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# DOMESTIC ABUSE IN HOUSING CONFERENCE 2023



 **doughty street**  
chambers

Tuesday 28<sup>th</sup> March 2023

WELCOME

Sarah Steinhardt

Joint Head of Doughty Street's Housing  
and Social Welfare Team

KEYNOTE

# Keynote: Harriet Wistrich Centre for Women's Justice

# **Domestic Abuse in Housing conference**

**Changing understandings of domestic abuse:  
recent history and the legal perspective**

Harriet Wistrich Founder and Director of the Centre for Women's Justice

# “Rule of thumb” 1782

A judge reportedly states that a man may beat his wife so long as he uses 'a rod not thicker than his thumb'. Many people consider this to be common law throughout the 19th century.



# Provocation

“Where on charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his-self control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to the jury; and in determining that question the jury should take into account everything both done and said according to the effect which, in their opinion, it would have had on a reasonable man.”



Victory for battered wives

## Woman who killed brutal lover is freed

By Hugh Muir and Terence Shaw

A LANDMARK judgment that provides a stronger defence for women accused of murdering their violent partners was handed down by the Court of Appeal yesterday. In a move hailed as “momentous and historic”, three appeal judges quashed the murder conviction of Emma Humphreys, a former prostitute who stabbed her lover to death after six months of physical and mental abuse.

The judges substituted a manslaughter conviction and freed her immediately after ruling that Mr Justice Jones, the trial judge, did not adequately explain to the jury the importance that her long-term ill-treatment made to her defence of provocation. It is thought the ruling will help women seeking to show that the cumulative effect of past abuse, or so-called “battered woman syndrome” led them to kill under a final act of provocation.

Campaigners said they would now be asking the Home Secretary to review the cases of 70 women currently in prison for the murder of their violent partners.

Humphreys, of Nottingham, was convicted in November 1989 of the murder of Trevor Armitage, 35, who met her when she was 18 and working as a prostitute. Nottingham Crown Court was told he was a drug addict, with previous convictions for violence, who never

know how to deal with it. There needs to be more thought and more humanity.”

Under the law of provocation, as developed by the House of Lords in 1957, a woman who kills her violent partner after a long history of abuse that finally causes them to lose their minds, may be liable to a charge of manslaughter rather than murder.

One of the main criticisms has been that this has meant to women who were not really in a complete state of provocation, which would allow them a long history of abuse that finally causes them to lose their minds, may be liable to a charge of manslaughter rather than murder.

Julie Walters, legal director of the Women’s Rights Organisation, Liberty, said: “The fact that a woman who has been taken so long between the two has had to choose between murder or manslaughter is a terrible responsibility — and one that no woman should have to bear.”

She said she planned to spend time writing and campaigning for the law to be changed for women who never



Free: Emma Humphreys

# Coercive and controlling behaviour

Professor Evan Stark : *Coercive Control: how men entrap women in personal life*

“A pattern of behaviour which seeks to take away the victim’s **liberty or freedom**, to strip away their sense of self. It is not just women's bodily integrity which is violated but also their **human rights.**”

A bespoke form of abuse

Concept of entrapment and also “social entrapment”

# S76 Serious Crime Act 2015

## Controlling and coercive behaviour in an intimate or family relationship

- An offence is committed by A if:
  - A repeatedly or continuously engages in behaviour towards another person, B, that is controlling or coercive; and
  - At time of the behaviour, A and B are personally connected; and
  - The behaviour has a serious effect on B; and
  - A knows or ought to know that the behaviour will have a serious effect on B.

Definitions of “personally connected to” and “serious adverse affect”



# Coercive and Controlling Behaviour: Statutory Guidance

- Isolating you from friends and family
- Depriving you of basic needs, such as food
- Monitoring your time
- Monitoring you via online communication tools or spyware
- Taking control over aspects of your everyday life, such as where you can go, who you can see, what you can wear and when you can sleep
- Depriving you access to support services, such as medical services
- Repeatedly putting you down, such as saying you're worthless
- Humiliating, degrading or dehumanising you

# Sally Challen wins appeal against conviction for murdering husband

**Challen, who was sentenced in 2011 to 18 years for killing her husband with a hammer, will face a retrial**



▲ Sally Challen, who appeared via a video link, burst into tears as she heard the result. Photograph: Courtesy of David Challen

# WOMEN WHO KILL:

how the state  
criminalises women  
who we might otherwise  
be burying



# Prevalence / criminal justice outcomes

- 108 men killed by female partners/ex-partners over a ten year period (2008-2018)
- 835 women killed by partners/ex-partners over same time period (Home Office FOI data)

## **Women kill men who have a history of abusing them:** (92 cases of women killing men they knew)

- 84% (n=78) women had killed men who were either their partner or ex-partner
- 77% (n=71) evidence to suggest abuse from deceased

## **Women who kill are rarely acquitted:**

- 46% (n=42), women were convicted of manslaughter
- 43% of cases (n=40) women were convicted of murder
- 7% of cases (n=6), women were acquitted

## **Women kill with weapons:**

- 71% of cases (n=65), women had stabbed the deceased
- 9% of cases (n=8), women attacked the deceased with another type of weapon

# Domestic Abuse Act 2021

## Definition of “domestic abuse”

s.1(2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if —

- (a) A and B are each aged 16 or over and are personally connected to each other, and
- (b) the behaviour is abusive.

s1 (3) Behaviour is “abusive” if it consists of any of the following—

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;
- (c) controlling or coercive behaviour;
- (d) economic abuse (see subsection (4));
- (e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

# Domestic Abuse Act: some key provisions

- S. 3 Children are recognised as victims in their own right;
- A legal duty on councils to fund support for survivors in 'safe accommodation' (Local authorities are sucking up the money)
- New protections in the family and civil courts for survivors – including a ban on abusers from cross-examining their victims, and a guarantee that survivors can access special measures (only applies to new cases)
- Post-separation coercive control (not in yet),
- A guarantee that all survivors will be in priority need for housing, and will keep a secure tenancy in social housing if they need to escape an abuser;
- A ban on GPs for charging for medical evidence of domestic abuse, including for legal aid;

# Domestic Abuse Act: DA Commissioner

- Appointment of a Domestic Abuse Commissioner (S 4 – 21)
- To encourage good criminal justice practice
- Data collections and analysis
- Make recommendations to public authorities
- Conduct research
- Provide info and training and public awareness
- Encourage joint working of authorities and agencies
- Publish strategic plans
- Duties to cooperate with commissioner and respond to recommendations



# Domestic Abuse Act: Protection Orders

- Domestic Abuse Protection Notices (Ss 23- 26)
- Domestic Abuse Protection Orders ( s 27 – 59)

The super-complaint identifies four key areas which, taken together, amount to an alarming failure to meet the basic police duty to safeguard a highly vulnerable section of the population:



- 1 FAILURE TO IMPOSE BAIL CONDITIONS
- 2 FAILURE TO ARREST FOR BREACH OF NON-MOLESTATION ORDERS
- 3 FAILURE TO USE OF DOMESTIC VIOLENCE PROTECTION NOTICES AND ORDERS
- 4 FAILURE TO APPLY FOR RESTRAINING ORDERS



# Domestic Abuse Act: new criminal offences

- S69 Threats to disclose private sexual photographs and films with intent to cause distress
- S70 Suffocation and strangulation
- S 72 Consent to serious harm for sexual gratification not a defence



**Non-fatal strangulation is common in domestic abuse**

**Women are 7 times more likely to be killed if their partner has previously choked them**

**Amend the Domestic Abuse Bill**

# Domestic Abuse Act: what is missing

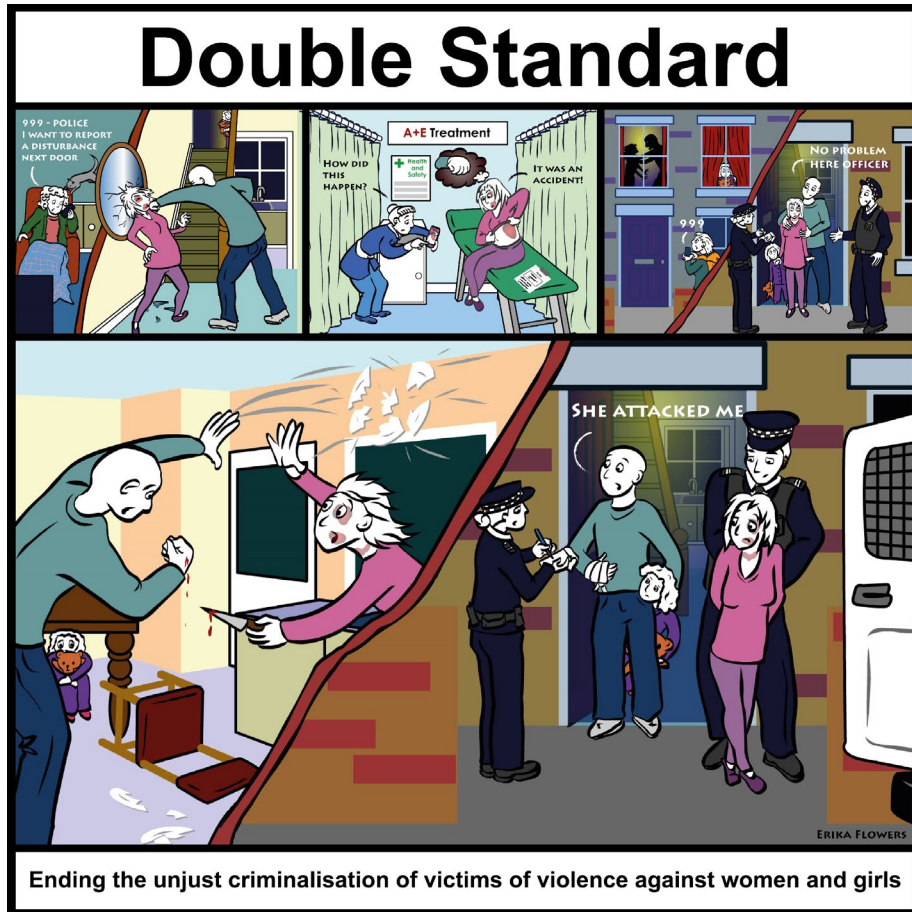
**Migrant rights** – immigration status used as a tool to control

- But No Firewall to protect victims reporting violence from being reported to immigration
- - only useless Migrant victims protocol
- No Recourse to Public Funds
- Istanbul Protocol reservation

**Defences for domestic abuse victims** charged with criminal offences

- - reform of self defence – modelled on Householder defence
- New defence for offences arising from coercion modelled on Modern Slavery Act defence (s45)

# Ending the unjust criminalization of victims of male violence



- 63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship.
- Of 173 women screened at HMP Drake Hall, 64% reported a history indicative of brain injury and for most this was caused by domestic violence.
- Women are more likely than men to commit an offence to support someone else's drug use (48% to 22%).
- Around half of arrests of women for alleged violence result in no further action, indicating widespread inappropriate use of arrest.
- Arrest rates in 2014/15 were twice as high for Black and 'mixed ethnic' women as for white women. Migrant women are over-represented in prison, particularly on remand.



# Domestic Homicide Sentencing Review

**Independent Review**  
**Clare Wade KC**

- Mandatory training for lawyers and judges on understanding and applying the concept of coercive control
  - Making strangulation, a form of killing almost exclusively used by men and not women, a statutory aggravating factor
  - Ensuring use of a weapon is not necessarily an aggravating factor (women who kill their abusers are likely to use a weapon because of disparities in size and strength and knowledge of the violence their abusers are capable of).
  - Establishing a comprehensive review of homicide defences.
- Clare Wade KC

*, “I fear that making overkill a statutory aggravating factor in the absence of adopting the other recommendations I have made will lead to injustice. In relation to controlling and coercive behaviour, there should be training across the criminal justice system and controlling and coercive behaviour should mitigate the seriousness of murders committed by victims who kill their abusers.”*

# Police super complaints

## **Domestic violence**

Domestic abuse within police force to be investigated

The 'boys' club' that protects officers has come under scrutiny



**CWVJ**  
Centre for Women's Justice  
**CWVJ**

# Domestic abuse and homelessness/allocations

Chair: Jo Underwood, Shelter

Speakers:

Zia Nabi, Doughty Street Chambers

Martin Westgate KC, Doughty Street Chambers

Izzy Mulholland, Public Interest Law Centre

# Homelessness & domestic abuse





## OFFICIAL STATISTICS JUL - SEP 2022

- 75,860 households were initially assessed as homeless or threatened with homelessness and owed a statutory homelessness duty, up 4.4% from July to September 2021.
- The number of households with children owed a prevention or relief duty increased 7.7% from July to September 2021 to 25,570.
- The second most common reason for those owed a relief duty was domestic abuse, accounting for 6,700 (17.5%) households owed a relief duty. This was an increase of 4.0% from the same quarter the previous year.





In 2018-19, 92% of defendants in domestic abuse cases referred to the Crown Prosecution Service were male and 83% of the victims were female (where sex of the defendant or victim was recorded)

CPS, [Violence Against Women and Girls Crime Report 2018-19](#)



# MAIN HOUSING DUTY

- Main duty acceptances increased 18.1% from the same quarter the previous year to **12,330** in July to September 2022.
- The number of households owed a main duty who were homeless and had priority need due to domestic abuse increased **31.7%** from July to September 2021, because of
  - an increase in homelessness due to domestic abuse over the previous year; and
  - priority need for single people who are homeless due to being victims of domestic abuse through the Domestic Abuse Act in July 2021.



## HOMELESS: SECTION 175 HA 1996

- (3) A person shall not be treated as having accommodation unless it is accommodation which it would be **reasonable for him to continue to occupy**.



***R (AWEYS) V BIRMINGHAM CITY COUNCIL [2009] UKHL 36 [2009] 1 WLR 1506***

- Ms. Moran who was said to have mental health problems and chronic poor coping skills left her home because of domestic violence. She moved to a refuge and signed a licence agreement which allowed her to stay at the refuge for as long as she needed it while she decided what to do.
- Summarily evicted from the refuge after an argument with staff. Found to be intentionally homeless from the refuge.
- The House of Lords allowed Ms. Moran's appeal finding that the refuge could not be considered accommodation which was reasonable for her continued occupation.



## REASONABLE TO CONTINUE TO OCCUPY: SECTION 177 (1)

- (1) It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to violence or domestic abuse against him, or against—
- a) a person who normally resides with him as a member of his family, or
  - b) any other person who might reasonably be expected to reside with him.



## SECTION 177 (1A)

1A) For this purpose—

(a) “domestic abuse” has the meaning given by section 1 of the Domestic Abuse Act 2021

(b) “violence” means—

(i) violence from another person; or

(ii) threats of violence from another person which are likely to be carried out



## **BOND V LEICESTER CC [2001] CA**

- Whether it is probable that continued occupation of the accommodation will lead to domestic violence is a question of fact, devoid of value judgments about what an applicant should or should not do



# DOMESTIC ABUSE ACT 2021

(2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if—

(a) A and B are each aged **16 or over** and are “**personally connected**” to each other, and

(b) the behaviour is **abusive**.

(3) Behaviour is “abusive” if it consists of any of the following—

(a) physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d) economic abuse (see subsection (4));

(e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of **a single incident or a course of conduct**





# SECTION 189: PRIORITY NEED

1) The following have a priority need for accommodation—

.....

(e) a person who is homeless as a result of that person being a victim of domestic abuse ;



# CODES OF GUIDANCE

- Homelessness Code of Guidance – Chapter 21
- Domestic Abuse Statutory Guidance (July 2022)



## POINTS OF NOTE

- Domestic abuse is 'domestic' in nature if the perpetrator is a person who is personally connected with the victim. This does not require the individuals to be living together.
- Domestic abuse does not have to be carried out by a partner or ex-partner.
- Housing authorities should not approach the alleged perpetrator, since this could generate further violence and abuse (21.24 Homelessness Code of Guidance)



## POINTS OF NOTE

- Housing authorities should not have a blanket approach toward domestic abuse which requires corroborative or police evidence to be provided.
- An assessment of the likelihood of a threat of violence or abuse being carried out should not be based on whether there has been actual violence or abuse in the past.
- Housing authorities should be particularly careful when making contact with a victim to ensure that they do not alert a perpetrator to the application, and so put the victim in danger.



## POINTS OF NOTE

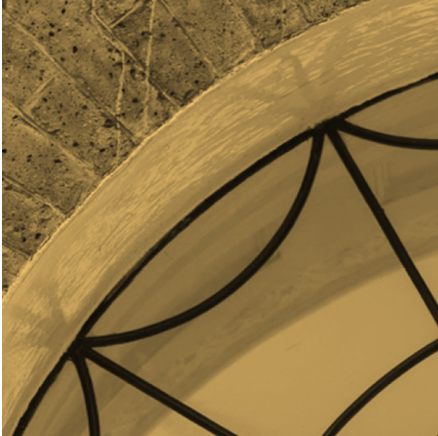
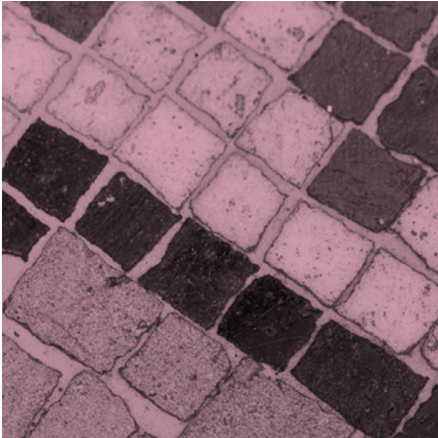
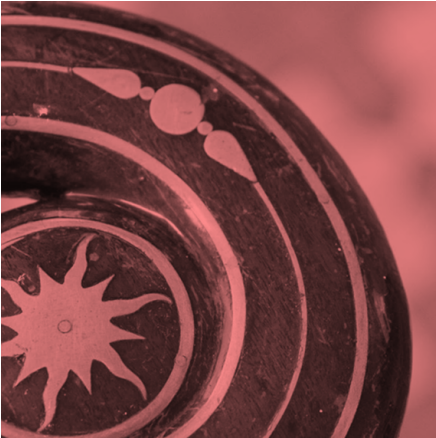
- Housing authorities should facilitate phone/online homelessness applications where most appropriate to guarantee the safety of the victim
- It should be made clear in local communications that households making a homeless application are able to bring a friend or specialist domestic abuse support worker, such as an Independent Domestic Violence Advisor (IDVA), to any appointments



## POINTS OF NOTE

- Victim must not be asked to return to their property to collect documentation if there is any chance that it could put them in danger.
- Housing authorities should be aware that this may be the first time a victim has disclosed their abuse and that the period during which a victim is planning or making their exit, is often the **most dangerous time** for them and any children they have (Para 21.32 Code)
- Housing authorities should not insist on the victim seeking an injunction
- Applicant should be given the benefit of any doubt

# THANK YOU



# Homelessness duties and domestic abuse







# DUTIES TO PLAN

Homelessness Strategy – Homelessness Act 2002 s. 3

“the particular needs that victims of domestic abuse have for safe accommodation” – Code 2.73.

Co-operation with other local authorities, service providers, and Violence Against Women and Girls Forum, refuges for fair and efficient move on arrangements Code 16.40 and 16.41.

HA 1996 advisory service – designed to meet the needs of victims of domestic abuse s. 179(2)(d).

s. 57 Domestic Abuse Act 2021



# PREVENTION DUTY S. 195(2)

“to take reasonable steps to help the applicant to secure that accommodation does not cease to be available for the applicant's occupation”

Already homeless?

Code 21.34



# RELIEF DUTY S. 189B

“Reasonable steps to help the applicant to secure suitable accommodation becomes available”

Informed by personalised plan under s. 189A

ss 175 and 177 qualify accommodation.

Gaps where abuse not within domestic abuse definition. Code 21.10



# STAYING PUT

Assisting people at risk of violence and domestic abuse wishing to stay safely in their home through provision of 'sanctuary' or other measures – Code 21.36

*Improving access to social housing for victims of abuse (25 Jan 2022) paras 37-9*



# LOCAL CONNECTION - 1

Acquiring a local connection through being

“normally resident...of [her] own choice” [HA 1996 s. 199(1)(a)]

*NJ v LB Lambeth* [2014] PTSR 497

Refuge “not a place to live” *Birmingham CC v Ali* [2009] PTSR 1270 para 43,  
Baroness Hale . Code 6.39



## LOCAL CONNECTION 2

Discretion to notify in relief and full duty cases. Not if:

“the applicant [or] any person who might reasonably be expected to reside with him will run the risk of [domestic abuse] in that other district” [s. 198(2)(c), 198(2ZA)].

“if (a) the applicant or any person who might reasonably be expected to reside with them has suffered has suffered violence (other than [violence that is domestic abuse]) in the district of the other authority; and it is probable that the return to that district of the victim will lead to further violence of a similar kind against him” [s. 189 (2A)] Code 10.52, 10.54



# SUITABILITY AND SUPPORT

s. 206 – accommodation must be “suitable”

s. 189A(2)(c):

“what support would be necessary for the applicant and any other relevant persons to be able to have and retain suitable accommodation”. Code Chap 11.

s. 213 Co-operation between authorities.



## S. 57 DOMESTIC ABUSE ACT 2021

Each relevant local authority in England must

- (a) assess, or make arrangements for the assessment of, the need for accommodation based support in its area,
- (b) Prepare and publish a strategy for the provision of such support in its area and
- (c) Monitor and evaluate the effectiveness of the strategy





## S. 57(3)(7)(8)

A relevant local authority that publishes a strategy under this section must, in carrying out its functions, give effect to this strategy

An authority may request co-operation from another and that other must comply “so far as reasonably practicable”



# GUIDANCE

Duty to have regard – s. 60

**Delivery of Support to Victims of domestic abuse in domestic abuse safe accommodation services**



# GUIDANCE EXAMPLE

B6.1 Victims with each relevant protected characteristics as per the Equality Act 2010 must be able to access the support that they need. Under this duty, we expect authorities to ensure sufficient appropriate support is available within relevant safe accommodation to meet the needs of all victims including those with relevant protected characteristics, additional and / or multiple complex needs, or whose support needs cannot be properly met within non-specialist domestic abuse safe accommodation

Public Interest  
Law Centre

# Practitioner's Guide – Management Transfers for DA Survivors

Isabella Mulholland, Legal Caseworker

# Management Transfers – A Practitioner's Guide

## What is a Management Transfer?

A survivor who is a social housing tenant

Needs to move because the perpetrator knows where they are living.

Can transfer the tenancy to a safe property.

Survivor may either:

- Want to remain in borough - near support networks; or
- Need to move outside of the borough due to risk from perpetrator.

# Management Transfers – A Practitioner's Guide

Why is it important to request MTs?

Little advice or support from social landlords

Leaves survivors in an unenviable dilemma

But, survivors can retain security of tenure and reside in safe accommodation

Please note, MTs take time

# Management Transfers – A Practitioner's Guide

## Different Scenarios

Tenancy with Local Authority

Tenancy with Housing Association

Cross borough transfer

Survivor wants to remain in borough

Temporary accommodation pending transfer

# MT Case Study 1 – Local Authority

## Case background

- Secure tenant in LA accommodation
- Perpetrator knew location of property
- MT requested within the borough
- LA delayed response for six months
- MT refused due to lack of ‘recent incidents’



# MT Case Study 1 – Local Authority

## PAP grounds:

- i. Unlawful evidential threshold
  - Client suffered continued, prolonged and irregular abuse for 20 years
  - Code: Should not assess likelihood of threat of DA on past violence
  - In any event: irrational to conclude C not at risk
  - LA ignored supporting letters from various professionals
  - Meanwhile client remains in dangerous home

# MT Case Study 1 – Local Authority

## ii. Acting contrary to its own housing allocations policy

- Housing policy: Transfers will be agreed where there is a *'high risk to the tenant or their family's safety if they remain in the dwelling/ area.'*
- C satisfied MT policy because of high risk posed by remaining in the property
- Policy also stated: offer made pursuant to 'current housing need'

# MT Case Study 1 – Local Authority

## iii. Unlawful delay in decision-making

- D was aware of client's circumstances for 6 months
- Delay was unnecessary and unreasonable and therefore unlawful

## iv. Acting contrary to PSED plus art 3, 8, 14 ECHR and Equality Act

- D forcing C to remain in unsafe property, breach of arts 3 and 14
- PSED: D did not display sensitive and careful approach to GBV
- Refusal of MT shows failure to consider effects of remaining in dangerous property

# MT Case Study 1 – Local Authority

## Outcome:

- Client offered management transfer within the borough
- 3 bedroom property in line with scheme
- Took one year to be offered property
- Client now in safe property with secure tenancy intact

# MT Case Study 2 – Housing Association

## Case background

- Claimant was an assured tenant of Network Homes property
- Survivor of domestic abuse, was in danger in the property
- Claimant applied for MT
- Network Homes refused so we brought JR

# MT Case Study 2 – Housing Association

## Important Applicable Law for Housing Associations

### *Amenability to Judicial Review*

- HAs, as PRPs, may exercise a public function when allocating social housing and will constitute public bodies when doing so. [*R (Weaver) v London and Quadrant Housing Trust [2009]*].
- D constitutes a public body: publicly funded, exercises statutory powers, takes the place of Central Government or Local Authorities, and provides a public service.
- Transfers constitute ‘allocations’, therefore transfers are subject to judicial review

# MT Case Study 2 – Housing Association

- Barriers recognised in the Code:

*‘Victims can experience many incidents of abuse before calling the police or reporting it to another agency...’ 21.14*

*‘... In some cases, corroborative evidence of abuse may not be available, for example, because there were no adult witnesses and/or the applicant was too frightened or ashamed to report incidents to family, friends or the police Housing authorities should not have a blanket approach toward domestic abuse which requires corroborative or police evidence to be provided. [Emphasis added]. .’ 21.24*

- Code is useful for Part VI DA cases

# MT Case Study 2 – Housing Association

## Outcome:

- Decision was quashed
- Defendant approved claimant's management transfer and she is now in new safe and suitable property with secure tenancy



# MT Case Study 3 – Cross borough transfer

## Case background

- Client DV survivor, secure tenant in HA property in London
- Client in danger in property, continuous abuse from perpetrator
- MARAC assessed: priority housing placement asap
- Requested MT from Housing Association
- Requested TA from borough
- Borough facilitated reciprocal arrangement

# MT Case Study 3 – Cross borough transfer

## Arguments for cross-borough transfer cases

- Liaise with another borough to arrange reciprocal agreement - s1 Localism Act
- Cite 21.41 and 21.43 of Code
  - 21.43: Housing authorities may consider implementing a reciprocal agreement with other housing authorities and providers to facilitate out of area moves for victims of domestic abuse.*
- Homelessness app: C should not have to choose between protecting tenancy or herself

# MT Case Study 3 – Cross borough transfer

## Outcome

- TA offered whilst MT was pending
- Borough agreed to arrange reciprocal, instead of HA
- Borough then asked HA for a property in return
- Client now in safe and suitable accommodation, with secure tenancy

# Management Transfers – Gatekeeping

## 'Abused Twice' Report

Endemic problem: gatekeeping of housing support by local authorities

Includes management transfers

Linked to chronic lack of social housing and austerity

# Conclusions

- Survivors remain at risk of domestic abuse OR
  - Lose security of tenure.
- = Management transfers tackle both issues.
- Success sheds light on wider issue of gatekeeping
  - Unnecessary use of NGO resources
  - Refusal of MTs because they can? That is where we come in.

Thank you and good luck!

# Working with survivors of domestic abuse

Chair: **Alice Irving**, Doughty Street Chambers

Speakers:

**Saskia Hagelberg**, sexual health team leader, Solace  
Women's Aid

**Laura Tomsa**, Domestic Abuse Lead, Barnardo's



Saskia Hagelberg,  
sexual health team leader, Solace  
Women's Aid



# Laura Tomsa, Domestic Abuse Lead, Barnardo's



**Believe in  
children**



**Barnardo's**

# Domestic Abuse & Homelessness

## A Children's Lens



## Working with Victims & Survivors

- Children are victims of domestic abuse in their own right.
- 1 in 5 children in the UK are exposed to domestic abuse during childhood.
- Experiencing domestic abuse as a child can undermine a child's basic need for safety and security, and can have a serious effect on their behaviour, brain development, education outcomes, and overall physical and mental wellbeing.
- Children need access to specialist services to help them to recover. Currently, provision is patchy and can be a postcode lottery.
- The Victim's Bill offers an opportunity to protect and support all victims of domestic abuse, including children and young people.

# Whole Family Approach

- Opening Closed Doors Programme
  - IPC Evaluated
    - Support for the adult survivor/victim
      - Risk management and trauma recovery
    - Support for the child victim
      - Child's voice
      - Trauma recovery
    - Support for the perpetrator
      - Behaviour change programme using a trauma informed approach



# Outcomes

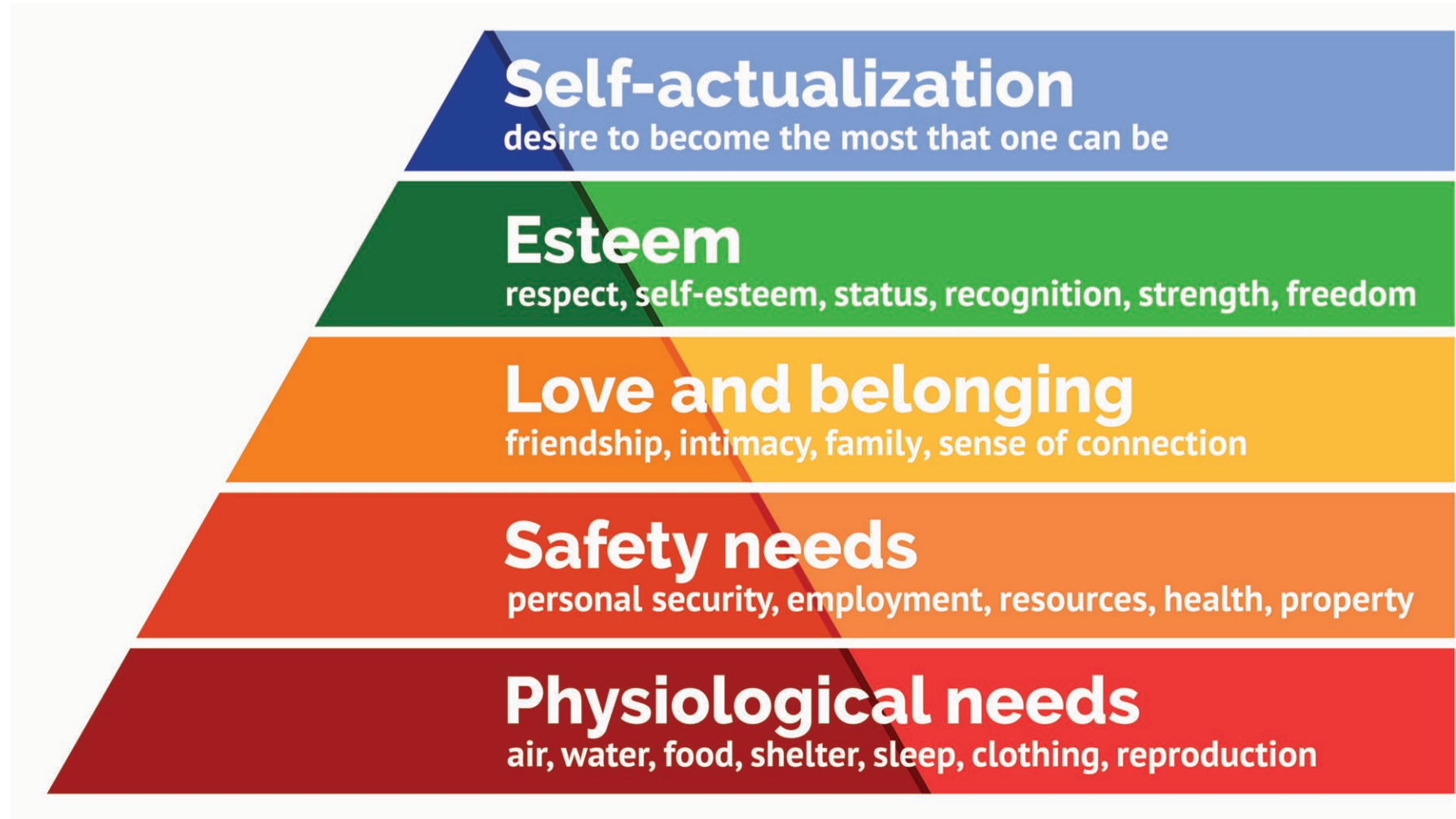




## What makes a home a 'home'?

- According to the Housing Act 1996, 'homelessness' does not solely mean the lack of a home. A person should be treated as homeless if they have no housing that it is reasonable or safe – including being at risk of violence/abuse.
- Therefore, children impacted by domestic abuse can often be 'homeless' whilst still having a roof over their head due to feeling, and being, unsafe in the place they should feel safest of all.
- A further issue that can often be faced by families is fleeing abusive relationships, and leaving their home
- Whilst seeking a place of solace and safety from an abusive household is and should be a primary consideration, a child leaving their home and community can often be extremely disruptive and damaging.

# Children's Needs



Maslow, 1943



## The impact on the victim

- Case study example
- Social & community networks
- Education
- Mental health and well-being
- Exposure to ACE's and the long term impact





# Influencing Change

## Barnardo's Women's Strategy

- Exploring the issue that mothers often take responsibility for violence and abuse they do not perpetrate
- Aim to promote a change in culture and understanding across professionals who directly support families impacted by DA
- We hope to demonstrate alternative solutions to the traditional, often formulaic response to families needing to flee their home, where it might be safe to adopt a different approach with support of statutory agencies; to either improve things at home, or even support the violent partner to leave the home to allow the children to remain settled in their home, school and community.

# Considerations





## Some Key Messages

- A Home is so much more...
- Children's voices need to be heard
- Safeguarding is everyone's responsibility



@shushinluh @DoughtyStPublic

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# Domestic Abuse in Housing Conference 2023



## **Children, Domestic Abuse and Housing** *Shu Shin Luh*

# TOPICS

- **Scale of concern** about children and domestic abuse
- **Legal tools: International law safeguards**
  - UN Convention on the Rights of the Child
  - Istanbul Convention
- **Legal tools: Domestic law safeguards**
  - Children Act 1989 – sections 17, 47, definition of “harm”
  - Children Act 2004 - section 11
  - Domestic Abuse Act 2021
    - Definition of “domestic abuse”
    - Child as a victim
- **The Protection Gap for Children**

# CHILDREN AND DOMESTIC ABUSE: WITHIN FAMILY

- Pre-Covid, **831,000 children** in England live in households that report domestic abuse (Children's Commissioner's *Childhood vulnerability in England* 2019)
- Domestic abuse is most common factor amongst children assessed as "in need" by local authorities in England. Nearly **one in four** (*Characteristics of children in need, reporting year 2022*)
- Children faced barriers to access support in **two out three local authorities in England Wales** interviewed by Action for Children in 2019 (*Patchy, piecemeal and precarious: support for children affected by domestic abuse*)
- More than **10% of local authorities** had **no support services available at all** for children affected by domestic abuse. **More than half** offered only time-limited support and **two-thirds** required parental engagement for the child to receive services.

# CHILDREN AND DOMESTIC ABUSE: INTIMATE RELATIONSHIPS

- No clear picture of extent to which young people experience domestic abuse within own relationships because this data is not collected **BUT**
- **Young people aged 16 to 24 were most at risk** of domestic abuse of any group (*ONS Data and analysis from Census 2021*)
- **16 and 17 years experience domestic abuse for an average for 1.5 years** prior to accessing support (Children's Society, *Missing the mark*, May 2020).
- NSPCC study from 2009 found 25% of girls and 18% of boys reported physical violence from an intimate partner; **72% of girls and 51% of boys experienced emotional partner abuse**, and 31% of girls and 16% of boys experienced some form of sexual partner violence.
- A 2019 Welsh survey of 74,000+ students found **28% of girls and 20% of boys had experienced emotional abuse**; 12% of girls and 17% of boys experienced physical abuse from an intimate partner.
- **A majority of local authorities** do not have policy / protocol in place for responding to under 16s experiencing teenage relationship abuse with just **39% of local authorities providing specialist support services for under 16s**.

# LEGAL PROTECTIONS: UNCRC

**Article 3(1):** in all action concerning children ... best interests of the child shall be a primary consideration.

**Article 19(1):** State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from **all forms of physical or mental violence, injury or abuse, neglect or negligence treatment, maltreatment or exploitation, including sexual abuse**, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

- Forms violence: domestic abuse, but also corporal punishment forced marriage, FGM, child trafficking
- Legislative and social policy measures include safe housing and welfare support

**Article 19(2):** Such protective measures should, as appropriate, include **effective procedures** for the establishment of social programmes **to provide necessary support for the children and for those who have the care of the child**, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment ... and as appropriate, for judicial involvement



# LEGAL PROTECTIONS: ISTANBUL CONVENTION

- **Full title of Convention:** Council of Europe Convention on preventing and combating violence against women **and domestic violence**
- Focus is on women and girls insofar as they experience gender-based violence disproportionately **BUT** offers protection to **all children** (girls and boys).
  - With exception of provisions on FGM, forced sterilisation, forced abortion, Convention drafted in gender-neutral language and can be implemented to supporting and protecting boys from forms of violence covered in convention, especially domestic violence.
- **Preamble** recognises children (girls and boys) are, in their own right, *“victims of domestic violence, including as witnesses of violence in the family”*
- **Article 18(3):** measures to protect victims from further acts of violence shall be based on *“integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment”*
- Not enough to offer victims and their children a place to stay (**Article 23**). Also calls for specialist support for children as victims of domestic violence (**Article 22**) including age-appropriate psycho-social counselling and respect for best interests of the child (**Article 26**)

# CHILDREN ACT 1989

**Section 17(10) “in need”** : (a) unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority; (b) health or development is likely to be significantly impaired, or further impaired, without provision for him of such services

**S.17(3) power to assist** with a view to safeguarding or promoting the child’s welfare. Assistance includes accommodation, financial and in-kind support: s.17(6).

**S.47** duty to investigate where LA *“have reasonable cause to suspect that child who lives or is found, in their area is suffering, or is likely to suffer significant harm.”*

**“Harm” for purposes of s.31**: attributable to care given or likely to be given to child if order were not made, not being what it would be reasonable to expect a parent to give to him.

- Means *“ill-treatment or the impairment of health or development, including **for example, impairment suffered from seeing or hearing the ill-treatment of another.**”* Development includes “physical, intellectual, emotional, social or behavioural development”: s.31(9) amended by s.120 Adoption and Children Act 2002 to take account impact of domestic violence on children

# CHILDREN ACT 2004

**S.10** – LA duty to make arrangements to promote cooperation with a view to improving well-being of children in the authority's area in relation to physical and mental health and emotional well-being; and protection from harm and neglect, etc.

**S.11** – named public authority's duty to make arrangements for ensuring (a) functions discharged having regard to need to safeguard and promote welfare of children and (b) any services provided by another pursuant to such arrangements are provided having regard to that need.

***R (HA) v Ealing LBC [2015] EWHC 2375 (Admin)***: housing allocation policy refusing to give reasonable preference to a victim of domestic violence and her five children because she didn't meet residence rule. No consideration of exceptionality clause in policy. No consideration of best interests of children in formulation of policy (no evidence of such) or in her individual case.

# DOMESTIC ABUSE ACT 2021

- Definition of “domestic abuse” confirmed in statute as going beyond physical violence: ss. 1-2
- BUT **domestic abuse** occurring where both victim and perpetrator are **aged over 16**. If **abusive behaviour directed at a person under 16** would be dealt with as **child abuse** rather than domestic abuse.
- **S.3: recognises child as a victim of domestic abuse** where a child who sees or hears, or experiences the effects of domestic abuse and is related to the person being abused or the perpetrator is to be regarded as a victim of domestic abuse in their own right.
- **S.7:** Domestic Abuse Commissioner to encourage “good practice” in the identification of children affected by domestic abuse.

# DOMESTIC ABUSE ACT 2021: PART 4

## “SUPPORT PROVIDED BY LAS TO VICTIMS

**Section 57** – local authority must:

- (1) assess / make arrangements for the assessment of, the need for accommodation-based support on its area
- (2) Prepare and publish strategy for provision of such support in its area and
- (3) Monitor and evaluate effectiveness of strategy

“**accommodation-based support**” premised on being victim and children residing in “relevant accommodation”

“**relevant accommodation**”: refuge; specialist safe accommodation (e.g. single sex accommodation with support); dispersed accommodation (like refugee but self-contained / semi-independent); sanctuary schemes; second stage accommodation (not as intensive support as refuge); specialist domestic abuse emergency accommodation

See *Domestic Abuse Support (Relevant Accommodation and Housing Benefit and Universal Credit Sanctuary Schemes) (Amendment) Regulations 2021/991*

# GAPS IN PROTECTION FOR CHILDREN?

- **Not all children are victims in their own right.** Under 16s in abusive intimate relationships not protected as victims and have no rights to access support in own right.
- **Support tied to accommodation** – “accommodated based”
  - Excludes community-based services e.g. Independent Domestic Violence and Abuse Advisors (Idva); outreach workers; helplines; counselling services; young people and children’s workers
  - Domestic Abuse Commissioner has duty to report on issues arising annually (s.20)
  - **Majority of victims, including children** (70%) remain at home. Will not receive support through this duty. (SafeLives’ Briefing for Second Reading of Domestic Abuse Bill, 28 April 2020)
  - **More than 65,000 adults and 85,000 children** at high risk of serious harm supported by community-based services (as compared to 11,000 women in refuge)
  - **No child-specific** specialist support services (including advocacy, counselling) in circumstances where they are unable to access support in two-thirds of LAs in England and Wales.
- **No protection for migrant children and their children** (many are British). S. 17 CA 1989 a blunt instrument and not a duty to assist including with accommodation.



THANK YOU FOR LISTENING!

# Domestic abuse and tenancies – the common problems

Chair: **Dominic Preston**, Doughty Street Chambers

Speakers:

**Sue James**, Chief Executive, Legal Action Group

**Daniel Clarke**, Barrister, Doughty Street Chambers

**Marie Paris**, Barrister, Doughty Street Chambers





# Sue James

## Chief Executive, Legal Action Group

# Domestic Abuse Act 2021

What is the impact on tenancies?

Domestic Abuse and Housing Conference 28 March 2023

Sue James  
Legal Action Group

# Domestic abuse – by its nature is a housing issue

*Domestic abuse report 2020: the hidden housing crisis* (June 2020):

*Domestic abuse is by its very nature a housing issue. The perpetration of domestic abuse creates a context of fear and curtailed freedom; usually in the places where women and their children should feel the safest, namely their homes. Every survivor's experience is different, but housing is often a critical factor in being able to escape an abuser or abusers (page 8).*

# Extends the definition of domestic abuse

**S 79 of Domestic Abuse Act 2021** amends Part 4 of the Housing Act 1985 (secure tenancies and rights of secure tenants). **S81ZA (4)** extends the definition:

- “abuse” means:
  - physical or sexual abuse
  - violent or threatening behaviour)
  - controlling or coercive behaviour
  - economic abuse (within the meaning of section 1(4) of the Domestic Abuse Act 2021);
  - psychological, emotional or other abuse
  - “domestic abuse” means abuse carried out by a person who is personally connected to the victim of the abuse (within the meaning of section 2 of the Domestic Abuse Act 2021)
  - a person may be a victim of domestic abuse despite the fact that the abuse is directed at another person (for example, the person’s child)”

# 81ZA lifetime tenancies

The local housing authority must grant a secure tenancy that is not a flexible tenancy to a former tenant or joint tenant if—

- the tenancy is offered to a person who is or was a tenant of some other dwelling-house under a qualifying tenancy and
- the authority is satisfied that—
  - the person or a member of the person’s household is or has been a victim of domestic abuse carried out by another person, and
  - the new tenancy is granted for reasons connected with that abuse
  - “qualifying tenancy” means a tenancy of a dwelling-house in England which is a secure or an assured tenancy, other than a flexible tenancy, but not an assured tenancy, and
  - granted by a private registered provider of social housing, by the Regulator of Social Housing or by a charitable housing trust

# 1985 Act Schedule 2 – Ground 2A: domestic violence

- The dwelling-house was occupied by a married couple, civil partners or a couple living together as a married couple or civil partners, and:
- One or both partners is a tenant of the dwelling-house.
- One partner has left because of violence or threats of violence by the other towards that partner or a member of that partner's family who was residing in the property as a family member.
- The court has to be satisfied that the partner who has left is unlikely to return.

# Guidance for local authorities

- Under section 84(4), a person exercising public functions to whom guidance is issued must have regard to it in the exercise of those functions.
- Local authorities have a strategic duty under Part 4 of the Domestic Abuse Act 2021 to provide safe accommodation and accommodation based support
- Housing providers should have policies in place to identify and respond to domestic abuse.
- Housing authorities should work co-operatively with other local authorities and commissioners to provide services to tackle domestic abuse.
- Tier one authorities in England are required to appoint a Domestic Abuse Local Partnership Board to support local needs assessments and local strategies.

# Social Landlords – how can they help?

- Management transfer policies
- Applying the policies – challenges?
- Failure to investigate – could this be discriminatory?
- Claiming possession- Ground 14A Housing Act 1988



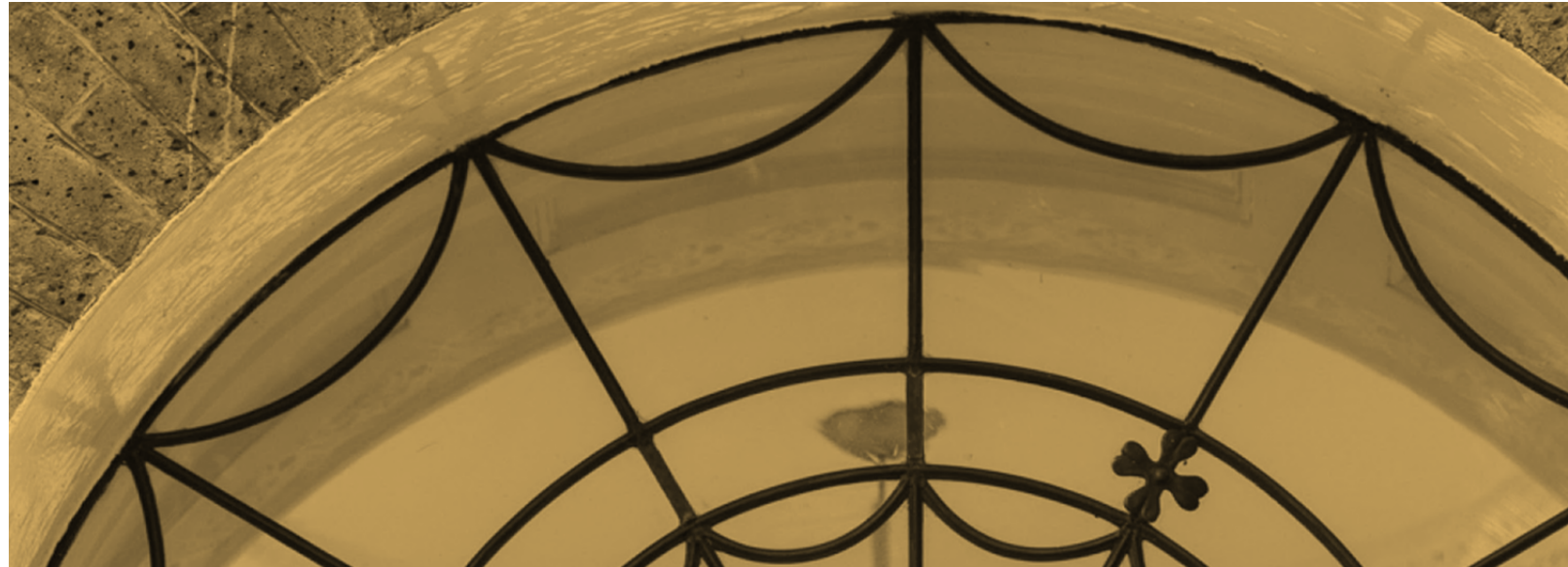
# Pan London Reciprocal Scheme

- The scheme supports individuals and families with social tenancies who are at serious risk of harm which includes domestic violence and abuse
- Enables access to another social tenancy in a different London Borough
- Applications need to be made by a housing officer or support worker



[www.doughtystreet.co.uk](http://www.doughtystreet.co.uk)

Domestic abuse and  
tenancies:  
Orders under Part  
IV Family Law Act  
1996



Daniel Clarke, Doughty Street Chambers

# COMMON ISSUES ARISING AS A RESULT OF ABUSE

- Continuation of abuse
- Exclusion from home by abuser / absence as a result of fleeing
  - Where abuser is the sole tenant
  - Where victim is sole or joint tenant
- Risk of termination of tenancy by abuser
  - Abuser may give NTQ whether sole or joint tenant
  - Landlord may accept short notice
- Other risks to tenancy:
  - Breach of tenancy by abuser
  - Rent arrears as a result of financial abuse or loss of income
- Long-term security / transfer of tenancy

# FAMILY LAW ACT 1996, PART IV

- Home rights
- Occupation orders
- Non-molestation orders
- Transfer of tenancies

# SECTION 30: HOME RIGHTS

- Only applies to spouses/civil partners
- Only applies where home was/was intended to be matrimonial/CP home
- Where A has tenancy/right to occupy joint home and B does not:
  - B has rights:
    - If in occupation, not to be evicted by A without leave of court under s33
    - If not in occupation, to enter and occupy with leave of court
  - Payment of rent by B is treated as payment by A
  - Occupation by B is treated as occupation by A for security of tenure
- Only continue for as long as:
  - marriage/CP subsists, unless court orders otherwise under s33
  - A has tenancy/right to occupy
- B may release in writing home rights over whole/part (Sch 4, para 5(1))

# SECTIONS 33-41: OCCUPATION ORDERS - OVERVIEW

- s33: Associated person, existing right to occupy (inc home rights)
- s35: One former spouse/civil partner with no existing right
- s36: One (former) cohabitant with no existing right
- s37: Neither (former) spouse/civil partner entitled to occupy
- s38: Neither (former) cohabitant entitled to occupy

Note that occupation orders essentially regulate the position between A and B and do not create rights of occupation as against third parties e.g. landlord (see s39(4))

# S33: ASSOCIATED PERSON WITH EXISTING RIGHT

- “Associated person” (s62(3): current/former spouse, CP, cohabitant, household member, family...)
- Where B has right to occupy/home rights in relation to joint home, may apply for an order to:
  - enforce right to remain in occupation as against A
  - require A to allow B to enter and remain in the property/part
  - regulate occupation by A and/or B
  - prohibit, suspend or restrict exercise of A’s right to occupy/home rights
  - require A to leave the property/part
  - exclude A from a defined area in which the property is included
- Court may order that home rights do not end with marriage/CP or death if just and reasonable
- Court to have regard to housing needs and resources of A, B and any relevant child (see s62(2)); financial resources of A and B; likely effect on health safety or well-being of A, B and any relevant child; conduct of A and B in relation to each other and otherwise
- If B or any relevant child likely to suffer significant harm from A if order not made, shall make order unless A or any relevant child likely to suffer equal or greater harm if order made (“balance of harm test”)

## S35: FORMER SPOUSE/CP WITH NO EXISTING RIGHT

- Picks up where end of marriage/CP ends home rights under s30
- Where A has tenant/right to occupy joint home and B does not, B may apply for same orders as under s33 but:
  - Court must consider additional factors:
    - Length of time since A and B ceased to lived together
    - Existence of any pending financial proceedings between A and B
    - Length of time since marriage/CP dissolved or annulled
  - Order may be for maximum of 6 months at a time (renewable)
- While order in force, provisions of s30(3)-(6) apply, such that occupation, payments etc. by B count as though done by A



## S36: ONE (FORMER) COHABITANT WITH NO EXISTING RIGHT

- “Cohabitant”: neither married nor CPs but “living together as if they were a married couple or civil partners” (s62(1)(a))
- Position essentially the same as under s35, but:
  - Court required to consider balance of harm test but outcome not mandatory
  - Court also required to consider: nature of parties’ relationship and level of commitment involved, length of cohabitation, whether A or B has (had) PR for any children

# SS37-38: NEITHER (FORMER) SPOUSE/CP/COHABITANT ENTITLED

- Where neither (former) spouse/CP has tenancy/right to occupy joint home, either may apply under s37 for essentially the same orders as under s33, save for those referring to A and B's rights to occupy (i.e. to permit applicant to enter/remain, to regulate occupation, to require respondent to leave, and/or to exclude him from the area)
- Court must consider matters in s33(6) and balance of harm applies
- Order may be for maximum of 6 months at a time (renewable)
- Position under s38 for (former) cohabitants essentially the same, save that, while court must consider balance of harm, outcome is not mandatory

# S40: ADDITIONAL PROVISIONS IN ORDERS UNDER SS33, 35 & 36

- On or after making order under ss33, 35 & 36 court may:
  - Impose obligations on either party as to repairs, maintenance, payments
  - Order occupying party to make periodical payments to party with tenancy/right to occupy
  - Grant either party possession or use of furniture or other contents
  - Order either party to take reasonable care of furniture or other contents
  - Order either party to take reasonable steps to keep dwelling/contents secure
- Court shall have regard to all the circumstances including financial resources, needs and obligations (including to each other and any relevant child)
- Order ceases to have effect when occupation order ceases

# SECTION 42: NON-MOLESTATION ORDERS

- Court may make order prohibiting respondent from molesting an associated person and/or a relevant child; generally, in relation to specific acts, or both
- May make an NMO (a) on application or (b) in any family proceedings, without application, for duration of proceedings
- Court must have regard to all the circumstances, including the need to secure the health and safety of applicant and any relevant child
- Breach of NMO is an either-way offence, punishable on indictment by up to 5 years' imprisonment (s42A)

## SECTIONS 43-49: FURTHER PROVISIONS (OO/NMO)

- s45: Court may make OO/NMO ex parte where just and convenient, having regard to all circumstances, including:
  - Any risk of harm to applicant or relevant child from R if not made immediately
  - Whether application likely to be deterred/prevented if not made immediately
  - Whether R deliberately avoiding service so as to cause serious prejudice
- s46: Court may accept undertaking from any party, save where R has used / threatened violence against applicant or relevant child and protection of power of arrest / NMO is necessary to protect them
- s47: Court *shall* attach PoA to OO where R has used/threatened violence against A/relevant child, unless satisfied that will be adequately protected without it — or *may* do so on ex parte application where risk of harm if no PoA attached immediately

# SCH 7: TRANSFER OF TENANCIES

- Applies to “relevant tenancies” (i.e. secure, assured, Rent Acts: para 1) of matrimonial/CP home or home where cohabited (para 3)
- Court may make order, where one/both of A and B is tenant:
  - Spouses: On or after making a divorce, nullity or separation order (para 2)
  - CPs: When it has power to make a CP property adjustment order (para 2)
  - Cohabitants: If cease to cohabit (para 3)
- Court must have regard to all the circumstances including (para 5):
  - Circumstances in which tenancy granted
  - Matters relevant to occupation orders
  - Suitability of parties as tenants
- Part II contains technical provision in relation to operation of orders
- Court make order for compensation (para 10) and other orders re responsibility for liabilities under the tenancy (para 11)

# OTHER RELEVANT STATUTES

- Protection from Harassment Act 1997
  - Injunctions
  - Criminal offence
- Matrimonial Causes Act 1973
  - Financial relief for parties and children on divorce etc (Part 2)
- Civil Partnership Act 2004
  - Property and financial arrangements on dissolution etc (Part 2, Chapter 3)
- Children Act 1989
  - Financial provision for person named in child arrangements order (Sch 1)
  - Includes powers to order settlement to be made for the benefit of the child (para 1(2)(d)) and transfer of property to the child or to applicant for the benefit of the child (para 1(2)(e))

# LEGAL AID: LASPO, SCH 1, PART 1

- Para 11:
  - (1) Civil legal services provided in relation to home rights, occupation orders and non-molestation orders under Part 4 of the Family Law Act 1996.*
  - (2) Civil legal services provided in relation to the following in circumstances arising out of a family relationship—*
    - (a) an injunction following assault, battery or false imprisonment;*
    - (b) the inherent jurisdiction of the High Court to protect an adult.*
- “Family relationship” = “associated persons” under FLA (paras 11(4))
- See also paras 12 (domestic violence) & 37 (PHA 1997 injunctions)



# Domestic abuse and tenancies: Benefits and Anti- social Behaviour



# COMMON BENEFIT PROBLEMS

- Economic abuse / neglect
- Costs of temporary accommodation
- Having to claim for two properties
- Children – impact of care proceedings on benefit claims
- Migrants' rights

# “PROVING” ABUSE TO THE DWP/LA

- Need written evidence from person in “official capacity” that:
  - Your circumstances are consistent with a person who has had domestic abuse inflicted or threatened upon them in the 6 months prior to notification to DWP; and
  - that you have made contact with the “official” to tell them about any incidents in the past 6 months
- Person acting in official capacity means:
  - Health care professional
  - Registered social worker
  - Police officer
  - Employer/Union rep
  - any public, voluntary or charitable body which has had direct contact with you about the domestic violence or abuse

# ECONOMIC ABUSE

- Defined in section 1(4) of the Domestic Abuse Act 2021 (“DAA 2021”) as:  
*“...any behaviour that has a substantial adverse effect on B’s ability to—  
(a) acquire, use or maintain money or other property, or  
(b) obtain goods or services.”*
- In context of housing benefit/UC, could involve: P being paid UC housing costs directly and spending it, and P monitoring S’s benefit accounts to prevent a move.

# ECONOMIC ABUSE - SOLUTIONS

- Alternative Payment Arrangements:
  - If you want to continue to claim UC as a couple but are worried about interference from P, you can ask the DWP to “split” the housing costs and pay it into two bank accounts
  - The primary caregiver may be allocated a higher proportion of the payments
  - Apply by phone/through Job Centre/through online journal
- Being treated as “liable” for rent for UC/HB:
  - If you meet all of the following criteria: (a) the person who is liable is not paying the rent; (ii) you need to pay rent to stay in the accommodation; (iii) it is unreasonable to make any other arrangements;(iii) it is reasonable to treat you as liable (*sch 2, part 1 Universal Credit Regulations 2013/376; reg 8(1) Housing Benefit Regulations 2006 SI 2006/213; FK v Wandsworth BC (HB) [2016] UKUT 0570 (AAC)*)

# COSTS OF TEMPORARY ABSENCE

- HB/UC can continue to be paid during temporary absence due to DA:
  - HB: will continue for up to 52 weeks if there is fear of violence (*reg 7(16)(x) Housing Benefit Regulations 2006/213*) (or 4 weeks if you do not intend to return but cannot escape liability)
  - UC: will continue for up to 12 months if there is fear of violence (*sch 3, part 1, paras 3 & 6 & part 2, para 9 Universal Credit Regulations 2013/376*) (must have intention to return if absence is 6 months+)
  - Whilst both seem to need “fear of violence”, DWP guidance clear that definition of domestic abuse within DAA 2021 has been adopted (*para 5.3, Help available from the Department for Work and Pensions for people who are victims of domestic violence and abuse*)

# COSTS OF TEMPORARY ACCOMMODATION

- Can claim for two properties:
  - HB: can claim for two homes for up to 52 weeks if C leaves due to fear of violence, C intends to return to initial home, AND it is reasonable for C to claim for two homes (*reg 7(6) Housing Benefit Regulations 2006 SI 2006/213*)
  - UC: can claim for up to 12 months if C leaves home due to fear of violence in the home/by a former partner, C meets payment condition and liability condition, AND it is reasonable for C to claim for two homes (*sch 3, part 1, paras 5 & 6(2) Universal Credit Regulations 2013/376*)
  - Again, “fear of violence” used but can be argued that DAA 2021 definitions should apply

# BEDROOM TAX - EXCEPTIONS

- Sanctuary Scheme:
  - Scheme to help DA survivors to remain in homes by installing security equipment
  - From 1 Oct 2021, exception to bedroom tax will apply for DA survivors involved in the scheme: (i) home has had security equipment installed under the scheme; (ii) the perpetrator of the abuse does not live at the home (unless they are a QYP etc); (iii) the C provides written evidence from person acting in official capacity (*Para 36(6) Sch. 4 UC Regs 2013; para 2(f) reg A13 Housing Benefit Regulations 2006*)
  - Exception arises from finding of discrimination in ***JD & A v the UK*** (ECHR)



# LOCAL HOUSING ALLOWANCE – EXCEPTIONS

- From 1 October 2022, shared accommodation rate of Local Housing Allowance will not apply if:
  - C provides written evidence that they have experienced domestic abuse at any time since the age of 16
  - For UC: C will receive one-bed rate regardless of whether they are living in shared accommodation
  - For HB: C will receive one-bed rate ONLY if they have exclusive use of at least two rooms (not including kitchen/WC) OR exclusive use of one bedroom and one kitchen/WC (unless they qualify for SDP)
- *(Sch.4, part 4, para 29(9B) Universal Credit Regulations 2013/376, and reg 2(1) and (1B) Housing Benefit Regulations 2006 SI 2006/213, as amended by the Housing Benefit and Universal Credit (Victims of Domestic Abuse and Victims of Modern Slavery) (Amendment) Regulations 2022/942)*

# DISCRETIONARY HOUSING PAYMENTS

- Gaps in rent caused by DA issues (e.g. children being in care leading to 'spare rooms', benefit cap arising because of loss of P's income/working tax credit exception) can be addressed at least temporarily by DHP
- Worth remembering that the statutory purpose of the DHP scheme is to address inequities caused by the benefit reforms, and that discrimination challenges against those reforms have failed because of the existence of the scheme (see para 14 of Annex A of DHP Guidance Manual, DWP, updated 31 May 2021)

# MIGRANTS' RIGHTS

- Destitution Domestic Violence Concession available if you:
  - Intend to apply indefinite leave to remain on basis of surviving domestic abuse
  - Previously had leave to remain as the spouse, civil partner, unmarried partner, or same-sex partner of a British citizen, person who is settled in the UK (such as indefinite leave to remain), or member of the Armed Forces who has served for at least four years
  - Are homeless or cannot afford to meet the costs of housing and/or their family's basic living needs
- DDV concession entitles you to three months' leave to remain and access to public funds and housing assistance

# ASB AND DOMESTIC ABUSE

- What your landlord can do for you under the ASBCPA 2014/Housing Acts:
  - Apply for injunction
  - Get a possession order
- Equally, landlords often take the above steps *against* survivors

# Domestic abuse, housing and the Equality Act 2010

Chair: Alice Irving, Doughty Street Chambers

Speakers:

Jamie Burton KC, Barrister, Doughty Street Chambers

Sarah Steinhardt, Barrister, Doughty Street Chambers



## **Domestic abuse, housing and the Equality Act 2010**

# Domestic abuse, housing and the Equality Act 2010

- **The Equality Act 2010 – prohibited conduct**

Jamie Burton KC

- **Applying the Equality Act to domestic abuse cases**

Sarah Steinhardt



# **The Equality Act 2010**

Jamie Burton KC



# The Equality Act 2010

- Public law duties and reporting obligations
- Protected characteristics and spheres of activity
  - Services and public functions (Part 3, Schedules 2 and 3)
  - Premises (Part 4, Schedules 4, 5 and 21)
  - Work (Part 5, Schedules 8 and 9)
  - Education (Part 6 , Schedules 10-14 and 17)
  - Associations (Part 7, Schedules 15 and 16)
  - Transport (Part 12, Schedule 20)

# The Equality Act 2010

- Discrimination and other prohibited behaviour
  - Direct discrimination: s.13
  - Discrimination arising from disability: s. 15
  - Indirect discrimination: s.19
  - Failure to make reasonable adjustments: s. 21
  - Harassment: s.26
  - Victimisation: s.27

# Statutory Guidance

- *Services, public functions and associations Statutory Code of Practice*
- Must be taken into account: Equality Act 2006 s. 15
- *Guidance on matters to be taken into account in determining questions relating to the definition of disability*
- Must be taken into account: para 12 sch 1 EA 2010

# The Protected Characteristics – section 4

- Age: s.5
- Disability: s. 6
- Gender reassignment: s.7
- Marriage and civil partnership: s.8
- Pregnancy and maternity;
- Race: s.9
- Religion or belief: s.10
- Sex: s. 11
- Sexual orientation: s.12

# Direct discrimination – section 13

- A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others: section 13(1)
- The comparison must be such that there is no material difference between the relevant circumstances of the claimant and those of his or her comparator: section 23(1) Actual or hypothetical: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL, per Lord Roger [134].
- ‘But for’ causation approach where another characteristic is a ‘stand-in’ for a protected characteristic: James v Eastleigh BC [1990] 2 A.C. 751; R (E) v Jewish Free School [2010] 2 AC 728
- Direct discrimination includes perceived and associative discrimination

# Indirect discrimination: section 19

“The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.”

Lady Hale in *R (on the application of E) v Governing Body of JFS* [2010] IRLR 601

# Indirect discrimination: section 19

*Homer v Chief Constable of West Yorkshire Police*

[2012] IRLR 601

"The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic ... The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified ..."

# Indirect discrimination: section 19

*Essop v Home Office; Naeem v Secretary of State for Justice* [2017] IRLR 558

“Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.”



# Indirect discrimination: section 19

- *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
  - (c) it puts, or would put, B at that disadvantage, and*
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

# Indirect discrimination: section 19

- “Shares with”: the important characteristic of indirect discrimination is that the person claiming that a PCP is discriminatory must be at a disadvantage as a member of a group of people, whether real or hypothetical: see also *Eweida v British Airways Plc* [2010] I.R.L.R. 322.
- Comparative exercise between a pool of people who share the person’s characteristics and those that do not: not all members of the protected group needed to be disadvantaged by the PCP, but group disadvantage must be shown (*Esop*)
- *R (Gullu) v Hillingdon LBC* [2019] EWCA Civ 692: challenge to a housing policy. Judge had been wrong to compare the claimant to an individual comparator rather than a group: comparison must be between the group with the protected characteristic and the group without it.

# Indirect discrimination: section 19

PCP not defined in the Equality Act 2010.

In *Ishola v Transport for London* [2020] EWCA Civ 112 it was held that Provision, criterion or practice were ordinary English words

“In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a **state of affairs** (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that practice here connotes some form of continuum in the sense that it is **the way in which things generally are or will be done**. That does not mean it is necessary for the PCP or practice to have been applied to anyone else in fact. Something may be a practice or done in practice if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.” (Simler LJ)

# Indirect discrimination: section 19

## Evidence gathering

- S19 ‘particular disadvantage’ wording intended to “do away with the need for statistical comparisons where no statistics might exist” (*Homer v Chief Constable of W Yorks Police* [2012] IRLR 601)
- Public authorities: PSED monitoring duty
- National or regional statistics
- Expert evidence on nature of protected characteristic/disadvantage
- Freedom of Information Act requests
- Subject access request
- Letter before action can request disclosure/information
- Request for further information: Part 18 CPR

# Indirect discrimination: section 19

- Proportionality/justification
- *R (Gullu) v Hillingdon LBC* [2019] EWCA Civ (16 April 2019): performance of the PSED had a bearing on justification: involved a duty to be informed about which protected groups should be considered before a decision about the PCP was made.
- Council's housing allocation policy prioritised people resident in the local area for 10 years. Breach of PSED as Equality Impact Assessment had failed to consider the position of non-UK nationals and the impact of the policy on them.
-

# Indirect discrimination: section 19

- Proportionality/justification
- R (H) v Ealing LBC [2017] EWCA Civ 1127: housing policies where working households were given priority indirectly discriminated against women, disabled people and the elderly but were justified to achieve the aim of creating sustainable communities – scheme overall could be considered, not just PCP
- R (C) v SSWP [2017] UKSC 72: DWP administrative computer system policies which indirectly discriminated against transgender customers were justified; not the role of the court to administer the welfare system and there was evidence that it would be complex and expensive to make changes to the system.
- J v X Estate Agents (York County Court, unreported) and Stephen Tyler v Paul Carr Estate Agents [2020] EW Misc 30 (CC): “no DSS” policies indirectly discriminated on grounds of sex and disability.

# Indirect discrimination: section 19

- Proportionality/justification
- *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487 (11 November 2020): confirmed indirect discrimination could be justified on the basis of the costs plus principle.
- Need for the D to save costs in order to live within their limited budget was a distinct factor from costs; could constitute the additional factor required to establish justification.
- Justification of a measure may be permitted on the basis that it is a short term solution even if could not be justified long term.

# Harassment: section 26

*26(1) A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

- ‘related to’ is potentially a wider definition, and can apply to situations where the unwanted conduct is “related to the protected characteristic but is not because of it -see EHRC Code para 7.10
- Sexual harassment is also unlawful sections 26(2) and (3).
- More likely to be an issue with private landlords, but see Worthington v Metropolitan Housing Trust [2018] H.L.R. 32 (threats of proceedings for ASB etc)



# Harassment: section 26

- “Unwanted conduct” can include inaction, for example a failure to investigate complaints: Conteh v Parking Partners Ltd [2011] ICR 341; Nailard v Unite the Union [2019] I.C.R. 28
- Likewise such conduct can “create” the proscribed environment:
- Where *“to the extent that the failure to support him or her actively made the position very much worse, effectively ensuring that there was no light at the end of the tunnel in remedy of the situation”*
- But it is the authority’s conduct (or inaction) which must be assessed to consider whether it is “related to” the protected characteristic

# Victimisation: Section 27

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
- (a) B does a protected act, or*
  - (b) A believes that B has done, or may do, a protected act.*
- (2) Each of the following is a protected act—*
- (a) bringing proceedings under this Act;*
  - (b) giving evidence or information in connection with proceedings under this Act;*
  - (c) doing any other thing for the purposes of or in connection with this Act;*
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.*
- *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*



# **The Equality Act 2010**

Sarah Steinhardt

# Using the Equality Act 2010

- Covers vertical relationships only
- Part 4 – premises
- Part 3 – services and public functions
- Part 3 only applies where not covered by the services, premises, work or education provisions of the Act: s. 28(2)(a); and where,
  - for the purpose of short stays by individuals who live elsewhere (e.g. decants) s. 32(3)(a); or
  - where accommodation is provided solely for the purpose of providing a service or exercising a public function (e.g. homeless accommodation): s. 32(3)(b).

# Using the Equality Act 2010

- Because the Act only covers vertical relationships, it covers: -
  - Situations where the landlord is themselves the abuser; and,
  - Situations where the landlord has failed to deal with domestic abuse in an appropriate way

# Where the landlord is the abuser

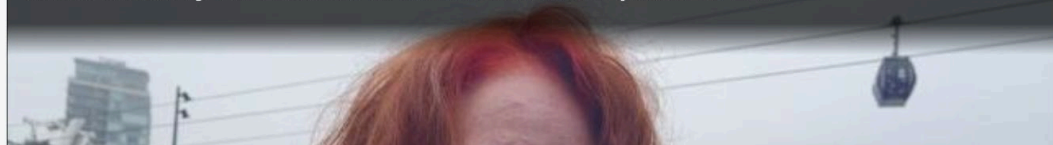
## NEWS

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### One-in-ten poor female renters have been propositioned for 'sex for rent' by predatory landlords

5 December 2022, 15:10

Alicia Kennedy the Director of Generation Rent speaks to LBC



News > UK > Home News

### 'Sex for rent': Man who told tenants to wear bikinis and asked for 'a girl in need' is first to be jailed

Court hears how Christopher Cox 'targeted vulnerable young women' who were in need of a roof over their head – including one woman who was homeless, 'unwell and desperate'

Maya Oppenheim Women's Correspondent • Wednesday 11 May 2022 15:20

• 7 Comments



### Revealed: How 60,000 women in the UK are targeted by vile sex-for-rent landlords, according to new study

- Some 59,000 women were offered housing in exchange for sexual favours
- Landlords propositioned thousands between March 2020 and last September
- The findings, in a new study, show men use adverts to entice vulnerable tenants

By [MOLLY CLAYTON FOR THE MAIL ON SUNDAY](#)

**PUBLISHED:** 01:07, 16 January 2022 | **UPDATED:** 02:03, 16 January 2022

# **The UK's dangerous and illegal 'sex for rent' market is growing – and the cost of living crisis will only make it worse**

BY AMY BEECHAM 9 MONTHS AGO

# **'Sex for rent' fears spark London landlord to launch women-only viewings**

The growing number of female residents being pressurised into "sex for rent" at

## **'Sex for rent' landlord jailed in first conviction of its kind in UK**

Christopher Cox, 53, sought women to wear bikinis around his house in Surrey, to take part in bondage sessions and to sleep in his bed

By Telegraph Reporters  
10 May 2022 • 5:35pm

# Where the landlord is the abuser

Research conducted by Generation Rent and Mumsnet has revealed a shocking prevalence of predatory behaviour, from unscrupulous landlords and letting agents towards tenants, in the private rented sector.

In a survey of 1045 submissions, respondents reported that unscrupulous landlords or letting agents had acted inappropriately or predatorily towards them in the past:

- 4% of respondents had been offered free or discounted rent in exchange for sexual favours
- 14% had experienced suggestive remarks
- 12% heard comments of a sexual nature
- 11% experienced unwanted comments about their body or appearance
- 4% had experienced unwanted touching



# Where the landlord is the abuser

- Unlawful conduct as a claim against would-be landlord: section 33
- Unlawful conduct as a defence and counterclaim to a possession claim: section 35; see *Lewisham v Malcolm* [2008] 1 A.C. 1399 §§19, 101, 104, 160.

# Equality Act 2010 - disposals

## ***33 Disposals, etc.***

*(1) A person (A) who has the right to dispose of premises must not discriminate against another (B)—*

*(a) as to the terms on which A offers to dispose of the premises to B;*

*(b) by not disposing of the premises to B;*

*(c) in A's treatment of B with respect to things done in relation to persons seeking premises.*

# Equality Act 2010 - disposals

*(3) A person who has the right to dispose of premises must not, in connection with anything done in relation to their occupation or disposal, harass—*

- (a) a person who occupies them;*
- (b) a person who applies for them.*

*(4) A person (A) who has the right to dispose of premises must not victimise another (B)—*

- (a) as to the terms on which A offers to dispose of the premises to B;*
- (b) by not disposing of the premises to B;*
- (c) in A's treatment of B with respect to things done in relation to persons seeking premises.*

# A defence and counterclaim

## Section 35

*(1) A person (A) who manages premises must not discriminate against a person (B) who **occupies** the premises—*

*(a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;*

*(b) by evicting B (or taking steps for the purpose of securing B's eviction);*

*(c) by subjecting B to any other detriment.*

# A defence and counterclaim

## Section 35

*(2) A person who manages premises must not, in relation to their management, **harass**—*

- (a) a person who **occupies** them;*
- (b) a person who applies for them.*

*(3) A person (A) who manages premises must not victimise a person (B) who occupies the premises— [...]*

- (b) by evicting B (or taking steps for the purpose of securing B's eviction);*
- (c) by subjecting B to any other detriment.*

# Interpretation

*(2) A reference to premises is a reference to the whole or part of the premises.*

*(3) A reference to disposing of premises includes, in the case of premises subject to a tenancy, a reference to—(a) assigning the premises,*

*(b) sub-letting them, or*

*(c) parting with possession of them.*

*(4) A reference to disposing of premises also includes a reference to granting a right to occupy them.*

# Overview

- Section 35 applies to public and private landlords
- A full defence to possession: [2008] 1 A.C. 1399 §§19, 101, 104, 160.
- Mandatory grounds: Malcolm at [99] and [143-144] (disapproving Floyd v S) [2008] 1 W.L.R. 1274)
- No need to plead a counterclaim: Manchester CC v Romano [2004] EWCA Civ 834 at [63–64].
- Although damages are available for injury to feelings: s. 119(4) Vento v Chief Constable of West Yorkshire Police [2003] IRLR 101; Da’Bell v NSPCC [2010] I.R.L.R. 19

# Liability of employers and principals

## ***109 Liability of employers and principals***

- (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
- (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
- (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
- (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*
  - (a) from doing that thing, or*
  - (b) from doing anything of that description.*



# Liability of employees and agents

## **110 Liability of employees and agents**

- (1) A person (A) contravenes this section if—(a) A is an employee or agent, (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).*
- (2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).*
- (3) A does not contravene this section if—(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and (b) it is reasonable for A to do so.*

# Case study: Ms A

- Ms A was offered self-contained accommodation by a 'Mr B' who claimed to be the landlord
- Upon moving in Ms A immediately became subject to sexual harassment from Mr B, inviting her out, bringing her flowers and propositioning her. When she rejected him, Mr B's grandmother took possession proceedings arguing that she had not known about Ms A and she was a trespasser
- As well as the factual defence, we argued that possession proceedings were victimization, and counterclaimed for sexual harassment
- After 2-3 initial hearings the case was settled

# Case study: Ms B

- Ms B was the tenant of a private landlord. She claimed that she had been raped by her landlord who had told her that she did not have to pay rent.
- The landlord brought possession proceedings on grounds of rent arrears. The claim was defended on grounds of victimization, and we counterclaimed for sexual harassment, harassment related to sex, and trespass against the person
- The case was settled.

# Landlord's indirect liability

- **Breach of the PSED as part of a public law defence**

Section 149; see *London and Quadrant Housing Trust v Patrick* [2019] EWHC 1263 (QB), [2020] HLR 3

- **Discrimination as a defence and counterclaim to a possession claim**

Section 35; see *Lewisham v Malcolm* [2008] 1 A.C. 1399 §§19, 101, 104, 160.

# The public law defence: the PSED

- Principles to be applied summarised in -
- *London and Quadrant Housing Trust v Patrick* [2019] EWHC 1263 (QB), [2020] HLR 3

# Section 149 (1) – the PSED

*(1) A public authority must, in the exercise of its functions, have due regard to the need to—*

*(a) **eliminate discrimination**, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

*(b) **advance equality** of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

*(c) **foster good relations** between persons who share a relevant protected characteristic and persons who do not share it*

# Section 149(3) – due regard to need to advance equality of opportunity

*(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*

- (a) **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic **that are connected to that characteristic;***
- (b) **take steps to meet the needs** of persons who share a relevant protected characteristic that are **different from the needs of persons who do not share it;***

# Section 149(6) – may treat more favourably

*(6) Compliance with the duties in this section may involve treating some persons **more favourably** than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.*

- Whether compliance with section 149 **does** involve treating some persons more favourably will depend on the circumstances: see e.g. *Dacorum v Powell* [2019] H.L.R. 21



# PSED – statutory purpose

- The aim of the PSED (as of other equality duties) is to bring equality issues into the mainstream, so that they become an essential element in public decision-making: ... In Bracking, para 59 McCombe LJ said:

*“It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.”*

- That was a case about formulation of policy, but the underlying principle applies equally to public authority decision-making of any kind: Hackney v Haque [2017] P.T.S.R. 769

# L&Q v Patrick (i): Application

- When a public sector landlord is contemplating taking or enforcing Possession Proceedings in circumstances in which [woman who is the victim of domestic abuse] person is liable to be affected by such decision, it is subject to the PSED
- “In the exercise of its functions” includes homelessness functions and decision making: Pieretti v Enfield LBC [2010] EWCA Civ 1104, [2011] P.T.S.R. 565
- Distinction between evaluative decisions and discretionary decisions however: see e.g. Freeman-Roch v Rother DC [2018] EWCA Civ 368 [2019] P.T.S.R. 61

# *L&Q v Patrick* (ii): Nature of duty

- The PSED is not a duty to achieve a result but a duty to have due regard to the need to achieve the results identified in section 149.
- Thus when considering what is due regard, the public sector landlord must weigh the factors relevant to promoting the objects of the section against any material Countervailing factors. In housing cases, such Countervailing factors may include, for example, the impact which the disabled person's behaviour.
- The PSED is 'designed to secure the brighter Illumination of a person's PC so that, to the extent that it bears upon his rights under other laws it attracts a full appraisal'.

# L&Q v Patrick (ii): Nature of duty

- Process not result duty, but can affect result: see per Dyson LJ in *Baker*, para 31 and per Aikens LJ in *Brown*, para 81. In *Hurley* [2012] HRLR 13 , para 78 BUT
- Indirect discrimination: section 19 Equality Act 2010

AND

- *Thlimmenos v Greece* (2000) 31 EHRR 15, para 44,:

*“The [Article 14] right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification **fail to treat differently persons whose situations are significantly different.**”*

# L&Q v Patrick (iii): Inquiries

- The public sector landlord is not required in every case to take active steps to inquire into the PC . Where, however, some feature or features of the information available to the decision maker raises a real possibility that this might be the case then a duty to make further enquiry arises.

*“the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons’ disabilities in the context of the particular function under consideration.”*

R. (Brown) v SSWP [2009] P.T.S.R. 1506 [85]; R. (Hurley and Moore) v SoS BIS [2012] H.R.L.R. 13[77, 89-90]; Bracking [25]

- See also R (Lunt) v Liverpool City Council [2009] EWHC 2356 (Admin) and Pieretti v Enfield London Borough Council [2010] EWCA Civ 1104.

# L&Q v Patrick (iv): Substance over form

- There must be a conscious consideration of the statutory imperatives
- The duty must be exercised with a “conscious approach and state of mind”; *“the duty must be exercised in substance, with rigour and with an open mind.”* Brown v Secretary of State for Work & Pensions [2008] EWHC 3158 (Admin) at [90] - [92] per Scott Baker LJ; Baker, para 37:

*“The question in every case is whether the decision-maker has in substance had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed.”*

# *L&Q v Patrick (v): A continuing duty*

- The PSED is a continuing one and is thus not discharged once and for all at any particular stage of the decision-making process.
- However, the PSED consequences of enforcing an order ought already to have been adequately considered by the decision maker before the order is sought and, in most cases, in the absence of any material change in circumstances (which circumstances may include the decision maker's state of knowledge of the disability), the continuing nature of the duty will not mandate further explicit reconsideration.
- See also *Nur v Birmingham CC* [2021] EWHC 1138

# L&Q v Patrick (vi): Timing of compliance

- Compliance should not be treated as a “*rearguard action following a concluded decision*”, but as an “*essential preliminary to such decision, inattention to which is both unlawful and bad government*”: R (BAPCO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139 per Sedley LJ at [3] also Bracking para 25(4)
- The duty will normally arise once a public sector landlord is on notice that it is relevant



# **L&Q v Patrick (vii): Recording / reasons**

- An important evidential element in the demonstration of the discharge of the PSED is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.
- The court has to be satisfied that there had been a rigorous consideration of the duty and that the authority has focused “very sharply” on the protected characteristic: Hotak v Southwark London Borough Council (Equality and Human Rights Commission intervening) [2015] PTSR 1189 .

# *L&Q v Patrick* (viii): Deference

- The court must be satisfied that the public sector landlord has carried out a sufficiently rigorous consideration of the PSED but, once thus satisfied, is not entitled to substitute its own views of the relative weight to be afforded to the various competing factors informing its decision.

# Landlord's indirect liability: discrimination

- Indirect discrimination
- (Often overlap with PSED if public sector landlord)
- Third party harassment

# Indirect discrimination: section 19

*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

*(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

*(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*

*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

# Harassment: section 26

*26(1) A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

# Harassment: section 26

- “Unwanted conduct” can include inaction, for example a failure to investigate complaints: Conteh v Parking Partners Ltd [2011] ICR 341; Nailard v Unite the Union [2019] I.C.R. 28
- Likewise such conduct can “create” the proscribed environment:
- Where *“to the extent that the failure to support him or her actively made the position very much worse, effectively ensuring that there was no light at the end of the tunnel in remedy of the situation”*
- But it is the authority’s conduct (or inaction) which must be assessed to consider whether it is “related to” the protected characteristic

# Case study: Ms C

- Ms C was a tenant in an ‘intermediate market rent’ property, which she had been offered following an assessment of her husband’s income.
- Her violent and abusive husband was ejected in family law proceedings. However, she could not afford the property on her own, and requested a transfer to cheaper property. Her public sector landlord refused as they would not accept benefits, and brought possession proceedings on rent arrears grounds.
- Defended on grounds of (a) indirect discrimination under s. 19/33 and breach of the PSED. Settled.

# Case study: Ms D

- Ms D was the tenant of a local authority. Her neighbours were disturbed by regular screaming, yelling and banging. After she separated from her abusive partner she received regular visits from him, banging on her door, yelling up to her window and so on.
- Her landlord brought proceedings on the basis of her liability for the behaviour of her former partner on the basis that he was a “visitor”.
- Defended on the basis of indirect discrimination and the authority’s failure to apply the PSED. The authority’s decision to seek possession was not proportionate where it had failed to support or pursue injunction proceedings against the former partner. Settled.



# Bringing the claim

- The county court has jurisdiction to determine a claim relating to inter alia a contravention of Part 4 (Premises): section 114(1)
- A claim must be brought within 6 months or such other period as the court thinks just and equitable: section 118
- conduct extending over a period is to be treated as done at the end of the period: s. 118(6)(a) Equality Act 2010.
- Assessors must be appointed “unless the judge is satisfied that there are good reasons for not doing so.” s. 114(7)

# Burden of proof: section 136

- If there are facts from which the court **could** decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred **unless the person shows that they did not contravene the provision:** section 136
- *Igen Ltd v Wong* [2005] EWCA Civ 142 approving the Barton Guidance:
  - (5) *It is important to note the word “could”. ... At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
  - (6) *... the tribunal must assume that there is no adequate explanation for those facts.*
  - (13) *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.*

# Burden of proof: section 136

- Discrimination may be inferred from statistical evidence and documentary evidence as to the treatment of others, including comparators: see e.g. *Home Office (UK Visas & Immigration) v Kuranchie* UKEAT/0202/16 (19 January 2017, unreported); *Rihal v London Borough of Ealing* [2004] IRLR 642.
- Applies at the case management stage: *EB v BA* [2006] EWCA Civ 132
- A lack of adequate record-keeping may of itself lead to a shifting of the burden of proof in appropriate cases, see e.g. *Ryglewicz v Hanson Quarry Products Europe Ltd* [2013] EqLR 432.

# Vulnerable parties / witnesses: PD 1A

*2. Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case.*

*3. A person should be considered as vulnerable when a factor – which could be personal or situational, permanent or temporary – may adversely affect their participation in proceedings or the giving of evidence.*

*4. Factors which may cause vulnerability in a party or witness include (but are not limited to)–*

*(e) The impact on them of the subject matter of, or facts relevant to, the case (an example being having witnessed a traumatic event relating to the case);*

*(f) Their relationship with a party or witness (examples being sexual assault, domestic abuse or intimidation (actual or perceived));*

*(g) Social, domestic or cultural circumstances.*

# Vulnerable parties / witnesses: PD 1A

*6. The court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.*

*7. If the court decides that a party's or witness's ability to participate fully and/or give best evidence is likely to be diminished by reason of vulnerability, the court may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective. This may include concealing the address and/or contact details of either party or a witness for appropriate reasons.*

# Vulnerable parties / witnesses: PD 1A

*8. Subject to the nature of any vulnerability having been identified and appropriate provisions having been made, the court should consider ordering ground rules before a vulnerable person is to give evidence, to determine what directions are necessary in relation to—*

*(a) the nature and extent of that evidence;*

*(b) the conduct of the advocates and/or the parties in respect of the evidence of that person;*

*(c) whether one or more special measures and/or any other support should be put in place for that person;*

*(d) any duty or power of the court under any enactment or its inherent jurisdiction to prohibit, limit or modify cross-examination of or by a vulnerable witness or to appoint a legal representative to conduct a cross-examination.*

# Vulnerable parties / witnesses: PD 1A

*10. Special measures may include, but are not limited to:*

*(a) preventing a party or witness from seeing another party or witness by the use of screens;*

*(b) allowing a party or witness to give evidence remotely by video conference;*

*(c) hearing a party or witness's evidence in private;*

*(d) dispensing with the wearing of wigs and gowns;*

*(e) admitting pre-recorded video evidence;*

*(f) questioning a party or witness through an intermediary; and*

*(g) using a device or other aid to help a party or witness communicate.*

# Remedies

- The county court has power to grant any remedy which could be granted in proceedings in tort or on a claim for judicial review: section 119(2) (Quashing orders in NTQ cases? Injunction orders?)
- An award of damages may include **compensation for injured feelings** whether or not it includes compensation on any other basis: section 119(4)
- In cases of unintentional indirect discrimination, the county court must not make an award of damages unless it first considers whether to make any other disposal: sections 119(5) and (6) – but NB refers to ‘knowledge of consequences’: *London Underground Ltd v Edwards* [1995] ICR 574



# Injury to feelings

- *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 1 sets out 'bands' for damages which were amended in *Da'Bell v NSPCC* [2010] I.R.L.R. 19 and more recently updated again by Joint Presidential Guidance issued in the Employment Tribunals:
  - Lower band (for the least serious cases, e.g. a one-off or isolated incident of discrimination) - £1,100 to £11,200
  - Middle band (which is used for serious cases that do not merit an award in the highest band) - £11,200 to £33,700
  - Top band (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment: £33,700 to £56,200

# Injury to feelings

- Evidence based

Frankish v Eye Watch Security Ltd (Hull) (Case No 1803842/2005) (10 January 2006, unreported) where the tribunal made no award of injury to feelings because the claimant gave no evidence orally or in her witness statement or in any documents of her having suffered any hurt feelings.

Lalli v Spirita Housing [2012] H.L.R. 30

- Aggravated damages available in addition: see e.g. Vento
- Ought not be too low “*in general, awards of less than [£1,100] are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings*” [paragraph 65].

# Injury to feelings

- Quantum reports – comparable cases
- Lawtel / *Harvey on Industrial Relations*

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CLOSING



Martin Westgate KC, Doughty Street Chambers