

Housing and Discrimination

An Introduction to the Equality Act 2010

Part 1: General duties under the Act

Introduction

1. The premises provisions in the Equality Act 2010 largely came into force on 1st October 2010. A list of the relevant statutory instruments bringing the Act into force can be found at: http://www.equalities.gov.uk/equality_act_2010/details_of_statutory_instrumen.aspx.

2. The premises provisions embrace similar provisions that were previously contained in several separate pieces of legislation, namely:

- The Sex Discrimination Act 1975
- The Race Relations Act 1976
- The Disability Discrimination Act 1995
- The Equality Act 2006
- The Equality Act (Sexual) Orientation Regulations 2007

3. This consolidation exercise is welcome because although the provisions in the separate acts were similar, they were not identical which meant that close attention was required in applying the appropriate provisions of the act in question. In addition although there was guidance to assist practitioners applying the DDA 1995 (DRC Code of Practice on Rights of Access, Services to the Public, Public Authority Functions, Private Clubs and Premises) and the RRA 1976 (CRE Code of Practice on Racial Equality in Housing) there was no equivalent guidance for the other legislation

4. As well as bringing the different strands of discrimination together the 2010 Act also:

- Introduces new provisions on reasonable adjustments to common parts (although these provisions have not yet come into force – apparently the government are still considering implementation);
- Extends the prohibition on harassment to disability;
- Re-establishes the appropriate definition of disability discrimination following the damage done in the House of Lords decision in *Lewisham LBC v Malcolm* (EHRC Intervening) [2008] UKHL 43; [2008] 1 AC 1399.

5. As yet there is no statutory code of practice on the premises provisions in the 2010 Act. In the meantime, for illustrative purposes only, examples in this paper are used

from the existing codes relating to the previous legislation which has now been repealed with effect from 1 October 2010.

6. The Equality and Human Rights Commission has produced some guidance for service users and service providers, which is of some use at least in interpreting the premises provisions: see www.equalityhumanrights.com/advice-and-guidance/guidance-equality-act-2010/equality-act-2010-guidance/. The Commission's specific guidance on housing is awaited. See also the Government Equalities Office: *Equality Act 2010: What do I need to know?*: www.equalities.gov.uk/equality_act_2010/equality_act_2010_what_do_i_n.aspx

The National Housing Federation have produced a Briefing Note which is available at www.housing.org.uk/Uploads/File/Policy%20briefings/Neighbourhoods/Equality%20Act%202010%20-%20nsपो2010br16.pdf.

Location of the premises provisions

7. The premises provisions are located within the Act at the following points:

- Part 4 – ss. 32 – 38 – General provisions
- Part 13 – ss.189 -190 – Disability Miscellaneous
- Schedule 4 – Reasonable adjustments
- Schedule 5 – Exceptions
- Schedule 21 – Reasonable adjustments supplementary

8. Practitioners should also acquaint themselves, at least generally, with Part 2 of the Act, which deals with protected characteristics and prohibited conduct.

Scope of the premises provisions

9. The premises and housing provisions in the 2010 Act are designed to protect those who suffer discrimination in a wide variety of contexts in relation to the **disposal** or **management** of premises and in relation to the **duty to make reasonable adjustments**.

10. In determining whether there will be any liability at all under these provisions it is important first to check whether the case in question falls within one of the exceptions (see *Exceptions* below).

11. The premises provisions apply to the protected characteristics of

- Sex
- Disability
- Race

- Religion or belief
- Sexual Orientation
- Pregnancy and maternity
- Gender reassignment

What is not covered by the premises provisions?

12. The provisions do not apply to the protected characteristics of age or marriage and civil partnership¹. Neither do they apply to discrimination, harassment or victimisation, which are already prohibited² by the work or education provisions in Parts 5 and 6 of the EqA³.

13. The premises provisions do not apply to the provision of accommodation if the provision is generally for the purpose of *short stays* by individuals who live elsewhere⁴ e.g hotels and holiday lets. It could also extend to other types of short term accommodation including for example, temporary accommodation provided to a tenant whilst major repair works are carried out to their home.

14. The premises provisions do not apply either to the provision of accommodation if the provision is for the purpose *only* of exercising a public function or providing a service to the public or a section of the public⁵. Cells in a police station would be premises provided solely for the purpose of exercising a public function and an estate agent providing general information about property will be providing a service to the public. If however the provision of accommodation is the primary purpose, Part 4 of the Act will apply.

15. Finally the premises provisions do not apply to a breach of an equality clause or rule; anything that would be a breach of an equality clause or rule but for section 69 or Part 2 of Schedule 7 of the EqA; or a breach of a non-discrimination rule.

Specific activities covered

Disposal

16. **Section 33(1)** sets out three types of unlawful behaviour in relation to the disposal of premises. It is unlawful for a person in relation to premises of which she has the right to dispose to discriminate:

- (a) in the terms on which she offers those premises, or
- (b) by refusing to dispose of the premises, or

¹ EqA,s.32(1).

² Or would be prohibited but for an express exception

³ EqA,s.32(2).

⁴ EqA,s.32(3) (a)

⁵ EqA,s.32(3) (b).

(c) in her treatment of the person with respect to things done in relation to persons seeking premises⁶.

Terms of disposal (s33(1)(a))

17. It is unlawful to discriminate in the terms on which premises are offered for rent or sale.

18. The 2001 Act Explanatory Notes give the example of a vendor offering her property to a prospective buyer who is disabled at a higher sale price than she would a non-disabled person, because of the person's disability⁷.

19. The DRC Premises, Services and Public Authority Code used a similar example. A house owner who is using an estate agent to sell his house⁸ discriminates by requiring a disabled purchaser to pay a 25 % deposit as a condition of continuing with the sale when he would not require such a large deposit in the case of a non-disabled person. Further examples are given of a landlord asking a deaf person for a non-refundable deposit as a condition of him renting a flat because he wrongly believes that the tenant will be less reliable than others because of his disability and a housing association which has a blanket policy of requiring all new tenants with a history of mental health problems to have only a short-term tenancy in the first instance to see if the tenants are suitable.

Refusing to dispose (s33(1)(b))

20. It is unlawful to discriminate by not disposing of premises.

21. For example, a housebuilder who refuses to sell properties at the entrance to a new building scheme to black buyers because he believes that white buyers will be deterred by the presence of black residents would be acting unlawfully. Similarly a commercial landlord who refuses to let office space to a self-employed businessman who previously had Hodgkins disease on the basis that the disability may recur causing irregular rent payments, would also be acting unlawfully.

Treatment with respect to things done in relation to persons seeking premises (s33(1)(c))

22. It is unlawful to discriminate in the treatment of the person concerned with respect to *things done in relation to persons seeking premises*. This somewhat vague and clumsily worded provision replaces the provisions in the main discrimination Acts which dealt with treatment in relation to any list of persons in need of premises of that description⁹. The new provision is potentially wider because it is not confined to activities connected with waiting lists for accommodation.

Allocations policies

⁶ EqA10, s33(1).

⁷ Para 131

⁸ The owner cannot therefore rely on the owner occupier exception: see below.

⁹ SDA, s 30(1);RRA, s 21(1);DDA,s 22(1); EA, s 47(1); ESOR, reg 5(1) .

23. The operation of the allocation and lettings policies of local housing authorities and housing associations would undoubtedly come under the heading of treatment with respect to things done in relation to persons seeking premises.

24. Most obviously a refusal to register a person on grounds of their sex, race, disability, religion or belief or sexual orientation would be discriminatory. Likewise a policy of allocating “hard to let” accommodation to particular minority groups through unconscious racial stereotyping would be unlawful: CRE Code 2006, para 2.10.

25. The administration of a waiting list by a small private letting agency would equally be caught by the prohibition under EqA10,s.33(1)(c), for example if the agency was found to have discriminated in making decisions as to who to place on the list. Similarly if a housing cooperative relied on its members to spread information about vacant properties by word of mouth and its members were predominantly from one racial group this could amount to unlawful indirect discrimination. Or, a housing association’s lettings policy which gives priority to tenant’s sons and daughters, particularly if the racial profile of tenants does not reflect that of people in housing need in the catchment area.

Commonholds (s33(2))

26. Where an interest in a commonhold unit cannot be disposed of unless a particular person is a party to the disposal, that person must not discriminate against a person by not being a party to the disposal.

27. Commonhold is a system of freehold ownership, which is suitable for blocks of flats, shops, offices and other multiple occupation premises in England and Wales¹⁰.

Management

28. Section 35(1) provides that it is unlawful for a person, who manages premises to discriminate against a person who occupies the premises:

- a) in the way in which he allows her, or by not allowing her to make use of a benefit or facility or
- b) by evicting her (or taking steps for the purpose of securing her eviction) or
- c) by subjecting her to any other detriment¹¹.

Access to benefits or facilities (s35(1)(a))

¹⁰ See generally, The Commonhold and Leasehold Reform Act 2002. References to commonhold land, a commonhold association, a commonhold community statement, a commonhold unit or a unit holder are to be construed in accordance with that Act: EqA10,s. 38(7).

¹¹ EqA10,s.35(1)

29. The EqA Explanatory Notes give the example of a manager restricting a tenant's use of a communal garden by setting fixed times when she can use the garden because she is undergoing gender reassignment, while allowing other tenants unrestricted access to the garden¹².

30. *Benefits or facilities* are left undefined in the Act. Therefore there is scope to argue that they include not just facilities like laundry or parking or access to communal gardens but also extend to a repairs service.

31. A landlord who responds more speedily to requests for maintenance or repair from one racial or religious group than others, irrespective of the relative urgency of the request would be discriminating¹³ as would a manager who responds to repair requests more slowly for one tenant because he has a learning disability.¹⁴

Eviction (s35(1)(b))

38. Eviction will not be prohibited if it is in accordance with the law. For example, a disabled person who has simply failed to pay the rent is just as liable to eviction as an able bodied person unless the eviction is discriminatory¹⁵.

39. The House of Lords in *Lewisham LBC v Malcolm* (EHRC Intervening) [2008] UKHL 43; [2008] 1 AC 1399 decided that it is the eviction process overall, (which involves a number of steps: the service of the notice to quit, the issue of the claim form, the obtaining of an order for possession and the enforcement of the warrant) that potentially fell foul of DDA, s 22(3)(c). It was artificial therefore to break the process down into different stages in order to determine whether there had been individual breaches along the way. However the new addition of the words: *or taking steps for the purpose of securing her eviction* ensure that any steps taken for the purpose of securing eviction may if discriminatory, be a breach of the Act. A notice of seeking possession or notice to quit could arguably be served for the purpose of securing a person's eviction

Detriment (s35(1)(c))

40. In *Manchester CC v Romano*¹⁶, it was common ground between the parties that serving a notice of seeking possession could constitute a detriment under the DDA, s. 22(3)(c)¹⁷. However as indicated above it may in any event be arguable under the EqA10, s.35(1)(2) that a notice is served for the purpose of securing eviction.

Withholding permission for disposal(s34(1))

¹² Para 136

¹³ CRE Code 2006, para 3.125.

¹⁴ EqA Explanatory Notes, para 136.

¹⁵ DRC Public Services and Public Functions Code, para 14.21; *S v Floyd* [2008] EWCA Civ 201; [2008] 1 WLR 1274.

¹⁶ [2004] EWCA Civ 834; [2005] 1 WLR 2775 @ [50]

¹⁷ See also *Lewisham v Malcolm* in the Court of Appeal [2007] EWCA Civ 763 at [48].

41. Section 34(1) provides that a person whose permission is required for the disposal of premises must not discriminate against another by not giving permission for the disposal to the other.

42. The EqA Explanatory Notes give the example of a disabled tenant who seeks permission from his landlord to sublet his room and his landlord refuses permission because he is disabled.

43. The CRE Code 2006 gives a similar example of a tenant who wants to sublet her flat to a Somali family, and needs her landlord's agreement to do so. The landlord would be discriminating if he withheld that consent on racial grounds.

44. The provision does not apply where permission to dispose of premises is refused by a court in the context of legal proceedings¹⁸, for example where the court dismisses an application for an order for sale under the Trusts of Land and Appointment of Trustees Act 1996.

Additional harassment and victimisation provisions

45. The EqA10 contains additional provisions prohibiting the harassment of a person who applies for premises, occupies premises, applies for permission to dispose of premises or to whom a disposal would be made if permission were given¹⁹. The prohibition on harassment does not extend to the protected characteristics of religion or belief or sexual orientation²⁰. Harassing someone with these characteristics, while delivering a service to them, for example a repairs service, might be direct discrimination because they would be receiving the service on less favourable terms than someone without the protected characteristic²¹.

46. The Act also prohibits victimisation in relation to the disposal and management provisions outlined above²².

47. The 2010 Act Explanatory Notes cite the example of a manager of a property who refuses to allow a lesbian tenant to use facilities, which are available to the tenants, or deliberately neglects to inform her about facilities which are available for the use of other tenants, because she had previously made a claim of discrimination against the manager. This would constitute victimisation²³.

Principal Definitions

Discrimination: May be direct or indirect.

¹⁸ EqA10,s.34(5)

¹⁹ EqA10, ss 33(1), 34(2), 35(2)

²⁰ EqA10, s.33(6), 34(4),

²¹ See EqA10,s.212(5)

²² EqA 10, ss 33(4), 34(3) and 35(3). See also the additional provision for commonhold units at EqA10,s.33(5).

²³ Para 136.

Direct discrimination is where a person treats another person less favourably than others because of a protected characteristic (s13 EqA).

Indirect discrimination occurs if a provision criteria or practice puts a person with a protected characteristic at a particular disadvantage (s19 EqA)

For discrimination arising from disability – see below.

Harassment: is unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Also covered is sexual harassment and harassment based on gender reassignment (s26 EqA)

Victimisation: is subjecting a person to detriment because they: bring proceedings under the Act; give evidence in connection with proceedings under the Act; do anything else in connection with the Act or make an allegation that another person has contravened the Act (s27 EqA).

Premises: are not defined save that it is stated that a reference to premises is a reference to whole or part of the premises²⁴. This would protect occupiers who are permitted to occupy only part of a dwelling, for example a room in a shared house. The term encompasses both commercial and non-commercial land including houses, flats, offices and commercial sites.

Disposing of premises: A reference to disposing of premises includes in the case of premises subject to a tenancy, a reference to (i) assigning the premises, (ii) sub-letting them, or (iii) parting with possession of them²⁵. The term is wide enough to include granting a right to occupy premises²⁶ which probably means that it includes all types of sales, lettings and grants of license²⁷. In the context of common hold units a reference to disposing of an interest in such a unit includes a reference to creating an interest in a commonhold unit²⁸

Right to dispose: In the absence of any definition, a person with a *right to dispose* will likely be the owner, landlord, leaseholder or arguably also any agent who is given permission to dispose on their behalf.

A person who manages premises: this is not defined either and there is no statutory guidance. In the meantime the DRC Premises, Services and Public Authority Code stated that the equivalent provision in the DDA was to be applied to property owners, managing agents, an accommodation bureau, a housekeeper, an estate agent, or rent collection service.²⁹

²⁴ EqA10,s.38(2)

²⁵ EqA10,s.38(3)

²⁶ EqA10,s.38(4)

²⁷ This is certainly how the phrase was interpreted under the DDA: see DRC Premises, Services and Public Authority Code, para 14.8.

²⁸ EqA10,s.38(5).

²⁹ Para 14.18.

Exceptions (Schedule 5)

The owner-occupier exception

48. With the exception of discrimination on grounds of race the provisions relating to the disposal of premises do not apply to the private disposal of premises by an owner-occupier (Sch 5 para 1).

49. A disposal is private if the owner occupier does not use the services of an estate agent for the purpose of disposing of the premises or publish (or cause to be published) an advertisement in connection with the disposal of the premises (Sch 5 para 1(2)).

50. An “owner occupier” means a person who owns an estate or interest in premises, and occupies the whole of them (Sch 5 para 1(5)).

51. The owner occupier exception is limited in its application to the permission for disposal provisions in EqA10,s.34(1) to religion or belief or sexual orientation (Sch 5 para 1(4)).

52. The 2010 Act Explanatory Notes give various examples of the application of the owner occupier exception including:

A homeowner who makes it known that she is preparing to sell her flat privately. A work colleague expresses an interest in buying it but she refuses to sell to him because he is black. The refusal would not be covered by the exception and so would be unlawful. If however the homeowner decided to sell her house privately to a fellow Christian rather than non Christian purchasers the exception would apply.

53. Similarly the non statutory draft guidance: *What the Equality Act 2010 means for you in accessing services and public functions or belonging to an association* gave the example of:

A man selling his house who has not yet advertised it or gone to an estate agent. A friend tells him that he knows someone who is interested. The person comes to look at the house and mentions that they are gay. The seller puts the asking price up because he does not want the gay person to buy the house. This is not against the law. However if the reason the seller put the price up was because the would-be purchaser was Jewish, this would be unlawful race discrimination.

54. The owner occupier exception is also applied to the duty to make reasonable adjustments: 2010 Act, Sched 5, para 2.

The small premises exception

55. *Small premises* are broadly defined as residential premises occupied in conjunction with the landlord or his close family. The small dwellings exception was

a common feature of all of the discrimination Acts³⁰. It has been retained in the 2010 Act³¹. It is likely to apply to a multi-occupancy residential building with shared accommodation.

56. Providing small premises meet the criteria detailed below they will be exempted from the provisions prohibiting discrimination in the disposal or management of premises or by the withholding permission for the disposal of premises.

57. The exception for “small premises” applies to anything done by a person in relation to the disposal, occupation or management of part of small premises³² if

- a) The person or relative of that person (“the relevant resident”) resides, and intends to continue to reside in another part of the premises;
- b) And the premises include parts (other than storage areas and means of access³³) shared with residents of the premises who are not members of the same household as the relevant resident.

58. If the exception applies, sections 33(1), 34(1) and 35(1)³⁴ of the 2010 Act apply only in so far as they relate to race³⁵.

59. The premises themselves must be “*small premises*”³⁶. There are two possible ways in which premises can qualify as “small premises”.

60. First the premises can meet the following criteria:

- i) Only the relevant resident and members of his household reside in the accommodation occupied by him, and
- ii) the premises comprise, in addition to the accommodation occupied by the relevant resident at least one other household, and
- iii) the accommodation for each of those other households is let, or available for letting, on a separate tenancy or similar agreement, and
- iv) the premises are not normally sufficient to accommodate more than two other households (Sch 5 para 3(3))

³⁰ SDA, ss 31(2),32 ; RRA, ss 22, 24(2) and (3);DDA, s 23;EA, s 48(1); ESOR , reg.6(2).

³¹ EqA10,Sch 5, paras 3-5. Note that under para 5 a Minister of the Crown can amend the provisions by order.

³² As defined below.

³³ It would arguably be sufficient therefore for the relevant resident to share a toilet or bathroom with others.

³⁴ Provisions on disposals, permission for disposal and management – see above.

³⁵ EqA, Sch5,para3(2).

³⁶ EqA,Sch5,para3(3) and (4).

61. Alternatively premises can qualify as small premises if they are not normally sufficient to provide residential accommodation for more than six persons (in addition to the relevant resident and members of the same household) (Sch 5 para 3(4)).

62. The Explanatory Notes of the Act give the example of a Jewish family which owns a large house but only lives in part of it. They decide to let out an unoccupied floor but any new tenant will have to share kitchen and cooking facilities. The family choose only to let the unoccupied floor to practicing Jews because they are concerned about their kosher food being compromised. This would be allowed under this exception.

Duty to make reasonable adjustments

63. The small dwellings exception also applies to the duty to make reasonable adjustments: 2010 Act,s.36(1).

Part 2 Discrimination Arising from Disability

Introduction

1. The definition of disability is not much changed from the previous definition under the DDA. There is no longer a list of capacities. A disabled person had to show that one of these capacities was affected to show a substantial adverse effect on day to day activities. This requirement has gone.

2. The main change is that in order to establish discrimination arising from disability there is no longer a requirement to have a comparator and the problems encountered in *Lewisham LBC v Malcolm* should now be overcome.

3. There are no statutory codes in place save that the “Guidance on matters to be taken into account in determining questions relating to the definition of a disability remains in force”³⁷. This guidance can be found at:

www.equalityhumanrights.com/uploaded_files/guidance_on_matters_to_be_taken_into_account_in_determining_questions_relating_to_the_definition_of_disability.pdf.

The Definition of Disability

The definition

4. Section 6(1) provides that a person has a disability if

- a) P has a physical or mental impairment and
- b) the impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities.

5. A person with a past disability , which falls within the definition, is protected even if he has recovered with the exceptions of section 190 (improvements to let dwellings) and Part 12 (transport).³⁸

³⁷ SI 2010 No 2317 para 13

³⁸ EqA s6(4)

6. The Act provides for a Minister of the Crown to issue guidance about matters to be taken into account in deciding whether someone has a disability for the purposes of s6(1) and further Schedule 1 has effect.³⁹ As set out above, the old Guidance continues to apply. The current Guidance has to be read together with Schedule 1 and any relevant Regulations.

(i) Physical and Mental Impairments (A3-9 of the Statutory Guidance)

7. It is not necessary for a mental impairment to be a clinically well recognised illness. The term should be given its ordinary meaning. Whether a person is disabled is to be determined by reference to the effect that an impairment has on that person's ability to carry out normal day to day activities. It may not be possible or necessary to categorise a condition as a physical or mental impairment. The underlying causes may be hard to establish. It is not necessary to consider how the impairment is caused. What is important is to consider the **effect** of the impairment.

(ii) "Long-term" adverse effect

8 Long Term effect means it has lasted at least 12 months; the period for which it is likely to last is at least 12 months or it is likely to last the rest of the person's life (Schedule 1 para 2 and Section C of the Statutory Guidance).

9. Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if it is likely to recur.

10. Where there is evidence that one illness has developed from another illness, the effect of that second illness is part of the assessment as to whether the original illness has or is likely to last for more than 12 months.⁴⁰

11. A substantial effect is likely to recur if it could well happen. See *Swift v Chief Constable of Wiltshire*⁴¹ where the EAT affirmed the approach to recurring conditions.

(iii) "Substantial" adverse effect

12. "Substantial" means more than trivial or minor: Section B of the Statutory Guidance. The impairment may not prevent the carrying out of normal day to day activities but for example may cause pain if the person does carry out that activity.

13. An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect. Thus if the person has paranoid schizophrenia but is well, provided he takes his medication, he is still treated as having a mental impairment with substantial adverse effects. This applies to medical treatment as well as the use of prosthesis or other aids

³⁹ EqA s6(5) and(6)

⁴⁰ *Patel v Oldham MBC* [2010] ICR 603

⁴¹ [2004] IRLR 540 EAT

i.e. hearing aids. The only exception is the wearing of glasses or contact lenses (Schedule 1 para 5 and B11-15)

14. In Paterson v Commissioner of Police for the Metropolis [2007] IRLR 763, the EAT held that the correct way of assessing whether the impairment has a “substantial” adverse effect is to compare what the claimant can do with what s/he would be able to do without the impairment. It is incorrect to compare the claimant's abilities with those of an average person in the population as a whole.

(iv) Normal Day-to-Day Activities (Section D of the Statutory Guidance)

15. The DDA had a list of “capacities” and the person had to show that one or more of these capacities were affected in order to show a substantial adverse effect on normal day to day activities. The list was restrictive and at times it made it difficult for people with obvious mental health impairments to bring themselves within these capacities. The list of capacities is not reproduced in the new Act. The new system should enable a more realistic practical approach to be taken to this issue. Having said that, the Guidance at Section D is often likely to be informative in deciding whether the person’s normal day to day activities are affected.

16. The activities of those who perform a particular skill or sport eg a musician or a professional tennis player were not considered day to day activities and the person only had a disability if the normal day to day activities were also affected. However this approach appears to be incompatible with an ECJ decision⁴² where the test applied was whether the impairment hindered participation of the person concerned in professional life over a long period of time. It did not need to be substantial to affect normal day to day activities. Applying this decision, it may be that specialised skills now fall to be treated as normal day to day activities. Indeed in *Paterson* (see above at para 14) the EAT held that a normal day to day activity can apply to something only done at work.

(v) Those who are “deemed” to be disabled

17. Schedule 1 para 6 and the Equality Act 2010 (Disability) Regulations 2010⁴³ para 7 provide that certain people are deemed to be disabled and so do not have to prove that they fall within the s.6 definition :

(i) those who are certified as blind, severely sight impaired , sight impaired or partially sighted by a consultant ophthalmologist;

(ii) those with cancer

(iii) those with HIV

(iv) those with Multiple Sclerosis

⁴² Chacon Navas v Eurest Colectividades SA [2007] All ER (EC) 59

⁴³ SI 2010 No 2128

A person who has a severe disfigurement is deemed to have an impairment which has a substantial adverse effect on their ability to carry out normal day-to-day activities, and must therefore only show that their disfigurement is long term (Schedule 1 para 3). However the 2010 Equality Act (Disability) Regulations at paragraph 5 provide that those who have tattoos or piercings will not be treated as falling within paragraph 3 of Schedule 1.

(vi) Progressive Conditions

18. Schedule 1 para 8 and B16-19 of the Statutory Guidance; where a person has a progressive condition, that person is to be treated as having an impairment which has a substantial adverse effect on his or her normal day to day activities from the moment that there is any impairment with some adverse effect provided that in the future the adverse effect is more likely than not to become substantial. Examples given are types of dementia, rheumatoid arthritis, systemic lupus erythematosus, motor neurone disease.

(vii) Exclusions from the Definition of Disability

19. The Equality Act 2010 (Disability) Regulations 2010 sets out certain conditions which are not be regarded as impairments for the purposes of the Act:

(i) addiction to/dependency on alcohol, nicotine or any other substance; other than where the original addiction arises from the administration of medically prescribed drugs or other medical treatment

(ii) seasonal allergic rhinitis (e.g. hay fever) except where it aggravates another condition

(iii) a tendency to set fires

(iv) a tendency to steal

(v) a tendency to physically or sexually abuse other persons

(vi) voyeurism

(vii) exhibitionism

(viii) disfigurements which consist of a tattoo, non-medical body piercing, and anything attached through such a piercing

20. A person with an excluded condition may still be protected by the Act if s/he has another impairment. This is considered in the 2006 Guidance and paragraph A14 gives useful illustrations, e.g. “a person who is addicted to a substance such as alcohol may also have depression or physical impairment such as liver damage, arising from the alcohol addiction. While this person would not meet the definition on the basis of having an addiction, he or she may still meet the definition as result of the effects of depression or liver damage”.

(viii) Babies and Young Children

21. The 2010 Regulations provide that where a child under 6 has an impairment which does not have substantial and long term adverse effects on the ability of that child to carry out normal day to day activities, the impairment is to be treated as having a substantial and long term adverse effect on the ability of that child to carry out normal day to day activities where it would normally have that effect on the ability of a person aged 6 years or over to carry out normal day to day activities.

The Court's Approach

22. The meaning of “disability” was considered in *Manchester CC v Romano* [2005] 1 WLR 2775 at [23] – [36] and *Lewisham LBC v Malcolm* [2008] 3 WLR 194 (“Malcolm”) at [71-75] [89-93] [126-132]. In each case, the Court of Appeal endorsed the general guidance on the proper approach to be adopted by an employment tribunal which was given by Morrison J in *Goodwin v Patent Office* [1999] ICR 302:

(i) A tribunal should look carefully at what was said in their originating application and response (IT 1 and IT3). The parties may not have identified the real questions in issue. Generally, it will be unsatisfactory for the disability issue to remain unclear and unspecific until the hearing itself (p.306F);

(ii) A purposive approach should be adopted. The language should be construed in a way which gives effect to the stated or presumed intent of Parliament (at p.307E);

(iii) In many cases, the question as to whether an applicant is a disabled person can only admit of one answer. In such clear cases, it would be wrong to search the Guide and use what it says as some kind of extra hurdle over which the applicant must jump (at p.307F);

(iv) The focus of attention required by the Act is on the things that the applicant either cannot do or can only do with difficulty, rather than the things that the person can do (at p.309E);

(v) “Substantial” means “more than minor or trivial” (p.310C);

(vi) The Employment Appeal Tribunal reversed the finding of the employment tribunal that the applicant, a paranoid schizophrenic, was not a “disabled person” (p.311E).

The majority of the House of Lords in Malcolm accepted the Court of Appeal’s approach on this issue (see at [6], [41],[117] & [127])

23. It will usually be obvious whether someone falls within the definition of disability but make sure that medical evidence addresses all aspects of the test of disability under the EqA.

Discrimination arising from Disability

24. Section 15 provides as follows

- (1) A person (A) discriminates against a disabled person (B) if
 - a) A treats B unfavourably because of something arising in consequence of B's disability and
 - b) cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability .

25. This section replaces the previous concept of “disability related discrimination”. The latter concept initially appeared to provide a defence to those disabled tenants facing eviction where their conduct related to mental health impairment. The case of *Lewisham v Malcolm* not only drove a coach and horses through this potential defence but in effect ended the whole concept of indirect discrimination across the board. The House of Lords overturned the long established employment case of *Clark v Novacold*⁴⁴ as regards comparators in this field. The established view was to adopt a broad approach to the selection of a comparator. Thus in a possession claim the comparator for the disabled tenant who had caused nuisance was a tenant who had not caused a nuisance and was not disabled. Following *Malcolm* the comparator became the tenant without a disability who had caused a nuisance. As the Explanatory Notes state at para 70 the effect of *Malcolm* was that the disability related discrimination provisions no longer provided the degree of protection that was intended for disabled people.

26. The Act introduces an entirely new concept that does not depend on any comparator. The issue is unfavourable treatment of the disabled person where the reason for the treatment arises in consequence of the disabled person's disability. There can be justification of the treatment which will involve consideration of proportionality issues. The alleged discriminator will not be liable if he can show that he did not know or could not reasonably be expected to know of the disability.

(i) Unfavourable Treatment

27. This is a new concept for housing lawyers. However comparators are not the issue. It matters not how A would have treated someone else who did not have a disability. The concept of unfavourable treatment is a broad concept. Any disadvantage to which B has been subjected will be less favourable treatment. B need not have suffered material or tangible loss. Depriving someone of a choice can be less favourable treatment. Be warned that it is not “unreasonable” treatment but “unfavourable” treatment. Thus there must be some evidence of a detriment to B.

(ii) Causation

28. There is no requirement to prove a direct link between the treatment by A and the disability of B. The test is “something arising in consequence of B's disability”. The “thing” that arises in consequence of B's disability may be rent arrears that arise due to B's learning disability or nuisance that arises from B's mental health problems.

⁴⁴ [1999] 2 AllER 977

Anything that arises as a result, effect or outcome of the disability will be something arising in consequence of B's disability.

29. Using examples from the old DRC Code : a landlord asks a deaf person for a non refundable deposit as a condition of him renting a flat because he believes that the tenant will be less reliable than others because of his disability. This is unfavourable treatment arising due to the disability and will not be lawful unless the landlord shows it is a proportionate response. Similarly a housing association that insists that all new tenants with a mental health history are only offered short term tenancies will be subjecting the tenants to unfavourable treatment that arises due to their disability; this will be unlawful unless proved to be a proportionate response.

(iii) Justification

30. The person who seeks to justify the unlawful treatment can avoid liability if he can show that the treatment was a proportionate means of achieving a legitimate aim.

31. Thus the first step will be to identify the legitimate aim. The aim must be a real objective consideration. See Balcombe LJ in *Hampson v Department of Education and Science* [1989] ICR 179 at 191 :

“In my judgment ‘justifiable’ requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition”.

The person seeking to justify the treatment has to set out what is the legitimate aim.

32. The treatment must be proportionate to any legitimate aim. This will involve considering whether the means sought to achieve the aim are appropriate and reasonably necessary to achieve the end. Necessary does not mean that it is the only means to achieve the same end but, if less discriminatory measures could have been taken to achieve the same end, the treatment will not be necessary. The treatment must be appropriate to the achievement of the aim, on balance, taking into account the severity of the disadvantage caused and the importance of the aim pursued. The more serious the impact the more cogent must be the justification. In the context of housing, the courts will no doubt look at the statutory framework and what may be proportionate for an assured shorthold tenant will not be for a secure tenant.

33. Where the discriminatory treatment relates to disability, it will be difficult for A to justify treatment if there has been a failure to comply with the duty to make reasonable adjustments.

34. The ECtHR affords States a margin of appreciation in accessing whether or not and to what extent differences in treatment are justified. Discrimination in “suspect classes” is subject to rigorous scrutiny and very weighty reasons will be required if discrimination is to be held as justified.⁴⁵ Whilst sex, race , nationality and religion and sexual orientation are “suspect classes”, disability is on the borders although the ECtHR appears to be moving towards accepting it as such⁴⁶

⁴⁵ R(Carson) v SS for Work and Pensions [2006] 1AC 173 at para 16

⁴⁶ Glor v Switzerland Application no 13444/04 30th April 2009

(iv) Knowledge

35. The person (A) must prove that she did not know and could not reasonably have been expected to have known of B's disability at the time of the unfavourable treatment. If this is shown then A will not have acted unlawfully within s15.

36. It would appear that if A was not aware of the disability when she issued proceedings but was then made aware of the same and decided to continue with the eviction process then A would be caught by s35(1)(b) which states that A must not discriminate against B who occupies premises by evicting B or "taking steps for the purpose of securing B's eviction". Thus if A, with knowledge of the disability, continues to seek possession, there will be an unlawful act unless A can justify the treatment.

37. Those considering running defences under the EqAct would do worse than to look at the case law that arose under the DDA (see North Devon Homes Ltd v Brazier [2003] HLR 905 that had established the DDA as a possible defence to possession claims (see also Manchester CC v Romano (DRC Intervening) [2004] EWCA Civ 834 [2005] 1 WLR 2775 (Brooke LJ, Jacob LJ, Sir Martin Nourse); Liverpool City Council v Slavin (DJ Wright, Liverpool County Court, 29.4.05), Legal Action, July 2005 p.28); Community Housing Association v Wye (15.2.07), Legal Action May 2007 29 (DJ Silverman); and Floyd v S (EHRC Intervening) [2008] EWCA Civ 201 (Mummery LJ, Lawrence Collins LJ and Munby J)).

Part 3 Reasonable Adjustments

General Outline

1. The aim of the reasonable adjustment duty is ensure that disabled people can rent and enjoy premises and facilities associated with them in a similar way to non-disabled people, by removing barriers to their occupation or enjoyment. With the exception of the duty in relation to common parts the provisions do not go as far as to require alterations to physical features. The substantive provisions are contained in Section 20 and Schedule 4 to the EqA. There are supplementary provisions in Schedule 21 which apply to reasonable adjustments in the context of premises, services and public functions, work, education and associations. The duty does not provide a cause of action but provides that failure to comply with the duty is a form of discrimination.

2. The duty to make reasonable adjustments applies to:

- (a) a controller of let premises;
- (b) a controller of premises to let;
- (c) a commonhold association;
- (d) a responsible person in relation to common parts⁴⁷

⁴⁷ EqA,s.36(1). Note that the provisions in s.36 can be excluded from application to particular types of premises by regulation, see s.36(8).

3. A *controller of let premises* is a person by whom premises are let or a person who manages them (s36(1)). An agency used by a landlord to let and manage leasehold premises, is a controller of premises under this provision⁴⁸. A management or resident's committee of a block of flats, and any other person who in practice has control over how the premises are let or managed would also likely be covered⁴⁹. The term *let* includes sub-let and premises shall be treated as let where they are the subject of a right to occupy them (s36(7)).

A *controller of premises to let* is a person who has premises to let, or a person who manages them (s36(3)).

A *commonhold association* for these purposes is a reference to the association in its capacity as the person who manages a commonhold unit (s36(4))

A *responsible person in relation to common parts* where the premises to which the common parts relate are let is a person by whom the premises are let and where the premises to which the common parts relate are part of commonhold land, the commonhold association (s36(5)). In relation to let premises *common parts* are the structure and exterior and any common facilities within or used in connection with, the building or part of a building which includes the premises.

4. The duty to make reasonable adjustments contains three requirements:

(i) The first requirement is , where a *provision, criteria or practice* of the controller puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take reasonable steps to avoid the disadvantage;

(ii) The second requirement is, where a *physical feature* puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with non disabled people, to take reasonable steps to avoid the disadvantage;

(iii) The third requirement is to take reasonable steps to provide an *auxiliary aid* where a disabled person would, but for the provision of an *auxiliary aid*, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled .

5. The term “*provision criteria or practice*” is not defined in the Act but plainly covers policies, procedures rules, requirements. It specifically includes a reference to a term of the letting⁵⁰. The reasonable adjustments provisions in the context of premises under the DDA were relatively untested by the higher courts. An exception was *Dee Thomas-Ashley v Drum Housing Association Ltd* [2010] EWCA Civ 265, where a tenant with Bipolar Disorder who owned a dog failed in her attempt to show that a "no animals" term in her tenancy agreement discriminated against her on the grounds of her disability and that in the circumstances there were reasonable steps which her landlord could have taken but failed to take. The term did not make it impossible or unreasonably difficult for her to enjoy the premises⁵¹.

⁴⁸ EqA Explanatory Notes, para 138

⁴⁹DRC Premises, Services and Public Authority Code, para 13.6 dealing with the equivalent provision in the DDA.

⁵⁰ EqA, Sch4, para 2(3).

⁵¹ DDA, s.24D

The example of reasonable adjustments in relation to a *provision, criteria or practice* given in the explanatory notes to the EqA is a landlord who has a normal practice of notifying all tenants of any rent arrears in writing with a follow-up visit if the arrears are not reduced. A learning disabled person explains to the landlord that he cannot read standard English so would not be aware that he was in arrears. He asks to be notified of any arrears in person or by telephone. The landlord arranges to visit or telephone the learning disabled person to explain when he has any arrears of rent. This personal contact may be a reasonable adjustment for the landlord to make.⁵²

Physical Features

6. These are defined in Section 20(10) but this definition does not include Schedule 4 paragraphs 2-4. It includes features arising from design or construction of a building; features of an approach to, exit from or access to a building; fixtures, fittings, chattels and furniture in or on premises and any other physical element or quality. The applicable definition in relation to paragraphs 2-4 of Schedule 4 is set out below.

Auxiliary aid

7. Paragraph 8 of the Equality Act 2010 (Disability) Regulations 2010 provides that certain items are to be treated as auxiliary aids or services for the purposes of paragraphs 2 -4 of Schedule 4. These include the removal, replacement or provision of furniture etc, the replacement of signs or notices, the replacement of taps or door handles, the replacement , provision or adaptation of a door bell or door entry system, changes to the colour of any surface.

Relevant matter

8. What amounts to a “relevant matter” varies according to the context in which the duty arises and is considered below.

Substantial disadvantage

9. The new threshold is “substantial disadvantage” (the old test was impossible/unreasonably difficult). “Substantial disadvantage” is defined as more than minor or trivial.⁵³

Request

10. In relation to the premises provisions, the duty is only triggered when there has been a request from the relevant person to take steps to avoid the disadvantage or provide the aid. Under the DDA, it was stated that it would be a request for the purposes of the Act if it was reasonable to assume from what was said or written that an adjustment has been requested⁵⁴. The DRC Premises, Services and Public Authority Code gave the example of a telephone conversation in which a prospective

⁵² Para 773.

⁵³ S212(5)

⁵⁴ DDA, ss 24C (1)(a)-(b),24D(2)(b)-(c),24J (1) (a)-(b), 24J (3) (c)-(d). There is no equivalent provision under the EqA.

tenant tells her landlord that she is visually impaired and finds the print in her proposed tenancy agreement too small. The tenant is here identifying an impairment and it is likely that it would be reasonable to regard this as being a request for an auxiliary aid, such as a tenancy agreement in an accessible format⁵⁵. The EqA states that a request has to have been received which could be interpreted as requiring a more specific request. The Code of Guidance once published may assist in this respect.

Discharging the Duty

11. The Duty will only be discharged by taking such steps as are reasonable to have to take to avoid the disadvantage or provide the auxiliary aid. The test of reasonableness is an objective one that will depend on the individual case subject to section 20(6) which provides that where the first or third requirement relates to provision of information it is reasonable to have to ensure that it is provided in an accessible format.

There is no justification for the failure to make reasonable adjustments.

Reasonable adjustments to *Let Premises* (Schedule 4 para 2)

12. A controller of let premises is required to comply with the first and third requirements in EqA,s.20 . The *disabled person* in this context is the tenant⁵⁶ or person who is otherwise entitled to occupy the premises, such as the disabled child or spouse of the tenant. The *relevant matters* are the enjoyment of the premises and the use of a benefit or facility, entitlement to which arises as a result of the letting . A controller of let premises is only required to make reasonable adjustments if he/she receives a *request* from or on behalf of the tenant or person entitled to occupy to take steps to avoid the disadvantage or provide the auxiliary aid.

13. If a term of the letting prohibits the tenant from making alterations and this puts the disabled person at a disadvantage in relation to the first requirement, the controller is required to change the term only so far as is necessary to enable the tenant to make alterations to the let premises so as to avoid the disadvantage.

Physical feature

14. It is never reasonable to require the controller to have to take a step which would involve the removal or alteration of a *physical feature*. For these purposes physical features do not include furniture, furnishings, materials, equipment or chattels in or on the premises⁵⁷. Further the replacement or provision of a sign or notice; the replacement of a tap or door handle; the replacement, provision or adaptation of a door bell or door entry system and changes to the colour of the wall, door or any other surface do not constitute an alteration of a physical feature⁵⁸ .

Reasonable adjustments to *Premises to let* (Sch 4 para 3)

⁵⁵ Para 15.27

⁵⁶ As defined at EqA,s.38(6)

⁵⁷ EqA,Sch4,para2(9)

⁵⁸ EqA,Sch4,para2(9)

15. The controller of premises to let must comply with the first and third requirements. The *disabled person* concerned in the context of premises to let is the person who is considering taking a letting of the premises. The *relevant matter* in the context of premises to let is becoming a tenant of the premises. A controller of premises to let is only required to make reasonable adjustments if he/she receives a *request* from or on behalf of the disabled person who is considering taking a letting of the premises to take steps to avoid the disadvantage or provide the auxiliary aid.

Physical feature

16. The controller of premises to let is not required to take a step which would involve the removal or alteration of a physical feature. Physical feature is defined as set out in paragraph 14 above ie by reference to Sch 4 para 9.

Reasonable adjustments to Commonhold units (Sch 4 para 4)

17. The commonhold association which manages a commonhold unit must comply with the first and third requirements. The *provision, criteria or practice* includes a reference to a term of the commonhold community statement or any other term applicable by virtue of the transfer of the unit to the unit holder. The *disabled person* concerned in the context of commonhold units is the person who is the unit-holder or is otherwise entitled to occupy the unit.. The *relevant matters* in the context of commonhold units are the enjoyment of the unit and the use of a benefit or facility, entitlement to which arises as a result of the term of the commonhold community statement or any other term applicable by virtue of the transfer of the unit to the unit holder. A commonhold association is only required to make reasonable adjustments if they receive a *request* from or on behalf of the unit holder or person entitled to occupy the unit to take steps to avoid the disadvantage or provide the auxiliary aid.

Term of the commonhold community statement

18. If the term of the commonhold community statement, (or any other term applicable by virtue of the transfer of the unit to the unit holder) that prohibits the unit holder from making alterations puts the disabled person at a disadvantage in relation to the first requirement the commonhold association is required to change the term only so far as is necessary to enable the unit-holder to make alterations to the unit so as to avoid the disadvantage.

Physical feature

19. It is never reasonable to require the commonhold association to have to take a step which would involve the removal or alteration of a *physical feature*.

Reasonable adjustments in relation to common parts (Sch 4 para 5)

20. Following a recommendation by the Review Group on Common Parts, a duty was for the first time imposed by the EqA on landlords and managers of premises to make disability related alterations to the common parts of residential premises, where reasonable and when requested by a disabled tenant or occupier. This would apply

where the disabled person is placed at a substantial disadvantage compared to a non-disabled person by a physical feature. Failure to comply with the duty would be treated as discrimination. **This section is not being implemented at this time.**

21. The responsible person in relation to common parts must comply with the second requirement in EqA,s.20(4) *i.e.* to take such steps as it is reasonable to have to take to avoid the disadvantage where a *physical feature* puts a *disabled person* at a substantial disadvantage in relation to a *relevant matter* in comparison with persons who are not disabled. The *physical feature* concerned must be in the common parts. The definition of physical feature under this paragraph is as set out in Section20(10). The *disabled person* concerned in the context of the common parts duty is a tenant of the premises; a unit holder; or a person who is otherwise entitled to occupy the premises, and uses or intends to use the premises as the persons only or main home. The *relevant matter* in the context of the common parts duty is the use of the common parts. A responsible person in relation to the common parts is only required to take steps to avoid the disadvantage if a *request* is received from or on the behalf of the disabled person and the steps requested are likely to avoid or reduce the disadvantage. In other words there is no obligation to comply with every request, only a request which is genuinely likely to assist the disabled person in using the common parts. In deciding whether it is reasonable to carry out adjustments to the common parts the responsible person is obliged to *consult* all persons that he thinks would be affected by them and the consultation must be carried out within a reasonable period of the request being made. If it is agreed to carry out adjustments, the agreement must be in writing and record rights and responsibilities and make provision for the costs of the works and any restorative works if the relevant person stops living in the premises.

Supplementary provisions (Schedule 21 and the Equality Act 2010 Disability Regulations 2010 paras 10- 14)

22. EqA,Sch 21 and the Regulations made thereunder contains supplementary provisions dealing with reasonable adjustments where a person providing services or carrying out public functions, an employer, an education provider or an association is required to consider reasonable adjustments to premises it rents and would need the landlords consent to do so.

23. If a binding obligation⁵⁹ requires the obtaining of consent of another person: to make an alteration to the premises occupied, a variation of a term of the tenancy or an alteration of the common parts it is always reasonable for the relevant person or organisation⁶⁰ to have to take steps⁶¹ to obtain that consent, but it is never reasonable for that person to have to make the alteration before the consent is obtained.

24. Where a person occupying under a tenancy⁶² wishes to make an alteration in order to fulfil a duty to make reasonable adjustments but is not entitled to do so, the tenancy is deemed to have effect as if it provided for that person to be entitled to make the

⁵⁹ See Sch21,para2(3) for definition

⁶⁰ Whether it be the occupier, the controller of let premises or the responsible person in relation to common parts.

⁶¹ Not including applying to a court or tribunal: EqA,Sch21,para 2(4)

⁶² In the circumstances defined in EqA,Sch21,para 3(1) and (2).

alteration with the written consent of the landlord; for that person to have to make a written application for that consent; for the landlord not to withhold the consent unreasonably and for the landlord to give consent subject to reasonable conditions. The Equality Act 2010 (Disability) Regulations 2010 set out circumstances in which a relevant landlord is to be taken to have withheld consent (para 10), is taken to have acted unreasonably in withholding consent (para 11); is withholding consent reasonably (para 12) and circumstances in which a condition made subject to consent is to be reasonable (para 13). The Regulations make further modifications to Schedule 21 where the occupier has a sub tenancy (para 14).

25. The EqA explanatory notes uses the example of an insurance company which has plans to install a stair lift to make the building more accessible to employees with mobility impairments. The terms of the lease preclude alterations to the staircase. The company writes to the landlord for permission to make the alteration. The landlord consults the superior landlord who agrees to waive this condition of the lease thereby allowing the installation of the chair lift to proceed. However as a condition of consent the landlord requires that the chair lift is removed on surrender of the lease.

26. In any case brought within Part 3,4,6,or 7 of the EqA if a person has applied in writing to the landlord for consent to an alteration and the landlord has refused to give consent or has given consent subject to a condition it is open for the person⁶³ to refer the matter to a county court or in Scotland ,the sheriff who must determine whether the refusal or condition is unreasonable. If the county court or sheriff finds that the refusal or condition is unreasonable they may make such a declaration as they consider appropriate and may make an order authorising the making of the alteration subject to any conditions imposed⁶⁴.

The example used in the explanatory notes to the EqA is of a disabled tenant who asks to have automated doors put in at the entrance of her block of flats. Her landlord would agree but is unable to do so because he is a tenant of a superior landlord who does not agree to the alteration. The tenant's remedy is to bring an action against her landlord in the county court where she can ask that the superior landlord is brought in as an additional party to the case. The court can order the alteration to be made and order the superior landlord to pay compensation if it finds that he has acted unreasonably in refusing his consent.

Part 4 Improvements to let Dwelling Houses: section 190

1. Where a landlord refuses permission to allow a disabled tenant (or indeed a tenant with a disabled household member) to carry out improvements to the premises to better facilitate their disability, the tenant may be able to rely on specific provisions which are equivalent to Landlord and Tenant Act 1927,s.19(2)⁶⁵.

2. As indicated already, there is no obligation in the premises provisions for a landlord to make any alterations to physical features of rented premises save in relation to common parts. There is provision, however enabling a tenant in certain cases to

⁶³ Which can include any disabled person with an interest in the alteration being made.

⁶⁴ EqA,Sch 21,para4(4).

⁶⁵ EqA,s.190

obtain consent to carry out disability related improvements himself by way of a reasonable adjustment in the form of a change to a term of the tenancy. This only applies, however, where the term of the letting prohibits alterations or improvements altogether. More often than not a tenant will be entitled to make improvements, but only with the consent of their landlord. If the landlord unreasonably refuses permission then the provisions in EqA, s.190 may assist.

3. The section applies where:

- i) The tenancy is not a protected tenancy, a statutory tenancy or a secure tenancy⁶⁶. Similar rights already apply to these types of tenancy by virtue of the Housing Act 1980, ss 81-85 and Housing Act 1985, ss 97-99.
- ii) The tenant or another person occupying or intending to occupy the premises is a disabled person who occupies or intends to occupy as their only or her only or principal home;
- iii) The tenant is entitled, with the consent of the landlord, to make improvements to the premises;
- iv) The tenant applies to the landlord for consent to make a *relevant improvement*.

4. An *improvement* is defined as an alteration in or addition to the premises and includes: an addition to or alteration in the landlord's fittings and fixtures; an addition or alteration connected with the provision of services to the premises; the erection of a wireless or television aerial and the carrying out of external decoration. It becomes a *relevant improvement* if, having regard to the disabled person's disability it is likely to facilitate his enjoyment of the premises. The DRC Premises, Services and Public Authority Code in interpreting the equivalent provision in the DDA used the example of a grab rail, which will enable the disabled person to move about the premises effectively.

5. The provisions of the section apply⁶⁷ as follows:

- i) If the consent of the landlord is unreasonably withheld it must be taken to have been given.
- ii) Where the tenant applies in writing for the consent, if the landlord refuses to give consent he must give the tenant a written statement of the reason why the consent was withheld. If however the landlord neither gives nor refuses to give consent within a reasonable time, consent must be taken to have been unreasonably withheld.
- iii) If the landlord gives consent to the making of an improvement subject to a condition, which is unreasonable, the consent must be taken to have been unreasonably withheld.
- iv) In any issue as to whether the consent of the landlord was unreasonably withheld, or a condition imposed was unreasonable it is for the landlord to show that it was not.

⁶⁶ As defined in EqA, s.190(9)

⁶⁷ Only in so far as provision of a like nature is not made by the lease: EqA, s.190(8).

- v) If the tenant fails to comply with a reasonable condition imposed by the landlord the failure is to be treated as a breach by the tenant of an obligation of his tenancy.

6. The examples of the provision in action given in the EqA explanatory notes include a disabled tenant who has mobility problems who asks her landlord to consent to the installation of a walk-in shower and a grab rail to help her use the lavatory. Her landlord refuses consent. It would be for the landlord to give reasons for the refusal, and to show that it was not unreasonable. If however the landlord consented to the fitting of the grab rail and shower, on condition that their colour matches the other bathroom fittings, and that they must be removed if the disabled person moves out of the property these might be reasonable conditions, but it is for the landlord to show that they are.

Part 5 Enforcement

1. A county court has jurisdiction to determine a claim relating to a contravention of Part 4 (premises): 2010 Act, s.114.

2. Proceedings on a claim within section 114 must be brought within 6 months starting with the date of the act to which the claim relates: s.118. In the case of continuing discrimination the 6-month time limit begins to run at the end of the period of the discriminatory conduct.

3. The county court can grant any remedy which the High Court has the power to grant in tort or judicial review proceedings (s.119(2)) such as damages (including for injury to feelings), injunctions and declarations.

4. The burden of proof lies initially with the Claimant. Once the claimant has established facts, which in the absence of any other explanation, indicate that a breach has occurred the burden shifts to the Defendant to show that there was no breach: s.136.

5. S.138 of the Act allows a person to obtain further information to determine if an unlawful act has occurred. The questions and answers are admissible in evidence and an adverse inference can be drawn from a failure to provide an answer within 8 weeks. This is a useful means of determining the validity of a case before issuing proceedings. And it can be used to request documents, which would not be available under the ordinary disclosure provisions.

6. In the context of housing proceedings it is open to a tenant or occupier who has been discriminated against to plead these matters in his/her defence and/or to bring a counterclaim for a declaration or damages. Note however the view of the Court of Appeal in *Romano*:

64 In our judgment, it would be preferable, in a case involving a secure tenancy or an assured tenancy, for the tenant to assert the matter on which he relies as part of his case that it would be unreasonable for the court to make a possession order, rather than to complicate the proceedings by adding a formalistic counterclaim for a declaration or an injunction.

7. In some cases however a simple defence will not be enough for instance in a reasonable adjustments claim a counterclaim or a freestanding claim will usually be the appropriate course.

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