

Equality Act 2010

Consultation by the Office for Disability Issues

**Response of the Employment Lawyers
Association**

- i. The Employment Lawyers Association ("ELA") is an unaffiliated group of specialists in employment law, including those who represent both employers and employees. It is not ELA's role to comment on the political merits or otherwise of proposed legislation: rather, it is to make observations from a legal standpoint.
- ii. ELA's Policy and Legislative Committee consists of barristers and solicitors (both private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws.
- iii. ELA's Legislative and Policy Committee set up a sub-committee under the chairmanship of Stephen Levinson to consider and comment on the Office for Disability Issues' consultation on guidance on matters to be taken into account in determining questions relating to the definition of disability. A list of the members of the sub-committee is set out in the Annex.
- iv. It is appropriate to add a note on our methodology. In order to collate a wide range of views we initially divided the questions amongst the members of the sub-committee and then carried out a joint review over several sessions. We believe as a result that our views represent opinion drawn from a wide spectrum of practitioners.
- v. References to the Disability Discrimination Act 1995 are abbreviated to "DDA" and the Equality Act 2010 to "EA".

STRUCTURE OF THE GUIDANCE

Questions 1 and 2

The Government would like to know whether you think this structure is the right one. If not, please explain why.

The Government would like to know whether you think this format helps towards an understanding of how the individual elements of disability work together. If not, please explain why.

- 1 We broadly welcome the decision to retain the original structure of the Guidance, which many practitioners and those involved in adjudication are familiar.
- 2 However, we recommend that the opportunity be taken to include a checklist and a decision-making tree, which would help those unfamiliar with the statutory concepts navigate through the definition. We also suggest that the addition of these two elements would assist in providing a coherent overview.

Specific points:

- 3 We suggest re-titling Section A as ‘The Definition’.
- 4 We suggest that the meaning of ‘impairment’ be given its own section.
- 5 When read together, paragraphs A13 and A15 are confusing and further explanation should be given. Paragraph A13 says that a manifestation (setting fires) of a qualifying condition (Condition A) is not protected. But paragraph A15 says a person is protected if they have an unprotected manifestation (alcoholism) of a condition attracting protection (for example depression). A possible way to deal with this is to focus on the connection between the reason for the treatment and the manifestation.
- 6 Paragraphs A18 and A19, relating to disability as a shared protected characteristic, are out of sequence. We suggest putting them towards the end of the text. Also, it would help if the text explained why the point is significant, with reference to indirect discrimination.
- 7 Our experience leads us to believe that, in practice, it is the question of the impact of an impairment on normal day-to-day activities that is the primary question for determination. Accordingly, we suggest Section D, which focuses on normal day-to-day activities, should appear earlier in the Guidance.
- 8 The introduction to paragraph B19 is a long and complex sentence, which may mislead. The individual person with the progressive condition is protected if the effect is likely to be substantial. She remains protected if the effect of treatment is ignored. Is paragraph B19 meant to be an example of a ‘cured’ condition? If so, perhaps it should be made clearer in the example and paragraph B19 could be re-drafted to reflect this.
- 9 In a similar vein, the final sentence of the example on page 23 (the SLE case) may confuse. It repeats what is said earlier in the example referring to the advice given. We thought the point should be made more clearly that she also met the long-term test, given the advice that had been given.
- 10 Section C would benefit from containing a reminder of the status of cancer as a deemed disability, even in cases of successful treatment of more minor cancers within a 12-month period of diagnosis.

TEXT OF THE GUIDANCE

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.

- 11 In general, the Guidance provides a sensible explanation of how the definition of disability operates. Given the similarities with the definition in Section 1(1) of the DDA, we support the approach taken, which mirrors the structure of the previous guidance.
- 12 The Guidance enables easy reference to existing case law, which will continue to provide guidance in the areas of the EA where the definition remains unchanged.

However, some of the new areas require clarification. We deal with these by reference to the paragraph numbers in the draft.

Paragraph 1

- 13 The Guidance suggests that, for a person to receive protection, they must meet the definition set out in Section 6 EA and its Schedules. This does not reflect the protection given to individuals who are not disabled, but are perceived to be disabled, or have an association with a disabled person but, again, are not themselves disabled. An explanation of these two concepts and an example is essential as this is a fundamental change.

Paragraph 2

- 14 We suggest that the statement “*the definition of who is a disabled person*” should read “*the definition of disability for the purposes of the Act is a legal definition.... and it is only adjudicating bodies which can determine whether a disability meets that definition.*”

Paragraphs 6 – 8

- 15 The Guidance refers correctly to the unique test in the EA. However, these paragraphs should make it clear that, while the holding of a blue badge, for instance, does not guarantee coverage under the EA (in line with current case law), alternative assessments of disability and impairment may play a useful part in assisting a disabled person to show they meet the definition of disability in Section 6 EA. In passing we suggest that thought should be given to consolidating the variety of definitions of disability, if that is practicable without reducing the availability of the various concessions and schemes.

Paragraph 8

- 16 This requires amendment to incorporate the need to establish less favourable treatment.

Paragraph A3

- 17 Whether an individual’s abilities are impaired should be contrasted with circumstances in which the person is unwilling to carry out the activity, to reflect correctly the meaning of impairment - see *J v DLA Piper UK LLP* [2010] UKEAT.

Paragraph A5

- 18 Here, it would be helpful to illustrate the last sentence “there are many which are not so immediately obvious” by adding “for example mental health conditions and learning difficulties”. We also propose some additional wording here to provide a further explanation to the effect that, in many cases, it is a matter of common-sense inference that a person has an impairment if there is evidence to indicate his or her ability to carry out normal day to day activities is being or has been adversely affected - see *J v DLA Piper UK LLP* [2010] UKEAT.

Paragraph A6

- 19 The list of mental health conditions here should have illustrative examples added to it. Our proposal is to add after the words “*mental health conditions*” the words “*with*

symptoms including low mood, anxiety or compulsive behaviour, panic attacks, changes in sleep patterns, phobias, unshared perceptions” before the words “and mental illness such as depression....”.

Paragraph A13

- 20 This paragraph arises from *Governing Body of X Endowed Primary School v (1) Special Educational Needs and Disability Tribunal (2) Mr and Mrs T (3) The National Autistic Society Admin* [2009] IRLR 1007.
- 21 There is concern that this may lead to anyone who has such tendencies linked to a mental health condition considering they will be completely excluded from disability protection, which may not necessarily be the case. We suggest here that there should be a reference to the duty to make reasonable adjustments because of the underlying condition rather than the excluded manifestation.

Paragraph C3

- 22 We were exercised by the final wording of the paragraph “*rather than it is more probable than not*” and a number of our committee felt it was confusing. These words are taken from the corresponding paragraph in the existing guidance under the DDA (in Paragraph C2) but are now no longer necessary given the changes in the case law.

Paragraph D3

- 23 This paragraph is a direct replacement for paragraph D5 in the current guidance. We believe the words “normal for a large number of people” provide a complexity that is unnecessary. The concluding words in the paragraph, “In this context ‘normal’ should be given its ordinary, everyday meaning”, are sufficient on their own.

Paragraphs D5 – D8

- 24 It appears that this section replicates the earlier view that work is not a day-to-day activity. Such a view is no longer valid following the cases of *Patterson v Commissioner of Police of the Metropolis*. [2007] IRLR 763 EAT and *Chacon Navas v Eurest Colectividades SA* (C-13/05) [2007] All ER (EC) 59. The Guidance should reflect the current position that it is likely to be only adverse effects of highly specialised work-based activities that fall outside the definition of disability.

Paragraphs D18 and following

- 25 Although there is no longer a specified list of capacities, the Guidance effectively mirrors the existing guidance in describing normal day-to-day activities. This is not sufficiently relevant to the employment context. We suggest that the illustrations need to include work related examples such as working shift patterns, keeping to deadlines and night working.

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.

Paragraphs A2

- 26 This paragraph is a little difficult to follow because of references to other parts of the Guidance within the text.

Paragraphs A4 & A5

- 27 We suggest it may also be more helpful if paragraph A5 preceded paragraph A4.

Paragraph A14

- 28 We suggest that this paragraph is out of place. It interferes with the sense and should not be between A13 and A15. It would be better placed after A15.

Paragraphs A18 – 19

- 29 We consider that that the text and examples in relation to shared protected characteristic are unclear and would benefit from redrafting to ensure the principle is more effectively conveyed, particularly to unrepresented disabled individuals.

Paragraph C4

- 30 This paragraph needs to reflect the position following *McDougall v Richmond Adult Community College* [2008] EWCA Civ 4. The first sentence of this paragraph is lifted from the earlier guidance and was relied upon in *Greenwood v British Airways plc* [1999] IRLR 600 EAT, a decision that was not followed in *McDougall*. We suggest that the explanation be redrafted to make clear that the question of whether the impairment is “*likely to recur*” must be judged at as at the date of the alleged breach of duty and that facts occurring between that date and a hearing are ignored.

Paragraph C11

- 31 We do not think this paragraph is easy to follow. Also we suggest that the example should be in this paragraph and not cross-referenced.

Paragraphs D5 – D8

- 32 The text and example, particularly paragraph D8 on page 33, are not easy to understand and would benefit from redrafting to make clear the principles in the case of *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24 i.e. that the fact that the claimant was only adversely affected at work did not mean he was outside the law’s protection. We suggest it be redrafted more clearly and that it would be helpful to have a mental health example here as well, possibly of a person adopting a coping strategy, see 43.3 below.

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.

- 33 As a general comment we consider that there are insufficient examples provided to illustrate the range of mental impairments and the way in which the protection of the EA applies to people with mental health difficulties.
- 34 We have proposed in our response to Question 3 that paragraph A5 be expanded to include a specific reference to mental health and learning difficulties and that, at paragraph A6, specific examples of mental health conditions should be provided.

Paragraph A5

- 35 When discussing that all impairments are not readily identifiable at the end of the paragraph, after the words *“while some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious”*, we suggest that reference should be made to learning difficulties and mental health conditions.

Paragraph A6

- 36 Given the difficulties individuals with mental impairments have had in gaining protection from the DDA, we suggest that the final example setting out various mental impairments could be moved to the top of the list

Paragraph B8

- 37 We suggest adding an example of managing a mental health condition, for example *“in order to manage her condition, a woman who experiences panic attacks finds that she can manage daily tasks if she can avoid the stress of travelling in the rush hour.”*

Paragraph B13

- 38 It would be helpful here to illustrate the *“effects of treatment”* point by reference to a wider range of treatments by including, for example, talking therapies, and adding these to the existing example.

Paragraph D2

- 39 We suggest that it would be useful if the list of normal day-to-day activities was widened to include more examples of people with mental health conditions who may experience difficulties in following instructions, timetabling, or understanding a social context.

Paragraph D13 onwards

- 40 More examples and explanations should be given in relation to mental impairment, as individuals with mental impairments often struggled to meet the day-to-day activities requirements of the old definition.
- 41 It is also important that there are examples that have work related normal day-to-day activities, such as shift patterns and time keeping, to assist with this (as commented on above).

- 42 In the Appendix there could be more items that illustrate factors where people with mental health difficulties experience substantial adverse effects on normal day-to-day activities.
- 43 We also consider the Guidance is poor in relation to mental impairments when addressing:
- 43.1 the effect of treatment, for example talking treatments, counselling, cognitive behaviour therapy and hearing voices workshops;
- 43.2 modification of behaviour; and
- 43.3 coping strategies, for example an employee who has anxiety/depression/schizophrenia finds it difficult to concentrate at work because of being placed in the middle of an open plan office. If the employee is moved to a corner desk, the employee is able to concentrate much better. The employee's mental impairment will still be considered as having a substantial adverse effect even though that adverse effect is alleviated when he is moved from the open plan environment. If that strategy was abandoned the adverse effect on his ability to concentrate would again be visible.

EXAMPLES IN THE GUIDANCE

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?

- 44 In our view, many of the examples are appropriate in that they cover a wide range of different types of physical and mental impairments. That said, we do have a number of observations.
- 45 We thought that the use of a general example in the text followed by specific illustration was most helpful, for example paragraph D9 on page 35. There is, however, inconsistent use of text and boxed examples throughout the Guidance and it would be useful to have a more consistent approach.
- 46 We suggest that there are a number of areas where additional examples could be used. In sections A & B, we believe that paragraphs A16 (past disability) and B19 (a progressive condition initially ameliorated by treatment but subsequently worsened) would benefit from an example. We suggest that an example closely based on the facts of *Kirton v Tetrasyl* [2003] IRLR 353, a case which related to incontinence, may prove useful here. In addition, we consider that a serious omission is the absence of a specific example to deal with the effects of treatment (paragraph B13) and severe disfigurement (paragraph B22), where there is a lack of helpful case law.
- 47 It would be helpful to have at paragraph C2 a mental health example to illustrate the approach to "long-term" by aggregation of consecutive related impairments. For example: *"A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. This condition lasted for eight months and then developed into depression so that he was no longer able to leave his home or go to work. This condition continued for five months. As the total period over which the effects lasted was in excess of 12 months, the long-term element of the definition of disability was met."*

- 48 In Section C, paragraph C9 gives an example that people may reasonably be expected to avoid certain substances to prevent recurrence of an effect. The text also says that this might be unreasonably difficult with some substances. It would be helpful to have examples of each contrasting case.
- 49 In Section D there are examples relating to each of the activities in the list of normal day-to-day activities contained in Schedule 1 of the DDA and the examples do appropriately support the text. However, this list of normal day-to-day activities is no longer in the EA and we suggest that it is appropriate to add examples that go beyond, and which do not simply follow, the old list.
- 50 The text at paragraph D5 is inaccurate following the decision in *Patterson v Commissioner of Police* [2007] IRLR 763. The courts have recognised that day-to-day activities do include work-related activities and it would be useful to have an example to illustrate how participation in working/professional life can be regarded as a day-to-day activity.

Question 7

The Government would like to know whether the examples are helpful in adding to the understanding of the related text. If not please explain why.

- 51 On the whole, the examples were helpful in adding to the understanding of the text. However, we suggest the focus should be on the degree of the adverse effect and not the type of the impairment. By way of illustration using the ADHD example at paragraph A13, determining whether or not an effect should be classified as adverse is usually clear, but it is sometimes difficult to assess whether that effect should also be considered substantial. We suggest that the examples could therefore be used more effectively to draw out this key distinction.
- 52 We consider that the examples would benefit from greater focus on why an adverse effect within a particular given scenario is to be regarded as substantial.
- 53 A “substantial” effect is defined in Section 212 EA as one that is “more than minor or trivial”. This is supported by various decisions, particularly *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19, which explains that the focus should be on what the claimants cannot do rather than what they can do. Generally, the examples do focus on what the person cannot do. But more examples are needed of what “more than minor or trivial” means. There is an additional point here made by some commentators, namely that the old guidance is misleading when it refers to “*going beyond the normal differences in ability which may exist among people*”, which places emphasis on comparing the claimant with other people rather than comparing the complainant with himself. (See *Patterson v The Commissioner of Police* [2007] IRLR 763).
- 54 In paragraph A8, the examples are useful. However, as the issue of obesity is a complex one where the adverse affects could well be variable, it is suggested that it is important to make this clear. We suggest by way of illustrative example: “*A woman is obese. Obesity in itself is not an impairment, but as it causes breathing and mobility difficulties, the effect is that she cannot walk*”.
- 55 We suggest that the example after paragraph A13 (on page 11) needs to explain clearly how a person can benefit from the protection of the EA while he may also have a condition that is excluded from protection. So it would be more appropriate if the

example referred to a young man with ADHD, which manifests itself in a number of ways including exhibitionism and inability to concentrate. Inability to concentrate would not be an excluded condition.

- 56 At paragraph A18 the example of the person with HIV is useful, but we would suggest an amendment to the wording because “personal experience” is not necessarily the same as having a condition.
- 57 In paragraph B3, obsessive-compulsive disorder (OCD) is a useful example of the effect of a condition on how an activity is carried out. However, we suggest that using regular hand washing as the example may mislead users of the Guidance, as it is an important aspect of duties in many industries. An alternative might be of someone with OCD leaving the house having to constantly check and re-check electrical items and plugs to ensure that they are turned off and constant checking and re checking the front door to ensure that it is locked.
- 58 In the example at paragraph B8, we suggest that there should be an additional explanation that modification of behaviour resulting from adopting the coping strategy might alter the effects of the disability to the extent that they are no longer substantial - and would therefore no longer meet the test.
- 59 At paragraph B22, it is suggested that it might be useful to include an example of non-standard disfigurement, for example Ramsay Hunt Syndrome, which causes paralysis of the face resulting in facial disfigurement. Such conditions will still have to meet the “long term” part of the definition. In this context, it may be that the JSB guidelines might prove helpful in identifying the extent of “severe” for these purposes.
- 60 We suggest that the example at paragraph C2 is too long. We consider that it would be more helpful if the terminology was consistent with the text of paragraph C2. This discusses the cumulative effect of related impairments. It refers to a condition that “develops from” an impairment. The example describes a condition that “arose from and therefore related to”. This could be replaced by either the words “develops from” or “related to”, both of which are used in the previous paragraph.
- 61 Paragraph C6 lists examples of impairments where effects can recur or effects can be sporadic. It is not clear whether these are examples of impairments which are likely to recur beyond 12 months (i.e. fall within the definition of long term). We suggest after the words “Other impairments with effects which can recur” adding the words “beyond 12 months”. We suggest it would be helpful to provide an example of impairments where the effects are more constant and conversely where the effects fluctuate.
- 62 We consider the second example in C6 to be too general. It does not make it clear why the woman does not have an underlying condition of depression i.e. it does not relate this to “medical evidence”. We propose amending the text to read:
- “Even though she has experienced two episodes of depression, she may well not be covered by the Act after the first occurrence. Without medical evidence to show that these episodes are part of an underlying condition of depression that are likely to recur beyond the 12 month period, this may not satisfy the definition.”*
- 63 Paragraph C11 is not currently illustrated by an example, but refers back to paragraph C6. We suggest it would be clearer to add an example to paragraph C11.

- 64 The example in paragraph D8 is very long. It would be more helpful to use more than one example to demonstrate the concepts contained within it.
- 65 Paragraph D9 is a good use of a general example followed by specific illustration of that example. This is a structure that is easier to follow than the more descriptive narrative of other examples.
- 66 The example at paragraph D12 of a girl with learning difficulties does not identify whether the adverse effect is her short attention span and difficulty remembering facts, or only her ability to read a few words.
- 67 It is not clear whether, in those examples where multiple adverse effects are considered, each adverse effect is to be regarded as substantial in its own right or whether it is the cumulative effect that makes them substantial. For instance, the example after paragraph D12 of the boy with ADHD does not explain the interrelationship between the adverse effect of: (a) forgetting his books; (b) finding it hard to concentrate; and (c) fidgeting and making inappropriate remarks.
- 68 One of the examples at paragraph D18 focuses on a woman with Downs Syndrome. It is clear that getting lost will constitute an adverse effect on her normal day-to-day activities. However, the example would benefit from going into detail as to the degree of the substantial adverse effect. For example, does she get lost temporarily but quickly realise and head back in the right direction, or does she get lost to the extent that she is unable to complete her journey?
- 69 The Guidance will likely be used to help in determining the extent to which an adverse effect is to be regarded as substantial, which is a relatively low hurdle. However, the Guidance would assist those using it by more clearly demarcating the fault lines. Another example in paragraph D18 examines a man with Menière's disease experiencing dizziness and nausea, which restrict his ability to move around his home. Whilst it is accepted that this adverse effect is capable of being substantial, we do not think this necessarily follows from the basic facts provided. To answer this question, we suggest further consideration should be given to the frequency and severity of the spells of dizziness and nausea suffered by the man.
- 70 We consider that the examples would be more helpful if there was an explanation of how the test of disability applied to them, identifying in particular the adverse effect in question and why that adverse effect is regarded as substantial. For instance, the example of the man with severe anxiety and symptoms of agoraphobia at paragraph D18 could be improved by adopting this approach. This example would also benefit from further details about the extent of the man's fears to go outside. How often is he able to go out, if at all? How severe are his panic attacks? What constitutes a stressful situation that could trigger an attack? By being more specific, the example would give clearer guidance to those using the Guidance of the factors to be considered.
- 71 Another approach that might be considered is whether an example can be re-used with alternative facts to flush out those situations where there is not a substantial effect, where there may be a substantial effect and where there is a substantial effect.
- 72 In some examples, it is not clear whether an adverse effect is substantial or not; see, for example, paragraph D20 and the use of the phrase "*it would be reasonable to regard this as a substantial adverse effect on normal day-to-day activities*". Reasonableness here is used in its non-legal and ordinary meaning and does not assist those using the Guidance decide the issue. We suggest that this phrase is changed to refer to it being "*acceptable to regard this as a substantial adverse effect*".

- 73 In the example at paragraph D22, it is not clear that the facts demonstrate clearly the conclusion that there is likely to be a substantial adverse effect. The focus should be on what cannot be done rather than what can be done. Although it is relevant to consider what can only be done with difficulty in this example, such as lifting household items, opening doors etc, there is no evidence to suggest that the man's difficulty in attempting to achieve these tasks means that he cannot sustain them over a reasonable period of time. Even though the test for substantial is "more than minor or trivial", this may be minor or trivial in the circumstances, depending on the evidence as to the degree of difficulty experienced by the man. As an alternative, the same example could be used but state that the man's impairment causes him to be tired so that he is only able to carry out these household tasks for a short time.

Question 8

The Government would like to know whether there are any particular points, which you consider might usefully be illustrated by examples. If yes, please explain what these are.

- 74 In our view, there is overlap between question 6 and question 8. We have approached this question on the basis that what is sought is a view on whether there are any points which have not been covered by the text and demonstrated by examples.
- 75 There are no examples that consider whether the adverse effect should be assessed at the time a decision was taken by the employer, or at the date of the Tribunal Hearing. The case of *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24 (which was confirmed in *McDougall v Richmond Adult Community College* [2008] IRLR 227) states that the time at which the substantial adverse effect of a disability should be assessed is when the alleged discrimination took place. This is perhaps a concept that could be highlighted and discussed (see paragraph 30 above).

SECTION D OF THE GUIDANCE AND THE APPENDIX

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.

- 76 The definition of disability for the purposes of the EA is based quite closely on the definition in the DDA. It is, therefore, unsurprising that the first two thirds of the DDA Section D Guidance is largely reproduced in the EA Section D Guidance, with few material amendments and some helpful clarification, for example explaining that physical impairments can result in mental effects and vice-versa (paragraph D17).
- 77 As already noted, the principal difference between the DDA and the EA in relation to the definition of disability is that the EA no longer requires a person to demonstrate that the impairment has an adverse long term effect on their ability to carry out a normal day-to-day activity with reference to the eight capacities. The major revisions between the DDA and EA Section D Guidance, therefore, are to the remaining third of the EA Guidance at paragraphs D18 to D30, which has been redrafted to reflect this.
- 78 In our view, the EA Section D Guidance is broadly clear and helpful and should prove useful and accessible to those using the Guidance. The examples are written in plain

English, and in the main, can be easily understood. The examples used are recognisable as daily tasks and are not based on socio-economic status. However, it is also our view that there is scope for some improvement in the instances we set out below.

- 79 At paragraph D8, the example states that an employee finds non-work exertion difficult and that it affects his ability to carry out normal day-to-day activities such as lifting and carrying everyday objects. The example goes on to indicate that the substantial effect is only apparent while at work, where he suffers from occupational asthma. We consider this example unclear and refer to our comments in paragraph 32 above.
- 80 While examples such as '*the application of make-up*' can be understood regardless of legal knowledge and the examples given in the Guidance appear to be consistent with existing case law, we suggest that it would be helpful to illustrate case law better by making it clear that that normal day-to-day activities should not be qualified by the time of the day they are carried out, for example in relation to difficulties ME sufferers may have with normal day-to-day activities during night work
- 81 The example under paragraphs D10 and D11 of the Guidance is unclear as to a) the different test for disability in children and b) whether it is intended to suggest that an amalgamation of adverse effects on normal day-to-day activities is said to amount to disability in an autistic child. We suggest it would be helpful to provide a separate example of what the adverse effect on normal day-to-day activities in a child under 6 years of age is when compared with the adverse effect on children aged 6 or over. This is particularly relevant in the employment field because of the advent of associative disability discrimination and resulting carers' rights. It would also be helpful to separate matters such as the difficulty in understanding the subtleties of human non-factual communication found in people with Asperger's Syndrome and autism, so that it is clear that each of these factors on their own can amount to a disability. The example mixes this difficulty with becoming anxious in new places and playing in the road without a sense of danger, which may also be impairments amounting to disability in isolation, or taken together.
- 82 We suggest that it would be appropriate and useful to re-insert the information from the DDA Guidance paragraph D12 into the EA Guidance paragraph D12 to explain why the provisions for children with disability have been put in place.
- 83 We also suggest that between paragraphs D13 to D17 it would be helpful to make reference to the fact that whether or not there is a substantial adverse effect on normal day-to-day activities may vary according to when the assessment is made. For example, impairment may appear to be remedied, only to later re-emerge. Assessments can be made on a good day or bad day and, in any event, except when past disability is the issue, the substantial adverse effect must be operative at the time the alleged discriminatory act occurred.
- 84 We also recommend that it would clarify the Guidance to explain at paragraph D9 and/or at paragraphs D13 to D17 that the degree of difficulty or pain suffered in carrying out normal day-to-day activity will be relevant to the determination of whether there is a substantial adverse effect on normal day-to-day activities.

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.

- 85 We think the list format of the bullet point examples is accessible and prefer it to having examples embedded only in the text of the Guidance. We anticipate that it will enable those using the Guidance to compare and consider when it would and would not be reasonable to decide that difficulties experienced by a disabled person have a substantial adverse effect on normal day-to-day activities.
- 86 We note that all the bullet point examples have been lifted from the DDA Section D Guidance. Given that the definition of disability under the EA is based closely on the previous definition under the DDA, ELA considers it sensible to reuse these examples, particularly given that these examples are thoughtful, helpful and illustrate clearly the concept of a substantial adverse effect on day-to-day activities.
- 87 We are, however, concerned that no new illustrative examples have been added to the Appendix. We note generally that the eight capacities in Schedule 1 DDA retain a strong influence on the redrafted last third of Section D of the Guidance as a whole. The purpose of removing the requirement for a person claiming disability to demonstrate that the activity affected involved one of the eight DDA capacities was to make it easier for some people to be categorised as disabled for the purposes of the EA, and this change will require adjudicating bodies and those using the Guidance to think more widely at times and, most importantly, to move away from the familiar concept of the eight capacities. We suggest that the lack of new examples will make this difficult and recommend that some additional examples be added, particularly relating to mental impairments including depression, anxiety disorders and behavioural symptoms associated with physiological disturbances such as anorexia nervosa or bulimia (see also paragraph 19 above).
- 88 We also suggest, for the sake of clarity, that the illustration regarding eyesight in the second bullet point on page 49 should be amended to include reference to contact lenses. This would be consistent with paragraph D25 of the Guidance and would better reflect the true legal position.

27th October 2010

ANNEX

The members of the Sub-Committee were:

Stephen Levinson (Chair)	RadcliffesLeBrasseur
Chris Benson	Leigh Day & Co
Pauline Dall	MIND
Sally Gold	Cheshire East Council
Lee Harding	Field Fisher Waterhouse LLP
Judith Hogarth	EEF
Anna Jackson	RadcliffesLeBrasseur
Peter Jones	Rawlison Butler LLP
Sean Jones	11KBW
Pam Kenworthy	Howells Direct LLP
Emma O'Byrne	Russell-Cooke
Evelyn Morgan	Vale of Glamorgan Council
Vivienne Reeve	Wragge & Co
David Scott	Minster Law, Solicitors.