

# DISABILITY AND HOUSING LAW: WHAT WE ALL NEED TO KNOW

THURSDAY 18 APRIL 2024



Media Partner:



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## Programme

09:00

Registration and refreshments

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09:30

Welcome

[Zia Nabi](#), *Joint head of housing team at Doughty Street Chambers*

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09:35

Keynote

[Clive Gilbert](#), *Policy Manager for Assistive and Accessible Technology*

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10:00

**Panel session: Mental Health and Capacity**

Chair: [Dominic Preston](#), *Doughty Street Chambers*

Speakers: [Sophy Miles](#) and [Daniel Clarke](#), *Doughty Street Chambers*

Our speakers will provide an introduction to the law around mental capacity and the functions of the Court of Protection, as well as addressing common issues that arise in the housing context and practical solutions. Topics will include Part 21, hoarding, and running possession cases alongside COP proceedings.

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11:15

Coffee break

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11:45 **Panel session: Equality Act and Damages**  
Chair: [Marie Paris](#), *Doughty Street Chambers*  
Speakers: [Sarah Steinhardt](#) and [Rea Murray](#), *Doughty Street Chambers*

This panel will explore how to achieve the best possible outcomes in disability discrimination claims. Our speakers will address the broad legal framework, as well as giving tips on instructing experts, getting funding, and drawing on other practice areas to justify generous damages awards in housing cases.

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13:00 **Lunch**

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14:00 **Promoting the Rights of Disabled Clients**

In conversation with [Monica Kreel](#), *Associate, TV Edwards*, and [Alice Irving](#), *Doughty Street Chambers*.

Monica and Alice will be discussing:

- How to empower clients to be involved in their cases
  - Getting reasonable adjustments
  - The tensions between the challenging the vulnerability narrative and presenting our client's case
  - How we can promote equality in the work we do, for our clients and our colleagues
  - Poverty, disability and systemic inequality
  - Accessibility to court system for disabled people
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14:45 **Panel session: Adaptations and Allocations**

Chair: [Professor David Cowan](#), *Doughty Street Chambers*

Speakers: [Zia Nabi](#) and [Marie Paris](#), *Doughty Street Chambers*

This panel will be looking at ways to get your clients suitable accommodation, be that through disabled facilities grants, challenges under the Care Act 2014, or challenges to housing allocations schemes and their implementation.

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16:00 **Coffee break**

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16:30 **Closing speech**

[Martin Westgate KC](#), *Doughty Street Chambers*

Our closing speaker will look at the ways in which local authorities need to be proactive in anticipating the needs of disabled people within their district, and monitoring the extent to which that need is being met. Topics will include homelessness strategies and the public sector equality duty.

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17:00

**Drinks reception**

## BIOGRAPHIES



### SARAH STEINHARDT

*Doughty Street Chambers*

Sarah is the joint head of the Housing and Social Welfare Team. She specialises in housing and community care, education and discrimination law, and in related public law. Sarah is particularly noted for her expertise in discrimination in housing and other discrimination outside of the employment field, and she enjoys working proactively and imaginatively to achieve positive outcomes for clients. She is astute to public funding issues and costs and always happy to discuss possible strategies at an early stage.



### ZIA NABI

*Doughty Street Chambers*

Zia is the joint head of the Housing and Social Welfare Team. He is a very experienced public and civil lawyer specialising in judicial review, statutory appeals, community care, children and the Court of Protection. Issues of fairness and access to justice are at the heart of his work. Most of his cases are concerned with the rights and interests of the most vulnerable and marginalised members of society.



### CLIVE GILBERT

*Policy Connect*

Clive Gilbert is the Senior Policy and Research Manager for Assistive and Accessible Technology at the cross-party think tank Policy Connect. He is part of a team that provides the secretariat for the All-Party Parliamentary Group for Assistive Technology - a cross-party group MPs and Peers that works to ensure disabled people can benefit from technology to lead fulfilling lives. Clive leads the team's work on social care and independent living and recently authored the [Smarter Homes for Independent Living](#) report, which made recommendations on how government, the health and social care sector and the technology industry can give disabled and older people more choice and control over their lives. The recommendations formed the basis of a new section in the national [Disabled Facilities Grant guidance](#) addressing assistive technology. Clive has been shortlisted for the Shaw Trust Disability Power 100 2022 - a list of most popular influential disabled people in the UK.



### **DOMINIC PRESTON**

*Doughty Street Chambers*

Dominic Preston is recognised as a leading junior in social housing by both Chambers and Partners and Legal 500. Comments include: *'one of the most tenacious and brilliant advocates. His attention to detail coupled with a strong focus on the overall strategy of the case ensures that he often gets outstanding results for clients'*. His housing work centres on homelessness, allocations, disrepair and possession. He is also regularly instructed in COP work by the Official Solicitor and by accredited legal representatives and has a particular expertise in hoarder cases and the cross-over between housing, COP and community care law. Legal 500's COP ranking states: *'Dominic comes at things with compassion, pragmatism and thoroughness. He is well-prepared and puts in the work.'*



### **SOPHY MILES**

*Doughty Street Chambers*

Sophy is an experienced practitioner who specialises in all aspects of mental capacity and mental health law, with a focus on Court of Protection and Inherent Jurisdiction cases and inquests. She has a particular interest in promoting the participation of vulnerable litigants and has been involved in several reported cases which examine this issue: (R (C ) v (1) First Tier Tribunal, (2) Tribunal Procedure Committee and (3) The Lord Chancellor [2016] EWHC 707 (Admin), VS v St Andrews Healthcare [2018] UKUT 250 (AAC), AR v West London NHS Trust and the Secretary of State for Justice: [2020] UKUT 273 AAC. Sophy was a member of the Civil Justice Council's Working Group on Procedure for Determining Mental Capacity in Civil Proceedings, which was chaired by Dan Clarke. She is an accredited mediator.



### **DANIEL CLARKE**

*Doughty Street Chambers*

Daniel has a wide range of experience across private law, public law and human rights work. His main areas of practice are housing, social welfare and community care, with a particular focus on discrimination, public law and human rights issues. He is regularly instructed to represent clients in claims for judicial review in the High Court, as well as parties and interveners in a range of other proceedings from the County Court to the Supreme Court. He has particular expertise in issues relating to mental capacity in civil cases and is the co-chair of the Civil Justice Council's working group, *Procedure for Determining Mental Capacity in Civil Proceedings*.



**MARIE PARIS**

*Doughty Street Chambers*

Marie is a specialist housing and social welfare barrister. She accepts instructions in housing, homelessness, community care, and related public law matters. She has extensive experience of litigating housing matters in the county court, having joined chambers after spending two years as a duty adviser at South West London Law Centre.



**REA MURRAY**

*Doughty Street Chambers*

Rea Murray specialises in housing, property and discrimination law, and in related public law. Rea's particular expertise lies in the Equality Act, homelessness, eligibility, and mental capacity in social housing. She is known for her personable and determined advocacy style and enjoys bringing creative and strategic perspectives to cases from the earliest stages of litigation.



**MONICA KREEL**

*TV Edwards*

Monica Kreel is a community care, public law and Court of Protection solicitor in the Social Welfare team at TV Edwards LLP in London. She qualified as a solicitor after a career working in disability policy, advice, and investigations: working at the Disability Rights Commission and the Equality and Human Rights Commission. She co-wrote the Disability Discrimination Act and Equality Act Codes of Practice, consulting widely with disabled people. She is disabled herself and is a carer for a disabled relative. Her recent cases include *R (TMX) v London Borough of Croydon & Anor* [2024] EWHC 129, where she acted for the Claimant who, like her, has MS. She loves and hates working in Legal Aid, in equal measure!



**ALICE IRVING**

*Doughty Street Chambers*

Alice Irving is a civil and public law practitioner, specialising in housing and social welfare, community care and education. Alice receives instructions across all areas of housing law. She has represented vulnerable clients in resisting possession claims, anti-social behaviour injunctions and closure orders. She has experience advising on and litigating disrepair claims, and challenging homelessness decisions. Alice has also provided advice to disabled clients in relation to Disabled Facilities Grants and other avenues for obtaining suitable accommodation. She has particular experience working with clients assessed as lacking capacity to litigate.



**PROFESSOR DAVID COWAN**

*Doughty Street Chambers*

David is a professor at Cardiff university's School of Law and Politics, and an Associate at Doughty Street Chambers. David predominantly practises in the areas of homelessness and allocations, landlord and tenant, human rights, and property law, including shared ownership. He appears in County Courts in his areas of interest, on which he also advises. He relishes the nitty gritty of housing and property law issues, constructive trusts and concurrent tenancies; and he has expertise in eligibility issues, particularly in EU law, human rights and public law, and equality issues. He was a part-time secondee to the Welsh Government, assisting with Renting Homes (Wales) Bill, and he has expertise in housing issues in Wales.



**MARTIN WESTGATE KC**

*Doughty Street Chambers*

Martin Westgate has a consistent track record of advice and representation in a wide range of subject areas although he concentrates on public and administrative law, housing and social care. Much of his work is in, and on appeal from, the Administrative Court and he is experienced in professional negligence and costs litigation, particularly in cases related to his main practice areas. His broad based practice makes him an ideal choice for cases that have a multidisciplinary aspect or that are difficult to categorise.



Clive Gilbert

Senior Policy and Research Manager  
Assistive and Accessible Technology  
Policy Connect





## This talk has three parts:

- About Policy Connect
- Historical context: Independent living
- The Smart Homes and Independent Living Commission



# Cross-party public policy research

The image displays four research report covers from Policy Connect. Each cover includes the Policy Connect logo, a specific research topic, a subtitle, a date, and a partner organization logo.

- Smarter Homes for Independent Living**  
PUTTING PEOPLE IN CONTROL OF THEIR LIVES  
28 APRIL 2022  
Partners: BU, Coventry University
- Empowering Innovation**  
THE ROLE OF UNIVERSITIES IN BOOSTING REGIONAL ECONOMIES  
10 MARCH 2022  
Partner: Higher Education
- Delivering Net Zero through Digital**  
2 FEBRUARY 2022  
Partner: All-Party Parliamentary Group for Manufacturing, IET
- Connecting the Watts**  
THE CASE FOR A NET ZERO DELIVERY AUTHORITY  
10 DECEMBER 2021  
Partner: Carbon Connect



# The growth of inclusive and assistive technology



# Assistive Technology Policy



policy connect the All-Party Parliamentary Group for assistive technology

## ACCESSIBLE VIRTUAL LEARNING ENVIRONMENTS

Making the most of the new regulations

This report has been produced in advance of the new digital accessibility regulations becoming law in September 2018, to help the Government and other providers out to face the necessary guidance and practical provisions to turn the regulations into reality and further education, can – if implemented well – make an important contribution to meeting the Government's ambition to create a more progressive and equal Britain by growing our domestic talent pool and closing the disability employment and attainment gaps.

The report's recommendations are aimed at doing much more than simply achieving compliance with the regulations. They set out how the requirements can be met in such a way as to improve learning and education for all students whether disabled or not.

The report begins with the context of why digital accessibility is important in education. It starts with the recent history of inclusion and outlines how digital accessibility can make virtual learning environments (VLEs) a new learning tool for all users. Chapter 2 sets out what the new regulations will require for educational bodies, lecturers and teachers, and what kind of information and data is included or exempt. Chapter 3 describes how the Government and sector bodies can help higher and further education institutions deliver on their obligations under the regulations – implementing these recommendations will be cost-effective and help consistency of application across the sector. Chapter 4 is targeted at higher and further education institutions themselves and provides a strategic 'how to' guide to implementation, with the objective of using the requirement for digital improvements to make education and learning better for all students.

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## DISABLED STUDENTS' ALLOWANCES:

### GIVING STUDENTS THE TECHNOLOGY THEY NEED TO SUCCEED

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## Outcomes: Smart homes and the future of social care

Contact: Cive Gilver | Cive.Gilver@policyconnect.org.uk | 0207 202 8862

### Overview

Smart home technology promises to transform social care and independent living among disabled and older people. On Tuesday 16th July 2019, the APPG for Assistive Technology gathered parliamentarians, health and social care professionals, smart home and assistive technology providers and charities for a roundtable to discuss the potential of smart technologies to upgrade services and improve lives.

The meeting marked the launch of our workstream exploring the role of technology in social care and independent living. The discussion took place as the Department for Health and Social Care released the Prevention Green Paper and promised to publish the long-awaited Adult Social Care Green Paper.

The outcomes will help shape the development of the new workstream, and inform our work to impact future policy.

### Key findings

- There is still a gap between the potential of smart home technology to support social care and independent living and the role products currently capable of performing. In particular mainstream technologies are often not accessible or reliable enough to be used alongside specialist products in the care context.
- Health and social care services need to more effectively embed technology into provision. They should support staff to work with technology by creating specialist dedicated roles within their organisations and empowering staff to develop the mix of technical and clinical skills required to deliver high quality technology enabled care services.
- There is an urgent need to develop a legislative and regulatory framework for the use of technology in care to ensure that people's rights are protected and innovation is allowed to flourish.



# Independent Living and Disability Rights Movements



# Independent Living Movement



University of Illinois, 1956



# Independent Living Movement



London, 1990



# Accessible Housing





# Smart Homes and Independent Living Commission



Chair  
Sir Paul Carter, CBE  
Kent County Council



Steering Group  
Liz Twist, MP  
Blaydon



Sponsors  
Bournemouth University  
Coventry University



# Independent Living - Opportunities



# Smart Homes and Independent Living Commission

## Report Launch

April 2022



# The Disabled Facilities Grant



# Adult Social Care Reform White Paper

Dec 2021

## Disabled Facilities Grant

- New guidance encouraging the use of ATech

**ACCEPTED**



# A new chapter for the DFG



The Disabled Facilities Grant and assistive technology

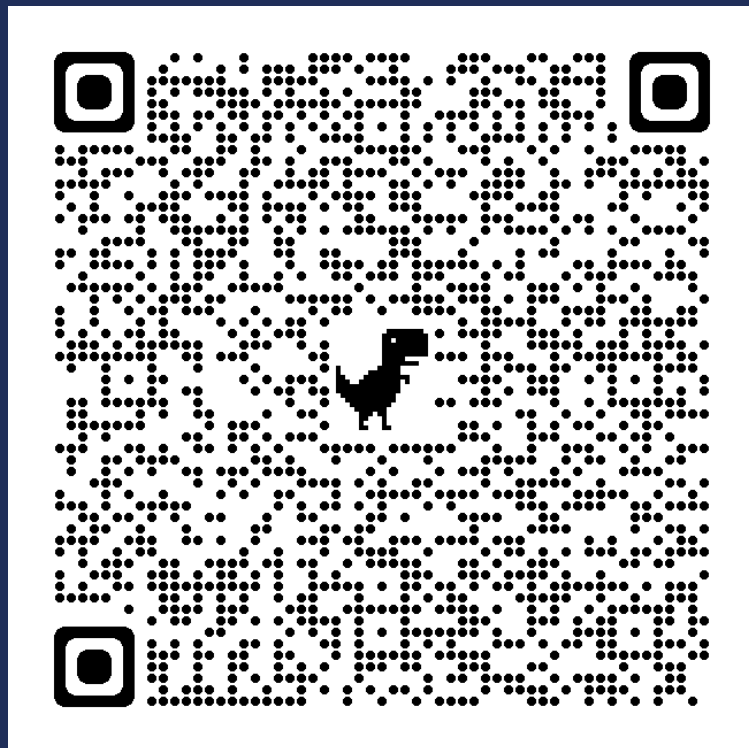
## Chapter 7: The Disabled Facilities Grant and assistive technology

### Assistive technology

- 7.1 According to the Medicines and Healthcare products Regulatory Agency (MHRA), the term 'assistive technology' refers to 'products or systems that support and assist individuals with disabilities, restricted mobility or other impairments to perform functions that might otherwise be difficult or impossible'.
- 7.2 Assistive technologies enable people to live healthy, productive, independent and dignified lives. They can help people participate in education and the labour market as well as stay in contact with family, friends and carers and use online services to access shopping, entertainment and information.
- 7.3 There is a large market in specialist assistive technology, offering a wide range of



You can read the guidance via this QR code:



# Recent developments

Foundations Smart Homes Pilot

Get in touch via LinkedIn and email:  
[clive.gilbert@policyconnect.org.uk](mailto:clive.gilbert@policyconnect.org.uk)

Thank you!







## Mental health and capacity

Speakers: Sophy Miles & Daniel Clarke

Chair: Dominic Preston

Disability and Housing Law conference, 18 April 2024



# Overview

- Will look at two scenarios, involving claims against tenants for:
  1. Hoarding
  2. Anti-social behaviour
- For each, will look at issues arising in relation to:
  - Defences to the claims
  - Litigation capacity
  - Subject matter capacity
  - Potential sources of support
  - Role of the Court of Protection

# Key sources (1)

- Mental Capacity Act 2005
  - Mental Capacity Act Code of Practice (2013)
  - Richard Jones & Eve Piffaretti, *Mental Capacity Act Manual*, 8th ed, 2018
  - Alex Ruck-Keene QC & others, *Court of Protection Handbook*, 4th ed, 2022
- CPR Part 21
- Equality Act 2010
  - EHRC Services, public functions and associations: Code of Practice (2011)
  - EHRC Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)

# Key sources (2)

- Care Act 2014
  - The Care and Support (Eligibility Criteria) Regulations 2014
  - Care and Support Statutory Guidance (updated March 2024)
  - Tim Spencer-Lane, *Care Act Manual*, 3rd ed, 2019
  - Stephen Knafler QC, *Adult Social Care Law*, 2nd ed, 2019
  - Luke Clements, *Community Care and the Law*, 7th ed, 2019
- Mental Health Act 1983
  - Mental Health Act 1983: Code of Practice (2015)
  - National Framework for NHS Continuing Healthcare (2022)
  - Richard Jones, *Mental Health Act Manual*, 26th ed, 2023

# Scenario 1: Hoarding

- X is an assured tenant of housing association
- Evicted from two previous properties on grounds of hoarding and GP raises concerns about possible hoarding disorder
- Problems arise again at new property
- Housing association brings possession claim under Grounds 12, 13 and 14
- Housing association makes referral to social services, who attempt to conduct a Care Act assessment. X tells social worker that he knows he has too many possessions in the house and must clear them or risks eviction, but denies he has a hoarding disorder, saying he is in the process of sorting this out and doesn't want any assistance from social services

# Defences

- Reasonableness
- Discrimination
  - Consistency with instructions from client?
  - Disability?
  - Unfavourable treatment?
  - Something arising in consequence of disability?
  - More proportionate courses?
    - Care Act support — is X capable of complying with tenancy with support?
    - Alternative accommodation?
- Working inside and outside the possession proceedings

# People who lack capacity

- Section 2 Mental Capacity Act:
- Established if:
  - P is ***unable to make a decision*** for himself ***in relation to a matter***
  - ***Because of*** an impairment of, or a disturbance in the functioning of, the mind or brain
- Irrelevant whether the impairment is temporary or permanent. Precise diagnosis **not necessary**
- Cannot be determined by mere reference to age/appearance or a condition or aspect of P which might lead others to make unjustified assumptions about his capacity
- **On ‘balance of probabilities’**
- P must be 16 or over (unless court is making a decision about P’s property and considers it likely P will lack capacity at 18; s. 18(3))

# Inability to make decisions

- P cannot make a decision for himself if he is:
- **unable to understand** the information relevant to the decision.
- **unable to retain that information.**
  - Ability to retain for a short period does not prevent capacity
  - But must be able to keep it 'on line' during the decision making process
- **unable to use or weigh the information** as part of the process of making the decision
- **unable to communicate his decision** (whether by talking, using sign language or any other means).
- Note: 'relevant information' includes information about the reasonably foreseeable consequences of making a choice or making no decision at all



# Litigation capacity

- ***Masterman-Lister v Brutton & Co*** [2002] EWCA 1889, per Chadwick LJ at 75 ,79; per Kennedy LJ at 26, 27.
- ***Sheffield CC v E & S*** [2004] EWHC 2808 (Fam), per Sir James Munby (Pres) at 34
- ***Bailey v Warren*** [2006] EWCA Civ 51 per Arden LJ at 126
- ***Dunhill v Burgin*** [2014] UKSC 18 per Lady Hale at 14

# Subject matter capacity

***A Local Authority v JB*** [2021] UKSC 52 per Lord Stephens at 68-70

- Remember that capacity requires an ability to make decisions about “a matter”
- Identify the correct formulation of “the matter”
- Then identify the information relevant to the decision, including the foreseeable consequences of deciding one way or the other, or failing to make the decision
- Must be “within the specific factual context of the case”

# Decisions about disposal of items

**AC v GC** [2022] EWCOP 39 at 14

- Volume of belongings and impact on use of rooms (depending on the function of the room)
- Safe access and use: extent to which you (and other residents in the property) are able or not safely to access and use living areas
- Creation of hazards: extent to which accumulated belongings create actual or potential hazards
- Safety of building – extent to which structural integrity and safety of building could be compromised
- Removal/disposal of hazardous levels of belongings-that this is possible/desirable

# Decisions about where to live

- ***LBX v K, L, and M*** [2023] EWHC 3230 (Fam) per Theis J
- Types of property; locations
- Difference between residing at or visiting a place
- Activities available
- That P would have to pay
- Consequences for contact with family
- The type of care P would receive

# Decisions about care

- ***LBX v K and others***
- What areas P needs support with
- What sort of support P needs
- Who will be providing it
- What would happen if P did not have any support or refused it
- That carers might not always treat P properly and that P can complain if not happy about their care

# Care Act 2014: Care and support

- Capacity to refuse assistance (s11 CA 2014)
- Care & Support (Eligibility Criteria) Regulations 2015, reg. 2, inc:
  - Ability to manage and maintain nutrition
  - Ability to maintain personal hygiene
  - Ability to maintain habitable home environment
  - Ability to make use of home safely
- Possible route to either (a) care and support at home (one-off clearance, regular support with cleaning, support to access activities) or (b) more supported alternative accommodation
- *“The established position is that a need for accommodation by itself does not constitute a need for care and support but that accommodation may nevertheless need to be provided, as a vehicle to deliver care and support, where the care and support the adult requires is 'accommodation-related', i.e. of a sort which is normally provided in the home or would be 'effectively useless' if the claimant has no home” (R (SB) v Newham LBC [2023] EWHC 2701 (Admin) para 52)*

# Care Act 2014: Safeguarding

- Safeguarding inquiry (s42 CA 2014): “Reasonable cause to suspect”
  - Adult has needs for care and support
  - experiencing or at risk of abuse or neglect
    - Includes self-neglect, e.g. hoarding (Code para 14.17)
  - as a result of needs, unable to protect self
- Local authority *“must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case (whether under this Part or otherwise) and, if so, what and by whom”*
- Power to require provision of information (s45)

# Role of the Court of Protection (1)

Interventions to support X to remain at the property if the court was satisfied this is in X's best interests

- In both **AC v GC** and in **A Local Authority v X** [2023] EWCOP 64, COP approved a clearance plan as being in P's best interests
- In **A Local Authority v X** COP had to weigh up wishes and feelings of X and possibility of that it could tip her into a suicidal state
- Court will give very careful consideration to how property is sorted and disposed of
- May involve use of specialist providers



# Role of the Court of Protection (2)

Interventions to identify alternative accommodation for X

- Would require identification of alternatives- ***N v ACCG*** [2017] UKSC 22, per Lady Hale
- Evidence from local authority as to available options – what is it willing to commission?
- X's wishes and feelings
- Decision by the COP will give these weight but they are not determinative- ***ITW v Z and others*** [2009] EWCOP 2525 per Munby J at 35

# But

- Will require an application to be made, probably by local authority and permission to be granted (likely)
- COP1, COP1B, COP3 (assessment of capacity), COP24 (witness statement)
- Will require evidence of X's capacity to conduct litigation *in the COP*
- Rule 1.2 COPR 2017- how will X participate? Litigation friend, Accredited Legal Representative?
- Practice Direction 3B -Case Management Pathways sets out stages (pre-issue, point of application, CMC etc)

## Scenario 2: Anti-social behaviour

- Y is a secure tenant of a local authority
- History of mental health problems, including admissions under MHA 1983 following episodes of psychosis
- Also history of alcohol dependency
- Y begins harassing and threatening neighbours when drunk, accusing them of spying on him on behalf of MI5
- Local authority:
  - obtains without notice interim injunction, with power of arrest, under Anti-Social Behaviour, Crime and Policing Act 2014
  - issues possession claim under Grounds 1 & 2

# Defences

- Reasonableness
- Discrimination
  - Similar issues to scenario 1
  - But see Equality Act 2010 (Disability) Regulations 2010
    - reg. 3(1): Addiction to alcohol
    - reg. 4(1)(c): Tendency to physical abuse of other persons
  - ***Risby v Waltham Forest LBC*** (2016) UKEAT/0318/15/DM: disability must be “effective”, but need not be sole or even main, cause
- Article 8 and/or Article 14 ECHR

# Litigation capacity

- Same approach as in previous scenario
- Requires Y to have capacity to conduct this specific litigation- to be “capable of understanding, with the assistance of such proper explanation from legal advisers.... as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings” (**Masterman-Lister** at 75, quoted in **Dunhill v Burgin** at 16)

# Injunction capacity

- Injunction should not be granted against a person incapable of understanding what he is doing or that it is wrong: ***Wookey v Wookey*** [1991] Fam 121 CA
- Nor against someone who has capacity to understand but not to comply: ***Pender v DPP*** [2013] EWHC 2598 (Admin)
- Significant concern about interim injunction with power of arrest in circumstances where it is suspected that person may lack capacity: see CJC report on ASB in the civil courts (2020), ***MTA v Commissioner of Police of the Metropolis*** [2023] EWHC 117 (KB) and CJC consultation on procedure for determining mental capacity (2023)

# Subject matter capacity

- Residence and/or care?
- Entering into a tenancy: ***London Borough of Lewisham v QR*** [2014] EWCOP 26 (DJ Batten decision -not binding but frequently quoted)
  - Obligation to pay rent, occupy and maintain the flat
  - Landlord's obligations
  - Risk of eviction if obligations breached
  - Purpose and terms of tenancy
- Surrendering a tenancy
  - Ending of mutual obligations
  - May owe outstanding rent

# Care Act issues

- See scenario 1
- In relation to eligibility criteria:
  - Developing and maintaining family or other personal relationships
  - Maintaining habitable home environment (see statutory guidance para 6.106(f): *“An adult may require support to sustain their occupancy of the home...”*)



# s117 Mental Health Act 1983 after-care (1)

- Applies where person detained under s3 (but not s2) among others
- Duty of ICB **and** local authority *“to provide or arrange for the provision of, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as ... satisfied that the person concerned is no longer in need of such service”*
- Cannot charge for after-care services
- Assessment for s117 after-care governed by framework for NHS continuing healthcare (see National Framework para 343)

# s117 Mental Health Act 1983 after-care (2)

- Following previous restrictive case law, since amendment by CA 2014, “after-care services” defined in s117(6) as “services which have **both** of the following purposes
  - (a) meeting a need arising from **or related to** the person's mental disorder; and
  - (b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder).
- MHA Code of Practice (2015) para 33.4:  
*[ICBs] and local authorities should interpret the definition of after-care services broadly. For example, after-care can encompass healthcare, social care and employment services, supported accommodation and services to meet the person's wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient's mental disorder, and help to reduce the risk of a deterioration in the patient's mental condition.*
- So, as with CA 2014, may be a route to (a) support at the property or (b) more supported alternative accommodation

# Role of the Court of Protection

- Requires identification of “the matter”- Y’s best interests as to where to reside or what care Y needs?
- “Reasonably foreseeable consequences” *includes information about the consequences to other persons or for members of the public- not limited to the consequences for P-* see ***A Local Authority v JB***, per Lord Stephens at 92
- COP could in principle consent to a care package for Y which restricts his behaviour in his best interests – fact-sensitive decision.



## **The Equality Act 2010 and Damages**

Sarah Steinhardt and Rea Murray

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[rea.murray@doughtystret.co.uk](mailto:rea.murray@doughtystret.co.uk)

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chambers

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# The Equality Act 2010 and Damages

Introduction to the legal framework  
for Equality Act claims

Rea Murray

Reasonable adjustments and  
practical tips for running claims

Sarah Steinhardt



**Introduction to  
the legal framework for  
Equality Act 2010 |  
damages claims**

Rea Murray

# The Equality Act 2010

- Protected characteristics (Pt 2 Chapter 1)
- Fields of activity (Pts 3-8)
- Discrimination and other prohibited behaviour (Pt 2 Chapter 2)
  - 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
- The advancement of equality (Pt 11)

# Statutory Guidance

- *Services, public functions and associations Statutory Code of Practice*  
Equality Act 2006 s. 15
- *Guidance on matters to be taken into account in determining questions relating to the definition of disability*  
Schedule 1, Paragraph 12 to the Act
- *Homelessness Code of Guidance for Local Authorities*  
Section 182 Housing Act 1996



# 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

# Disability – section 6

- A person (P) has a disability if: -
  - a) P has a physical or mental impairment; and,*
  - b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.*
- “Substantial” means more than minor or trivial (section 212), and
- “long term” means the effect has lasted at least 12 months, is likely to last at least 12 months, or is likely to last the rest of the person’s life: sch. 1 para 2
- “Likely” means “*could well happen*” : Boyle v SCA Packaging [2009] ICR 1056

# Disability – section 6

- The ‘impairment’ does not need to be diagnosed or a clinically recognized ‘disorder’. It must be given its natural meaning: *Mcnicol v Balfour Beatty Rail Maintenance Ltd* [2002] I.C.R. 1498
- “*The purpose of the definition of disability is not to confine an impairment to that which can be shown to be given a medical label which is either a recognised physical or mental condition: it is, rather, to describe the nature of the impairment.*” *Walker v Sita Information Networking Computing Ltd* UKEAT/0097/12, [2013] Eq.L.R. 476
- But the ‘impairment’ must be more than ‘a reaction to adverse circumstances’: *J v DLA Piper UK LLP* [2010] ICR 1052; *Igweike v TSB Bank Plc* UKEAT/0119/19, [2020] IRLR 267

# Disability – section 6

- Functional assessment
- The assessment of disability must focus on what P cannot do or what she can only do with difficulty, adverse consequences or prompting: *Aderemi v London & South East Railway* [2013] I.C.R. 591
- The effects of medication or treatment must be disregarded: para 5 of Schedule 1

# Disability – excluded conditions

- If the impairment falls within Equality Act 2010 (Disability) Regulations 2010/2128 and which covers a range of broadly ‘criminal or anti-social activity’ such as a **tendency to physical abuse** or **addictions** the person is not deemed to be disabled for that purpose.
- Also, a tendency to set fires; a tendency to steal; a tendency to sexual abuse of other persons; exhibitionism; and voyeurism.
- By Reg.4(1)(c), any tendency to physical abuse of others cannot qualify as an impairment or therefore as a disability for the purposes of the 2010 Act, while the same applies to addiction to alcohol, nicotine or any other substance, unless originally the result of prescribed medication or medical treatment (Reg.3(1)).

# Disability – the cause of the impairment

- *‘it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although addiction to alcohol is expressly excluded’*: Guidance §A8; Wood v Durham County Council UKEAT/0099/18 (3 September 2018), unreported
- ‘Kaltoft’ emphasised that *“the concept of disability does not depend on the extent to which the person may or may not have contributed to the onset of his disability”*

# Disability – the cause of the impairment

- A woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk.
- A man has a borderline moderate learning disability which has an adverse impact on his short-term memory and his levels of literacy and numeracy. For example, he cannot write any original material, as opposed to slowly copying existing text, and he cannot write his address from memory.
- It is the effects of these impairments that need to be considered, rather than the underlying conditions themselves.

*Guidance A7*

# Disability – providing evidence

- What sort of evidence should be provided?
- What can be obtained?
- Is expert evidence possible / available?



# Protected spheres of activity

## Part 4 Premises

- **Scope**
- Premises are not within the definition of goods, facilities and services dealt with under Part 3. Part 4 is heavy and there is no Code of Guidance.
- Premises means the whole or the part (section 38(2)) and disposing includes letting, sub-tenancy, assignment and parting with possession (section 38(4)).
- Not: age or marital status, work or education, short stays, accommodation the provision of which is for the purpose only of exercising a public function or providing a service to the public or a section of the public (section 32(3)) .

# Protected spheres of activity

## Part 4 Premises

- **Disposals: section 33**
- Would potentially include an allocation of housing but usually by judicial review – and approached under the service provision (see: *Gullu v Hillingdon, Ward v Hillingdon, Z & Ors v Hackney & AIHA*)
- Harassment specifically prohibited in section 33(3) but religion and sexual orientation excluded (section 33(6)). But this would be a detriment for the purposes of Direct Discrimination so bring the claim that way. Victimisation also specifically prohibited (section 33(4)).
- **Management, including eviction/possession: section 35**
- *Akerman Livingston v Aster* [2015] UKSC 15

# Protected spheres of activity

## Services and public functions: section 29

### Section 29(6)

- *A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, **do anything that constitutes discrimination, harassment or victimisation.***

### Section 31(4)

- *A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.*
- Doesn't cover PCs of age or marriage/civil partnership

# Protected spheres of activity

## Application of Part 3 - Section 28 provides

(2 )This Part does not apply to discrimination, harassment or victimisation—

- (a) that is prohibited by Part 4 (premises), 5 (work) or 6 (education), or
- (b) that would be so prohibited but for an express exception.

(3) This Part does not apply to—

- (a) a breach of an equality clause or rule;
- (b) anything that would be a breach of an equality clause or rule but for section 69 or Part 2 of Schedule 7;
- (c) a breach of a non-discrimination rule.

# 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)
- ‘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 – section 13

## **Example:**

A mother seeks admission to a privately run nursery for her son who has Hirschsprung's disease, which means that he does not have full bowel control. The nursery says that they cannot admit her son because he is not toilet trained and all the children at the nursery are. The refusal to admit the boy is not because of his disability itself; but he is being treated unfavourably because of something arising in consequence of his disability.

# Direct discrimination – section 13

## **Example:**

More men than women are using a council sports centre. The management team wants to encourage more women to use the facilities. They decide to restrict the number of men who can use the gym at popular times. They also offer their male users some vouchers for special training events to compensate. As the restriction only applies to men, they are being treated less favourably because of their sex, regardless of the additional benefit of the special offer.

# Discrimination arising from disability: section 15

*(1) A person (A) discriminates against a disabled person (B) if—*

*(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*



# Discrimination arising from disability: section 15

- Two causative stages:
  - The reason for the unfavourable treatment ('the something'); and,
  - Whether the 'something' arose in consequence of disability.

*Sheikholeslami v University of Edinburgh* UKEATS/0014/17, [2018] IRLR 1090
- The latter has been described as a “broad” or “loose” test and is factual rather than medical: *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] I.C.R. 1492

# Discrimination arising from disability: section 15

- Was the disability “a reason and thus an effective cause” of the ‘something’?: *P v Governing Body of a Primary School* [2013] UKUT 154 (AAC)
- There may be more than one reason why treated unfavourably- was the ‘something’ “a significant influence” causing the unfavourable treatment: *Nagarajan v London Regional Transport* [2000] 1 A.C. 501
- B must be a disabled person within the meaning of s.6: *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763 [2014] 3 C.M.L.R. 43

# Discrimination arising from disability: section 15

- Knowledge is of the facts constituting disability, A cannot rely on advice that B was not disabled: Gallop v Newport [2013] EWCA Civ 1583
- A public body may be a duty to make enquiries: Pieretti v Enfield [2011] H.L.R. 3 where “some such feature of the evidence” presented raised “*a real possibility that the appellant was disabled in a sense relevant to..*” [the decision to be made or the duty to be discharged]. [35]

# Discrimination arising from disability: section 15

- Structured approach: *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213

*“First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, **are the means chosen no more than is necessary to accomplish the objective?**”*

- Objective test – issue is not what D did or did not consider: *Hardy and Hansons Plc v Lax* [2005] ICR 1565

# 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 – e.g. their specific disability – and those that do not: section 6(3)(b)
- Does not require any request for an adjustment
- Does not require knowledge of disability

# *Nur v Birmingham CC* [2021] EWHC 1138

## **The policy**

- To enable the best use of the Council and partner registered provider stock, properties will be allocated to those applicants who need that size and type of property.
- As such, preference for houses with two or more bedrooms will be allocated to families with dependent children.
- Sheltered housing and extra care accommodation will be allocated to older people.
- Properties with adaptations will be allocated to persons with a physical or sensory disability.”

# *Nur v Birmingham CC* [2021] EWHC 1138

- The Council's Occupational Therapy Service assessed the Second Claimant as requiring an adapted property.
- This meant that her mother, the First Claimant could only realistically bid for adapted accommodation or accommodation that was said to be capable of being adapted.
- There was no adapted accommodation that was not a house.
- The policy was operated by the Council's officers so that the absence of children in a family was treated as a decisive matter for any allocation decision – so a family with children under 18 would always trump a family with a disabled child over 18.



# Nur - ONS Report 2020

- Disabled people are far more likely to live in social housing than non-disabled people (24.9% of disabled people as opposed to 7.8% of non-disabled people).
- Disabled people aged 24 and over are significantly more likely to live with their parents than non-disabled people in the same age group. For those between 30-34 years old, 15.5% of disabled people lived with their parents compared to 9.5% of non-disabled people
- Disabled people with autism and those with severe learning difficulties are by far the most likely to live with their parents into adulthood.

# ***Nur* – indirect discrimination s.19**

- Disabled households were only in practice, able to have any chance of bidding successfully for adapted properties.
- The pool of potential properties was further diminished by the rule which gave priority for houses to households with children.
- This was a particular disadvantage.
- Also relevant to take account of the fact that disabled households were less likely to be able to bid successfully for houses than non disabled households because they were less likely to have a child in their household.

# ***Nur* – indirect discrimination s.19**

- Decision to offer a measure of preference to houses for families with dependent children was a legitimate aim.
- But council had failed to show that proportionate.
  - Obligated to look at how the Council's policy worked out in practice. Not limited to looking at the words of the policy itself.
  - No evidence to show that the remaining pool of properties that were available to disabled households left disabled households without children with a reasonable pool of properties they could bid for.
  - **Not an answer to say that the Council retained a discretion to allocate property outside of the bidding system**

# Failure to make reasonable adjustments: section 21

- It is 'discrimination' to fail to comply with the duty at section 20
- The duty at section 20:
- First requirement: “where a **provision, criterion or practice** of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

# Failure to make reasonable adjustments: section 21

- *The second requirement is a requirement, where a **physical feature** puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

The second requirement (Physical features) does not apply in premises cases - sch. 4 para 2(2) but **does** apply in public functions cases

- *Third requirement “where a disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage ....”*

# 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.*

- Sexual harassment is also unlawful sections 26(2) and (3).

# 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

## **Example:**

A party of adults with learning difficulties have a meal in a restaurant accompanied by their support workers. Some of the restaurant staff make fun of the party with gestures and silently mimicking them. The support workers are very upset by the conduct of the staff which spoils their meal by creating a degrading and humiliating environment in the restaurant for them as well as for the adults they support. The support workers could bring a claim of harassment related to disability.



## **Example:**

A member of staff at a neighbourhood fast food outlet calls a teenage boy 'Paki' when he comes into the shop. The staff member knows the boy was born in Britain and his family comes from Turkey, and he regards this name calling as just a joke. The boy has told him to stop, and now hates coming to the shop, especially with his mates, as he dreads being insulted and verbally abused for a characteristic he does not possess.

# 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.*



**Reasonable adjustments  
and practical tips for  
running claims**

Sarah Steinhardt

# Part 3 or Part 4?

- **Section 32(3)**

- *(3) This Part [Part 4] does not apply to the provision of accommodation if the provision—(a) is generally for the purpose of short stays by individuals who live elsewhere, or*
- *(b) is for the purpose only of exercising a public function or providing a service to the public or a section of the public.*

- **Section 28(2)**

- *(2) This Part [Part 3] does not apply to discrimination, harassment or victimisation—(a) that is prohibited by Part 4 (premises), 5 (work) or 6 (education), or (b) that would be so prohibited but for an express exception.*

# Part 3 or Part 4?

- *R (FG) v Royal Borough of Kensington and Chelsea* [2024] EWHC 780 (Admin)
  - Responsibilities of local authority in respect of accommodation allocated to the Claimant fell under Part 4 and not Part 4: "A local housing authority does not provide housing accommodation "for the purpose only of exercising a public function"
- *Plummer v Royal Herbert Freehold Ltd* Central London County Court  
Central London County Court
  - Responsibilities of landlord in relation to on-site membership only leisure facilities/pool fell under Part 3

# Reasonable adjustments: the duty

- The duty at section 20:
- First requirement: “where a **provision, criterion or practice** of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

# Reasonable adjustments: the duty

- *The second requirement is a requirement, where a **physical feature** puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

The second requirement (Physical features) does not apply in premises cases - sch. 4 para 2(2) but **does** apply in public functions cases (sch. 2 para 2(1))

- *Third requirement “where a disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage ....”*

# Reasonable adjustments: PCPs

***“where a provision, criterion or practice of A's.....”***

- “PCP” should be construed widely and may include decisions to do something in the future, as well as a ‘one-off’ or discretionary decisions: see Code of Practice on Services, Public Authorities and Association para 5.6
- Includes a term of the letting: Schedule 4 para 2
- Examples of broad meanings: Fareham College v Walters [2009] I.R.L.R. 991; Archibald v Fife Council [2004] IRLR 651
- But Newcastle NHS Trust v Bagley [2012] Eq. L.R. 634 [84]



# Reasonable adjustments: substantial disadvantage

*“... puts a disabled person at a substantial disadvantage...”*

- In Part 3 cases reference to “a disabled person” is to disabled persons generally: sch. 2 para 2(2)
- This means that it is an anticipatory duty: e.g. *MM v Secretary of State for Work and Pensions* [2014] 1 W.L.R. 1716 [43]; *ZH v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69
- *Finnigan v Chief Constable of Northumbria Police* [2014] 1 WLR 445 Means anticipatory duty to make reasonable adjustments by reference to the needs of disabled persons sharing a sufficient commonality of disability as a result of which they are at a substantial disadvantage relative to persons who are not disabled in relation to a relevant matter. Also *Paulley v FirstGroup plc* [2017] 1 WLR 423

# Reasonable adjustments: substantial disadvantage

- Must be at a “substantial disadvantage” in relation to –

Part 4 (Sch 4 para 2(5))

*(a) the enjoyment of the premises;*

*(b) the use of a benefit or facility, entitlement to which arises as a result of the letting.*

- *Beedles v Guinness Northern Counties Ltd* [2011] EqLR 1081 - enjoyment of the premises. See *Thomas-Ashley v Drum Housing Association Ltd* [2010] EWCA Civ 265, [2010] 2 P. & C.R. 17

Part 3 (Sch 2 para 2(5))

*“if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit”*

# Reasonable adjustments: substantial disadvantage

- “Substantial disadvantage” means “more than minor or trivial” (s. 212)
- As noted by Elias LJ in MM v Secretary of State for Work and Pensions [2014] 1 W.L.R. 1716 it “is not, therefore, a particularly high hurdle to establish substantial disadvantage” [§42].
- The PCP may involve stress or anxiety for the non-disabled too, but if it “*bites harder on the disabled*” then the duty arises: Griffiths v Work and Pensions Secretary [2015] EWCA Civ 1265 at §§47 and 58.)).
- Burden on C to prove: R (Imam) v Croydon [2021] H.L.R. 44

# The duty to make reasonable adjustments: section 20

- “... *at a substantial disadvantage...*”
- “Substantial disadvantage” means “more than minor or trivial” (s. 212)
- *Being placed at a substantial disadvantage in relation to the exercise of a function means—*
  - (a) *if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or*
  - (b) *if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment: Schedule 2 para 2(5)*

# Reasonable adjustments: Comparison

*“... in comparison with persons who are not disabled...”*

- *“in many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play” Fareham College Corporation v Walters [2009] IRLR 991. See also CA in Smith v Churchills Stairlifts plc [2006] ICR 524 ( § 39) and in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 ( § 21).*
- Part 3 cases:
  - Between disabled persons generally and others
- Part 4 cases:
  - Between claimant/disabled person and those who do not have her disability

# Reasonable adjustments: when the duty arises

## Part 4

- The duty applies to the tenant or someone entitled to occupy: sch. 4 para 2(4)
- Duty applies only if the landlord “*receives a request from or on behalf of the tenant or a person entitled to occupy the premises to take steps to avoid the disadvantage*” sch. 4 paras. 2(6) and 3(5).
- BUT PSED includes duty to have due regard to the need to avoid discrimination – an anticipatory element for social landlords?

## Part 3

- An anticipatory duty

# The duty to make reasonable adjustments: an anticipatory duty

## Code of Practice

- *7.20 In relation to all three areas of activity (services, public functions and associations) the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service, avail themselves of a function or participate in the activities of an association.*

# The duty to make reasonable adjustments: an anticipatory duty

## Code of Practice

- *7.21 Service providers should therefore not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. Failure to anticipate the need for an adjustment may create additional expense, or render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defence to a claim of a failure to make a reasonable adjustment.*



# The duty to make reasonable adjustments: an anticipatory duty

## Code of Practice

- *7.24 Service providers are not expected to anticipate the needs of every individual who may use their service, but what they are required to think about and take reasonable steps to overcome are barriers that may impede people with different kinds of disability. For example, people with dementia, mental health conditions or mobility impairments may face different types of barriers.*

# The duty to make reasonable adjustments: section 20

- The duty is anticipatory but ...

*7.26 Once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services, it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that they face in accessing services, or has suggested a reasonable solution to that difficulty.*

- *H v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69; *Finnigan v Chief Constable of Northumbria Police* [2014] 1 WLR 445, para 32; *VC* [2018] 1 WLR 4781, para 157

# The duty to make reasonable adjustments: section 20

## Example:

A disabled person attending the annual general meeting of an association experiences a flare-up of their medical condition, as a result of which they would have experienced severe back pain when sitting on the hard chairs provided for the meeting. Despite the lack of notice, those organising the meeting were able to find a more suitable chair and make this available to the association member.

# The duty to make reasonable adjustments: section 20

## **Example:**

Customers in a busy post office are served by staff at a counter after queuing in line. A disabled customer with severe arthritis wishes to purchase a vehicle tax disc. He experiences pain if he has to stand for more than a couple of minutes. Other customers would not expect to have to undergo similar discomfort in order to buy a vehicle tax disc. Thus, the post office's queuing policy places the disabled customer at a substantial disadvantage. Consideration will have to be given as to how the queuing policy could be adjusted so as to accommodate the requirements of such disabled customers.

Depending on the size of the post office, staff could ask the customer to take a seat and then serve him in the same way as if he had queued. Alternatively, it might provide a separate service desk with seating for disabled customers.

# The duty to make reasonable adjustments: section 20

## Example:

A person with a visual impairment regularly receives printed letters regarding his social security benefits, despite the fact that on previous occasions he has indicated his need for Braille and this has been provided. He finds this repeated need to telephone to ask for Braille frustrating and inconvenient, but is told that the software, which generates communications, does not enable a record to be kept of customers' needs for alternative formats. This may constitute a failure to make reasonable adjustments if it is judged to have left the disabled person at a substantial disadvantage and there was a reasonable adjustment that could have been made.

# Reasonable adjustments: the duty

*“ ... to take such steps as it is reasonable to have to take to avoid the disadvantage...”*

- An objective test: Royal Bank of Scotland v David Allen [2009] EWCA Civ 1213 / Smith v Churchill's Stairlifts plc [2006] IRLR 41
- Cost is relevant but must be viewed in context: Cordell v Foreign and Commonwealth Office [2012] I.C.R. 280; Code of Practice para 7.2 / 7.3
- Code of Practice: *“a step does not have to be effective to be reasonable.”*
- But – schedule 2 para 2(8):
- *If A exercises a public function, nothing in this paragraph requires A to take a step which A has no power to take.*

# R (DMA) v Secretary of State for the Home Department [2021] 1 W.L.R. 2374

- The Secretary of State had breached her duty to make reasonable adjustments under section 20 of the 2010 Act by
  - failing to monitor disabled applicants for section 4(2) Immigration Act 1971 accommodation as part of the continuing duty and;
  - failing to provide an effective system for prioritising the claims of disabled applicants.

# Reasonable adjustments: Reasonableness

- A step does not have to be **effective** in order to be reasonable.
- The step will be reasonable if it would give the disabled person “a chance” or “a real prospect” of avoiding the disadvantage: Cumbria Probation Board v Collingwood UKEAT/0079/08; Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.
- In Part 3 cases, the Code of Practice says:  
*“In deciding whether a step is reasonable, a service provider should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.”*



# Reasonable adjustments: Discharge of duty

*“... to avoid the disadvantage.”*

- Archibald v Fife Council [2004] IRLR 651 at [15] Lord Hope

*“The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, [...] The crucial question is whether the council should have taken one more step”*

- Code of Practice: *“A service provider [including those exercising public functions] would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take.”*
- Failure to comply with the duty cannot be justified

# The duty to make reasonable adjustments: a continuing duty

Code of Practice § 7.27

- *The duty to make reasonable adjustments is a continuing duty. Service providers should keep the duty and the ways they are meeting the duty under regular review in light of their experience with disabled people wishing to access their services. In this respect it is an evolving duty, and not something that needs simply to be considered once only, and then forgotten. What was originally a reasonable step to take might no longer be sufficient, and the provision of further or different adjustments might then have to be considered.*

## **Example:**

A large sports complex amends its 'no dogs' policy to allow entry to assistance dogs. It offers assistance dog users a tour of the complex to acquaint them with routes. This is likely to be a reasonable step for it to have to take at this stage. However, the complex then starts building work and this encroaches on paths within the complex, making it difficult for assistance dog users to negotiate their way around. Offering an initial tour is therefore no longer an effective adjustment as it does not make the complex accessible to assistance dog users. The service provider therefore decides to offer assistance dog users appropriate additional assistance from staff while the building work is being undertaken. This is likely to be a reasonable step for the service provider to have to take in the circumstances then existing.

## **Example:**

A library has a small number of computers for the public to use. When the computers were originally installed, the library investigated the option of incorporating text-to-speech software for people with a visual impairment. It rejected the option because the software was very expensive and not particularly effective. It would not have been a reasonable step for the library to have to take at that stage. The library proposes to replace the computers. It makes enquiries and establishes that text-to-speech software is now efficient and within the library's budget. The library decides to install the software on a number of the replacement computers and to give priority access to those computers. This is likely to be a reasonable step for the library to take at this time.

# A term of the letting: adaptations

- Sch 4 para 2(7) if such a term that prohibits the tenant from making alterations puts the disabled person at such a disadvantage, A is required to change the term only so far as is necessary to enable the tenant to make alterations to the let premises so as to avoid the disadvantage.
- Para 2(8) *“It is never reasonable for A to have to take a step which would involve the removal or alteration of a physical feature.”*
- *Smailes & Poyner-Smailes v Clewer Court Residents Ltd*, Cardiff County Court 30 January 2019 (Unreported)

# Homelessness - Points to consider

- Does the authority always tell homeless applicants to attend housing office on date of eviction?
- How does this affect the ability to secure suitable accommodation where the applicant needs adapted accommodation?
- Are NS tenancy/licence agreements in Easy Read format?
- Do applicants have the a chance to have an advocate with them?
- Does the LA offer phone/video interviews?
- Do applicants have to wait in the waiting room for long periods? If so, how does it avoid those with chronic pain, mental health disorders and incontinence being at a particular disadvantage?

# Homelessness - Points to consider

- What is the practice for securing interim accommodation? What reasonable adjustment is built into the practice to make allowance for disabled applicants?
- How does the LA plan for those with Autism who find change and disruption to routine traumatising and difficult?
- Are there mechanisms for delivering planned and notified moves to interim or temporary accommodation, or is it 'on the day' accommodation?
- Is there an ability to provide advance information on temporary accommodation to ease transition?

# What are the relevant PCPs?

- A 'one offer' rule
- A practice or policy of giving accommodation for 28 days under section 190 HA 1996
- A practice or policy of discharging the relief duty after 56 days
- A practice or policy of using preferred suppliers of temporary accommodation
- A rent criterion
- The means of communication
- The criteria that will or wont be taken into account on suitability



# Case study: R (S) v Norwich

- Homeless applicant with relatively severe Autism. Unable to cope with shared space; profoundly anxious about social interaction and change/transition
- County Court made repeated orders with a view to allowing the LA to offer a planned and timely move to suitable interim accommodation before his eviction. They failed to do this telling him to present as homeless when he has a warrant.

# Case study: R (S) v Norwich

- In relation to what PCPs might Mr S be at a substantial disadvantage?
- What is the nature/consequences of the disadvantage? Does it go to the conferment of the benefit?
- What adjustments would be reasonable
  - At the anticipatory stage?
  - And at the delivery stage?

# What are the relevant PCPs?

- Policies and practices:
  - Requiring homeless applicants to defer making an application until they have received a notice of eviction, or until it has been executed
  - Searching for accommodation 'on the day' of eviction or not until it is needed urgently
  - Requiring applicants to be placed in 'stage 1' and then 'stage 2' interim or temporary accommodation
  - Requiring applicants to wait in the waiting room all day
  - Interviewing applicants in person
  - The budget that is spent on TA
  - Timetable of decision making
  - The type of accommodation that is provided / pool of availability

# The nature of the disadvantage

- He cannot cope with uncertainty and change needs to be carefully managed. He finds an 'on the day' allocation extremely stressful
- He cannot cope with a shared living space. It causes great stress which in turn affects his behaviour and makes such accommodation unsustainable.
- He cannot cope with a full public waiting room and cannot wait
- All of these things are a disadvantage in relation to the conferment of the benefit – i.e. housing and housing assistance

# Adjustments

- Anticipatory stage
  - A system for identifying applicants who need these adjustments and noting the requirements
  - Procedures that allow for advance planning of temporary accommodation
  - Systems that allow for information to be provided to applicants – e.g. a visual timetable, a video walk-through of temporary accommodation, timed appointments etc
- Delivery stage
  - Planned provision of accommodation
  - An increased budget

# Allocations - Points to consider

- Will people with some disabilities be unable to manage online systems?  
Are any alternatives sufficient?
- Are some housing related needs less accommodated, will some applicants be waiting longer?
- Does the allocations scheme account for mental health related disadvantages?
- Does a policy of group viewing disadvantage some applicants?
- Could information be made available in other formats?

# *Nur v Birmingham CC* [2021] EWHC 1138

- Allocation policies fell within Part 3 and not Part 4 because the authority was providing accommodation solely in the exercise of a public function.
- This meant it was under a pro- active duty to make reasonable adjustments under section 29(7) as opposed to the reactive duty under Part 4.
- The question was whether the Council’s housing allocation policy operated in practice put disabled people at a “substantial disadvantage - i.e. more than minor or trivial. It did.
- The Council had taken no steps to adjust the policy as operated to meet the needs of disabled people.

# *Nur v Birmingham CC* [2021] EWHC 1138

Adjustments that could have been made were:

- Properties that were adapted to meet the needs of disabled persons could be exempted from the automatic preference given for all houses to households with children
- If the preference given for all houses to households with children (presently all adapted properties) was to be maintained, pro-active steps could be taken to enable disabled people to secure other suitable accommodation when applying the policy.
  - information being provided to bidders about whether a non-house property was “adaptable”
  - measure of preference could be given to disabled households in applying for properties which could be adapted to meet the needs of the disabled



# 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.
- “expiry of the period in which they might reasonably have been expected to” make adjustment: s. 118(6); *Matuszowicz v Kingston upon Hull* [2009] I.R.L.R. 288
- Section 33 of the Limitation Act 1980 factors which the court must take into account

# 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?)
- 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)

# 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 £56,000

# 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*

# Burden of proof

- 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.*



## **Promoting the rights of Disabled clients**

Monica Kreeel  
Associate Solicitor

# **1. Some background, some history**

- Social model of disability
- A recent history of Disabled people's rights in the UK
- Cuts, cuts, cuts
- Fighting back through the UN

# **2. What's happening on the ground and our response**

- Public authorities' culture and practice: putting up barriers and twisting our language
- How we can respond and promote equality and human rights



# The Social Model of Disability

“The Social Model of Disability was developed by Disabled people and describes people as being disabled by barriers in society, not by our impairment or difference. If modern life was set up in a way that was accessible for Disabled people, then we would not be excluded or restricted.

“The social model of disability helps us recognise barriers that make life harder for Disabled people. These barriers are identified as being the physical environment, people’s attitudes, the way people communicate, how institutions and organisations are run, and how society discriminates against those of us who are perceived as ‘different’. Removing these barriers creates equality and offers Disabled people more independence, choice, and control.”

**Disability Rights UK**

# Social Model of Disability

“The Social Model frames disability as something that is socially constructed. Disability is created by physical, organisational and attitudinal barriers and these can be changed and eliminated. This gives us a dynamic and positive model that tells us what the problem is and how to fix it. It takes us away from the position of "blaming" the individual for their shortcoming. It states that impairment is, and always will be, present in every known society, and therefore the only logical position to take, is to plan and organise society in a way that includes, rather than excludes, Disabled people.”

Barbary Lisicki 2013

# A recent history of Disabled people's rights

Sex Discrimination Act 1975, Race Relations Act 1976 but no discrimination laws on disability

Disabled people self-organised, including the Direct Action Network and demonstrated in the 1980s and 1990s, including the "Piss on Pity" demonstrations of the early 1990s

Intense lobbying, protests and direct action led to the Disability Discrimination Act 1995 (DDA 1995)

But lots of exemptions: e.g. it didn't cover small employers or housing; and no statutory body to enforce the DDA

# A recent history of Disabled people's rights

- Disability Rights Commission (DRC) set up in 2000
- DDA extended in 2000 and 2005 – including extensions in the definition of disability, coverage of all employers, public sector duty
- Involvement of Disabled people in shaping the DDA and its Codes of Practice
- DRC supported legal cases that strengthened the law e.g. redefining was meant by reasonable adjustments

# UN Convention on the Rights of People with Disabilities (UNCRPD)

Ratified by the UK in 2009 as an unincorporated Treaty (its role in UK law looked at in R (Davey) v Oxfordshire County Council & Ors [2017])

Article 4 – General obligations to abolish legal barriers and promote Disabled people’s rights: “To undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”

“With regard to **economic, social and cultural rights**, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.”

# UNCRPD

## **Article 19 - Living independently and being included in the community**

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs

# UNCRPD

## Article 28 - Adequate standard of living and social protection

1. States Parties recognize **the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions**, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures... (see full Article)

# Change of direction and austerity

- Disability Rights Commission dissolved into the Equality and Human Rights Commission in 2007 – much more Government involvement
- Financial crash of 2007/8
- Austerity policies of Coalition and Tory Governments from 2010, including welfare reform (bedroom tax, 2 child policy, LHA reductions), cuts to local authority spending, NHS spending that has not kept up with need
- Local authorities started issuing notices under s.114 Local Government Finance Act 1988. A section 114 notice enables them to issue a reduced budget under which they commit to only providing essential services which are required under statute.
- One in five council in England expect to issue a s.114 notice over the next year



# Disability and poverty

Almost half of all people in poverty in the UK are living in families with a Disabled person.

Two thirds of Disabled people living alone are in poverty.

Poverty worse for Disabled people from Black and minority ethnic communities

Only 50 per cent of Disabled people of working age in the UK in employment compared to 80 per cent of non-disabled people of working age (2017)

Disabled people more likely to be in debt

(Source: Luke Clements/ Fact and figures 2018: Disability in the UK)

# Taking the UK to the UNCRPD Committee

- Disabled people's organisations petitioned the UNCRPD Committee in 2015.
- The UN Committee found that “grave” and “systematic violations” of Disabled people's rights had taken place because of welfare reforms in the UK since 2010. The Committee said welfare reforms had “disproportionally and adversely” affected the rights of Disabled people, citing changes to Housing Benefit entitlement, eligibility criteria for Personal Independence Payment (PIP) and social care, and the ending of the Independent Living Fund.
- Found breaches to Articles 19, 27 and 28

# UK Government's Response

In March 2024, the UK Government was questioned by the Committee.

Svetlana Kotova, Inclusion London commented:

"The UK government says it is "fully committed" to the UNCRDP, but it could not tell the UN any steps it has taken towards the UN's recommendations given in 2017 when the UK was found to have committed grave and systematic violations of our rights. **This is because there has been no progress since the government rejected those findings and all recommendations.** We continue to be detained and kept in institutions, with no progress towards our right to independent living, and the government is doing nothing to lift us out of poverty caused by its punitive benefits sanction regime. We hope the UN's further report will outline these failures and call for the government to make the drastic and urgent changes we need to enjoy our human rights like everyone else."

# How does this affect policy and practice on the ground?

## Gatekeeping

Examples:

- Cuts to front line staff so you it's harder to access services
- Staff without the specialist skills to understand the needs of disabled people
- Tighter enforcement of rules e.g. Care Act eligibility
- Waiting lists for assessments or services
- Simply not doing anything at all!

# **Bureaucratic systems**

- More processes to follow before you finally get a service
- Referrals leading to other referrals: disabled people's lives stuck while they wait for the next stage and often go round in circles
- Funding panels, even for small decisions
- Inaccessible IT systems
- Disabled people and their carers using all their energy to fight; frustrated, exhausted and labelled as difficult

# **Discriminatory restrictions to services**

For example:

- Wheelchair and seating services not being offered to people living in care homes
- Disabled migrants being denied services under the Care Act and channelled through NRPF teams instead
- Children's Services refusing to recognise children with autism or mental health issues as "disabled", unless they have a learning disability
- Charging for services that should be free

## **Disabled people not believed**

- Increasing demands for medical evidence
- Intrusive and inhumane assessments

A recent example:

A 90-year old woman with dementia had a “reablement assessment” involving six people (an OT, two care workers, a care agency manager, an interpreter and a social worker) who watched her being stripped and washed. The purpose was to see if the care could be delivered in a quicker or cheaper way.

**Social model subverted** meaning that the language of rights and empowerment is twisted and used against Disabled people

The concept of “resilience” taken from vulnerability theory → “you can manage with less; this will be good for you”

Equality legislation → “you’ve got equal access so you don’t need targeted services or benefits”

Strengths based assessments → “it would patronise you and disempower you to give you services”



## **Barriers in accessing justice**

- LASPO 2013 and JR regulations – no payment without permission (except for interim relief)
- Harder to find a legal aid solicitor
- Harder for legal aid solicitors to get the funding they need from the LAA to cover their costs or instruct experts
- Inaccessible, run down or closed down courts
- Longer waits for hearings

# How can we work to support our clients' rights

## **Understand the climate:**

Listen and hold people's distress especially in the first appointment – your client has struggled to get hold of a solicitor and may need time to vent and tell their story

Believe your clients' unbelievable tales

Understand why your client may have been labelled as awkward or difficult

Understand how anger and trust issues affect your client's relationship with you (especially if giving negative advice)

# Supporting our clients' rights

**Give your client agency in their own case.** Involve your client, ask them how they want to be described, let them tell their own story – and don't reduce them to a list of impairments, their trauma or their immigration history

**Try and think social model** even though we're being forced into a medical model. What are the barriers to your Disabled client being able to achieve their aspirations in life? How can you explain these ?

**Understand and convey the person's aspirations for equality** even if we have to explain medical conditions and impairments

**Legal help forms** Don't start with the equality monitoring information (ethnicity, disability etc)

# Supporting our clients' rights

**Make reasonable adjustments in our own practice**, for example finding out about your clients' communication needs and their needs at court. Keep a reasonable adjustment form on file, which can also record their language needs

**Ensure written communication is accessible.** Nothing wrong with plain English

**Be wary of well-meaning advocates/friends/parents etc** Just because we're rushed, doesn't mean we can cut out our client from being centre stage in their own case.

**Keep mental capacity under review**

# Supporting our clients' rights

## Language is important

From Disability Rights UK:

“Language is an important part of the Social Model of Disability because language reflects the cultural assumptions and thinking of the society around us. Language is never purely descriptive - it shapes how we see each other, the value we place on different identities, and sometimes how we behave.

“In the past, Disabled people were described in a way that reflected a negative or medical view of disability. These terms, such as ‘cripples’, ‘handicapped’ and ‘wheelchair bound’ reinforce a negative view of Disabled people and often show us as powerless ‘victims’ or ‘objects’.

However, Social Model language rejects this negative or medical language and replaces it with more positive language that sees us as human beings. For example, “Disabled person”, “wheelchair user”, and “person with learning disabilities”.

## **Language is important**

Vulnerable/vulnerability: avoid the “V word” because we are all vulnerable as human beings and rely on society to protect us. We become more vulnerable when the social fabric is not there. Economic and social power makes us more resilient. (But taking away our services doesn’t make us more resilient).

Don’t be afraid to correct or query barristers or judges in their use of language. (See the Equal Treatment Bench Book).

# Supporting our clients' rights

**Aim high for your clients** Despite crumbling and local authorities going bankrupt, still strive for Disabled people's rights as set out in the UN Convention. And remember, a public authority not having money is not a valid excuse to disregard statutory duties.

**Look out for spurious policies, inaccessible bureaucracy, excessive waiting times, gatekeeping** and challenge these practices. Don't join in the climate of fatalism!

**Use legislation, statutory guidance and non-statutory guidance written in better times:** Autism Act and its guidance, Equality Act Codes of Practice, Care and Support Statutory guidance

**Think strategically:** Is there a systemic or policy issue you can follow through with a JR PAP letter before action, a complaint, a review under s.44 Care Act, involvement of Equality and Human Rights Commission?

# Supporting our clients' rights

- **Recruit and support Disabled colleagues** Remember, no such thing as unlawful positive discrimination for Disabled people under the Equality Act. The legislation is asymmetrical.
- **Listen to what Disabled people and their organisations are saying about how policies are affecting them on the ground** and use this information in your practice.
- **Attend events organised by Deaf and Disabled people's organisations** (“Orgs of” disabled people, not “Orgs for”)
- **Expand your knowledge of Deaf and Disabled people's history, culture and present day struggles**



# ACCESSIBILITY AND PARTICIPATION

- HM Courts & Tribunals Services have a duty to make reasonable adjustments under the Equality Act 2010.
- Preparation is key.
  - Some basic accessibility information at <https://www.gov.uk/find-court-tribunal> but not always accurate. Contact the court early to check.
  - Make sure you understand your client's accessibility needs clearly and accurately – don't make assumptions.
  - Advise clients about security checks so they can prepare, if necessary.

# ACCESSIBILITY AND PARTICIPATION

- Anti-discrimination and reasonable adjustment duties under EA 2010 do not apply to exercise of judicial functions: Schedule 3, para 3.
- BUT Equal Treatment Bench Book, available at:  
<https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/>
- Practice Direction 1A – Participation of Vulnerable Parties or Witnesses.  
Consider whether to seek a ground rules hearing.



## Allocation Schemes

# Introduction

- a local housing authority must comply with the provisions of Part 6 in allocating housing accommodation: section 159(1) HA 1996
- a local housing authority must have a scheme for determining priorities and the procedure to be followed in the allocation of housing stock: section 166A(1) HA 1996
- in determining priorities the scheme must be framed so that reasonable preference is given to prescribed categories of applicants: section 166A(3) HA 1996
- the authority may only allocate housing to eligible and qualifying persons: section 160ZA HA 1996
- The power to set qualification criteria in section 160ZA (7) is subject to the reasonable preference requirement in section 166A (3)

# SECTION 166A (5)

(5) The scheme may contain provision for determining priorities in allocating housing accommodation to people within subsection (3); and the factors which the scheme may allow to be taken into account include—

- (a) the financial resources available to a person to meet his housing costs;
- (b) any behaviour of a person (or of a member of his household) which affects his suitability to be a tenant;
- (c) any local connection (within the meaning of section 199) which exists between a person and the authority's district.

# CODE OF GUIDANCE

- a local housing authority shall in the exercise of its functions have regard to such guidance as may from time to time be given by the Secretary of State a local housing authority shall not allocate housing accommodation except in accordance with their allocation scheme: section 169 HA 1996

- Paragraph 3.26 of the Code of Guidance :

“In framing their qualification criteria, authorities will need to have regard to their duties under the equalities legislation, as well as the requirement in s.166A(3) to give overall priority for an allocation to people in the reasonable preference categories.”

# WIDE DISCRETION

*R (Ahmad) v Newham LBC [2009] UKHL 14*

Local authorities have a wide discretion as to the principles on which their scheme should be framed and the way in which housing accommodation should be allocated

“... such a policy [an Allocations Scheme] must comply with the statutory requirements and with the general public law requirement of rationality. It must, of course, be lawfully and fairly operated, for example without unlawful discrimination.”

# ALLOCATION SCHEME REQUIREMENTS

- a local housing authority shall not allocate housing accommodation except in accordance with their allocation scheme: section 166A(14) HA 1996

*R (Flores) v Southwark LBC [2020] EWCA Civ 1697*

“Section 166A(14) requires a local authority to comply with the Allocation Scheme which it is established, not only when deciding which applicant should be selected or nominated for a particular property, but also when deciding where on the waiting list an applicant should be placed.”



# INTEPRETATION OF SCHEME

- The meaning of a housing allocation scheme, like that of any other comparable policy document, is for the court to determine but in interpreting the meaning of an allocation scheme, a court should adopt a practical, common sense, non-legalistic approach which allows a degree of flexibility for individual cases

*R (Ariemuguvbe) v Islington LBC* [2009] EWCA Civ 1308

# INTERPRETATION: NUR V BIRMINGHAM CC [2020] EWHC 3526 (Admin)

The First Claimant's household comprised of the First Claimant and her three adult daughters

The Second Claimant has cerebral palsy with spastic diplegia

The Occupational Therapy Service assessed the Second Claimant as requiring an adapted property

## **Policy**

*To enable the best use of the Council and partner registered provider stock, properties will be allocated to those applicants who need that size and type of property.*

*As such, preference for houses with two or more bedrooms will be allocated to families with dependent children.*

*Sheltered housing and extra care accommodation will be allocated to older people.*

*Properties with adaptations will be allocated to persons with a physical or sensory disability.”*

# INTERPRETATION: NUR V BIRMINGHAM CC [2020] EWHC 3526 (Admin)

As a result of the Second Claimant's disability, the Claimant was only permitted by the Defendant to bid on four-bedroom properties that were adapted or adaptable.

In 2019 Council stated that in the exercise of its discretion the First Claimant was now eligible to bid for three bedroomed property

The First Claimant made a bid and as of 7 July 2019 was listed on the website as being at bid position one The Defendant then withdrew the First Claimant's bid.

***Your client's children are all adults, and therefore she is classed as not having dependent children. Your client continues to be eligible to bid for accommodation, including bids for flats and maisonettes.***

# INTERPRETATION: NUR V BIRMINGHAM CC [2020] EWHC 3526 (Admin)

- The local authority had acted unlawfully and in breach of its own allocation policy by skipping the claimant's bid for the adapted property because she had no children in the family unit. The true construction of the scheme was to give families with children a head start in being considered for a house.
- However, it had been operated unlawfully so that the absence of children in a family was treated as decisive for any allocation decision.
- Nothing in the scheme explained what weight should be allocated to families with children in comparison with other applicants. That lacked transparency and predictability, and had led unsurprisingly to an effective automatic decision in favour of any family with children.
- Further, the local authority had allocated adapted housing to families with children who did not need the adaptations, cutting across its duty to make reasonable adjustments towards disabled people. The local authority had misunderstood its own scheme and acted unlawfully in its implementation .

# ACADEMIC CLAIMS: NUR v BIRMINGHAM CC

- The claimants had permission to review the lawfulness of the allocation scheme, in particular to determine whether the local authority was acting lawfully in preferring applicants with children over applicants with dependent disabled adults.
- The claimants did not cease to have standing under [CPR Pt 54](#) as a result of the discretionary offer of accommodation.
- Further, a public body could not avoid legitimate examination of the lawfulness of its decision-making process by making an exception for an individual affected by that process, and then argue that the challenge to the process should not proceed because it was rendered “academic” by the exception it had made.
- Claim for damages and declaratory relief.

# Allocations scheme and the Equality Act 2010

- Direct discrimination: s.13
- Discrimination arising from disability: s. 15
- Indirect discrimination: s.19
- Discrimination by failing to make reasonable adjustments: s. 21

# Part 3: Services and public functions

- Exercise of public function / provision of services – **s.29**
- **Section 29(6)** a person must not in the exercise of a public function must not do anything that constitutes discrimination
- **Section 29(7)(b)** a duty to make reasonable adjustments applies to a person who exercises a public function/service provider

# Indirect discrimination: section 19

- 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
- a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:
  - A applies, or would apply, it to persons with whom B does not share the characteristic
  - 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
  - it puts, or would put, B at that disadvantage, and
  - A cannot show it to be a proportionate means of achieving a legitimate aim.
- “Disadvantage” is not defined in the EqA. It includes a denial of choice and “it is enough that the person can reasonably say that they would have preferred to be treated differently” (paragraph 5.10 EHRC Services Code).
- Under paragraph 2(5) of Schedule 2 ““Being placed at a substantial disadvantage in relation to the exercise of a function means ... if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.



# Reasonable adjustments: section 20

- Where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then A is under a duty on to take such steps as it is reasonable to have to take to avoid the disadvantage.
- Paragraph 2(2) Schedule 2 provides that the reference in section 20(3) to a disabled person is to disabled persons generally
- For the purposes of section 20 EqA 2010, “substantial” means more than minor or trivial (*section 212(1) EqA 2010*).
- “Disadvantage” is not defined in the EqA. It includes a denial of choice and “it is enough that the person can reasonably say that they would have preferred to be treated differently” (paragraph 5.10 EHRC Services Code).
- Under paragraph 2(5) of Schedule 2 ““Being placed at a substantial disadvantage in relation to the exercise of a function means ... if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment

# Failure to make reasonable adjustments: section 21

- Failure to comply with the duty to make reasonable adjustments constitutes discrimination
- If a Part 3 claim there is an anticipatory duty to make reasonable adjustments.
- If a part 4 claim then duty applies only if A *“receives a request from or on behalf of the tenant or a person entitled to occupy the premises to take steps to avoid the disadvantage”* sch. 4 paras. 2(6) and 3(5).

# PCP

- 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
  - *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.***
- Allocations policies qualify as a PCP

# Essop v Home Office [2017] 1 WLR 1343

- Don't have to show reason why a PCP puts one group sharing a PCP at a disadvantage; enough that it does .
- Protected characteristic need not be the reason for the less favourable treatment, needs a causal link between the PCP and the disadvantage suffered.
- Aim is to achieve a level playing field – where people sharing particular PC are not subject to requirements which many of them cannot meet but which cannot be shown to be justified. Aim is to achieve equality of results.
- Reasons why one group may find it harder to comply with the PCP than others are many and various.
- Reason for disadvantage need not be unlawful in itself
- No requirement that every member of a group be put at a disadvantage.
- Commonplace for particular disadvantage to be established on the basis of statistical evidence.
- Always open to Respondent to show that PCP is justified

# Adverse impact: burden of proof

- S136:

*“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision”*

- First stage: evidential burden on claimant to demonstrate *prima facie* case on all the facts/evidence
- Burden then shifts to defendant to demonstrate no discrimination on balance of probabilities
- Court entitled to draw adverse inferences: e.g. *Base Childrenswear v Otshudi* [2019] EWCA Civ 1648 (wholly untruthful reasons for dismissal of Black employee)

# Administrative court /county court?

*Hamnett v Essex County Council* [2014] 1 WLR 2562

- The clear intention of Parliament is that claims under section 29 must be brought in the county court.
- In general the Administrative Court is not well suited to hear factual disputes of the sort that may arise under section 29 and other similar provisions of the 2010 Act.
- Normally permission would not be granted where there is an adequate alternative remedy.

# 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)
  - Tortious damages for consequential loss, damage and injury
  - Injunctive relief
  - Quashing orders, mandatory orders and declaratory relief
- 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)

# Allocations

## ***R (H) v Ealing London Borough Council [2017]***

- The Council's Working Households Priority allocations scheme discriminated inter alia against disabled persons who were less likely to be able to satisfy its requirements of needing to be in work to be eligible for an allocation than non-disabled persons.
- There had been an initial failure to comply with section 149(1) EqA 2010 by failing to provide a proper equality impact assessment. There was no analysis of the number of non-working disabled people who had been overtaken or were at risk of being overtaken by working people lower down the same priority band or on a lower band.



## R (Ward & Others) v Hillingdon LBC [2019] EWCA Civ 692

- a. The court had to be satisfied that an allocations policy did not unlawfully discriminate
- b. In a case of indirect discrimination the comparison was between groups rather than individuals [57]. There was no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage
- c. The groups for comparative purposes consisted of those who shared the relevant protected characteristic and those who did not. The fact that some members of the comparator group were also disadvantaged by the PCP did not negate indirect discrimination if a higher proportion of the protected group suffered that disadvantage
- d. There was no requirement under the Equality Act 2010 for the Claimant to show why the PCP put one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It was enough that it did

## R (Ward & Others) v Hillingdon LBC [2019] EWCA Civ 692

- a. The burden lay on the policymaker to justify the impugned PCP – this it had failed to do by the material it relied on.
- b. The key principle was the goal of equality of outcome. If a PCP resulted in a relevant relative disadvantage as regards one protected group, any measure relied on as a safety valve had to overcome that relative disadvantage.
- c. There was no evidence that the safety valves within the allocation policy had actually operated to eliminate the disadvantage to the protected groups.
- d. The authority had not attempted to justify the indirect discrimination in the sense of acknowledging that there was discrimination and explaining why it was justified.

# R (Ward & Others) v Hillingdon LBC

- Compliance with the public sector equality duty involved a duty of inquiry. In formulating a policy it was not incumbent on a policy maker to assess the potential indirect discriminatory effect on every conceivable group that shared a protected characteristic. By 2016 when a court challenge had been made, the authority ought to at least have considered the position of the protected group and its failure to do so was a breach of the public sector equality duty.

# Nur v Birmingham CC [2021] EWHC 1138

## The policy

- *To enable the best use of the Council and partner registered provider stock, properties will be allocated to those applicants who need that size and type of property.*
- *As such, preference for houses with two or more bedrooms will be allocated to families with dependent children.*
- *Sheltered housing and extra care accommodation will be allocated to older people.*
- *Properties with adaptations will be allocated to persons with a physical or sensory disability.”*

# Nur v Birmingham CC – facts

- The Council's Occupational Therapy Service assessed the Second Claimant as requiring an adapted property.
- This meant that her mother, the First Claimant could only realistically bid for adapted accommodation or accommodation that was said to be capable of being adapted.
- There was no adapted accommodation that was not a house.
- The policy was operated by the Council's officers so that the absence of children in a family was treated as a decisive matter for any allocation decision – so a family with children under 18 would always trump a family with a disabled child over 18.

# ONS Report 2020

- Disabled people are far more likely to live in social housing than non-disabled people (24.9% of disabled people as opposed to 7.8% of non-disabled people).
- Disabled people aged 24 and over are significantly more likely to live with their parents than non-disabled people in the same age group. For those between 30-34 years old, 15.5% of disabled people lived with their parents compared to 9.5% of non-disabled people
- Disabled people with autism and those with severe learning difficulties are by far the most likely to live with their parents into adulthood.

# Decision – indirect discrimination s.19

- Council had misunderstood its own policy by treating the presence of children under 18 as decisive when allocating houses.
- No defence to a discrimination claim for the unintentional discriminator to say that they were unaware of the discriminatory effect of the decision making system.
- The comparison was between persons on the register who were applying for properties and had a disabled person in their household and persons who did not have a disabled person in their household.
- Non-disabled households were able to bid for all properties on the Council's list.

# Decision – indirect discrimination: s.19

- Disabled households were only in practice, able to have any chance of bidding successfully for adapted properties.
- The pool of potential properties was further diminished by the rule which gives priority for houses to households with children.
- This was a particular disadvantage.
- Also relevant to take account of the fact that disabled households were less likely to be able to bid successfully for houses than non-disabled households because they were less likely to have a child in their household.



# Decision – indirect discrimination: s.19

- Decision to offer a measure of preference to houses for families with dependent children was a legitimate aim.
- But council had failed to show that proportionate.
  - Obligated to look at how the Council's policy worked out in practice. Not limited to looking at the words of the policy itself.
  - The reasons advanced to justify giving a preference for houses to households with dependent children applied equally to households where a member was a young adult with learning difficulties.
  - No evidence to show that the remaining pool of properties that were available to disabled households left disabled households without children with a reasonable pool of properties they could bid for.
  - **Not an answer to say that the Council retained a discretion to allocate property outside of the bidding system**

# Decision – reasonable adjustments

- Allocation policies fell within Part 3 and not Part 4 because the authority was providing accommodation solely in the exercise of a public function.
- This meant it was under a pro- active duty to make reasonable adjustments under section 29(7) as opposed to the reactive duty under Part 4.
- The question was whether the Council’s housing allocation policy operated in practice put disabled people at a “substantial disadvantage - i.e. more than minor or trivial. It did.
- The Council had taken no steps to adjust the policy as operated to meet the needs of disabled people.

# Decision – reasonable adjustments

- Adjustments that could have been made were:
- Properties that were adapted to meet the needs of disabled persons could be exempted from the automatic preference given for all houses to households with children
- If the preference given for all houses to households with children (presently all adapted properties) was to be maintained, pro-active steps could be taken to enable disabled people to secure other suitable accommodation when applying the policy.
  - information being provided to bidders about whether a non-house property was “adaptable”
  - measure of preference could be given to disabled households in applying for properties which could be adapted to meet the needs of the disabled

# PSED

- One of the purposes of the PSED is to ensure that unintended discrimination is identified by a public body before it results in individuals with protected characteristics from suffering adverse outcomes.
- Accepted by the Council that this made it very difficult for it to demonstrate that it had discharged its Public Sector Equality Duty because it simply did not have any reliable information to enable Council officers or members to know how the scheme was working and whether the scheme was, in practice, impacting adversely on any group of Birmingham residents with protected characteristics.

# PSED

- The EIA could not be criticised for not having foreseen every single problem arising from the interaction of different policy decisions.
- The Council never reviewed how the policy was working in practice and they did not undertake any analysis to see how the scheme was impacting on those with protected characteristics at any point after 20 April 2017 when the policy became live.
- The Council had been operating a scheme for the past 4 years without knowing whether, in practice, the scheme achieved the objectives which were set out when the scheme was launched or had unintended consequences which impacted adversely on groups of Birmingham residents with protected characteristics.

# R (Willott) v Eastbourne Council (2024)

## EWHC 113

- Claimant had diagnoses of ADHD and autistic spectrum disorder. Evicted for ASB.
- Council refused entry on to the housing register on grounds of serious ASB.
- Alleged that this amounted to disability discrimination.
- Claim failed.

# R (Willott) v Eastbourne Council (2024)

## EWHC 113

- Section 19 indirect discrimination: C had failed to show that policy excluded a greater number of persons with ADHD and an autistic spectrum condition than persons without those disabilities. In any event, policy proportionate.
- Ss. 20 & 21: C had failed to show that establish that policy resulted in substantial comparative disadvantage to people with neuropsychiatric conditions. No duty to make reasonable adjustments.
- Section 15: evidence did not show that C's ASB was in consequence of disability.

# Damages - Nur

Damages relatively modest.

*“It may well be that, even if the Council had made the adjustments that it ought to have made to the policy to remove the disadvantages suffered by Mrs Nur, the intense competition for suitable properties would not have resulted in Mrs Nur securing a property at an early stage. She clearly ought to have secured a suitable property earlier than she did, but the very significant mismatch between supply and demand may well mean that she would not have been allocated a property a significant time prior to the issue of these proceedings ”*



# Disabled Facilities Grants and Reasonable Adjustments



# ENGLISH HOUSING SURVEY 2019/20

- 8% of all households in England (1.9 million) had at least one person with a long-standing physical or mental health condition and said that they required adaptations to their home
- 53% of households that required adaptations reported that they did not have all the adaptations they needed (going up!)
- 25% of private renters, and local authority renters who needed adaptations reported having unsuitable housing, with a smaller figure of 21% for housing association tenants and 17% for owner-occupiers
- Returns submitted over 2019/20 for England showed 70,563 grant applications were received leading to the adaptation of 58,181 homes (for owner occupiers and tenants of private landlords or housing associations).

# DISABLED FACILITIES GRANTS

- Grants from local authority for disabled people who need to make adaptations to their homes
- Can apply for grants of up to £30,000 in England, and £36,000 in Wales (with councils having discretion to "top up")
- Can be paid in instalments as work progresses, or in one lump sum at conclusion of works
- Applications are made to the local council
- Central government funding for DFGs in England set to be £573 million in 2023/24, and to stay at that level in 2024/25 – but there are concerns that this money is not trickling down
- National Disability Strategy published in July 2021 promised new guidance (published in March 2022), and social care White Paper promised increase to maximum grant limit, changes to the means test, a review of grant allocation, new fund for minor repairs – but no consultation as yet!

# ELIGIBILITY

## **19 Disabled facilities grants: owner's and tenant's applications.**

- (1) A local housing authority shall not entertain an application for a . . . grant unless they are satisfied—
- (a) that the applicant has, or proposes to acquire, an owner's interest in every parcel of land on which the relevant works are to be carried out, or
  - (b) that the applicant is a tenant (alone or jointly with others)—
    - (i) in the case of an application in respect of works to a dwelling, of the dwelling, or
    - (ii) in the case of a common parts application, of a flat in the building,
- and, in either case, does not have or propose to acquire such an owner's interest as is mentioned in paragraph (a), or
- (c) that the applicant is an occupier (alone or jointly with others) of a qualifying houseboat or a caravan and, in the case of a caravan, that at the time the application was made the caravan was stationed on land within the authority's area.

In this Chapter “tenant”, in relation to a . . . grant, includes—

- (a) a secure tenant, introductory tenant or statutory tenant,
  - (aa) a tenant or licensee under a secure contract within the meaning of the Renting Homes (Wales) Act 2016 (anaw 1) (see section 8 of that Act),
  - (ab) a tenant or licensee under an introductory standard contract within the meaning of the Renting Homes (Wales) Act 2016 (see section 16 of that Act),
- (b) a protected occupier under the M2Rent (Agriculture) Act 1976 or a person in occupation under an assured agricultural occupancy within the meaning of Part I of the M3Housing Act 1988,
- (c) an employee (whether full-time or part-time) who occupies the dwelling or flat concerned for the better performance of his duties, and
- (d) a person having a licence to occupy the dwelling or flat concerned which satisfies such conditions as may be specified by order of the Secretary of State

## Means tested (**Housing Renewal Grants Regulations 1996**)

- Assess how much the household needs to live on. This is referred to as 'allowable income' and is calculated using a set of standard allowances for living costs using basic amounts of income support/pension credit and a flat rate allowance for housing costs.
- Compare this with their actual income to see if they have any 'surplus' income they could use to pay off a loan. A 'tariff' income is added on for any savings over £6,000. If the household is in receipt of any means tested benefits, they are automatically 'passported' through and awarded a 100 per cent grant even if they have some small surplus income according to this calculation.
- For those not in receipt of means tested benefits, calculate how big a loan they could afford to pay off using their 'surplus' income. The calculations assume a loan period of 10 years for owner-occupiers and 5 years for tenants at a standard rate of interest and incorporate 'tapers'.
- Compare the size of the loan they could afford with the cost of the work needed to see whether they qualify for a grant. If the calculated loan amount is the same or greater than the cost of the adaptations, they do not get any grant. If the loan amount is less than the cost of works, the amount of grant is calculated as the total cost of works minus the calculated loan amount

# PURPOSE

## **23 Disabled facilities grants: purposes for which grant must or may be given.**

(1) The purposes for which an application for a . . . grant must be approved, subject to the provisions of this Chapter, are the following—

(a) facilitating access by the disabled occupant to and from

(i) the dwelling, qualifying houseboat or caravan, or

(ii) the building in which the dwelling or, as the case may be, flat is situated;

(b) making

(i) the dwelling, qualifying houseboat or caravan, or

(ii) the building,

safe for the disabled occupant and other persons residing with him;

(c) facilitating access by the disabled occupant to a room used or usable as the principal family room;

(d) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room used or usable for sleeping;

(e) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a lavatory, or facilitating the use by the disabled occupant of such a facility;

(f) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a bath or shower (or both), or facilitating the use by the disabled occupant of such a facility;

(g) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a washhand basin, or facilitating the use by the disabled occupant of such a facility;

(h) facilitating the preparation and cooking of food by the disabled occupant;

(i) improving any heating system in the dwelling qualifying houseboat or caravan to meet the needs of the disabled occupant or, if there is no existing heating system there or any such system is unsuitable for use by the disabled occupant, providing a heating system suitable to meet his needs;

(j) facilitating the use by the disabled occupant of a source of power, light or heat by altering the position of one or more means of access to or control of that source or by providing additional means of control;

(k) facilitating access and movement by the disabled occupant around the dwelling qualifying houseboat or caravan in order to enable him to care for a person who is normally resident there and is in need of such care

- making it easier to get into and out of the dwelling by, for example, widening doors and installing ramps;
- ensuring the safety of the disabled person and other occupants by, for example, providing a specially adapted room in which it would be safe to leave a disabled person unattended or improved lighting to ensure better visibility;
- making access easier to the living room;
- providing or improving access to the bedroom, and kitchen toilet, washbasin and bath (and/or shower) facilities; for example, by installing a stair lift or providing a downstairs bathroom;
- improving or providing a heating system in the home which is suitable to the needs of the disabled person;
- adapting heating or lighting controls to make them easier to use;
- improving access and movement around the home to enable the disabled person to care for another person who lives in the property, such as a spouse, child or another person for whom the disabled person cares;
- Improving access to a garden (*The Disabled Facilities Grants (Maximum Amounts and Additional Purposes) (England) Order 2008 (SI 2008/1189)*)



# TEST

## Section 24(3)

a local housing authority must satisfy itself that the works are necessary and appropriate to meet the needs of the disabled person, and are reasonable and practicable depending on the age and condition of the property.

In reaching a decision, the authority will consider whether the works:

- are needed to provide for a care plan to be implemented which will enable the disabled occupant to remain living in their existing home as independently as possible;
- would meet, as far as possible, the assessed needs of the disabled person taking into account both their medical and physical needs; and
- distinguish between what are desirable and possible legitimate aspirations of the disabled person, and what is needed, and for which grant support is fully justified.

- For the housing authority to make, but there is a duty to consult with Social Services on whether works are necessary and appropriate (not whether they are reasonable and practicable)
- Should get a decision within six months
- Decision challengeable on ordinary public law grounds (not a factual decision for the court): *R (Gulrez) v Redbridge LBC* [2022] EWHC 2908 (Admin)

# APPLICATION PROCESS

- Must be made in writing
- Must specify works needed
- Must include at least two estimates of the costs of carrying out the works and details of any other services and charges such as the disconnection of utilities
- Have to supply either owner certificate or tenant certificate (with owner certificate from landlord most of the time)
- Should get decision within six months, with reasons for refusal if appropriate
- Challenge is by way of judicial review (though you can also complain to LA or ombudsman)
- Can also apply to LA for discretionary grant if you do not meet the criteria for mandatory DFG (helpful where you want to move to new property)

# PRIVATE LANDLORDS

- Disabled people, the report said, also “face particular problems in the private rented sector”, with reports of private sector landlords being reluctant to allow adaptations (EHRC report, *Housing and disabled people: Britain’s hidden crisis*, May 2018)
- 79% of landlords had no knowledge of DFGs but after finding out more “68 percent of landlords were more willing to adapt their properties.” (NRLA press release, May 2021)

# EQUALITY ACT - ADAPTATIONS

## Section 190 Equality Act 2010

- Applies where tenant /occupant is disabled person and property is their only and main home.
- Tenant must be entitled, with the consent of the landlord, to make improvements to the premises and must have applied for consent in writing to make a 'relevant improvement'.
- A 'relevant improvement' is:
  - An alteration in or addition to premises, including in relation to fittings and fixtures, the provision of services to the premises... • that, having regard to the disabled person's disability, is likely to facilitate that person's enjoyment of the premises.

# LANDLORD'S CONSENT

## Section 190 Equality Act 2010

- If landlord refuses consent, must give written statement of reasons.
- If consent 'unreasonably withheld' it must be taken to have been given.
- If landlord fails to respond to request within reasonable time, consent to be taken to have been unreasonably withheld.
- It is for the landlord to prove that any consent was not unreasonably withheld.

NOTE: Does not apply to all tenancies. In particular, does not apply to secure tenancies, but similar provision in sections 97-98 Housing Act 1985.

# REASONABLE ADJUSTMENTS

## PART 4 PREMISES

### Section 35 Equality Act 2010

- A person who manages premises (A) must not discriminate against a person (B) who occupies the premises in the way in which A allows B, or by allowing B to make use of a benefit or facility... or by subjecting B to any other detriment.
- Discrimination includes direct discrimination, indirect discrimination, discrimination arising from disability and failure to make reasonable adjustments (see section 21 Equality Act 2010).
- Section 35 prohibits harassment and victimization.
- Where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with a person who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage

# PN CONT.

Section 20(13) directs us to Schedule 4 in relation to application of duty to Part 4 (premises).

- A must comply with the first and third requirements: Schedule 4 para 2(2).
- It is never reasonable for A to have to take a step which would involve the removal or alteration of a physical feature: Schedule 4 para 2(8).
- A reference to a physical feature (except in the context of paras 2-4 Schedule 4) is a reference to a feature arising from the design or construction of a building, a feature of an approach to exit from or access to a building, a fixture or fitting, furniture, materials equipment or other chattels in or on premises: Section 20(10).
- For the purposes of para 2 Schedule 4, physical features do not include furniture, furnishing, materials, equipment or other chattels in or on the premises: Schedule 4 para 2(9).



## What to think about:

- A PCP includes a reference to a term of the letting: Schedule 4 para 2(3).
- If a term of the letting that prohibits the tenant from making alterations puts the disabled person at the disadvantage referred to in the first requirement, A is required to change the term only so far as is necessary to enable the tenant to make alterations to the let premises so as to avoid the disadvantage: Schedule 4 para 2(7).

## **Schedule 4 para 5**

- ‘Relevant matters’ are the enjoyment of the premises, or the use of a benefit or facility, entitlement to which arises as a result of letting.

## **Schedule 4 para 6**

- A duty to make reasonable adjustments only arises if A receives a request from or on behalf of the tenant or the person entitled to occupy the premises to take steps to avoid the disadvantage or provide the auxiliary aid.



# Martin Westgate KC

## Doughty Street Chambers