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LEGAL AID IN THE RECESSION

LAG

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The purpose of the Legal Action Group, a national, independent charity, is to promote equal access to justice for all members of society who are socially, economically or otherwise disadvantaged. To this end, it seeks to improve law and practice, the administration of justice and legal services.

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Narrowing the class divide?

In a move described allegedly by a cabinet minister as 'socialism in one clause', the government looks set to introduce law to require public bodies to tackle social and economic inequality. Harriet Harman QC, in her capacity as Secretary of State for Equality, is leading the public debate for the move. Predictably, some sections of the media have come out strongly against the proposal, arguing that the government is declaring 'war on the middle class'. LAG believes that what is being proposed in the white paper, *New opportunities: fair chances for the future*, is rather moderate and should enjoy support from across the political spectrum, that is, if MPs are serious about striving to create a fairer society.

The issue of class is always a subject fraught with controversy. These days in political discourse any mention of class is avoided. Less precise phrases like 'hard-working families' or 'ordinary folk' are used by politicians as a cipher for the term 'the working class'. Primarily, this is because in the last century the traditional working class, which can be defined as those people in manual occupations, moved from being the majority of the population (75 per cent in the 1900s) to making up a minority of around 38 per cent of the population today. In the same period, the number of people in professional and management occupations grew from eight per cent to 34 per cent of the population. Politicians are therefore wary of alienating the majority of voters who might not identify themselves as working class. There is growing evidence though that social mobility in the UK has stalled. This has led to calls for the law to be used to ensure that working-class people are given better life chances.

The white paper, which was published in January, stated that the government was considering legislating to make it the duty of all public authorities to tackle socio-economic disadvantage by 'narrowing gaps in outcomes for people from different backgrounds'. Unless the government has a last-minute loss of nerve, the Equality Bill, which is due to be published this month, will include such a provision. LAG would welcome this move.

It could be argued that working-class people suffer direct discrimination, for example, the catchment areas of schools with good examination results often exclude poorer neighbourhoods. This exclusion leads to a middle-class bias in a school's intake. There is also the derogatory rhetoric in the media and elsewhere of labelling working-class people 'chavs'; however, a directly enforceable right not to be discriminated against on the ground of class is not what the government is proposing. The Equality Bill's provisions will be aimed at the strategic level of the planning of public services.

A policy paper published by the Government Equalities Office on the proposed duty on public bodies to tackle socio-economic inequality was discussed at a meeting held last month. The paper gave examples of how the government envisages the duty would work in practice: picking up on the question of schools' application processes, it discusses authorities changing the accessibility of the information they provide to encourage parents who are socio-economically disadvantaged to apply to schools in their area. In another example, the paper discusses inequalities in access to sports and leisure opportunities, and how a local council could require service providers to meet targets for people from deprived wards to use leisure facilities. The paper is clear in ruling out people having a direct right to force public bodies to rethink decisions on the ground that they have been discriminated against because of their class.

LAG is sceptical that this proposed duty amounts to 'socialism in one clause'. Throughout the 20th century, governments on the left and right of the political divide have aimed to improve social mobility, though they have often differed on the means to do so. What the white paper proposes will require decision-makers to consider how they will bring this about and make sure that everyone, regardless of class, has equal access to services, and where necessary come up with solutions to remove barriers to achieving this.

Many legal aid clients are poor and disadvantaged, and these problems can be alleviated by access to legal services. For LAG, the interesting question is to what degree will the proposed legislation allow for independent, judicial scrutiny of public authorities' decisions? The danger is that without this capacity, many public bodies will pay only lip service to the duty. We would argue that if progress on social mobility continues to be low, a future government should consider introducing directly enforceable rights linked to social class.

LAG marks legal aid at 60

To coincide with the 60th anniversary of the Legal Aid and Advice Act (LAAA) 1949, LAG is publishing two new books this month: *The Justice Gap: whatever happened to legal aid* and *Making Legal Aid Work: a handbook for practitioners* (see page 44 of this issue). In addition, on 11 June, LAG will hold a conference entitled 'Legal aid at 60: Bridging the justice gap' to mark the anniversary and discuss the government's plans to reshape the legal aid system (see back page of this issue). At the conference, as well as giving practitioners information about legal services policy developments, LAG hopes to spark debate about the future of legal aid. A series of policy articles will also appear in *Legal Action* to mark the anniversary (see page 6 of this issue).

Meanwhile, in a blast from the past, the Legal Services Commission (LSC) has revived the legal aid 'picnic table' logo to celebrate the 60th anniversary of the LAAA. The logo was dropped in April 2001 when the Access to Justice Act 1999 created the LSC, which replaced the Legal Aid Board.

The LSC is keen to find the longest-serving legal aid lawyer and legal aid firm, and to talk to solicitors who were practising legal aid in the 1950s.* The LSC would also like to talk to clients who have been helped by the legal aid system and might want to take part in the commission's anniversary celebrations.

* E-mail: joanne.white@legalservices.gov.uk.

Barristers are leaving family legal aid, new report says

A study undertaken by the King's Institute for the Study of Public Policy (KISPP) at King's College London has found that specialist family barristers are deserting legal aid work as a reaction to successive legal aid cuts.[1] *The work of the family Bar: report of the week-at-a-glance survey 2008*, found that legal aid pay rates lag behind those for private and local authority funded work: one-quarter of family law barristers earn less than £44,000 and one-half less than £66,000, and one-quarter of female black and minority ethnic barristers were earning less than £52,000 a year. Using a 'week-at-a-glance' survey, the report's authors examined in detail over 5,000 cases being undertaken by 1,610 barristers in the third week of October 2008. The report, which was commissioned by the Family Law Bar Association, was published in February 2009 just as the Legal Services Commission prepares to introduce changes to the family graduated fee scheme that the Bar Council claims will reduce legal aid payments by up to 55 per cent in some cases.

'This compelling report provides hard evidence that government policies are driving skilled advocates out of the family justice system, leaving the most vulnerable in society exposed to miscarriages of family justice', said Desmond Browne QC, the Bar's chairperson. He said that it was especially regrettable that barristers are effectively penalised for doing legally aided family work, rather than privately paying work, and that this is 'hitting women and black and minority ethnic advocates hardest of all'.

Steve Hynes, LAG's director, commented: 'This report raises again the vexed question what is a fair rate of pay for publicly funded work? Also, the Bar needs to look at the structure of the profession, as it is clear from the report that women make up over 60 per cent of the barristers undertaking less lucrative, publicly funded work, while a minority 37 per cent of them have better paying, specialist ancillary relief practices.'

Meanwhile, Lord Laming's report on child protection work was published last month.[2] *The protection of children in England: a progress report* was commissioned in the aftermath of the Baby P case. It called for, among other things, the government to immediately address the inadequacy of the training and supply of frontline social workers and more engagement from NHS staff on child protection work. In the report, Lord Laming asked the Secretary of State for Justice, Jack Straw, to take 'immediate' action on the delay in bringing cases relating to the care of children to court; on average, they take 45 weeks to do so. Lord Laming also called on the Ministry of Justice to review the increase in court fees – from £150 to over £4,000 if a case goes to a full hearing – for care order applications by local authorities (see also June 2008 *Legal Action* 3).

1 Available at: www.barcouncil.org.uk/assets/documents/Work%20of%20the%20Family%20Bar%20Kings_FLBA.pdf.
2 Available at: http://publications.everychildmatters.gov.uk/eOrderingDownload/HC-330.pdf.

LAG responds to Straw's comments

In a speech to the London School of Economics last month, Secretary of State for Justice Jack Straw condemned what he called the extraordinary growth in the legal aid budget and the numbers of lawyers paid for by the state.* He claimed that recent reforms had enabled the government to gain 'much greater control over legal aid expenditure'.

'Jack Straw seems only to comment on legal aid to say lawyers are being paid too much. It is a crude political tactic to put pressure on legal aid providers to reduce costs, but ignores the reality of the costs in the system. The government has had little success in tackling the costs in Very High Cost Cases which account for 50 per cent of the costs of legal aid in the Crown Court, but make up only one per cent of cases,' said Steve Hynes, LAG's director.

*Available at: www.justice.gov.uk/news/speech030309a.htm.

Citizens Advice calls for rethink on criminal means test

In an article published in its *Evidence* magazine last month, Citizens Advice has highlighted the impact of the recent reintroduction of the means test in magistrates' courts.* It claims that 22 million people in England and Wales (55 per cent of the adult population) are no longer entitled to legal aid to pay for their defence.

Citizens Advice questions whether the new means test has been set appropriately, arguing that the test, for example, excludes lone parents who earn the minimum wage of £5.35 per hour but are taken out of entitlement due to the family credit they receive.

*Available at: www.citizensadvice.org.uk/index/campaign/s/evidence-journal.htm.

LAG launches Access to Justice Audit

LAG has just launched the Access to Justice Audit project to continue its policy of developing the users' perspective on the legal aid system.[1] The audit will complement LAG's other projects during 2009 to mark the 60th anniversary of legal aid (see left). The audit will consist of at least six studies of different aspects of civil justice from the client's perspective, including debt work and housing law, family law (including childcare and domestic violence), employment law, community care law and immigration law. LAG hopes that the project will also be able to include audits on inquest law and actions against the police. Each study will feature interviews with those who are in the frontline of providing legal services, including lawyers and advice workers, which will appear on LAG's website.

In a link-up with the *Guardian* and *Observer* newspapers, a series of films will be broadcast by the *Guardian* which will draw on the Access to Justice Audit. The first of these films, on housing and debt work in the county court, features Jacqui O'Carroll, a Citizens Advice Bureau caseworker, and her clients at Dover Magistrates' Court (see May 2008 *Legal Action* 7).[2]

Journalist and author Jon Robins, LAG's former communications and campaigns director, who will work on the audit, said: 'It is LAG's view that one of the reasons that the access to justice campaign has had, as yet, little impact on policy-makers has been the inability to provide a voice for users to articulate the human cost of failings in the legal aid system. The primary motivation for the project would be to do just that: to seek out and talk to those people who struggle to find legal redress.'

Commenting on the launch of the audit, Steve Hynes, LAG's director, said: 'As the recession bites, people will be increasingly reliant on legal services to enforce their rights. Through the *Guardian*'s films and LAG's website coverage of the audit, it is hoped that we can bring the issues of access to justice and publicly-funded legal services to a wider audience.'

1 Visit: www.lag.org.uk/justiceaudit.
2 Visit: www.guardian.co.uk/money/video/2009/mar/12/repossessions-advice-debt.

news feature

Report back on 2009 HLPA meetings

Robert Latham, a barrister at Doughty Street Chambers, writes:

At the Housing Law Practitioners Association (HLPA) meeting in January, HHJ Nic Madge and David Watkinson spoke on 'Housing law and human rights'. Nic Madge outlined the development of the Strasbourg jurisprudence over the past five years.[1] David Watkinson considered the continuing standoff between UK domestic courts and Strasbourg as exemplified in *McCann v UK* App No 19009/04, 13 May 2008 and *Doherty v Birmingham City Council* [2008] UKHL 57, 30 July 2008; [2008] 3 WLR 636. *Kay v Lambeth LBC* [2006] UKHL 10, 8 March 2006; [2006] 2 AC 465 has now been taken to Strasbourg. The UK government has been asked to address the question whether or not Mr Kay had been provided with the opportunity to have the proportionality of his eviction decided by an independent tribunal in the light of the relevant principles under article 8 of the European Convention on Human Rights. HLPA has submitted representations on the execution of the judgment in *McCann v UK* which is to be considered by the Committee of Ministers of the Council of Europe at its meeting in June. HLPA concludes that given the failure of the domestic courts to bring UK law in line with Strasbourg jurisprudence, parliament must intervene.

At HLPA's AGM last month, the major concern was the threat posed to high-quality, specialist housing providers by the Legal Services Commission's (LSC's) civil bid rounds for 2010 (see March 2009 *Legal Action* 6 and page 8 of this issue). Over the past three years (to March 2008), the number of solicitors holding LSC housing contracts has declined from 455 to 370. Several HLPA members have withdrawn from the market after giving up the battle to provide the high-quality service for which they strived. While there has been a modest increase over the past three years in the number of not-for-profit providers (from 149 to 164), they are now seen to be under greatest threat by the proposed changes (see February 2009 *Legal Action* 3). HLPA's robust response to the consultation paper is available on its website.[2] Last month, Communities and Local Government (CLG) provided a detailed response to the concerns raised by HLPA.[3] At the AGM, Andrew Dymond and Robert Latham presented papers on the new landscape for possession proceedings.[4]

HLPA has just launched a membership recruitment campaign to ensure that it represents a higher proportion of the declining number of providers. In addition to HLPA's training role, it has been highly effective in lobbying for law reform.

One example of HLPA's success in lobbying is the forthcoming 'death' of the tolerated trespasser. However, on 18 March, CLG notified social landlords that the proposed commencement date for s299 of the Housing and Regeneration Act 2008 had been postponed from 6 April to 'early May' this year.[5] CLG has also published the draft Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 together with an explanatory memorandum.[6] These will be discussed in May 2009 *Legal Action*.

The next HLPA meeting will be on 'Homelessness' and will take place on 20 May. The meeting will be chaired by Lord Justice Sedley.[7]

1 For a fuller analysis visit: www.nicmadge.co.uk.
2 Available at: www.hlpa.org.uk.
3 See note 2.
4 All papers from meetings, together with a verbatim record of members' discussions, are available in the HLPA members' area at: www.hlpa.org.uk.
5 Available in the HLPA members' area. See note 4.
6 Available at: www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111476826_en.pdf and www.opsi.gov.uk/si/si2009/draft/em/ukdsiem_9780111476826_en.pdf respectively.
7 All HLPA meetings will take place at Portland Hall, University of Westminster, 4 Little Titchfield Street, London W1W 7UW from 7 pm–9 pm.

This is the first article in a new series, 'Legal aid at 60: bridging the justice gap', to mark the anniversary of the Legal Aid and Advice Act 1949. Here, Steve Hynes, LAG's director, discusses the recession and its likely impact on creating demand for legal services.

Legal aid in the recession

For many people, the most disturbing aspect of the recession is how quickly it has hit the wider economy. Concerns over toxic sub-prime mortgage debts spread rapidly into a general breakdown in confidence in the banking sector, which was caused by banks' risky lending in the boom times of the past ten years. A lack of credit for businesses and declining demand for their products has led to an increase in unemployment which has spread from the financial services sector into all areas of the economy. As a result of the squeeze on the public finances, the public sector is also affected and it is making staff redundant. According to one estimate, 10,000 jobs have gone so far and this figure could rise as the government struggles to pay the bill for the bail out of the banks.[1]

To help offset the impact of the recession, lessons need to be learnt from looking at the last economic slowdown, the resulting increase in demand for legal services and the choices now facing the government. Norman Lamont was the Chancellor of the Exchequer from 1990 to 1993 during the latter part of the last recession. He came to grief after burning through £27 billion in a forlorn attempt to defend the pound's value in the European exchange rate mechanism (ERM). In September 1992, in the middle of this economic crisis, interest rates spiralled to 15 per cent.

Norman Lamont's £27 billion looks small beer compared with the costs of the current crisis, but in contrast to the recession in the 1990s those who remain in work will be cushioned by the historically low interest and inflation rates. It remains to be seen if the Labour government will pay the same political cost as did the Conservatives for their management of the economy in the previous recession.

The increasing demand for advice

Housing and debt work often grab the headlines in telling the story of people who are caught at the sharp end of a recession. In 1991, a record number of 189,789 possession actions were brought in the county court. This was a 28 per cent increase on the previous year (see March 1992 *Legal Action* 6). In the early 1990s, owner-occupiers were eligible to claim 50 per cent of eligible mortgage interest for the first 16 weeks unemployment and 100 per cent thereafter. In January this year, the government changed the rules to make homeowners eligible to claim full eligible mortgage interest after 13 weeks unemployment. Moreover, the government says that it has only changed the rules on a temporary basis.

Of equal concern is general consumer credit debt. According to Financial Services Authority research published in March 2006, an estimated 1.5 million households were falling behind with credit repayments.[2] In 1992, two million households were in debt, double the number in 1981; however, it should be emphasised that this was at a time of high interest rates compared with the current historic low rates. Household debt has ballooned over the past ten years as lenders were awash with cash for loans, albeit, as it turns out, the money had been borrowed largely on the financial market merry-go-round. The demand for money advice in this recession is therefore likely to be higher than that in the previous one.

In 1992, industrial tribunals (now called employment tribunals (ETs)) were experiencing severe delays because of the backlog of cases, according to the *Council on Tribunals annual report 1991/1992*. By March 1992, the number of claims had risen to 62,000, ie, a 60 per cent increase on the previous year. In response, the government increased the number of tribunal staff: it employed 16 more full-time and 50 more part-time chairpersons. The increase in the number of claims had been caused by multiple claims and the impact of the recession.

Current Employment Tribunals Service statistics show a 23 per cent increase in ET cases. Unions and other advisers, for example, those in Citizens Advice Bureaux (CABx) are saying that employers are cutting corners in their attempts to shed jobs in response to the recession. According to CABx, they have seen an 18 per cent increase in the number of enquiries to do with dismissals on the same period last year.[3]

The jobless count currently stands at around two million, but this is set to rise throughout the next year and could peak at 3.04 million according to some estimates.[4] High unemployment inevitably increases the demand for legal advice on benefit entitlement.

Who will give the advice?

The Legal Services Commission (LSC) has moved to provide duty schemes that cover

104 out of the 194 county courts in England. One of the 22 county courts in Wales is covered in this way, with a further 13 covered by outreach services. The government also injected an extra £10 million into CABx in November last year to increase their capacity to give advice to clients hit by the recession. It is hard to make direct comparisons with the position in the early 1990s, but looking at the figures the advice sector seems much the same size with around 2,000 or so outlets depending on how these are counted.

The big difference is that over 400 organisations now contract with the LSC for services, including debt, while there has been a startling decline in the number of solicitors' firms contracting with the commission. The number is down from 11,060, including criminal providers in 1991/1992, to under 3,500 civil and 2,500 criminal providers today (it should be noted also that because of the overlap between firms doing both civil and criminal work, there are probably fewer than 5,000 firms contracting with the LSC). This is due, in part, to deliberate policies pursued by the LSC, especially around quality, which reduced the number of firms, and those solicitors who decided to pull out of legal aid as they could not make publicly-funded work pay.

LAG would argue that the decline in the number of solicitors' firms undertaking legal aid work could have the most marked effect in housing law. Since 2003, the number of firms in this area of publicly-funded work has dropped from 799 to 362 firms. As a result, clients will have difficulty accessing services in disrepair and other cases in which specialist legal help is needed. In housing-related debt and other debt cases, the decline in solicitors' contracts will have less impact as much of this work has been traditionally carried out in the voluntary sector and paid for by local authorities and other funders. Despite the problems of fixed fees, the fact remains that in the previous recession, with the exception of Law Centres®, legal aid did not fund not-for-profit (NFP) agencies, and so it has added to the capacity of the sector, though admittedly a great degree of cross subsidy is going on.

Recession cost drivers

A recession acts as a cost driver on legal aid. More people become eligible for legal aid as unemployment rises and incomes are reduced by less overtime, and fewer (or lower) bonuses and other work-related payments. This will have the effect of raising eligibility levels from the historically low 29 per cent reported last year (see September 2008 *Legal Action* 10), but because currently the legal aid budget is capped at £2 billion, LAG predicts that without new money the legal aid fund will have difficulty in meeting demand as the recession bites. So far, through reallocating unused matter starts and other budget savings, the LSC has been able to announce an extra 68,000 matter starts in social welfare law. LAG would argue that this figure will not be enough as the legal aid fund comes under increasing pressure.

In the recessions during the 1980s and 1990s, the government responded to spiralling expenditure on legal aid by cutting eligibility. In 1986, in a move that at the time stunned the legal aid world, the government introduced draconian cuts in response to a dramatic increase in costs over the preceding two years caused, in part, by increasing eligibility levels. In 1992, eligibility was cut, again, in response to increased costs (see April 1992 *Legal Action* 4). In the current recession, without cuts in eligibility, which all sides would find unacceptable, a budget crisis seems probable because of the increase in the need for services that will be caused by the recession and the likely demand-led rises in criminal and family law legal aid.

Overall crime rates have been falling since the last recession. However, there is already evidence that crime is on the increase. According to the British Crime Survey, in the quarter that ended in September 2008, domestic burglaries increased by four per cent, fraud and forgery by 16 per cent, and street robberies involving knives by 18 per cent.[5] A significant increase in crime would feed through into costs in the criminal legal aid system, as it is reasonable to anticipate that the rise in crime would be matched by an increasing number of arrests and prosecutions.

According to the LSC, the number of family law children cases is increasing. This is because of the adjustment of local authorities to the court fee changes and the Public Law Outline procedure (see June 2008 *Legal Action* 3). There is also it seems a 'Baby P effect', with local authorities being more prepared to take child protection proceedings as they are fearful of repeating Haringey Council's errors. Overall, the recent fall in expenditure in family law children legal aid cases is likely to be a blip, and the costs look set to rise, which will put further budgetary pressure on the legal aid budget.

Possible reforms

In *The Justice Gap: whatever happened to legal aid?*, LAG's new book about legal aid policy, the authors argue that through combining existing funds, a national non-means-tested telephone advice service could be established to ensure everyone would have access to initial advice.[6] The authors also argue for a system of Community Legal Services Grants to plug the gaps in social welfare law services. These would be a more flexible means of funding NFP advice services and would combine services paid for by legal aid with those paid for by local authorities. As well as these policy ideas, other suggestions include the greater promotion of legal expenses insurance and a consultation on establishing a separately funded and managed social welfare law fund.

The fundamental problem within the legal aid system remains, though, a demand-led criminal budget with increasing costs, especially in Crown Court and other higher court work, with its knock-on impact to the civil fund. The civil and criminal legal aid budgets need to be separated and criminal legal aid needs to be compensated for the external cost drivers created by the Home Office and other government departments. LAG argues that the effects of the recession will present the government with the stark choice between looking at measures such as LAG suggests or being forced to embark on cutting civil legal aid at a time when people most need it.

1 See Polly Toynbee, 'Don't blame the public sector for catching the fat cats' virus', *Guardian*, 3 March 2009, available at: www.guardian.co.uk/commentisfree/2009/mar/03/executive-pay-bonuses-conservatives.
2 *Financial capability in the UK establishing a baseline*, available at: www.fsa.gov.uk/pubsother/fincap_baseline.pdf.
3 See Peter Walker, 'Recession hit firms 'use dodges to shed staff without redundancy pay', *Guardian*, 16 February 2009, available at: www.guardian.co.uk/money/2009/feb/16/recession-unemployment-redundancy-pay.
4 See Gráinne Gilmore and Ian King, 'More than 3 million will be out of work next year, CBI warns', *Times*, 16 February 2009, available at: http://business.timesonline.co.uk/tol/business/economics/article5741781.ece.
5 *Crime in England and Wales: quarterly update to September 2008*, 2nd edition, 01/09, Home Office, 22 January 2009, available at: www.homeoffice.gov.uk/rds/pdfs09/hosb0109.pdf.
6 Available from April 2009. See page 44 of this issue for details.

In this the second of two articles, Gareth Mitchell and Stephen Pierce, solicitors at Pierce Glynn, examine the research evidence relied on by the Legal Services Commission (LSC) to justify its proposals for non-family civil legal aid from 2010 and propose that improving the experiences of civil legal aid users requires an alternative path of reform. The first part of this article appeared in March 2009 *Legal Action* 6.

On the edge of the abyss: legal aid from 2010 – Part 2

In Part 1 of this article the authors explained why the proposals set out in *Civil bid rounds for 2010 contracts: a consultation* (October 2008) are likely to lead to a significant reduction in the availability of social welfare advice; in particular, the proposal to terminate all housing-only, benefits-only and debt-only contracts.[1] In response, the LSC says that moving towards one-stop-shop advice provision is essential given the evidence it has obtained about problem clusters and referral fatigue (*Civil bid rounds for 2010 contracts*, paras 1.3 and 3.4–3.6). However, the LSC significantly misrepresents this evidence.

Causes of Action

The first report relied on by the LSC is the *Causes of Action* report produced by the Legal Services Research Centre, the research division of the LSC.[2] In particular, the LSC relies on this report to justify its contention that '[p]eople do not face "legal problems" but clusters of problems'.[3] This report is also central to the LSC's justification both of Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANs) and of the planned restructuring of non-family civil legal aid provision from 2010 (*Civil bid rounds for 2010 contracts*, para 3.4).[4] However, there are significant problems with the LSC's continued reliance on these reports.

First, the *Causes of Action* report is out of date. The first edition, published in 2004, was based on a survey conducted in 2001, in which respondents were asked about their experiences of resolving civil law problems during a three-and-a-half-year period from 1998 to 2001. The second edition, published in 2006, was updated to include additional data collected from a second survey, conducted in 2004, in which respondents were asked about their experiences of resolving civil law problems during a three-and-a-half-year period from 2001 to 2004.

Second, the vast majority of those surveyed had not come into contact with the legal aid system (first edn, pp80–84; second edn, pp122–123). Instead, the respondents to the surveys were randomly selected and included people from all walks of life and all income brackets, not just those who had received or who were potentially entitled to receive civil legal aid.

In addition, in both surveys, respondents were asked whether they had experienced one or more of 18 categories of 'justiciable problems' during the previous three-and-a-half years. Some of the 18 problem categories fell outside the scope of the legal aid scheme, for example, one category was 'personal injury'; while other categories were defined so as to mix together a very broad range of problems – some of which would fall within the scope of the current legal aid scheme and others which would not (for example, the 'money/debt' category included problems with pension funds, insurance companies unfairly rejecting claims, and disputes about wills, as well as more conventional debt problems, such as difficulties managing money (second edn, p7, footnote 27)).

Furthermore, when the researchers asked respondents about experiences of seeking advice, they did not look solely at advice from legal aid-funded solicitors, Law Centres® and advice agencies but advice in the broadest possible sense, including '… local authorities, trade unions and professional bodies, employers, the police, insurance companies, health professionals, claims agencies, housing associations, social workers, court staff, churches, politicians, the media, job centres, banks and trade associations' (first edn, pp61–62).

As a result, the report's conclusions offer little insight into the experiences of those who use the legal aid system, yet the *Causes of Action* report continues to be described as the LSC's 'key evidence base' for its civil legal aid reforms (*Civil bid rounds for 2010 contracts*, para 3.4). For example, the LSC says in *Civil bid rounds for 2010 contracts* that one of the key findings of the *Causes of Action* research was that 'one in seven people who seek advice fail because the adviser is unable to help' (para 3.5). However, that statistic was heavily influenced by the data for non-legal aid advice providers: for example, 33

per cent of attempts to obtain advice from local authorities were reported to have been unsuccessful, compared with only five per cent of attempts to obtain advice from solicitors – and there was no attempt to work out whether these were legal aid or non-legal aid solicitors (second edn, p101).

Third – and perhaps most remarkably – neither report supports the LSC's assertion that most people do not experience individual problems, but 'problem clusters'. For example, out of 5,015 respondents to the 2004 survey, 33 per cent indicated that they had experienced at least one problem in the previous three-and-a-half years, 12 per cent said they had experienced at least two problems, and five per cent said they had experienced three or more problems (second edn, pp15 and 53, footnote 205). In other words, the majority of respondents who did indicate that they had experienced a problem only experienced one problem.

Fourth, where a respondent reported having experienced two or more problems during the previous three-and-a-half years the *Causes of Action* research identified this as a 'problem cluster'. Whereas the mere fact that someone experienced two or more problems during the same three-and-a-half-year period does not necessarily mean that the problems were either simultaneous or causally connected. As a result, the *Causes of Action* report invariably overstates the extent to which respondents experienced problem clusters. Indeed, it is very hard for policy-makers to draw any reliable conclusions at all about problem clusters from the *Causes of Action* report because of this fundamental flaw in its methodology.

Fifth, while the LSC's current proposals to abolish housing-only, benefits-only and debt-only contracts are said to have been developed 'in response to findings from *Causes of Action*' (*Civil bid rounds for 2010 contracts*, para 4.9), neither edition of the *Causes of Action* report identified a 'problem cluster' involving housing, benefits and debt. Instead, the only potentially relevant statistical trend that was detected was the reporting of 'homelessness' problems together with one or more of 'treatment by the police', 'rented housing', and 'benefits' problems; but this was only detected in the 2004 survey (ie, not in the 2001 survey) and only on the back of a very small sample of people reporting any homelessness problems at all – 61 in a survey of 5,015 people (second edn, pp27, 77–78). It is also to be noted that the 2004 report did not suggest that the small number of people reporting a homelessness cluster, and who were entitled to legal aid, had experienced any difficulties obtaining holistic and seamless advice from legal aid providers.

Sixth, the LSC's current reform proposals also draw heavily on the theory of 'referral fatigue' developed in the *Causes of Action* report; the suggestion being that the *Causes of Action* report establishes that legal aid clients with, for example, linked 'homelessness', 'mental health' and 'treatment by the police' problems are less likely to receive the help they need if all their problems cannot be addressed by the same organisation.

However, the theory of 'referral fatigue' developed in the *Causes of Action* report looked at a much broader statistical phenomenon. Respondents who reported at least one problem during the initial *Causes of Action* surveys progressed to a follow-up interview which addressed a single problem in depth, including any attempts to seek advice. If the person they initially consulted for advice said s/he could not help and suggested they obtain advice elsewhere, respondents were asked whether they did so. If the second organisation said it could not help and suggested they obtain advice elsewhere, respondents were asked whether they did so, and so on. When they compiled the results the researchers noted that for each time a respondent was told to try somewhere else, they were less likely to do so – and the researchers' hypothesis (and it was only a hypothesis because they did not ask respondents why they stopped seeking help) was that some respondents gave up seeking help because they became exhausted (first edn, pp77–78).

'If the LSC is interested in improving the experience of legal aid users it should begin by improving the quality of initial diagnostic advice and, in particular, create incentives for suppliers to look beyond the initial presenting problem ...'

But, crucially, this was not a survey that looked just at the behaviour of legal aid users and legal aid suppliers, but at the population as a whole and at 'advice providers' in the broadest possible sense (ie, trade unions, the police, insurance companies, social workers, health professionals etc). Furthermore, the feedback that respondents provided about particular types of advice providers showed, for example, that 0 per cent of respondents criticised solicitors for sending them somewhere else, whereas respondents were frequently dissatisfied with the help they received from employers, local councils, the police, and insurance companies (first edn, pp79–80).

As the authors of *Causes of Action* point out, these results suggest that people sometimes make bad initial decisions about where to go for advice, and then become frustrated when they are not referred on appropriately; which points to a need for better legal education across the population as a whole as to where best to turn for initial advice, coupled with better training for non-legal professionals to ensure that they make more effective referrals when they are approached for help about civil law problems (first edn, pp109, 111).

However, in justifying its current proposals, the LSC misrepresents this conclusion as a specific problem with civil legal aid of clients with multiple, linked problems being less likely to receive all the help they need if they are referred to a separate organisation for help with a linked problem. The reports' authors do not identify any such problem – which should come as no surprise given that section B1 of the Specialist Quality Mark already requires that legal aid suppliers make 'active referrals' whenever they cannot assist with a linked problem (ie, the supplier must book an appointment with another supplier rather than merely 'signpost' by providing a list of telephone numbers).

A trouble shared

The second report relied on by the LSC is *A trouble shared – legal problems clusters in solicitors' and advice agencies*,[5] published in November 2006. In contrast to *Causes of Action*, the independent researchers from Cardiff University and Matrix Research who produced this report focused primarily on legal aid users and legal aid suppliers. They did so by observing 178 client interviews conducted by both

generalist and specialist agencies providing housing, benefit or debt advice, or a combination of these three areas, and by asking legal aid users about their experiences (the observations were conducted in three local authority advice departments, three Citizens Advice Bureaux, three solicitors' offices and three specialist advice agencies – so predominantly legal aid suppliers, but not exclusively).

The majority of the clients they observed only had one problem (p17) – again, dispelling the LSC's myth that most clients do not have individual legal problems but 'problem clusters'.

Of the minority of clients who did have a 'problem cluster', by far the most prevalent combination was those with a 'rented accommodation' problem who presented with a linked 'welfare benefits' problem (15 per cent of observed clients, p21). However, the study does not appear to have differentiated between housing benefit problems and other welfare benefit problems. That is a highly significant omission because, as experienced housing and welfare benefits solicitors, we know that the majority of these clients are likely to have been those with rent arrears caused by housing benefit problems.[6] Housing benefit problems fall within both the 'housing' and the 'welfare benefits' LSC contract categories; so for the majority of these housing clients their linked benefit problem will have been resolvable by a provider with a housing-only contract (ie, without the need for a referral to a supplier holding a benefits contract).

Only four per cent of observed clients had a 'problem cluster' involving both housing and benefits and debt (p21).

Aside from housing and benefits, the researchers found it difficult to make any other predictions about the mix of problems that clients with multiple problems might present with:

As one would expect, given the specialisms of the advisers observed, the problems we observed clustered around housing, benefits and debt, but there was a wide range of problem types, most notably with benefits, homelessness, relationship and employment problems linked with a wide range of other problems. Mental health problems also had linkages across a range of problems. Standing back from the results a little, ***it is worth observing that the precise details of individual clusters are in some ways less important than the tendency for different problems to occur for the same clients in broad and unpredictable ways****.*

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Another finding of note is the extent to which problem types outside the main three of debt, housing and welfare benefits tended to give rise to the biggest problem clusters. In particular, problems which involved relationship breakdown/children, home ownership, mental health, domestic violence, employment and homelessness gave rise to the most complex, and arguably the most serious, problems (p89, emphasis added).

It was these bigger problem clusters, occurring outside the housing, benefit, debt bundle, that the authors considered were most likely to indicate 'acute social exclusion' and it was the clients experiencing these broader, more complex clusters who were 'often the most vulnerable and in need of concerted and co-ordinated help' (p26) – help which should be provided by specially trained case managers who could prepare 'care plans' to co-ordinate both legal and non-legal interventions (pp98–99). (An interesting idea, albeit one which would, in many cases, tend to duplicate the statutory care planning role performed by social services.)

As to clients with smaller and less complex clusters involving housing, benefits and/or debt, the authors concluded that linked problems could be dealt with adequately by separate advisers in different organisations as long as they communicated effectively with each other (p31). This approach chimed with the views of the clients they spoke to who were far more interested in being able to access good quality advice than in being able to access all the advice they needed under one roof (p33). Both the authors of the report and the clients they spoke to also recognised that even if an organisation had the ability to deal with multiple linked problems 'in house', clients were likely to end up seeing separate advisers for each problem in any event (pp31, 33).

In light of these findings, the authors of *A trouble shared* express considerable reservations about the LSC's civil legal aid reforms; in particular the emphasis on reducing the number of suppliers so as to enable the LSC to reduce its own management costs, rather than on improving the experience of legal aid users (p88).

First, they feared that the reforms 'may dramatically reduce and concentrate the supply of publicly funded legal advice and help in social welfare law' (p88) – leading to fewer access points and reduced client choice.

Second, they were concerned that while in over one-third of the client interviews they observed clients had problems caused by local authorities, it was these same local authorities who were to be placed at the heart of commissioning of CLACs and CLANs (pp26–27, 35, 88).

Third, and most fundamentally, the authors noted that the LSC 'appears simply to associate holistic advice with the

concentration of different specialist services in one centre or network …' (p69) – whereas what was in fact observed to be far more important was ensuring that clients could access advisers with sufficient time and skill to look beyond the initial presenting problem and who, when linked problems were identified, had the knowledge and time to make effective referrals (either in house or externally) and to follow this up with effective, on-going communication between advisers as each case progressed (pp74 and 94).

As a result, the report endorses the consensus from the advisers who participated in the study that 'it would be better to address existing barriers and shortcomings in a systematic and planned manner than to aim for extensive re-modelling or re-organisation towards a seamless monopoly' (p86), and that to do this the LSC should be focusing on three, critical questions:

- *What are the incentives and skills necessary for each supplier to identify* all *of a client's justiciable problems and accurately assess the risk to the client and the need for further help?*
- *What incentives and information are necessary to ensure that the client is properly and effectively signposted or referred to the provider most likely to successfully deal with their problem?*
- *How and when should suppliers dealing with separate aspects of a client's cluster of problems, communicate and co-operate?* (p96)

On the edge of the abyss

In the first part of this article we explained why the LSC's proposals for social welfare law, in particular the proposal to end all housing-only, benefits-only and debt-only contracts, are likely to lead to a significant reduction not only in the number of suppliers, but also in the overall supply and quality of social welfare law advice. The disadvantages of taking such a high risk approach are obvious, particularly as demand for social welfare law advice is increasing as a result of the recession.

The LSC justifies this risk by referring to the *Causes of Action* and *A trouble shared* reports, and by suggesting that if it rids itself of smaller, niche suppliers and concentrates the supply of social welfare law advice in the hands of fewer, larger suppliers this will improve the experience of legal aid users. However, neither report advocates such an approach, and while the reduction in the current diversity of supply may enable the LSC to make marginal savings to its administration costs and make it easier to introduce price-competitive tendering in due course, it is very difficult to see how legal aid users will benefit.

Most legal users have individual problems. A minority have problem clusters. Where clients do experience problem clusters the mix of problems they experience is broad and unpredictable. To meet successfully the needs of clients with multiple, linked problems requires skill, experience and adequate funding – not a top-down, clumsy, artificial and ill-conceived bundling of a limited number of social welfare areas of law into a 'social welfare' contract.

If the LSC is interested in improving the experience of legal aid users it should begin by improving the quality of initial diagnostic advice and, in particular, create incentives for suppliers to look beyond the initial presenting problem and explore whether there may be linked problems which might also benefit from advice. At the moment, that frequently does not happen because controlled work fixed fees have blinkered advisers to the wider ramifications of clients' problems, creating instead an overwhelming financial incentive to dispose of each case as quickly and cheaply as possible. It also does not happen because suppliers, in particular Community Legal Advice telephone advice suppliers, rely increasingly on low skilled and narrowly trained advisers to provide crucial, initial diagnostic advice; a trend that is exacerbated by price-competitive tendering.

When problem clusters do arise, the LSC needs to recognise that these clusters are unpredictable and diverse. Our homeless clients sometimes have linked debt or welfare benefits problems, but they are just as likely to have linked immigration, asylum or criminal law problems. Yet there is no suggestion that these areas of law will be 'bundled' with social welfare law contracts. Furthermore, even where one supplier might potentially be able to deal with a linked social welfare law problem 'in house', a lack of capacity, conflicts of interest, and client choice may all require external referrals to be made in any event. As a result, what the LSC should be encouraging are effective referrals and effective communication throughout the legal aid system, rather than creating artificial contract 'bundles'.

The current contract requires 'active referrals' whenever a linked problem is identified (via section B1 of the Specialist Quality Mark), which should ensure that clients receive a seamless service, whether a linked problem is referred 'in house' or externally. If, in practice, some suppliers are not meeting this requirement then that is a contract compliance issue for the LSC to take up with individual suppliers, not a reason to reinvent civil legal aid. And if the LSC wants to streamline inter-agency referrals further, it should encourage suppliers in each procurement area to develop internet-based referral systems.[7]

As for effective communication, it might well have been the case 20 years ago that geographical proximity aided joint working; but with the advent of e-mail and the internet the barriers to joint working are no longer reduced by placing two advisers in the same building, but by creating protocols and incentives to ensure that where two or more advisers are helping the same client they do so collaboratively (whether those advisers share the same employer or work for separate suppliers).

It may of course be that the LSC has already made its choice: price-competitive tendering is the only way forward and the simplest way to facilitate this is to work towards fewer, larger legal aid suppliers and, ultimately, one social welfare contract per procurement area tendered to the lowest bidder. If so our concerns will doubtless fall on deaf ears; but it makes for a marked contrast with other areas of the public sector where client choice, quality and diversity of supply remain highly valued.

1 Available at: www.consult.legal services.gov.uk/inovem/consult.ti/2010Contracts/consultationHome.
2 *Causes of Action: civil law and social justice*, Pascoe Pleasence et al, Legal Services Research Centre, first edn, 2004; second edn, 2006. Available at: www.lsrc.org.uk/publications.htm.
3 *The Legal Services Commission's Strategy for the Community Legal Service 2006–2011*, p3.
4 See, for example, 'Minister launches first-ever Community Legal Advice Centre', LSC press release, 24 May 2007, available at: www.legalservices.gov.uk/aboutus/press_releases_5596.asp.
5 Available at: www.dca.gov.uk/research/2006/08_2006.pdf.
6 For a detailed discussion of the prevalence of housing benefit problems as a cause of rent arrears see *Possession action – the last resort?*, Citizens Advice, 2003, available at: www.citizensadvice.org.uk/possesion-action.pdf.
7 For example, see: www.nellbooker.net.

Local taxation update 2009

Alan Murdie summarises policy, legislation and cases dealing with various aspects of local taxation liability and enforcement over the past two years.

POLITICS AND LEGISLATION

Increase in penalties

Higher penalties for failing to supply information requested by local authorities for council tax purposes have been introduced under the Local Government Finance (England) (Substitution of Penalties) Order 2008 SI No 981. The level of penalties is increased from 1 May 2008 from £50 to £70 for an initial failure to supply and from £200 to £280 for every subsequent failure to supply.

Such penalties are not criminal convictions or punishments, but if they are not paid can be recovered through the magistrates' court in the same way as unpaid sums of council tax. An appeal may be made to the valuation tribunal (VT) against the imposition of a penalty.

Handcuffing

In May 2008 another case of handcuffing a pensioner committed to prison for council tax debt was reported (see April 2008 *Legal Action* 26).[1] The case of Ms Josephine Rooney, aged 71, has been submitted to the Joint Committee on Human Rights in June 2008, though no decision or comment has been forthcoming to date. Ms Rooney was jailed for 28 days in respect of £1,476.17 owed to Derby City Council. She was handcuffed in court and conveyed to HMP & YOI Foston Hall where she was also strip searched.

Restrictions on backdated benefit

From 6 October 2008, applications for housing benefit (HB) and council tax benefit (CTB) may only be backdated for three months, for persons of pensionable age, instead of 12 months as permitted previously: Social Security (Miscellaneous Amendments) (No 4) Regulations 2008 SI No 2424; Housing Benefit and Council Tax Benefit (Amendment) (No 2) Regulations 2008 SI No 2824. Among the justifications offered for the change are 'to reduce the amount of intrusion into … financial circumstances' for claimants: *Social Security (Miscellaneous Amendments) (No 4) Regulations 2008 SI No 2424: Report by the Social Security Advisory Committee under section 174(1) of the Social Security Administration Act 1992 and the statement by the Secretary of State for Work and Pensions in accordance with section 174(2) of that Act*, para 3.[2] However, the effects of this ruling may be mitigated to some extent in individual cases by the Court of Appeal's decision in *R (Gargett) v Lambeth LBC* (see below).

CASE-LAW

Valuation tribunals

■ Pogonowska v Camden LBC

[2008] All ER (D) 38, [2008] EWHC 3212 (Admin), 5 November 2008

■ Mayer v Epsom and Ewell BC

[2008] EWHC 2918 (Admin), 10 November 2008

Both cases involved arguments between taxpayers and local authorities over whether mothers or their adult sons were liable to council tax on domestic dwellings. In both cases, the VTs had upheld the decisions of the local authorities and the taxpayers appealed to the High Court.

In *Pogonowska*, the appellant was a mother who owned a property where she maintained that her son resided. The mother was not resident in the property. However, the local authority decided that it was she, not her son, who was liable for tax. The appellant argued that in reaching its decision, the VT did not take into consideration that a credit check on the property indicated that her son had been recorded on the electoral roll as being resident at the property for two years. The appellant argued that the tribunal's decision was perverse on the facts.

The court ruled that usually a person's sole or main residence would the dwelling which a reasonable onlooker knowing the material facts would regard as the person's dwelling at a particular time: see *R (Williams) v Horsham DC* [2004] EWCA Civ 39, 21 January 2004; (2004) *Times* January 29. The VT had erred in failing to take account of the son's entry on the electoral roll. The case would be remitted to the tribunal for a rehearing.

In *Mayer*, the applicant was resident in a property owned by his mother. The applicant's mother had gone into care in 2004. The VT concluded that his mother was no longer resident in the property on the basis that the receiver appointed by the Court of Protection in respect of her affairs confirmed that she was no longer resident there, and there was no substantive evidence to support a claim that she was still living at home or likely to return.

The court ruled that the VT's ruling could only be interfered with if the decision contained an error of law. It was not an error of law for the VT to make a finding of fact with which an appellant disagreed.

Comment: At first glance, the two judgments, decided five days apart, may seem hard to reconcile. Both concerned provable facts which at first sight seem excluded from challenge in the High Court, appeals being limited to points of law. The distinction lies in that while the High Court will not normally interfere with a finding of fact made by a tribunal, the failure to consider a fact may amount to a mistake of law. In the High Court, the appellant does not get a rehearing but an examination of the way in which the tribunal reached its conclusions. As in *Pogonowska*, overlooking a relevant factor may amount to a mistake on the facts and to an error in law. Similarly, the use of the word 'perverse' reflects a principle established in *Bracegirdle v Oxley* [1947] KB 349, that a tribunal may on occasion get the facts so wrong that any finding in law based on its conclusions is unsustainable. Furthermore, it should be noted that in cases where an appellant decides to challenge a tribunal decision by judicial review – as distinct to the statutory right of appeal for VTs – the judge enjoys a very wide discretion to dismiss an application. This also occurs at the leave stage when the judge considers the merits of the case, which will invariably involve some consideration of the facts. Therefore, complete consistency cannot be expected or demanded in judicial decision-making.

Exemption: student status

■ R (Fayad) v London South East Valuation Tribunal

[2008] EWHC 2531 (Admin), 10 October 2008[3]

The applicant undertook a PhD at Imperial College London. He contended he was

entitled to the benefit of an exemption from council tax as a full time student between March 1998 and February 2006. Although his student exemption certificate expired in 2003, he contended that a longer exemption should apply for a longer period as he had been granted five years by the college to write up his thesis. He also maintained that an Asylum and Immigration Tribunal (AIT) had recognised him as a student. The applicant argued that these facts brought him within article 4 and Schedule 1 of the Council Tax (Discount Disregards) (CT(DD)) Order 1992 SI No 548, which defined student status for council tax purposes. The applicant was refused student status by the local authority. He appealed to the VT, which dismissed his appeal. The applicant applied for judicial review, having failed to appeal within 28 days of the VT's decision.

The court refused the application for judicial review. Attendance meant physical attendance at an educational establishment within the meaning of articles 1 and 5 and Schedule 2 of the CT(DD) Order, which required attendance for at least 24 weeks of study in the academic year and with an average of at least 21 hours at an educational establishment. This meant a student had to attend some identifiable place; however, as the college rules did not impose a requirement of attendance, the exemption was not available. The decision of the AIT did not assist in identifying the applicant as a student as it proceeded on a different statutory basis to the definition in the CT(DD) Order.

Comment: Following this decision, it appears that students who are not required to attend at 'some identified place' for the statutory period are not entitled to a student exemption. Thus, many PhD students, and others, for example, those who are permitted to work from home, perhaps with childcare responsibilities, will be potentially liable for council tax.

Bankruptcy

Since 2007, 'Local taxation update' articles have highlighted the use of bankruptcy proceedings against council tax debtors. The past 18 months have seen growing concern and media awareness of the issue, particularly after a feature in the *Observer* newspaper in February 2008.[4]

The practice of using bankruptcy proceedings against council tax debtors was criticised in spring 2008 by Local Government Ombudsman Jerry White (see *Wolverhampton City Council* 06B16600, 31 March 2008, where a sum of £750 that was owed in council tax increased to approximately £38,000 as a result of bankruptcy proceedings).[5] The Ombudsman recommended that the local authority should meet the costs of annulling the bankruptcy order. In his report the Ombudsman ruled that a charging order should have been considered by the council and stated:

… The council cannot, it seems to me, turn a blind eye to the consequences to the debtor of any recovery option it pursues. Some courses will no doubt be administratively more convenient and less costly than others. But in selecting those options the impact on the debtor should be weighed in the balance. The dire and punitive consequences of bankruptcy, involving a multiplication of the original debt many times over and frequently incurring the loss of the debtor's home, must be a factor to be taken into account in deciding that the 'last resort' is indeed appropriate. I have seen no evidence that this relevant consideration was taken into account. And that too was maladministration (para 94).

The following High Court decisions are of particular note on the use of bankruptcy proceedings.

■ Lambeth LBC v Simon

[2007] BPIR 1629,
6 June 2007

The local authority alleged non-payment of council tax debts. It sought to present a bankruptcy petition against the debtor through the Chancery Division of the High Court. The authority had obtained three liability orders from Camberwell Magistrates' Court for council tax amounting to £2,258 for the years 1997/98, 1998/99 and 2004/05. A statutory demand had been served, but the debtor had made no attempt to set aside either the demand or the liability orders. The debtor contested the petition on the basis that a previous bankruptcy order, which post-dated the three liability orders, had been annulled in May 2005 on the ground that all his debts had been paid. At the hearing of the petition, the debtor presented a letter from the council which tended to confirm his claim that the liability orders had been paid in full.

Registrar Simmonds dismissed the bankruptcy petition. The court distinguished between discharge from bankruptcy under s281(1) of the Insolvency Act (IA) 1986 and annulment under s281(2): the latter provision provided that the court must be satisfied that all bankruptcy debts have been paid or secured. The court examined the evidence before it, and found what it described as a 'triplication of petitions' by the local authority and that its accounts were in a state of disarray. The local authority had failed to inform the official receiver of two of the alleged liabilities underpinning the petition. One liability order was found to be wrong and another was nine years old. The court was not satisfied that the statements in the petition were true, and as a consequence the petition would be dismissed. The court also stated per curiam:

I am constrained to record that I (and my brother registrars) have been for some time and remain concerned by the particulars of debt relied upon in petitions by some local authorities. This case only heightens this concern. There are cases where pleaded liability orders are shown not to exist. In other cases they cannot be proved by the production of a sealed order or a statement from the clerk to the magistrates that an order has been made. No credit for payments are shown, thus the integrity of the debt upon which some local authorities' petitions are based is in question. Rule 6.8(2) [of the Insolvency Rules] requires (amongst other things) that 'There shall be stated in the petition, with reference to every debt in respect of which it is presented (a) the amount of the debt, the consideration for it … (b) when the debt was incurred or became due.' Such is my concern that I call for future petitions by local authorities relying on liability orders that both the statutory demand and the petition step out a full history of the account properly showing all debts and credits. Further that where a liability order(s) is/are relied upon that the local authority must be in a position to, and be prepared to, prove the existence of those liability orders to the satisfaction of the court (para 45).

■ R (Mohammed) v Southwark LBC

[2009] EWHC 311,
24 February 2009

In August 2006, the local authority applied for a liability order against the debtor for £1,243.47, which comprised £297.35 outstanding in respect of the financial year 2005/06 and £881.02 for the year 2006/07. The claimant applied for judicial review on the basis that he had been made bankrupt in November 2005 and that the authority was aware of this. After leave for judicial review was granted, Southwark accepted that it would not pursue the amount outstanding for 2005/06 as being a bankruptcy debt within IA s382. It also emerged that a liability order had already been obtained for the year 2005/06 in June 2005. The local authority admitted that proper procedures regarding billing had not been followed and offered an undertaking not to enforce the order. The applicant sought judicial review to quash the order in its entirety.

The court found that the liability order

obtained in August 2006 was unlawful and must be quashed. The sum of £297.35 was a debt provable in bankruptcy, having arisen at the time the applicant was declared bankrupt. The council tax system provides that taxpayers are liable to pay sums on account. Where a taxpayer fails to pay an instalment, a reminder notice must be served. If the debtor fails to pay within seven days of the notice, the outstanding tax liability for the year falls due. The sum of £297.35 owed in relation to 2005/06 was a debt provable in bankruptcy, as the liability to pay it had already arisen by the time the debtor had been declared bankrupt in November 2005. Therefore, as a bankruptcy debt it could not be pursued by way of a liability order application. With respect to the following financial year 2006/07, the liability to pay had not yet arisen at the time of the bankruptcy order and the debtor therefore had a liability to council tax.

However, the council would still have required permission from the court to seek a liability order under IA s285(3) as the debtor was an undischarged bankrupt and Southwark was one of his creditors. Furthermore, the fact that the sum stated in the liability order was wrong and had been subject to duplication of proceedings only strengthened the case for quashing it. The council was ordered to pay 75 per cent of the applicant's costs, which the court assessed as a litigant in person at £500 in keeping with Civil Procedure Rule (CPR) 48.6.

Comment: Both the judgment in *Lambeth LBC v Simon* (above), which has hitherto only been known to insolvency lawyers and practitioners, and in *R (Mohammed)* reflect the sloppiness and corner-cutting that have all too often characterised the use of bankruptcy proceedings against defaulters. Readers should note that local authorities are also precluded from using committal proceedings against debtors who are already bankrupt (see *Re Smith (a bankrupt) ex p Braintree DC* [1990] HL 2 AC 215. The pursuit of old debts might also be challenged as an injustice, following *R v Lambeth LBC ex p Ahijah-Sterling* [1986] RVR 27.

Discretionary housing payments

■ R (Gargett) v Lambeth LBC

[2008] EWCA 1450,
18 December 2008,
February 2009 Legal Action 29

This is the first case on discretionary housing payments (DHPs) to reach the higher courts. As a result, it is of considerable significance as regards the making of DHPs, and gives a broad interpretation to the term 'housing costs'. The DHP system, which was first introduced in July 2001, allows a local authority to give extra assistance to persons who are receiving housing benefit (HB) and council tax benefit (CTB). The onus is on the claimant to apply for DHP and the discretion is with the local authority as to when a payment is appropriate. *Gargett* considered the purpose and scope of the DHP regime and whether or not a local authority may make DHPs to cover arrears of rent if the applicant was receiving full HB and CTB.

In *Gargett*, the claimant was a 24-year-old single mother with five children. She was the tenant of St Martin's Community Partnership. From October 2004, she received HB and had been an assured tenant, initially at a rent of £82.57 a week. By the relevant time, the rent had increased to £99.33. Neither the landlord nor the claimant informed the council of the increases in rent. As a result, the council did not have all the information it needed to calculate the correct amount of HB and arrears of £3,800 accrued. The landlord sought repossession. In July 2007 the claimant applied for a DHP to cover the rent arrears. In August 2007 Lambeth refused the application. It stated that it had no discretion in the matter, and cited the full HB and CTB being received by the claimant. Proceedings for judicial review were launched on the ground that the council had fettered its discretion. The application for judicial review was refused and then renewed before the Court of Appeal.

The Court of Appeal identified regulations 2 and 4 of the Discretionary Financial Assistance (DFA Regs) Regulations 2001 SI No 1167, as amended by the Housing Benefit Regulations (HB Regs) 2006 SI No 213, as amended as the key provisions. In order to be eligible for a housing payment, it is necessary, under DFA Regs reg 2(1)(b), that the applicant must appear to the council 'to require some further financial assistance' (in addition to the benefits to which s/he is entitled). Thus, DHPs were not simply benefit payments available at the discretion of the council: the words 'further assistance' presupposed an applicant who is already receiving benefits and requires more to meet 'housing costs'. As a matter of ordinary English, 'housing costs' includes arrears of rent, these not being expressly excluded by the regulations. Under DFA Regs reg 5, the council had a wide discretion to make payments, which could be for either a past or future period, including a lump-sum payment.

The court examined DFA Regs reg 4, which it considered would not be awarded 'top prize in a competition for Plain English', and found that any payment had to be divided into a weekly sum. Lambeth argued that this clause required a continuing shortfall between the rent demanded and the amount of benefit being paid, and that as maximum HB and CTB were being paid, it was not possible to exceed this amount. However, the court found that on the correct construction of regulation 4, it was possible to encompass a payment for past arrears, taking a step- by-step approach to each paragraph.

- The first step was to note that the amount which the DHP should not exceed was 'an amount equal to the amount of the aggregate of the payments specified in regulation 12(1) of the [HB Regs]'.
- The second step was to examine the provisions of the HB Regs to ascertain the amount of the aggregate of the payments specified in reg 12(1). The relevant, specified, periodical payments which the claimant was liable to make in respect of her home included 'payments of, or by way of, rent'. These words were wide enough to cover arrears of rent, even where the council had not been informed of any increase by the landlord or the tenant.
- The third step was to identify that the rental payments for which the claimant was liable were '[s]ubject to the following provisions of this regulation', including HB Regs reg 12(3) by which the 'eligible rent' for the dwelling was ascertained for HB calculations.
- The fourth step was to identify the amount of the 'eligible rent' in accordance with HB Regs reg 12(3)(b)(i) to (iii). That involved deducting payments of liabilities for water and sewerage charges, and certain service charges from the aggregated payment of rent, in order to reach the figure for 'eligible rent'. The claimant accepted that as a result of DFA Regs reg 2, DHPs represented 'further financial assistance' with 'housing costs', and housing benefits already paid for past housing costs had also to be deducted. That was implicit in the purpose for which DHPs might be made. Otherwise, the applicant would be receiving DHPs for housing costs that had already been met by past payment of housing benefits. It would not be a case of a need for 'further' financial assistance to meet 'housing costs'.
- The fifth and final stop was to go to HB Regs 80 and 81, which provide for the averaging out of rental payments so as to produce a weekly figure to enable the HB calculations to be made. However, no particular point arose on those regulations in this case.

While DFA Regs reg 4 puts a cap on the maximum payment under a DHP, it was not limited to existing weekly shortfalls between rent and HB, and it was possible to make a lump sum payment(s) with respect to the past. The court ruled that the local authority had misconstrued the DFA Regs by raising the fact that the claimant was already receiving full HB and CTB as a reason why no DHP

could be made to cover rent arrears. The council had discretion and had misdirected itself in failing to exercise it.

Comment: By widening the scope for DHPs to cover arrears, this decision is likely to lead to an increase in the number of applications received by local authorities. The judgment may also assist in cases of arrears for council tax where the local authority is not prepared to reduce an amount owed using its powers under s13A of the Local Government Finance Act 1992. It may also be of assistance where a DHP is sought with regard to arrears of council tax and situations where the regulations may fail to cover particular situations, for example, in certain immigration categories.

In *Gargett* the main judgment was given by Mummery LJ, with concurring judgments from Wall LJ and Toulson LJ who agreed with the above analysis. Wall LJ considered that there had been no evidence of the tenant being at fault as it was frequently the case that landlords receiving benefit often increased the rent without informing the tenant (this may be a particular problem where the landlord is resident abroad). Concerning Ms Gargett, Wall LJ stated: 'the appellant cannot be criticised for either ignorance or incomprehension of the statutory regime (para 36)'. It is also interesting to note his comments on the complexity of the regulations: 'In my view it remains an apparently non-eradicable blemish on our operation of the rule of law that the poorest and most disadvantaged in our society remain subject to regulations which are complex, obscure and, to many, simply incomprehensible (para 36).'

■ R (JJB Sports plc) v Telford and Wrekin BC

[2008] 2870 (Admin), 5 November 2008

The applicant company sought to quash a liability order for non-domestic rates granted by District Judge Morgan at Telford Magistrates' Court on 22 May 2007. The local authority had issued what it termed a 'multibill' for more than one year's liability on the applicant's premises. The 'multibill' had been unlawful as regulation 4 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations ('the Collection Regs') 1989 SI No 1058 required different bills for different financial years. This had been challenged by the applicant company. The local authority had withdrawn a summons and then issued two separate demands in the correct format. By the time the matter reached the magistrates' court, the issue was limited to rates for the period 9 January 2006 to March 31 2006 that were, the applicant argued, irrecoverable on the basis that the local authority had failed to serve its demand 'as soon as practicable', which was a mandatory requirement under regulation 5 of the Collection Regs.

In court, the local authority admitted that its multi-billing practice was unlawful; however, this had not stopped it from issuing some 400 such demands a year. District Judge Morgan condemned the local authority's behaviour 'as showing contempt for parliament's rules and regulations and an abuse of the court process', and described it as 'disgraceful'. Nonetheless, District Judge Morgan granted the order as no prejudice was shown to the ratepayer. The ratepayer appealed.

The liability order would be upheld. The key issue being whether prejudice was alleged or found. The court took as its starting point, the House of Lords' decision in *R v Soneji and another* [2005] UKHL 49, 21 July 2005, which reviewed the legal effect of failing to follow mandatory requirements that might invalidate an act, while a breach of a purely directory requirement would not do so. With regard to the latter, Lord Stein in *Soneji* had identified a further distinction between two types of directory requirements:

- requirements of a purely regulatory character where a failure to comply would never invalidate an act; and
- those where a failure to comply would never invalidate an act provided that there was substantial compliance.

The court considered that following *Soneji*, the law took a more flexible and discretionary approach to both mandatory and directory requirements with a concentration on the consequences of non-compliance with a statutory regime. In addition to examining the consequences, it was necessary to look at whether or not parliament intended total invalidity to follow from non-compliance with a statutory rule. Examining the facts of the present case, the court identified regulation 5(1) as striking a balance between the interests of the ratepayer and the local authority, a view endorsed in *Encon Insulation Ltd v Nottingham City Council* [1999] RA 382 where liability orders based on late demand notices had been quashed. This had been distinguished in *Regentford Ltd v Thanet DC* [2004] EWHC 246 (Admin), 18 February 2004, where late demands had been upheld as no substantial prejudice had been caused to the ratepayer. In the present case, the authority was relying on a notice which was 56 days late but was not defective and no prejudice had been identified in contrast with *Hardy v Sefton MBC* [2006] EWHC 1928, 27 July 2006; [2007] RA 140.

Comment: Since the beginning of the 20th century, it has been relatively rare for cases concerning the validity of demands for rates to be argued in the higher courts. The present case illustrates the cavalier attitude and corner cutting which some local authorities can take to enforcement proceedings. The law relating to defects in billing and enforcement is in need of clarification by the higher courts.

In this case, Timothy Brennan QC, sitting as a deputy High Court judge, stated obiter at paragraph 36: 'I am prepared to assume, without in any way deciding, that a magistrates' court which is invited to make a liability order may be entitled to refuse to make such an order in a case where there has been a serious breach of the mandatory provisions of the Collection regulations which has caused prejudice to the ratepayer.' Furthermore, at paragraph 37 he stated: 'It may also be possible to envisage a case where the decision of a rating authority to proceed with enforcement may, in the light of its own breaches of the regulations, and consequent prejudice to the ratepayer, be so unfair as to call for the intervention of the court on judicial review.' This latter remark suggests the possibility of judicially reviewing the issue of the decision to seek a summons.

1 See *Derby Evening Telegraph*, 3 May 2008. Also, details from personal communication from Ms Rooney, 29 May 2008.
2 Available at: www.official-documents.gov.uk/document/cm74/7469/7469.pdf.
3 Josephine Henderson, barrister, 5 Paper Buildings, represented the interested party. The author would like to thank her for the transcript/notes of the judgment.
4 See 'Alarm at rush to bankrupt council tax debtors', 10 February 2008, available at: www.guardian.co.uk/money/2008/feb/10/1/print.
5 Available at: www.lgo.org.uk/GetAsset.aspx?id=fAAOADcAMAB8AHwARgBhAGwAcwBlAHwAfAAwAHwA0.

Alan Murdie is a barrister, who co-founded the Poll Tax Legal Group in 1990. He has been involved with many test cases concerning the community charge and has wide experience of liability order applications in the magistrates' courts. He is co-author, together with Ian Wise, of *Enforcement of Local Taxation: an advisers' guide to non-payment of council tax and the poll tax*, LAG, 2000, £12.50. The author may be contacted at Zacchaeus 2000 Trust, 38 Ebury Street, London SW1 0LU.

Recent developments in housing law

Jan Luba QC and **Nic Madge** continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Possession claims in the county court

In the last quarter of 2008, 29,095 possession orders were granted to mortgage lenders and 27,715 possession orders were granted to landlords by the county courts in England and Wales. The provisional total number of orders in 2008 was 114,296 granted in favour of mortgage lenders and 112,294 granted in favour of landlords. An introductory note to the latest statistical report suggests that the launch of the mortgage possession pre-action protocol was the likely cause of a fall of about half in the number of new mortgage-lender claims being issued weekly from October to December 2008: *Statistics on mortgage and landlord possession actions in the county courts – fourth quarter 2008*, Ministry of Justice, 20 February 2009.[1] For commentaries on the new mortgage possession protocol see District Judge Robert Jordan, 'Don't let it be misunderstood' [2009] March/April ROOF 41 and T Bailey and G Williams, 'Stemming a rising tide?' (2009) 159 NLJ 221.

The year on year increase in possession cases in Northern Ireland has reached over 63 per cent, prompting the independent Housing Rights Service (HRS) to establish a Preventing Possession Initiative which was launched on 13 February 2009. Under the initiative, emphasis is placed on securing advice for those facing the threat of eviction and on working with social landlords and mortgage lenders to stem the numbers of possession claims issued: HRS press release, 12 February 2009.[2]

A paper published by the Centre for Policy Studies (CPS) has suggested that more positive use of available judicial discretion could prevent large numbers of evictions each year: *Save 100,000 homes from repossession* (*CPS Pointmaker*, February 2009).[3]

In February 2009 the housing minister (Margaret Beckett MP) set out the progress that the government believed it had made in encouraging the establishment of the national Mortgage Rescue Scheme for England. She identified Havering, Portsmouth, Kettering and Penwith as being councils especially advanced among the 75 local authorities that will be operating the scheme and said that 'we expect to see the first people benefiting any day now'.[4]

Eligibility for social housing

Applications made to local housing authorities under Housing Act (HA) 1996 Part 6 (allocation of social housing) or Part 7 (homelessness) on or after 2 March 2009 will be subject to new statutory provisions as a result of the Housing and Regeneration Act (H&RA) 2008 s314 and Sch 15 being brought into force in England and Wales on that date by the Housing and Regeneration Act 2008 (Commencement No 1 and Saving Provisions) Order 2009 SI No 415. The new provisions amend HA 1996 s185(4) which was declared incompatible with rights under the European Convention on Human Rights ('the convention') in *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184; [2006] 1 WLR 505. The amendments introduce a new class of 'restricted persons' for whom the primary method of discharging the main homelessness duty is to be the arrangement of a private sector tenancy. The details of the changes were set out in non-statutory guidance sent by Communities and Local Government (CLG) to all local authority chief housing officers in England on 16 February 2009.[5] The amendments introduce new requirements for HA 1996 s184 notifications, amend HA 1996 in respect of the full housing duty, and adjust the reasonable preference categories in HA 1996 s167(2).

The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2009 SI No 358 amend the eligibility regulations made under HA 1996 Parts 6 and 7 to waive the normal habitual residence requirements in respect of British citizens and British nationals returning from Zimbabwe.[6] That change will enable them to access social housing and homelessness assistance in the UK on arrival. This reflects a scheme under which the government is to offer up to 3,000 elderly or vulnerable people still living in Zimbabwe the opportunity of assistance to settle in the UK. The new regulations came into force on 18 March 2009 and only apply to those arriving before 18 March 2011.

Housing and anti-social behaviour

Use by local housing authorities of the new premises closure order powers which became available on 1 December 2008 is documented in detail in *ASB Focus*, Issue 3 (Home Office, February 2009).[7] It reviews cases handled by Westminster, Camden, Leeds, Birmingham and Tower Hamlets councils.

The Home Office has also produced for MPs a handy guide to powers available to address anti-social behaviour: *Anti-social behaviour enforcement and support tools information pack for Members of Parliament* (Home Office, January 2009).[8]

Housing associations

Considerable numbers of properties developed by housing associations for shared ownership (part-rent, part-buy) remain unsold, while demand for social housing to rent is soaring. The Tenant Services Authority (TSA) has announced that, in response to that situation, 4,000 unsold shared-ownership homes have been released for use by housing associations for social rented housing: TSA press release 16/09, 23 February 2009.[9]

The portfolio of housing stock owned by some housing associations is fragmented over wide geographic areas. The TSA has published a new report illustrating how rationalisation can achieve benefits for both landlords and tenants and has invited associations to consider rationalisation of their stock holdings: *Location, location, location* (TSA, February 2009).[10]

Local authority powers

New guidance has been issued to local authorities designed to encourage greater and more imaginative use of the very broad 'well-being' power in Local Government Act 2000 s2: *Power to promote well-being of the area: statutory guidance for local councils* (CLG, February 2009).[11] The power enables a council to do almost anything to improve the well-being of its area by (among other things) assisting individual residents. Those advising residents with housing problems may find it useful to remind authorities of the very broad scope of these powers.

Improving the housing stock

The housing minister has set out the government's aspiration to 'retro-fit' the current housing stock to make it more energy efficient. This will involve basic measures like loft-lagging and cavity wall insulation for all homes by 2015, more substantial improvements to seven million homes by 2020, and by 2030 all homes are to benefit from 'all the cost-effective measures possible': Ministerial speech, 12 February 2009.[12] The detail is set out in papers generated by a government consultation exercise to which responses are sought by 8 May 2009.[13]

Meanwhile, more modest help with minor repairs and adaptations for elderly owner-occupiers will be available from local housing authorities. On 26 February 2009 the government released details of the 2009/10 grant allocation to each local authority for these 'handyperson' repairs.[14] It simultaneously published *The future Home Improvement Agency handyperson services report* (CLG, February 2009).[15]

Stock transfers

H&RA 2008 s294 contains amendments to the arrangements for consultation and balloting prior to stock transfer from local housing authorities to housing associations. The government is consulting on the new statutory guidance it will issue about these provisions: *Consultation before disposal to private sector landlord: statutory guidance – a consultation paper* (CLG, February 2009).[16] The closing date is 21 May 2009.

H&RA 2008 ss295–296 encourage more local authority tenants and residents to investigate options to transfer the management or ownership of their council housing stock. On 16 February 2009 the secretary of state issued a new general approval for housing management agreements under HA 1985 s27.[17] A letter sent by CLG to local housing authorities explains that the secretary of state has updated the general approval to take account of the coming into force of the Housing (Right to Manage) (England) Regulations 2008 SI No 2361 and a number of other changes in legislation.[18]

New advocacy for tenants

CLG has published proposals for a new National Tenant Voice organisation intended to represent the interests of tenants: *Citizens of equal worth* (CLG, January 2009).[19] Both a full report and a summary are available.

The government has also explained the progress that has been made towards establishing the national representative group for tenants and the further steps to be taken in consultation about, and recruitment to, the new National Tenant Council: *National Tenant Voice plans agreed – an update for tenants* (CLG, February 2009).[20]

Right to buy

The draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009 has been laid before parliament for approval.[21] The Order would allow the Welsh Assembly to legislate for: (a) suspension of the right to buy in particular circumstances; and (b) modification of the right so that it ceases to apply in relation to particular classes of dwelling.

Land for housing

On 6 February 2009 the Department of Health issued directions to all NHS trusts and health service bodies under National Health Service Act 2006 s8 about the factors to be taken into account when selling off their land for housing development.[22] The directions cover the quality of the housing to be developed and the requirement for developers to provide an appropriate mix of tenures.

PUBLIC SECTOR TENANCIES

Human rights: article 8

■ Liverpool City Council v Doran

[2009] EWCA Civ 146,
3 March 2009

Liverpool granted Ms Doran, an Irish Traveller, a licence to occupy a pitch on a site which the council ran in accordance with the Caravan Sites Act 1968. There were allegations of anti-social behaviour by her and other members of her family. She denied these allegations. There were also complaints that Ms Doran and her daughter had moved additional caravans onto their pitches without permission and that unauthorised and highly dangerous electrical work had been carried out. The council served a notice to quit and then began a possession claim. At trial, the council sought summary judgment on the basis that a notice to quit had been served and it was irrelevant whether the council was able to prove that there had been breaches of the licence. HHJ Trigger granted the council summary judgment. Ms Doran appealed.

The Court of Appeal dismissed her appeal. Toulson LJ said that *Doherty v Birmingham City Council* [2008] UKHL 57; [2008] 3 WLR 636 had 'created a new battleground area' (para 46). He described the effect of *Doherty* as being two-fold.

49. First, there is no formulaic or formalistic restriction of the factors which may be relied upon by the licensee in support of an argument that the council's decision to serve a notice to quit, and seek a possession order, was one which no reasonable council would have taken. Such factors are not automatically irrelevant simply because they may include the licensee's personal circumstances, such as length of time of occupation. …

50. Secondly, the question whether the council's decision was one which no reasonable person would have made is to be decided by applying public law principles as they have been developed at common law, and not through the lens of the convention.

Whether or not a 'council's decision was unreasonable has to be decided by applying public law principles as they have been developed at common law [and] it is to be remembered that those principles are not frozen' (para 52). He continued 'it is likely to be a rare case indeed where a council decides to issue a notice to quit and seek a possession order without any ground on which a reasonable council might have done so' (para 55). In this case, the submission that no reasonable council would have served a notice to quit was 'hopelessly unarguable' (para 56). The council had evidence of repeated breaches of the licence or anti-social behaviour.

'Whether [Ms Doran was] right or wrong, or whether it was six of one and half a dozen of the other, there [was] no denying the fact that the council had cause to believe that her family were trouble makers and that there had been repeated breaches of the licence.' He rejected 'as unarguable any submission that a reasonable council must have conducted the equivalent of a judicial investigation into where exactly the truth lay between the allegations and counter-allegations before deciding that it was appropriate to terminate [Ms Doran's] licence' (para 56).

■ Dublin City Council v Gallagher

[2008] IEHC 354,
11 November 2008

Mrs Nancy Gallagher, the defendant's mother, was the sole tenant of premises owned by the city council. Mrs Gallagher died in 2005. Mr Gallagher applied to succeed to his mother's tenancy, but the council found that he did not fulfil the criteria of its scheme of letting priorities created under HA 1966 s60. The council served a notice to quit and began possession proceedings. A district judge made a finding of fact that, except for a short period, Mr Gallagher had resided with his mother and regarded that dwelling as his permanent residence. This finding was contrary to that made by the council when rejecting his application to succeed to his mother's tenancy. In the light of this finding, the district judge expressed concern that the hearing of

the case would represent little more than a 'rubber stamp' of the council's decision and referred various questions to the High Court. In the High Court, Mr Doherty's advocate argued that the Irish Human Rights Act 2003 permitted judges hearing cases under the summary procedure to examine the circumstances which led to a decision to issue proceedings and that to comply with the convention, defendants should be entitled to a hearing on the merits before an independent and impartial tribunal – ie, the district court.

O'Neill J stated that if Mr Gallagher's contention that he had lived with his mother for many years was correct, the premises were 'clearly' his home within the meaning of article 8. The grant of a warrant would be 'a gross interference' with his right to respect for his home, and so his rights under article 8 would be engaged. The first step in considering whether that interference could be justified was to establish the true facts pertaining to his occupation of the premises. Any court or tribunal which had the jurisdiction to deprive him of possession would have to be satisfied that the grant of the warrant was justified in the terms set out in article 8(2). A warrant would be in accordance with national law (ie, HA 1966 s62) and in pursuit of a legitimate aim (regulating a limited housing stock). However, there was a requirement for procedural safeguards to enable consideration as to whether eviction was necessary and proportionate to a legitimate aim. O'Neill J continued '[t]he jurisprudence of the European Court of Human Rights suggests that in the realm of eviction proceedings there should, in principle, be an opportunity for an independent tribunal to adjudicate on the proportionality of the decision to dispossess'. In this case, the procedure which the council followed 'was unstructured, unregulated and specifically failed to give the defendant an opportunity to answer the concerns' which the council raised. It 'failed to give [him] an opportunity to challenge and test the view being formed by the [council], which was adverse to his case'. That failure to give Mr Gallagher the opportunity to offer an explanation of his position deprived him of a hearing of his case. O'Neill J found that that failure and the absence of 'procedural safeguards' breached articles 6 and 8 of the convention. He also found that the process of judicial review would not have given a hearing on the merits. He made a declaration of incompatibility.

Suspended possession orders

■ Austin v Southwark LBC

[2009] EWCA Civ 66,
16 February 2009

Alan Austin was granted a secure tenancy in 1983. In 1986, as a result of rent arrears, Southwark brought a possession claim. In 1987, a suspended possession order was made, but Alan Austin defaulted and became a tolerated trespasser. His brother, Barry Austin, went to live with him in 2003. Alan Austin later died and Southwark brought a new possession claim against Barry Austin. He made an application under Civil Procedure Rules (CPR) Part 19 to be joined as a party to the possession claim, to represent the estate of his brother and retrospectively to postpone the date for possession so that he would be entitled to succeed to the tenancy under HA 1985 s87(b). HHJ Welchman dismissed the application. Following *Brent LBC v Knightley* (1997) 29 HLR 857, he held that the right to apply for a postponement of an order for possession under HA 1985 s85 was not an interest in land which was capable of being inherited. Any right ceased on the brother's death. Barry Austin appealed, arguing that *Knightley* predated the Human Rights Act (HRA) 1998 and was not compliant with the convention, specifically article 1 of Protocol 1. Flaux J dismissed the appeal ([2007] EWHC 355 (QB), 29 January 2008; April 2008 *Legal Action* 33). Mr Austin appealed further to the Court of Appeal.

The Court of Appeal dismissed the appeal. HHJ Welchman was right to decide that in this case the words 'an interest in a claim' in CPR 19.8(1) meant 'the claim to make an application under s85'. The 'claim to defend the possession proceedings had merged into the possession order' (para 18). Arden LJ said that *Knowsley Housing Trust v White* [2008] UKHL 70; [2009] 2 WLR 78, demonstrated 'that the proper approach to a question of statutory construction of [HA 1985] Part IV will in appropriate cases be a purposive and practical approach in order to achieve the purposes of the legislation', including the protection of secure residential tenants (para 24). However, that protection is not limitless. The Court of Appeal was bound by the ratio in *Knightley*. The right to apply under s85 was a personal right which could only be exercised by the tenant. Furthermore, the Court of Appeal held that article 1 of Protocol 1 was not engaged because the former tenant's right to apply under s85 was not a possession after his death.

Setting aside possession orders

■ Southwark LBC v Jackson and Jackson

Lambeth County Court,
27 January 2009[23]

Mr and Mrs Jackson were elderly secure tenants. In 2005, they left their home so that Southwark could carry out repairs. Their grandson looked after the premises in their absence. By early 2008, some, but not all the works, were completed. On 19 February 2008, Southwark served a notice to quit on the basis that the tenancy had ceased to be secure, because the tenant condition was no longer met. Mr and Mrs Jackson did not attend the hearing of the subsequent possession claim and an outright possession order with a judgment for rent arrears was made in their absence. A warrant for possession was executed. Mrs Jackson applied to set aside the possession order under CPR 39.3 (non-attendance at hearing), but was unable to give a good reason for failing to attend or for the delay in making the application. Shortly before the hearing of the application, it came to light that the notice to quit was invalid because it was served on Tuesday 19 February 2008 and stated that it would expire on Monday 17 March 2008 (ie, 27 days and not 28 days later). The saving clause was inadequate. At court, it was argued that the court had a separate power to set aside the order pursuant to CPR 3.1(7) (power to vary or revoke the order). Southwark agreed that the notice to quit was invalid, but argued that the court should not set aside the order.

After considering *Edwards v Golding* [2007] EWCA Civ 416 and *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 WLR 1945, HHJ Gibson set aside the possession order. If the court had considered the invalid notice to quit at the first hearing, the order would not have been made. If the order stood, it would force the tenants from their home other than in accordance with the law. That would be contrary to the convention. HHJ Gibson also commented that at the initial hearing, the case had been dealt with very summarily, as a simple rent arrears case. The district judge did not appear to consider whether a prima facie case had been made that the tenancy had ceased to be secure. In particular, Southwark's own pleading mentioned the presence of the grandson and did not deal with whether he was there simply as caretaker for the tenants. The district judge did not appear to consider this key issue at all, and so there appeared to be a significant doubt about whether the tenant had in fact parted with possession. In these circumstances, the possession order would have been unlawful.

Possession claims against trespassers

■ Secretary of State for the Environment, Food and Rural Affairs v Meier

[2008] EWCA Civ 903,
31 July 2008,
October 2008 Legal Action 35

On 11 February 2009, the Appeal Committee granted leave to the occupiers to appeal to the House of Lords.

ANTI-SOCIAL BEHAVIOUR

Obligations of landlords towards neighbours

■ Mitchell v Glasgow City Council

[2009] UKHL 11,
18 February 2009,
[2009] 2 WLR 481,
(2009) Times 26 February

James Mitchell and James Drummond were neighbouring tenants of Glasgow City Council. Mr Drummond made threats towards Mr Mitchell, including a claim that he would kill him if he (Drummond) were to be evicted. The council was aware of Mr Drummond's threatening and aggressive behaviour, and in 2001 held a meeting with him, at which his possible eviction for anti-social behaviour towards Mr Mitchell was discussed. Shortly after the meeting, Mr Drummond attacked and killed Mr Mitchell. Subsequently, Mr Drummond was charged with murder, but the prosecution accepted his plea to culpable homicide. In 2003, Mr Mitchell's widow and daughter raised a civil action for damages against Glasgow City Council in respect of the death. The pursuers (claimants) maintained that the defenders (defendants) owed the deceased and his family a duty of care:

■ to instigate eviction proceedings against Mr Drummond within a reasonable time of complaints about his behaviour being made; and

■ to warn Mr Mitchell about the meeting with Mr Drummond.

They relied on the common law and article 2 of the convention (right to life shall be protected by law). After a debate (ie, a pre-trial hearing, where no evidence was heard), Lord Bracadale, the Lord Ordinary, dismissed the action as irrelevant. The pursuers reclaimed against that dismissal. An Extra Division of the Inner House of the Court of Session ([2008] CSIH 19, 29 February 2008; July 2008 *Legal Action* 21) held:

■ by a majority, that it was premature to conclude that the pursuers must fail on their claim that there was a duty to warn and that that element of the case should proceed to trial; but

■ by a majority, that the pursuers' case based on breach of article 2 was without foundation; and

■ unanimously, that there was no duty to instigate proceedings for eviction within a reasonable time of complaints being made.

Both parties appealed to the House of Lords.

The House of Lords allowed the council's appeal and dismissed the pursuers' cross-appeal. Lord Hope, with whom the other Law Lords agreed, concluded that 'it would not be fair, just or reasonable to hold that the defenders were under a duty to warn the deceased of the steps that they were taking … [As] a general rule … a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk.' 'The situation would have been different if there had been a basis for saying that the defenders had assumed a responsibility to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to rely on them to do so. It would then have been possible to say not only that there was a relationship of proximity but that a duty to warn was within the scope of that relationship' (para 29).

With regard to article 2, the test is a high one. In this case, there was 'no basis … for saying that the defenders ought to have known that, when Drummond left the meeting, there was a real and immediate risk to the deceased's life' (para 34).

Public Services Ombudsman for Wales

Complaint

■ Conwy CBC

200701993,
12 January 2009

Mr and Mrs Smith were tenants of Clwyd Alyn Housing Association. They complained that they were subject to noise and disturbance from the family living next door, who rented their home from Conwy. Gradually, the Smiths became subject to direct intimidation, abuse and racial harassment which intensified after they gave evidence in court proceedings against the family. They said that this behaviour continued and that they made regular complaints to the council. They complained that they had never been advised of the procedures that Conwy had for dealing with anti-social behaviour and that the council had not communicated with them adequately over their complaints or properly investigated or acted on the family's behavioural problems and repeated breaches of their conditions of tenancy.

The Ombudsman reviewed five earlier public interest reports that had been issued on Conwy's previous handling of complaints involving racist abuse, anti-social behaviour and its failure to consider the position of victims of anti-social behaviour in relation to the HRA and the Homelessness Act 2002. While acknowledging that some administrative changes had been made by the council as a result of these reports, the Ombudsman was concerned to find in the Smiths' complaint evidence of replication of previous failings to deal with anti-social behaviour long after the compliance period for implementation of recommendations in the earlier reports, most notably after the establishment of an anti-social behaviour unit and after the council said it had provided additional training for staff. The ombudsman found a continuing lack of knowledge on the part of council staff in dealing with enforcement action. He recommended that Conwy pay the Smiths £2,500 for each of the four years during which the main aspects of maladministration and injustice occurred and recommended that a fulsome and detailed apology should be provided to them from the corporate level of the council. He also recommended that the council ensure that its staff conduct a further review of procedures for dealing with homelessness and anti-social behaviour and provide additional training and procedures to remedy the shortcomings identified in his report and for evidence of this to be provided to him within three months.

Breach of injunction

■ Cambridge City Council v Joyce

B5/09/0273,
24 February 2009

Mr Joyce was a secure tenant. His landlord obtained an injunction restraining him from committing any annoyance, or using surveillance equipment on the road in which he lived. He was also prohibited from using violence or intimidating behaviour and from entering certain local authority buildings. He breached the injunction. His landlord claimed possession, applied to commit him for contempt and sought a further injunction. The judge found that 11 breaches were proved on the balance of probabilities, and that three breaches were proved beyond reasonable doubt. After considering the medical evidence and the absence of remorse on Mr Joyce's part the judge made a possession order and sentenced Mr Joyce to 21 days' imprisonment, suspended on conditions that he give up possession and commit no further breaches. Mr Joyce appealed against the committal order.

The appeal was dismissed. There was no basis on which it could be said that the sentence imposed was clearly wrong. The judge had imposed a limited sentence with conditions to comply with the orders. There was no basis on which the court could interfere with the sentence.

Closure notices

■ Dumble v Metropolitan Police Commissioner

[2009] EWHC 351 (Admin), 6 February 2009

Ms Dumble was the tenant of a one-bed flat in a purpose-built block of flats. There were allegations of anti-social behaviour. At the request of the Metropolitan Police Commissioner, a closure notice was served under Anti-social Behaviour Act (AsBA) 2003 s1. The magistrates' court found that the premises had been used in connection with Class A drugs; a number of people had visited the premises day and night; drug paraphernalia had been found in the stairwell of the block of flats; members of the public and other residents of the block were subjected to disorder and nuisance; and that after service of the closure notice there had been no further incidents. The court made a closure order under s2. Ms Dumble appealed by way of case stated.

The Divisional Court dismissed the appeal. The justices had been entitled to conclude that the conditions in s2(3) were satisfied, despite a hiatus of two weeks and two days between the service of the closure notice and the date of the order. Scott Baker LJ, after referring to *Chief Constable of Cumbria Constabulary v Wright* [2006] EWHC 3574 (Admin); [2007] 1 WLR 1407 said 'it would be quite impossible to conclude that disorder or serious nuisance in this case had permanently ceased'. Furthermore, although article 8 of the convention was engaged because the closure order meant that Ms Dumble would lose her home, it was absolutely plain that a closure order was necessary. The mere fact that the justices did not specifically recite article 8 was not fatal to the making of a closure order.

■ R (Taylor) v Commissioner for the Metropolitan Police

[2009] EWHC 264 (Admin), 15 January 2009

The Metropolitan Police Commissioner made an application for a closure order under AsBA s2. After hearing evidence, Deputy District Judge Newton refused to make a closure order. However, she also declined to make an order for costs in favour of Mr Taylor on the basis that there was no jurisdiction to do so.

Lloyd Jones J allowed an appeal by way of case stated. He held that applications for closure orders have all the necessary characteristics of a complaint. Accordingly, magistrates' courts have jurisdiction to award costs under Magistrates' Courts Act 1980 s64.

Anti-social behaviour orders

■ F v Bolton Crown Court

[2009] EWHC 240 (Admin), 22 January 2009

After making observations about the importance of complying with the procedural requirements relating to hearsay evidence, the Administrative Court quashed an anti-social behaviour order made against a 13-year-old because there was no 'necessity' for it – see Crime and Disorder Act 1998 s1C(2)(b) and *R v Boness* [2005] EWCA Crim 2395; [2006] 1 Cr App R (S) 120.

PRIVATE SECTOR TENANCIES

Tenancy deposits

■ Piggott v Slaven

Great Grimsby County Court, 23 February 2009[24]

In April 2005, Mr Piggott granted Ms Slaven a tenancy of a house. She paid him a deposit of £600. On 14 February 2008, Mr Piggott granted Ms Slaven an assured shorthold tenancy of a different property, for an initial fixed term of six months. Of the deposit for the earlier premises, £75 was returned to Ms Slaven. The balance of £525 was retained by Mr Piggott. He said that £105 was for the first week's rent under the new tenancy, and the remaining £420 was 'rent in advance'. On 24 June 2008, he served a s21 notice, stating that he required possession on 27 August 2008. Ms Slaven defended the possession claim which Mr Piggott subsequently issued, stating that he had failed to comply with HA 2004 s213(1) (deposit to be dealt with in accordance with an authorised scheme) or s213(4) (initial requirements of a tenancy deposit scheme) and so, according to s215(1), was not entitled to serve a s21 notice. She also counterclaimed for an order that he pay her three times the amount of the deposit in accordance with s214(4).

After referring to s212(8), District Judge Richardson held that the question of whether or not money is to be held as security is to be judged objectively. It would be contrary to the purpose of the Act to allow landlords to avoid its consequences by stating that they personally did not intend to hold money as a security. He found that the sum of £420 was not paid as rent in advance, but was intended to afford Mr Piggott security should Ms Slaven breach any future obligations to pay rent under the tenancy agreement. It was accordingly a 'tenancy deposit' for the purposes of s212(8). It had not been dealt with in accordance with an authorised scheme, as required by s213. He dismissed the possession claim and ordered Mr Piggott to pay £1,260 within 14 days.

Harassment and eviction: damages

■ Evans v Ozkan and Hussein

Bromley County Court, 6 February 2009[25]

Mr Evans was an assured shorthold tenant of a room at a weekly rent of £100. Before signing the tenancy agreement and handing over a deposit of £400 he told his landlords that he was receiving income support and would need to claim housing benefit. About a month later, delays in payment led to an intimidating visit by Mr Hussein who demanded £1,000 which Mr Evans did not have. On 21 March 2007, Mr Evans returned home to find some of his belongings on the pavement and the defendants and two other men throwing out more of his things. Mr Hussein was verbally intimidating. The police became involved and Mr Evans was arrested, but, on his release that evening, he found many of his belongings lying on the pavement, crushed or smashed. The lilo he had been using as a mattress was deflated and full of holes. Other possessions were missing. His ruined belongings smelled of urine. Mr Evans spent the night in his car, but returned the next day to find that the locks had been changed. The defendants followed Mr Evans to the local pub, threatened him with baseball bats and demanded £1,000, making it clear that he would not get his belongings back until he had paid. Further threats were made. Mr Evans applied to the council for homelessness assistance and was rehoused. In the intervening period he spent 63 nights without a home and his health deteriorated. He also suffered from thoughts of suicide. Mr Evans claimed damages for trespass, harassment and unlawful eviction. The defendants' defence was struck out for failure to comply with directions. They appeared at trial and represented themselves.

After considering *Tvrtkovic v Tomas* August 1999 *Legal Action* 29; *Bamberger v Swaby* December 2005 *Legal Action* 21; *Poku-Awuah v Lenton* February 2006 *Legal Action* 30; *Hadden v Nicholson* November 2006 *Legal Action* 32; *Diallo v Brosnan* January 2007 *Legal Action* 23; and *Daramy v Streeks* June 2007 *Legal Action* 37, HHJ Hallan awarded general damages of £15,750 (£250 per day for the whole period that Mr Evans was homeless) and interest of £883.73 for the period from the day he was rehoused to the date of the hearing. The judge also awarded special damages of £5,000, aggravated damages of £1,000 and exemplary damages of £2,000 together with interest of £562.85 for the period from the date of the eviction to the date of the hearing. The judge considered that damages that would otherwise have been payable under the Protection from Harassment Act 1997 formed part of the award in

aggravated damages. Exemplary damages were awarded because the defendants had sought to avoid the due process of law and the costs attendant on that.

Discretionary housing payments

■ Acland v Great Yarmouth BC

[2008] EWHC 2916 (Admin), 3 November 2008

Mr Acland was awarded a discretionary housing payment. The payment ceased in 2007. Mr Acland made a further application, but this was refused. He appealed. The Appeals Committee agreed to reassess the application if Mr Acland: (a) submitted to medical examination by a medical practitioner of the council's choosing; and (b) sought, and, if offered, accepted a suitable council property. Mr Acland declined to visit the doctor nominated by the council. The Appeals Committee then confirmed the decision to terminate the discretionary housing payment.

Mr Acland sought to apply for judicial review, arguing that the decision breached his rights under the convention. On a renewed application for permission to apply for judicial review, Pitchford J concluded that the application had no prospect of success. The requirement that he submit to an independent medical examination was within the local authority's discretion. Mr Acland's failure to attend the medical examination precluded him from the exercise of the council's discretion. Pitchford J dismissed the application.

HOUSING ALLOCATION

Reasonable preference categories

■ R (Ahmad) v Newham LBC

[2009] UKHL 14, 4 March 2009

Newham operated a choice-based letting scheme with three bands. The largest band (from which 75 per cent of lettings were made) contained applicants who were entitled to a 'reasonable preference' under one or more of the categories in HA 1996 s167(2). When bids from members of that band were received for an available property they were ranked by registration date. The property would be allocated to the bidder with the oldest date. Two smaller bands dealt with (a) existing council tenants who had no grounds for 'reasonable preference' – transfer cases (able to bid for up to five per cent of lettings) and (b) non-council tenants with no reasonable preference (able to bid for sheltered and hard-to-let homes only). The council also operated a 'direct lets' scheme for 'decants' (households requiring rehousing as a result of council action) and others requiring an urgent move in exceptional circumstances.

The claimant had multiple housing needs spanning a number of reasonable preference categories and several members of his household had medical needs. His application for 'direct let' status was unsuccessful and he remained in the choice-based letting main band, queuing by date. He sought judicial review of Newham's scheme on the basis that: (a) it irrationally grouped the vast bulk of applicants into a single band distinguishing between them by date of registration rather than housing need; and (b) giving five per cent of lettings to the transfer band was incompatible with giving applicants who were within s167(2) a reasonable preference. The Administrative Court and the Court of Appeal upheld his claim but the House of Lords allowed the council's appeal.

It held that:

■ the language of HA 1996 s167, as substituted by the Homelessness Act 2002, gave local housing authorities greater flexibility than hitherto. It no longer *required* that those in the reasonable preference categories who were in the greatest need should be housed first. Waiting time was a relevant factor in determining who should be allocated social housing. Newham's scheme could not be described as irrational for giving that factor pre-eminence. Cases of the most serious nature were still capable of being addressed by the 'direct let' arrangements;

■ allowing transfer tenants to bid for up to five per cent of lettings, when they themselves would be releasing council property for allocation to others, did not amount to a denial of a 'reasonable' preference to those in the statutory categories.

Comment: Robert Latham and James Harrison will be explaining the full implications of this decision in the May 2009 issue of *Legal Action*.

The applicant's household

■ R (Ariemuguvbe) v Islington LBC

[2009] EWHC 470 (Admin), 24 February 2009

The claimant was eligible for an allocation of social housing by the council under HA 1996 Part 6. She sought accommodation for herself, her husband, their five adult children (aged between 22 and 31) and three grandchildren (all younger than two). The council decided that for the purposes of its allocation scheme her household would comprise only herself, her husband and the grandchildren. Nothing in the published scheme defined the term 'household'. The council declined to treat the adult children as part of the claimant's household because: (a) they were non-dependent; (b) they were subject to immigration control and their immigration status was precarious; and (c) they were subject to terms of entry that prohibited them from reliance on public funds. The claimant sought judicial review of that decision.

Cranston J dismissed the claim. He held that as neither HA 1996 Part 6 nor the scheme contained any definition of 'household' the question of whether a particular person should be treated as a member of another's household was at large within the wide discretion that governed allocation of social housing. There had been no error in the council's decision-making as to whether it would treat the adult children as members of the claimant's household.

Assessing applications

Public Services Ombudsman for Wales

Complaint

■ Gwynedd CBC

200800969, 11 February 2009

The complainant was the occupier of an overcrowded housing association property (an inspection in October 2007 established that the overcrowding was a Category 1 Hazard for the purposes of HA 2004 Part 1). She had applied to the council for allocation of council accommodation and had been waiting for ten years. It had a points-based allocation scheme. Although her points had been assessed and reviewed, her total was insufficient to trigger an offer of accommodation.

On investigating her complaint, the Ombudsman found that although the council's scheme offered additional points if an applicant was 'homeless' (in keeping with HA 1996 s167(2)(a) and (b)), no officer dealing with her application for allocation had considered the possibility that her housing conditions might be so bad as to render her homeless (HA 1996 s175(3)) and thus trigger additional points. The Ombudsman found that, following receipt of information in February 2005 that the applicant's nine-year-old son was having to live elsewhere, no reasonable authority could have been satisfied otherwise than that she was homeless. In consequence of that maladministration, the complainant had been deprived of additional 'homelessness' points for over three years.

The Ombudsman recommended that the complainant be offered the next available property in her area of choice and that she receive an apology and £2,500 compensation.

HOMELESSNESS

Applications

Public Services Ombudsman for Wales
Complaint
■ Conwy CBC
200702044,
11 December 2008
The council reorganised its housing services to provide a Housing Options and Support Team. Within that team were housing advice officers with delegated powers to determine applications under HA 1996 Part 7 (Homelessness). However, it was not possible (save in exceptional cases, such as street homelessness) to make an application direct to those officers. It was first necessary for applicants to be seen by officers of the Homelessness Prevention Team (HPT) who might, in appropriate cases, make a referral to the housing advice officers. Enquirers mentioning homelessness were directed to the HPT and the office procedure manual recorded that 'proof of homelessness or threatened homelessness is required'.

The complainant was a private sector tenant. In June 2007, following a visit by council officers in which it was found that the property was unsuitable for the complainant and her young child because there were no fire precautions and no safe means of escape from fire, her landlords gave her notice to quit. The HPT wrote to the landlords pointing out that the notice was invalid and setting out the requirements for a valid notice. On 31 August 2007 the landlords served a notice complying with HA 1988 s21 and expiring on 31 October 2007.

Despite numerous contacts with the council, during which the complainant's attention was drawn to other options in the private sector, no arrangements were made to deal with her as homeless or threatened with homelessness until, on 17 October 2007, a homelessness application was referred by HPT to the housing advice officer. A decision letter accepting the main housing duty (HA 1996 s193) was not issued until 11 December 2007.

The Ombudsman found maladministration in the failures: (a) to consider the possibility that the conditions in the complainant's home were so serious as to render her 'homeless' (HA 1996 s175(3)); (b) to issue a decision reasonably promptly between mid-October and mid-December 2007; and (c) to deal with an extant application for a review of the complainant's allocation points.

The Ombudsman said: '[I]t is possible that the failure to recognise the trigger for homelessness inquiries [HA 1996 ss183–184] occurs because emphasis is placed on the council's prevention of homelessness work to such an extent that homelessness inquiries are deferred … [T]he advice and written information given to [the complainant and her partner] could be perceived as seeking to actively dissuade them from seeking assistance from the council with their housing, persuading them instead to look in the private rented sector' (para 67).

Commissioner for Complaints
Complaint
■ Housing Executive
200700491,
6 November 2008
The complainant was severely disabled and in medical need. He applied for a transfer to other accommodation more suited to his needs but when that made only limited progress he wrote to the executive (the statutory homelessness authority for Northern Ireland) in December 2002 asking to be assessed as 'homeless'. The Housing (Northern Ireland) Order 1988 SI No 1990 defines as homeless a person in accommodation which it would not 'be reasonable for him to continue to occupy'. When the council took a year to determine the application (and find that a rehousing duty was owed) the applicant complained to the Commissioner. The chief executive told the Commissioner that there was no record of the December 2002 application but the Commissioner's investigation turned up both the December 2002 letter and the executive's reply sent to it.

The Commissioner found maladministration in the unacceptable failure by the executive to follow the requirements of the legislation and of its own guidance on carrying out homelessness investigations. Had the application been promptly investigated, a full duty would have been owed a year earlier than was acknowledged. An apology and payment of £4,000 was recommended.

Intentional homelessness

■ Ugiagbe v Southwark LBC
[2009] EWCA Civ 31,
10 February 2009,
(2009) Times 18 February
The claimant was an assured shorthold tenant with a fixed-term (one-year) tenancy. When that expired, the landlord gave her a little more time but then told her to leave and she did so. She applied for homelessness assistance under HA 1996 Part 7.

The council accepted that she had been in ignorance of the landlord's need to obtain a possession order to secure her eviction but decided that she had become homeless intentionally because her ignorance of that 'relevant fact' had not been in 'good faith': HA 1996 s191(1) and (2). It found that she had had advice that she should go to the council's Homeless Persons Unit (HPU) for assistance before leaving. She had not done that. Had she taken that step, she would have been advised not to leave without a court order. The decision was upheld on review and HHJ Welchman dismissed an appeal.

The Court of Appeal allowed a second appeal. The claimant had been in ignorance of a relevant fact *and* had acted in 'good faith'. She had not ignored the advice given but simply decided not to approach the HPU because she had not, at the time, wished to become homeless or be treated as homeless. After reviewing authorities on 'good faith' in homelessness cases spanning 25 years, Lloyd LJ said:

26. Her failure to go to the HPU for help could be said to have been foolish or imprudent. But neither of those would be sufficient to put her conduct into the category of not being in good faith, nor would it even if she were regarded as having been unreasonable.

27. The subsection provides relief against the otherwise potentially harsh consequences of subsection (1) … for those who act in relevant ignorance, but subject to the safeguard of the requirement of good faith. It seems to me that the use of the phrase 'good faith' carries a connotation of some kind of impropriety, or some element of misuse or abuse of the legislation.

Discharge of duty

■ Newman v Croydon LBC
[2008] EWCA Civ 1591,
17 December 2008
The council accepted that it owed Mr Newman the main housing duty under HA 1996 s193(2). It provided him with a non-secure tenancy. However, following complaints of drug-dealing and other anti-social behaviour, the council gave him notice to quit, obtained a possession order and, in November 2007, executed that order. It decided that its duty had been discharged because Mr Newman had become homeless intentionally: s193(6)(b). That decision was upheld on review.

Mr Newman appealed, contending that even if the review decision was correct he was in any event entitled to further temporary accommodation as an intentionally homeless person in priority need: s190(2)(a).

The appeal came before HHJ Ellis on 23 May 2008. By that date the applicant had been accommodated by friends and relatives for six months. The judge dismissed the appeal on the basis that it had become academic and futile. He accepted that any accommodation secured under s190(2)(a) would have been for a maximum of three

months, ie, that it would have expired in January or February 2008, long before the hearing. Nothing would be achieved by quashing the review decision.

Lawrence Collins LJ refused a renewed application for permission to bring a second appeal. He reserved for another occasion the question of whether a different result might be required in a 'starker case'. But the decision of the judge in this case had been justified on the facts and did not raise an important point of principle.

HOUSING AND CHILDREN

■ R (MM) v Lewisham LBC

[2009] EWHC 416 (Admin), 6 March 2009

At the age of 17, the claimant fled her home in fear of domestic violence and took shelter in a women's refuge. After she had been there for four months, a refuge worker telephoned social services to make a referral on the basis that the claimant was in need of support. Without making any further enquiries or conducting any proper assessment, the council decided that the claimant was not a 'child in need' because any support needs she might have could be met by a local voluntary organisation. A month later the claimant applied for homelessness assistance. However, no decision was made on the application for over four months. She made a further approach to social services but it again declined to assist on the basis that her accommodation needs would be addressed in the homelessness application and she was fast approaching 18.

On a claim for judicial review, Sir George Newman (sitting as a deputy High Court judge) found that had an adequate assessment been made under the Children Act (CA) 1989 on the initial referral no reasonable council could have failed to have been satisfied that the claimant was a child in need owed the s20 duty. He granted a declaration that she should have been accommodated for 13 weeks before turning 18 and was therefore enitled to further assistance as a 'former relevant child'. He added: 'I would urge the defendant to take action to ensure that: (1) child in need assessments are not carried out in a summary manner as occurred in this case; (2) ... its housing department do not simply fail to respond to applications in respect of children; (3) ... steps are taken to ensure that the imminence of a child attaining 18 years is not taken as a basis for failing to take any action; and (4) ... there is due and proper contact *between its housing authority and its* social services authority' (para 37).

■ R (Liverpool City Council) v Hillingdon LBC

[2009] EWCA Civ 43, 10 February 2009, (2009) Times 13 February

A young male asylum-seeker applied to Liverpool for accommodation. It carried out an assessment under CA 1989 s20 and decided that he was an adult rather than a child. It referred him to the National Asylum Support Service which initially provided him with accommodation in Liverpool but then moved him to a detention centre in the Hillingdon area. An immigration judge, having received medical evidence, was satisfied that the applicant was a child. He was released from the secure unit and approached Hillingdon for assistance. It gave him temporary accommodation under CA 1989 s17 but, on discovering he wished to live in Liverpool, sent him back to that council's area without conducting an assessment under s20 (as to age or otherwise). Liverpool's claim for judicial review of Hillingdon's conduct was dismissed.

The Court of Appeal allowed an appeal and held that Hillingdon had acted unlawfully. It found that Hillingdon had failed to satisfy itself about the age of the young man or carry out a welfare assessment under s20. It had wrongly treated his wish to go to Liverpool as determinative of its responsibilities. It remained under an extant duty to conduct an assessment and determine the extent of its duties (if any) under s20.

HOUSING CONDITIONS

■ Dobson v Thames Water Utilities Ltd

[2009] EWCA Civ 28, 29 January 2009

Residents living near the defendant's sewage treatment works brought a group action alleging nuisance and negligence in the operation of the works. They claimed to have been affected by odours and mosquitoes.

It was not in dispute that they might recover compensation for breach of article 8 of the convention if their enjoyment of their homes had been impaired. However, there was no agreement about the basis on which any such damages might be assessed, nor about whether such damages might be payable in addition to any damages otherwise awarded at common law.

The Court of Appeal's judgment – on an appeal against the findings of a judge on trial of preliminary issues – contains a review of the correct approach to the assessment of compensation under article 8 and the HRA.

1 Available at: www.justice.gov.uk/docs/stats-mortgage-landlord-qu4-2008.pdf.
2 Available at: www.housingrights.org.uk/docman/hrs/preventing-possession-initiative-launch/download.html.
3 Available at: www.cps.org.uk/latestpublications.
4 Available at: www.communities.gov.uk/speeches/corporate/realhelpnow.
5 Available at: www.communities.gov.uk/documents/housing/pdf/1155611.pdf.
6 Available at: www.opsi.gov.uk/si/si2009/pdf/uksi_20090358_en.pdf.
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22 Available at: www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_094330.
23 Giles Peaker and Timothy Waitt, solicitors, and Anthony Gold, London.
24 Christopher Stockdale and John Barkers, solicitors, Grimsby.
25 Dawn Amos and Thomas Dunton, solicitors, London, and Alastair Redpath-Stevens, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 23–25 for transcripts or notes of judgments. Readers can visit their personal websites at: www.nicmadge.co.uk and at: www.gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm.

Regionalisation: a new era for the Administrative Court

This month the Administrative Court will open its four regional centres in England and Wales. In this article, Sam Karim outlines the reasons and justification for this change, and provides practical assistance on how it will affect judicial review practitioners. The article also attempts to clarify and dispel some of the concerns that practitioners may hold about the change.

Introduction

On 21 April 2009, the regional centres of the Administrative Court will open in Birmingham, Cardiff, Leeds and Manchester. As this momentous change draws closer, it is important to appreciate the impact on all areas of judicial review practice. At the beginning of the working day on 21 April, judicial review claims can be issued and heard in one of the four regional centres of the Administrative Court and, of course, in London. A specific Practice Direction (PD), PD 54D *Administrative Court (Venue)*, has been issued to assist with this reform (this PD is considered in detail below).[1]

Historically, however, the Administrative Court (being part of the Queen's Bench Division (QBD)) arguably can be said to have a tradition of presiding outside London. The present Administrative Court (previously the Crown Office List) finds its historical foundations in the Court of the King's Bench. The latter grew out of the King's Court or Curia Regis.

In 1215 the King's Court was recognised formally by way of the Magna Carta, as was the Common Bench (later Court of Common Pleas). At this stage, the King's Bench was theoretically a movable court. Increasingly, however, the King's Bench became a fixed court, even though it could in theory meet anywhere in England: from 1421 it appears not to have moved from Westminster Hall. In 1873 the Court of Queen's Bench became the Queen's Bench Division of the High Court of Justice. So, given that one may assume that the Queen's (or King's) Bench Division has a historical presence outside of London, what are the actual justifications and reasons why this specialist court of the QBD of the High Court of England and Wales is now to sit outside the capital?

The justification for regionalisation

The initial proposal for the regionalisation of the Administrative Court was published in *Justice outside London*, the report of a judicial working group in January 2007.[2] In April 2006, the working group was asked by the civil sub-committee of the Judicial Executive Board to consider and make recommendations about arrangements for Lords Justices and High Court judges to hear cases outside London. The working group was convened by the then vice-president (now president) of the QBD, Lord Justice May, and consisted of Mr Justice Patten, Mr Justice Gibbs, Mr Justice Roderick Evans and Mr Justice McCombe. The working group concentrated, although not exclusively, on the hearing of civil and Administrative Court cases by High Court judges; its report mainly concerned the deployment, outside of London, of judges of the QBD.

The main recommendations of the report were that fully operational offices of the Administrative Court should be established in Birmingham, Cardiff, Leeds and Manchester and that judges should sit regularly to hear Administrative Court cases in those centres. Judicial Communications Office news release 36/07, 14 November 2007 stated that the working group in its report, *Justice outside London*, said:[3]

Nearly all judicial review and other claims in the Administrative Court have to be brought in London, with the obvious inconvenience and additional expense that this causes for claimants, defendants, interested parties and their lawyers. The essential point is proper access to justice is not achieved if those in the regions can only bring judicial review and other claims in the Administrative Court in London. The present system discriminates against those who are not in the South of England (paragraph 51).

The key drivers behind regionalisation as set out in *Justice outside London* can be summarised as follows:

- 'The essential point is proper access to justice is not achieved if those in the regions can only bring judicial review and other claims in the Administrative Court in London' (paragraph 51).
- 'There would be substantial saving in public and private expense' (paragraph 51).
- 'The present system discriminates against those who are not in the South East of England' (paragraph 51). Those who are discriminated against include practitioners and judges, or those who wish to become judges (see, for example, paragraph 25(c)).
- For Wales, there were powerful constitutional reaons and practical concerns (paragraphs 56–58 and 60–62).
- Incidentally, the working group thought that regionalisation might help to 'relieve nominated Administrative Court judges from some of the burden of mountainous repetitive paper applications' (especially in the areas of immigration and asylum) (paragraph 82).

The working group's regionalisation proposal, however, had various critics, including Mr Justice Collins (then lead judge of the Administrative Court), Roger Venne, Master of the Crown Office and Lynne Knapman, Head of the Administrative Court Office, who provided a memorandum to the working group that did not (in theory) oppose local lodging of claims, but which argued that claims ought to be dealt with centrally (paragraph 78). The working group had taken various criticisms into account, and when outlining the main recommendation for the establishment of regional centres said:

This is a conclusion which we have reached on a balance of competing considerations, not all of them in favour of the conclusion … But in the end we think that the balance is strongly in favour of the conclusion' (paragraph 50).

Supporters of the regionalisation project, such as Frances Patterson QC, have said that:[4]

This initiative is all about access to justice. It is expected that cases will be determined quicker and at lower cost by using the new court and will also allow local parties to have their disputes resolved by their local court to the same high standard presently offered by the court in London. The regionalisation will transfer much of the work currently dealt with solely by the Royal Court of Justice with local connections. The establishment of the Administrative Court in the region is a testament to the level of expertise and interest in public law work in

the rest of the country and demonstrates the common misconception that administrative law practice is concentrated in London.

The regionalisation proposal has been carried forward by the Her Majesty's Courts Service Project Board and its lead project manager, Denise Dolan. Stakeholder meetings took place and specific working groups were established as a result of concerns raised. Rabinder Singh QC (the then chairperson of the Constitutional and Administrative Law Bar Association), Tim Dutton QC (the then chairperson of the Bar Council) and the writer chaired various working groups to harness concerns and provide and/or suggest practical solutions during the implementation phase. For the purposes of this article, Denise Dolan confirmed that:

- during the first year of regionalisation, it is expected that only nominated High Court judges (judges who are not High Court judges but who have been nominated to sit in the Administrative Court – they can range from deputy High Court judges to circuit judges) will sit in the regional centres. Only in exceptional circumstances will section 9 judges sit in the regional centres.

As such, the judges who will sit in the regional centres (as nominated High Court judges) will have the prerequisite specialist knowledge and familiarity with administrative and/or public law and procedure to operate in this area. In addition, the use of deputy High Court judges will also be similarly restricted to persons with equivalent knowledge and skills;

- all four regional centres will have their own staff, including a regional lawyer who has been trained and/or has worked in the Administrative Court Office in London. These lawyers will be overseen by central lawyers in London; and
- the new regional centres, together with London, will use the same computer network system: COINS. This is a confidential and secure system which will enable all five centres to act cohesively. COINS will be linked so that court staff in one region are able to have full access to the records of another centre. There will be no possibility of two or more of the same claims being issued more than once in the respective regional centre. In addition, 'forum shopping' will not be possible in COINS.

The practical consequences of regionalisation

The new PD 54D concerns the place in which a claim before the Administrative Court should be started and administered, and the venue at which it will be determined. Its express intention is:

… to facilitate access to justice by enabling cases to be administered and determined in the most appropriate location. To achieve this purpose it provides flexibility in relation to where claims are to be administered and enables claims to be transferred to different venues (paragraph 1.2).

It has been made clear that the intention behind this change is to secure quicker access to the Administrative Court by claimants, with a view to speeding up the process, and to enable matters to be heard more locally. This goes to the very heart of the persisting problems of the Administrative Court in respect of delay. The key issues contained within PD 54D are as follows:

- The PD indicates that a claim form for proceedings in the Administrative Court may be issued at the Royal Courts of Justice in London or at the District Registry of the High Court at Birmingham, Cardiff, Leeds or Manchester, subject to a series of excepted classes of claim (paragraph 2.1);
- The excepted classes of claim which will be dealt with in London include proceedings relating:
  - to control orders;
  - to financial restrictions;
  - to terrorism;
  - to the discipline of solicitors; or
  - where there is or is to be a special advocate (paragraph 3.1).
- During court hours, any urgent application must be made to the judge designated to deal with such applications in the relevant District Registry. Out of court hours, any urgent duty out-of-hours High Court judge in London (paragraphs 4.1–4.2);
- Paragraph 5.2 of the PD provides the following guidance:

The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection, subject to the following considerations as applicable –

… any reason expressed by any party for preferring a particular venue;

… the region in which the defendant, or any relevant office or department [where] the defendant, is based;

… the region in which the claimant's legal representatives are based;

… the ease and cost of travel to a hearing;

… the availability and suitability of alternative means of attending a hearing (for example, by video link);

… the extent and nature of media interest in the proceedings in any particular locality;

… the time within which it is appropriate for the proceedings to be determined;

… whether it is desirable to administer or determine the claim in another region in the light of the volume of claims issued at, and the capacity, resources and workload of, the court at which it is issued;

… whether the claim … [issued is] sufficiently similar to those in another outstanding claim to make it desirable that [they] should be determined together with, or immediately following, [the] other claim; and

… whether the claim raises devolution issues and for that reason whether it should more appropriately be determined in London or Cardiff.

Conclusions

It is difficult to deny that the regionalisation of the Administrative Court fundamentally improves access to justice in public law cases. At the outset many criticised the project on issues regarding a number of practical problems relating to the lack of a central computer system and the possible variation in the quality of judges sitting in the regional centres. These practical problems have since been resolved through the extensive participation of stakeholders and working groups.

There can be no doubt that the level of judicial expertise will be identical in the regional centres as compared with London, and that all five centres of the Administrative Court will be connected by one computer system. Under such circumstances, one can only agree and commend the recommendations of the judicial working group and look forward to the expansion of the historic Administrative Court that is accessible to all regardless of locality.

1 At the time of going to press, PD54 was available at: www.justice.gov.uk/civil/procrules_fin/pdf/preview/cpr_update_49_PD_amendments.pdf.
2 Available at: www.judiciary.gov.uk/publications_media/judicial_views_responses/justice_outside_london/index.htm.
3 Available at: www.judiciary.gov.uk/publications_media/media_releases/2007/3607.htm.
4 Frances Patterson QC is head of Kings Chambers in Manchester and Leeds. She is the present chairperson of the Northern Administrative Law Association and a deputy High Court judge who sits in the Administrative Court.

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Owner-occupiers law review 2009

In this annual review, Derek McConnell looks at the changes and developments in the law relating to owner-occupation. Readers are invited to send relevant case notes to LAG or direct to the author.

POLICY AND LEGISLATION

Repossession statistics

In 2008, members of the Council of Mortgage Lenders (CML) repossessed 40,000 properties. In 2007, the figure was 27,100. At the end of 2008, some 219,100 mortgages were in arrears of more than three months up from 127,500 at the end of 2007: CML press release, 20 February 2009.[1] Figures released by the Ministry of Justice (MoJ) show that, in 2008, 142,046 mortgage possession actions were commenced in England and Wales resulting in 114,275 possession orders (including suspended orders) being made: MoJ news release, 20 February 2009.[2] The figures for 2007 were 137,605 and 95,374 respectively. In 2008, 148,000 residential possession claims were issued by landlords in the county court.

Central government initiative in respect of mortgage arrears

In September 2008, as the scale of the homeowner problem was becoming clear, the government issued *Homeowners support package: impact assessments*, outlining its assessment of the benefits of support for homeowners.[3]

Following the collapse in the financial market in autumn 2008, central government announced a number of initiatives to assist mortgage borrowers in difficulty with repayments. Many of the initiatives are outlined on the government's website Directgov.[4]

- The *Mortgage rescue scheme* was announced in November 2008 by way of a £200 million package to enable defaulting borrowers who are not in negative equity to seek help through the intervention of a registered social landlord (RSL).[5] The RSL will either provide a loan to enable the borrower's mortgage payments to be reduced or the RSL will clear the secured debt completely to enable the ex-borrower to remain as a tenant. It is claimed that this scheme will avoid up to 6,000 repossessions across England.
- The *Homeowners mortgage support scheme* was announced by the Prime Minister in December 2008.[6] It has been the subject of revision and is anticipated will come into effect in April 2009. It is a complicated scheme involving the government guaranteeing interest rolled up over a maximum period of two years during which the lender agrees to forego repossession where it is expected that the borrower will be able to resume full repayments if given time to do so. The eligibility criteria and the detail of the scheme are set out in the *Policy scheme description*.[7]
- In the 2008 pre-budget report, the government announced the creation of a new Lending Panel bringing together government, banks, trade bodies, regulators and consumer groups to monitor lending to businesses and individuals. The major lenders on the panel have agreed to a moratorium on repossessions, committing not to repossess for at least three months after a borrower falls into arrears. Some lenders have gone further and have committed not to repossess for at least six months after a borrower is in arrears: *HM Treasury press release 09/09,* 6 February 2009.[8]
- With effect from 5 January 2009, changes were made to the benefit regulations regarding the payment of mortgage interest on some housing costs (Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008 SI No 3195).[9] Homeowners who receive income support, jobseeker's allowance, state pension credit or employment and support allowance will now be entitled to payments in relation to mortgage interest after 13 weeks from the start of the claim for benefit. The maximum loan on which mortgage interest will be met has been increased from £100,000 to £200,000.

Financial Services Authority

In March 2008, the Financial Services Authority (FSA) issued its *Mortgage effectiveness review – stage 2 report* dealing with the specialised sectors of sub-prime and lifetime mortgages where the FSA believed that there was a greater risk of 'consumer detriment'.[10] The review noted that both types of borrowers generally shopped around for the best product but that sub-prime borrowers relied heavily on brokers.

On 5 August 2008, the FSA issued details of a review of its effectiveness in its regulation of mortgage lending and called on borrowers to be treated fairly, particularly in the context of the anticipated increase in the level of arrears and repossessions.[11] The review concluded that more could be done by lenders to consider a borrower's personal circumstances and to offer more options to resolve the arrears position. It also published examples of good and poor practice in relation to arrears recovery, responsible lending and mortgage advice. At the same time the FSA issued the research report *Mortgage effectiveness review: arrears findings*, prepared for the FSA, based on interviews with 40 borrowers in default in late 2007.[12] The conclusions recorded that lenders were not seen as being willing to agree to alternatives such as payment holidays, making partial payments, capitalising arrears and switching the type of mortgage.

On 27 November 2008, the FSA wrote to all mortgage lenders and administrators stating that the FSA expected lenders and administrators to review critically current arrears policies and management practices and procedures and to assess whether in practice borrowers in arrears are being treated fairly.[13] Lenders and administrators were required to communicate their conclusions and any actions they proposed to take to the FSA by 31 January 2009. The fact that the FSA decided to give the lending industry this second warning is some indication of the fact that the FSA is not best pleased by the industry's response to the mounting difficulty of mortgage repossessions.

Mortgage arrears protocol

On 19 November 2008 the *Pre-action protocol for possession claims based on mortgage or home purchase plan* arrears in respect of residential property came into effect.[14] It seeks to regulate pre-litigation procedure in respect of first charge residential mortgages and home purchase plans regulated by the FSA, second charge mortgages over residential property and other secured loans regulated by the Consumer Credit Act 1974, and unregulated residential mortgages. For analysis of the protocol see R Jordan, 'Don't let it be misunderstood', ROOF March/April 2009, p41; Tom Bailey and Greg Williams, 'Stemming a rising tide' NLJ 13 February 2009, p221; and Derek McConnell,

'New mortgage arrears protocol explained', January 2009 *Legal Action* 19. While the protocol only applies to England and Wales, the CML has confirmed that it would be happy 'to work towards developing a pre-action protocol for Scotland if that is what the Scottish government wants': CML news & views, 4 November 2008.[15]

Legislative reform

In December 2008, a joint Treasury-FSA consultation paper was issued on proposals for the legislative framework for the regulation of Islamic finance investment bonds including mortgage finance: HM Treasury press release 136/08, 11 December 2008.[16] This included a helpful analysis of the Islamic financial landscape in the UK. The consultation period closed in March 2009.

In February 2009, the government issued a consultation paper on how to strengthen protection for vulnerable homeowners in the 'sale-and-rent-back' market: HM Treasury press release 09/09, 6 February 2009.[17] The proposal is to bring companies offering sale-and-rent-back agreements within the scope of regulation by the FSA. This follows the publication of a report by the Office of Fair Trading (OFT) on the sale-and-rent-back market in October 2008.[18] The FSA has also issued its own consultation paper, *Regulating sale and rent back: an interim regime*, which sets out the FSA's thinking on future regulation: FSA press release FSA/PN/022/2009, 6 February 2009.[19] The suggestion is that an 'interim regime' is brought in from July 2009 with a full regime to be implemented in the second quarter of 2010. The consultation process closes on 1 May 2009.

In February 2009, the OFT issued its consultation paper *Second charge lending – OFT guidance for brokers and lenders*.[20] The document sets out the OFT's guidelines on various issues associated with second mortgages, including general principles of customer care and good practice such as the expectation that repossession should only be a last resort. The consultation process ends on 8 May 2009. In November 2008, the Finance and Leasing Association issued its *Good practice guidelines for second charge mortgages – helping customers with payment difficulties*.[21] This mirrors much of what is contained in the mortgage pre-action protocol.

In February 2009, the OFT also announced the launch of a market study covering regulation of the process of buying and selling homes which it is intended will be completed by the end of 2009: OFT press release 19/09, 25 February 2009.[22]

The study will take a comprehensive look at the market for home-buying-and-selling services. It will consider:

- competition on price and quality between service providers, principally estate agents;
- the prospects for entry by new business models, including internet-based models;
- whether the existing regulatory framework provides the right balance between protecting consumers who are buying or selling a home and ensuring that the market remains open to competition and innovation;
- the relationships between estate agents and other service providers such as mortgage brokers, surveyors, solicitors and other professional advisers.

The Home Repossession (Protection) Bill was introduced to the House of Commons by Andrew Dismore MP and received its first reading on 3 February 2009. The purpose of this Private Members' Bill is to overturn the decision in *Horsham Properties Group Ltd v Clark and Beech* (see below).The bill will have its second reading on 26 June 2009.

Council of Mortgage Lenders' arrears and possessions policies

On 22 October 2008, the same date that the mortgage arrears protocol was signed off by the Master of the Rolls, the CML issued its *Industry guidance on arrears and possessions to help lenders comply with MCOB 13 and TCF principles*.[23] The CML described the guidance 'as a further step in strengthening the robustness of existing practices, alongside the Civil Justice Council's pre-action protocol …' The guidance sets out in tabular form examples of good practice in policy and procedure, and may of some benefit to advisers in their dealings with mortgage recovery cases.

Consumer credit

The Legislative Reform (Consumer Credit) Order 2008 SI No 2826, which came into effect on 31 October 2008, creates a new exemption relating to investment properties. The Order inserts s16C into the Consumer Credit Act (CCA) 1974 under which a credit agreement secured by a land mortgage that is not occupied (or less than 40 per cent only is occupied) by the borrower or his/her defined close family is exempted from regulation by the CCA 1974 (reg 3). Unlike the business exemption in s16B of the CCA 1974 which only applies where the credit exceeds £25,000, the investment exemption applies for credit of any amount. This amendment was made to exempt buy-to-let mortgages from regulation under the CCA 1974.

The CCA 2006 amended the CCA 1974 by replacing the extortionate credit bargain provisions in ss137–140 with a new unfair relationship test in ss140A–140C. Since 6 April 2008 the new provisions apply to all credit agreements whenever entered into and whether or not the agreement is regulated under the CCA 1974. The sole exception is where an agreement is exempt under s16(6C) of the CCA 1974 because it is a regulated mortgage contract under the Financial Services and Markets Act 2000. In May 2008 the OFT issued its guidance document *Unfair relationships – enforcement action under Part 8 of the Enterprise Act 2002*.[24] This sets out the OFT's thinking on the concept of 'unfair relationship', particularly in the context of its regulatory role to protect consumers under Enterprise Act 2002 Part 8.

Home Information Packs

The Home Information Pack (Amendment) (No 3) Regulations 2008 SI No 3107 made minor amendments to the principal Home Information Pack (No 2) Regulations 2007 SI No 1667 and introduced the new requirement, effective from 6 April 2009, for the seller to include, within the information pack, a property information questionnaire answering standard questions about the property being sold.[25]

CASE-LAW

Mortgage possession proceedings

■ Horsham Properties Group Ltd v (1) Clark (2) Beech and GMAC RFC Ltd (third party) and Secretary of State for Justice (intervener)

[2008] EWHC 2327 (Ch), 8 October 2008

The defendants obtained a 'buy-to-let' mortgage from GMAC RFC Ltd (GMAC) in January 2004. Arrears accrued and GMAC appointed receivers under a power in the legal charge and Law of Property Act 1925 s101. In September 2006, the receivers sold the property, relying on a clause permitting this in the charge, to Coastal Estates for a price adequate to pay off the debt secured by the legal charge. On the same day Coastal transferred the property to the claimant, who then issued possession proceedings claiming that the defendants were trespassers. Ms Beech, in defending the proceedings, conceded that the power of sale had arisen under s101 and that the terms of the legal charge enabled the receivers to sell the property free from the rights of the defendants as mortgage borrowers. It was argued that the loss of Ms Beech's rights as co-owner amounted to being deprived of a possession within the meaning of article 1 of Protocol No 1.

The court held that the defendants' interest in the property was lost when the

receivers contracted to sell the property to Coastal. The exercise by receivers appointed and acting under purely contractual powers of overriding the defendants' interest in the property, namely the equity of redemption, by contracting to sell the property did not amount to deprivation of possession within the meaning of article 1. Following default by a borrower, the sale of a property without having obtained a court order for possession is justified in the public interest and does not require scrutiny by a court. This was a right given to the lender by the borrower under the terms of the mortgage contract. Administration of Justice Act 1970 s36 had no application in a claim for possession by a purchaser as it was a claim not brought by the mortgage lender.

The CML, following this decision, has indicated that its members:

... will not try to sell a property occupied by a residential borrower without first obtaining a court order (unless the property is vacant or has been abandoned, or in cases of fraud, or with the informed consent of the borrower). Similarly, the lender will not appoint a receiver to sell a residential property without getting a court order beforehand ...

However, the commitment of CML members not to appoint a receiver without first obtaining a court order does not apply to commercial transactions, including buy-to-let mortgages, business loans secured against a residential property or bridging loans (CML news & views, 18 November 2008).[26]

■ Richardson v Midland Heart Ltd

12 November 2007,
[2008] L&TR 31

In September 1995 the claimant acquired a shared ownership lease from the defendant housing association. The lease was for 99 years and the claimant paid a premium of £29,500 which represented 50 per cent of the market value of the house. The lease reserved a rent of £1,456 per annum subject to an indexed, annual increase, and contained 'staircasing provisions' enabling the tenant to acquire further shares in the house and eventually the freehold. Following threats from the claimant's husband's criminal associates, the claimant left the house and rent arrears accrued. The claimant decided to sell the house and asked the defendant to sell the house on her behalf. The property was valued at £151,000 and the claimant signed a form indicating her agreement to a sale at that price. The house was marketed but no buyer was found. A possession order was obtained by the defendant under Ground 8. The claimant brought proceedings claiming that, as a result of the shared ownership lease and the premium which she had paid, she had acquired a 50 per cent interest in the property and that the freehold was subject to a trust. She sought a declaration in relation to the extent of her interest in the property and an order for sale or an account of 50 per cent of the proceeds of sale.

The court rejected the argument that there were two tenancies, namely an assured tenancy protected by the Housing Act (HA) 1988 and a long leasehold interest vulnerable to forfeiture. It held that the lease granted to the claimant created a 99-year term of years certain and was, as a result, a tenancy to which HA 1998 s1 applied. As the property was let as a separate dwelling to an individual who occupied it as her only or principal home and as it did not fall within any of the exceptions, it was therefore an assured tenancy. The possession proceedings had been properly brought and the defendant was entitled to the possession order. There was no foundation for the argument that the freehold was held on trust by the defendant for itself and the claimant. The relationship was simply one of landlord and tenant.

■ In the matter of Dehdashti Haghighat (a bankrupt) sub nom Louise Brittain (trustee in bankruptcy) v (1) Dehdashti Haghighat (2) Dehdashti Haghighat

12 January 2009,
LS Gaz 29 January 2009, p15

The trustee in bankruptcy (B) applied for an order for possession and sale of a flat occupied by the bankrupt husband (H) and his wife (W). H and W lived in the property with their three adult children. The eldest child, M, was seriously disabled and required continuous care which was provided by W. The figures showed that even with the sale of the flat, there would still be a substantial shortfall in the bankruptcy. In deciding whether it was just and reasonable to make the order sought, the court was required to decide whether the circumstances of the case were exceptional, so as to set aside the presumption in Insolvency Act 1986 s336(5) that the interest of the bankrupt's creditors outweighed all other considerations. There was evidence that H and W were estranged and that once divorced H and his younger son were to move out. Expert evidence stated that W provided daily care for M and that she was vulnerable to a range of chronic illnesses as a result of looking after M. In addition, the present care arrangements at the property were dependent on W having H there to help with moving M. B contended that it was just and reasonable for the orders to be made as the local authority would come under a statutory obligation to rehouse the family as homeless.

The court held that if B's application were simply dismissed she would be deprived of any expectation of receiving anything for the estate and would remain liable for the flat's ground rent and service charges. W's and the children's, and, in particular, M's interests were also material. An order for possession would be granted to be deferred for a substantial period, namely three years, or, if sooner, until three months after M ceased permanently to reside at the property. This was to allow the local authority to make provision for W and M in accommodation which would be suitable to their needs, and for an orderly change to be effected in M's care arrangements.

Limitation

■ Bradford & Bingley plc v Cutler

[2008] EWCA Civ 74,
18 January 2008

In 1987 the defendant purchased a property with a mortgage. The defendant was made redundant and claimed benefit. Payments were made in relation to the mortgage interest in accordance with the relevant benefit regulations with the last payment being made directly to the claimant in December 1993. In June 1994, the security was sold following repossession. In November 2005, the claimant issued proceedings to recover the shortfall on sale. The claim was defended on the basis that it was statute-barred as more than 12 years had elapsed since the course of action had accrued. The issue was whether the last payment by the Benefits Agency, which was within the 12 years before the issue of proceedings, was sufficient to extend time for the claimant.

Dismissing the appeal, the court held that the judge was right to hold that in making the payment to the claimant the Benefits Agency was acting as the defendant's agent. In making the claim for benefit, to include assistance with mortgage interest payments, the defendant knew that the payments would be made directly in discharge of his mortgage liability. Accordingly, the Benefits Agency made those payments as the defendant's agent and the limitation period was therefore extended.

■ Yorkshire Bank Finance Ltd v Mulhall

[2008] EWCA Civ 1156,
24 October 2008

In April 1991 the claimant obtained a money judgment against the defendant, and in June 1991 a charging order absolute was made to secure the judgment debt on the defendant's property. In January 2007 the defendant sought to have the charging order set aside as the claimant had taken no steps to

enforce the charging order. The defendant argued that the charging order was not enforceable by reason of lapse of time, relying on Limitation Act 1980 s20 as more than 12 years had elapsed from the date on which the right to receive money had accrued.

Dismissing the defendant's appeal, the court concluded that the claimant's rights were not barred after 12 years because the holder of a charging order does not have a right to possession such that time can run against it under s15 and extinction of title cannot therefore occur under s17: *Ezekiel v Orakpo* [1997] 1 WLR 340 approved.

Public funding statutory charge

■ McPherson v Legal Services Commission

[2008] EWHC 2865 (Ch), 24 November 2008

In 1997 a mortgage lender brought possession proceedings against the respondent and her husband claiming possession and a money judgment at the time claimed to be £267,864.35. In June 1998 the respondent obtained a legal aid certificate which was subsequently revoked in April 2001. In December 2001 judgment was obtained by the lender. The proceedings continued and in January 2002 a consent order was agreed. The consent order recited that the parties had agreed terms of settlement and that the lender had received £265,000. In November 2002 the title to the property was transferred into the respondent's sole name. In March 2006, the Legal Services Commission (LSC), as applicant, applied to HM Land Registry to register a statutory charge in its favour. The respondent objected to that registration, contending that no property had been recovered or preserved and that the property had no value, net of the mortgage in favour of the lender. The matter was referred to the adjudicator of the Land Registry. During the proceedings the LSC served its statement of case which accepted that if the respondent could show that there was no equity in the property at the date of the consent order then the LSC would concede that it did not have a statutory charge as there was no equity for the charge to attach to.

On appeal it was held that the applicant had achieved something as a result of the defence. The most obvious thing was that it had reduced the sum claimed by the lender from whatever it was at the date of settlement to the reduced settlement figure. The LSC was entitled to a statutory charge on whatever was the extent of the respondent's beneficial interest in the property as at the settlement date in January 2002.

1 Available at: www.cml.org.uk/cml/media/press/2108.
2 Available at: nds.coi.gov.uk/content/Detail.asp?ReleaseID=393159&NewsAreaID=2.
3. Available at: www.communities.gov.uk/documents/housing/pdf/Homeownerssupportpackage.
4 See campaigns.direct.gov.uk/mortgagehelp/index.html.
5 Available at: www.communities.gov.uk/housing/buyingselling/mortgagerescuemeasures.
6 Available at: www.communities.gov.uk/housing/buyingselling/mortgagesupportscheme.
7 Available at: www.communities.gov.uk/housing/buyingselling/mortgagesupportscheme/mortgagesupportpolicy.
8 Available at: www.hm-treasury.gov.uk/press_09_09.htm.
9 Available at: www.opsi.gov.uk/si/si2008/uksi_20083195_en_1.
10 Available at: www.fsa.gov.uk/pages/Library/Communication/PR/2008/030.shtml.
11 Available at: www.fsa.gov.uk/pages/Library/Communication/PR/2008/087.shtml.
12 Available at: www.fsa.gov.uk/pubs/other/mer_report.pdf.
13 Available at: www.fsa.gov.uk/pages/Library/Communication/PR/2008/142.shtml.
14 Available at: www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_mha.htm.
15 Available at: www.cml.org.uk/cml/publications/newsandviews/27/86.
16 Available at: www.hm-treasury.gov.uk/press_136_08.htm.
17 Available at: www.hm-treasury.gov.uk/press_09_09.htm.
18 Available at: www.oft.gov.uk/advice_and_resources/resource_base/market-studies/current/saleandrent.
19 Available at: www.fsa.gov.uk/pages/Library/Communication/PR/2009/022.shtml.
20 Available at: www.oft.gov.uk/shared_oft/consultations/oft1057con.pdf.
21 Available at: www.fla.org.uk/news/news.asp?ID=502.
22 Available at: www.oft.gov.uk/news/press/2009/19-09.
23 Available at: www.cml.org.uk/cml/filegrab/ Asand Psindustryguidance22Oct08.pdf?ref=6055.
24 Available at: www.oft.gov.uk/advice_and_resources/publications/guidance/consumer_credit_act/oft854.
25 Available at: www.opsi.gov.uk/si/si2008/uksi_20083107_en_1.
26 Available at: www.cml.org.uk/cml/publications/newsandviews/28/89.

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New protection for victims of human trafficking

From 1 April 2009, important new protection is available to victims who have been trafficked for sexual, labour and other exploitation. In this article, Sandhya Drew outlines the scope of the provisions that victims' advisers and advocates must be aware of and explains how these can be accessed.

Most significant of the substantive provisions are as follows:

- a 45-day minimum recovery-and-reflection period;
- a one-year temporary residence permit; and
- access to a national support service, including an increased number of supported accommodation places.

The changes have come about as a result of ratification of the Council of Europe Convention on Action against Trafficking in Human Beings ('the trafficking convention') on 17 December 2008.[1]

In UK law, and summarising, a trafficked person is defined as someone who has been transferred into, within or from the UK, with the intention of subjecting him/her to a form of exploitation. That exploitation may be sexual or labour exploitation or other serious exploitation such as sale of his/her organs. Such abuse must reach a minimal level of seriousness. Trafficking occurs where there is an intention to exploit, whether or not the exploitation actually occurs.

Recovery-and-reflection period

The 45-day recovery-and-reflection period is intended to allow a victim of trafficking time:

- to recover from initial acute trauma;
- to escape the influence of the alleged perpetrators of trafficking; and
- to take an informed decision on whether to assist the relevant authorities in relation to any investigation or prosecution arising in relation to the trafficking.

A person who has been granted a period of reflection and recovery will not be removed from the jurisdiction during that period. The recovery-and-reflection period is granted, by means of issue of a letter from the Home Office, as a matter of administrative discretion. In practice 45 days, although longer than the minimum period of 30 days required by the trafficking convention, is unlikely to provide more than a very brief respite for the victim. The period may be extended, for example, where an individual has acute trauma and mental health difficulties. Thus, if the client needs counselling, the recovery period should cover the time recommended by the counsellor. The grant of the recovery-and-reflection period does not, of itself, create any entitlement for the individual to reside in the UK when the period has expired. It may also be terminated during its duration.

Convention-compliant support

At the same time as the recovery-and-reflection period is granted, the individual will have access to support of at least the minimum level required by the trafficking convention. Such minimum levels will include the following:

- accommodation;
- access to emergency health treatment;
- a translation and interpretation service, if needed;
- counselling;
- information regarding his/her legal rights and the services available;
- assistance to enable his/her rights and interests to be presented and considered at appropriate stages of criminal proceedings; and
- access to education for children.

The government has entered into an agreement with the POPPY Project to provide support for victims of trafficking for sexual exploitation and domestic servitude. There is no specific provision for victims of labour trafficking. The support given should be tailored to the victim. Victims will have a range of needs, which should be ascertained by the adviser at the initial meeting.

Accommodation

A greater number of supported accommodation places are now available for adults. The POPPY Project offers support to women who have been trafficked into prostitution.[2] It is not necessary to accept accommodation in order to access support. There has always been a duty on local authorities to assist children who are in need of accommodation.

Access to emergency health treatment

Victims often suffer from health problems requiring the attention of a doctor or dentist or an optician. An identified victim, or identified possible victim, of trafficking is exempt from any liability to charges: National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2008 SI No 2251; National Health Service (Charges to Overseas Visitors) (Amendment) (Wales) Regulations 2008 SI No 2364 and National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2008 SI No 290. The exemption goes beyond the minimum standard of access to emergency treatment.

Translation and interpretation services

Where translation or interpretation is needed, the adviser must ensure that any translator or interpreter is from a reputable source such as the National Register of Public Service Interpreters Ltd.[3]

Counselling

Clients may need counselling. They may be referred through a GP or to a specialist foundation such as the Helen Bamber Foundation,[4] the POPPY Project or, in some circumstances, the Medical Foundation for the Victims of Torture.[5] A counsellor's report may provide useful evdence.

Information regarding legal rights and assistance in enabling victims' interests to be represented in criminal proceedings

There are no new provisions to enable victims to access legal information and advice. This is a significant lacuna. UK law does not provide for separate representation of victims seeking compensation in criminal proceedings. As a result, compensation orders are often not sought. Although compensation may be obtained from the Criminal Injuries Compensation Authority, full public legal funding is not available.

Criteria for access to recovery period and to support

Questions are likely to arise about what needs to be proved before an individual is granted a recovery and reflection period and given access to support. The trafficking convention (articles 10–13) sets a low threshold, consistent with the protective intention of the provisions. All that is needed are 'reasonable grounds' (article 10(2)) to believe that a person has been a victim of trafficking in human beings. The trafficking

convention also provides that where the age of a victim is uncertain and there are reasons to believe that the victim is a child, s/he shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age. It would seem logical that the initial grace period is to allow time for recovery and the commencement of communication from the victim. For all these reasons, the threshold should not be set unreasonably high and 'reasonable grounds' should be given its usual meaning. Considered often in case-law, it means simply whether there is a set of circumstances that would give rise to a rational belief that someone is a victim of trafficking. Questions of credibility have limited place at this initial stage. There is further support for this view from the Organization for Security and Co-operation in Europe (OSCE) in its 2004 handbook, *National referral mechanisms: joining efforts to protect the rights of trafficked persons: a practical handbook*, which refers to the making of a presumption.[6] The timescales also suggest a low threshold. The UK Border Agency (UKBA) anticipates that any decision will be made on average within five days from referral.[7] This would be an unreasonably short time in which to make a reliable assessment, even on the balance of probabilities. For example, in the case of women trafficked into prostitution, the experience at the POPPY Project over the past six years indicates that full disclosure leading to an accurate assessment will take at least 30 days. It should be borne in mind that any documentation generated in this exercise is likely to be disclosable in any subsequent criminal proceedings against traffickers.

Challenging the decision

There is no right of appeal on the merits from a decision of the Home Office as to whether there are reasonable grounds that the person is a victim of trafficking. It is arguable that this will give rise to a challenge under article 6 of the Human Rights Act 1998. However, the decision is subject to judicial review. Expert advice should be sought before commencing judicial review proceedings.

One-year residence permit

A one-year residence permit may be granted following the initial period of recovery and reflection. A permit will be granted where a victim's stay is considered necessary owing to his/her personal situation, or where the stay is necessary for the purpose of his/her co-operation with the competent authorities in investigations or criminal proceedings. It is granted by the UKBA as a form of discretionary leave to remain (DLR). The UKBA considers that its current DLR policy already covers the first category and DLR has been extended to cover the second one. Grant of a temporary residence permit does not of itself confer any right to long-term or permanent residence, and advisers should consider whether also to make an application for asylum or humanitarian protection.

Criteria for grant of residence permit

Again, the applicable standard of proof required in order to be granted a one-year residence permit is likely to be problematic in practice. The threshold for qualifying for a permit appears to be higher than the reasonable grounds test. The Home Office *Impact assessment* refers to a point where 'a competent authority has decided conclusively that an individual is a victim of trafficking'.[8] This is unclear and unworkable and is unlikely to be the standard applied from April onwards. 'Conclusively' suggests beyond a reasonable doubt. It is very difficult to see how this can necessarily determined in 45 days. The 45-day period is intended to be a period of recovery and reflection for the victim, not a period of intensive investigation. Nor will a decision have been made on prosecution. It is therefore more likely that the correct standard is the same as for the initial reflection period but that, in addition to identification as a possible victim, the stay must be necessary on the ground of welfare or co-operation in investigation or proceedings. This is consistent with article 14 of the trafficking convention.

Whether or not an adult victim is able to work will depend on the individual circumstances. Many victims of sex trafficking wish to retrain and regain skills but are unable to work. Victims of labour trafficking may have different needs. The Home Office *Impact assessment* anticipates a right to work being granted once the temporary residence permit has been granted. This is done by application to the Home Office to vary conditions.

Co-operation and national referral mechanism

Protection of victims is only as effective as their detection and identification. Identification may occur by front-line staff or by advisers and advocates in the private and voluntary sector. Article 35 of the trafficking convention requires the state to adopt a multi-agency approach and to co-operate with civil society in the identification and referral on of potential victims. This is sometimes referred to as a national referral mechanism (NRM) and is described by the OSCE in its 2004 handbook as 'a co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, co-ordinating their efforts in a strategic partnership with civil society'. The NRM anticipates national co-ordination. At the same time, the duty to protect lies on whatever part of the state has competence in the particular matter. Article 10 of the trafficking convention requires the state to provide its competent authorities with persons trained and qualified in preventing and combating trafficking in human beings. In the UK, the UK Human Trafficking Centre (UKHTC) has pioneered the multi-agency and co-operative partnership approach.[9] However, there are indications (the model had not been finalised at the time of going to press) that the structure of an NRM has been misunderstood and an overcentralised model applied. The point is not so much to have a central agency which is trained and qualified but to train and qualify all agencies which might come across possible victims of trafficking. Although they may then refer the victim's case on, first-stage identification cannot take place without adequate training and expertise. The model envisages direct referral to the UKBA in cases where a potential victim is identified in the immigration system, and referral to the UKHTC in other cases. A central committee within the UKHTC, with members seconded from specialist agencies, has been set up. It is not yet clear how much scope there is for input of expertise from local authorities or from children's safeguarding boards. The problem is acute in the case of children in the immigration system. However, the UKBA has been charged with making the decision about the grant of the initial period and also with whether the individual qualifies. While the UKBA may be the relevant authority for grant of a permit, it has little expertise in applying child protection principles. This has yet to be fully resolved.

Sources of referral

Referral may take place from various sources. A victim may be identified in immigration proceedings, in an employment or labour inspection context, or in the family or criminal courts. The referral should be made to the UKHTC in the first instance.

1 Available at: www.coe.int/t/dghl/monitoring/trafficking/Source/PDF_Conv_197_Trafficking_E.pdf.
2 Visit: www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php.
3 Telephone: 020 7940 3166 or visit: www.nrpsi.co.uk.
4 Visit: www.helenbamber.org.
5 Visit: www.torturecare.org.uk.
6 Visit: www.osce.org.

7 *Impact assessment of ratification of the Council of Europe convention on action against trafficking in human beings*, 6 October 2008, p5 is available at: www.crimereduction.homeoffice.gov.uk/humantrafficking004c.pdf.
8 See note 7, p6.
9 Telephone: 0114 2523891 or visit: www.ukhtc.org.

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Police misconduct and the law

Stephen Cragg, **Tony Murphy** and **Heather Williams QC** continue their six-monthly review of developments in police misconduct law.

CASE-LAW

Common law torts

A number of recent cases have commented on the approach to be taken in relation to the most frequently occurring torts in this area.

False imprisonment

■ **Alford v Chief Constable of Cambridgeshire Police**

[2009] EWCA Civ 100, 24 February 2009

In this case the Court of Appeal commented on the approach that a court should take when considering whether to uphold a judge's finding that there were 'reasonable grounds to suspect' a person of an offence. Richards LJ said at para 33 that:

… the question is one on which an appellate court has to reach a conclusion of its own, rather than limiting itself to deciding, for example, whether the trial judge's conclusion was plainly wrong. If, however, the trial judge has approached the task correctly, it will generally be appropriate to place weight on his assessment, given his proximity to the evidence and his better overall 'feel' for the case; and I would expect an appellate court to be slow in practice to interfere with the trial judge's conclusion.

Also in *Alford*, the Court of Appeal was asked to consider the meaning of a passage in *Clarke v Chief Constable of North Wales* [2000] Po LR 83, where Sedley LJ suggested that where a briefing officer had misled an arresting officer, a chief constable would still be vicariously liable for the 'wrongful arrest' but on behalf of the briefing officer rather than the arresting officer. The court held that Sedley LJ's comments did not mean that a claim for false imprisonment could be maintained in such circumstances (because the information known to the arresting officer was the all-important factor), although it might be possible to bring an action in misfeasance for the wrongdoing of the briefing officer.

■ **Commissioner of Police of the Metropolis v Raissi**

[2008] EWCA Civ 1237, 12 November 2008

In this case the Court of Appeal also confirmed that an arresting officer could not have reasonable grounds to suspect a person of an offence based on what the arresting officer assumed would be information available to his/her briefing officer, even though it had not been communicated to the arresting officer.

■ **Chief Constable of West Yorkshire v Armstrong**

[2008] EWCA Civ 1582, 5 December 2008

This was an example of a case where the judge's finding of 'reasonable grounds to suspect' was overturned by the Court of Appeal. The police had arrested a man on suspicion of rape and the trial judge found that the police had not established the necessary 'reasonable grounds to suspect'.

The Court of Appeal overturned the judge's decision, finding that it had been made 'with a large degree of hindsight, and he has not looked at the whole surrounding circumstances, as he was obliged to do' (para 16). Hallett LJ emphasised that although in non-urgent cases it may be incumbent on an arresting officer to make further inquiries before deciding whether or not to arrest, in many cases it was important for an arrest to be made early in an investigation.

Malicious prosecution

■ **Clifford v Chief Constable of Hertfordshire**

[2008] EWHC 3154 (QB), 18 December 2008

Cranston J considered the liability of the police for malicious prosecution even where it is the Crown Prosecution Service (CPS) making charging decisions, on which the judge says there is no previous authority. At para 50, the judge said that:

The police may still be regarded as prosecuting an offence for the purposes of

tort liability even if, after charge, they transfer the prosecution to an independent prosecutor, or even if it is the prosecutor who lays the charges. That is because the independent prosecutor is reliant on the police for the collection of the evidence which grounds the charge. If the police fail to forward evidence to the independent prosecutor then he or she may well charge incorrectly, or may continue with a prosecution which has subsequently become baseless.

Comment: This is important clarification of the position now that it is the CPS which is almost invariably responsible for charging decisions.

Assault

■ Roberts v Chief Constable of Kent

[2008] EWCA Civ 1588, 17 December 2008

The Court of Appeal reaffirmed a number of recent cases which have accepted that the use of a police dog is a justified use of force to apprehend a fleeing suspect. Although the claimant was suspected of only a drink-driving offence and had received 'very nasty' injuries inflicted by the dog, the court found that the force used was reasonable for the purposes of Criminal Law Act 1967 s3.

Misfeasance

In *Watkins v Home Secretary* [2006] UKHL 17, 29 March 2006; [2006] 2 AC 395, the House of Lords held that the tort of misfeasance in a public office is not actionable without proof of material damage.

■ Hussain v Chief Constable of West Mercia Constabulary

[2008] EWCA Civ 1205, 3 November 2008

The claimant appealed against a decision to strike out his misfeasance claim, alleging that police officers had failed to provide him with appropriate assistance and subjected him to racially-motivated hostility. Expert evidence indicated that the claimant did not have a psychiatric diagnosis but that he experienced anxiety symptoms at time of stress, including muscular tension and numbness in his limbs.

The Court of Appeal held that these transitory, 'trifling' physical symptoms did not amount to 'material damage', so as to enable the claimant to sue for misfeasance. This expression included recognised psychiatric illnesses, which in general were those within the *International statistical classification of diseases and related health problems* published by the World Health Organisation. Accordingly, the claim had been rightly struck out.

Comment: The court's ruling restates the orthodox position that anxiety or distress do not amount to 'material damage', but with the added emphasis that a claimant will not be able to avoid the rigour of this principle by pointing to minor accompanying physical symptoms. While agreeing with the decision in this case, Maurice Kay J queried whether the requirement to show 'material damage' should be set at the same level as applies to negligence claims, given that misfeasance is an intentional tort of considerable gravity.

If the claimant's action had been for unlawful race discrimination under the Race Relations Act 1976, he could have recovered compensation for injury to feelings, without having to establish 'material damage'.

Procedure

■ Adorian v Commissioner of Police of the Metropolis

[2009] EWCA Civ 18, 23 January 2009, (2009) Times 23 February

The claimant was arrested and found guilty of an imprisonable offence. During his arrest he sustained serious injury, and then claimed against the police for assault, battery and negligence. The defendant applied to strike out the whole claim on the ground that the claimant had not obtained prior permission under s329 of the Criminal Justice Act 2003. Owen J rejected the strike-out application. He found that the s329 requirement to apply for permission was directory not mandatory. He granted the claimant retrospective permission as there was evidence on which a court could properly conclude that grossly disproportionate force had been used (see November 2008 *Legal Action* 46). The defendant appealed. The Court of Appeal roundly rejected the appeal for similar reasons to Owen J. The defendant has confirmed that there is to be no further appeal.

Comment: This impressive judgment relates to the 'Tony Martin' provision in s329 which was designed to prevent burglars suing their victims for *assault and battery* and/or *false imprisonment*, requiring the court's permission to be obtained for any such claim arising out of the *same occasion*[1] on which s/he was *convicted* of an *imprisonable* offence. The Court of Appeal agreed that a failure to seek permission before issue will not necessarily be fatal, although it could be penalised in costs depending on all the circumstances, including whether the defendant had raised a pre-action intention to rely on s329. The court was clearly concerned that s329 was not intended to confer additional protection on police officers. However, it declined to rule on the submission that, in police cases, the requirement that permission for a claim should be granted only subject to evidence on which the court could conclude that the force used was 'grossly disproportionate' should be read down so as not to afford state officials an unjustified degree of protection.

Police conduct

A new set of regulations concerning police misconduct came into force on 1 December 2008. The Police (Conduct) Regulations 2008 SI No 2864 are the most important, and include new procedures for police misconduct 'meetings' and hearings. The Code of Conduct has been replaced by *Standards of professional behaviour*, which is a pared-down version of the Code. A new 'standard' is 'Challenging and Reporting Improper Conduct' whereby '[p]olice officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards …' The details are in Home Office Circular 025/2008 entitled *The Taylor reforms – police conduct, performance and associated regulations*.[2]

Human Rights Act 1998 cases

Article 8

■ S and Marper v UK

App Nos 30562/04 and 30566/04, 4 December 2008, (2008) Times 8 December

In this case the Grand Chamber considered the policy in England and Wales of retaining the DNA and fingerprints of virtually all persons charged with an offence whether or not s/he is subsequently convicted. Mr Marper had had domestic violence charges against him discontinued before trial, and a minor known as 'S' had been acquitted of robbery. In 2004 the House of Lords decided that even if there was a breach of the article 8(1) right to respect for private life by the retention, it was very limited and, in any event, any breach was easily justified as proportionate under article 8(2) for the legitimate purpose of prevention of crime: *R (Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, 22 July 2004; [2004] 1 WLR 2196.

The Grand Chamber took a very different view: first, finding a substantial breach of article 8(1), given the very personal nature of the information retained and the feelings of stigmatisation felt by those subject to retention. The court was 'struck by the blanket and indiscriminate nature of the power of retention in England and Wales' (para 119), and found that it could not be justified under article 8(2), highlighting the case of children especially.

Comment: This is the first time that a House of Lords' judgment decided under the Human Rights Act 1998 has been departed from by the European Court of Human Rights

(ECtHR). Since the ruling, the Home Secretary has promised that more common-sense rules will be introduced. An amendment to the Crime and Policing Bill allows for regulations to be introduced to set out how the discretion in the Police and Criminal Evidence Act 1984 to detain fingerprints and samples should be exercised. There will be a power to set up a body to oversee and amend the new procedures. In the meantime, although S and Mr Marper have had their DNA samples destroyed, most police forces have not made changes to their policies, preferring to wait for the Home Office regulations. It also seems that samples and fingerprints already on the database may be retained unless specific requests to destroy them are made.

Article 5

■ Austin and another v Commissioner of Police of the Metropolis

[2009] UKHL 5,
28 January 2009,
[2009] 2 WLR 372

Ms Austin was confined within the police cordon imposed in Oxford Circus during the demonstrations on May Day 2001. The facts and proceedings below are summarised at April 2008 *Legal Action* 17. The House of Lords was only concerned with whether her detention infringed article 5(1) of the European Convention on Human Rights ('the convention'), and whether the purpose for which a measure was imposed was relevant to the question of whether a deprivation of liberty had occurred. It was accepted by both parties that resolution of this issue would also establish whether or not she was falsely imprisoned. The Commissioner argued in the alternative that if article 5 was engaged, the detention was lawful under article 5(1)(b) and/or 5(1)(c). However, the Commissioner's primary submission was that the claimant suffered no 'deprivation of liberty' so article 5 was not engaged. The trial judge had found that the cordon was imposed in good faith, and was a proportionate measure that was enforced for no longer than was reasonably necessary in circumstances where police were engaged in an unusually difficult exercise in crowd control aimed at avoiding personal injuries and damage to property.

The House of Lords held that although article 5 did not refer to the interests of public safety or the protection of the public as cases in which a person might be deprived of his/her liberty, importance had to be attached to such factors in deciding whether or not there had been a breach of article 5, so that competing fundamental rights might be reconciled with each other. In light of the trial judge's finding of fact, the cordon did not constitute an arbitrary deprivation of liberty and so article 5 was not applicable.

Comment: As the Lords' speeches acknowledge, there is nothing in the wording of article 5 itself to indicate that the purpose behind a measure is relevant to whether the article is engaged. On the contrary, the structure of the article strongly suggests that purpose only becomes relevant after a deprivation of liberty has been found, when considering whether any of the justifications set out in article 5(1)(a)–(f) exist. The ECtHR has said repeatedly that these exceptions are to be strictly construed. The difficulty that arose on the present facts is that article 5 makes no reference to the interests of public safety or the protection of public order as justifications for deprivation of liberty. The Lords concluded that the framers of article 5 had not appreciated that such measures were at risk of being held within the ambit of the article and that if they had done, they would have provided for this expressly, as, for example, in article 9(2) where the right to freedom of expression is qualified by such considerations (among others). This line of reasoning has worrying implications: it could, for example, be applied to detention on other grounds that are not listed as permissible justifications in article 5(1) but are to be found in other articles of the convention, such as national security considerations. As the House of Lords acknowledged, the ECtHR has not had to address this issue directly. Ms Austin is considering whether to make an application to the ECtHR.

It is important to note that the House of Lords stressed that purpose could only be relevant in avoiding the conclusion that there was a deprivation of liberty where the action taken was proportionate, reasonable and confined to what was strictly necessary to achieve the relevant purpose. Furthermore, Lords Walker and Neuberger sounded notes of caution, the latter emphasising that purpose is more likely to be relevant in a non-paradigm case of detention, such as the present.

Articles 2 and 3

■ R (JL) v Secretary of State for Justice (Equality and Human Rights Commission intervening)

[2008] UKHL 68,
26 November 2008

The House of Lords held that the state's positive obligations required it to hold an investigation that was compliant with the procedural requirements implied into article 2 of the convention whenever a prisoner attempted suicide and long-term injury resulted, irrespective of whether there was an arguable basis for showing that the state was in breach of its substantive duties of protection under article 2. The essential ingredients of such an investigation were that it:

- was initiated by the state;
- was conducted promptly and expeditiously by a person who was independent of those implicated in the relevant events;
- it involved the family and provided for a sufficient element of public scrutiny.

A public hearing akin to a full public inquiry would rarely be required. For a fuller account of the House of Lords' decision and a discussion of the implications for prisoners, see February 2009 *Legal Action* 18.

Comment: If such an injury is caused when the conduct of the police is called into question, the case is very likely to be referred to the Independent Police Complaints Commission (IPCC) to decide on how to investigate (Police Reform Act (PRA) 2002 Sch 3 para 4(1)(a)), and the IPCC will need to exercise its powers (PRA 2002 Sch 3 para 15) to decide on the 'mode of investigation' in such a way as to be compliant with articles 2 and 3. Indeed, in a passage approved in the case of *Reynolds*, see below, the IPCC accepts that it 'has an obligation to determine a form of investigation that is an effective independent investigation that does not have any hierarchical or institutional connection with those implicated in the events' (IPCC, *Criteria for investigation*, 30 June 2004, para 21).

■ Re (E) (A child) v Chief Constable of the Royal Ulster Constabulary and another (Northern Ireland Human Rights Commission and others intervening)

[2008] UKHL 66,
12 November 2008,
[2008] 3 WLR 1208

Loyalist protestors in Belfast employed extreme and sustained violence in an attempt to intimidate Catholic pupils and parents from walking to school. The police initially closed the route before setting up an expensive security corridor to protect the pupils during their journey. A cessation of the loyalist violence was eventually negotiated.

The appellant considered that the police should have taken a more robust approach with the protestors, including making more arrests. She sought declaratory relief that, among other things, the police had failed to discharge their positive obligation to protect the pupils/parents from inhuman and degrading treatment within the meaning of article 3, and that the police had discriminated against them as Catholics contrary to article 14.

The House of Lords unanimously rejected her appeal. Lady Hale's opinion provides an illuminating analysis of article 3, particularly

as it relates to children. The Lords found that the *Osman* test (*Osman v UK* App No 23452/94, 28 October 1998; (2007) EHRR 245) should be applied when considering the positive obligation on the police to protect members of the public from inhuman and/or degrading treatment from others under article 3. It was accepted that article 3 was engaged and that the Royal Ulster Constabulary (RUC) was on notice of a real and immediate risk from the protestors. The only question was what should the RUC have done to avoid that risk, judged reasonably.

The House of Lords accepted the RUC's argument that a more aggressive approach to the protestors might have triggered more widespread violence, giving rise potentially to more dangerous consequences both for the pupils/parents and the wider community. The effort made by the police to keep the route open by forming a human shield was a reasonable response to the protest. Lord Carswell found no evidence of discrimination and did not consider the way in which, for example, Protestant parades are policed in Northern Ireland to be a correct comparator.

Comment: Lady Hale crystallised the nature of the duty in article 3 cases as the 'duty to take adequate measures to provide care and protection' (quoted at para 9 from *Mayeka v Belgium* App No 13178/03, 12 October 2006; (2008) 46 EHRR 23, para 55) and a key question to be 'whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim' (quoted at para 10 from *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, 3 November 2005; [2006] 1 AC 396, para 92).

Lady Hale identified the central dispute to be whether the police were entitled to take into account the risk of serious harm to unspecified people elsewhere in Belfast for the purpose of the *Osman* test. She found that as a general principle, a police officer is not entitled to stand by while a person seriously ill-treats another, just because s/he fears the wider consequences of doing so: 'He has to step in, come what may' (para 14). However, she joined in dismissing the appeal on the basis that stepping in to make arrests in this case would have made the children's experience worse not better, thus it was not analogous to the police stepping in, for example, to remove a child from an abusive parent. (A potential area for concern in Lady Hale's opinion (at para 14) is that she is 'troubled' by the rejection of the 'but for' causation test in *E v UK* App No 33218/96, 26 November 2002; (2002) 36 EHRR 31, in favour of a more flexible standard. Interveners are also warned by Lords Hoffman and Brown against simply repeating points made by the parties and that their role was to provide the House with a more rounded picture than it would otherwise obtain.)

■ R (B) v Director of Public Prosecutions

[2009] EWHC 106 (Admin), 27 January 2009

The claimant alleged that part of his ear had been bitten off during an attack and the CPS instituted criminal proceedings against his alleged attacker. A psychiatric report was obtained concluding, among other things, that the claimant was suffering from psychotic symptoms and paranoid delusions that *may* have affected his perception and recollection of the attack so as to undermine the reliability of his account. As a result, the CPS decided to offer no evidence against the alleged attacker on the basis that the psychiatric report precluded the CPS from putting the claimant before the jury as a reliable witness. There was no other available evidence to identify the attacker.

The Divisional Court agreed with the claimant's argument that the CPS decision was both irrational and contrary to article 3. The court was influenced by the fact that the psychiatric report was expressed in general terms and the CPS had made no attempt to seek a more conclusive opinion from the psychiatrist or to meet with the claimant. In relation to article 3, the court found that the CPS approach had added insult to injury and was humiliating for the claimant. It understandably caused him to feel vulnerable and like a second-class citizen.

He was awarded £8,000 under the Human Rights Act 1998 for being deprived of the opportunity of the proceedings running their proper course and for being made to feel that he was beyond the effective protection of the law. The court did not make specific findings on the claimant's other arguments that:

- articles 8 and 14 were also breached; and
- there had been a breach of s49A(1)(c) of the Disability Discrimination Act (DDA) 1985 (the general duty on public authorities to have due regard to the need to promote the equality of opportunity between disabled persons and other persons).

Comment: This judgment, like *Re (E) (A child) v Chief Constable of the Royal Ulster Constabulary and another (above)* and *R (Reynolds) v Independent Police Complaints Commission* and *Chief Constable of Sussex* (below), underlines the importance of the positive duties on public authorities to respond effectively to credible allegations of ill-treatment contravening article 3, whether that ill-treatment is alleged against public officials or members of the public. This judgment makes clear that these duties persist beyond the investigation/arrest stages, and encompass any resultant court proceedings, including decisions around instituting and discontinuing proceedings. These positive duties include not only a duty to conduct an effective, independent inquiry, but also to treat victims in a fair, respectful and careful manner to facilitate their vindication of their rights under article 3.

The contrasting outcomes in *R (B) v Director of Public Prosecutions* and *Re (E) (A child) v Chief Constable of the Royal Ulster Constabulary* are interesting. It is certainly arguable that the pupils/parents in *E* were made to feel 'vulnerable' and like 'second-class citizens' by the failure to arrest the protestors. It is perhaps more difficult to argue that they were made to feel 'beyond the effective protection of the law' in view of the security cordon and the political context. Had the CPS in *B* taken the time to meet with the psychiatrist and the claimant before discontinuing the prosecution, the outcome in that case might well have been different.

The approach in *B* might be useful in some cases against the CPS where otherwise immunity from suit in negligence would be applicable, as in *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, (so long as article 2 or 3 is engaged by the decision-making process). It also resonates with the approach taken by the Court of Appeal in *Alder v Chief Constable of Humberside* [2006] EWCA Civ 1741, 18 December 2006, in the context of race discrimination (see April 2007 *Legal Action* 14). Perhaps surprisingly, the discrimination arguments did not find favour in *B* (or *E*), although Toulson LJ did warn against 'unfounded stereotyping' (para 55) and accepted that the general duty under DDA s49A may have significance at the investigative stage. (However, a claim for damages under the DDA was never an option due to the fact that decisions not to institute or to discontinue criminal proceedings are excluded from the operation of the Act under s21(4).)

■ R (Reynolds) v Independent Police Complaints Commission and Chief Constable of Sussex

[2008] EWCA Civ 1160, 22 October 2008

The claimant's brother ('the victim') was arrested by police officers during which time his head may have struck the ground. The victim was subsequently diagnosed with brain injury. The IPCC decided to conduct an independent investigation into what happened after the victim had come into contact with police officers, but that Sussex Police should investigate what happened to him before that

time. The IPCC took the view that it did not have the power to investigate whether the head injury could have occurred before police contact. The victim's brother sought judicial review.

The High Court decided that the IPCC had the power and indeed a duty to ensure that all the circumstances pertaining to the cause of the victim's injury were independently investigated. The court considered it impossible to divorce the two stages of the investigation and essential for the IPCC to have direction and control over both (see November 2008 *Legal Action* 46). The IPCC appealed unsuccessfully to the Court of Appeal.

Comment: The Court of Appeal was clear that the IPCC had a power and a duty to investigate possible misconduct by police officers but not to investigate possible criminal conduct by members of the public, which was the role of the police. However, the fact that the IPCC's investigations might sometimes overlap with police investigations (for example, a police investigation into the source of the drugs on which the deceased overdosed in custody) did not absolve the IPCC from making its own independent investigation and evaluation of the cause of injury or death following police contact. The court's emphasis on the importance of independence and involving the next of kin in these investigations is welcome (see para 22). The court also did not approve the High Court's obiter comments endorsing the use of serving police officers from complaint departments in independent IPCC investigations. The manner in which the IPCC conducts its independent investigations remains a matter for its discretion and the Court of Appeal made clear that any challenge to the exercise of that discretion will face an uphill task (as was seen from the decision in *Saunders v IPCC* below). It will be interesting to see what form of public hearing will result in this case given that an inquest will not be necessary.

■ R (Saunders and Tucker) v Independent Police Complaints Commission and others

[2008] EWHC 2372 (Admin), 10 October 2008

The families of two men who were fatally shot by the police sought a judicial review of the IPCC's failure to ensure that the police officers involved in the shootings did not confer with one another before making their notes of the incident in each case. The families relied on the ECtHR's decision in *Ramsahai v Netherlands* App No 52391/99, 15 May 2007; (2008) 46 EHRR 43, that such conferring could lead to contamination of evidence and was thus in breach of the state's duty to conduct an effective investigation into police shootings under article 2. The IPCC was in favour of non-conferring and accepted that it had the power to direct police officers not to confer in individual investigations over which it had direction and control. However, the IPCC argued that it would have been counter-productive to have issued directions against conferring while it was in negotiations with the Association of Chief Police Officers (ACPO) about changing the guidance police organisations issue to officers to prohibit conferring following police shootings. Underhill J agreed reluctantly with the IPCC, but sent out clear signals to ACPO in his judgment that it needed to revise the guidance issued to officers around conferring or risk that practice being found in breach of article 2. Two weeks after his judgment, ACPO issued revised guidance which advises officers not to confer with others before making their accounts following a police-related shooting except in exceptional circumstances.[3]

Comment: The decision by ACPO to revise its guidance represents an effective victory for the claimants. It remains to be seen whether the practice of conferring will now be abandoned in all police investigations on the basis that it is obviously important to remove any risk of contaminating officers' accounts, not just in police shooting investigations.

Compensation for wrongful convictions

■ R (Adams) v Secretary of State for Justice

[2009] EWHC 156 (Admin). 4 February 2009

The claimant applied for judicial review of the secretary of state's decision refusing his claim for compensation under Criminal Justice Act (CJA) 1988 s133. His conviction for murder had been quashed by the Court of Appeal following a reference by the Criminal Cases Review Commission, on the basis that his legal representatives at trial had failed to discover and deploy three pieces of evidence made available by the prosecution in the unused material. The court considered that the cumulative effect of the three failures rendered the conviction unsafe, but indicated in terms that absent the failures the claimant would not necessarily have been acquitted. The secretary of state determined that the eligibility test in CJA 1988 s133(1) was not met, as the conviction was not reversed on the basis of a 'new or newly-discovered fact' and/or no such fact showed 'beyond reasonable doubt that there has been a miscarriage of justice'.

The Divisional Court dismissed the claim. The claimant could not show that there had been a miscarriage of justice: he could neither establish that he was demonstrably innocent nor that he should clearly not have been convicted at the trial. Furthermore, there was no 'new or newly-discovered fact' as the relevant evidence was available to be discovered by the defendant's representatives by the time of the trial.

Comment: The court concluded that a 'miscarriage of justice' had not been established on either of its two possible meanings. For a summary of the recent case-law relating to those meanings see November 2008 *Legal Action* 44; in *R (Allen, formerly Harris) v Secretary of State for Justice* [2008] EWCA Civ 808, 15 July 2008; [2009] 1 Cr App R 2. The claimant's petition for leave to appeal has recently been refused by the House of Lords.

The novel point was the ruling on the 'new or newly discovered fact' issue which appears to introduce an additional requirement to the express statutory criteria, namely that the fact in question was not reasonably capable of discovery at the trial stage. The court's interpretation effectively penalises the claimant for the failings of his previous lawyers. Arguably this is a more restrictive approach than parliament intended. The only express reference to the applicant's culpability in the statutory wording is to be found in the requirement that the non-disclosure was not 'wholly or partly attributable to the person convicted'.

■ R (Miller and Hall) v Independent Assessor

[2008] EWHC 2758 (Admin), 13 November 2008

The first claimant was wrongly convicted of murder and spent four years and one month in custody. The secretary of state accepted that he was eligible for compensation under the (now abolished) ex gratia scheme. The assessor awarded him £55,000 in respect of his loss of liberty. The second claimant was wrongly convicted of murder and robbery and spent 11 years and one month in prison. His compensation claim was accepted under CJA 1988 s133. The assessor awarded him £125,000 for loss of liberty and £10,000 for injury to feelings, mental suffering and the stress of the prosecution process. The assessor made other non-pecuniary and pecuniary awards to both claimants that were not the subject of the legal challenge.

Both claimants brought judicial review proceedings claiming that the awards for loss of liberty were irrationally low, in particular as they failed to maintain a relationship of proportionality with civil law awards for shorter terms of imprisonment. It was also submitted that the assessor had erred in law

in basing his figures on personal injury awards. In Mr Hall's case, the sum for the stress of the prosecution process was challenged as being irrationally low and out of line with the guidance given in *Thompson v Commissioner of Police of the Metropolis* [1988] QB 498.

The claims were dismissed. The court held that no error of law had been established and the awards were not irrational.

Comment: In Mr Miller's case permission to appeal has been granted by the Court of Appeal. Mr Hall decided not to appeal. The grounds of appeal include that the Divisional Court failed to address the claimant's submission that in light of previous case-law (*R (O'Brien, Hickey and Hickey) v Independent Assessor* [2003] EWHC 855 (Admin), 16 April 2003) the assessor was bound to seek to maintain a relationship of proportionality with the civil law awards, yet failed to do so. Furthermore, the court proceeded on an erroneous understanding of the earlier *O'Brien* litigation – which it relied on in rejecting the rationality challenge.

Criminal Justice and Immigration Act 2008

With effect from 1 December 2008, the Criminal Justice and Immigration Act (CJIA) 2008 has amended CJA 1988 s133 and introduced a new s133A and s133B. Transitional provisions are contained in CIJA 2008 Sch 27. The changes are significant and are, in summary, as follows:

- Applications for compensation must be made within two years of the date when the conviction is reversed, unless the secretary of state directs that there are exceptional circumstances: s133(2) and (2A).
- A conviction is not to be treated as 'reversed' when it is quashed if the person is to be retried. The conviction is only 'reversed' if and when the person is acquitted of all offences at the retrial or the prosecution decides not to proceed with the retrial: s133(5A).
- The assessor is now permitted to make a deduction from the total compensation award (as opposed to elements of the non-pecuniary award) on the grounds of contributory conduct and/or previous convictions of the applicant. Furthermore, the assessor can decide to pay a nominal amount of compensation only where there are 'exceptional circumstances which justify doing so': s133A(3) and (4).
- The compensation award must not exceed the overall compensation limit, which is £1,000,000 in a case where the applicant was detained for at least ten years and £500,000 in any other case: s133A(5) and (7), and s133B.
- The total amount of compensation payable for loss of earnings in respect of any one year must not exceed an amount equal to 1.5 times the latest median annual gross earnings as published by the Office of National Statistics: s133A(6).

Enhanced criminal record certificates

Under the provisions of Police Act (PA) 1997 Part V, where an applicant seeks employment involving the regular care, training or charge of children, s/he will seek an enhanced criminal record certificate (ECRC) with a view to reassuring the potential employer. However, before the secretary of state issues the ECRC s/he will obtain information from chief officers of police, who are under a duty to include material which 'might be relevant' for the purposes of the certificate.

■ R (S) v Chief Constable of West Mercia Constabulary and Criminal Records Bureau

[2008] EWHC 2811 (Admin), 18 November 2008

The claimant applied for judicial review of the decision to disclose in his ECRC details of charges brought against him for five public order offences. At the criminal trial, the claimant had presented alibi evidence showing that he was elsewhere on one of the occasions. The magistrates acquitted the claimant, indicating that they accepted that he could not have been the perpetrator. The deputy chief constable upheld the original decision to include the information in the ECRC, on the basis that the allegations might have been true.

The Administrative Court held that the original decision to include the material was irrational as at that stage no information had been sought or obtained as to the basis of the acquittal. The deputy chief constable's subsequent decision was also irrational as very strong grounds existed to suggest that the claimant had been exonerated at trial and had not been the offender.

Comment: The judge considered that a reasonable decision-maker would not disclose the existence of allegations in a ECRC without first taking reasonable steps to ascertain whether they might be true. This observation appears to be of general application.

However, Wyn Williams J was also at pains to stress that his conclusion in relation to the subsequent decision was very specific to the particular facts. In many instances, it would be perfectly reasonable for a chief constable to conclude that an alleged perpetrator might have committed an offence, notwithstanding his/her acquittal depending on the circumstances. In this area, the House of Lords gave leave to appeal on 23 January 2009 in a case challenging the compatibility of the ECRC scheme with article 8 of the convention: *R (L) v Metropolitan Police Commissioner* [2009] 1 WLR 275 ([2007] EWCA Civ 168, 1 March 2007; [2008] 1 WLR 681).

1 An intimate search following an arrest has been held to have taken place on a separate occasion from the arrest (see paragraph 24 of the judgment).
2 Available at: www.knowledgenetwork.gov.uk/HO/circular.nsf/1cc4f3413a62d1de80256c5b005101e4/5b8cbab136284be180257504004a2576?OpenDocument.
3 Available at: www.wm-ireland.com/polfed/issues/acpo1008.pdf. A wider review of the ACPO firearms manual is ongoing.

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Police complaints: European Commissioner's *Opinion* published

Graham Smith, consultant on police complaints to the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, looks at the commissioner's *Opinion concerning independent and effective determination of complaints against the police* that was published last month.[1]

Of major concern to the commissioner is the climate of impunity for police violence and ill-treatment that has become apparent to the Strasbourg authorities in recent years.[2] The *Opinion* provides guidance to the 47 member states of the Council of Europe on the handling of complaints against police officers and other public officials who exercise police powers. As an accompaniment to the *European code of police ethics*, the commissioner's initiative reflects the increasing importance attached to police complaints.[3]

The operation of an independent, fair and effective police complaints system is essential to the administration of a democratic and accountable Police Service. The *Opinion* ties together developments in European Convention on Human Rights ('the convention') case-law and the international trend towards citizen oversight to explain how complaints may be handled appropriately and proportionately.

Democratic policing

Democratic principles are not easily reconciled with the activities of an independent body with coercive powers. In the UK, the policing-by-consent ethos associated with the image of the 'Bobby on the beat' was developed in the 19th century for the purpose of overcoming democratic deficits. More recently, the tripartite arrangement between chief officer, police authority and Home Secretary, ushered in under the Police Act 1964, is intended to make independent police services accountable.

Adoption by the United Nations of a *Code of conduct for law enforcement officials* in 1979 did much to advance the cause of principled policing.[4] The assertion in the preamble that 'every law enforcement agency should be representative of and responsive and accountable to the community as a whole' captures the essence of democratic policing.

Police complaints, and the way they are handled, are important indicators of police responsiveness and accountability. An independent, fair and effective complaints system which has the capacity to deal with all complaints appropriately and proportionately, with proper regard to the seriousness of the complainant's grievance and the consequences for the officer complained against, will enhance public trust and confidence in the police. The Police Ombudsman for Northern Ireland (PONI) and the Independent Police Complaints Commission (IPCC) for England and Wales are two of only a handful of citizen oversight bodies currently operating across Europe.[5]

Five convention principles

At the heart of the commissioner's *Opinion* are developments in the Strasbourg jurisprudence on articles 2 and 3 of the convention. Starting with the standard laid down in *McCann v UK* App No 324, 27 September 1995; (1995) 21 EHRR 97, that deprivation of life must be subject to the most careful scrutiny, the European Court of Human Rights has ruled in a series of cases that ineffective and inadequate investigation of complaints about death and serious injury violate the procedural obligations of a state to protect the right to life and prohibition of torture.[6] Where article 2 or 3 is engaged, the expectation is that the authorities will commence an investigation immediately and in the absence of a complaint having been made. The court has developed five principles of effective police complaints investigation: independence, adequacy, promptness, public scrutiny and victim involvement.

■ **The independence principle** requires that there should not be institutional or hierarchical connections between investigator and officer complained against and there should be practical independence (see *Ramsahai v Netherlands* App No 52391/99, 15 May 2007; (2007) 46 EHRR 43). Stipulation of two forms of independence, sometimes referred to as 'organisational' and 'functional' independence, rests on the presumption that investigation of a law enforcement official by a body separate to the police is the best guarantee of the exercise of independent judgment by the investigator. To achieve this end, the *Opinion* recommends that there should be a statutory independent police complaints body (IPCB) with powers to investigate incidents which engage article 2 or 3. In furtherance of this principle, the commissioner also recommends that the IPCB has general oversight responsibilities for the entire police complaints system (see further below).

■ **The adequacy principle** requires that an investigation should be capable of gathering evidence to establish whether or not the police behaviour complained of was unlawful and to identify and punish those responsible (*Aksoy v Turkey* App No 21987/93, 18 December 1996; (1996) 23 EHRR 553). Drawing on convention case-law, the *Opinion* gives several examples of what is expected for a thorough and comprehensive police complaints investigation, including the tracing and questioning of all police and non-police witnesses, not uncritically accepting police evidence, and comprehensive forensic testing and analysis of the evidence. There is an additional duty to examine thoroughly all of the facts to uncover discriminatory motives because of the difficulties associated with proving complaints of discrimination (*Nachova v Bulgaria* App No 43577/98, 6 July 2005; (2005) 42 EHRR 43).

■ **The promptness principle** requires that an investigation should be conducted promptly and expeditiously in order to maintain confidence in the rule of law (*Isayeva v Russia* App No 57947/00, 24 February 2005; (2005) 41 EHRR 38). Failure to act promptly may give the appearance that there is a reluctance to investigate or collusion between investigators and officers to conceal misconduct. Delay may result in the loss of evidence, abuse of process or failure to bring an offender to justice.

■ **The public scrutiny principle** requires that procedures and decision-making are open and transparent in order to ensure accountability (*Ognyanova v Bulgaria* App No 46317/99, 23 February 2006; (2006) 44 EHRR 7). As a consequence of the confidential and sensitive nature of complaints investigations, the degree of scrutiny may vary. Connected to the victim involvement principle, there should be a presumption that documents will be disclosed to help dispel any concern that there is impunity for police misconduct.

■ **The victim involvement principle** requires that the complainant should be involved in the investigation of a complaint in order to safeguard his/her legitimate interests (*McKerr v UK* App No 28883/95, 4 May 2001; (2002) 34 EHRR 20). There is an

expectation that complainants will be consulted and kept informed of developments throughout the determination of their complaint. Victim support, counselling and legal representation should be available to ensure complainants' wellbeing and that their interests are safeguarded effectively.

Citizen oversight

The effective investigation principles also serve as useful guidelines for the determination of all complaints against the police. In addition to recommending that the IPCB should have investigative powers, the commissioner advises that such a body should have general oversight responsibilities for the police complaints system.

Reference is made to the Paris principles and the different types of national institution that protect and promote human rights.[7] Particular mention is made of the need for the IPCB to be appointed by and answerable to the legislative assembly or a committee of elected representatives that does not have express policing responsibilities. The IPCB should be representative of a diverse population and consult all stakeholders in the police complaints system, including complainants and their representatives, community organisations and non-governmental organisations.

The *Opinion* stresses that the IPCB and police should work together as partners and maps out how they may co-operate in the operation of an effective complaints system. High-profile police services with developed information and communication systems should be responsible for public awareness. It is recommended that the IPCB should have responsibility for recording all complaints, although they may be made directly to the police. On this point it is suggested that a complainant's expectation that a relatively uncomplicated complaint will be resolved quickly by the police in a simple and straightforward manner should not be frustrated by overly bureaucratic procedures or unnecessary intervention by the IPCB. For complaints that do not engage article 2 or 3 of the convention, a range of arrangements are suggested for the sharing of responsibilities between the IPCB and police which take account of the seriousness of the complaint, resources and public interest.

Lesson-learning, an approach that has been developed by the IPCC and involves research and analysis of the behaviour that gives rise to complaints, is acknowledged as an important strategy for preventing misconduct and misunderstanding between the police and public.

Combating impunity

The *Opinion* includes suggestions about how the investigation principles may also be applied to the conduct of independent, fair and effective criminal and disciplinary proceedings that arise as a consequence of a complaint. Criminal and disciplinary sanctions are an important protection against police impunity and enhance public trust and confidence in the police (*Guja v Moldova* App No 14277/04, 12 February 2008).[8]

Implicit in the adequacy principle is the expectation that proceedings will follow resolution of a complaint if there is sufficient evidence. The commissioner proposes two alternative models. The 'standard model' provides for the IPCB to forward its investigation report to the criminal prosecution authority, and for the police to decide whether or not to bring criminal or disciplinary proceedings of the Council of Europe respectively, in accordance with standard procedures. Under this system there would be a post-resolution role for the IPCB in making recommendations to the prosecuting authority and police and keeping the complainant informed of progress in proceedings.

In some European jurisdictions, notably in Scandinavia, specialist criminal prosecution authorities with their own investigators handle criminal complaints against the police from the recording of the allegation through to the conduct of criminal proceedings. The commissioner suggests that this separate prosecution system could be adapted to handle complaints against the police under the auspices of an IPCB. In this model, the IPCB would be responsible for the preparation and conduct of criminal proceedings against police officers that arise from complaints made by members of the public.

Conclusion

The Human Rights Commissioner's *Opinion* on police complaints represents an important step forward in the development of democratic and accountable policing services. Across Europe it is possible to identify human rights concerns with policing, borders and immigration, and counter-terrorism powers and practices that target people, whether members of Roma, Muslim, lesbian, gay, bisexual and transgender communities or other minority groups.

Much in the commissioner's *Opinion* is standard practice for the PONI and IPCC. The Strasbourg jurisprudence in this area is evolving rapidly, especially concerning the difficulties associated with the prohibition of discrimination. The commissioner's recommendation that complainants should be entitled to legal representation is most apposite.

The suggestion that an IPCB could investigate and prosecute police officers, in much the same way as the Serious Fraud Office deals with its caseload, would clearly enhance independent and impartial decision-making. Although no such system has existed to date, citizen oversight of democratic and accountable policing services is still in its infancy. As reforms are introduced in accordance with the prevailing constitutional and legal traditions in different jurisdictions, it is to be expected that fairer and more effective police complaints systems will be developed and cross-fertilisation will take place.

1 Available at: www.coe.int/t/commissioner/WCD/latestDocuments_en.asp.
2 Council of Europe Commissioner for Human Rights, *There can be no impunity for police violence*, 3 December 2007, available at: www.coe.int/t/commissioner/Viewpoints/071203_en.asp.
3 The code was adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 at the 765th meeting of the Ministers' Deputies and is available at: www.coe.int/t/e/legal_affairs_co-operation/police_and_internal_security/documents/Recs(2001)10_ENG4831-7/pdf.
4 The code was adopted by UN General Assembly resolution 34/169 of 17 December 1979, and is available at: www.un.org/documents/ga/res/34/a34res169.pdf.
5 Independent police complaints bodies also operate in Belgium, Hungary and Ireland.
6 See Kristina Stern and Saimo Chahal, 'Articles 2 and 3 of the European Convention on Human Rights: the investigative obligation Part 1 and Part 2', June and July 2006 *Legal Action* 30 and 23 respectively.
7 UN General Assembly, *Principles relating to the status and functioning of national institutions for the protection and promotion of human rights* ('the Paris principles'), A/RES/48/134, 85th Plenary Meeting on 20 December 1993, available at: www2.ohchr.org/english/law/parisprinciples.htm.
8 European Committee for the Prevention of Torture, *The CPT standards: "substantive" sections of the CPT's general reports*, 2006, Ch IX, available at: www.cpt.coe.int/en/documents/eng-standards.pdf.

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Recent developments in practice management

The start of the financial year means that many legal aid firms and not-for-profit (NFP) agencies with Legal Services Commission (LSC) contracts will be starting a new budget. Vicky Ling looks at how to manage a budget and ensure that a firm stays profitable.

What should be in the budget?

If an activity is in the business plan, it should be reflected in the budget. The budget should cover one year in detail and preferably a further two years, in outline at least. Preparing a budget should be a shared activity between partners or senior managers, heads of department and the cashier or finance manager. They all have their own areas of expertise to contribute. Firms need to try to make the budget as accurate as possible, by looking back at the historical data and forward at increases or decreases which will result from planned activity.

Income

Fees budgets in legal aid firms often used to be set using the rule that fee earners ought to bring in three times their salaries in terms of fees in order to pay for support staff, overheads and allow a profit for the partners. This has probably been superseded by a more sophisticated approach, but the three-times-salary rule is not a bad 'sense check' when considering whether or not people are bringing in a reasonable level of income. However, it is probably not applicable in NFP agencies as traditionally they do little or no certificated work at higher fees.

Although fewer fees are charged by time spent, chargeable time is still a useful concept when assessing viability or profitability. The Law Society of England and Wales uses a target of 1,100 hours per year.[1] The Law Society of Scotland suggests 1,000 hours for partners, 1,200 for all other fee earners and 800 for trainees.[2] In a survey of legal aid firms undertaken by Frontier Economics for the then Department of Constitutional Affairs in 2003, 137 firms provided details of their chargeable hours.[3] Partners produced approximately 1,300 hours per year, and other solicitors approximately 1,200 hours per year. In another survey, published in 2006 as part of *Lord Carter's review of legal aid procurement*, solicitors among the leading crime firms averaged 1,500 hours a year.[4]

It is a good idea to involve solicitors and caseworkers in discussions about setting fee targets. Partners and heads of departments need to be realistic in their expectations and work through any problems that fee earners identify. For example, fee earners may say that they find it hard to meet targets because their clients do not turn up for appointments, which is hardly their fault. However, it would be worth looking at whether there is anything the organisation can do to encourage clients to attend, such as sending a text message the day before the appointment, or arranging diaries so that clients do not have to wait too long for a date to meet, as the risk is that by the time the appointment comes round they will have gone elsewhere or resigned themselves to putting up with the problem and will not turn up.

When firms consider the previous year's fees they may find that fee earners are generating different levels of fees although they appear to have similar caseloads and levels of support. It is important to investigate the reasons for this; if one person has adopted a more efficient way of working, it makes sense to share it with the rest of his/her colleagues.

If, conversely, someone is struggling, firms need to see what they can do to help him/her meet the targets. A positive approach will probably be the most effective in improving performance.

Salaries and overheads

In order to identify whether the firm is making a profit from the work, it needs to find out what it costs to produce the fees. So, to take an exaggerated example, if fees average £50 per hour and it costs the firm £30 per hour in salaries and overheads to produce those fees, the firm is making a profit of £20 per hour. In the Law Society's *Legal aid toolkit*, Andrew Otterburn suggests that if your costs per hour are less than £45 you are doing well, around £55 per hour is medium and £65 per hour is high.[5]

Salaries are the most significant part of any budget in a professional service organisation. From a budgetary point of view, they are quite straightforward as firms base the budget on the previous year's, allowing for any planned recruitment and pay rises.

Some accountants recommend that firms should attribute notional salaries (equal to the highest-paid salaried partner or fee earner) to equity partners, otherwise firms are ignoring a significant cost and their figures may look much better than they really are.[6] It also gives firms a good idea of how much working capital they might have available at the end of the year. However, most legal aid firms do not do this and simply share any profit between the partners.

In order to identify more and less profitable activities, firms should allocate overheads on a departmental basis. To do this, they should deduct the departmental salaries (fee earners and other staff) and any overheads that are directly attributable to a particular department from its fees. Shared overheads, for example, receptionists, costs drafter, cashiers, should be allocated on a per capita basis (by fee earner, including partners). So, for example, if the crime department has six fee earners and the family department has four, 60 per cent of the shared overheads should be allocated to the crime department and 40 per cent to the family department.

One of the ways legal aid firms have attempted to remain profitable is to analyse the way they work and see whether some tasks can be carried out by paralegals and administrators rather than by solicitors. Initially, this can be relatively easy to do without adversely affecting quality and can make a big difference to producing a profit or surplus at the end of the year.

1 In the 1980s and 1990s, the Law Society used to publish *The expense of time*. That guide used this target figure, which was then adopted as a benchmark.
2 'Fee Charging Seminar', 7 February 2006, Summary of proceedings, p14, available at: www.lawscot.org.uk/uploads/Update/Fee%20Charging%20-%20February%202006.pdf.
3 *A market analysis of legal aided services provided by solicitors*, December 2003, available at: www.dca.gov.uk/laid/frontier-solicitors-rpt.pdf.
4 *2005 and 2006 surveys of criminal firms*, June 2006, para 3.2, available at: www.legalaid procurementreview.gov.uk/docs/otterburn-lca-survey-2005-research-2006.pdf.
5 Available from: www.lawmanagementsection.org.uk/pages/store/view/108.
6 Andrew Otterburn, *Profitability and law firm management*, Law Society, 2007.

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Legislation

LEGAL AID

Community Legal Service (Financial) (Amendment) Regulations 2009 SI No 502

These regulations amend the Community Legal Service (Financial) Regulations 2000 SI No 516 which govern the financial aspects of the provision of services funded by the Legal Services Commission in civil and family matters as follows:

- Provide that legal representation in the Court of Protection in cases involving the deprivation of a person's liberty under Sch A1 to the Mental Capacity Act 2005 is to be provided irrespective of the financial resources of the client or the client's representative.
- Increase the financial eligibility limits for monthly and disposable income.
- Make minor corrections. In force on 1 April 2009 and 6 April 2009.

Legal Services Act 2007 (Commencement No 4, Transitory and Transitional Provisions and Appointed Day) Order 2009 SI No 503

This Order is the fourth commencement order made under the Legal Services Act (LSA) 2007. This Order brings into force on 31 March 2009 various provisions of the LSA as follows:

- Brings into force for limited purposes certain terms used in the LSA to allow for the proper interpretation of those provisions pending the establishment of the new regulatory system.
- Sets out the concurrence requirements for certain Law Society rules and regulations until such time as the society's regulatory arrangements can be approved by the Legal Services Board.
- Omits references to 'regulatory arrangements' until the introduction of that concept by LSA s21.
- Alters the effect of the commencement of LSA Sch 16 para 44 so that, until the commencement of LSA Sch 16 para 39 (which omits s37A from the Solicitors Act (SA) 1974), the society will be able to exercise its 'new' powers under ss44B, 44BA, 44BB and 44BC of the SA for the purpose of investigating complaints about professional services provided by a solicitor, and makes similar provision in relation to professional services provided by a recognised body.
- Provides for the interpretation of the terms 'appropriate regulator' and 'authorised person' which would otherwise have no effective meaning until the LSA is more fully in force.
- Extends the disapplication of ss22(1) and 23(1) of the SA afforded by s9(4) of the Administration of Justice Act (AJA) 1985 to managers, as well as officers and employees, of recognised bodies.
- Omits the power of the Council of Licensed Conveyancers in new s32(1)(ba) of the AJA (as inserted by para 20(4) of Sch 17) to make rules prescribing arrangements for authorising recognised bodies to carry on certain reserved legal activities.
- Omits the reference in AJA s32 (as inserted by LSA Sch 17 para 20(11)) to the Council for Licensed Conveyancers being designated as a licensing authority until the commencement of the licensing regime in LSA Sch 10.
- Omits reference to LSA s15 in the description of 'authorised person' for the purpose of the transitional provisions in LSA Sch 22 until the commencement of that section.
- Makes transitional provision for the changes being introduced to the society's compensation arrangements, principally by new ss36 and 36A of the SA (as substituted by LSA Sch 16 para 37).
- Appoints 31 December 2009 as the day before which the Legal Services Board must make rules relating to the exercise of regulatory functions for the purpose of LSA s30.

(See also the table in the Order showing the further effects of the bringing into force of the LSA's provisions.) In force 31 March 2009.

PRACTICE AND PROCEDURE

Appeals (Excluded Decisions) Order 2009 SI No 275

Section 11 of the Tribunals, Courts and Enforcement Act (TCEA) 2007 provides that a party to a case has a right of appeal on a point of law from the First-tier Tribunal to the Upper Tribunal. Section 13 of the TCEA provides that a party to a case has a right of appeal on a point of law from the Upper Tribunal to the relevant appellate court (being the Court of Appeal in England and Wales, the Court of Session or the Court of Appeal in Northern Ireland). But there is no right of appeal under s11 or s13 against an 'excluded decision'. Excluded decisions are listed in ss11(5) and 13(8) of the TCEA. This Order lists additional decisions which are also excluded from a right of appeal from the First-tier Tribunal to the Upper Tribunal, or from the Upper Tribunal to the relevant appellate court, as the case may be. This Order revokes and replaces the Appeals (Excluded Decisions) Order 2008 SI No 2707 which listed additional excluded decisions. In force 1 April 2009.

Tribunals, Courts and Enforcement Act 2007 (Transitional Provision) Order 2009 SI No 450

Section 108(1) of the Tribunals, Courts and Enforcement Act (TCEA) 2007 gives effect to Sch 17 of that Act, which inserts into the Insolvency Act (IA) 1986 a new Part 7A, on debt relief orders. Section 108(2) of the TCEA gives effect to Sch 19 of that Act, which inserts into the TCEA a new Sch 4ZB (itself given effect by new s251V of the TCEA, contained in new Part 7A) on debt relief restrictions orders and undertakings.

Debt relief restrictions orders may be made in respect of a debtor who is subject to a debt relief order where, broadly, his/her conduct in relation to his/her insolvency is found to be culpable. Schedule 19 sets out who may apply for a debt relief restrictions order and possible grounds for obtaining one, and gives details about the timing of an application and the duration of the order or undertaking. Such orders may have a duration of a minimum of two years and a maximum of 15 years, and are intended to serve to protect the public from a culpable debtor.

While subject to a debt relief restrictions order, the debtor will remain subject to the same disabilities as those imposed by the original debt relief order, for example, s/he will not be able to obtain credit beyond the prescribed amount without disclosing his/her status.

Short of an application being made to the court for a debt relief restriction order, a debtor may offer a debt relief restrictions undertaking to the secretary of state, who may accept the undertaking rather than apply for an order.

Section 145 of the TCEA, under which this Order is made, provides that the secretary of state may, among other things, make any transitional provision which he considers necessary or expedient for the purpose, or in consequence of any provision of that Act. Section 251V of and Sch 4ZB to the IA, inserted as explained above, permit the court, on the application of the secretary of state or the official receiver acting on a direction of the secretary of state, to make a debt relief restrictions order if it thinks it is appropriate to do so having regard to the conduct of a debtor either before or after the making of a debt relief order (see Sch 4ZB para 2(1)). However, since the provisions introducing debt relief orders and debt relief restriction orders and undertakings do not come into force until 6 April 2009, this Order prevents any conduct of the debtor before that date from being taken into account by the court so as to prevent the provisions from having any possible retrospective effect. In force 6 April 2009.

PRISONS

Parole Board (Amendment) Rules 2009 SI No 408

The purpose of these rules is to provide the Parole Board (the Board) with greater flexibility in deploying its resources to better cope with an increasing number of cases referred to it. These rules are made under Criminal Justice Act (CJA) 2003 s239(5) and amend the Parole Board Rules 2004 (the 2004 Rules).

The 2004 Rules set out the procedure to be adopted by the Board when dealing with cases referred to it by the secretary of state under ss28(6)(a), 28(7) or 32(4) of the Crime (Sentences) Act 1997 or under ss39(4) or 44A(2) of the CJA 1991.

The rules include a transitional provision that specifies that the 2004 Rules will continue to apply to all hearings which begin before 1 April 2009. In force 1 April 2009.

Benefit rates from April 2009

New weekly rates of benefits are specified in the Social Security Benefits Up-rating Order 2009 SI No 497. They apply from the week beginning 6 April 2009. The draft Tax Credits Up-rating Regulations 2009 come into force on 6 April 2009. However, readers should note that the April increase in child benefit was brought forward to 5 January 2009. Also, in early 2009 a payment of £60 was made to all those who receive the basic state pension, which was equivalent to bringing forward the increase from April to January.

Adoption

Statutory adoption pay
- Earnings threshold £95.00
- standard rate £123.06

Bereavement

Widow's benefit
- Widowed mother's allowance £95.25
- Widow's pension (standard rate) £95.25

Bereavement benefit
- Bereavement allowance (standard rate) £95.25
- Bereavement payment (lump sum) £2,000 *
- Widowed parent's allowance £95.25

Children

Child benefit
- Eldest or only child (couple) £20.00
- Other children £13.20

Disability

Attendance allowance
- higher rate £70.35
- lower rate £47.10

Disability living allowance
care component
- highest rate £70.35
- middle rate £47.10
- lowest rate £18.65

mobility component
- higher rate £49.10
- lower rate £18.65

Industrial injuries disablement benefit
- 18 or over, or under 18 with dependants 100% disabled £143.60

Carer's allowance £53.10

Employment and support allowance

Personal allowances:

Single person
- under 25 £50.95
- 25 or over £64.30

Lone parent
- under 18 £50.95
- 18 or over £64.30

Couple
- both under 18 £50.95
- both under 18 with child £76.90
- both under 18 (main phase) £100.95
- both under 18 with child (main phase) £100.95
- one 18 or over, one under 18 £100.95
- both over 18 £100.95
- claimant under 25, partner under 18 £50.95
- claimant 25 or over, partner under 18 £64.30
- claimant (main phase), partner under 18 £64.30

Premiums
- enhanced disability
  - single £13.40
  - couple £19.30
- severe disability
  - single £52.85
  - couple (lower rate) £52.85
  - couple (higher rate) £105.70
- carer £29.50
- pensioner
  - single with work-related activity component (WRAC) £40.20
  - single with support component £34.85
  - single with no support component £65.70
  - couple with WRAC £72.00
  - couple with support component £66.65
  - couple with no support component £97.50

Components
- work-related activity £25.50
- support £30.85

Incapacity

Incapacity benefit
- long-term £89.80

Short-term (under pension age)
- lower rate £67.75
- higher rate £80.15

Short-term (over pension age)
- lower rate £86.20
- higher rate £89.80

Maternity

Statutory maternity pay
- Earnings threshold £95.00
- standard rate £123.06

Maternity allowance
- Standard rate £123.06
- Maternity allowance threshold (for variable rate) £30.00 *

Paternity

Statutory paternity pay
- Earnings threshold £95.25
- standard rate £123.06

Retirement

State pension
- Category A or B £95.25

Pension credit
Standard minimum guarantee
- single £130.00
- couple £198.45

Additional amount for severe disability
- single £52.85
- couple (one qualifies) £52.85
- couple (both qualify) £105.70

Additional amount for carer £29.50

Savings credit threshold
- single £96.00
- couple £153.40

Capital

Amount disregarded £6,000 *
Amount disregarded:
- care homes £10,000 *

Deemed income £1* for each £500* (or part) over above amounts

Housing costs

Deduction for non-dependants:
- as for income support

Severe disablement allowance

Basic rate £57.45
adult dependant £31.90
age-related addition
- higher rate £15.65
- middle rate £9.10
- lower rate £5.35

Unemployment Jobseeker's allowance (contribution-based)

Personal rates
- Under 18 £50.95
- 18–24 £50.95
- 25 or over £64.30

Income support and Jobseeker's allowance (income-based)

Personal allowances: income support (IS)

Single person aged under 18, usual rate £50.95
Under 18, higher rate payable in specific circumstances £50.95
18–24 £50.95
25 or over £64.30

Personal allowances: jobseeker's allowance (JSA)

Single person aged under 18, usual rate £50.95
18–24 £50.95
25 or over £64.30

Personal allowances for both IS and JSA

Lone parent
- under 18, usual rate £50.95
- under 18, higher rate payable in specific circumstances £50.95
- 18 or over £64.30

Couple, both under 18 £50.95
- both under 18, one disabled £50.95
- both under 18, with responsibility for a child £76.90
- one under 18, one 18–24 £50.95
- one under 18, one 25 or over £64.30
- both 18 or over £100.95

Amounts for dependent children

Personal allowance (under 20) £56.11
Family premium/family premium lone parent rate £16.75
Enhanced disability premium – child rate £19.60
Disabled child premium £48.72

Premiums for both IS and JSA

Pensioner (under 75)
- Single (JSA only) £65.70
- Couple £97.50

Pensioner (enhanced) (75–79)
- Couple £97.50

Pensioner (higher) (80+)
- Single (JSA only) £65.70
- Couple £97.50

Disability
- Single £27.50
- Couple £39.15

Enhanced disability premium
- Single rate £13.40
- Couple rate £19.30

Severe disability
- Single £52.85
- Couple (one qualifies) £52.85
- Couple (both qualify) £105.70
- Carer £29.50

Housing costs

Deduction for non-dependants

Aged 25 or over, receiving IS or income-based JSA, aged 18 or over, not in work or gross income less than £116 £7.40 *

Adults earning gross income

£369 or more	£47.75 *
£296–£368.99	£43.50 *
£223–£295.99	£38.20 *
£172–£222.99	£23.35 *
£116–£171.99	£17.00 *

Capital limits**

Upper limit	£16,000 *
Amount disregarded	£6,000 *
Upper limit (claimant/partner 60 or over)	£16,000 *
Amount disregarded (claimant/partner 60 or over)	£6,000 *
Child's limit	£3,000 *

Tariff income

£1* for every complete £250* (or part) between amount of capital disregarded and capital upper limit

Housing benefit and council tax benefit

Personal allowances: housing benefit (HB)

Single person
- 16–24 £50.95
- 25 or over £64.30
- (entitled to main phase Employment Support Allowance (ESA)) £64.30

Lone parent
- under 18 (HB only) £50.95
- 18 or over £64.30
- (entitled to main phase ESA) £64.30

Couple
- both under 18 (HB only) £76.90
- one or both 18 or over £100.95
- (claimant entitled to main phase ESA) £64.30

Dependent children
- Under 19 £56.11

Pensioner

Single person/lone parent
- 60–64 £130.00
- 65 or over £150.40

Couple
- one or both 60–64 £198.45
- one or both 65 or over £225.50

Premiums: HB

Family	£17.30
Family (lone parent)	£22.20 *
Child under one	£10.50 *

Disability
- Single £27.50
- Couple £39.15

Enhanced disability premium
- Single rate £13.40
- Disabled child rate £20.65
- Couple rate £19.30

Severe disability
- Single £52.85
- Couple (one qualifies) £52.85
- Couple (both qualify) £105.70
- Disabled child £51.24
- Carer £29.50

ESA components
- work-related activity £25.50
- support £30.85

Non-dependant deductions***: HB (rent)

Aged 25 or over, receiving IS, income-based JSA or ESA (income related) and aged 18 or over, not in work or gross income less than £120 £7.40 *

Adults earning gross income

£382 or more	£47.75 *
£306–£381.99	£43.50 *
£231–£305.99	£38.20 *
£178–£230.99	£23.35 *
£120–£177.99	£17.00 *

Personal allowances: council tax benefit (CTB)

As for HB, except that personal allowances are not payable for young people aged 16 and 17

Premiums: CTB

As for HB

Non-dependant deductions***: CTB

Adults earning gross income

£382 or more	£6.95 *
£306–£381.99	£5.80 *
£178–£305.99	£4.60 *
less than £178	£2.30 *
others, aged 18 or over (and not receiving IS)	£2.30 *

Capital limits**

Upper limit	£16,000 *
Amount disregarded	£6,000 *
Upper limit (claimant/partner 60 or over)	£16,000 *
Upper limit (pension credit guarantee) from October 2003	no limit
Amount disregarded (claimant/partner 60 or over)	£6,000 *
Child disregard	£3,000 *
Upper limit (living in residential care/nursing home)	£16,000 *
Amount disregarded (living in residential care/nursing home)	£10,000 *

Tariff income

£1* for every £250* (or part) or where claimant/partner 60 or over, £1* for every £500* (or part) between amount of capital disregarded and capital upper limit

Working tax credit (per annum unless otherwise stated)

Income threshold	£6,420 *

Elements
- basic element £1,890
- 30-hour element £775
- couple and lone parent element £1,860
- disabled worker element £2,530
- severe disability element £1,075
- 50+ return to work payment (16–29 hours) £1,300
- 50+ return to work payment (30 hours or more) £1,935
- childcare element:
  - 80% of weekly cost for one child up to costs of £175*
  - 80% of weekly cost for two or more children up to costs of £300*

Child tax credit (per annum unless otherwise stated)

Income threshold	£6,420 *
Threshold (entitled to child tax credit but not working tax credit)	£16,040
Second income threshold	£50,000 *

Elements
- family element £545 *
- baby element £545 *
- child element (per child) £2,235
- disability element £2,670
- severe disability element £1,075

Other benefits

Statutory sick pay
- Earnings threshold £95.00
- Standard rate £79.15

Guardian's allowance £14.10

Dependency increases

Adult dependants: for spouse or person looking after children, where claimant receiving:
- retirement pension or own insurance £57.05
- long-term incapacity benefit or unemployability supplement £53.10
- severe disablement allowance £31.90
- carer's allowance £31.70
- short-term incapacity benefit (over pension age) £51.10
- short-term incapacity benefit (under pension age)/ maternity allowance £41.35

Child dependants: where claimant receiving:
- retirement pension, widowed mother's allowance, widowed parent's allowance, short-term incapacity benefit (higher rate) and long-term incapacity benefit, carer's allowance, severe disablement allowance, industrial death benefit (higher rate), unemployability supplement or short-term incapacity benefit (over pension age) £11.35 *

* Denotes no change from 2008 figure

**Rules common to IS, JSA (income-based), ESA (income-related), Pension Credit, HB and CTB unless stated otherwise.

***Rules common to IS, JSA, ESA, Pension Credit, HB and CTB unless stated otherwise.

▶ Books

Actions against the police

Police Misconduct
legal remedies 4th edn
John Harrison/Stephen Cragg/
Heather Williams QC
2005 ♦ Pb 978 0 905099 91 0 ♦ 760pp ♦ £37

Community care

Community Care and the Law
4th edn
Luke Clements/Pauline Thompson
2007 ♦ Pb 978 1 903307 47 2 ♦ 1064pp ♦ £48

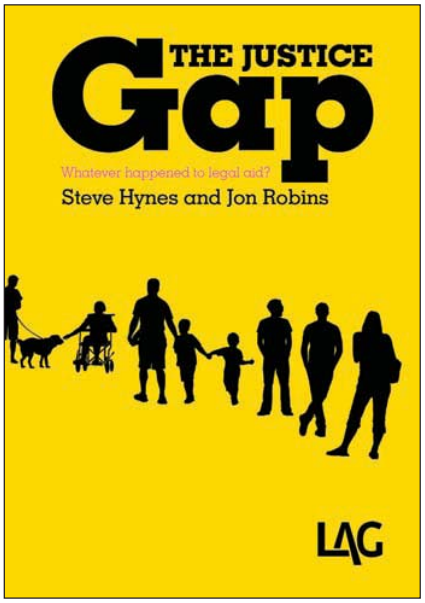
Crime

ASBOs
a practitioner's guide to defending anti-social behaviour orders
Maya Sikand
2006 ♦ Pb 978 1 903307 41 0 ♦ 496pp ♦ £45

Defending Suspects at Police Stations 5th edn
Ed Cape
2006 ♦ Pb 978 1 903307 44 1 ♦ 1008pp ♦ £52

Defending Young People
in the criminal justice system 3rd edn
Mark Ashford/Alex Chard/
Naomi Redhouse
2006 ♦ Pb 978 1 903307 34 2 ♦ 1008pp ♦ £48

Abuse of Process
a practical approach
Colin Wells
2006 ♦ Pb 978 1 903307 46 5 ♦ 384pp ♦ £45



Identification
investigation, trial and scientific evidence
Paul Bogan
2004 ♦ Pb 978 1 903307 25 0 ♦ 502pp ♦ £37

Reconcilable Rights?
analysing the tension between victims and defendants
Edited by Ed Cape
2004 ♦ Pb 978 1 903307 31 1 ♦ 148pp ♦ £15

Debt

Enforcement of Local Taxation
Alan Murdie/Ian Wise
HALF PRICE
2000 ♦ Pb 978 1 903307 01 4 ♦ 384pp
** Reduced from £25 to £12.50*

Employment

Employment Law
an adviser's handbook 7th edn
Tamara Lewis
2007 ♦ Pb 978 1 903307 53 3 ♦ 864pp ♦ £30

Employment Tribunal Claims
tactics and precedents
2nd edn
Naomi Cunningham/Michael Reed
2007 ♦ Pb 978 1 903307 55 7 ♦ 472pp ♦ £30

Discrimination Law Handbook
2nd edn
Camilla Palmer/Barbara Cohen/Tess Gill/
Karon Monaghan/Gay Moon/Mary Stacey
Edited by Aileen McColgan
2007 ♦ Pb 978 1 903307 38 0 ♦ 968pp ♦ £55

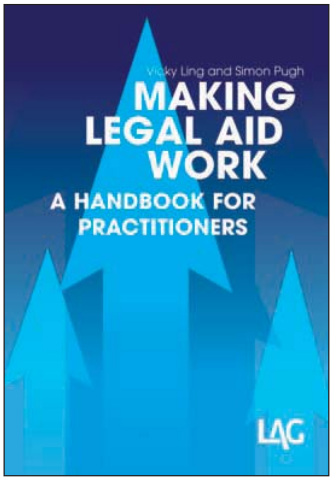
Age Discrimination Handbook
Declan O'Dempsey/Schona Jolly/
Andrew Harrop
2006 ♦ Pb 978 1 903307 48 9 ♦ 760pp ♦ £35

Maternity and Parental Rights
a guide to parents' legal rights at work
3rd edn
Camilla Palmer/Joanna Wade/
Katie Wood/Alexandra Heron
2006 ♦ Pb 978 1 903307 40 3 ♦ 880pp ♦ £35

Employment Tribunal Procedure
3rd edn
Judge Jeremy McMullen QC/
Rebecca Tuck/Betsan Criddle
2004 ♦ Pb 978 1 903307 29 8 ♦ 758pp ♦ £37

Family

Family Emergency Procedures
a guide to child protection and domestic violence 2nd edn
HALF PRICE
Nicola Wyld/Nancy Carlton
1998 ♦ Pb 978 0 905099 68 2 ♦ 448pp
** Reduced from £28 to £14*



Gypsy and Traveller law

Gypsy and Traveller Law
2nd edn
Edited by Chris Johnson/Marc Willers
2007 ♦ Pb 978 1 903307 52 6 ♦ 592pp ♦ £30

Housing

Housing Law
an adviser's handbook
NEW
Diane Astin
Dec 2008 ♦ Pb 978 1 903307 43 4 ♦ 968pp ♦ £35

Leasehold Disputes
a guide to Leasehold Valuation Tribunals
2nd edn
Francis Davey/Justin Bates
April 2008 ♦ Pb 978 1 903307 62 5 ♦ 376pp ♦ £30

Housing Law Casebook 4th edn
Nic Madge/Claire Sephton
Feb 2008 ♦ Pb 978 1 903307 45 8 ♦ 1192pp ♦ £55
** Includes a free CD-rom of complete contents*

Supported Housing and the Law
Sue Baxter/Helen Carr
2007 ♦ Pb 978 1 903307 51 9 ♦ 680pp ♦ £30

Homelessness and Allocations
7th edn
Andrew Arden QC/Caroline Hunter/
Lindsay Johnson
2006 ♦ Pb 978 1 903307 37 3 ♦ 880pp ♦ £45

Defending Possession Proceedings 6th edn
Nic Madge/Derek McConnell/
John Gallagher/Jan Luba QC
2006 ♦ Pb 978 1 903307 30 4 ♦ 840pp ♦ £48

Quiet Enjoyment 6th edn
Andrew Arden QC/David Carter/
Andrew Dymond
2002 ♦ Pb 978 1 903307 14 4 ♦ 320pp ♦ £29

▶ Books

Human rights

Human Rights Act Toolkit OUT OF STOCK
2nd edn
Jenny Watson/Mitchell Woolf
Feb 2008 ♦ Pb 978 1 903307 61 8 ♦ 268pp ♦ £30

European Human Rights Law
Keir Starmer QC
1999 ♦ Pb 978 0 905099 77 4 ♦ 960pp HALF PRICE
** Reduced from £35 to £17.50*

Immigration and asylum

Support for Asylum-seekers
a guide to legal and welfare rights 2nd edn
Sue Willman/Stephen Knafler/
Stephen Pierce HALF PRICE
2004 ♦ Pb 978 1 903307 24 3 ♦ 788pp
** Reduced from £39 to £19.50*

Law reform

The Justice Gap NEW
whatever happened to legal aid?
Steve Hynes/Jon Robins
April 2009 ♦ Pb 978 1 903307 63 2 ♦ 192pp ♦ £20

Beyond the Courtroom
a lawyer's guide to campaigning
Katie Ghose
2005 ♦ Pb 978 1 903307 35 9 ♦ 396pp ♦ £20

Practice and procedure

Making Legal Aid Work NEW
a handbook for practitioners
Vicky Ling/Simon Pugh
April 2009 ♦ Pb 978 1 903307 68 7 ♦ 352pp ♦ £40

Inquests
a practitioner's guide 2nd edn
Leslie Thomas/Adam Straw/Danny Friedman
Aug 2008 ♦ Pb 978 1 903307 57 1 ♦ 736pp ♦ £48

The Adviser's Toolkit
giving legal advice
Elaine Heslop
2007 ♦ Pb 978 1 903307 49 6 ♦ 384pp ♦ £22

Parole Board Hearings
law and practice
Hamish Arnott/Simon Creighton
2006 ♦ Pb 978 1 903307 42 7 ♦ 356pp ♦ £24

Public law

Judicial Review Proceedings
a practitioner's guide 2nd edn
Jonathan Manning
2004 ♦ Pb 978 1 903307 17 5 ♦ 720pp ♦ £34

▶ Training

Spring 2009

Actions Against the Police (Advanced)

28 April
£195 + VAT 6 hours CPD Course grade: A
Trainers: Fiona Murphy/Heather Williams QC/ Phillippa Kaufmann

This course will provide practitioners with a comprehensive update of developments in the law relating to liability, procedure, quantum, costs and funding of relevance to police actions (including claims against other detaining authorities), since the course was last delivered in December 2007. In addition, there will be a special focus on public law remedies emerging from police cases, including identifying challenges in the context of complaint and misconduct processes and the exercise of police powers.

Practical Equality and Diversity Training for the Bar – London

7 and 12 May
£120 + VAT 2 hours CPD per evening Course grade: S
Trainer: Catherine Rayner

This course is designed to assist participants to implement the Equality and Diversity Code in chambers. It is open to all members and staff of chambers and will be particularly useful for chambers' equal opportunities officers. This course runs over two evenings on 7 and 12 May 2009. Please note that delegates are expected to attend both evenings.

Community Care Update

8 May – this course is now full. It runs again on 1 December 2009.
£195 + VAT 6 hours CPD Course grade: U
Trainers: Karen Ashton/Luke Clements/ Stephen Cragg/Phil Fennell/Stephen Lodge/ Pauline Thompson

LAG

Community Care Law Reports

practitioner seminar

Deprivations of liberty in health and social care cases

Speaker: Paul Bowen, barrister, Doughty Street Chambers
Chairperson: Stephen Knafler, barrister, Garden Court Chambers

6 May 2009
6.30 pm–8.30 pm, followed by a short reception
Doughty Street Chambers, London

1.5 hours CPD

Each CCLR subscriber is allowed two free places per subscription on this seminar. Additional places are charged at £25 + VAT per delegate. Non-subscribers are charged £25 + VAT.

Places are limited and will be allocated on a first-come, first-served basis.

To book
Tel: 020 7833 2931 Fax: 020 7837 6094
E-mail: lag@lag.org.uk

If you register your interests at: www.lag.org.uk/getupdates, we will e-mail details of LAG's courses to you.

Training information

▶All courses take place in central London unless otherwise stated.

***▶Subscribers to Legal Action** receive a 10% discount on course fees! Discount applies to mailing address only.*

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LAG is accredited with the Law Society, the Bar Council and the Institute of Legal Executives.
COURSE GRADES Law Society-accredited courses are graded as follows:
B Basic/Introductory I Intermediate
A Advanced U Updating
S Suitable for all levels

CONCESSIONARY RATES may be available for certain individuals and organisations.

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Do you have ten or more people in your organisation who require training on the same subject? If so, we may be able to provide an in-house course at a more cost-effective rate. For more information about in-house training, concessionary rates or for any other training enquiries, please contact the Training Department, tel: 020 7833 2931 or e-mail: lag@lag.org.uk.

noticeboard

Conferences and courses

Shelter
Allocating social housing: law and practice
15 April 2009
10 am–4.30 pm
London
£225 + VAT (commercial)/
£200 + VAT (standard)/
£150 + VAT (concession)
5 hours CPD
This course looks in detail at the legal framework for local authority housing allocation schemes as well as Housing Corporation guidance to registered social landlords (RSLs) on their lettings policies. Delegates will have the opportunity to consider the implications of relevant case-law for allocation schemes and decisions made on housing applications. The course contains:
■ what is an allocation?;
■ eligibility: nationality and immigration law;
■ eligibility: unacceptable behaviour serious enough to make a person unsuitable to be a tenant;
■ points schemes and banding schemes;
■ suspension policies; and
■ issues for RSLs, arms length management organisations and large scale voluntary transfers companies.
Tel: 0844 515 1155
E-mail: training@shelter.org.uk
www.shelter.org.uk

London Discrimination Unit
Running a multi-strand discrimination case
28 April 2009
10 am–5 pm
London
£170 (for profit organisations)/
£120 (for non-profit/trade union members)
6 hours CPD
Tel: 020 7840 2024
E-mail: dstreete@lambethlawcentre.org

Garden Court North Chambers
Immigration seminar
7 May 2009
9.30 am–4.30 pm
Manchester
£50 + VAT/ £35 + VAT (voluntary organisations)
5.5 hours CPD
The seminar will be chaired by Ian Macdonald QC, and will include presentations on:
■ fresh claims – Kerry Smith;
■ detention – Alex Durance;
■ recent developments concerning the Citizens Directive – Paul Draycott;
■ how to approach article 3 – Vijay Jagadesham;
■ best practice in preparing fresh article 8 claims – Melanie Plimmer; and
■ asylum support for immigration lawyers – Rory O'Ryan.
Tel: 0161 236 1840
E-mail: hray@gcnchambers.co.uk
www.gcnchambers.co.uk

Inquest/Garden Court North Chambers
Inquest training event
15 May 2009
9 am–4.30 pm
Manchester
£150 + VAT
5.5 hours CPD
The programme will cover the latest developments in inquest law and practice, and will focus on providing practical tools and guidance for practitioners as follows:
■ first steps: contacting the coroner, funding, evidence and disclosure;
■ the scope of the inquest (including article 2 of the European Convention on Human Rights);
■ pre-inquest hearing and witnesses;
■ expert evidence, juries and conducting the full hearing and verdicts;
■ a coroner's point of view;
■ post-inquest remedies: damages, civil claims, conditional fee agreement funding;
■ how Inquest's casework impacts on policy and practice; and
■ the Coroners and Justice Bill and other developments, including *Roach v Home Office*; *Matthews v Home Office* [2009] EWHC 312 (QB), 25 February 2009 on the recoverability of inquest costs.
Tel: 020 7263 1111
www.inquest.org.uk

Lectures, seminars and meetings

Doughty Street Chambers
Mental health for immigration lawyers
28 April 2009
6.30 pm–8 pm
London
£20
1.5 hours CPD
Paul Bowen and Alasdair Mackenzie lead this seminar which aims to assist practitioners to deal with mental health matters as they arise in the immigration context. It will provide a practical introduction to mental health law, and will look at the law and practice around removal or deportation of people with mental health issues, including the UK Borders Agency's policy and the case-law of the European Court of Human Rights and the domestic courts.
Tel: 020 7404 1313
E-mail: enquiries@doughtystreet.co.uk
www.doughtystreet.co.uk

Volunteers required

Working Families
Working Families is recruiting solicitors or barristers from throughout the UK to join its pro bono list. Ideally, lawyers should have expertise in maternity and family-friendly rights or wish to develop their knowledge. This is an opportunity to participate in interesting and important work, and to develop expertise in this area of law.
E-mail: vanesa.wheeler@workingfamilies.org.uk
www.workingfamilies.org.uk

East Finchley Advice Service
East Finchley Advice Service is a charitable organisation in East Finchley, London N2. The service provides advice to local residents on a wide range of consumer problems. It runs a weekly, one-hour, drop-in legal advice session on Tuesday evenings which is staffed by volunteer, qualified solicitors who normally work one evening a month. The service now needs additional volunteer solicitors, particularly those specialising in housing, family law and employment law.
E-mail: help@efas.org.uk
www.efas.org.uk

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