Housing Law Practitioners' Association Meeting

Minutes of the Meeting held on 19 January 2011
Portland Hall
University of Westminster

The Equality Act 2010

Chair **Robert Latham, Doughty Street Chambers**

Speaker: **Peter Reading, Equalities and Human Rights Commission**

Meeting Overview

There were two parts to the meeting:

(i) Our Speaker: Peter Reading, the Director of Legal Policy at the EHRC, gave an excellent presentation on the Equality Act 2010. The main provisions of the Act came into force on 1 October 2010. The new Public Sector Authority Duties are due to come into force on 6 April 2011. Peter offered to involve HLPA in the preparation of new Guidance for Social Landlords on the Human Rights Act. HLPA have subsequently taken up this invitation and Michael Paget is representing the Association on the working party.

(ii) The Consultation Papers "Proposals for the Reform of Legal Aid in England and Wales" and "Proposals for the Reform of Civil Legal Aid Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations. Both these consultation papers were published on 15 November. Responses were required by 14 February. The meeting provided the opportunity for members to inform the responses to be made by the Association. The responses were being coordinated by James Harrison and Robert Latham respectively. Using CFAs and other means of funding to secure access to justice would become increasingly important when the scope of and eligibility to legal aid is restricted. All HLPA members were urged to submit their individual responses.

The Chair reported that HLPA's new web-site had been launched in December (www.hlpa.org.uk). This included HLPA's recent response to the DCLG Green Paper "A Fairer Future for Social Housing". It also provided a discussion forum whereby members can participate in debate, whether about legal developments or to inform responses to be made by the Association to various consultations. HLPA's responses to the two consultation papers have now been published.

The transcript of Peter Reading's Consultation Should be read in conjunction with his slides which provide both an overview of the new Act and an introduction to the housing provisions. Peter highlighted the following:

- A single Act to replace some 35 Acts and 52 statutory instruments; and 16 EC Directives.
- The new ConDem government does not intend to implement Part 1 – socio-economic inequalities or gender pay reporting (s.78).
- The new government is still considering whether/when to implement the new duty to make reasonable adjustments to common parts of leasehold and commonhold premises.
- The Objectives of the Act: harmonising and simplifying the law; making the law more effective; and modernising the law.
- The nine protected characteristics – the protected characteristics of age and marriage and civil partnership do not apply to the premises provisions.

- The nine types of prohibited conduct.

- The new definition of discrimination arising from disability which reverses the effect of *Lewisham LBC v Malcolm* [2008] UKHL 43.

- The new public sector authority duties – whilst the duties have remained the same, the new government have made the specific duties less prescriptive; they rather put the emphasis on "transparency", "equality outcome objectives" and "localism".

- On 26 January 2011, the EHRC issued a Code of Practice on "Services, Public Functions and Associations (Part 3 of the Act).

- The date for any Code of Practice on "Premises" (Part 4) has yet to be announced.

MINUTES

Chair: Welcome to our first meeting of 2011; I hope we can build on the success of our Housing Conference just before Christmas. Tonight we are splitting the meeting into two; part one in which we have a presentation on the Equality Act and part two in which we will discuss the legal aid reforms and the Green Paper on Jackson. Can we first approve the minutes of the last meeting as a correct record? I am not planning to have a detailed information exchange tonight so that we can focus on the legal aid changes but if anyone else has got anything that they want to raise we will raise it quickly before we move on to legal aid.

I would also like to mention that the new HLPA website was launched just before Christmas, www.hlpa.org.uk. If you had gone into your website this week, firstly you would have found all the fascinating material on the public sector equality duties which have just been published. Secondly you would have been asked to bring along the questionnaires to the two consultation documents so you can follow what we are going to discuss in due course. Thirdly you would have seen the response which the Association submitted this week on *A Fairer Future for Social Housing*. I would suggest that you look at it. There are some very big issues on the agenda at present relating to social housing and the new tenancies for fixed terms at market rents. You may also have seen that on Monday there was a second reading of the Localism Bill which the Government published in December, somewhat anticipating the responses to the consultation.

I now move to our presentation tonight on The Equality Act 2010. We are very lucky to have Peter Reading, the Director of Legal Policy at the Equalities and Human Rights Commission. We were hoping also to have Catherine Casserley but she pulled out yesterday and Peter, to his great credit, has agreed not only to do his overview but also to add on an addendum with regard to the premises section so we are particularly grateful to Peter. Peter has been leading the Commission's work on the production of codes and guidance on the Equality Act. Previously he worked as a senior lawyer in the legal policy team at the EHRC and at the Commission for Racial Equality. He has been heavily involved in influencing the development of the Equality Act having worked on various aspects of the Act since the Discrimination Law Review began in 2005. He is also an independent equality and human rights consultant to Warwick University, an executive board member at the Discrimination Law Association and co-author of the Oxford University Press Blackstone's *Guide to the Equality Act*.

When I look at the Equality Act, I go back to the roots of the Race Relations Act 1965. I can still just about remember the days when we had those signs in newsagents windows saying "No Irish" and "No Coloureds". It is interesting to note how the discrimination legislation applied to housing from the early days. Even though we have now moved on from that overt form of racism, the allocation of housing without discrimination is still something on which we need to focus. We then had the Sex Discrimination Act in 1975 which did not have such a great impact on housing but it did encourage the granting of joint tenancies. We are all aware of the unsatisfactory nature of the law when it comes to one joint tenant unilaterally determining a tenancy. Those are issues which we need to address in due course. When the Human Rights Act 1998 came in we actually jumped the gun on sexuality with *Ghaidan v Godin-Mendoza* [2004] UKHL 30 securing equality of treatment for same sex partners. We were a bit slower when the Disability Discrimination Act 1995 came on the scene in realising the extent to which the DDA could afford a defence to possession proceedings. When we did realise the extent and looked at the legislation, we noted the limited defence of justification. It does seem to me

that that led, perhaps inevitably, to *Malcolm* which highlighted the unsatisfactory nature of the legislation on premises and had such dire consequences in other areas of equality law, particularly employment where *Novacold* had worked extremely well. We now have a new definition of "discrimination arising from a disability" and a new Act which codifies the previous legislation. Who better could we have than Peter Reading to take us through this?

Peter Reading: It is a pleasure to be here speaking to the Association and thank you, Robert, for inviting me. As Robert was mentioning in terms of the history of discrimination law in Britain, it is interesting to see the way society is developing. Did anyone of you see today's Guardian on the front page? Hall and Preddy v Bull (HHJ Rutherford, Bristol County Court, 18 January 2011), the gay couple who were refused accommodation in a B&B in Cornwall, is a case which we supported and I am pleased to say that they won the case. It does show, if you read the judgement, the way in which society is moving. Previously there were cases with signs saying "No Blacks" or "No Gypsies" allowed in pubs or premises. But it is disturbing to think that even in 2008, we had similar problems in relation to housing in the context of sexual orientation.

I am going to speak in two parts. In the first part I will be myself and the in second, I will try and replace Catherine Casserley in her role as barrister at Cloisters talking about particular housing issues. In the first part I would like to give you an overview of the main provisions in the Act, how they operate and our role in the Commission in terms of producing codes and guidance to assist all sectors of society in terms of understanding their obligations and the enjoyment of those rights to non-discrimination.

There are four aspects I quickly want to cover. Firstly, the aims and background to the Equality Act. Secondly the key features. Thirdly the public sector equality duties because they are very important generally but also in terms of housing. Some of the changes may impact on social housing providers. Finally, the codes of practice and guidance.

It is important to step back from the provisions themselves and actually ask what is the Act trying to do in our society? It tries to achieve a number of things. Obviously a fairer society where everyone is free from discrimination and prejudice. It is important to think about these issues in terms of treating everyone with dignity and respect. In our view that is bringing in human rights concepts into aspects of discrimination. Thirdly, we think the Act is about trying to maximise individuals' potential in their lives because, if you are discriminated against in your employment or when you are at school or in terms of your housing, that is going to have a major impact on your lives, a major negative impact. Finally, it is important to remember that the Act is trying to create mechanisms to eliminate systematic discrimination. An example of that is the public sector duty, but you also have the positive action provisions as well.

In terms of the importance of the Act, they are twofold. Firstly the Act applies to everyone. I would like to see someone that could say that the Act does not apply to them at some stage in their lives because it applies to young people, it applies to women, it applies to men, it applies to people of ethnic origin, sexual orientation, older people so all of you and everyone in society benefits from the Act and all of you, I am sure, may have suffered some form of discrimination in relation to some of those aspects the Act is trying to protect. Secondly, it applies to all of us in every aspect of our lives and what I mean by that is obviously from employment to education, housing, if you are in a club and so on and so on.

The background to the Act, the Discrimination Law Review started in 2005 so it took a long time to get from that to the enactment of the Act which was in April last year. That is important because there was a lot to do; there were literally hundreds of pieces of legislation if you include the secondary legislation that needed to be consolidated. There were three goals, firstly harmonising and simplifying the law because it was disperse and complicated. Secondly, making the law more effective so trying to make the mechanisms more effective. Thirdly, modernising the law because there have been a number of improvements in the law which I think will affect everyone in various ways, some of which I will go into. In terms of the modernising, simplifying 40 years of legislation and 35 Acts, 52 statutory instruments and so on is a huge piece of work. Although it is still very long and is probably not something you want to read for pleasure unless you want to help going to sleep, that is because it is reforming so much law. There is also an important aspect about harmonising the law across the protected characteristics, trying to make sure that where possible we have the same level of protection across the different protected grounds so whether it is gender, sexual orientation and so on and also, as I said, strengthening the law. Some examples of those which Robert has already mentioned are disability arising from discrimination, to correct the effect of the *Malcolm* decision, disability health

questionnaires being limited in what people can be asked in their employment, discrimination by association which I will touch on and, for example, new tribunal powers in terms of recommendations that they can make.

In terms of where we are right now, most of the Act came into force on 1 October last year. A number of provisions did not and those are the ones where the Government had either not finalised their thinking on what those provisions should be or where the Government had not decided whether they were going to bring them in at all. Because as we all know, we had a change in Government so the Act was passed in April last year and then there was a new Government which wanted to think about whether some or all of these further provisions should even be brought in or not. The current Government has decided that they are definitely bringing in the public sector duty in April this year and they are about to publish the specific duties relating to that. They have decided that they are going to bring in the positive action tie-break provisions in relation to employment, so that is Section 159. In October this year the default requirement age will end so people will not automatically be able to dismiss people when they are 65; they will have to prove that there was a legitimate justification to dismiss them so that is very important as well. The Government is still considering a number of other provisions which I have listed and I think the most important one for you, obviously in terms of housing, is the duty to make reasonable adjustments to common parts of leasehold and common-hold premises. So we do not know when or if they are going to bring that in. Finally there are areas where the new Government has decided no, we are not interested in that and that is the socio-economic duty which is Section 1 and specific gender pay reporting provisions which would force employers to publish data in terms of pay reporting. There are other things that they are considering in relation to that and I am happy to take any questions on that but these are two provisions where they have decided no.

So, in terms of protected characteristics, I mention briefly what they are. There are nine as you can see. I will not go into any detail about them but you may have some questions. In terms of prohibitive conduct, again I have listed all of those and they are all provisions that were in previous discrimination legislation so there is nothing new except for discrimination arising from disability which I will touch on in a moment.

The key new provisions are association and perception, which we did not have in existing discrimination law. An example of this is the case of *Coleman*, where you are discriminated against not because you yourself have that characteristic so you yourself are disabled but because you are associated with that person in some way, say for example, you are their mother or their friend We represented Miss Coleman, who was a secretary in a law firm whose son was disabled, and she was discriminated against by her employers not because of her being disabled but because her son was in terms of treatment, in terms of insults to her about why she was taking off extra time, etc, etc. That case went to the European Court of Justice which decided that discrimination by association in relation to disability is prohibited and protected. Other provisions are the age discrimination provisions relating to services, public functions and associations, which the Government has said are likely to come into force next year. We do not know the date and we also do not have details of the provisions and what the exceptions are. That is an area where the Government is currently working on what those regulations should be and we and others will be responding to their consultation in due course. It could affect you in some ways so I think it is something to be aware of.

There is the definition of disability where there have been some changes. Discrimination arising out of disability I mentioned before, such as pre-employment health questionnaires which limit the circumstances in which you can ask a disabled person about their disability, in essence, and their health which is related to their disability. There are some changes about gender reassignment, pay secrecy and third party harassment. As I say, I will not go into detail but happy to take questions.

Discrimination arising from disability is important for you because of *Malcolm* and it is important because it does change the test for discrimination in this context. So it is where someone is treated unfavourably because of something arising in consequence of their disability and also the employer, if they cannot show that the treatment is a proportionate means of achieving a legitimate aim, that will amount to discrimination. What is important is that you do not need to have a comparator in this situation whereas under the previous test you did. If the employer did not know or could not reasonably have known that the person has the disability then that will not be discrimination so you have to have those three elements that you consider in relation to the test.

The public sector duty, as I said, is also a very important provision and it has changed. It has changed because of the specific duties and I will go into some more detail about that. As you probably know,

there are three elements to the public sector duty and that is similar to the elements that you had under the gender, race and disability duties so firstly eliminating discrimination, harassment and so on, secondly advancing the equality of opportunity and thirdly fostering good relations in society. So it applies to the listed public authorities and also private bodies carrying out public functions, and the reason why that is very important for you is that certain social housing providers such as RSLs we think are subject to the general duty.

There is a duty to have due regard to these issues in terms of all the powers and functions of public authorities. This gives you some examples of what that actually means in practice, what public authorities and private bodies carrying out public functions need to do and also what they would need to do in terms of good relations. Again I will not go into detail but the public sector duty is an area where there is lots of misunderstanding about what the duty actually requires. The most important thing is that it is not about a tick box exercise, it is about public authorities considering how is this changing policy going to impact on protected groups? If there is an impact, what are we going to do to make sure that that does not prejudice them either by directly discriminating against them or preventing them from advancing in, for example, their employment in the organisation and so on? So it is actually supposed to be a practical measure to try and eliminate systematic discrimination because, as some of you may know, it arose, originally, out of the McPherson Enquiry into the death of Stephen Lawrence and the failings of the police force in terms of investigating his death. The finding was that there was systemic discrimination in the police force and there was a need to create this new duty in relation to race and it has been extended to disability and gender and now across all the protected characteristics so that is a major change in terms of what public authorities will need to do.

The Government is about to announce and publish the final version of the specific duties. They have been consulting on them the last few months and we have been doing a lot of work in terms of analysing those and doing a consultation response. It is important to recognise that this new Government is taking a very different approach to what they see as the manner in which public authorities need to fulfil their policy duties. Although the general duty has stayed the same,, the specific duties are less prescriptive and more about transparency in terms of public authorities being required to publish data on equality and publish their objectives in terms of improving equality. There are lots of stakeholders and I would say that these duties are not as good as the previous duties because they do not provide a level of clarity for public authorities as to what they actually must do. Others may say that it is better because it is about transparency and it is about local authorities having more autonomy on how they set their objectives and so on which is, obviously, a big theme of the new Government.

Here I have tried to give you a sort of analysis of a comparison of whether we are going forwards or backwards with the new duty. We are definitely going forwards in terms of its covering other protected characteristics but perhaps we are not going forwards in relation to the actual specific duties.

Thirdly, I would like to talk about our role; hopefully some of you know something about us. We have a remit across Britain, not Northern Ireland because there is an Equality Commission and a Human Rights Commission there. We have a mandate which is tripartite; equality, human rights and good relations. They do all interact and overlap. We have a number of mechanisms in terms of trying to promote those changes in society which includes advice and guidance which, obviously, I am talking about tonight but also includes all the work that we have done around the legislative framework in terms of the Equality Act. We worked on the whole process of securing the Act in terms of Parliamentary involvement, responding to White Papers, etc, etc. It is also very important to mention our role is raising awareness and understanding of people's rights, whether it be equality or human rights. This sort of meeting is very good example of how we can help you to understand the importance of equality and human rights as well as your obligations and people's rights in the context of housing. We also monitor progress in society in terms of equality and human rights issues; we published a review of equality issues in October last year and we will be publishing a human rights review in December this year. Finally, we have carrot and stick methods of operation; we have strong enforcement powers which we can use both in supporting individuals in claims, intervening in cases, doing enquiries, powers relating through the public sector duty, etc.

In terms of our work on codes and practice I will give you a quick overview of what they are for and what we have done so far. There are two types of guidance, there are the statutory codes of practice and there is the non-statutory guidance. The codes have a formal and legal effect because they are laid before Parliament. The Government Equalities Office has to approve them, actually they have to be approved by the whole Government and they are used by courts and tribunals in terms of

interpreting the law so they will and do apply them. It is also for people such as yourselves, lawyers, those in HR departments, people that we hope will have a reasonable understanding of the issues and will be able to apply them in their work. So far we have produced a number of codes, the three main ones being the Employment Code, the Equal Pay Code and the Services, Public Functions and Associations Codes. They are just about to be finally approved by the Government and come into force, probably in the next week or two. But you can already use them; they are on our website, they are not going to change, it is just going through the process of approval. So I would look at those if you have some queries about those issues. In terms of the public sector duty, that is not going to be finalised until probably later this year because we cannot do all of these codes at once, they are a lot of work and require a lot of resources. We are still in the process of producing that one although we have published guidance on the specific duties which is also on our website, so that is just the element of what is required for the specific duties. Other codes we are going to produce are ones relating to education, further and higher education, schools and right at the bottom in small print you will see that we are still thinking about housing and premises and transport. That is not because we think that housing is not important but just because we cannot do everything at once, so we need to get back to you about that and I am sure that there will be information available on our website.

We also produce non-statutory guidance and, essentially, that is supposed to be user-friendly for the general person in the street who wants to understand what their rights or obligations are. People can just print off sections from our website, it is in module form and much more accessible. Again we have produced guidance for employers, service providers and service users, employees, and we are currently updating the services guidance to include an aspect on housing so you should also watch out for that. As I said, we published the guidance on specific duties a few days ago.

So that is an overview. I am now going to miraculously change into Catherine Casserley. What is important to recognise is that most of the law has remained quite similar. The main changes are actually in relation to disability but there are some important changes and I will give you a quick overview of those. As you may know or not know, all the housing and premises provisions are in Part 4 of the Act; they relate to all aspects of housing, sales, leasing, and management and also apply to both residential and commercial premises and the public and private sector. So every aspect of housing is covered. The only one that is not covered is private dwellings where, say for example, someone says I want to live with a man, not a woman, in terms of renting their house out. Most people would say that you should be able to do that and therefore those aspects are not covered. But in terms of public housing in the sense of a public service, the case of the B & B illustrates that where it is a service provided to the public, public housing service, it is not really housing in that sense but accommodation, then the Act will apply. The provisions do not apply to the characteristics of age, marriage and civil partnership so having said that it generally applies those are situations where it will not. Also it will not apply where the other provisions of the Act apply. That sounds a bit complicated but, essentially, you cannot attempt to bring a claim both in relation to someone providing a service and someone providing housing; you have to decide is this a housing situation or is it a service provision situation or is it a public function situation? And that will depend on the facts of the case.

The main changes are in relation to disability which is why Catherine Casserley, who used to work at the DRC and I know very well, was going to speak to you. Reasonable adjustments must be made to avoid disadvantage to disabled people and there are three ways in which that can be done. The disadvantage could be caused by a practice or policy of the organisation, it could be caused by a physical feature or it could be where a disabled person needs an auxiliary aid or service so, say for example a deaf person who requires assistance in a housing situation. The reasonable adjustment provisions are a bit different, though, from other situations where reasonable adjustments must be provided because they do apply to all aspects of the Act. There must first be a request by the disabled person for a reasonable adjustment. I think that is very important; it is not an anticipatory duty whereas for other parts of the Act it is. The duty applies to, as I said, policies, practices and procedures but also to auxiliary aids. I am going to come on to physical features because we have got new provisions for those. As I have just said, those are adjustments to the common parts and, as I said before, the Government has not decided when or if, it is a bit unclear. If you look at their website they say they have not decided about these provisions whereas previously we actually thought that they had definitely decided that they would be bringing them in so they are perhaps slipping back a bit. In relation to common parts I have tried to set out there what the requirements are. You need a request, as I said, in relation to the other parts, that the disabled person is at a substantial disadvantage compared to non-disabled people in terms of using those common parts. There needs to be consultation with others as to whether this is necessary, appropriate, etc. and there has to be an agreement that the disabled person will pay for the costs where appropriate. I do not know how that is going to operate in practice, though, if a disabled person cannot pay for those.

It is important to mention briefly improvements to let dwelling houses because they are provisions that relate, obviously, to housing. Where a disabled tenant or occupier seeks to make a disability related improvement a landlord must not unreasonably withhold that consent, so this is where the disabled person themselves seeks to make a change to the property but the landlord can place conditions on the consent.

In terms of housing and the public sector duty, it is important to mention *Weaver v London and Quadrant Housing* and its implications because we intervened in the case and Jan Luba QC represented us. It is an important case about the Human Rights Act and its coverage for registered social landlords but it has direct implications for the public sector duty because the way in which public authorities are defined under the duty is based on the definition under the Human Rights Act. In summary private bodies carrying out public functions will be subject to the general duty. *Weaver* decided that probably most registered social landlords are subject to the Human Rights Act and by implication that they are subject to the general duty. I do not know if that all sounds very complicated but I am sure you can ask me any questions if you are not sure. I have gone through there what I think the Act actually means. There is no proposal that social landlords be subject to the specific duties so this would only be the general duty, to complicate things further.

In terms of the public sector duty code, we have made some brief reference to the fact that registered social landlords would be covered by the general duty as an example so we thought that was important to include. Finally, it is important to note that we are also producing guidance for social landlords and that is both RSLs and local authorities where they are providing social housing in terms of their human rights obligations. We plan to publish that in April this year. We have an advisory group involving housing stakeholders and if there is anyone who perhaps wants to be involved or think they have got experience in that, I would be most interested in talking to them. We think it is a very important piece of guidance specifically for social providers of housing who, we understand, would very much benefit from having some practical guidance of what it all means for them.

Chair: Thank you very much, Peter, and I think we should acknowledge the importance of the EHRC intervening in cases. You mentioned *Weaver* which is unfinished business because the Supreme Court clearly want to revisit. But also *Pinnock* which I hope is closing the game of ping pong between Strasbourg and the domestic courts on Article 8. Do we have any questions? Or any volunteers to work on this guidance for social landlords and the Human Rights Act? I am sure we would like to take you up on that invitation as it is going to be important guidance and we would like to have an input.

Katie Brown, Philcox Gray & Co Solicitors: I do not know whether you have had a chance to read through the Government's proposals for the reform of legal aid or, more specifically, looked at the Equalities Impact Assessments. In those impact assessments they are arguing, I think, that the provision of legal aid is not a service or something similar and saying, therefore, that the Equalities Act would not apply to what they are doing. So I am wondering whether you have a viewpoint on that. Alternatively, they have then gone on to say that yes, there is likely to be a disproportionate impact on, in particular, disabled people, women and people from a minority ethnic background but they are saying that it is going to be a proportionate means of achieving a legitimate aim. I am just wondering if the EHRC have any viewpoint on that or whether the EHRC are going to be looking at this?

Peter Reading: Yes, we are doing work on the consultation. In terms of your question about whether legal aid is a service, I think it is but we have not really been thinking about it from that perspective; we have been thinking about it from the perspective of the Government being, obviously, subject to the public sector equality duty in all of its functions and this is a function of the Ministry of Justice, broadly. So that is where the requirement for impact assessments obviously kicks in and in terms of the disproportionate impact on particular groups, yes I think it is interesting when you read the impact assessments that they basically say, yes there is a disproportionate impact but hey, we don't care really. So we will be responding to them on those points but also for the whole breadth of the consultation, because I think it is quite complicated in the sense that there are aspects that they are going to retain which are positive in terms of legal aid funding for human rights cases or discrimination cases but there areas where they are going to stop the legal aid which would have, in our view, an indirect discriminatory impact on certain groups. An example of that is that although they are retaining legal aid for discrimination cases, they are planning to drop it for related employment aspects such as unfair dismissal and in the experience of practitioners that I have spoken to they said that you cannot separate out those two and often without that legal advice at the beginning you may not know that there is a discrimination issue. So there are all sorts of indirect consequences, I think, of some of what they are proposing as well. So in summary, yes we are on to it and so are a lot of other

organisations and it is good that there is going to be a strong response. Whether or not that will make any difference, though, I doubt it.

Chair: Just before Christmas the Fawcett Society brought their challenge against the budget which was unsuccessful and, obviously, the whole cuts agenda does raise very important equality issues. Do you have any comment to make about the decision in the Fawcett Society case?

Peter Reading: I am in a difficult position on that because they came to us for funding so I actually cannot talk about the Fawcett case. What I can talk about is what we are doing. Obviously we have all sorts of enforcement powers to do Section 31 assessments as they are called but basically it is our way of investigating whether public authorities have complied with their public sector equality duties, so what we have launched is an assessment in relation to the spending review broadly and that is primarily focused at the Treasury. We have just published on our website the terms of reference for that assessment so if any of you are interested you can have a look. So we are also very concerned about the actual and potential impact of the spending cuts, not just obviously on equality groups but human rights as well in terms of how that may affect services provided to groups, for example, the police, etc. So yes, it is a very big issue.

David Watkinson, Garden Court Chambers: I have got a request and a question. The request is that when Catherine Casserley was previously in your shoes and the Commission was working on its guidance on the Disability Discrimination Act, HLPA was consulted over the parts of that guidance which included housing, particularly in the housing examples that were in it, so I was wondering if you would consider doing the same in relation to the housing code of practice that you are working on and any other guidance? So that is the request. The question is about the parts of the Equality Act that the Government is proposing not to implement. The applicable law, as I understand it, is that once an Act has been passed the Minister's powers are limited to deciding when a provision is to come into force and not if it is to come into force. That is the Fire Brigade's union case and that was cited against me in the course of last when I was involved in proceedings against the DCLG for backing off from a date to implement the extension to the Mobile Homes Act to gypsies and travellers on local authority sites. So my question is, is the Commission considering taking any action in relation to the Government's refusal to bring into force parts of the Equality Act either now or in the future?

Peter Reading: I think I will deal with the second question because I think it is a very interesting one. Some of the provisions they have set out, for example dual discrimination, whereas others there would need to be secondary legislation to set out what they are so, for example, the age provisions in relation to services and public functions which I mentioned, there is no content in terms of exceptions. I was not aware of that case and I would actually be interested in talking to you about that because we were not thinking that there was the possibility of actually challenging the Government on such provisions. That was not my understanding of what the Government's powers are but I certainly could be wrong.

On the point about consultation, yes we definitely would hope to consult with all of you. What we have done for the others is we have formally consulted in the sense of publishing a consultation where people respond within the twelve week period, both for the codes and the guidance, even if for the guidance we do not necessarily have to do that but we think it is good practice. What we have also done, though, is set up groups where stakeholders will come in and actually express their concerns or their wishes for the guidance, both before that work is commenced but also during so when we have actually got the drafts. So there a number of ways in which stakeholders will be able to feed in and we would obviously encourage that because the more feedback we have the better the products will be.

Chair: Thank you very much indeed Peter, it has been a very interesting presentation and may the Association continue to work closely with the EHRC and may the EHRC keep up your interventions.

Pierce Glynn have brought a judicial review against the DCLG in respect of the fact that the service charge provisions under Section 18 and 19 of the Landlord and Tenant Act 1985 do not extend to council weekly tenancies and they are particularly concerned about heating charges. I gather that the DCLG are consulting on this and whether there should be any change of the law. Gareth Mitchell is asking the Association to write a supporting letter. Shelter are also supporting it and are seeking evidence. I would simply like to propose that we do support that initiative and if anyone has any evidence of where council tenants have been stung by service charges which they are unable to challenge we would welcome hearing about them as soon as possible. Is that agreed that we should support it? Thank you.

I am afraid you are also going to hear from me for another two minutes because we have two Green Papers to discuss. The major one is on legal aid and the second one is on proposals to reform civil litigation funding arising from the Jackson Report and I have been asked to deal with that very briefly first. It seems to me that there are three headings that we need to deal with: CFAs for housing disrepair; CFAs for judicial review, Housing Act appeals and perhaps other areas where you are not seeking damages as a remedy; and issues from Jackson which are not addressed in the Green Paper. In preparing our response, we would welcome feedback either today or through the website on these issues. I would certainly welcome volunteers from solicitors who deal with CFAs for housing disrepair to make sure they are going to be workable in the future. But on CFAs for housing disrepair, the first issue we need to consider is should success fees still be recoverable? Should they be recoverable regardless of whether the claim is primarily for damages or for specific performance? The Government is suggesting it should only arise if the primary remedy is seeking repairs but it seems to me it is very difficult to draw the distinction between the two. Should there be a maximum to the success fee? At present it is 100%; are we willing to compromise for a bit less to make sure that we can still recover some success fee? Should we go for qualified one-way cost shifting? I think we certainly should, but are there limits to which circumstances it should be available? Should it be restricted to claims against social landlords including local authorities?

Conditional fees for judicial review and Housing Act appeals; it is not something that we have used to any great extent in the past but it may be that in the future it is important to our access to justice. It seems to me that we should argue for a success fee to be recoverable. Again there is the question, should there be a maximum to the success fee? Again it seems to me that we should argue for qualified one-way cost shifting.

If I move on to a third heading, issues which are not addressed, Jackson accepted the representations made that the *Boxhall* rules in judicial review should be amended so that if you succeed in achieving a successful outcome and you have pursued the protocol, you should normally get your costs. You should not need to establish that you would have succeeded had you gone the whole way to a full hearing. It seems to me that we ought to push for that proposal to be implemented. Secondly, he came up with the proposal that the pre-action protocol for possession claim should be amended to deal with Article 8 claims and in the light of *Pinnock* it seems to me that that is as relevant now as it was then. Hopefully it is something that the EHRC may be taking up in their guidance to social landlords. Thirdly, the Bar's Civil Legal Aid sub-committee put forward a proposal in relation to landlords' offers to settle with no order as to costs. Jackson proposed that there should be consultation on the proposal that where a housing claim is settled in favour of a legally aided party, that party should have a right to ask the court to determine which party should pay the costs of the proceedings. The reason for that is that you are probably aware that defendants are becoming increasingly canny in coming up with offers which are favourable to the client, subject to there being no order as to costs. I had a case recently in the Court of Appeal where we were challenging an adverse finding on a discharge issue and Lewisham proposed that they would put the client in Band One for permanent accommodation, which would give her the cream of the accommodation that is available, provided that there was no order as to costs on the homelessness appeal. That outcome on Part 6 is something which we could never have achieved through the proceedings. Whether or not it was lawful for Lewisham to offer a "bung" to give the client priority at the expense of other housing applicants, I am not sure. But this is a type of issue with which we need to grapple. As we move towards risk rates, it seems to me that is a proposal which we should advocate and seek examples. So those are the issues that I think we need to address on that Green Paper.

At this stage I am not going to seek a response save to ask anyone "are you willing to help with the CFA issue on disrepair?" I will now hand over to Vivien Gambling, our Chair.

Vivien Gambling, Lambeth Law Centre and Chair, HLPA: We do not want to talk for a long time about the legal aid proposals tonight, what we want is a discussion and to get as many views as we can about the proposals themselves. James Harrison from Edward Duthie Solicitors is co-ordinating HLPA's response to the consultation paper. First of all, has everyone got a very brief summary of the proposals which I left at the reception desk? I think what comes across to me about the paper is that it is written very much in a sort of quasi-academic way, I do not want to give it too much credence as an academic treatise but I think whoever has written it has very little understanding of the sector. There seems to be no joined up thinking about what impact the proposals might have on other departments and other areas of Government funding. I must confess I have not yet got to the end of all the impact assessments but they are almost more important than the proposals themselves. Just to highlight, some of the impacts which the Government foresees from this paper include loss of social cohesion and increase in criminality to name but a few and also, as was mentioned earlier, they have already

identified that the proposals will have a disproportionate impact on women, a disproportionate impact on people from minority ethnic groups and a disproportionate impact on those who have disabilities. As was said earlier, it is half, well we do not really care and half, well those are precisely the people that use legal aid so it is hardly surprising, is it?

I went to a meeting today at the LSC where a senior Ministry of Justice official was talking about the financial aspects of the paper and he said "help us understand what the likely changes will be". So I think it is really important that in our response we do highlight the very real impact that the proposals will have. As I say, it is logical in a sense in that they think about what are the important factors, what factors are we going to take into account? Well, the importance of the issue, the litigant's ability to present their own case, availability of alternative sources of funding and availability of other routes to resolution of problems. All those are logical but I think what they do not understand is that there are various assumptions made, such as if we take legal aid away from whole swathes of areas then they do not see the likely effect of that; they assume that CABs and Shelter and National Debt Line and others will still be there to pick up the tab not realising that many CABs themselves depend upon legal aid contracts and so might not be there.

In terms of the scope for housing, I have set out there the areas under the proposals as drawn at the moment which will be retained. So possession cases are okay, fortunately we will still be able to bring disrepair claims as counter-claims in rent arrears possession cases, appeals to county court on points of law under Section 204; so basically homelessness appeals are retained in the scope, Mobile Homes Act cases to do with possession will be retained in the scope. In terms of non-counter-claim disrepair, I think this is very worrying indeed so for housing disrepair cases where the claimant is seeking an order for specific performance it seems that it will only be those cases which are of such significance that without it the life or health of a litigant or their family may be at serious risk. I think we cannot assume that that means aggravation of asthma or that sort of thing because the only example that they give in the paper is repair of gas equipment which could lead to explosion or some other catastrophe. ASBO proceedings and injunctions, it is proposed, will remain in the scope. So perhaps it is more important to look at the list of areas of housing which it is proposed will be removed from the scope and that is, firstly, all housing advice and representation except for homelessness and housing disrepair non-damages cases. I think that is very wide, there may be various cases that we can think of that are not actually on their set list. And action to enforce right to buys, right to buy freehold or extended lease, this one I think is of some concern. Actions to set aside legal charge or mortgages, that is really about possession at that stage; if somebody cannot set aside a legal charge which might have been obtained through a debt action the next step is an application for sale of the property so I think it is of some concern that that is taken out of scope. Unauthorised change of use of premises, frankly I do not know what that means but I am sure that other people do. Action under the Housing Grants, Construction and Regeneration Act, applications for new tenancy under Landlord and Tenant Act and action for re-housing, again I am not quite sure what is meant by that, and I have put in italics on here basically the ones which I think stand out most of all which it is proposed will be removed, action for wrongful breach of quiet enjoyment. I have not got on this list unlawful eviction but unlawful eviction is definitely on its way out under the proposals. On the next page, housing disrepair where the primary remedy sought is damages, including damages for personal injury so after the explosion, if your family is wiped out or injured, then there will not be legal aid to bring that case, it seems. Action under Mobile Homes Act not concerning eviction, well I can think of cases where legal aid has certainly been warranted but are not quite eviction or possession cases.

I have just put a note there that the Ministry of Justice seems to have recognised that in all those housing areas which it is proposed to take out of scope they have considered and taken into account the fact that the class of individuals likely to bring these proceedings are more likely to be ill or disabled compared to the civil legal aid client base as a whole. I think that is a general recognition that housing clients, generally, are more likely to be ill or disabled than the general population of people receiving legal aid. I said that it is unclear whether homelessness reviews are included because they are simply not mentioned. I have had a view today from Anne Lewis from Advice Services Alliance who I think has raised the question with somebody in the Ministry of Justice which suggests that the intention is to keep homelessness reviews in scope but we cannot rely on a conversation with somebody, non-attributable, etc. etc. Also there is no mention at all about evictions of gypsies and travellers.

So thinking about the areas of housing that are kept in scope and not kept in scope, I think as well as thinking about those areas individually and clients who will not be helped in cases that cannot be brought, I think it is important for us to respond on the overall impact of the proposed changes. Somebody made the point very effectively today in the immigration context that okay, housing remains

in scope; what happens if nobody can do disrepair cases, free-standing disrepair cases? Your bog standard housing disrepair case where somebody's life is not threatened or their health is not seriously at risk, nevertheless, it is having a daily impact on their lives, maybe on the health of the children, etc. and in terms of the viability of organisations it is kind of accepted, recognised, that housing disrepair cases have cross-subsidised other housing cases and enabled organisations to remain viable. I think if we think that some organisations, whether it be private practice, not-for-profit will no longer be viable if housing disrepair is taken out of scope we need to say so.

The other area that I will highlight, apart from mentioning briefly that all debt which is non-possession related will go and nearly all welfare benefits will go, is housing benefit. I have just quoted from the paper itself in my point 13 because I am not quite sure where housing benefit ends up under the paper. Basically, I suppose the starting point is that housing benefit is taken out of scope; however if the inability to pursue a housing benefit appeal leads to somebody's house being at risk, possession being at risk, then they might get back into scope through debt or through housing but it is entirely unclear to me at what point they think somebody's home is at risk. Quite often you identify a housing benefit problem which you know is going to become a risk to somebody's home so homelessness is there as a threat in the background but if there is no letter from the landlord yet threatening possession proceedings, query whether the Legal Services Commission would accept that that would be within scope.

I will hand over to James at this point.

James Harrison, Edwards Duthie Solicitors: I am just going to whizz through some of the financial eligibility changes because there are a few little devils in the detail there. You will all be familiar with a client on benefits where they are passported, you whizz through the legal help form quite quickly because they are automatically passported to the legal aid. That remains for income but goes for capital so if you are on a passporting benefit they are passported only for income and you do need to look at the capital requirements. Now that is potentially quite significant because if you have got someone on means tested benefits who owns their home and it is worth more than £200,000, which these days is not an enormously valuable property, they will not be eligible by virtue of some changes to the disregards which I will come to in a moment. Another proposal on capital is if your client has more than £1,000 in capital and, of course, that will include money just sitting in their bank account; perhaps they have just been paid yesterday, they will be expected to pay a contribution of £100 as a capital contribution to the cost of their legal aid. Now that could be a very significant part of their income when someone who has a monthly income of a little over £1,000 is spending every penny of it and more. That will also have to be handled by suppliers, not by the Commission; it will be for suppliers to collect the £100 and pay it to the Commission so that is a knotty little proposal which will be even knottier in practice.

The rule where you disregard the first £100,000 of equity goes; any equity is counted as capital and the pensioner disregards. I will not trouble you with the detail of those but if you did not know about them you need not bother yourselves because they are going to go, apparently. The mortgage disregard is retained and extended, apparently. The Ministry of Justice says what it wants to do is to work out the actual capital value that there is in a property rather than a notional one; a tiny bit of positive news but hardly so when seen in the context of the other things I have just mentioned. There is a discretionary waiver of the capital limits; that is all quite complicated and again I will not trouble you the detail of that. The other side of that coin, though, is that there is charge on the property so I guess it is a bit like the stack charge, if it is waived it will be charged to the property. Finally on eligibility, income contributions change and it will not surprise you to know that they go up and not down. At the moment the maximum level of contribution works out at about 20% of disposable income when you have done that rather bizarre calculation; it will rise by, I guess, 50% to a maximum of 30% which is a pretty significant hike on income contribution. So if your client is faced with a capital contribution and income contribution that is really a very significant change in the landscape on eligibility.

I will now hand back to Viv to talk about remuneration.

Vivien Gambling: The main proposals on remuneration are a proposal for a 10% reduction across the board for everything; that will be solicitors' rates and counsel. I assume it means a 10% reduction on a fixed fee as well; I have not heard any suggestion that the three times exceptional case threshold would change at all. Another proposal is to cap enhancements and this makes me feel that I must have been doing something wrong because the papers says that typically enhancements are 30%-50% on solicitors' rates across the board which produces a typical hourly rate, they think, of £103-119

and also you can have 200% uplift in the High Court. The proposal is to have maximum of 100% in the High Court, 50% in other courts and to set criteria, which I think there are already. Risk rates, I think the more I look at this paper the more worried I become, at the moment what they call risk rates only apply to high cost cases. I think these risk rates are the proposed risk rates: £70 per hour for solicitors, only £50 per hour for junior counsel and £90 per hour for senior counsel. It is proposed that risk rates would apply and they look at cases where you start on investigative help which are very few, I think; the suggestion is that risk rates apply after the investigative help stage is completed. More worryingly is that they say in all other cases where the case starts on full representation, risk rates would be payable from the point at which the legal aid certificate was issued. Well, it seems to me that what they are saying, or what they might be saying, is that risk rates apply to almost every case so that is a worry. The other point about risk rates is that if you have risk rates then you do not get enhancements. The principle is that it is to try and make people assess the merits of a case more acutely, I suppose, if they know that what they are going to be paid is going to be affected. But how does that applies in your standard possession cases? Where does that leave possession proceedings? They do make a distinction between ordinary cases and borderline cases; most possession cases in my cabinet might be borderline cases but it is not clear whether they really mean that cases such as possession cases would be treated as borderline cases in which case there is a 30% increase.

On experts' fees I find the paper is almost incoherent so the only thing I can say is that a) they are still doing research and, b) until the research is completed the proposal is that the standard rate for experts would £50 per hour so we have to think, do we know any experts, surveyors, etc, medical experts who would be prepared to act at that rate?

James Harrison: Who is still breathing and has the will to do legal aid work? Well tucked away in a small paragraph of the 224 pages that is the Green Paper, ignore the impact assessments for the moment, is this paragraph, "too often those seeking civil legal aid find the process time-consuming, inconvenient and stressful. For those in work, taking time out of the working day to visit a lawyer is difficult. For the elderly or the immobile, getting out to visit a lawyer is problematic. For the vulnerable living in small communities, a visit to a high street lawyer can be inconvenient. We need to redesign the system so it caters much better for the needs of its clients, makes the most of the advances in technology and acknowledges changes in the structure of our lives. It must also provide the value for money that is essential in view of the need to reduce legal aid expenditure." Well, there is an aspect of this proposal which was hardly mentioned in the press launch of the Green Paper and that is what is called the telephone gateway which, in my view, is one of the most radical proposals in the whole paper which has the potential to really change the face of legal aid for clients and for those lawyers who believe in Legal Aid and want to do it for the benefit of clients.

You will all be familiar with the telephone helpline, the CLS line which clients ring; this becomes the gateway for legal aid services. If your client wants legal aid for a specialist case, one of the areas that remains in scope that is, they do not come to your firm or organisation on the high street, they have to go via the telephone line. They ring and they are greeted by an operator who diagnoses the problem. The person is not a lawyer; they are trained to diagnose the client's problem. Now so often I see clients and they tell me what their problem is and, of course, I listen sympathetically for five minutes or so and then I say, "Do you mind if I have a look at your papers?" And of course, only at that point does the problem become clear when I can look at their documents. So at that first stage, I think it is very worrying as to how well clients can explain the problem that will allow it to be diagnosed. If they get through that process, if it is recognised that they need specialist advice, they will go through to specialist lawyer on the phone and if at that point it is recognised that they need face to face advice they will be referred through to a solicitor or not-for-profit organisation with a contract. What are those cases? Well, it is very unclear; they are described as complex cases. Now I have heard the suggestion and I agree with it, it is just too simplistic. What is a complex case? You may have a case which is actually legally quite complex but is relatively easy for the client to deal with themselves or vice versa. It is a very odd test.

Now if you are feeling nervous, let me nervously tell you what is in the impact assessment because the suggestion in the impact assessment is that that will result in a reduction of income to solicitor organisations of some 75% and for not-for-profit organisations some 85%. So the Ministry of Justice acknowledges that this, in the small print of the impact assessment, is going to have an enormous impact on the amount of clients coming through to face to face advice in your organisation because it is going to be largely a telephone service. So there we are.

Vivien Gambling: We did outline questions that we thought might be the issues for us to seek your views on but I certainly do not want to limit what people want to say. I will run through the questions and then rather than take them in turn we will just hear from people.

One is just about the telephone gateway, what are people's views about that? A more tricky issue for HLPA, possibly, is to what extent we argue for welfare benefits and debt to remain funded? I only say tricky because I know what my own view is but I think that view might not be unanimous. With regard to the proposed scope of housing, changes to fees, I think it is quite important to decide whether HLPA makes any positive suggestions for other ways of saving costs? So let us hear some contributions.

John Stock, Moss & Co: About this telephone gateway, you mentioned that they need to be routed through the telephone gateway but what is to stop the client from simply turning up on your doorstep with their claim form and particulars for possession and a hearing tomorrow? Would you have to tell them no, go and ring the number and risk them being routed to somebody who had not even seen the papers over the phone or, worse, to your competitor? So how exactly would that work, what is to prevent them from turning up on the doorstep?

James Harrison: In answer to your question, if it is proceedings that would justify the grant of a certificate to represent in those proceedings you can go ahead and do it. This is for legal help work and you will not be able to see, as it is proposed, clients who turn up in your office wanting legal help. There will have to be some code that is given that will allow you to do it.

John Stock, Moss & Co: So you will actually have to turn them away?

James Harrison: Yes.

Vivien Gambling: I think that is right, I actually think it applies to public funding as well. Regarding the telephone gateway, it is apparent is that they really have not thought it through. As of today, it seems that there are moves, signals that possibly they may do a further consultation but that is exactly what it means. Somebody comes into your office, you say, "I cannot help you but if you or I or we phone the telephone helpline we will see whether they will agree to let me act for you."

Nik Antoniades, Shelter: If I can make an even stronger argument to reinforce what James has said about telephone gateways, we have problems with our clients understanding their problems. I have been on Shelter's telephone advice line, which is a secondary advice service, advising first hearing advisors where first hearing advisors often do not know what the problem is and you have to listen to them and help them understand what the problem is and then rephrase the question that they are asking you so you can then give them the right answer to give their client. And these are supposedly trained advisors but heaven knows what these trained telephone operators are going to be. I have anecdotal and lots and lots of stories; I do not know how useful that can be in terms of putting in the form of evidence to support a submission for the consultation but perhaps we can talk afterwards.

Lou Chrisfield, Tower Hamlets Law Centre: I am just wondering about disrepair claims because for most claims we get inter-parties costs so does anybody ask the LSC how much they spend on disrepair claims, because as a money-cutting measure it cannot be particularly effective? I am just wondering whether it is worth asking them how much of the budget goes on disrepair because I would have thought it would be quite small.

Vivien Gambling: I cannot give your figures but I think it is probably bigger than we might think. I think lots of people do say I win all my disrepair claims, there is no cost to the fund but I have heard figures at some point and there is definitely a cost.

Mike O'Dwyer, Philcox Gray Solicitors: Two things, telephone gateways and saving costs and administration. On telephone gateways there is some experience of the internal workings of the telephone fire services, particularly through those of us who are peer reviewers in housing and certainly I have been peer-reviewing telephone advice services for the last four years quite regularly and I can say one or two things about my experience. But one thing I would say is that it is quite clear to me, and I am sure it would be clear to my colleagues peer-reviewers, that the more complicated the case, the more voluminous the paperwork and/or the more urgent the presenting problem, the less adequately they do it. I am sure that we could build on that in terms of showing the telephone services for what they are. Secondly, in relation to telephone advice services, there is no evaluation substantively, certainly to my knowledge, of the operator service and this is the service that is going to

be the first port of call and supposedly the service that is going to analyse substantively the need for referral on to the specialist advisor or not. Certainly nowhere in peer review is there any material whatsoever provided in relation to what happens at the operator service so that is worth knowing and I think it is a point of weakness.

Moving on quite separately, incidentally I do actually agree Viv, this has been written by persons who have got no experience whatsoever with the day to day running of the legal aid system. There is no mention whatsoever of the existing processes of limiting costs such as the limitations on certificates, such as the assessment processes, such as the whole case management directions processes; all of that is completely out with the paper. But I would just like to say something about cost savings. The easiest way to implement cost savings both in relation to administration of legal aid and also the amount of costs being claimed is to resurrect preferred supplier status. Now this is something that was introduced by the Legal Services Commission in pilot form after the Carter report and it lasted for a year, I think, even more, certainly some of our members took part in it. It was a quid pro quo whereby if the firm was quality assured it was given extra delegated powers, thus saving administration and a stream-line billing system, and I think it was pretty universally accepted that after some teething problems it was actually welcomed by all. I seem to remember that it was dropped in the run up to 2007 fixed fee decisions that were made internally by the LSC so preferred supplier status is still there; it is tried, it is tested, bring it in.

Vivien Gambling: So what you are really talking about is saving the cost of administration because more trust is put in the supplier? Does anyone else have any suggestions about cost savings?

Katie Brown, Philcox Gray Solicitors: Again, not really cost savings but just on the point about getting the inter partes costs, my understanding was that you get inter partes costs and it will go back into the legal aid fund but I am not altogether sure that that is the case. I have heard that it goes into the Treasury so it goes out of the legal aid fund and I was wondering if we could just make the point that the money that we are winning, in effect, should be going back into the legal aid fund. Also any of the interest when we get compensation and we pay it over to the LSC what happens to the interest on that? Because if we hold it for a client in a client account then we have got to pay interest on that but if we pay it over to the LSC, who are holding it in effect for the client, what happens to the interest and is that put back into the legal aid fund? I do not know the specifics or ins and outs.

James Harrison: I am not sure whether it is right that it goes to the Treasury, I do not know the detail on that, I have to say. I think any positive proposals for cost savings are worth making simply for the bounce of it if nothing else.

Chair: I am sure it does not go to the Treasury. I think the problem is the Legal Services Commission have never been able to reconcile what goes out in one year and what comes in another year from the same case.

Vivien Gambling: What about welfare debts and housing, I know not every organisation does those areas of work but are there people whose organisations would definitely be affected? Would you be hampered in what you can do for clients?

Contributor: I think that to say that clusters of problems on housing, welfare benefit, debt and employment and no longer exist is a nonsense and we should really stand up for a holistic approach to meeting client need.

Jan Luba QC, Garden Court Chambers: I would like to say something very briefly about timing as a result of the meeting that Viv and I attended this afternoon with the Ministry of Justice and the Legal Services Commission. One of the unanswered questions in the consultation paper is what do you do about the fact that you have recently let three year contracts for the provision of legal services on terms and rates which the bidders for those contracts had in mind in framing their plans. The Commission and the Ministry of Justice made it quite clear that the remuneration changes proposed in the Green Paper will come into force in October 2011. That is, as you will appreciate, a little less than ten months from now. That will apply not only to the changes that Viv has described in terms of the risk rates, the absence of enhancements and the 10% reduction in assessed bills but it will also apply, as Viv has indicated, to the fixed rates payable for new matter start work. The Commission indicated that the terms of the contracts which many of you have just taken provide a break clause opportunity at three months' notice in order to give effect to any change in legislation and the LSC interpret a change in legislation as including a funding amendment order made by statutory instrument. So the idea is that in mid-summer there will be a funding instrument that will go through Parliament by

negative resolution achieving the reductions of expenditure. Simultaneously, the contracts will be ended by three months' notice and you will be invited to agree the reduced rates for the remainder of the term. In terms of the holistic approach, because it takes longer to achieve the primary legislation to take things out of scope, it is very likely that welfare benefits and debt may remain in scope for the existing social welfare law contracts probably well into 2012, so it will not be necessary to terminate them until the following year.

The suggestion from Mike O'Dwyer was that we might move to back to or advocate a preferred supplier status for those of us who want special terms but, as the discussion on telephone gateway advice has indicated, if you are planning for a future in this area of work it is very probable that you will be the specialist to whom the operator will refer; that will be the only way of getting any bulk client work in the legal aid system. James suggested that the operator puts you through to a specialist lawyer; if only that were the case, it puts you through to something called a specialist legal advisor which is probably a person supervised a long way up the structure by somebody who was once a lawyer. If you can re-organise yourselves so as to be in a position to, firstly, service a huge bank of calls in any particular subject area referred to by the operator and then set up probably mobile regional offices at which you could see the small subsidiary number of clients who you will be allowed to see face to face, then it is possible, I think, to devise a method of delivering legal services with legal aid in housing beyond 2013. But as James' presentation indicated, any idea that a service centre or firm on a street might be viable in legal aid terms is simply pie in the sky if the proposals set out in this paper are adopted. So I think our colleagues who are doing the drafting have their work cut out and I wish them well.

James Harrison: Can I just add that if you are sitting here fuming and you need a therapeutic exercise to let vent to your anger at these proposals, well go ahead, get a blank piece of paper and write something and send it to me, please, and we will put it into the consultation along with all the other contributions, for which I am enormously grateful for the time that people are contributing. In the usual HLPA manner we have divvied up the questions amongst those who have volunteered to help out and we will be stitching it all together. I am pleased to say there is a real commitment amongst all the practitioner groups to share papers to make sure that there is some combined approach on these things and it will be submitted to the Ministry of Justice well before the midday deadline on 14 February. Thereafter there can be a brief spell of romance on the Valentine's Day Massacre of legal aid, as I have heard it termed.

Contributor: One of the things that we have been advised to do is to collect our experiences of clients who will lose the service that they are currently getting, so we have actually got volunteers who are interviewing clients with a very simple questionnaire and trying to get a pile of their experiences that we can submit as part of our response to the consultation document. We are also giving all of our clients just a summary sheet of what is actually happening and inviting them to send that to their MP. I am very sure that lots of people here are already involved in the Justice for All campaign and many people were at the lobby last week. But if anyone wanted a copy of our questionnaire or a sample of our pack because they want to do something similar I am more than happy to arrange for that to be sent to people because I think that is the way that we are going to get the message across. The only way that we are going to get the message across is actually really tell people about the impact and get the message about how it is going to impact on individual lives. Rational argument, there is nothing rational you can about most of this except to tell them what it is going to do to people.

Vivien Gambling: I think that is really helpful. Also I think it is really helpful if people have experience of the telephone advice service or anything else, just email me or James so that we can incorporate the comments. Also, I think it is really important that as well as HLPA putting in a response please do put in your own individual response as well, either from your organisation or from you as an individual because numbers matter. I think they weigh the responses or come up with a statistical measure of how many yeses or noes there are so I think that is really important. I have to say I think probably the telephone gateway they are going to have to rethink because it is so ill-thought out at the moment. In my experience the Ministry of Justice, if anything, has been a bit more receptive when you actually explain impacts of changes than the LSC has been in the past so I think there is an opportunity to have an impact.

Chair: Thank you all for coming and to the speakers for their presentations. Our next meeting is on 23 March when the topic will be Housing and the Human Rights Act.

The Equality Act 2010: an overview

Peter Reading
Director of Legal Policy
19 January 2011

Overview

This presentation will cover :

- The aims and background to the Equality Act 2010
- Key features of the Equality Act
- The public sector equality duty
- The role of the EHRC
- Codes of Practice and Guidance

Goals of the Act

The Act seeks to:

- Create a fairer society without discrimination and prejudice
- Ensure that all are treated with dignity and respect
- Enable everyone to maximise their potential in all aspects of their lives
- Provide mechanisms to eliminate systemic discrimination and promote equality of opportunity

Importance of the Act

The Act is important for everyone in every aspect of their lives:

Everyone: most people at some stage of their lives are likely to face some form of discrimination protected under the Act and therefore everyone will benefit from it

Everyday: the Act benefits people in all aspects of their lives from employment, to gaining education and housing.

Background to the Act

- Feb 2005 – launch of Discrimination Law Review (DLR)
- June 2007 – Final Report of Equalities Review published
- DLR proposals for a Single Equality Bill had three goals:
  - Harmonising and simplifying the law;
  - Making the law more effective;
  - Modernising the law.

Modernising

- Simplifying – ie replacing 40 years of discrimination law
  - 35 acts, 52 statutory instruments, 13 codes of practice, 16 EC directives
- Harmonising the law across protected characteristics
- Strengthening the law – e.g. Disability arising from discrimination, disability and health questionnaires, increased scope (association); new tribunal powers

Commencement of the Act

- **1 October 2010:** Most of the Act came into force
- **April 2011**:
  - Public Sector Equality Duty
  - Positive action in recruitment and promotion (s.159)
- **October 2011** - Default retirement age
- **Government is still considering:**
  - auxiliary aids in schools (s. 20 & Sch. 13)
  - dual discrimination protection (s.14)
  - age discrimination in services and public functions (Parts 3 and 7)
  - Duty to make reasonable adjustments to common parts of leasehold and commonhold premises
  - diversity reporting by political parties (s.106)
- **Government not implementing:**
  - the socio-economic duty (s.1)
  - gender pay reporting (s.78)

Protected characteristics

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

Prohibited conduct

- Direct discrimination
- Discrimination arising from disability
- Gender reassignment absence from work
- Pregnancy and maternity discrimination
- Indirect discrimination
- Reasonable adjustments
- Harassment
- Victimisation
- Causing, instructing, inducing and aiding discrimination

Key new provisions

- Association and perception (s.13)
- Age discrimination in services, public functions and associations (s.28)
- Definition of disability (s.6 and Schedule 1)
- Discrimination arising out of disability (s.15)
- Pre-employment health enquiries (s.60) and EHRC power to enforce ban (s.60(2))
- Gender reassignment (s.7)
- Pay secrecy applies to all protected characteristics(s.77)
- Third party harassment applies to all protected characteristics (s.40(2))

Discrimination arising from disability (s.15)

- A person is treated unfavourably (no comparison needed!) because of **something arising in consequence** of his/her disability, and....
- the employer/service provider cannot show that the treatment is a proportionate means of achieving a legitimate aim**, this will amount to DADF,**
- UNLESS the employer etc didn't know, or could not reasonably have been expected to know, that the person had the disability.

Public sector equality duty - General duty

- Scheduled public authorities must, in the exercise of their functions, have due regard to the need to -
  - Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act
  - Advance equality of opportunity
  - Foster good relations
- Duty applies to bodies which are not public authorities but which exercise public functions

What does 'due regard' mean?

- **Advancing equality of opportunity**
  - Removing or minimising disadvantages experienced by persons who share a protected characteristic
  - Taking steps to meet the needs of persons who share a protected characteristic
  - Encouraging persons who share a protected characteristic to participate in public life or other activity in which participation is disproportionately low
- **Good relations**
  - Tackling prejudice between groups
  - Promoting understanding between groups

Specific duties

- Section 153 - Ministerial power to impose specific duties to help public authorities meet their 'general duty'
- The **proposals** for the specific duties –
  - Transparency – public authorities required to publish data on equality in relation to their workforce and services they provide
  - Equality outcome objectives - public authorities will be required to set equality outcome objectives, informed by the evidence and data they publish
- Government response to consultation published January 2011, regulations to be laid late January 2011

PSED - regression or progression?

The existing PSED

- Applies to race, gender and disability
- Emphasis on promoting equality of opportunity and good race relations
- Specific duties prescriptive
- Restricted to public authorities and in relation to disability bodies carrying out public functions.

The new PSED

- Integrated - applies to all protected characteristics
- Emphasis on **advancing** equality of opportunity and **fostering** good relations
- Specific duties less prescriptive
- Applies to any body which carries out a public function.

Role of Equality and Human Rights Commission

- EHRC has a remit across Britain to promote and protect equality and human rights, and to foster good relations between groups
- It has a range of powers to achieve mandate:
  - Provides advice and guidance
  - Works to implement an effective legislative framework
  - Raises awareness and understanding of everyone's rights
  - Monitors progress - **Triennial Review 11 October 2010**
  - Legal enforcement powers

EHRC's Codes of Practice

- The statutory **Codes of Practice** explain the provisions of the Act, primarily intended for courts, tribunals, and lawyers. They include guidance on best practice, clearly distinguished from law.
- Codes of Practice for **Employment**, for **Equal Pay**, and for **Services, Public Functions and Associations** laid in Parliament due to come into force January 2011
- Draft Code for **Public Sector Equality Duty** - England February 2011, timetable for Scotland and Wales PSED Codes depends on devolved administrations
- Consultation on Code for **Further and Higher Education** in Great Britain completed
- Codes for **Schools** in England & Wales, and Schools in Scotland – consultation will commence in February 2011
- Codes for **Housing and Premises**, and for **Transport** – TBC

EHRC's Non-statutory guidance

- The **non-statutory guidance** is intended for a wider public audience, and is being made available in web and hard copy, accessible versions, and in Welsh translation
- Tranche 1 – published in July 2010
  - 2 guides for Employers, and for Employees
  - 2 guides for Service Providers, and for Service Users
  - 1 guide for 'What's New' in the Act
  - Currently updating Service Provider and Service User guidance to include housing
- Tranche 2 - January 2011
  - Published guidance on the PSED

Housing and the Equality Act 2010

Peter Reading
Director of Legal Policy
19 January 2010

Legal implications: discrimination

- Part 4: Premises discrimination provisions
- Relates to the sale, leasing and management of all premises
- Applies to residential and commercial premises
- Applies to both the public and private sector
- Similar to existing discrimination save for new provisions on disability

Legal implications: discrimination

- Provisions do not apply

  to protected characteristics of age and marriage and civil partnership

  where other parts of the Act do, eg employment (Part 5), or services and public functions (Part 3)

Legal implications: discrimination

- Reasonable adjustments

Must take reasonable steps to avoid disadvantage to disabled persons in three situations:

Created by a practice, policy or procedure;

Caused by a physical feature

To provide an auxiliary aid or service

Legal implications: discrimination

- Reasonable adjustments

Must receive a request from the disabled tenant for a reasonable adjustment, the duty is not anticipatory;

Duty applies entirely to the first (practices, policies and procedures) and third (auxiliary aids and services) aspects of the duty only

Legal implications: discrimination

- Reasonable adjustments

EA 2010 creates a new duty to make reasonable adjustments for common parts (eg stairwells)

Legal implications: discrimination

- Reasonable adjustments and common parts

Requirements:

- Request
- Disabled person at substantial disadvantage compared to non disabled person in use of common parts
- Consultation
- Agreement and payment of costs by disabled person

Legal implications: discrimination

Part 13: improvements to let dwelling houses

Requirements:

- Disabled tenant or occupier seeks to make a disability related improvement
- Landlord may not unreasonably withhold consent
- But landlord can place conditions on the consent

Legal implications: the promotion of equality

Weaver v London and Quadrant Housing, Court of Appeal

Scope of HRA and private bodies carrying out public functions

Definition under sections 149 and 150 of the EA same as under the HRA

A body who is not a public authority but who exercises public functions is subject to the general equality duty: ss149(2) and 150(5)

Legal implications: the promotion of equality

Many social housing providers will be subject to the general duty.

Will need to have due regard to the need to:

- Eliminate discrimination, harassment and victimisation;
- Advance equality of opportunity;
- Foster good relations between persons with protected characteristics and others

Not proposed to be subject to specific duties: GEO consultation on specific duties.

Legal implications: the promotion of equality

EHRC guidance and Code plan to discuss the implications for private bodies carrying out public functions for the public sector duty

EHRC will also be producing separate guidance on complying with the HRA and good practice: April 2011

Equality and Human Rights Commission

equalityhumanrights.com

‘Building a society built on fairness and respect where people are confident in all aspects of their diversity.’