have on the basis essentially of the historical disadvantage experienced by disabled people (see in particular Archibald) and it is far from clear that a broader definition would have attracted the same approach and commentary from the higher courts. In addition, tribunals are so

used to determining whether or not someone fits into the current definition of disability, it will be quite a change to deal with a broader, less contentious definition. It is essential, in order to minimise any risks associated with broadening the definition, that the codes of practice provide a detailed explanation of how the anti-discrimination duties, and the definition of disability issue, should be approached.

Another concern relating to a broadening of the definition is the asymmetrical nature of the legislation. The broader the definition, the more difficult it would seem to be to retain an asymmetrical approach to the legislation, given that the definition would be covering a much broader concept of disability. It might be that direct discrimination would have to be available to those discriminated against because they do not have a disability or a particular disability, although the reasonable adjustment concept would be retained for those with a disability.

6.(Paras. 68-71)

Would there be a need to ensure that priority could be given to those who are most in need of reasonable adjustments?

Can you give examples of where you think problems may arise?

A: The concept of reasonable adjustment has been one of the most successful aspects of the Disability Discrimination Act and DLA would be loath to see this concept diluted in any way. We understand the concern that having a reasonable adjustment duty available to anyone, regardless of level of impairment, might be seen to dilute the concept. In addition, one of the factors listed in the Act to be taken into account in determining whether or not an adjustment is a reasonable one to make is the amount already spent on adjustments. There is therefore concern that an employer might be able to spend a large amount of money on a large number of relatively minor employee adjustments and that it would not then be reasonable to spend an equivalent sum on an adjustment for a disabled person who is in need of greater, more expensive adjustments. Whilst this may be a real concern, DLA would hope that revised factors on reasonableness in the Act, and a revised Code of Practice, would be able to ensure that those in most need of adjustments are not deprived of them. In particular, the concept of what is “reasonable” should have some relationship to a greater need for adjustments and the Code should give guidance on this. We understand that in Canada and Ireland,

dilution has not been an issue (although these obviously deal with smaller populations than in the UK).

7. If the Scrutiny Committee proposal were adopted would there be an additional need for a more focused definition (i.e those who experience the greatest levels of inequality) to be adopted in relation to the Disability Equality Duty, or in relation to positive action more generally ?

A: DLA believes that both positive duties and positive action are extremely important in achieving substantive equality. The aim of positive action is to overcome barriers to full participation but rather than the definition of disability being focused, it is DLA's view that the positive action measures should be focused - to remove barriers for those who are most disadvantaged, subject to greatest inequality in the particular context. If those who are subject to such disadvantage benefit, it is likely that other disabled people will also benefit.