

**Barnardo's Response to
Definition of Disability –
Consultation by the
Disability Rights
Commission**

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Response from Barnardo's

Introduction

1. Barnardo's is the UK's leading children's charity, providing 370 services nationwide. Every year we work with over 120,000 young people and their families affected by today's most urgent issues such as poverty, disability, discrimination and abuse.
2. We welcome this consultation into the possibility of extending the definition of disability in the Disability Discrimination Act. Barnardo's works with children from a variety of different backgrounds, including those with disabilities, serious illnesses and those with mental health problems. We are keen to ensure that sufficient legal protection is in place for these children and young people and their families to ensure that they are not unreasonably denied access to employment or services as a result of their condition.

Q1. Do you think that the way in which “disability” is defined in the Disability Discrimination Act 1995 should be changed?

3. Barnardo's supports the revising of the definition of “disability” used in the Disability Discrimination Act. We believe that the current definition is too narrow to provide protection for all people who need it. In particular it does not provide sufficient protection for:
 - people who suffer from mental health problems
 - the carers of disabled people
 - suffers of behavioural disorders such as ADHD
4. Despite amending the Disability Discrimination Act, in December 2005, to remove the requirement that a mental illness must be “clinically well recognised”, the Act still does not provide comprehensive protection to those with a mental illness. This is primarily because it is drafted in a way which puts an emphasis on physical disabilities. For example the current approach to defining disability requires not just that an individual actually suffers from an “impairment”, but also that that impairment is “substantial” and “long term”. Many mental illnesses such as short term depression can have a relatively short term effect but are nevertheless very debilitating. The definition also requires that the condition has an adverse effect on the individual's abilities to “carry out normal day to day activities” and in defining “normal day to day activities” it emphasises the physical activities which make up everyday life such as mobility, manual dexterity, speech, hearing etc, but does not include day to day activities which are typically affected by mental health conditions such as the ability to communicate, socially interact or relate to strangers.

5. The effect of this narrowing of the definition is that individuals with many mental illnesses/conditions have been excluded from the act. These include short term depression - because it does not have a long term effect, and propensity to self-harm –because although “perception of risk” is included as a day to day activity, many tribunals do not take this to include someone who has the intellectual capacity to understand the risk but then chooses to ignore it.
6. There are a number of reasons why the DDA should be expanded to cover those with a mental illness. Firstly mental health problems still attract a strong stigma in society, and the risk of discrimination on these grounds is high. Secondly there is already a strong correlation between social exclusion and mental health (as highlighted by the social exclusion unit’s recent report “Mental Health and Social Exclusion”). Many of the young people we work with with mental health problems also have a number of other risk factors in their lives which make them susceptible to social exclusion, such as a history of being in care, of being in trouble with the law etc. By allowing discrimination to act as a further barrier to these young people entering employment or education, we risk making it even more difficult for them to break the cycle of social exclusion and become active members of their communities.
7. In addition to the limitations regarding mental illness, the existing DDA is also limited in the extent to which it allows for protection for individuals who are perceived to be disabled, or who are associated with someone with a disability. This contrasts with the sexual orientation regulations, where it is accepted that an individual may suffer discrimination simply because someone perceives them to be gay, or because they have a relative who is.
8. This current gap in the legislation can have a particular impact on the parents of disabled children. Some studies have revealed that just over 2% of mothers who have a disabled child are in full time employment and less than 11% work part time. This compares with 29% of mothers in the general population who work full time and 36% who work part time.
9. The Government has gone some way to addressing this problem by introducing the “right to request flexible working” which for parents of children with a disability extends up to 18 years. However, this right is limiting, it does not allow tribunals to challenge the reason the employer gives for not accepting the employee’s request but merely to investigate whether the request was considered using the current procedure. Providing the parents of disabled children with a right to claim for discrimination and to request “reasonable adjustments” on the grounds of their association with their child would give them much more effective protection. It would provide tribunals with a greater scope to look at the reasons why an employer dealt with a particular employee’s request for flexibility in the way they did, and whether the reaction was “reasonable”. This would send out a strong signal to employers that they should be working to ensure that the parents of disabled children who want to stay

active in the labour market are, where possible, able to so. It may also go some way to help the substantial numbers of disabled children currently living in poverty.

10. Finally Barnardo's is keen to ensure that children with behavioural disorders such as ADHD are covered by the legislation, irrespective of how serious the diagnosis. It is unclear at the moment if such children are automatically covered, and a change in the definition would clear up any ambiguity.

Q2: If yes, do you think it should be changed to the approach set out in paragraph 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.

11. Barnardo's supports the definition, as described by the scrutiny committee and as highlighted in the consultation document. We believe this would extend coverage to the groups, described above where we have particular concerns i.e. those with (currently excluded) mental illnesses – such as short term depression, and those who are discriminated against because of their association with a disabled person and those with behavioural disorders.

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 (paragraphs 81-82 and 85-86) or**
 - **Other?**
12. On balance Barnardo's would prefer the introduction of the Irish/Australian definitions of “impairment” into the legislation. We believe that without this there is a danger that the tribunals – drawing on previous case law – will adopt an interpretation of an “impairment” which relies heavily on the concept of what can physically impair us in our day to day life, without considering how other non physical problems may impair someone, such as the ability to socially interact. Amending the legislation along the lines of the Irish/Australian model would mean specifically stating that impairment includes “a condition, disease or illness which affects a person's.....emotions.....or which results in disturbed behaviour”. This would clearly spell out that depression, self harm, and suicidal tendency are all covered by the regulations, and would not allow any individual tribunals to adopt a more restrictive interpretation.

Q4: If the Scrutiny Committee proposal were adopted what would you see as the main benefits?

- **It might make it easier for disabled people, employers, service providers etc to understand who is protected and what is required under the law.**
 - **It might better support good practice approaches**
 - **It might make it easier for individuals to resolved disability related problems**
13. As stated above Barnardo's believes that the main advantages of changing the definition would be to extend coverage to groups who currently struggle to make a claim under the Act because of the restricted definition.
14. In addition however, Barnardo's also believes that the change in definition will make it easier for all applicants – including those who are covered by the current definition. In particular because it will switch the emphasis in disability discrimination cases from “disability” to discrimination, and should mean that applicants no longer have to spend large amounts of money on expensive medical testimony to prove they are disabled, before the tribunal will ever look at whether what happened was discrimination.

Q5: If the scrutiny committee proposal were adopted, what would you see as the main risks?

- **Broadening the definition might lead to a weaker legal interpretation of non-discrimination rights**
 - **Broadening the definition might discredit or trivialise disability discrimination law**
 - **Other**
15. Barnardo's does not believe that either of the risks identified will cause substantial problems. While the definition will extend to include more people, there will still be a requirement to prove an act of discrimination as a result of the person's condition, which should prevent trivial claims. Bringing more people within the scope of the Act may in fact help to broaden debate in society over what it means to be or not be disabled and may help break down preconceptions as the focus of the courts becomes not on the “disability”, and how it restricts an individuals ability to carry out day to day activities, but on the concept of “discrimination”, and “reasonable adjustment” i.e. what can be done to enable everyone to have access to employment, and services.

Q6: Would there be a need to ensure that priority could be given to those who are most in need of reasonable adjustments?

16. Barnardo's would like to see action to protect a business's ability to positively discriminate in favour of disabled people to address the historical imbalance caused by years of discrimination against disabled people. This could be done by

adding a clause to the Act which allows for positive discrimination in favour of a particularly group of disabled people.

Q7: 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?

17. It is important for the Act to allow for employers and public services to focus their resources on a particular group of disabled people, so for example to provide sheltered employment for people with a learning disability without falling foul of the law. This can be done by adding a specific clause on the issue of positive discrimination (as described above).
18. However Barnardo's does not support the introduction of a requirement in the Act for either employers or public services to focus such activities and resources on those suffering from the greatest level of inequality. We believe that this would have the adverse affect of discouraging many of these schemes completely since they would always be open to challenge that they did not focus on the group suffering from the greatest level of inequality – something which would be open to very different interpretations and likely vary over time.

If you have any questions or need any further details, please contact:

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