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Autism Bill

Clause 1: Amendments to Disability Discrimination Act 1995

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1 Introduction

Clause 1 of the Autism Bill provides for amendments to the Disability Discrimination Act 1995 (the DDA). This briefing note, which supplements an earlier research paper on the Autism Bill, provides further information to support Members' consideration of the proposed amendments. In short, the paper:

- Addresses the relationship between the definition of disability contained within the DDA and tests of disability applied within the benefits and tax credits systems.
- Notes that in the past it has been suggested that physical and mental together are all encompassing terms and to add to them carries legislative risks.
- Highlights the relative importance of the list of day to day activities to the definition of disability and identifies support for change.

2 Relationship of definition of DDA to social security benefits and taxation

The DDA gives disabled people rights to protect them from discrimination in:

- Employment;
- Access to goods facilities and services, including transport;
- The management, buying or renting of property; and
- Education

The DDA only provides protection, however, to those people who meet its definition of disability. Disability is defined in the DDA as 'a physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out normal day to day activities'.

It is important to note that this definition of disability is not applied within the benefits and tax credits systems. Rather, within these areas it has been noted that six main tests of disability are applied:

- *limited capability for work - used for the new employment and support allowance;*
- *incapacity for work - used for statutory sick pay, incapacity benefit, severe disablement allowance, income support and the unemployment supplement under the Industrial Injuries and War Disablement schemes. There are different tests of incapacity depending on the benefit you claim;*
- *needing care, supervision or watching over by another person - used for disability living allowance care component and attendance allowance. A similar test is used for constant attendance allowance under the Industrial Injuries and War Disablement schemes;*

- *unable or virtually unable to walk* - used for disability living allowance mobility component and war pensioners' mobility supplement;
- *degree of disablement* - used for industrial injuries disablement benefit, war disablement pension and vaccine damage payments;
- *at a disadvantage in getting a job* - used for the disability element of working tax credit.¹

Addressing the relationship of the DDA definition to other references, guidance from OFMDFM states that:

6. The definition of disability set out in the Act and described in this guidance is the only definition relevant to determining whether someone is a disabled person for the purposes of the Act or Order. References to "disability" or to mental or physical impairments in the context of other legislation are not relevant to determining whether someone is a disabled person under the Act or Order and should be disregarded.

7. There is a range of services, concessions, schemes and financial benefits for which disabled people may qualify. These include, for example: the Blue Badge parking scheme; tax concessions for people who are blind; and disability-related social security benefits. However, each of these has its own individual eligibility criteria and qualification for any one of them does not automatically confer entitlement to protection under the Act, nor does entitlement to the protection of the Act confer eligibility for benefits or concessions.²

3 Physical and Mental Impairments

The DDA defines disability as 'a physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out normal day to day activities'. Clause 1 of the Autism Bill seeks to insert 'social (including communication)' after mental into this definition.

It has been argued in the past, however, that the terms physical and mental were meant to be all encompassing and that adding further categories of impairment may not be without risk.

Addressing the suggestion that the definition should include reference to sensory impairments, William Hague, the Minister in Charge of the Disability Discrimination Bill (as the DDA was then) argued that:

¹ Disability Alliance website (accessed 17/01/11) <http://www.disabilityalliance.org/ask4.htm#Q13>

² OFMDFM - Guidance on matters to be taken into account in determining questions relating to the definition of disability <http://www.ofmdfmi.gov.uk/disabilitydiscriminationact1995.pdf> (accessed 17/01/11)

... we must consider the danger of creating the impression that there ought to be additional categories, which would throw doubt on the simplicity and width of the terms "physical or mental". If the word sensory is included, people could assert that the words learning, psychiatric and psychological should be included. Those aspects are meant to be embraced by the term mental. The potential list grows even longer, but it serves only to introduce doubt about what might still be left out; the phrase "physical or mental" is meant to ensure that nothing is left out. It was wide enough in the 1944 Act, is wide enough in the Americans with Disabilities Act 1990 and, I believe, is wide enough in the Bill.³

Addressing the possible addition of the terms 'sensory' or 'communication' to broaden the definition of disability (as contained in the DDA) in a proposed measure of the National Assembly for Wales, The House of Commons Select Committee on Welsh Affairs noted that:

Both this committee and the Assembly Committee examined whether the term "physical or mental impairment" needed to be qualified in order to ensure that persons with a sensory or communications impairment, for example, would be included within its scope...

...The Assembly Parliamentary Service Legal Division confirmed that:

it seems clear that a communication impairment will inevitably fall under either a 'mental' or 'physical' impairment.

...Advice prepared by the Assembly Parliamentary Service Legal Division for the Assembly Committee noted:

if a definition is a broad one (as 'physical or mental impairment' appears to be) then there are risks in grafting on to it references to specific conditions which are already covered. For example, adding a specific reference to 'communication impairment' could give the impression that 'physical or mental impairment' is not as all-encompassing a definition as it would otherwise appear to be.

It is a principle of statutory interpretation that if there are a number of similar specific situations and only some of them are mentioned then the intention must be to exclude the ones which are not.⁴

³ House of Commons, Disability Discrimination Bill, Standing Committee E, 2 February 1995

⁴ House of Commons, Select Committee on Welsh Affairs, *Second Report: Proposed Legislative Competence Orders in Council: Additional Learning Needs*, 21 December 2007 available at; <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmwelaf/44/4402.htm>

4 Day to Day Activities

To meet the DDA definition of disability, an impairment must, amongst other things, affect at least one of the following 'day to day activities', which are listed in Schedule 1 of the DDA:

- mobility;
- manual dexterity;
- physical coordination;
- continence;
- ability to lift, carry or otherwise move everyday objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn or understand; or
- perception of risk of physical danger.

The Autism Bill seeks to add 'taking part in normal social interaction' and 'forming social relationships' separately to this list. The list has in the past presented a hurdle for those with Asperger's who seek to meet the definition of disability contained in the DDA.

In the landmark case of *Hewett vs. Motorola*,⁵ the main question addressed by the Employment Appeals Tribunal was whether the long term impairment suffered by Mr Hewett of Autistic Spectrum Disorder and/or Asperger's Syndrome affected substantially his ability to carry out normal day to day activities, and in particular his ability to concentrate, learn or understand. Remitting the case back to the Tribunal, the EAT concluded that it was in error in not accepting that the Mr Hewett's ability to understand was affected by his impairment.

Amendments to the list of day to day activities have been supported in the past. The Joint Committee on the Draft Disability Discrimination Bill published Volume 1 of their Bill Report in May 2004. Addressing the issue of day-to-day activities, the Committee concluded that:

86. A great deal of evidence suggests that the definition of "day-to-day activities" is not operating in the way in which it was originally intended. Proposed amendments by witnesses concentrated on four elements

⁵ *Hewett v Motorola Ltd* Appeal No.UKEAT/0526/03/ILB

thought to be inadequately covered by the existing list: ability to care for oneself, communication, interaction with others, and perception of reality and judgement.

88. *The Committee recommends the addition of the following activities to the list of "normal day-to-day activities" in Schedule 1:*

- *ability to care for oneself*
- *ability to communicate and interact with others*
- *perception of reality.*⁶

In determining whether someone has a disability as defined in the DDA, four questions must be addressed:

- (i) Has the individual got an impairment, physical or mental
- (ii) Does the impairment adversely affect day to day activities?
- (iii) Is the adverse effect substantial - or would it be but for the beneficial effects of ongoing medication or other treatment?
- (iv) Are the adverse effects long-term?

As regards the first question above, it is important to note that it is not necessary to establish whether an impairment is physical or mental just that it is one or the other or perhaps both. Statutory guidance from the Office of the First Minister and Deputy First Minister on the definition of a disability, produced in 2008, states that:

*It may not be possible, nor is it necessary, to categorise a condition as either physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.*⁷

It is also important to note that the first question does not take precedence over the other three. Indeed, in the context of depression and disability, it has been noted that if a tribunal finds evidence of an adverse effect it:

... should not get too hung up on labelling the particular impairment concerned... in many or most cases it will be easier –and is entirely

⁶ House of Commons - House of Lords, Joint Committee on the Draft Disability Discrimination Bill, Draft Disability Discrimination Bill Report, Volume 1, May 2004, available at: <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtdisab/82/8205.htm#a13>

⁷ OFMDFM, *Disability Discrimination Act 1995 (as modified by Schedule 8 thereof for application in Northern Ireland) Guidance on matters to be taken into account in determining questions relating to the definition of disability*, 2008, available at: <http://www.ofmdfmi.gov.uk/disabilitydiscriminationact1995.pdf>

legitimate – for the tribunal to park that issue and to ask first whether the claimant’s ability to carry out normal day to day activities has been adversely effected – one might say impaired on a long term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect – in other words, an ‘impairment’. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues for the kind to which we have referred.⁸

Whilst the definition of disability in the Equality Act 2010 (the Act repealed the DDA in England Scotland and Wales) contains reference to normal day-to-day activities, the Act itself, unlike the DDA, does not stipulate what these are. The Office for Disability Issues, the body set up to co-ordinate disability policies across the UK Government, however, has published a consultation document on guidance for defining disability within the context of the Equality Act. Section D of the consultation document presented guidance on defining normal day-to-day activities and included the following within a list of factors which it would be reasonable to regard as having an adverse effect on normal day to day activities:

Significant difficulty taking part in normal social interaction or forming social relationships.⁹

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⁸ Michael Rubenstein, Disability: Guidance on depression cases, In the Courts: Equal Opportunities Review, December 2010

⁹ Office for Disability Issues, *Equality Act 2010: Guidance – Guidance on matters to be taken into account in determining questions relating to the definition of disability*. p49