

Disability Discrimination Act

**OFMDFM CONSULTATION ON “GUIDANCE ON MATTERS
TO BE TAKEN INTO ACCOUNT IN DETERMINING
QUESTIONS RELATING TO THE DEFINITION OF
DISABILITY”**

Consultation Report

CONSULTATION REPORT:

Background

The Disability Discrimination Act (DDA) 1995, as amended, prohibits discrimination against disabled people in a range of circumstances, including in employment and occupation, 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 (Northern Ireland) Order 2006, the Office of the First Minister and deputy First Minister (OFMDFM) 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 operation), and has not been amended since. As a result of various legislative changes since 1996, including the Disability Discrimination (Northern Ireland) Order 2006 (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 has now been updated.

Consultation exercise

The revised text was subject to a consultation exercise, which took place between 23 October 2006 and 15 January 2007. 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, and 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 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 are appropriate to either the guidance or the consultation exercise. In line with the powers given to OFMDFM 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.

Many of the responses received had clearly been subject to much consideration. Various suggestions for changes and additions to the text were received. Whilst not all could be accepted, thanks are extended to those providing them and to all those who responded to the consultation. Given the volume of suggestions, it has not been possible to list all of them in this report. Those, not covered here will be addressed in letters to individual respondents.

The Consultation Document

The Consultation document provided 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 160 recipients covering key stakeholders including bodies representing the interests of adjudicating bodies, disabled people, business and employee interests as well as professional bodies.

The consultation document was also placed on the OFMDFM website. 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

In total 15 responses were received. Nine respondents used the questionnaire format. The remainder provided comments in narrative text or in a combination of questionnaire/narrative.

The following is an analysis of the responses and a summary of views expressed in relation to each of the questions asked in the consultation

questionnaire. All comments were considered when the guidance was revised following the consultation exercise. Given the small numbers involved responses have not been broken down into percentages.

Table A Type of Respondent

Type of Respondent	Number
Professional body	1
Disability organisation	5*
Voluntary Body	4*
Advisory body	5
Other	2
TOTAL	15*

* Two bodies identified themselves as both voluntary and disability organisations

SUMMARY OF RESPONSES

Question 1: Do you think this structure is the right one?

Table 1	Frequency
Yes	9
No	0
Response in different format	6
No response	0
Total	15

Table 1 shows the responses. Of the 15 responses received, there was overall support (9) for the proposal from respondents using the questionnaire. No respondents disagreed with this question. The six who responded in a different format were generally positive.

The majority of respondents stated that overall the structure was the right one, but some did offer suggestions for improving the text.

Some comments were made on the physical presentation of the Guidance. The Law Centre felt that the presentational style of bold, bulleted text and use of boxes could be confusing. The ECNI made other suggestions for improving the presentation of the examples. We had used different styles to emphasise specific points. However, we have now simplified it by removing all underlining of bold text throughout the Guidance and placing all text in the same font (Ariel 14). We are also looking at how we might improve the presentation of the boxed examples in the final printed document.

The Law Centre also suggested that there should be a separate section on children and a summary section at the end of the document. Neither of these suggestions has been taken up since this might cause a reader to only refer to those sections. It is essential that anyone using this document considers all the factors to be taken into account in deciding whether a person may be disabled for the purposes of the Act. To be aware of all the elements relating to the definition of disability it is necessary to read the guidance in its entirety.

The Royal College of Speech and Language Therapists thought the first section in Part 2 should not be headed "General" suggesting instead separating the text into "Introduction" and "Meaning of Impairment". While accepting that "General" did not accurately reflect the chapter content, "Introduction" had already been used in Part 1. Also, we wanted to avoid substantial renumbering to ensure that the final version retained similarity with the version for consultation. Instead, we have changed the heading to "Definition of disability and meaning of "impairment"".

Several respondents raised the issue of providing the final guidance in alternative formats. It is our intention to publish it in large print, DVD and Braille. Given that the guidance is primarily designed for courts and tribunals an easy read version has not been prepared.

Question 2: Do you think this format helps towards an understanding of how the individual elements of the definition of disability interrelate?

Table 2	Frequency
Yes	9
No	1
Response in different format	5
No response	0
Total	15

Table 2 shows the responses. Of the 15 responses received, 9 agreed, only 1 disagreed and 5 responded in a different format. Again, most responses were quite positive.

The Northern Ireland Housing Executive said the format “provides a clear and logical progression from one section to the next in its explanation of how the various elements of the definition of disability in the DDA fit together.” The Law Centre thought the format provided a reasonable guide as to how the individual elements of the definition of disability interrelate. However they suggested that the guidance should be more explicit regarding the need to satisfy all elements of the definition of disability. As a consequence we have repeated (at A2) the introductory statement that “those using the guidance for the first time should read it all, as each part of the guidance builds upon the part(s) preceding it”.

The Royal College of Speech and Language Therapists did not consider the format helpful as they considered that the wide-ranging effects of communication disabilities and their effects upon individuals day-to-day functioning were not sufficiently detailed in the guidance. They also felt that the examples referring to stammering did little to educate the judiciary of potential difficulties. As a result we have made certain changes to the text. (See Questions 4, 6 and 7)

Question 3: Do you think the text is clear enough in its explanation of how the definition of disability works?

Table 3	Frequency
Yes	7
No	2
Response in different format	6
No Response	0
Total	15

Table 3 shows the responses. Of the 15 responses received, just under half (7) agreed, 6 replied (mainly positively) in a different format and 2 disagreed.

The Law Centre said: “The text is clear and easily understood.” Those who replied in the negative (the Royal National Institute for the Deaf (NI) and the Royal College of Speech and Language Therapists) raised specific points. RNID (NI) thought the text may prove too difficult for deaf people who use British or Irish Sign Language and queried the lack of an example of a person using Sign Language. As mentioned earlier, the guidance will be produced in a variety of alternative formats (DVD, large print and Braille). The Royal College of Speech and Language Therapists thought the terms “impairment” and “condition” were sometimes used seemingly interchangeably. They, the Children’s Law Centre and Disability Action raised queries about the examples of impairments used at A6 as well as the terminology used to describe them. A number of responses referred to the terminology and difference between “learning disability” and “learning difficulty”. There appeared to be confusion between respondents as to what is meant by these terms. Several suggestions were received for additions to this section. While not all suggestions have been taken on board we have made the following changes at A6

- added a bullet point to cover communication impairments;
- changed “learning difficulties” to “learning disabilities” to differentiate between that and the bullet point which covered developmental impairments (learning difficulties)

Question 4: Do you think there are any parts of the text that are hard to understand?

Table 4	Frequency
Yes	4
No	3
Response in different format	8
No Response	0
Total	15

Table 4 shows the responses. Of the 15 responses received, 4 agreed, 3 disagreed and 8 replied in a different format.

Only three respondents thought that there were no parts of the text that were hard to understand. Numerous detailed comments were received to this question and, as a result, the following changes have been made:

- at A15 (People who have had a disability in the past) the example has been separated out from the text in the paragraph;
- at B8 (Effects of behaviour) “or” has been added in the first sentence so it now reads “Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment **or** because of a loss of energy and motivation.”;
- also at B8 the example on stammering has been revised;
- at D22 (Physical co-ordination) “ “composite” activities” has been changed to read “ “composite” (combined) activities”;
- D25(iii) (Eyesight) has been cross-referenced to B14;
- at D26 (Memory or ability to concentrate, learn or understand) the term “non-factual” information has been removed from the penultimate sentence which now reads “The ability to learn or understand also covers the perception of what is meant by certain types of verbal communication such as the use of humour or sarcasm as well as non-verbal communication such as body language and facial expressions.”

Question 5: Do you think it is equally clear how a person with a mental impairment is covered compared to a person with a physical impairment?

Table 5	Frequency
Yes	8
No	1
Response in different format	4
No Response	2
Total	15

Table 5 shows the responses. Of the 15 responses received, 8 agreed, 1 disagreed, 4 replied in a different format and 2 did not comment.

The Royal College of Speech and Language Therapists felt that the needs of people with mental health and speech and language communication needs had not been adequately represented.

The Law Centre welcomed the frequent use of examples of mental impairments and the acknowledgement that people may suffer physical and/or mental impairments. However they felt it vital that the guidance clearly state the removal of the requirement for a mental illness to be “clinically well recognised”. This change is mentioned three times in the Guidance. However, we have highlighted certain text at A9 (Mental illness) to draw further attention to this recent change.

Question 6: Do you think other parts of the text would benefit from examples?

Table 6	Frequency
Yes	3
No	5
Response in different format	5
No Response	2
Total	15

Table 6 shows the responses. Of the 15 responses received, 3 agreed, 5 disagreed, 5 replied in a different format and 2 did not respond.

Many respondents requested that additional examples be included at various places throughout the text. Where possible, these have been accommodated, but the number of examples has been limited to avoid interrupting the flow of the explanatory text and making the guidance too lengthy.

The Royal College of Speech and Language Therapists commented on the use of two examples of stammering. This has now been amended to include a wider range of communication impairments.

There was criticism of the lack of a developed example of a person with more than one impairment (which alone would not have a substantial adverse effect). As a result a new example has been developed at B6 (Cumulative effects of an impairment).

Question 7: Do you think the examples are helpful in adding to an understanding of the related text?

Table 7	Frequency
Yes	7
No	2
Response in different format	6
No Response	0
Total	15

Table 7 shows the responses. Of the 15 responses received, 7 agreed, 2 disagreed and 6 replied in a different format.

The majority of respondents found the examples helpful in adding to an understanding of the text. The use of frequent examples of mental impairment was welcomed.

In relation to communication disorders the Royal College of Speech and Language Therapists felt the range of disabilities was not adequately represented.

The Law Centre welcomed the broad use of various impairments and situations within the examples. They went on to suggest that if examples are from case law, they should be referenced. While the original text and the case studies did take account 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.

As a result of specific comments about examples the following changes have been made:

- at B8 (Effects of behaviour) the example of the woman with a stammer avoiding certain activities has been revised; (This example was criticised by different respondents as being unhelpful.)
- at B18 (Progressive conditions) the gender of the child in the example has been changed to female;

- at D14 (Children with a disability) the example of the boy with ADHD has been expanded to emphasise the ability to understand;
- at D20 (Mobility) the second example has been slightly amended;
- at D 22 (Physical co-ordination) an additional example on the effects of swallowing has been used;
- at D23 (Continence) “major” has been removed from before “soiling”;
- at D25 (Speech, hearing, eyesight) the example of the man with a stammer has been slightly revised following comments by one respondent and moved to B8;
- at D25(i) (Speech) an additional example has been added;
- D25(iii) (Eyesight) has been cross-referenced to B14;
- at D26 (Memory or ability to concentrate, learn or understand) a slight change has been made to the initial paragraph;
- at D27 (Perception of the risk of physical danger) a further example has been added to illustrate the text.

Question 8: Do you think there are particular points which you consider might usefully be illustrated by examples?

Table 8	Frequency
Yes	5
No	4
Response in different format	4
No Response	2
Total	15

Table 8 shows the responses. Of the responses received, 5 agreed, 4 disagreed, 4 replied in a different format and 2 did not respond.

A few specific suggestions were made. As a result the following changes have been made:

- at D11(Indirect effects) reference has been included to the possible after effects such as pain or fatigue an impairment may cause;
- at D12 (Children with a disability) an example of a child under 6 has been included;
- at D22 (Physical co-ordination) an additional bullet point has been included to cover the ability to swallow food and/or liquids and additional example on swallowing difficulties has been added.

Question 9: Do you think the distinction between “capacities” and ‘normal day-to-day activities’ has been made sufficiently clear?

Table 9	Frequency
Yes	5
No	3
Response in different format	5
No Response	2
Total	15

Table 9 shows the responses. Of the responses received, 5 agreed, 3 disagreed, 5 replied in a different format and 2 did not respond.

Mainly positive comments were received to this question. The Law Centre thought “The guidance provides a good base of information regarding “capacities” and “normal day-to-day activities.”.

The Law Centre also welcomed the recognition at D2 that physical impairment can result in mental effects and the mental impairments can have physical manifestations. The ECNI commented on normal day-to-day activities specifically in relation to work related and other specialised activities (D7 – D10). In order to clarify that many types of work or specialised hobbies may still involve day-to-day activities we have put in bold text the sentence at D9 (Work-related and other specialised activities).

Question 10: Do you think 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?

Table 10	Frequency
Yes	7
No	2
Response in different format	5
No Response	1
Total	15

Table 10 shows the responses. Of the responses received, 7 agreed, 2 disagreed, 5 replied in a different format and 2 did not respond.

Again, most responses were encouraging. The Law Centre described the bullet points as “helpful in providing an easy reference tool”. The British Stammering Association and the Royal College of Speech and Language Therapists referred to the terminology used in relation to speech advising that it did not represent current terminology. Consequently at D25 the section on speech has been revised to take account of their comments and additional examples used.

Further changes to original text

As a result of other comments made by respondents the following additional changes have been made to the text.

- at A4 the following two sentences have been removed:

“It is not possible to provide an exhaustive list of conditions that qualify as impairments for the purposes of the Act. Any attempt to do so would inevitably become out of date as medical knowledge advanced.”

- at D14 an additional reference has been made to an ECNI Code of Practice.

Finally, the references to blind or partially sighted people being deemed to be automatically covered by the Disability Discrimination Act 1995 have been removed. (A10 and D25(iii)) The Regulations to implement this are still pending due to a review of procedures.

ANNEX 1

List of respondents

Action Mental Health

Children's Law Centre

Disability Action

Epilepsy Action

Equality Commission for Northern Ireland

Law Centre NI

National Children's Bureau

Northern Ireland Campaign for ME/ CFS Healthcare

Northern Ireland Housing Executive

Northern Ireland Human Rights Commission

Omagh College

RNID (NI)

Royal College of Speech & Language Therapists

Skill NI

The British Stammering Association