Housing Law Practitioners' Association

Minutes of the Meeting held on 15 May 2013
Portland Hall, University of Westminster

Using the Equality Act

Speakers: **Robert Brown, Arden Chambers**
Sarah Steinhardt, Doughty Street Chambers

Chair: **Justin Bates, Arden Chambers**

Chair: My name is Justin Bates, the Vice-Chair of HLPA. Before introducing our speakers, could I ask if anyone has any corrections to the Minutes of the last meeting? If not I would like to introduce our speakers tonight on the topic of Using the Equality Act. Firstly, we have Robert Brown, a barrister at Arden Chambers and editor of the County Law Report, who will be speaking on some of the basic building blocks of the Equality Act. Secondly, we have Sarah Steinhardt of Doughty Street Chambers who will be speaking about reasonable adjustment.

Robert Brown: As housing lawyers I think it is very important to have a handle on the key concepts, the building blocks, of the Equality Act. I have seen several cases, particularly in relation to possession proceedings, where a defendant appears to have a disability and the easy option is to jump straight to an allegation that it is unlawful discrimination under Part 4 (Premises) and simply set it out like that in a defence. Actually I think there are a number of steps to get through first before you really make out that defence. It is because of that that I wanted to spend a little time going through the concepts and how they are set out in the Act, why they are there and how you use them, which is important not just for defences but for claims that you may be bringing and advising generally.

In my notes I have set out an introduction about how we get to the Equality Act and what there was before it, but I would like to start with the first of the key concepts of "protected characteristics", which is a brand new one introduced in the 2010 Act. Paragraph 15 sets out a number of "protected characteristics": age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. For some of those the definition is fairly obvious, for others it is not. One of those that I have a particular axe to grind about is age. I was working for Help the Aged which then became Age UK when the Equality Act was just a Bill and was being drafted and we were making a lot of suggestions and proposing amendments to the Bill in relation to age and age discrimination. Unfortunately, in Part 4 Premises, which is the key part that we are interested in, age is exempt. The Government's view and Parliament's view was that age did not need to be protected in relation to premises on the basis that there was, so they said, no evidence that there was any problem in relation to discrimination on the grounds of age in relation to premises. We put the case, we thought relatively powerfully, that actually that was not quite right and there was a fair bit of evidence in relation to that. Nonetheless that was their conclusion. There are other parts of the Act in which age discrimination does come into play and I think as housing lawyers we may need to think about some of them fairly creatively, particularly Part 3 on Goods, Facilities and Services. The other point to note is that direct discrimination for age can be justified, which is different for every other "protected characteristic", and that is something that I will pick up again later.

The next "protected characteristic" is disability and I will spend some time with this because, certainly in my experience and I think in Sarah's experience as well, this is the one that we are most frequently going to encounter in relation to possession claims, homelessness applications, etc. In some cases it will be fairly obvious if someone has a disability. In others it is not going to be so clear cut and that is when you really do need to start to grapple with the definition set out in Section 6, which has several stages to it. The first, 6(1)(a), is that the person has a physical or mental impairment. That in itself is not enough, that impairment has to have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities so there are a number of elements to that, substantial and long-term, normal day-to day activities. Now "substantial" simply means more than minor or trivial and that is Section 212 which I have flagged up for you in the notes. I have referred to the case of *Aderemi v London & South Eastern Railway*. There was a view for a while that there was a sliding scale from

trivial all the way up to substantial and there may be something in the middle of that that was not quite substantial; that is not the case. If it is not minor or trivial it is substantial. That is actually quite a relatively low threshold to get over in many respects and it is quite helpful. One source you will need to consider is the Guidance the Office for Disability Issues has set out and I have included the current link for this.

The Guidance is very, very important and every tribunal, including a court, who is being asked to decide whether someone has a disability, must consider such parts of it as it thinks relevant. It is quite a weighty document of about 50-60 pages and, as a circuit judge said to me recently, expecting a district judge to read the whole thing and then decide what is relevant may be asking too much in terms of demands on the court's time. On the other hand, the Guidance says a number of times throughout it that it is a document that should be read holistically, it should be read not in isolation but individual elements must be read throughout the document. So I think there is going to be a tension there that we may find between judges who are going to say, simply point me to the relevant part, and the Guidance itself which is saying it is all relevant. I do think, however, that as judges become more familiar with the Guidance this is going to become less of a problem because they are going to start with a knowledge base of already knowing what it includes.

On page 7 and over I have set out various elements of the text and I do not want to labour those too much because they are there in the notes and they are there in the Act. What I would like to draw some attention to is this question of how you go about proving that the particular person's condition does meet this test. Sarah says in the employment tribunal it is quite a common thing to happen where there would be almost a trial of a preliminary issue about whether there was a disability; if there is not and the case has been alleged disability discrimination then it falls away there. Whereas certainly in my experience and I think Sarah's experience, the county courts have been less keen to embrace that sort of staggered approach. Now whether that is something that is a good thing or not is up for debate but I can certainly see it may be in a possession case where the claimant is saying that there is no disability and they want it dealt with as a preliminary issue to move things along more quickly. But the evidence you will need, unless it is a case where there is an obvious disability, someone who is registered blind for example, in the more nebulous cases such as mental health discrimination cases, there will be some sort of expert report. The questions that you will need to put to the experts, of course, should be focused not just on questions of capacity as they normally are, but on questions arising out of the Equality Act. That being said, the ultimate decision on whether the person has a disability or not is one for the courts; it is not one for the experts, it is one for the courts. The court will obviously give a tremendous amount of weight to a properly reasoned expert report. But it is important to try and get that evidence in as early as possible. I know one of the issues being discussed after these talks is the consultation on legal aid reforms and, of course, if you are legally aided and you need to obtain an expert report there are a number of points to be considered.

A couple of things that are important as well, and I set these out at paragraphs 32 and 33 of my notes on pages 8 and 9, is the Act itself is not the end point. There are Regulations which then take certain impairments out of scope, as it were. They are particularly important in a number of the client bases we are talking about or will be talking about where substance abuse will be an issue. Because of the Equality Act 2010 (Disability) Regulations 2010, an addiction to a substance is not an impairment, it is not a disability for the purposes of the Act unless it arose from someone who was prescribed drugs. That said, you will see over the page there is then a tension between whether that is the impairment or whether it is the cause of another impairment. The case that I have cited there is an Employment Appeal Tribunal case, *Power v Panasonic UK*, which has recently been approved by the Court of Appeal in a housing case, *Lalli v Spirita Housing* and as the Guidance says, what you are actually considering, really, is the impairment itself. So if somebody has, because of alcohol or drug addiction, a different impairment that still becomes a disability or can be a disability for the purposes of the Act. I have a side note here, I do not know how many of you saw the post on Nearly Legal at the weekend that flagged up this talk and there was a suggestion there that as housing lawyers we have always been a bit slow to the discrimination party as it were. Certainly a lot of the cases that you will see in relation to disability issues and others are employment cases where there is a lot more law in relation to these things. Partly, I think, because an appeal would automatically go to the Employment Appeal Tribunal where the decisions are published and far more accessible than an appeal to a circuit judge would be, partly because it has been a greater problem. I do not necessarily agree with the suggestion that as housing lawyers we have completely missed the boat or been late for the party and one of the points that I will come on to later is that housing lawyers have been quite quick to seize on the due regard duty. I do not want to spend too long simply reading what is in the notes so I just want to highlight, again at paragraph 35, that is the definition of gender reassignment. One part there which I think is fairly important because it may be missed is that this covers people who are not just

undergoing or have undergone the process of gender reassignment but are proposing to so at a very early stage and that is quite important.

Next I have flagged up race and the one thing that I do want to draw your attention to is the latest development in relation to race discrimination. When the Equality Act was just a Bill there was a lot of lobbying to say that caste discrimination should be included and should be protected against. The then Government said that there was not enough evidence that it was a problem but they would keep it under review and keep monitoring it and if evidence came forward that it was a problem legislation would be introduced to include caste discrimination. The new Government has in fact been good to that promise and has used the Enterprise and Regulatory Reform Act to amend the 2010 Act to provide that caste discrimination is going to be prohibited, so that is a new development. It has not yet come into force but will do so soon. I think it is particularly in response to a quite high profile Employment Tribunal case at the end of last year and early this year where there were allegations of caste discrimination.

These are just some of the "protected characteristics". As I said, I have set the other ones out earlier in the notes and they are defined in the Act. It is important to identify which protected characteristic you are relying on and then move to the next stage which is the various types of discrimination which are prohibited by the Act. The first and most obvious is direct discrimination, the definition for that is in Section 13 and you will find it on page 10 of the notes. There is no defence to direct discrimination on the grounds that it is seen as the worst kind of discrimination, the most blatant, except, as I have said, for age discrimination where the defence of objective justification can come in. I will explain more about objective justification in a minute but it relates to the concept that we are becoming more and more familiar with as housing lawyers which is proportionality. The next type of discrimination which is prohibited is indirect discrimination which is Section 19. Indirect discrimination is there to act in those situations where there is a provision, criteria or practice which is often called PCP, which is discriminatory in relation to a relevant protected characteristic. An obvious example used to be from an employment context which would be a prohibition on working part-time. Women, historically, were more likely to work part-time or need to work part-time. So a complete prohibition on that was indirectly discriminatory against women. That would be unlawful discrimination unless it can be objectively justified; unless it is a proportionate means of achieving a legitimate aim. That imports the concept of European law with which the courts are becoming more and more familiar and in relation to indirect discrimination and to discrimination arising from disability it is often going to be the key issue.

Starting on page 12 I have set out a bit of a history lesson about *Malcolm v Lewisham LBC*. What Parliament did in the 2010 Act to deal with the decision of the House of Lords in *Malcolm v Lewisham LBC* was to introduce discrimination arising from disability, which is Section 15 and the definition of that is at paragraph 59 in the notes. There are several stages to it. The first stage is subsection (1)(a), when a person treats another person unfavourably because of something arising in consequence of the disability and then they cannot show that the treatment was a proportionate means of achieving a legitimate aim. Now, in relation to subsection (1)(b), I know one of the things that Sarah is going to talk about later is Section 136 which is the reversal of burden of proof in discrimination cases, actually Section 15(1)(b) brings that in to Section 15 itself and it does shift the burden back to the party who was alleged to be discriminated to show why they are not. But there is a multi-stage process here. Thinking of a typical case that we may have, if there are rent arrears and those rent arrears arise because of mental health conditions which means that the tenant is unable to deal with housing benefit, those kinds of circumstances, then that may be something which comes in under Section 15. If the landlord then goes for a possession claim they are treating them unfavourably because of it. But you quite frequently see cases where disability is pleaded as a defence, the defendant has a disability, but unless it is actually tied in to the reason that the landlord is seeking possession it is really not good enough; it does not help, it does make out the defence. That is why I say you really have to draw down into these key concepts and understand where they go. So an example of that may be a tenant who has a disability, the landlord is going for possession because there is anti-social behaviour; if the disability is, for example, the tenant is blind and their behaviour is abusing their next door neighbour or something like that there is no causal connection between the two so that does not really make it out. If, on the other hand, you have a behavioural problem and a mental health condition that may be linked to that then it can start to make it out. Of course, what the landlord then will try and do is show that it is proportionate means of achieving a legitimate aim and that is something that the court will have to review.

The next two types of discrimination that are prohibited, harassment and victimisation, I suspect are far less likely to arise in a housing law context so I will not say much more about them. Reasonable adjustments I am going to say nothing more about because I know it is something that Sarah is going

to spend time on but I have tried to set the law out there as much as I can. The final type of prohibited discrimination that I want to address is at paragraph 64 and this is actually a type of discrimination that is not prohibited. In the 2010 Act Parliament legislated to ban combined discrimination, the discrimination that arose because of a combination of two characteristics. The example that I have given over the page, one that was actually played out in real life and was quite famous, was where older, female TV presenters were losing their jobs in preference to either younger women or older men but it was the older women who were the ones who were always being forced out. It was not because they were older TV presenters, it was not because they were female TV presenters; it was a combination of both. Parliament legislated for that and was going to bring it in. The Government then decided a couple of years ago that this would be too onerous a burden on employers to have to deal with in the recession and decided that it would not be introduced. However, there may still be a way of getting it in and if you look at my footnote 21 on page 17 I hope I have pointed you in the direction to follow that up and it may be there are cases where you can rely on that.

Part 3 and Part 4 then become the next most important Parts. I have set out the protected characteristics, which is the first key concept, the types of prohibited discrimination, which is the second key concept and the third key concept, key building block of any discrimination claim or defence which is the area of law in which the behaviour is prohibited. Part 3 relates to goods, facilities and services and public functions so this will engage a lot of local authority functions particularly and it is also going to engage, probably, registered provider functions in some areas although those may go into Part 4 as well. Part 4 is premises and that is the main one that we as housing lawyers will be interested in, I suspect, because of Section 35 which is on page 21 of my notes. You will see there at Section 35(1)(b) where the Act gets to is taking steps to evict or evicting a person. Of course, as I tried to say at the outset, simply pleading Section 35 and saying this is unlawful disability discrimination because you are trying to evict someone does not make out the case; you have to follow the building blocks all the way through. The reason why I think that housing lawyers have been at the forefront of pushing this is the public sector equality duty, which starts on page 23 of my notes, paragraph 82. One of the reasons that I think housing lawyers have been quite pro-active with this was the period of time in between the House of Lords decision on *Malcolm v Lewisham* and before the Equality Act came into force. At that point what had effectively happened was disability discrimination defences to possession claims had been pretty much neutered, so instead what was then relied on was a public law defence of a failure to have due regard to the precursors to Section 149 and there are a number of cases where that has been attempted. The main reported case is *Barnsley Metropolitan Borough Council v Norton* which is in the notes. But the due regard duty has been used in other sort of housing cases, in *Brent v Corcoran* for example it was alluded to but what I would say is simply because the 2010 Act was given other tools, particularly in Section 15, is not to lose sight of this. For example, as I have said, age is not covered in relation to premises in Part 4 but a public authority still has to have due regard to protect the characteristic of age in relation to decisions and it may be that Section 149 can be relied on in that way in relation to certain decisions. So please do not lose sight of Section 149 which I think is a very important provision to get to the next stage of equality law. Previously equality law and discrimination law has been aimed at stopping discrimination. What the Equality Act tries to take a step forward and certainly what Section 149 does and its precursors try and do is move forward to promoting equality rather than just eradicating discrimination. Those are social policy objectives, obviously, but that is partly what that is there to do and it is a very powerful duty.

Finally, my last section on page 29 deals with Part 15 of the Act, which is a series of provisions to keep an eye out for when they come into force, relating to issues such as the presumption of advancement in family property cases. At the moment those have not been brought into force, but hopefully at some point soon they will be.

Chair: Thank you Robert. We will now move on to Sarah.

Sarah Steinhardt: I will cover the practical application of the Equality Act focusing on possession proceedings and in doing so I will go through some of the case law that applies in other areas like employment and education to see how that applies in the housing context so perhaps what lessons we can learn as housing lawyers. That is important because one of the stated intentions of the Equality Act was to harmonise the law in different areas. Previously there had been all sorts of inconsistencies between race discrimination and sex discrimination, between premises and education and so on. The aim of the Equality Act was to bring everything into line and so what that should mean is that we can now apply the authorities that in employment cases safe in the knowledge that they really ought to apply in the same way in the premises context.

So first of all, the starting point is Section 35 which is what provides a defence to a possession pleading. The important point is that a person (A) who manages premises must not discriminate against a person (B) who occupies the premises so obviously the important word there is "discriminate" and that is where we find the definitions that we see under Section 15. But a landlord also discriminates against a disabled person if they fail to make reasonable adjustments in respect of that person. So a failure to make those reasonable adjustments provides a defence to possession proceedings. The key points are that this applies to public and private landlords; it is a full defence. If discrimination is made out then there ought not to be a possession order. It applies in mandatory possession cases as well as discretionary cases. There is no need to necessarily plead a counter-claim. We see that in the case of *Romano* which is, hopefully, cited in my paper. But do remember that damages are available in claims for discrimination and the court in *Vento v Chief Constable of West Yorkshire Police* which is the key authority on the level of damages that are awarded as injuries to feelings and discrimination cases said that really there should not be an award of less that £500. For a tenant who is in rent arrears that £500 actually can be a key amount of money and, of course, it really ought to be far more than that. It is important to bear in mind that there has to be an evidential basis for any sort of claim for damages in a discrimination case and what that means is there being evidence, for example, that that person was diminished in their self-esteem or somehow reduced or disadvantaged or disenfranchised as a person. Those are the kinds of issues that damages for injury to feelings are intended to cover.

Now there is a distinction between these private law discrimination issues and the public law duty to have due regard because whereas for public sector equality duty the court is entitled to refuse relief on the grounds that perhaps the decision would have been the same irrespective of the duty to have due regard, which we have seen in *Barnsley v Norton*. Where it is discriminatory to be seeking possession, of course, the court cannot condone that by then ordering possession. So I am going to focus on mental health and learning disabilities because the chances are these are the issues that we are going to most frequently encounter. Three main ways of challenging a decision to seek possession in respect of such a person will be Section 15 which is discrimination arising from disability, failure to make reasonable adjustments and, of course, the failure to have due regard to disability. I will not deal with the public sector equality duty because it is dealt with quite fully in Robert's paper but I will deal with the first two. Of course, we have also had victimisation and harassment apply; they are unlikely to come up very often in housing cases although I would say victimisation is something that you might possibly encounter where the tenant who, for example, complains about racial harassment from their neighbour and then the landlord, not knowing who to believe, thinks it is easier to just get rid of your client. So that would be a case of victimisation; that is how that might apply.

Section 15, discrimination arising from disability, is set out at paragraph 19 of my paper, so a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability. I will go through that then step by step. So first of all, this involves asking the question, what is the reason why possession is being sought? Now usually this will usually be straightforward, it would be rent arrears or it would be nuisance behaviour but sometimes this may involve looking behind what is suggested to be the reason for possession or for seeking possession to ask if there is some other reason. Now, obviously, that is going to be the case in proceedings under the accelerated procedure or introductory tenancies but it may also just be that the reason which is presented as the reason for seeking possession is not the true reason. In my paper I cite the case of *P v Governing Body of a Primary School*, which was a very recent case in which the school had listed a number of reasons why they had excluded P. Some of them were disability related, some of them were not disability related but what happened there was that the tribunal had jumped straight from finding that there had been acts of violence to a conclusion that therefore seeking to exclude that child was justified. That approach was wrong; you have to go through the steps, you have to identify what is the reason why the action is being taken and is that because of a disability or does that arise in consequence of the disability?

So that is the next question, then, did that something, be it rent arrears or anti-social behaviour arise in consequence of this disability? As we have heard, you really do need to have medical evidence that deals with this. Medical evidence or perhaps occupational therapy evidence might also be appropriate but there needs to be a proper professional analysis of what this person's condition is or what this person's impairment is and how that then affects their behaviour in a functional sense. We can see from the case of *Gloucester v Simmons* what happens when the medical evidence does not fulfil what it needs to fulfil, it does not address the questions it needs to address. So in that case the doctor had simply written "yes, the behaviour is caused by the disability." Well, that was not enough because what needed to be addressed was it caused by the disability and something else? What was the

effect of alcohol addiction and alcohol use on that person's behaviour? Without engaging with those questions what is very likely to happen is that the judge simply will not follow what the medical evidence says because the doctor will have to support that conclusion properly. Now a common issue that often arises then is the interaction between disability and an excluded condition, be that dependency on alcohol or a tendency towards physical abuse and so on. As we have heard, having an excluded condition, although the word "condition" is perhaps slightly unhelpful but an excluded trait, does not preclude you from being a disabled person. But the question then arises, does the behaviour arise in consequence of the disability or does it arise in consequence of the excluded condition? That is what is addressed by the case of *Edmund Nuttall Ltd and Butterfield*.

In that case the EAT said, "first in our judgement, focusing on the employer's reason for the less favourable treatment, if the legitimate impairment was a reason and that an effective cause of the less favourable treatment then prima facie discrimination is made out notwithstanding that the excluded condition also forms a part of the employer's reason for that treatment." Now that has been applied very recently in the case of *P v Governing Body of a Primary School* which I referred to earlier and that is then taking the authority out of an employment context and applying it in an educational context and, crucially, applying it for the purposes of Section 15 of the Equality Act. So what you are looking at when you are asking, does the behaviour arise in consequence of the disability is what is a cause, was it a reason or an effective cause, notwithstanding perhaps the tendency towards physical abuse or alcohol addiction which, for example, might form another reason for the behaviour. It must be a consequence of these disabilities so there has to be a person who is established as having a disability. There are then issues about perceived discrimination and associative discrimination which I deal with in my paper. All I would say on that at the moment is that, of course, you do need to bear in mind the situation where perhaps it is the son or daughter of the tenant who is causing nuisance to the neighbours and if they are the person with the disability you have to think very carefully about then how you structure the claim. Now I do not think that should be a problem in respect of providing a defence but if you want to bring a counter-claim then that person is going to need to be added to the frame.

The next issue then is knowledge so the test is whether the landlord did not know and could not reasonably be expected to know that the person was disabled. Now in the employment context the Code of Practice has for a long time said that an employer can only avail themselves of this defence if they had done all that they could be reasonably expected to do to establish whether or not that person had a disability. There is no real reason why the same logic should not apply in the housing context albeit that the steps that are likely to be reasonable are likely to be less for a landlord. So in the employment context an employer will normally be expected to send their employee to an occupational therapist to get an assessment once they have noticed that there might be a disability. We will not expect landlords to do that but we would expect some conscious consideration of whether or not that person had a disability once they are on notice that there may be an issue there. Of course, in the context of the public sector equality duty and public sector landlords, *Pieretti v Enfield* does create a duty to make enquiries once the landlord is on notice that there may be a disability.

Finally on this, justification;this is likely to be something that as housing lawyers we are very well experienced with and very able to deal with. What I would say on this is first of all it would be difficult for a landlord to justify what is otherwise discrimination if they have failed to comply with the public sector equality duty and it will be, in my view, impossible for them to justify the decision if they have failed to comply with their duties to make reasonable adjustments.

So all of these different anti-discrimination duties all feed into one another and that brings me on to the issue of reasonable adjustments which, as I have said, is my axe to grind. The reason why I think it is so important is first of all there is no justification for failing to comply with your duty to make reasonable adjustments. Once the duty has arisen you cannot excuse a failure to comply with your duty. Secondly, there is no margin of discretion; when we are looking at reasonableness we are looking now at the objective reasonableness of the steps that are proposed. Not whether it was a decision which a reasonable landlord could make or which a reasonable local authority could make but whether in the court's view it was reasonable. So it is aimed at creating a level playing field for people with disabilities and it requires a very careful approach and you do really have to go through it step by step. So it takes the form at Section 20 of three requirements and this is at paragraph 39 of my paper.

The first is "*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*". The second requirement is the same in relation to physical features and the third in relation to auxiliary aid. The first issue is

whether or not you are bringing a claim under Part 3 or Part 4. Of course, the vast majority of the time it will be Part 4 but there are some important differences. So Part 3 is the services and public functions provision and Part 4 deals with premises. Part 3 only applies if the premises part does not so the first question is does this fall under premises? But Part 3 does apply to provision of accommodation where it is for the purpose of short stays by individuals who live elsewhere so that might include decants, for example, or where accommodation is provided solely for purpose of providing a service or exercising a public function. That might include, for example, NASS accommodation or it might possibly include homelessness accommodation. So it may be that it is possible to bring your case under Part 3 instead of Part 4 and there are certain advantages of bringing the case under Part 3 instead of Part 4 because there are differences in the way that the duty to make reasonable adjustments arises. So for a Part 3 case, public functions, all three requirements apply, physical features, auxiliary aid and provisions, criterion or practice which are known as PCPs. So all three apply but most importantly, it applies to disabled persons generally and what that means is that it is an anticipatory duty so a person exercising a public function must assume that the services will be provided to people with disabilities and must take steps in advance of that being the case. That, obviously, then feeds into the public sector equality duty which means that there needs to be an assessment. Who are these disabled people that we are providing our services for or exercising our functions for? That has to be on an informed basis so that is what we see in the case of *R (Lunt) v Liverpool City Council*. In that case the council has made certain assumptions about wheelchair users and not really taking into account those whose wheelchairs were above a certain size. So when exercising the public sector equality duty it needs to be on an informed basis.

In relation to Part 4, only the first and third requirements apply. PCPs will be the provision that is most commonly used and it applies to tenants or someone else entitled to occupy but most importantly, unlike every other area in relation to reasonable adjustments, when it is a premises case there must be a request for the reasonable adjustments. That is Schedule 4 paragraph 2(6) and 3(5).

So first of all, where a provision, criterion or practice of A's and this is a change from policy, practice or procedure which was what was used in the previous language in relation to premises. For some obscure reason there was a slightly different wording; that has now been brought into line and that is important because PCP has an established meaning in employment law and it is a very wide meaning. It does not just mean a formal policy or something that is written down and it certainly does not mean that it has to be something that which is applied to everybody. PCP in this context can involve one-off decisions and discretionary act, an example of which is *Fareham College v Walters* where the refusal to allow an employee to return to work on a phased basis was found to be a PCP. Similarly, in *Archibald v Fife Council* the job description was a PCP. So these can be very, very broadly defined and that means that it could be the decision to seek possession in your case. So you have to be very careful about the way that you follow through the logic from the PCP to the disadvantage to the reasonable adjustments and that is what I hope to take you through. So put the disabled person in the context of Part 3; this means, as I said, disabled persons generally, at a substantial disadvantage, we know that this means more than minor or trivial so it is a very low threshold, in relation to a relevant matter. Under Part 3 this means the provision of the service or the exercise of the function and where there is a benefit conferred it means in relation to the concerns of the benefit. So, for example, if the PCP that we are looking at is an allocation scheme, the benefit which is conferred by that PCP is housing. So if you are disadvantaged in relation to the concerns of that benefit, i.e. housing, then the duty will arise.

Under Part 4, the substantial disadvantage must be in relation to the enjoyment of the premises or the use of a benefit or facility entitlement to which arises as a result of the letting. In terms of the way that we can deal with the issue of the enjoyment of the premises and whether or not it affects your enjoyment, any PCP that puts you at risk of possession proceedings obviously affects your use or enjoyment of the premises. So if you are in danger of being evicted there is nothing more likely to diminish your enjoyment of the premises than being evicted. It is then whether or not you are disadvantaged in comparison with persons who are not disabled. This is not a strict comparative exercise so it is not the exercise that you may have come across in employment cases and direct discrimination cases where you have to set up a hypothetical comparison. In reasonable adjustments we are looking at a pool of comparison and a rather more broad comparative exercise. The question is, then, whether or not such steps have been taken as to avoid the disadvantage as unreasonable. Now this is an objective test; this is not a Wednesbury test, it is not whether or not the landlord thought it was a reasonable step, it is whether the court thinks that it is a reasonable step to have been taken. Cost is relevant but it is by no means decisive and it must be viewed in context. *Cordell v The Foreign and Commonwealth Office* is the case that deals with the costs of making the adjustment and that was a very extreme example where a woman who worked for the Diplomatic Service suggested that she

needed the employment of a lip reader, the cost of which would be many times her own salary. She continued to contest that this was a reasonable adjustment that needed to be made and in that case it was found that it was not.

One of the main issues that we as housing lawyers will come across is whether the step is likely to be effective. *Her Majesty's Prison Service v Johnson* said that where the step is unlikely to be effective or will not be effective the duty can be said to fall away. In that case a prison psychologist was unable to return to work; there were no other jobs that she could go to, she was totally unable to undertake any role at all and in that case the court found that the duty to make reasonable adjustments had effectively fallen away. But that, again, was an extreme example and it has been held that actually if the proposed reasonable adjustment would give the disabled person a chance then that is sufficient, which is the case of *Cumbria Probation Board v Collingwood* which I use in my paper. More recently that case has been looked at again and it has been suggested that if it has a real prospect that that should be sufficient. But that is not to say that if there is not a real prospect that it is not necessarily a reasonable adjustment to make.

This will be a key issue in anti-social behaviour cases where, for example, you have a tenant who is harassing their neighbours and we say that a reasonable adjustment would be to refer that person for some sort of support or counselling. If that person had previously failed to engage with such services or previously failed to comply with court orders, the landlord is very likely to argue that this is not a reasonable adjustment to make because it would not be effective. But the point is does it give that person a chance to moderate their behaviour? If so, then it may be a reasonable adjustment or it may not, taking account, perhaps, of the interests of neighbours but it may be that it is a reasonable step to take.

The end point in a reasonable adjustment case is reached only when all reasonable adjustments have been made and that person is no longer at a disadvantage. This was the case of *Archibald v Fife Council* where a road sweeper became unable to do her job and wanted to be redeployed in an administrative role for which she had no experienc. The council had taken a number of steps to try to redeploy her, to give her some preferential treatment. They had automatically short-listed her for a number of roles but whenever she was interviewed she did not get the job and the council said, we have made all the reasonable adjustments that we can make, we have done our duty. What Lord Hope said was it is not simply a duty to make reasonable adjustments, the making of adjustments is not an end in itself; 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". So the end point we are looking for is whether or not any further steps would be reasonable or unreasonable, but it is not enough to say we have done X, Y and Z and that is all we have to do.

I have set out the case of *Environment Agency v Rowan*; that describes the steps that have to be taken in a reasonable adjustment case. I would now like to go through one or two examples of how reasonable adjustments might apply. The first is the case of *Barber v Croydon LBC* which is not a reasonable adjustment case but I think it is helpful because it demonstrates how reasonable adjustments could be used. In that case we had a defendant who had had an argument with the caretaker of his block and he had sworn at the caretaker and threatened him, spat in the caretaker's face and kicked him and, obviously, possession proceedings were brought. The defence was that there a breach of the public sector equality duty and that there was disability related discrimination, then under the DDA. Of course, by the time it had got to court *Malcolm* had happened and there was no disability related discrimination any more. So all that was left was the public sector equality duty and in fact the general public law claim which is really what the case was decided on. But when you look at the extract which I have set out at paragraph 63 of my paper, the Court of Appeal said:

"The issue, however, in this case is whether that general policy applied or should have been applied to Mr Barber in this case. The criticisms of the way in which the Council handled the incident are not based on any discrimination by them against him. The question is not whether he was treated less favourably than a person without his disabilities but whether he should have been treated differently precisely because he has such disabilities and because they were a significant contributory factor to his behaviour that day."

So that case was really decided on the failure of the council to follow its own policy in relation to the steps that should have been taken prior to seeking possession. Those steps that were identified as steps to be taken, or reasonably taken, prior to taking possession could well have been sought on a reasonable adjustment request and the failure then to make those reasonable adjustments could well

have formed the defence. We see a similar situation, not in a housing case but again something which explains how this might work, in *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal, Mr and Mrs T*, or more briefly known as *X v T*. In that case the child, Stacy, had ADHD but he also had a tendency to physical abuse which was, obviously, an excluded condition and he was excluded from school for physically assaulting a member of staff. In that case the High Court upheld the decision that the school had failed to make reasonable adjustments in enlisting the support of the Access to Learning Specialist Teaching Team. As a consequence, the decision to exclude him from the school was therefore unlawful, so again it is that connection between if you fail to make reasonable adjustments that might have prevented the behaviour that then causes in that case exclusion from school but possibly possession then the subsequent decision will be unlawful.

What was found in that case was it said while the proposed reasonable adjustment included a means of controlling a tendency to physical abuse it was not limited to such matters but included "*measures for the management of pupils with ADHD generally, including calming and de-escalation strategies. Such strategies may be directed at non-compliant and disruptive behaviour falling short of a tendency to physical abuse.*" So what that means is that if the proposed reasonable adjustment is directed partly at the disability and partly at the excluded condition, for example alcohol misuse, then nevertheless that will be a reasonable adjustment to have to be taken so reasonable adjustment does not need to be directed solely at the disability; it can be broader than that. In fact in that case, of course, the argument that was made by the school on appeal was that, "yes but the reason why he was excluded was because of the tendency to physical abuse; it was not because of the ADHD". But the point is that reasonable adjustment was not made and because it was not made then the decision to exclude him was unlawful. That case, again, has been upheld most recently in the case that I referred to earlier. So that gives you an example of how powerful the tool is when used in cases where we are looking at some sort of disruptive or otherwise undesirable behaviour.

A few points about some of the ways you can bring such a claim. First of all, obviously, there is jurisdiction in the county court to hear counter-claims; I would see that under Section 114. The reverse burden of proof, at Section 136, is a really important provision. It is not a simple reversal of the burden and I know that county court judges tend to be incredibly reluctant to hear any arguments at all about burden of proof. But actually in the discrimination context it is absolutely vital because the point is that if the court finds that it could be discrimination, that there are facts which suggest that it could be discrimination, then the court must find that it is discrimination unless there is cogent evidence to the contrary. That has recently been dealt with by the Supreme Court which heard many arguments on the issue of cogent evidence and whether or not that places an unfair burden on respondents to such claims. The Supreme Court was absolutely adamant that the guidance set out in *Igen Ltd v Wong* which sets out a very straightforward step by step approach was right and that it did not overcomplicate things at all. Now burden of proof is unlikely to be particularly helpful in reasonable adjustment cases but it is will be very important in cases such as discrimination arising in consequence of disability.

The questionnaire procedure at Section 138 is shortly to be abolished. Apparently the Government does not think that it is very helpful. It is absolutely vital in cases of indirect discrimination. For example, if you are alleging that an allocation scheme is indirectly discriminatory you will have to identify group disadvantage which means that you will need to know about things like how many adapted properties there are, how many ground floor flats etc and all of that information is most easily provided through the questionnaire procedure. However the Government does not agree so it will be gone fairly soon.

Finally, on the issue of remedies, Section 119 provides that the remedies include any remedy that would be available in a claim of tort or in a judicial review so quashing orders, for example, are available in the county court under Section 119 as well as damages for injury to feelings and any other damages that arise as a result of the discrimination. As I said earlier, it is important to be astute to how the issue of damages will be addressed when drafting witness statements so that the witness statements have to very clearly go through the issues of causation, the issues of disability, the functional effects of the disability, the proposed reasonable adjustments and why they would be helpful, why they would be effective, what is hoped to be the result of the proceedings and how these proceedings have affected that person.

I think that is all that I need to cover. I had prepared some powerpoint slides which have all the cases that I have referred to so I can make those available.

Chair: We will email those slides when we circukate the minutes of the meeting. I will now invite questions to the speakers.

Nik Antoniades, Shelter: Sarah, you finished off mentioning witness statements. I have a client who has severe learning disabilities, barely articulate, how do you get she/he to put in their witness statement all the things that you have said they should put in their witness statement?

Sarah Steinhardt: It is really difficult. What I would say is in the past I have made a request for reasonable adjustments from the court to lead a person with learning difficulties through their evidence orally and that was successful. There is always a tension with any client as to the extent of the input that you have in preparing a witness statement, of course, especially with speakers of other languages. Judges differ massively in the approach that they take; some are very realistic about the fact that solicitors draft witness statements and others will say that this is clearly not drafted by that person and so it is a very difficult position. What I would say is to be rather upfront about the way that the witness statement has been prepared and perhaps include in the witness statement itself the manner in which that evidence has been drawn out of that witness so you do not look like you are putting words into that person's mouth. It is difficult but I think there are ways of dealing with it and I think a court would be in a pretty difficult position to be saying that because your client has learning difficulties they therefore only get a one page, two paragraph witness statement.

Andrew Brookes, Anthony Gold: When would you ask the court to appoint an assessor or assessors to assist them in an Equality Act claim?

Sarah Steinhardt: In my experience it is always helpful to have assessors. I would say they are absolutely vital in race cases; in disability cases less so. I have to say, I think it is something that you would ask for as something that potentially might be useful; I have not personally seen them to be terribly useful. I suppose it is a judgement call in each case but in race cases absolutely vital. I say that because one of the things that very often happens in race cases is that judges expect a level of proof which is not realistic. There is a sense that race cases are so serious that you should expect absolutely watertight evidence which is utterly unrealistic in a discrimination case and that is why we have the burden of proof provisions that we have. Lay assessors should be there to attempt to put some sort of real life, real world focus on the issues.

Anne Robinson, Fisher Meredith: My question is about premises cases. Do you think that the reasonable adjustments request could be used to ask a landlord to transfer a tenant to other property where their disability needs which may have arisen since the tenancy was let to them means that they can no longer realistically enjoy that property because the reasonable adjustments would not then enable them to enjoy that premises; it would be a different letting, it would not be the same letting that they had.

Sarah Steinhardt: I absolutely think it can be used to get a transfer and I think that will probably be one of the most useful ways that the issue can be approached. The point is that it is the PCP that has to have the substantial disadvantage in relation to the use or enjoyment of the premises; it is not the reasonable adjustments. So if that person is disadvantaged in their current premises then the duty arises and the duty to make those reasonable adjustments can involve any premises or it can involve any steps, in the same way that going to see a counsellor does not necessarily go to your use or enjoyment of the premises but the point is that the duty arises because there is a disadvantage which does go to the use or enjoyment of the premises. Of course, in relation to transfers we have some authority in terms of *Barnsley v Norton* and also there are references in *Pinnock* to there being a need to ask where is that person going to go? Should the landlord be looking first at whether or not alternative accommodation can be arranged? It is very like a redeployment case in the Employment Tribunal.

Stephen Pierce, Deighton Pierce Glynn: When you are approaching your psychiatrist to ask for a report about whether your client is suffering from mental impairment or not, it is important to set out what mental impairment means under the Equality Act because it has a different meaning under the Mental Health Act. Under the Mental Health Act an impairment is distinguished from illness and so if you ask your psychiatrist if your client suffering from schizophrenia is mentally impaired they will tend to say no, so you need to explain what it means under the terms of the Equality Act.

Sarah Steinhardt: Can I add something to that as well? Robert referred in his paper to the case of *Walker v Sita Information Networking Computing* which is a very recent case involving a person who was obese and in that case the Employment Tribunal had found that she was not disabled because

there was no illness that was the cause of her functional impairment. The reason why she had trouble breathing and could not go upstairs was because of her weight; it was not because of any illness that she had. So what that case shows us is that we are really looking at this functional test; we are not looking at it from such a medical perspective and the question really is whether or not there is a substantial adverse affect on their ability to carry out day to day activities.

Chair: If there are no more questions I would like to ask you to thank our speakers in the usual way. Finally there are a couple of announcements from the Executive Committee.

Sara Stephens, Anthony Gold: We have published a HLPA guide to legal aid which I hope you all have. There is one minor amendment to that guide in that the LLA gave me their wrong DX address and so it has not changed from the previous address. They have also published SHQ which they have been updating and have provided some further clarification on issues that we have been querying with them, such as the availability or not, as it seems, of legal aid disrepair cases. Eight days after the new contracts came in the Government published the Transforming Legal Aid Consultation Paper. We are drafting a response and it should be on the website for comments by the end of the week, I hope. The new proposals are a resident's requirement to qualify for legal aid; a proposal that legal aid costs may only be awarded if you get permission in judicial review cases; a removal of legal aid for borderline cases; and proposals to reduce barristers' fees and experts' fees which are obviously crucial if you are trying to get experts' reports for disability discrimination cases. I would urge everybody to please have a look at the consultation paper and let us have your comments as soon as possible.

Chair: All that remains for me to do is to thank you all for coming and say we hope to see you on 17 July for the next meeting on Allocations: The New World.

arden chambers

Equality Act 2010

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Introduction

1. The Equality Act was supposed to be the fulfilment of a flagship manifesto promise. In the end, the introduction of a Bill to Parliament was much delayed, although, as we shall see below, that did allow the subsequent Act to cure one of the last acts of the House of Lords in its judicial capacity.

2. The Act may be seen as being primarily a consolidating one, although that it is not to say that it contains nothing new – far from it.

3. Consolidation was clearly welcome. Prior to 2010, the principal domestic legislation could be found in:

    (i) Equal Pay Act 1970;
    (ii) Sex Discrimination Act 1975;
    (iii) Race Relations Act 1976;
    (iv) Disability Discrimination Act 1995;
    (v) Employment Equality (Religion or Belief) Regulations 2003;
    (vi) Employment Equality (Sexual Orientation) Regulations 2003;
    (vii) Employment Equality (Age) Regulations 2006;
    (viii) Equality Act 2006, Pt.2;
    (ix) Equality Act (Sexual Orientation) Regulations 2007.

    Most of which had been subjected to numerous amendments. The consequence was a "tangled mess of inconsistent and opaque anti-discrimination legislation".[1]

4. The Equality Act must also be viewed in context – in many instances there will be an overlap with the Human Rights Act 1998 and, given that large parts of the Act

[1] Anthony Lester & Paola Uccellari, 'Extending the equality duty to religion, conscience and belief: Proceed with caution', EHRLR (2008), pp.567-573, p.568.

are rooted in European Union law,[2] it is often necessary to consider the influence of the EU.[3]

5. The road to the final Act, can be traced through the Discrimination Law Review (set up in February 2005); the DCLG consultation paper *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (June 2007); GEO Command Papers *Framework for a Fairer Future - the Equality Bill* (Cm 7431, June 2008) and *The Equality Bill - Government Response to the Consultation* (Cm 7454, July 2008); and the *New Opportunities White Paper* (Cm 7533, January 2009).

6. The Bill was introduced in the House of Commons on April 24, 2009. It received royal assent on April 8, 2010.

7. The Act is split up into 16 Parts:

(i) Socio-economic duty;
(ii) Key concepts;
(iii) Goods, facilities and services (GFS) and public functions;
(iv) Premises;
(v) Employment;
(vi) Education;
(vii) Private clubs, political organisations, etc;
(viii) Prohibitions on some other forms of conduct;
(ix) Enforcement;
(x) Void and unenforceable terms in contracts, etc;
(xi) Due regard duty;
(xii) Transport;
(xiii) Consent for reasonable adjustments to premises;
(xiv) Exceptions;

[2] *e.g.* Council Directives 75/117/EC, 76/207/EC, 2000/43/EC, 2000/78/EC, 2004/113/EC and European Parliament and Council Directive 2006/54/EC.
[3] In which context the possibility of further EU legislation in this area should not be dismissed, see, *e.g.*, The European Commission's draft Equal Treatment Directive. Wider sources of law may also need to be considered, such as the United Nations Convention on the Rights of Persons with Disabilities: *HK Danmark v Dansk almennyttigt Boligselskab* (Case C-335/11) [2013] EqLR 528.

(xv) Family property;

(xvi) General provisions.

8. For our purposes, the most important are Pts.2, 3, 4 & 11.

9. A note of caution – the Act has been brought into force in a piecemeal fashion. Not all provisions apply to all of the protected characteristics (on which, more below). Those that do, may not apply equally to the full range of that characteristic (*e.g.* age, where under 18s are involved). Coherence and a principled approach are not always immediately obvious.

10. But first, a slight digression.

Prologue: socio-economic duty

11. Part 1 of the Act came out of the *New Opportunities White Paper*. It introduced a brand new duty which would have required specified public authorities, when making strategic decisions such as deciding priorities and setting objectives, to consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage. Such inequalities could include inequalities in education, health, housing, crime rates, or other matters associated with socio-economic disadvantage. It would be for public authorities subject to the duty to determine which socio-economic inequalities they were in a position to influence.

12. Unlike the main public sector due regard duty (considered below) the socio-economic duty only operates at a strategic level. While a breach of it would be amenable to judicial review, there would be no private law cause of action: s.3.

13. Although the duty might be considered to be a fairly weak one, it was nonetheless a very controversial provision, being described as “socialism in one clause”, which was presumably either praise or damnation, depending on one’s perspective.[4]

[4] But equally inaccurate from either perspective.

14. The coalition government has not brought Pt.1 into force, nor does it have any plans to do so.

Concepts – protected characteristics

15. The Act works by defining the "protected characteristics" of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation: s.4.

16. While several of these may be thought to be fairly obvious, the definitions of other characteristics are not necessarily quite so clear.

17. Section 5 deals with age:

> "(1) In relation to the protected characteristic of age—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
>
> (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

18. So, for example, an age group would include "over fifties" or twenty-one year olds, while a person aged twenty-one does not share the same characteristic of age with "people in their forties". However, a person aged twenty-one and people in their forties can share the characteristic of being "under fifty".

19. Section 197 creates a power to amend the Act by order so that either specified conduct; anything done for a specified purpose; or anything done in pursuance of arrangements of a specified description do not contravene the Act, so far as age is

concerned. This power has been exercised in the Equality Act 2010 (Age Exceptions) Order 2012.[5]

20. Next, s.6 defines disability:

> "(1) 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."

21. For these purposes "substantial" means more than minor or trivial: s.212(1).

22. Section 6(1) requires a focus on what the person cannot do, not on what they can do: *Aderemi v London & South Eastern Railway* [2013] ICR 591, EAT.

23. The Office for Disability Issues (ODI) has published guidance issued by the Secretary of State under 2010 Act, s.6(5). The guidance concerns the definition of disability in the 2010 Act. Any adjudicating body which is determining whether someone is a person with a disability, for the purposes of the 2010 Act, must take into account any aspect of the guidance which appears to it to be relevant.

24. The guidance was laid before Parliament in draft on February 10, 2011, before being issued on April 7 and then coming into force on May 1, by virtue of The Equality Act 2010 (Guidance on the Definition of Disability) Appointed Day Order 2011.[6] It is published as *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability* and can be downloaded from:

5 SI 2012/2466. Article 7 amends the 2010 Act to exempt residential mobile homes from age discrimination provisions.

6 SI 2011/1159. Where the act complained of took place before 1 May 2011 (or began before that date, if it is a continuing act), then the Guidance issued under the Disability Discrimination Act 1995 should still be applied: art.3 and see also *Aderemi v London & South Eastern Railway* [2013] ICR 591, EAT.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf.[7]

25. It has been suggested that the ODI Guidance might, wrongly, indicate that there is something of a sliding scale between trivial and substantial: *Aderemi v London & South Eastern Railway* [2013] ICR 591, EAT.

26. The effect of an impairment is long-term if it has lasted for 12 months; it is likely to last for 12 months; or it is likely to last for the rest of the affected person's life: Sch.1, para.2. If an impairment ceases to have a substantial adverse effect it is to be treated as continuing to have that effect if it is likely to recur.

27. An impairment consisting of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities: Sch.1, para.3.

28. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that, it would be likely to have that effect: Sch.1, para.5. However, that doesn't apply to a sight impairment that is correctable by spectacles or contact lenses.

29. Schedule 1, para.6 provides that cancer, HIV infection and multiple sclerosis are all disabilities.

30. Where someone has a progressive condition, as a result of which they have an impairment which has/had an effect on their ability to carry out normal day-to-day activities, but the effect isn't/wasn't a substantial adverse one, it is nonetheless taken to be so if the progressive condition is likely to result in such an impairment: Sch.1, para.8.

[7] The *Guidance* applies in England, Scotland and Wales. Similar, but separate, guidance applies in Northern Ireland.

31. An example from the ODI guidance may help to illustrate this provision: [8]

> "A young boy aged 8 has been experiencing muscle cramps and some weakness. The effects are quite minor at present, but he has been diagnosed as having muscular dystrophy. Eventually it is expected that the resulting muscle weakness will cause substantial adverse effects on his ability to walk, run and climb stairs. Although there is no substantial adverse effect at present, muscular dystrophy is a progressive condition, and this child will still be entitled to the protection of the Act under the special provisions in Sch1, Para 8 of the Act if it can be shown that the effects are likely to become substantial."[9]

32. Note that some characteristics are specifically excluded from qualifying as impairments for the purposes of s.6. For instance the Equality Act 2010 (Disability) Regulations 2010[10] prescribe a number of conditions that are not to be classed as disabilities:

> (i) Addiction to alcohol, nicotine or any other substance, but these exclusions do not apply to an addiction which was originally the result of administration of medically prescribed drugs or other medical treatment;
> (ii) A tendency to set fires;
> (iii) A tendency to steal;
> (iv) A tendency to physical or sexual abuse of other persons;
> (v) Exhibitionism and voyeurism;
> (vi) The condition known as seasonal allergic rhinitis;
> (vii) A severe disfigurement that consists of a tattoo (which has not been removed) or a piercing of the body for decorative or other non-medical purposes.

[8] While noting that the *Guidance* should be read in its totality; individual elements should not be considered in isolation: *Guidance*, p.5.
[9] *Guidance*, p.24.
[10] SI 2010/2128.

33. The cause of an impairment is irrelevant, even if it is not itself a disability because it is excluded, *e.g.* alcoholism: *Power v Panasonic UK* [2003] IRLR 151, EAT (approved in *Lalli v Spirita Housing* [2012] EWCA Civ 497; [2012] HLR 30, at [36]). As the ODI guidance states:

> "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 an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition." [11]

34. The Employment Appeal Tribunal has recently emphasised this in *Walker v Sita Information Networking Computing* [2013] EqLR 476. In that case the claimant suffered from what was described as a "constellation" of symptoms which could not be attributed to any recognisable pathological or mental cause and were exacerbated by his obesity. The Employment Tribunal had held that there was no disability because the cause of the symptoms could not be identified. Langstaff J stressed the need to have regard to the effect of the impairments, not their cause (though the absence of an obvious cause might have evidential significance in an appropriate case if the genuineness of the symptoms was put in issue).

35. The protected characteristic of gender reassignment is defined by s.7(1) as being where a person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

[11] *Guidance*, p.9.

36. The protected characteristic of race is worth considering for two specific reasons.

37. First, it includes colour, nationality, and ethnic or national origins: s.9(1). This remedies an inconsistency in previous legislation where not all definitions of race included colour.

38. Secondly, Parliament has recently used Enterprise and Regulatory Reform Act 2013, s.97 to amend s.9, 2010 Act, to provide that a Minister of the Crown must further amend s.9 to make provision for caste to be an aspect of race.[12]

39. Religion means any religion and a reference to religion includes a reference to a lack of religion: s.10(1). Belief means any religious or philosophical belief: s.10(2). Again, a reference to belief includes a reference to a lack of belief. The government was at pains to stress in the Explanatory Notes that adherence to a particular football team would not be a belief for the purposes of s.10(2).

40. The protected characteristic of sexual orientation covers a person's sexual orientation towards persons of the same, opposite, or either sex: s.12(1).

Concepts – types of discrimination

41. Separate provisions deal with direct and indirect discrimination: ss.13 & 19.

42. Direct discrimination is the simplest and most obvious form of discrimination (s.13(1)):

> "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."

[12] The amendment (requiring a further amendment) comes into force on 25 June 2013.

43. It is not necessary for the person subjected to direct discrimination to have the protected characteristic. It is enough that they are associated with someone who does.[13] This gives effect to the decision of the ECJ in *Coleman v Attridge Law* (Case C-303/06) [2008] ICR 1128.

44. The Supreme Court has said (under the "old" law) that whether there had been discrimination on the ground of sex or race depended upon whether sex or race was the criterion applied as the basis for discrimination and that the motive for discriminating according to that criterion was irrelevant: *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728.

45. Note that direct age discrimination is capable of being objectively justified and that treating disabled persons more favourably does not directly discriminate against someone who is not a disabled person: s.13(2)-(3).[14]

46. The Supreme Court in *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728 queried whether there was a defect in domestic discrimination law in contrast to the law in many countries and the Convention for the Protection of Human Rights and Fundamental Freedoms, it does not provide a defence of justification in cases of direct discrimination.

47. Indirect discrimination targets discriminatory activity that is sometimes more subtle (s.19):[15]

> "(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.

[13] Except for the protected characteristic of marriage and civil partnership so far as Pt.5 (work) is concerned: s.13(4).

14 In relation to justification of direct age discrimination, see, *e.g.*, *Hörnfeldt v Posten Meddelande AB* (Case C-141/11) [2010] 3 CMLR 37; *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2009] EWHC 2336 (Admin); [2010] 1 CMLR 21; [2010] ICR 260; *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] ICR 704; *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] 2 CMLR 50; [2012] ICR 716; *European Commission v Hungary* (Case C-286/12) [2013] 1 CMLR 44.

[15] Although not always much more subtle, as in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213.

(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."

48. There is a special form of protection for disabled persons, discrimination arising from disability: s.15.

Disability: Malcolm v Lewisham LBC

49. In order to understand the new provision, a brief history lesson is necessary.[16]

50. The Disability Discrimination Act 1995, as amended, defined discrimination as follows:[17]

"... a person ("A") discriminates against a disabled person if—

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified.

(2) For the purposes of this section, treatment is justified only if—

(a) in A's opinion, one or more of the conditions mentioned in subsection (3) are satisfied; and

[16] Perhaps not *necessary*, but included here anyway.
[17] Disability Discrimination Act 1995, s.24.

(b) it is reasonable, in all the circumstances of the case, for him to hold that opinion."

51. Under the 1995 Act less favourable treatment could only be justified by reference to a number of stated conditions, including not to endanger the health and safety of any person. When considering the issue of objective justification under the 2010 Act, it is noteworthy that the defence of justification has been extended from the position in the 1995 Act. While health and safety may still be an important factor, the issues which may be relied upon by the landlord go far wider than that.

52. The Court of Appeal held that although the 1995 Act did not explicitly afford a defence to possession proceedings, a secure or assured tenant may assert matters on which he relies under the 1995 Act in support of an argument that it would not be reasonable to make a possession order, instead of counterclaiming for a declaration that the landlord's conduct is unlawful or for an injunction prohibiting that conduct: *Manchester CC v Romano* [2004] EWCA Civ 834; [2005] 1 WLR 2775; [2004] HLR 47.

53. A majority of the House of Lords (Lord Bingham, Baroness Hale and Lord Neuberger) subsequently held that a tenant may have a defence to a claim for possession based on unlawful discrimination under the Disability Discrimination Act 1995, even though he may have no defence under landlord and tenant law: *Lewisham LBC v Malcolm* [2008] UKHL 43; [2008] 1 AC 1399; [2008] HLR 41.

54. That case involved a secure tenant who had sublet his flat. The local authority commenced possession proceedings and the tenant defended on the basis that his decision to sublet the property was related to his schizophrenia.

55. The majority of the House of Lords (Lords Bingham, Scott, Brown and Neuberger) held that in deciding whether a landlord has treated a disabled tenant less favourably than he would treat others, the comparison required under Disability Discrimination Act 1995, s.24(1)(a) is between the landlord's treatment of the disabled tenant and the landlord's treatment of a tenant without a disability who has

acted in the same way; a tenant without a disability who had unlawfully sublet would also have been evicted by the authority; accordingly, the defendant had not been discriminated against.

56. Baroness Hale's was the lone voice in the minority. In her Ladyship's opinion the comparison to be made for the purposes of s.24(1)(a) was that in *Clark v TDG Ltd (t/a Novacold Ltd)* [1999] ICR 951, CA. Applied to the facts of *Malcolm* that meant that the comparison was between the authority's treatment of the defendant and their treatment of a hypothetical tenant who had not unlawfully sublet.

57. The decision prompted uproar amongst disability rights groups and the Office for Disability Issues (ODI) was readily persuaded that the House of Lords had gone too far.[18] The Equality Act 2010 provided an opportunity to reverse the effects of the decision of the House of Lords. The Act does this in two ways.

58. First, and this was originally the only way put forward, through extending indirect discrimination to cover disability: s.19 & s.25(2)(c).

59. Secondly, the ODI was persuaded after consultation to introduce a provision dealing with discrimination arising from disability (s.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."

Harassment & victimisation

[18] Although whether it was the lawyers who "broke" the Act (as suggested at http://nearlylegal.co.uk/blog/2013/05/lets-try-not-to-break-this-one-hlpa-and-the-equality-act-2010/), or whether the statutory drafting was to blame, is a debate for another day.

60. Harassment is covered by s.26. There are three types of harassment. The first type, which applies to all the protected characteristics apart from pregnancy and maternity, and marriage and civil partnership, involves unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading humiliating or offensive environment for the complainant or violating the complainant's dignity. The second type, sexual harassment is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type of harassment. The third type is treating someone less favourably than another because they have either submitted or failed to submit to sexual harassment, or harassment related to sex or gender reassignment.

61. Victimisation is covered by s.27. Victimisation takes place where one person treats another badly because he or she in good faith has taken or supported any action taken for the purpose of the Act, including in relation to any alleged breach of its provisions. Victimisation takes place where one person treats another badly because he or she is suspected of having done this or of intending to do this.

Reasonable adjustments

62. The duty to make reasonable adjustments arises in the context of disability discrimination and is contained in s.20. The duty comprises three requirements which apply where a disabled person is placed at a substantial disadvantage in comparison to non-disabled people. The first requirement covers changing the way things are done (such as changing a practice),[19] the second covers making changes to the built environment (such as providing access to a building), and the third covers providing auxiliary aids and services (such as providing special computer software or providing a different service). Those three requirements are set out in s.20, as follows:

[19] An employer's incompetence has been held not to amount to a provision, criterion or practice: *Carphone Warehouse v Martin* [2013] EqLR 481, EAT.

> "(3) The first requirement is a 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.
>
> (4) 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.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

63. Clearly, whether the adjustment is "reasonable" is a critical question. In an employment context, if there is a "real prospect" of an adjustment removing a disabled employee's disadvantage, that will be sufficient to make the adjustment a reasonable one. However, that does not mean that a prospect less than a "real prospect" would automatically not be sufficient to make the adjustment a reasonable one. It may, in all the circumstances, still be enough.[20]

Combined discrimination

64. Finally, in terms of the "introductory" provisions, we come to s.14, "combined discrimination: dual characteristics", which has been left to last and taken out of order for the simple reason that it is not in force and is unlikely to be brought into force by the present government.

65. It is, nonetheless, important to know what s.14 was meant to do, because that mischief remains uncured. As a result of *Bahl v Law Society* [2004] EWCA Civ

[20] *Leeds Teaching Hospital NHS Trust v Foster* [2011] EqLR 1075, EAT.

1070; [2004] IRLR 799, discrimination on the grounds of different characteristics has to be looked at separately. This makes it difficult for someone who wants to argue that, *e.g.* the reason that they are no longing reading the TV news is because they are an older woman. This might not be direct discrimination on the grounds of sex, as a *younger* woman might still get the job, and it might not be direct discrimination on the grounds of age, as an older *man* might also get the job.

66. Dual discrimination, which would only have been available in relation to direct discrimination and only for a combination of two characteristics at a time, was meant to tackle this problem.

67. The Chancellor, somewhat remarkably, put a stop to that in his 2011 budget speech in which he announced that s.14 would not be implemented.[21]

GFS and public functions

68. Part 3 does not apply to marriage and civil partnership or to age for those under 18: s.28(1).

69. Part 3 also does not apply to conduct that is covered by Pts.4, 5, or 6 (premises, work and education), or would be caught by those parts but for an express exception.

70. Section 29 is the central component of Pt.3:

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

[21] But see *Ministry of Defence v DeBique* [2010] IRLR 471, EAT, where it was held that the nature of discrimination was often multi-faceted and could not always be compartmentalised into discrete categories; the disadvantage to which the complainant was subjected arose because she was a 24/7 soldier with a child and was of Vincentian origin. See also James Hand, 'Combined Discrimination – section 14 of the Equality Act 2010: a partial and redundant provision?', PL (2011), pp.482-490.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

(3) A service-provider must not, in relation to the provision of the service, harass—

(a) a person requiring the service, or

(b) a person to whom the service-provider provides the service.

(4) A service-provider must not victimise a person requiring the service by not providing the person with the service.

(5) A service-provider (A) must not, in providing the service, victimise a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

(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.

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

(8) In the application of section 26 for the purposes of subsection (3), and subsection (6) as it relates to harassment, neither of the following is a relevant protected characteristic—

(a) religion or belief;

(b) sexual orientation.

(9) In the application of this section, so far as relating to race or religion or belief, to the granting of entry clearance (within the

meaning of the Immigration Act 1971), it does not matter whether an act is done within or outside the United Kingdom.

(10) Subsection (9) does not affect the application of any other provision of this Act to conduct outside England and Wales or Scotland."

Premises

71. Part 4 deals with premises. It does not apply to age or marriage and civil partnership: s.32(1).

72. Again, Pt.4 does not apply to conduct that is covered by Pts. 5 or 6, or would be caught by those parts but for an express exception: s.32(2).

73. Part 4 also does not apply to the provision of accommodation which is either generally for the purpose of short stays by individuals who live elsewhere, or for the purpose only of exercising a public function or providing a service to the public or a section of the public: s.32(3).

74. There are four substantive provisions in Pt.4, dealing with disposals, permission for disposals, management, and reasonable adjustments.

75. Section 33 covers disposals:

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

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

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

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

(2) Where an interest in a commonhold unit cannot be disposed of unless a particular person is a party to the disposal, that person

must not discriminate against a person by not being a party to the disposal.

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

(a) a person who occupies them;

(b) a person who applies for them.

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

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

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

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

(5) Where an interest in a commonhold unit cannot be disposed of unless a particular person is a party to the disposal, that person must not victimise a person by not being a party to the disposal.

(6) In the application of section 26 for the purposes of subsection (3), neither of the following is a relevant protected characteristic—

(a) religion or belief;

(b) sexual orientation."

76. Permission for disposals is dealt with by s.34:

"(1) A person whose permission is required for the disposal of premises must not discriminate against another by not giving permission for the disposal of the premises to the other.

(2) A person whose permission is required for the disposal of premises must not, in relation to an application for permission to dispose of the premises, harass a person—

(a) who applies for permission to dispose of the premises, or

(b) to whom the disposal would be made if permission were given.

(3) A person whose permission is required for the disposal of premises must not victimise another by not giving permission for the disposal of the premises to the other.

(4) In the application of section 26 for the purposes of subsection (2), neither of the following is a relevant protected characteristic—

(a) religion or belief;

(b) sexual orientation.

(5) This section does not apply to anything done in the exercise of a judicial function."

77. Discrimination in the management of premises is covered by s.35:

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

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

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

(c) by subjecting B to any other detriment.

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

(a) a person who occupies them;

(b) a person who applies for them.

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

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

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

(c) by subjecting B to any other detriment.

(4) In the application of section 26 for the purposes of subsection (2), neither of the following is a relevant protected characteristic—

(a) religion or belief;

(b) sexual orientation."

78. Lastly, we get to the duty to make reasonable adjustments in relation to leasehold and commonhold premises and common parts, s.36:

"(1) A duty to make reasonable adjustments applies to—

(a) a controller of let premises;

(b) a controller of premises to let;

(c) a commonhold association;

(d) a responsible person in relation to common parts.

(2) A controller of let premises is—

(a) a person by whom premises are let, or

(b) a person who manages them.

(3) A controller of premises to let is—

(a) a person who has premises to let, or

(b) a person who manages them.

(4) The reference in subsection (1)(c) to a commonhold association is a reference to the association in its capacity as the person who manages a commonhold unit.

(5) A responsible person in relation to common parts is—

(a) where the premises to which the common parts relate are let (and are not part of commonhold land or in Scotland), a person by whom the premises are let;

(b) where the premises to which the common parts relate are part of commonhold land, the commonhold association.

(6) Common parts are—

(a) in relation to let premises (which are not part of commonhold land or in Scotland), the structure and exterior of, and any common facilities within or used in connection with, the building or part of a building which includes the premises;

(b) in relation to commonhold land, every part of the commonhold which is not for the time being a commonhold

unit in accordance with the commonhold community statement.

(7) A reference to letting includes a reference to sub-letting; and for the purposes of subsection (1)(a) and (b), a reference to let premises includes premises subject to a right to occupy.

(8) This section does not apply to premises of such description as may be prescribed."

79. So far as common parts are concerned, the relevant provisions (s.36(1)(d), (5), (6)) have not yet been brought into force.

80. Section 36 needs to be read with Sch.4.

81. Schedule 5 makes some exceptions to Pt.4, relating to owner-occupiers and small premises.

Due regard duty

82. The public sector equality duty is now contained in s.149. It had three precursors:

(i) Sex Discrimination Act 1975, s.76A, which imposed a duty on public authorities to have due regard to the need to, *inter alia*, eliminate unlawful discrimination; and to promote equality of opportunity between men and women;

(ii) Race Relations Act 1976, s.71, which imposed a duty on public authorities to have due regard to the need to, *inter alia*, eliminate unlawful discrimination; and to promote equality of opportunity and good relations between persons of different racial groups; and

(iii) Disability Discrimination Act 1995, s.49A, which imposed a duty on public authorities to have due regard to the need to, *inter alia*, eliminate unlawful discrimination; promote equality of opportunity between disabled persons and other persons; take steps to take account of disabled persons' disabilities, even where that involves

> treating disabled persons more favourably than other persons; promote positive attitudes towards disabled persons; and encourage participation by disabled persons in public life.

83. Due regard is the regard that is appropriate in all the circumstances: *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809, at [31].

84. In *Baker*, Dyson LJ said at [37] that:

> "The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed. ... To see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning."

85. The importance of "due regard" being exercised in this context is reinforced by the fact that Parliament has made the obligation an unqualified one: *R (Meany) v Harlow* DC [2009] EWHC 559 (Admin), at [61].

86. The Court of Appeal has emphasised the "importance of compliance with s.71, not as a rearguard action following a concluded decision but as an essential preliminary to any such decision. Inattention to it is both unlawful and bad government.": *R (Bapio) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 7, at [3].

87. The Divisional Court made clear in *R (Brown) v Work and Pensions Secretary* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, at [89] that neither

> "... section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal disability equality impact assessment when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking an assessment, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability. ..."

88. The Divisional Court then laid down six general principles that demonstrate how a public authority should carry out its "due regard" duty:

> "[90] … First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have 'due regard' to the identified goals: compare, in a race relations context, *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] 3 FCR 203, para 114, per Silber J. Thus, an incomplete or erroneous appreciation of the duties will mean that 'due regard' has not been given to them: see, in a race relations case, the remarks of Moses LJ in *R (Kaur) v Ealing London Borough Council* [2008] EWHC 2062 (Admin) at [45].
>
> "[91] Secondly, the 'due regard' duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. On this compare, in the context of race relations: the *Elias* case [2006] 1 WLR 3213, para 274, per Arden LJ. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty: compare, in the race relations context, the remarks of Buxton LJ in *C's* case [2009] 2 WLR 1039, para 49.

“[92] Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of ‘ticking boxes’. Compare, in a race relations case the remarks of Moses LJ in *Kaur's* case, paras 24-25.

“[93] However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have ‘due regard’ to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in *Baker's* case [2009] PTSR 809, para 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non-statutory guidance in all cases where section 49A(1) is in play. ‘In this way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced’: *Baker's* case, para 38.

“[94] Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have ‘due regard’ to the needs identified will only be fulfilled by the relevant public authority if (i) it appoints a third party that is capable of fulfilling the ‘due regard’ duty and is willing to do so; and (ii) the public authority maintains a proper supervision over the third party to ensure it carries out its ‘due regard’ duty: compare the remarks of Dobbs J in *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2007] EWHC 1941 (Admin) at [92] and [95].

“[95] Fifthly, and obviously, the duty is a continuing one.

“[96] Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they

> had actually considered their disability equality duties and pondered relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1): see the remarks of Stanley Burnton J in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin) at [69]; those of Dobbs J in the *Eisai* case [2007] EWHC 1941 (Admin) at [92] and [94]; and those of Moses LJ in *Kaur's* case, para 25."

89. The Court of Appeal held in *Pieretti v Enfield BC* [2010] EWCA Civ 1104; [2011] PTSR 565; [2011] HLR 3 that the duty imposed on public authorities by s.49A of the 1995 Act applied not only to formulation of policies, but also to the application of those policies in individual cases.

90. Where, in a post-*Pinnock*[22] case, a defendant to possession proceedings claimed that the local authority had failed to have due regard to his daughter's disability, the Court of Appeal held that if the claimant's failure to comply with its duties under the 1995 Act had been challenged by an application for judicial review it would have been open to the Administrative Court to conclude that the decisions already taken should not be set it aside, if it considered that the claimant could now be relied upon to exercise its relevant future functions properly: *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834; [2012] PTSR 56; [2011] HLR 46, [36].

91. By analogy, where a breach of a public law duty was relied upon by way of defence it was open to the court to take the view that, if the decision would not have been set aside on an application for judicial review, it should not provide a basis for a defence to proceedings for possession: *Barnsley v Norton*, [37].

92. The 2010 Act introduced a new, broader "public sector equality duty": s.149.

[22] *Manchester CC v Pinnock* [2010] UKSC 45; [2011] 2 AC 104.

93. Section 149 provides that specified public authorities and bodies which exercise public functions must, in the exercise of their functions, have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity and foster good relations between persons with protected characteristics[23] and others.[24]

94. Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; and encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low: s.149(3).

95. Section 149(4) provides that the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

96. Having due regard to the need to foster good relations involves having due regard, in particular, to the need to tackle prejudice and promote understanding: s.149(5).

97. Compliance with the s.149 duties may involve treating some persons more favourably than others: s.149(6).

98. The duty came into force in England and Wales on April 5, 2011.

99. Additionally, the relevant national authority (Secretary of State or Welsh Ministers) may impose further duties on such bodies: s.153(1),(2). These regulations require

[23] Not including marriage and civil partnership: s.149(7).
[24] For a powerful argument as to why “religion or belief” should not have been included in this duty see Anthony Lester & Paola Uccellari, 'Extending the equality duty to religion, conscience and belief: Proceed with caution', EHRLR (2008), pp.567-573.

specified English public authorities (including local authorities and the Homes and Communities Agency) to publish information to demonstrate their compliance with the Equality Duty, by 31 January 2012 (6 April 2012 for educational institutions) and then at least annually, and equality objectives, by 6 April 2012 and then at least every four years: The Equality Act 2010 (Specific Duties) Regulations 2011.[25]

100. The government is currently carrying out a review of the public sector equality duty, as one of the outcomes of its Red Tape Challenge. The review is expected to be completed by June 2013. The review is focusing on:

(i) How well understood the duty and guidance are;
(ii) The costs and benefits of the duty;
(iii) How organisations are managing legal risk and ensuring compliance; and
(iv) What, if any, changes would ensure better equality outcomes.[26]

Family property[27]

101. Part 15 is a rather loose collection of four provisions, none of which are yet in force. Section 198 will abolish the common law rule that a husband must maintain his wife.

102. Section 199 is *probably* the most important of the Pt.15 provisions, but even that is likely to have limited application. The presumption of advancement is to be abolished by s.199.

103. Section 1 of the Married Women's Property Act 1964, which provides that:

[25] SI 2011/2260. For Wales, see Equality Act 2010 (Statutory Duties) Wales Regulations 2011 (SI 2011/1064). For Scotland, see Equality Act 2010 (Specific Duties (Scotland) Regulations 2012 (Scottish SI 2012/162).
[26] See https://www.gov.uk/government/policy-advisory-groups/123.
[27] Part 15 (along with s.190) does not apply to Scotland.

> "If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares"

Will be amended by s.200 so that it becomes:

> "If any question arises as to the right of a husband or wife to money derived from any allowance made by either of them for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to them in equal shares"

104. The 1964 Act will then be cited as the Matrimonial Property Act 1964. Section 201 inserts a provision to the same effect into the Civil Partnership Act 2004 (as s.70A).

105. As noted above, none of Pt.15 has yet been brought into force and there is no indication when it will be.

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INTRODUCTION

1. When the Equality Act 2010 ("the Act") came into force it consolidated 116 separate pieces of legislation into one place and brought together all pre-existing anti-discrimination legislation. The stated intention of the Act was to harmonise and streamline anti-discrimination law and practice, bringing the UK into line with the European Directives and simplifying the system for the enforcement of equality rights.

2. The Act also strengthened the law in a number of areas, and brought in innovations which had previously not been known to housing law, and because of the newly harmonised legal framework, it made reading across the different areas in which discrimination law applies that much more straightforward. It must be regarded as Parliament's intention that, except where expressly provided otherwise, a consistent interpretation be given to the Act's provisions across housing, employment, education and public functions. This is an exciting opportunity for housing law.

3. This paper is intended to follow on from Robert Brown's and looks at some of the unique features of discrimination law, and some of the lessons that can be drawn from case law in other areas. I focus on possession proceedings in relation to people with disabilities (in particular mental health and learning disabilities) because this is the area most frequently encountered by housing lawyers. But much of what I consider would also be relevant to areas such as homelessness appeals and allocations decisions.

4. What I most want to deal with is reasonable adjustments, which is much under-used in housing, and which is a powerful and misunderstood (at least in housing) tool. Reasonable adjustments are important because, unlike other areas of discrimination they are not dependent on an overt act of unfavourable treatment, but on the principle of equal treatment by the creation of a level playing field. In so doing the provisions recognise that different or more favourable treatment may be required in order to address disparate impact. The duty to make reasonable adjustments is essentially a duty to remove disadvantage. While there may be arguments about the reasonableness of steps that are proposed, the nature of the disadvantage and so on, as a general rule the duty is not discharged until the disadvantage has been eliminated: see *Archibald v Fife Council* [2004] IRLR 651 at [15] per Lord Hope of Craighead.

KEY PROVISIONS

5. The key provisions relating to residential premises are as follows:

    a. Section 6 and Schedule 1: the definition of disability

    b. Prohibited conduct:

        i. Section 13: Direct discrimination

        ii. Section 15: Discrimination arising from disability

        iii. Section 19: Indirect discrimination

        iv. Section 21: Failure to make reasonable adjustments

        v. Section 26: Harassment

        vi. Section 27: Victimisation

    c. Part 3 and Schedule 2: Services and Public functions

    d. Part 4 and Schedules 4 and 5: Premises

    e. Sections 113, 118 and 119: Jurisdiction, time limits and remedy

    f. Section 136: Burden of proof and section 138: Power to question

    g. Section 149: Public sector equality duty

    h. Part 13 and Schedule 21: Reasonable adjustments in lettings

    i. The Equality Act 2010 (Disability) Regulations 2010 SI No 2128 ("the Regulations"): interpretation and scope of protections under the Act.

    j. Statutory Guidance: "Guidance on matters to be taken into account in determining questions relating to the definition of disability"

    k. Statutory Guidance: "Code of Practice on Services Public Functions and Associations"

AREAS IN WHICH THE DUTIES APPLY

Premises

6. Part 4 of the Act provides for protection from discrimination in the case of controllers and managers of premises and in respect of decisions to dispose of premises. It therefore covers:

    a. estate agents;

    b. landlords;

    c. local authorities; and,

    d. managers of premises.

7. Part 4 is designed to operate where the premises in question are the victim's home and it does not cover provision of accommodation where it is (a) generally for the purpose of short stays by individuals who live elsewhere, or (b) for the purpose only of exercising a public function or providing a service to the public or a section of the public.

8. Controllers and managers of let premises are under a duty not to discriminate in relation, among others, disposals (section 33) and the management of premises (section 35):

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

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

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

    There is a slight change here since the DDA which referred to a "refusal" to dispose. In this way the new law recognises the subconscious drives that are often indicative of discrimination and the difficult issue of proof of discrimination.

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

(Where a disposal is by an owner-occupier and where the landlord does not use an estate agent and does not advertise the letting, she is only prohibited from discriminating on grounds of race: schedule 5 paragraph 1(3).)

9. Section 35 concerns the management of premises:

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

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

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

(c) by subjecting B to any other detriment.

10. 'Detriment' is to be given its ordinary meaning and does not connote any special characteristics. It is sufficient that the person might reasonably be said to be disadvantaged: *Shamoon v RUC (Northern Ireland)* [2003] ICR 337, HL.

11. Those who have a right to dispose of premises and managers of premises are also covered by the provisions on harassment and victimisation, both provisions that may offer additional protection and causes of action in cases of breach of quiet enjoyment and unlawful eviction.

Services to the public

12. The provisions concerning goods, facilities and services are at section 29 of the Act and provide for protection of service users, or potential service users, from discrimination, including harassment, victimisation, direct and indirect discrimination. Service providers are under a duty to make reasonable adjustments, and a failure to do so amounts to unlawful discrimination: s. 28(7)(a).

13. Service providers must not discriminate against a person requiring the service by not providing services to that person, by providing it on less favourable terms or by subjecting that person to any other detriment. There is a change from the previous provisions from "refusing or deliberately omitting" to provide a service to now simply "not providing", indicating a slightly lower threshold.

14. "Service provision" to the public is defined as something that could be provided to the public. *In re Amin* [1983] 2 AC 818, the House of Lords said that the test is whether the conduct in question was similar to that which would be or could be undertaken by a private person, and did not extend to actions of entry clearance officers.

Public functions

15. The public function provisions apply in relation to a function of a public nature, exercised by a public authority or another person (including a private organisation), where the function is not covered by the services, premises, work or education provisions of the Act. However, there will be some situations however where the circumstances will fall within Part 3 and will apply:

    a. where the provision of accommodation is generally for the purpose of short stays by individuals who live elsewhere (e.g. decants) s. 32(3)(a); or

    b. where accommodation is provided solely for the purpose of providing a service or exercising a public function (e.g. homeless accommodation): s. 32(3)(b).

16. By section 29(6) a person must not, in the exercise of a public function, do *anything* that constitutes discrimination, harassment or victimisation.

17. Those exercising public functions are under a duty to make reasonable adjustments, and a failure to do so amounts to unlawful discrimination: s. 28(7)(b).

18. Section 31(4) provides that *"a public function is a function that is of a public nature for the purposes of the Human Rights Act 1998."*

DISCRIMINATION ARISING FROM DISABILITY

Definition

19. Section 15 provides as follows

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

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

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

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

Unfavourable Treatment

20. The concept of unfavourable treatment is a broad concept. B need not have suffered material or tangible loss. Depriving someone of a choice or opportunity can be unfavourable treatment.

"Because of something…"

21. The "something" must be identified by the court (*P v Governing Body of a Primary School* [2013] UKUT 154 (AAC) [52]) and the disabled person must have been treated less favourably "because of" that something. In a possession case the "something" will be normally be the grounds for possession and will be easy to identify as rent arrears, nuisance behaviour or a breach of the tenancy. However, in a case under the accelerated procedure or in the case of introductory tenants the situation is likely to be more nuanced; in those circumstances, the court must ask what was the reason why the disabled person was treated as she was.

22. The words "because of" were an attempt to avoid the difficulties that had been encountered with the words "on grounds of" in the previous legislation. However, the key authorities are likely to still be helpful, notable the classic speech of Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 A.C. 501 at 512-513:

> *Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.*

"… arising in consequence…"

23. The disabled person must have been treated unfavourably because of "something arising in consequence of B's disability"; this might be, for example, rent arrears that arise due to B's depression or nuisance that arises from B's schizophrenia. Anything that arises as a result, effect or outcome of the disability will be something arising in consequence of B's disability.

24. A common issue that arises is the complex interaction between drug and alcohol addiction and mental health. In such circumstances, the tenant may be disabled as a result of depression, PTSD or some other mental health condition, or indeed the physical effects of substance abuse, but the question arises as to whether the "something" is caused by the disability or by an excluded condition such as alcohol addiction or a tenancy to physical abuse. Thus, a tenant may be accused of anti-social behaviour which may be the result of his drinking or his mental health issues, or a combination of the two.

25. In *Edmund Nuttall Ltd v Butterfield* [2006] ICR 77 (at 85 E-H) which was approved by the High Court in *Governing Body of X Endowed Primary School v Special Education Needs*

and Disability Tribunal and Ors [2009] EWHC 1842 it was said that the following approach should be taken:

> *"It is plain that a claimant may have both a legitimate impairment and an excluded condition… In these circumstances it seems to us that the critical question is one of causation. What was the reason for the less favourable treatment, here the dismissal of the Claimant? If the reason was the legitimate impairment, then prima facie discrimination, subject to the defence of justification, is made out; if the reason was the excluded condition and not the legitimate impairment, then the claim fails by reason of his disability. That distinction may be easily stated. However it does not deal with the case where both the legitimate expectation and the excluded condition for the employers reason for the less favourable treatment….[in such cases the complainant] must show that the less favourable treatment was for a reason related to the [the complainant's] disability….if the legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the employers' reason for that treatment".*

26. Recently this approach was applied in a post Equality Act 2010 case, brought under section 15 in the case of *P v Governing Body of a Primary School* [2013] UKUT 154 (AAC) which confirmed:

> *"the critical question is one of causation. What was the reason for the less favourable treatment…?" If that analysis shows more than one reason "if the legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the … reason for that treatment."* para 52.

"… of B's disability."

27. The particular framework of the provisions on disability require that B establish that he or she is a disabled person within the meaning of section 6 of the Act. However, this does beg the question as to the role of carers (associative discrimination) and perceived discrimination.

28. While the Act does not provide in terms that it includes "perceived or apparent discrimination" the intention was to extend prescription of direct discrimination to less favourable treatment on account of the discriminator's perception of the presence of a protected characteristic as well as its actual presence. The Explanatory Notes (para.59) state that the definition of direct discrimination is broad enough to cover less favourable treatment because the victim is "wrongly thought to have the protected characteristic" and give as an example the rejection of the application of a white man by an employer who wrongly believes the applicant is black because he has an "African sounding name".

29. In *Aitken v Commissioner of Police of the Metropolis* (EAT 0226/09) the EAT, in remarks that are clearly obiter, rejected the argument that the Disability Discrimination Act 1995 ("DDA") should be interpreted to include discrimination because of a perceived disability (the case concerned a person with Obsessive Compulsive Disorder and whose problems were found to fall short of a disability). In light of the stated intentions of parliament however these obiter remarks of the EAT in *Aitken* may now be regarded as having been superseded by the 2010 Act. The current position is probably better reflected by the majority in *English v Thomas Sanderson Blinds ltd* ([2009] I.R.L.R. 206 (CA)). The case concerned reg. 5 of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) which dealt with harassment "on the grounds of sexual orientation". Sedley L.J. and Lawrence Collins L.J. were clear that the claimant's actual sexual orientation was irrelevant to such a question.

30. Similarly, in relation to harassment, direct and indirect discrimination the Act provides protection from discrimination in the case of those who are associated with a disabled person, reaffirming the position under the DDA as confirmed by *Coleman v Attridge Law Coleman v Attridge Law (A Firm)* (C-303/06), ECJ. Therefore the tenant who is treated less favourably because of her son's disability, or who experiences harassment on that basis may bring a claim in respect of her own treatment.

31. Where the protected characteristic is disability however, the perception or associative argument does encounter a difficulty because in these cases the protected characteristic has a particular legal context. Whether a tenant can successfully assert the perception argument where, in the case of disability, the landlord believes – wrongly - that the tenant is a disabled person is yet to be decided.

Knowledge

32. The person (A) must prove that she did not know and could not reasonably have been expected to have known of B's disability at the time of the unfavourable treatment. If this is shown then A will not have acted unlawfully within section 15.

33. The Code of Guidance on Services, Public Functions and Associations replicates the previous Guidance under the DDA, and the corresponding employment Guidance by stating that in order to rely on this defence, "a service provider must do all they can reasonably be expected to do to find out if a person has a disability" (paragraph 6.16). Arguably the same approach should be taken in premises cases and it is noted that in the case of public authorities the public sector equality duty requires enquiries to be made once a public body is on notice that there may be a disability: *Pieretti v Enfield* [2011] H.L.R. 3.

34. It would appear that if A was not aware of the disability when she issued proceedings but was then made aware of the same and decided to continue with the eviction process then A would be caught by section 35(1)(b) which states that A must not discriminate against B who occupies premises by evicting B or "taking steps for the purpose of securing B's eviction". Thus if A, with knowledge of the disability, continues to seek possession, there will be an unlawful act unless A can justify the treatment.

Justification

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

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

> *"In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".*

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

38. The treatment must be proportionate to any legitimate aim. This will involve considering whether the means sought to achieve the aim are appropriate and reasonably necessary to achieve the end. Necessary does not mean that it is the only means to achieve the same end but, if less discriminatory measures could have been taken to achieve the same end, the treatment will not be necessary (e.g seeking to move the tenant to more suitable accommodation).

REASONABLE ADJUSTMENTS

The scope of the duty

39. The duty is set out at section 20 and comprises the following three requirements:

> *(3) The first requirement is a 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.*
>
> *(4) 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.*
>
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

40. In order to bring a claim the disabled person must be at substantial disadvantage "*in comparison with persons who are not disabled*". This does not require the strict comparative exercise necessary in other areas of discrimination law and is often readily discernible from the nature of the disadvantage: *Fareham College v Walters* [2009] I.R.L.R. 991 However, advisors must be clear in constructing and interpreting

PCPs to ensure that the person claiming a failure to make reasonable adjustments is disadvantaged compared to those who are not disabled.

41. There are differences in the scope of the duty in respect of these three areas:

Premises

42. Subject to certain limited exceptions, only the first and third requirements apply to landlords in relation to lettings and sub-lettings: section 36. In summary therefore the duty requires a controller of let premises -

    a. to take reasonable steps to avoid substantial disadvantage created by a provision, criteria or practice; and

    b. to take reasonable steps to provide an auxiliary aid or service where, without it, the disabled person would be put at a substantial disadvantage.

43. Further details of the scope of the duty to make reasonable adjustments in relation to premises are set out in schedule 4, paragraph 2 of which provides details in relation to the duty on controllers of let premises the duty to make reasonable adjustments applies to a tenant of the premises, or someone who is otherwise entitled to occupy them.

44. In relation to premises, the disabled tenant or occupier must be at a "substantial disadvantage" in relation to - (a) the enjoyment of the premises; (b) the use of a benefit or facility, entitlement to which arises as a result of the letting.

45. This replaced the previous test in relation to let premises of there being a duty to make reasonable adjustments where there is a "practice, policy or procedure which has the effect of making it impossible, or unreasonably difficult, for a relevant disabled person (i) to enjoy the premises, or (ii) to make use of any benefit, or facility, which by reason of the letting is one of which he is entitled to make use, or (b) a term of the letting has that effect." (s. 24D DDA 1995). This change brought the provisions on

premises into line with those on employment and education, a process which began when the duty to make reasonable adjustments was introduced in the 2005 Act.

46. The key innovation of the Act in this area is that it introduced a unified test of "substantial disadvantage" so that where the disabled person is at a substantial disadvantage, reasonable steps are required. To this extent the change confirms the case law which had given a broad meaning to the phrase "impossible or unreasonably difficult" (see *Roads v Central Trains* [2004] EWCA Civ 154). However, "substantial" now bears a statutory definition of "more than minor or trivial" (s. 212) and therefore, this indicates a somewhat lower threshold which must be reached in order for the duty to be triggered.

47. Similarly, there is no longer a requirement that the auxillary aid "would be of little or no practical use to the relevant disabled person concerned if he were neither a person to whom the premises are let nor an occupier of them".

48. By changing the words "practice, policy or procedure" the Act again indicates that the same test should be applied across employment, education housing and public functions. While arguably there is little difference between the old test and the new "provision, criteria or practice" or PCPs bears an established and very broad meaning in employment law which can now be relied upon.

49. What is different about the duty to make reasonable adjustments in housing is that no duty to make such adjustments unless and until a controller receives a request to do so from or on behalf of a tenant or person entitled to occupy: sch. 4 paras. 2(6) and 3(5).

50. Subsection 7 makes clear that any reasonable adjustments that are made at to be at the landlord's expense. She is not entitled to require the disabled person to contribute to the costs of complying with the duty.

Provision of services and exercise of public functions

51. Schedule 2 provides for detail on the duty to make reasonable adjustments in the provision of services and public functions. Schedule 2 paragraph 2 provides that

references to "a disabled person" is to "disabled persons generally". As the Explanatory Notes to the Act make clear, the change in wording to "disabled persons generally" is intended to indicate that the duty is an anticipatory one, so that service providers and those exercising public functions must anticipate the needs of disabled people in advance and make appropriate adjustments: para. 676. Knowledge of an individual's disability is not required.

52. 'Disabled persons generally' in this context does not mean that all disabled persons must be disadvantaged, or even that a class of disabled persons must be disadvantaged. It is sufficient that the person claiming discrimination is not experiencing the disadvantage as an individual but as part of an ascertainable group: *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin).

53. If a benefit is or may be conferred in the exercise of the function being "placed at a substantial disadvantage" means being placed at a substantial disadvantage in relation to the conferment of the benefit: sch. 2 para. 2(5)(a). So for example, in relation to the allocation of housing the conferment of the benefit is housing. For the duty to make reasonable adjustments to arise the applicant must be at a disadvantage which is more than minor or trivial, in relation to the conferment of housing.

54. Similarly, where the public function is one by which people are subjected to a detriment, being "placed at a substantial disadvantage" means suffering an unreasonably adverse experience when being subjected to the detriment: see schedule 2 para. 5. This may apply in the case of policies on anti-social behaviour or possession for example.

55. Again, the Act was a move to a unified test, with "substantial disadvantage" now connoting a lower threshold test than that contained in section 21E DDA, which referred to PCPs that made it "impossible or unreasonably difficult" for disabled persons to receive a benefit conferred or to be subjected to the detriment in question.

Discharge of duty

56. The duty to make reasonable adjustments is discharged only when the disabled person is no longer at a substantial disadvantage: *Archibald v Fife Council* [2004] IRLR 651 at [15] per Lord Hope of Craighead. A landlord or public body which says 'because we did something, the duty upon us is discharged' does not satisfy the Act if the something it did was ineffective to alleviate the problem but something more would have alleviated it. As Lord Hope put it, the question is whether 'one more step' was required.

57. The only exception to this rule is in relation to the provision of services and the exercise of public functions and in respect of the second requirement, that is, the physical features requirement. In those circumstances the service provider or public body is under a duty either to take reasonable steps to avoid the disadvantage, or to adopt a reasonable alternative method of providing the service or exercising the function: schedule 2 para 2(3).

58. Once adjustments have been identified the question is the reasonableness of the proposed steps. This will involve consideration of the cost of taking that step, the impact on the landlord/service provider's organisation and others and the resources available to it. As such it is likely that a local authority landlord is likely to have a far higher hurdle in showing that the step was unreasonable than a small private landlord.

59. It goes without saying that it will rarely be wise to argue that ignoring the rent arrears/breach of tenancy/anti-social behaviour is a reasonable step. Such an adjustment to the landlord's normal practice is highly unlikely to be considered reasonable. However, what may be considered reasonable is taking some action short of possession or taking some action to support a disabled person in their tenancy. Consideration will be given to the range of powers that are available to the landlord, including community care referrals, management transfers, housing support, and so on.

60. Crucial is the issue of whether the proposed adjustment would be effective in eliminating the disadvantage; thus in the case of possession proceedings, whether it is likely to avoid the behaviour/rent arrears/breach of tenancy that caused possession to

be pursued. In respect of service he Code of Practice on Services Public Functions and Associations states that:

> *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. 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.*

61. In *Cumbria Probation Board v Collingwood* UKEAT/0079/08: HHJ McMullen said that "it is not a requirement in a reasonable adjustment case that C prove that the suggestion made will remove the substantial disadvantage". The EAT then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant "a chance". Similarly in *Leeds Teaching Hospital NHS Trust v Foster* [2011] EqLR 1075, the EAT held that there was no need for the tribunal to have found that there would have been a "good" or "real" prospect of removing the disadvantage. It would have been sufficient for it to have found simply that there would have been a prospect. If there was a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but that did not mean that anything less than a real prospect would be insufficient to make the adjustment a reasonable one (see para.17 of judgment).

REASONABLE ADJUSTMENTS IN PRACTICE

Anti-social behaviour

62. A good example of how the duty to make reasonable adjustments can be used in housing law is the case of *Barber v Croydon LBC* [2010] H.L.R. 26. CA. This case concerned a defendant who had learning difficulties and a personality disorder, and suffered from acute depression. In 1999, the Council accepted a homeless duty to him and secured him temporary accommodation. In 2007, the defendant had an argument with the caretaker of his block. The defendant swore at the caretaker and threatened him. He spat in the caretaker's face and kicked him in the knee causing an injury which required hospital treatment. The caretaker reported the incident to the authority's

antisocial behaviour officer. The officer consulted with his manager and it was decided to serve notice to quit on the defendant. In defending possession proceedings two points were raised under the then DDA, in addition to a public law defence (1) Breach of the public sector equality duty at s. 49A DDA 1995; and (2) Disability related discrimination under s. 3A(1) DDA 1995. No issues or counterclaim was raised in respect of failure to make reasonable adjustments.

63. By then, disability related discrimination had been rendered redundant to all intents and purposes by *Malcolm* and this claim was rejected, both at the County Court and at the Court of Appeal. However, the Court of Appeal in rejecting the claim gave reasons that echo the requirements for a reasonable adjustments claim:

> *The issue, however, in this case is whether that general policy applied or should have been applied to Mr Barber in this case. The criticisms of the way in which the Council handled the incident are not based on any discrimination by them against him.* [i.e. disability related discrimination] *The question is not whether he was treated less favourably than a person without his disabilities but whether he should have been treated differently precisely because he has such disabilities and because they were a significant contributory factor to his behaviour that day.*

64. The argument on section 49A DDA was that the Council was obliged to have regard to Mr Barber's disabilities when deciding to take action in respect of the incident which occurred on May 22, and again, was formulated in terms strongly resonant of the duty to make reasonable adjustments:

> *35 [Counsel for the Defendant]'s case on this appeal is that Mr Barber, as a disabled and vulnerable person within the meaning of that policy, had a legitimate expectation that the guidelines I have referred to would be applied to him and that it was unreasonable for the Council to have served a notice to quit and instituted possession proceedings against him without first having consulted the IMHS and social services in order to decide whether a recurrence of his May 22 behaviour could be avoided by a measure short of the recovery of possession. The categorisation of his conduct as a category 3 case cannot obviate the need to explore these possibilities nor, he submits, can it exclude the use of something short of immediate eviction where that would both avoid further ASB on Mr Barber's part and avoid the risk to his stability and wellbeing which a possession order might create.*

65. The Court of Appeal found that the decision to seek possession was unlawful in public law terms for reasons that sound very similar to the issues that would be considered in a reasonable adjustments claim. Namely, that although the defendant's assault on the caretaker was serious, the claimant was required to explore options other than eviction given the isolated nature of the incident, and having regard to the psychiatrist's assessment of the defendant; the authority ought to have consulted other agencies on whether an alternative to eviction, such as an antisocial behaviour contract, was appropriate. As a result, the decision to seek possession was one which no reasonable authority could make.

66. A strong part of the reasoning in *Barber* was the fact that the Council had failed to follow its own policy in respect of vulnerable tenants. Nonetheless, the case demonstrates how a reasonable adjustments argument can be used; that is, where the landlord's PCP on possession or anti-social behaviour is applied to a disabled tenant, advisors should consider making a request for a pause or stay in proceedings while alternatives are sought or while support is put in place or referrals made. Where such steps are reasonable a landlord would be acting unlawfully in pressing ahead.

67. In identifying reasonable adjustments, as long as the adjustments are directed at eliminating the disadvantage suffered by the tenant *compared with those who are not disabled,* and are reasonable, there will be a duty to make that adjustment. Thus, where a tenant or a member of her family has both a disability, and also an excluded condition such as a tendency to physical violence or an addiction, the question is whether the adjustments proposed are *only* directed at the excluded condition or are *also* directed at the disability. Thus, in *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal, Mr. and Mrs. T, The National Autistic Society* [2009] I.R.L.R. 1007 the Administrative Court found that because the reasonable adjustments which were proposed were directed at the whole of the Claimants behavioural difficulties and not just to the excluded part, the claim for discrimination should succeed.

68. In that case a pupil was excluded from school because of behaviour which amounted to a tendency to physical violence and was therefore outside of the protection of the DDA under Regulation 4 of the Disability Discrimination (Meaning of Disability) Regulations 1996 S.I.1996/1455:

69 However, the Tribunal's decision is founded on its conclusion that the Governing Body had failed to take such steps as it was reasonable for them to take to ensure that JT was not placed at a substantial disadvantage in comparison with pupils who are not disabled. It is that conclusion which is specifically challenged in this appeal.

70 Although a number of complaints were made by Mr. and Mrs. T in the proceedings before the Tribunal of alleged failures to make reasonable adjustments, the only one which was upheld was the failure to enlist the advice and support of the Access to Learning Specialist Teaching Team prior to the incident of 6th November 2007. […] the Tribunal concluded that an appropriate strategy and reasonable adjustment for the school would have been to enlist the advice and support of the Access to Learning Specialist Team prior to the incident on 6th November 2007. This was, the Tribunal considered, a practical step to have taken and one which would not have made unwarranted demands on the financial resources of the responsible body. The Tribunal expressed its surprise that these strategies were not already in place.

71 While the measures described in the decision at paragraph 19F appear to include means of controlling a tendency to physical abuse, I do not understand them to be limited to such matters. On the contrary, they appear to include measures for the management of pupils with ADHD generally, including calming and de-escalation strategies. Such strategies may be directed at non-compliant and disruptive behaviour falling short of a tendency to physical abuse. [...] I consider that there was here a failure to make a reasonable adjustment in respect of a protected disability.

69. What this case shows is that the lawfulness of a decision can be challenged by using the duty to make reasonable adjustments even where on justification, reasonableness or proportionality a person would be bound to lose. In the case like the one above, disciplinary action in a school, as indeed the issue of possession proceedings, are likely to be justifiable even where the behaviour is caused by a disability but even more so where the behaviour arises from an excluded condition. By using the reasonable adjustments duty, and approaching the issue from the side, tenants can avoid the problem in *Higgins v Manchester City Council* [2006] H.L.R. 14 where a straightforward balancing exercising will always favour the neighbours of those committing of anti-social behaviour.

Rent

70. In relation to rent arrears cases two PCPs may be relevant to the issue of reasonable adjustments:

    a. The requirement to pay rent, contained in the tenancy agreement, and the terms upon which rent is payable; and,

    b. The landlord's policy or practice in respect of rent arrears including any informal practice as to when possession proceedings are issued.

71. Arguably, either of these requirements is capable of putting a person with mental health or learning disabilities at a disadvantage in comparison to those without that disability, although a difficulty is that rent arrears are clearly highly prevalent among those who do not have such disabilities. The disadvantage will be the defendant's exposure to possession proceedings.

72. The key issue in such cases is likely to be identification of adjustments and the reasonableness of those adjustments. It is highly unlikely to be considered to be a reasonable adjustment to ask a landlord to waive or reduce the right to rent, although there may be circumstances in which such a request is appropriate, for example a tenant who has a temporary and serious issue such as cancer.

73. More likely the court will concerned with how the tenant with mental health problems or learning disabilities can be helped to pay the rent, or to clear arrears. Reasonable steps might include reminder telephone calls, visits, the authorisation of a third party to assist, a referral to social services or to a support organisation, the appointment of an advocate etc.

Changes to terms / breach of tenancy agreement

74. An interesting example of this issue, and which demonstrates the some of the differences in the new drafting under the Act can be seen in the case of *Thomas-Ashley v Drum Housing Association Ltd* [2010] EWCA Civ 265. The case concerned a dog called Alfie, who lived with the Appellant in an assured shorthold property. The

Appellant, who suffered from a bipolar mood disorder, appealed the possession order on the basis that the landlord was in breach of their obligation to make reasonable adjustments under Section 24A(2) of the DDA 1995.

75. There was expert evidence that the companionship of the dog and the obligation to care for and exercise him promotes the mental health and well-being of the appellant to a marked degree. The evidence that the dog was beneficial to the appellant's mental health was summed up in the following answer from the witness Dr. Schenk who stated that "I can conclude that Alfie is not only beneficial for her mental health but essential in her rehabilitation".

76. The Court of Appeal found *inter alia* that as Alfie's company was not a factor in the Appellant's use or enjoyment of the premises, but of her state of mind more intrinsically there was no discrimination.

77. However, had the case been brought under the new indirect discrimination provisions it may have been successful on that point (although not overall) as there is no requirement under the provisions at section 19 for the particular disadvantage to go to the use or enjoyment of the premises. Any person claiming such indirect discrimination would need to demonstrate that others with mental health disabilities are also disadvantaged by a no pets rule.

BRINGING DISCRIMINATION CASES

The structure of the claim

78. The case law on reasonable adjustments indicates that courts should require an "intense focus" on the words of the statute. A general discourse as to the way in which a landlord or employer had treated a disabled person generally, or as to the thought processes which had been gone through, is to be avoided. A court must be satisfied that there was a provision, criterion or practice which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The duty is to take such steps as are reasonable to prevent that disadvantage: *Royal Bank of Scotlan v Ashton* [2011] I.C.R. 632.

79. Thus, when considering a claim of failing to make reasonable adjustments, a court cannot not properly judge whether any proposed adjustment is reasonable without first identifying the provision, criterion or practice, or the relevant physical features of the premises, the identity of non-disabled comparators, where appropriate, and the nature and extent of the substantial disadvantage suffered by the claimant. The identification of the substantial disadvantage might involve looking at the cumulative effect of both the provision, criterion or practice and the physical nature of the premises: *Environment Agency v Rowan* [2008] I.C.R. 218 applied (paras 14-16).

80. Schedule 4 para 2 states that "provision, criterion or practice" includes a reference to a term of the letting. However this is not the only thing that PCP can mean. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied, as well as a 'one-off' or discretionary decision: see Code of Practice on Services, Public Authorities and Association para 5.6. Examples of the wide definition of a PCP include the refusal of a phased return to work: *Fareham College v Walters* [2009] I.R.L.R. 991, or the job description / the requirement to do the job: *Archibald*. However, the court cannot simply "list things that it does not like and label them as failures to comply with the duty to make reasonable adjustments": *The Newcastle Upon Tyne Hospitals NHS Foundation Trust v Mrs K Bagley* [2012] Eq. L.R. 634 at 84

81. Great care should be taken in identifying the PCP and the disadvantage occasioned by it. The focus should be upon the practical result of the measures which could be taken (see *Ashton* paras 2, 24 of judgment).

Jurisdiction

82. By section 114 the county court has jurisdiction to hear claims of discrimination under the various parts referred to above. There is no specific mention of the Administrative Court or the extent to which private law claims can be brought as part of a judicial

review. However, the law appears to be clear that an applicant is not precluded from raising private law claims and/or issues in public law proceedings (see e.g. *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin)) and in any event, the lawfulness of a decision in discrimination terms is bound to be highly relevant to public law legality.

Burden of proof

83. The burden of proof in discrimination cases is more than simply a reverse burden and does not only apply in marginal cases. It is an important two stage process, mandated by the Burden of Proof Directive, the aim of which is to give full effect to the enforcement of anti-discrimination rights. In so doing it recognises the difficulty that claimants face in obtaining direct evidence of discrimination. See for example *Network Rail v Griffiths-Henry* [2006] I.R.L.R. 865 at paragraph 18 and

84. Section 136 provides for a reverse burden of proof to operate:

> *(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.*

85. Thus there is a two stage test, where at the first stage the party alleging discrimination need only prove facts from which it *could* infer discrimination. The guidance on the way that court should apply the reverse burden is set out in *Igen Ltd v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster* [2005] EWCA Civ 142 and, at this first stage, calls for special regard to be had to the fact that primary evidence of discrimination is unusual and that "the outcome at this stage of the analysis by the [Court] will therefore usually depend on what inferences it is proper to draw from the primary facts found". *Igen Ltd v Wong* was recently approved in most enthusiastic terms by the Supreme Court in the case of *Hewage v Grampian* [2012] UKSC 37.

86. If such facts are proved, it is then for the alleged discriminator to show that it did not commit an act of discrimination. To discharge that burden it must prove, on the balance of probabilities, that the treatment was "in no sense whatsoever" on the

grounds of the protected characteristic. Since the facts necessary to prove an explanation would normally be in the possession of the Defendant cogent evidence would normally be expected to discharge that burden of proof: *Igen Ltd v Wong*.

87. The burden of proof provisions are unlikely to assist very much in cases of reasonable adjustments and indirect discrimination (see *Ms B E Dziedziak v Future Electronics Ltd* [2012] Eq. L.R. 543) however, they can be vital in demonstrating discrimination in cases of discrimination arising from disability or where unfavourable treatment is alleged.

Questionnaires

88. One of the unique aspects of discrimination law is the ability to serve a questionnaire on the other side with a view to obtaining information. Section 138 sets out the right to serve the questionnaire and provides details of the consequences that follow from the procedure. The Equality Act 2010 (Obtaining Information) Order 2010/2194 sets out the form of request and the procedure.

89. It is designed to be a pre-action step and the permission of the court is needed if you intend to serve a questionnaire after the issue of proceedings.

90. Questionnaires are vital in indirect discrimination cases where claimants need to prove not only that they have been put at a substantial disadvantage but that they belong to a group of people who have been collectively disadvantaged. In these cases statistical evidence is usually vital. An example of how this may be useful in the housing context may where an applicant for a housing transfer wishes to know how many properties are available that would be suitable for him.

91. Section 138(4) provides that a court may draw an inference from—

    (a) a failure by R to answer a question by P before the end of the period of 8 weeks beginning with the day on which the question is served;

    (b) an evasive or equivocal answer.

92. A failure to respond to a questionnaire, or the provision of an evasive or equivocal answer can be a fact from which discrimination can be inferred, although this should only be in appropriate cases. In this respect, they are to be regarded as similar to pleadings, and indeed questionnaires, and answers can be struck out in the same way as statements of case: Practice Direction – Proceedings Under Enactments Relating To Discrimination para 4.3.

Time limits

93. The time limit for bringing a claim in the county court is 6 months starting with the date of the act to which the claim relates, or (b) such other period as is just and equitable (s. 118). Conduct extending over a period is to be treated as done at the end of the period.

94. Where the act complained of is a failure to act, such as a failure to make reasonable adjustments the failure to do something is to be treated as occurring when the person in question decided on it and in the absence of evidence to the contrary, is when the landlord/service provider/public authority does an act inconsistent with doing it, or on the expiry of the period in which they might reasonably have been expected to do it.: s. 118(6) and (7). Advisors should note the case of *Matuszowicz v Kingston upon Hull* [2009] I.R.L.R. 288 which found that the onus was on those alleging a failure to make reasonable adjustments to identify the date by which they ought reasonable to have been made.

Remedies

95. By section 119(2) (2) the county court has power to grant any remedy which could be granted by the High Court (a) in proceedings in tort; (b) on a claim for judicial review. Thus the county court is entitled to quash local authorities' decisions and mandate action, as well as make declarations as the legality of policies.

96. Section 119(4) provides that an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis). The

appropriate levels for an award of injury to feelings were set out in *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 101 and amended in *Da'Bell v NSPCC* [2010] I.R.L.R. 19:

> **Lower band** (for the least serious cases, e.g. a one-off or isolated incident of discrimination) - up to £6,000 (formerly £5,000)
>
> **Middle band** (which is used for serious cases that do not merit an award in the highest band) - £6,000 to £18,000 (formerly £15,000)
>
> **Top band** (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. The guidelines suggest that only in the most exceptional case should an award of compensation for injury to feelings exceed £30,000) - £18,000 to £30,000 (formerly £25,000).

97. In the case of unintentional indirect discrimination the county court must not make an award of damages unless it first considers whether to make any other disposal: s. 119(6).

98. It is important to bear in mind that an injury to feelings award should have an evidential base. Therefore, when drafting witness statements lawyers should be astute to the ways in which the landlord's failure disempowered the client or diminished them in their self esteem, since these are the kinds of issues that the award is intended to deal with.

CONCLUSION

99. The duty to make reasonable adjustments is unique in offering a substantive equality duty to take positive action. It can provide a vital tool for housing lawyers ready to identify the steps that could be taken to improve your client's position. However, a clear understanding of the legal framework is required in order to set out and request appropriate adjustments at an early stage. Even in service and public function cases, where a request is not required, early action in identifying the PCP is important.

100. In possession cases, as in decisions on reasonableness, the issue is frequently whether the package of measures proposed, whether a repayment plan, a managed move, a behaviour contract etc is likely to be effective and reasonable. Advisors must guard against the desire to use discrimination provisions as simply a 'bolt on' to reasonableness, inviting the court to find a tenant less culpable or somehow deserving of sympathy. The duty is one that works towards delivering a level playing field, it does not demand special treatment except to the extent that it is necessary to achieve equality.

101. One area where the duty is particularly helpful is in the case of local authority landlords where the landlord will have a range of powers available to it. In those circumstances the duty to make reasonable adjustments is important because it is an objective test as to the reasonableness of the proposed steps. Thus, a tenant can avoid having to get over a high *Wednesbury* test and demand, in effectm a full merits review of the authority's decision.

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doughty street chambers

15 May 2013

doughty street chambers

Using the Equality Act 2010
HLPA 15 May 2013

Sarah Steinhardt
Doughty Street Chambers

'at the heart of human rights'

Section 35: a defence to possession proceedings

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

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

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

(c) by subjecting B to any other detriment.

- A landlord "discriminates" against a disabled person *inter alia* if it fails to comply with the duty to make reasonable adjustments: s. 21(2)

doughty street chambers

Key points

- Applies to public and private landlords
- A full defence: *LB Lewisham v Malcolm* [2008] UKHL 43 at [19], [101], [104], and [160]
- Mandatory grounds: *Malcolm* at [99] and [143-144] (disapproving *Floyd v S (EHRC Intervening)* [2008] 1 W.L.R. 1274)
- No need to plead a counterclaim: *Manchester CC v Romano* [2004] EWCA Civ 834 at [63–64].
- Although damages are available for injury to feelings: s. 119(4) *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 101; *Da'Bell v NSPCC* [2010] I.R.L.R. 19

'at the heart of human rights'

- Focus on mental health and learning disabilities

- Three main ways of challenging the possession proceedings:
  - Discrimination arising from disability: s. 15
  - Failure to make reasonable adjustments: s. 21
  - Failure to have due regard to disability: s. 149

  (less commonly victimisation and direct discrimination)

Section 15: discrimination arising from disability

(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.

"… because of something…"

- The court must identify the "something" that is the reason why B was treated unfavourably: *P v Governing Body of a Primary School* [2013] UKUT 154 (AAC) [52]
- This may mean looking behind the purported grounds for possession, or may involve an analysis of why the decision was taken in cases under the accelerated procedure or introductory tenants

"… arising in consequence …"

- Excluded conditions
- Edmund Nuttall Ltd v Butterfield [2006] I.C.R. 77 at [29(6)]

  "... Thus, in our judgment, focusing on the employers' reason for the less favourable treatment, if the legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the employers' reason for that treatment":
- Applied in respect of s. 15 in *P v Governing Body of a Primary School* [2013] UKUT 154 (AAC)

"…of B's disability."

- B must be a disabled person within the meaning of section 6
- Query whether perceived disability is sufficient: *Aitken v Commissioner of Police of the Metropolis* (EAT 0226/09) cf. *English v Thomas Sanderson Blinds ltd* ([2009] I.R.L.R. 206 (CA)
- Associative discrimination: *Coleman v Attridge Law Coleman v Attridge Law (A Firm)* (C-303/06), ECJ

Knowledge

- *"…where the reason for seeking possession (or, if relevant, the landlord's knowledge), changes during the course of the procedure, it may be that an exercise, which had started off as lawful, could thereby become unlawful under the 1995 Act.* Lord Neuberger in *Malcolm*, at [133]
- Where the landlord is a public body there 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]

Justification

- *Balcombe LJ in Hampson v Department of Education and Science* [1989] ICR 179 at 191:

  "In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".

- PSED and the "obvious question …. Where that person is going to live": *Barnsley MBC v Norton* [2011] H.L.R. 46 at [30]

- Reasonable adjustments

Section 20: reasonable adjustments

- *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."*
- *Second requirement: "where a **physical feature** puts a disabled person at a substantial disadvantage …."*
- *Third requirement "where a disabled person would, but for the provision of an **auxiliary aid,** be put at a substantial disadvantage …."*

Part 3 or Part 4?

- Part 3 only applies where not covered by the services, premises, work or education provisions of the Act: s. 28(2)(a)
- Part 3 applies to provision of accommodation where:
  - for the purpose of short stays by individuals who live elsewhere (e.g. decants) s. 32(3)(a); or
  - where accommodation is provided solely for the purpose of providing a service or exercising a public function (e.g. homeless accommodation): s. 32(3)(b).
- Section 31(4) *"a public function is a function that is of a public nature for the purposes of the Human Rights Act 1998."*

- **Public functions: Part 3**
  - All three requirements apply
  - Applies to "disabled persons generally: Schedule 2 paragraph 2
  - Cross over with PSED: *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin).
- **Let premises: Part 4**
  - First and third requirements apply: sch. 4 para 2(2)
  - Applies to tenant or someone entitled to occupy: sch. 4 para 2(4)
  - Must be a request: sch. 4 paras. 2(6) and 3(5).
  - Landlord cannot charge tenant: s. 20(7)

"where a provision, criterion or practice of A's….."

- Change from "policy practice or procedure" – newly harmonised meaning
- "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
- 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]
- Includes a term of the letting: Schedule 4 para 2

"… puts a disabled person …"

- Part 3: means "disabled persons generally": Sch. 2 para 2
  - Indicates anticipatory duty: para. 676 Explanatory Notes
  - Doesn't mean all disabled persons*: Roads v Central Trains* [2004] EWCA Civ 1541 */ R (Lunt) v Liverpool City Council* [2009] EWHC 2356

"… at a substantial disadvantage…"

- "Substantial disadvantage" means "more than minor or trivial" (s. 212) -a lower threshold test than that contained in s. 21E DDA, which referred to PCPs that made it "impossible or unreasonably difficult"

"… in relation to a relevant matter…"

- Part 3:
  - The relevant matter is the provision of the service, or the exercise of the function: sch. 2 para 4
  - Being placed at a substantial disadvantage means in relation to the conferment of the benefit: sch. 2 para. 2(5)(a).
- Part 4:
  - Must be at a "substantial disadvantage" in relation to –

    (a) the enjoyment of the premises;

    (b) the use of a benefit or facility, entitlement to which arises as a result of the letting. Sch 4 para 2(5)

"… in comparison with persons who are not disabled…"

- Not a strict comparative exercise: *Fareham College v Walters* [2009] I.R.L.R. 991 – 'pool for comparison'

" … to take such steps as it is reasonable to have to take to avoid the disadvantage..."

- Part 3: Physical features - duty to take reasonable steps or to adopt a reasonable alternative method of providing the service or exercising the function: sch. 2 para 2(3)

cont.

"…such steps as it is reasonable…"

- 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
- Resources are relevant: Code of Practice para 7.2 / 7.3
- Whether the step is likely to be effective -where any adjustment is unlikely to be effective the duty can be said to fall away: *HM Prison Service v Johnson* [2007] I.R.L.R. 951
- But the step will be reasonable if it would give the disabled person "a chance" of avoiding the disadvantage or "a real prospect": *Cumbria Probation Board v Collingwood* UKEAT/0079/08; *Leeds Teaching Hospital NHS Trust v Foster* [2011] EqLR 1075

"… to avoid the disadvantage."

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

  "it is not simply a duty to make adjustments. The making of adjustments is not an end in itself. 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"
- Failure to comply with the duty cannot be justified and amounts to a complete defence

- *Environment Agency v Rowan* [2008] I.C.R. 218 guidelines as to the minimum factual findings required:
  - (a) The provision criterion or practice applied; or
  - (b) The physical feature of premises;
  - (c) The identity of the non-disabled comparators (where appropriate)
  - (d) The nature and extent of the substantial disadvantage suffered by the Claimant.
- The Act demands "an intense focus" on the words of the statute: *Royal Bank of Scotland v Ashton* [2011] ICR 632*:*

Examples

- Anti-social behaviour
  - *Barber v Croydon LBC* [2010] H.L.R. 26
  - *North Devon Homes Ltd v Brazier* [2003] HLR 90
  - *Manchester CC v Romano* [2004] H.L.R. 47
  - *Gloucester CC v Simmonds* [2006] EWCA Civ 254
- Rent arrears: *Floyd v S* [2008] 1 W.L.R. 1274
- Changes to terms: *Thomas-Ashley v Drum Housing Association Ltd* [2010] EWCA Civ 265
- Subletting: *LB Lewisham v Malcom* [2008] 1 A.C. 1399 [76; 107]

Governing Body of X Endowed Primary School v SENDIST, Mr. and Mrs. T, The National Autistic Society

- JT had ADHD and a tendency towards physical abuse
- He was excluded for physically assaulting a member of staff
- The High Court upheld the decision that the school had failed to make a reasonable adjustment in enlisting the support of the Access to Learning Specialist Team and as a consequence the decision to exclude him amounted to unlawful discrimination:
- At [71]: *While the [proposed reasonable adjustment] included means of controlling a tendency to physical abuse, it was not limited to such matters but included measures for the management of pupils with ADHD generally, including calming and de-escalation strategies. Such strategies may be directed at non-compliant and disruptive behaviour falling short of a tendency to physical abuse.*

- Jurisdiction: s. 114
- Burden of proof: s. 136 / *Igen Ltd v Wong* [2005] EWCA Civ 142
- Questionnaires: s. 138 (shortly to be abolished)
- Time limits: s. 118; "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
- Remedies: s. 119