

Guidance on matters to be taken into account in determining questions relating to 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 the 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 welcomes the opportunity to respond to the consultation on guidance on matters to be taken into account in determining questions relating to the definition of disability. This is a complex area which needs clear guidance. Overall we find the Guidance helpful, in particular in reflecting long-standing case-law on a range of issues. However, one new issue which would benefit from further explanation or possibly an illustrated example is where discrimination occurs because a person is mistakenly believed to be disabled. Since this action, and that of discrimination on the basis of association with a disabled person, is now prohibited by the Equality Act, it is misleading to state, as para. 1 of the Guidance does that only those who are defined as disabled will be entitled to protection under the Act. We believe it would also be helpful in this introductory section to mention that those who have had a disability count as disabled, as this is an often neglected provision.
3. Para. 7 correctly states that eligibility for other schemes such as the Blue Badge, or having been identified as having Special Educational Needs, does not automatically confer entitlement to protection under the Act. However, we are concerned with the expense that many protected individuals have to go to in order to establish that they are indeed disabled, paying for expensive specialist reports. It would therefore be helpful if the guidance indicated that there will generally be a significant overlap in those who are eligible for a particular scheme

and protection under the EA, and that having established eligibility may assist towards proving entitlement under the EA.

4. Overall we find this page 13 hard to understand, and feel it would benefit from redrafting.
5. B10 suggest reword last sentence since it is ambiguous, merely saying that the effects of the environment should 'be considered', without indicating how they should be considered. Is it more or less likely to be a disability if the effects are only worse under certain environmental conditions? Same point applies to para. B15 – how account should be taken should be spelt out.
6. Example on page 20 is confusing in that it does not explicitly relate to the substantialness of an impairment, with which this section is concerned. It would be useful if moved to the section on recurrence and a more apposite example substituted for it.
7. page 23, boxed example last sentence –would be clearer if it replaced 'she will, however, still' with 'she will also'. The word 'however' doesn't make sense on the eg because it is surely almost certainly long-term. It might be better to change the example to one which better illustrates your point.
8. B20 – it reduces clarity to cite schedules and paragraphs without giving their content, even when you have only recently done so. More generally the meaning of this paragraph needs to be clarified.
9. The meaning of C4 is unclear.
10. An example would be useful at C7.
11. C9. We feel that the issue regarding avoidance behaviour is given too much prominence in the documents as a whole, given that in most situations avoidance activity in itself substantially disrupts a person's day to day activities. The most obvious example is having to avoid walking too far or sitting on the wrong sort of seat in relation to a back condition. A child who needs to avoid certain substances because of allergies may find their day to day activity of eating substantially affected.
12. D3 –We think that the requirement that a day to day activity is 'normal for a large number of people', goes too far. There is a subtle but important difference between 'not a small group' and 'a large number of people'. We suggest adding the example of working nights being a normal activity
13. Work related and specialised activities. We think that more clarity is required here. For example the text seems to imply that work activities are not day to day activities. This is wrong - much of what we do at work is a day to day activity - it's only the very specific that fall outside. The text also seems to suggest that it is 'normal' to be able to play

some musical instrument at an amateur level or play football at an amateur level. We agree and think this should be more explicitly stated. There is no reason why hobbies should not constitute day to day activities.

14. D8 and accompanying example would also benefit from clarification.
15. D16 – See comments re C9 above. We strongly recommend that this reference to modifications of behaviour should be omitted.. Readers will get confused and believe that people are not disabled if they have adopted or should have adopted other ways of doing things.
16. D24, boxed example: surely the point is that ‘This has a substantial adverse effect on the normal day-to-day activity of hearing / holding a conversation.’ The final sentence gives the impression that you need to go on to find another affected activity. We suggest adding ‘This has a substantial adverse effect on the normal day-to-day activity of hearing / holding a conversation.’ and then add the word ‘also’ to the final sentence.
17. D30, first example: the same point applies, i.e. crossing the road is itself a normal day-to-day activity. The text gives the impression that the person must cite another affected activity
18. Appendix, p49 – ‘intermittent loss of consciousness’ should stand alone. Surely that is enough to create a substantial adverse effect without having to show associated confused behaviour too.
19. Overall, is the list of examples here does not take full advantage of the removal of the previous ‘capacities’ categorisation. It would be good to have a few more examples which previously did not easily fit in to the definition.
20. It would be useful if somewhere in the Guidance the following 2 examples were added, because they frequently occur and employers tend not to take them seriously: a person who can read newspapers and books but only by holding them 6 inches from their eye; and migraines. It would also be helpful to have examples of children experiencing difficulties with day to day activities in the school context.