

# **Equality Act 2010**

**Government response to the consultation  
Guidance on matters to be taken into account in  
determining questions relating to the definition  
of disability**

**February 2011**

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## Introduction

The Equality Act 2010 (the Act) provides people with protection from discrimination in relation to a protected characteristic, in a wide range of circumstances including in employment and access to services and public functions, premises, education and associations.

Disability is a protected characteristic covered by the Act. In order to qualify for protection as a disabled person against disability discrimination, an individual needs to meet the Act's definition of a disabled person. Section 6 and Schedule 1 of the Act, together with regulations made under those provisions, define who is a disabled person for the purposes of the Act. The definition of disability is also relevant to protection from direct discrimination and harassment that is provided by the Act to people who are wrongly perceived to be disabled or who are associated with a disabled person.

The Act introduced a new definition of disability for the purposes of protection from discrimination. It is similar to that which applied for the purposes of the Disability Discrimination Act 1995 (DDA), though it removes one requirement that applied under the DDA. For the purposes of the DDA, in general, someone was considered to be disabled if they had a physical or mental impairment which had a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Under paragraph 4(1) of Schedule 1 to the DDA, the impairment was taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affected one of the following, which has become known as the "list of capacities":

- mobility
- manual dexterity
- physical co-ordination
- 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 the risk of physical danger.

The Act does not include the list of capacities, so removes the requirement for a person to demonstrate that where an impairment adversely affects the ability to carry out a normal day-to-day activity, the activity must involve at least one capacity.

## **Statutory guidance**

The Act provides that a Minister of the Crown has the power to issue Statutory Guidance (Guidance) on matters that are to be taken into account in deciding questions relating to the definition of disability 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, under paragraph 12 of Schedule 1 to the Act, an adjudicating body, such as a tribunal or court, when it is deciding whether a person is a disabled person for the purposes of the Act, is required to take account of any aspect of the Guidance that appears to be relevant.

Previously, the Government published Guidance in relation to the definition of disability that applied under the DDA. The Government intends to publish new Guidance on how the new definition in the Act operates. The new Guidance will also take account of developments in case law as a result of key court and tribunal cases which have helped to improve understanding of how the definition of disability for the purposes of anti-discrimination law works in practice. The Guidance will be published under section 6(5) of the Act.

## **Consultation exercise**

On 9 August 2010, the Office for Disability Issues, in the Department for Work and Pensions, published revised draft Guidance together with a consultation document seeking views on whether the draft Guidance would assist users to understand how the definition of disability under the Act operates. The consultation ended on 31 October 2010.

A range of organisations responded to the consultation, including: the Equality and Human Rights Commission (EHRC); disability organisations representing people with a variety of impairments

including the Disability Charities Consortium<sup>1</sup> and the United Kingdom Disabled People's Council; and professional associations including the Discrimination Law Association, The Law Society and the Royal College of Physicians. In addition there were 8 responses from individuals.

Over all, 40 written responses to the consultation were received:

- **15** were from charities or disability organisations
- **8** were from professional associations
- **8** were from individuals
- **4** were from other organisations
- **2** were from local authorities
- **1** was from a legal business
- **1** was from a university
- **1** was from a statutory body

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<sup>1</sup> Formed of seven leading disability organisations: Mencap, Scope, MIND, Royal National Institute of Blind People (RNIB), Royal National Institute for Deaf People (RNID), Royal Association for Disability Rights (RADAR) and Leonard Cheshire Disability

## **Consultation responses**

### **Key findings and government response**

The consultation posed ten questions, and respondents were invited to qualify their response with comments where appropriate. Some respondents chose not to use the format of the consultation document for their responses, while some others chose only to answer certain questions, or to raise a specific point of interest. Where respondents have not offered responses to particular questions, we have assumed that they were content with that aspect of the Guidance. In some instances, there was an overlap in the responses to particular questions, as the comments raised by respondents related to matters covered by more than one question.

A number of respondents raised issues which fell outside of the scope of the consultation exercise. For example some queried, or disagreed with, the legal definition of disability or the policy underpinning it. Some others suggested that the Guidance should include explanations about how the definition operated in relation to specific provisions in the Act.

These issues were not relevant to the Guidance or the consultation exercise. The Guidance only concerns those matters to be taken into account in deciding whether the definition of a disability for the purposes of the Act is met. The aim of the consultation was not to seek views on how disability should be defined in the legislation, but to ascertain whether the draft guidance appropriately assisted users to understand how the definition, which is already established under the Act, operates. Furthermore, the policy proposal to amend the definition to remove the list of capacities had itself been consulted on as part of the wider consultation on proposals for the Equality Bill which became the Equality Act 2010.

Suggestions that the Guidance should include explanations about how the definition operates with other provisions in the Act, such as those concerning reasonable adjustments for disabled people are matters that are appropriate to the Codes of Practice and other guidance material published by the Equality and Human Rights Commission.

The following sections summarise the responses received to each question and set out the Government's response.

## Overview of the consultation response to question 1

The Government would like to know whether you think this structure is the right one.

If not, please explain why

Of the 40 respondents to the consultation, 24 provided an answer to question 1. Of these 24 responses:

- 18 indicated the structure was right or helpful (though 5 made qualifying comments)
- 3 did not specifically indicate whether the structure was the right one but provided comments (2 of which appeared positive), and
- 3 indicated the structure was not right.

Overall, the majority of respondents to question 1 indicated support for the structure, though some respondents made suggestions for further improvements. One respondent, however, specifically stated that the structure of the Guidance was not the right one and considered that it was 'too long winded'.

## Government response

In general, we have decided to follow the structure of the previous guidance. That is because this format, in which each section builds on the previous section, is one which the majority of respondents found useful, and it is one with which users of the Guidance are familiar. This approach was supported by a number of respondents. These included the Equality and Human Rights Commission, and Thompsons Solicitors, as well as the Disability Charities Consortium, which commented that, by building on the way the current Guidance is structured, this approach will ensure an efficient transition once the new Guidance is introduced.

We considered a suggestion from some respondents, including the EEF (the manufacturers' association) and the Employment Lawyers' Association, that it would be appropriate to include a

decision tree or flow chart. However, the necessity to consider a range of factors, and the special rules which apply in particular situations (for example in relation to fluctuating conditions and severe disfigurement) meant that such a tree would be unduly complex. Alternatively, a simplified chart showing only the basic elements to be considered, would pose a risk of discouraging users from considering the detail of the text as a whole, which is essential to adjudicating bodies' and other users' understanding of how the definition operates.

## **Overview of the consultation response to question 2**

The Government would like to know whether you think this format helps towards an understanding of how the individual elements of the definition of disability work together.

If not, please explain why.

Of the 40 respondents to the consultation, 24 provided an answer to question 2. Of these 24 responses:

- 19 indicated the format of the Guidance was helpful (though 5 made qualifying comments)
- 2 did not specifically indicate whether the format was helpful but provided comments (1 of which appeared positive), and
- 3 indicated the format was not helpful.

Overall, the majority of respondents to question 2 indicated support for the existing structure. In some instances, both the positive and negative responses were accompanied by detailed suggestions for improving the structure. For example, the Law Society and the University of Westminster Law School commented that the Guidance needed to make clearer that it was necessary to consider all elements of the definition when deciding whether a person is disabled for the purposes of the Act.

### **Government response**

As the majority of responses supported the format in which the elements of the definition are set out in a logical progression, we have retained this structure.

However, we have amended the Guidance to make clearer at the start of each section that the section should not be read in isolation, but needs to be considered alongside the other sections.

We have also amended the Guidance to include discrete sections on disabled children and where disability is a particular or shared protected characteristic for the purposes of the Act. This was in response to comments from some respondents, including the Employment Lawyers' Association and the Equality and Human Rights Commission, who considered that coverage of these issues had not been located appropriately in the consultation draft.

### **Overview of the consultation response to question 3**

The Government would like to know whether you think the text is clear enough in its explanation of how the definition of disability in the Equality Act 2010 works.

If not, please explain why.

Of the 40 respondents to the consultation, 25 provided an answer to question 3. Of these 25 responses:

- 16 indicated the text is clear enough in its explanation of how the definition of disability in the Equality Act 2010 works (albeit 8 gave qualifying comments)
- 3 did not specifically indicate whether the text is clear enough but provided comments (2 of which appeared positive), and
- 6 indicated the text is not clear enough.

The majority of respondents gave positive responses to question 3. However, a significant number of respondents to this question provided comments on, and suggestions for amendments to, the text. These included a wide range of detailed drafting suggestions, or suggestions for the use of alternative terminology in respect of certain impairments, through to more substantive points on the principles underlying the operation of the definition, and the need for improved reference to key case law.

### **Government response**

We have carefully considered the wide-ranging responses to this question and have made a number of textual changes where we considered them to be appropriate.

In particular, we have amended the Guidance to include additional text to clarify further the principles of key case law, for example in relation to excluded conditions, and in respect of the meaning of “likely”. We have also provided an explanation that the definition of disability will be relevant to provisions in the Act which provide protection from direct discrimination and harassment for a person who is wrongly perceived to be disabled, or who is associated with a disabled person. These changes take account of comments from, for example, the Equality and Human Rights Commission, the Discrimination Law Association and the EEF.

Among the textual changes, we have made amendments to reflect suggestions from Changing Faces, for example, to clarify further how the definition operates in relation to a person with a severe disfigurement. Also, in response to comments from the Disability Charities Consortium and Employment Lawyers’ Association, a new example has been added to clarify how the cumulative effect of related impairments should be taken into account in determining whether a person has experienced a long-term effect.

## **Overview of the consultation response to question 4**

The Government would like to know whether you think there are any parts of the text that are hard to understand.

If so, please tell us what they are, and why you think they are hard to understand.

Of the 40 respondents to the consultation, only 25 provided an answer to question 4. Of these 25 responses:

- 11 indicated there are no parts of the text that are difficult to understand (albeit 5 provided qualifying comments)
- 3 did not specifically indicate whether parts of the text are difficult to understand but provided comments, and
- 11 indicated there were parts of the text that were difficult to understand.

The responses to question 4 covered a range of aspects, some of which fell outside of the scope of the consultation. There was also a high degree of overlap between points raised by respondents in relation to question 3 and question 4. Thus a significant number of respondents provided comments on, and suggestions for amendments to, the text. These included a wide range of detailed drafting suggestions or points for clarification, as well as some suggestions, for example from the Employment Lawyers' Association, for improved clarification of key case law.

## **Government response**

We have reviewed the text to clarify and simplify where possible the explanation of how the elements of the definition operate. In doing so, we have also taken account of drafting and other suggestions to improve the text. For example, in response to comments from the Law Society of Scotland and others, we have amended the text to clarify that general normal day-to-day activities can include activities carried out in the context of work.

We have also included additional or alternative examples to assist in illustrating the text. However, in doing so, we have sought to achieve a balance between adding new text and examples and avoiding making the document unduly lengthy, particularly in the light of some comments that the draft Guidance was already too long.

## **Overview of the consultation response to question 5**

The Government would like to know whether it is equally clear how a person with a mental impairment is covered, compared to a person with a physical impairment.

If not, please tell us what you think.

Of the 40 respondents to the consultation, only 21 provided an answer to question 5. Of these 21 responses:

- 11 indicated the text is clear in explaining how different impairments are covered in the Guidance (though 1 made qualifying comments)

- 3 did not specifically indicate whether the text is clear but provided comments (1 of which appeared positive), and
- 7 indicated the text was not clear.

In general, the responses to question 5 were mixed and a range of comments indicated that the Guidance should provide more explanation of how the definition operates in respect of people with mental impairments.

## **Government response**

We have taken account of comments raised, for example by the Disability Charities Consortium and the Foundation for People with Learning Difficulties, that there was insufficient emphasis on, and examples given about, how the definition operates for people with mental health impairments or learning disabilities. We have made a number of amendments to the text and to the examples to make this clearer; for example to the section which explains how impairments with recurring and fluctuating effects are to be treated in relation to the “long-term” requirement of the definition.

In addition, we have amended, and included more, examples in the Appendix to illustrate factors which may have a substantial adverse affect on the ability of a person with a mental health condition or learning disabilities to carry out normal day-to-day activities.

## **Overview of the consultation response to question 6**

The Government would like to know whether you consider that examples have been used appropriately. Would other parts of the text benefit from examples.

If yes, please say where.

Of the 40 respondents to the consultation, only 25 provided an answer to question 6. Of these 25 responses:

- 11 indicated the examples in the Guidance have been used appropriately (albeit 6 gave qualifying comments)

- 4 did not specifically indicate whether the examples have been used appropriately but provided comments (1 of which appeared positive), and
- 10 indicated the examples have not been used appropriately and other parts of the text would benefit from examples.

There was a minority of wholly positive responses in relation to question 6. Overall, the majority of respondents offered detailed comments on the use of existing examples, and made suggestions for the amendment of existing examples or additional examples. For example, the National Union of Students and Being the Boss considered that it would have been useful to include more illustrative examples in the text or Appendix, respectively.

## **Government response**

In response to the wide range of responses received, we have made a number of amendments to examples in the text and the Appendix. For example, as discussed in the response above in relation to question 4, we have amended, and added more, examples to show how people with mental health conditions may meet the requirements of the definition. These amendments include the deletion of an example which was considered by the Leicester Centre for Integrated Living as being inappropriate.

In addition, in response to a number of comments, including from the University of Westminster Law School and the Kent County Council, the section on disabled children has been amended to include an example of a child under 6 years of age.

## **Overview of the consultation response to question 7**

The Government would like to know whether the examples are helpful in adding to an understanding of the related text.

If not, please explain why.

Of the 40 respondents to the consultation, only 26 provided an answer to question 7. Of these 26 responses:

- 16 indicated the examples are helpful in explaining the related text (albeit 6 gave qualifying comments)

- 4 did not specifically indicate whether the examples are helpful but provided comments (1 of which appeared positive), and
- 6 indicated the examples are not helpful.

The majority of respondents to question 7 agreed that the examples are useful in explaining the text. However, as with question 6, responses were accompanied by a range of, sometimes detailed, suggestions for adding or amending examples. In addition, there was overlap in some of the responses as some respondents simply cross-referred to the answers and comments made to other questions covering the use of examples in the Guidance.

## **Government response**

We have made a range of amendments to the examples to reflect comments received. These include amendments to the section covering normal day-to-day activities and the Appendix to take account of comments from, for example, the Equality and Human Rights Commission and the Disability Charities Consortium that the examples still seemed to reflect, implicitly, the list of capacities even though that list does not apply for the purposes of the definition in the Act.

We have also amended or added examples to better reflect that normal general day-to-day activities can include activities associated with work.

In addition, we have amended the Appendix to give more examples of aspects of mental health conditions which may adversely affect a person's ability to carry out normal day-to-day activities.

## **Overview of the consultation response to question 8**

The Government would like to know whether there are particular points which you consider might usefully be illustrated by examples.

If yes, please explain what these are.

Of the 40 respondents to the consultation, only 25 provided an answer to question 8. Of these 25 responses:

- 5 indicated there are no particular points in the Guidance that need examples (albeit 4 gave qualifying comments),
- 17 indicated particular points do need examples,
- 3 did not specifically indicate whether particular points need examples but provided comments.

The majority of respondents to this question offered comments or suggestions on the examples. Again a number of responses, for example those from Sense Scotland, the Equality and Human Rights Commission, and Kent County Council, cross-referred to comments raised in relation to other questions covering the use of examples. In many cases, the comments concerned detailed amendments to examples in the text or suggestions for new examples.

## **Government response**

As explained in the response to question 7, we have reconsidered the examples used in the text in the context of the responses received and have made a range of amendments to previously-existing examples or added new examples, to better illustrate the text.

For example, in response to a comment from Plymouth City Council, we have included a new example to illustrate where a past disability meets the Act's definition of disability. We have also amended the Appendix to include new examples provided by the Foundation for People with Learning Disabilities. In addition, we have taken account of several responses, including that from Leicestershire Centre for Integrated Living, suggesting that there should be an example to illustrate how the effects of treatment are to be taken into account when considering substantial adverse effects of an impairment.

However, while we recognise the value of examples in illustrating the points of the text, in revising and adding examples, we have had to be mindful of the need to achieve a balance between providing adequate examples and avoiding the Guidance becoming too lengthy.

## Overview of the consultation response to question 9

The Government would like to know whether you consider that the examples help to make clear the types of factors that it would be reasonable, or not reasonable, to consider as having a substantial adverse effect on 'normal day-to-day activities'.

If not, please explain why.

Of the 40 respondents to the consultation, only 25 provided an answer to question 9. Of these 25 responses:

- 17 indicated the examples help to make clear how the effects of an impairment can have a substantial adverse effect on the ability to carry out normal day-to-day activities (albeit 11 gave qualifying comments)
- 3 did not specifically indicate whether the examples are helpful but provided comments (1 of which appeared positive), and
- 5 indicated the examples are not helpful.

The majority of respondents to question 9 gave a positive response, but there were a range of respondents who offered comments in response to this question. Again there was a degree of overlap with the responses to other questions concerning the use of examples in the Guidance. For example: Thompsons Solicitors, Disability Action, and Sense Scotland cross-referred to other answers.

### Government response

We have made a range of amendments to the Guidance to reflect comments raised on the question concerning the use of examples and the detail of the examples themselves. To take account of one individual's response to question 9, we have revised some examples to illustrate adverse effects of an impairment on normal day-to-day activities in a social setting.

## Overview of the consultation response to question 10

The Government would like to know whether the bullet point examples in the Appendix are clear enough and whether they help to illustrate the concept of a substantial adverse effect on day-to-day activities.

If not, please explain why.

Of the 40 respondents to the consultation, only 31 provided an answer to question 10. Of these 31 responses:

- 14 respondents indicated the bullet point examples are clear enough (albeit 10 provided qualifying comments)
- 10 did not specifically indicate whether the bullet point examples are clear enough
- 1 was undecided, and
- 6 indicated the examples were not clear enough.

Although just under half of the respondents to question 10 supported the use of the examples, a majority of respondents offered detailed comments or drafting suggestions. A number of these respondents did not raise new comments in relation to question 10, but cross-referred to answers given to earlier questions relating to examples. However a range of respondents including the Law Society, the Equality and Human Rights Commission and the Employment Lawyers Association, commented that, as drafted, the Appendix seemingly maintained an implicit link to the capacities list which applied for the purposes of the Disability Discrimination Act 1995.

In addition, a range of individual respondents and organisations, such as Sense Scotland and the National Bureau for Students with Disabilities (SKILL), representing users of British Sign Language, commented that some examples inadequately took account of the difficulties faced by people whose first language is sign language.

### Government response

We have reviewed the examples used in the Appendix and have made a number of amendments, or replaced examples in the light of the comments and drafting suggestions received.

In particular, we have amended and re-ordered the examples to better reflect the general nature of day-to-day activities, so as to avoid an implicit link with the capacities list. We have amended the Appendix to take account of the comments of individuals and organisations representing users of British Sign Language. In addition, in response to comments provided by the Disability Charities Commission and others, the examples in the Appendix have been amended to provide a wider range of factors, relating to mental health conditions and learning disabilities, which may have a substantial adverse effect on a person's ability to carry out normal day-to-day activities.

## Further comments

In addition to answering the specific consultation questions, respondents were invited to provide any additional comments. Slightly fewer than half (16) of the 40 respondents offered additional comments.

A number of the additional or general comments, both positive and negative, fell outside of the scope of the consultation. That is because they covered such matters as:

- the actual legal definition in the Act and/or the policy underlying that definition
- issues connected with the way that the duties under the Act operate or are applied, which are matters that are appropriate to the Codes of Practice and non-statutory guidance on the Act's provisions
- general comments made about the impact of disability on an individual, attitudes towards disabled people and good practice in dealing with disabled people.

In some instances, the additional comments covered aspects already raised earlier in the person's or organisation's response or duplicated comments raised by other respondents in relation to consultation questions. For example, the need for the Guidance to clarify that the definition is relevant for the purposes of protection from direct discrimination and harassment for people who are associated with a disabled person or who are perceived to be disabled. Or for the Guidance to more accurately reflect case law in relation to excluded conditions.

Some responses referred to the consultation process itself, such as the inability to complete the response form on line and the limited range of accessible formats that were made available.

We have carefully considered the additional comments, and where these were relevant to the Guidance, we have made appropriate amendments to the text.

Issues raised in relation to the consultation exercise are being considered by the Office for Disability Issues in relation to the conducting of future consultation exercises.

## **Conclusion**

Although not all suggestions could be accepted, we are grateful for the wide range of responses that we received to the consultation. We believe that the responses have enabled us to produce revised Guidance which explains better what needs to be considered in determining questions relating to the definition of disability for the purposes of the Equality Act 2010.

## **Annex A: Respondents to the consultation**

Alliance for Inclusive Education (ALLFIE)  
Association of Occupational Health Nurse Educators  
Association of Schools and College Leaders (ASCL)  
Being the Boss  
British Stammering Association  
Changing Faces  
Disability Action  
Disability Charities Consortium<sup>2</sup> (DCC)  
Discrimination Law Association  
EEF – The manufacturers' organisation  
Equality and Human Rights Commission  
Employment Lawyers Association  
Foundation for People with Learning Disabilities  
Individual  
Individual – Belinda Warwick  
Individual – David Rose  
Individual – Jeff McWhinney  
Individual – John Walker  
Individual – Kathleen Grehan  
Individual – Rachel Allen  
Individual – Tony Williams  
Kent County Council  
Leicestershire Centre for Integrated Living (LCIL)  
National AIDS Trust (NAT)  
National Bureau for Students with Disabilities (SKILL)  
National Federation of the Blind – Scottish Central Branch  
National Union of Students  
Papworth Trust  
Plymouth City Council  
Royal College of Physicians  
Royal College of Speech and Language Therapists  
Royal National Institute for Deaf People (RNID)  
Sense Scotland  
Social Care Institute for Excellence<sup>3</sup> (SCIE)

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<sup>2</sup> An informal coalition of seven disability charities: Leonard Cheshire Disability, Mencap, Mind, Royal National Institute of Blind People (RNIB), Royal National Institute for Deaf People (RNID), Royal Association for Disability Rights (RADAR) and Scope

<sup>3</sup> An independent charity, funded by the Department of Health and the devolved administrations in Wales and Northern Ireland

The Law Society  
The Law Society of Scotland  
Thompsons Solicitors  
United Kingdom Council on Deafness (UKCoD)  
United Kingdom Disabled Peoples Council (UKDPC)  
University of Westminster Law School

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