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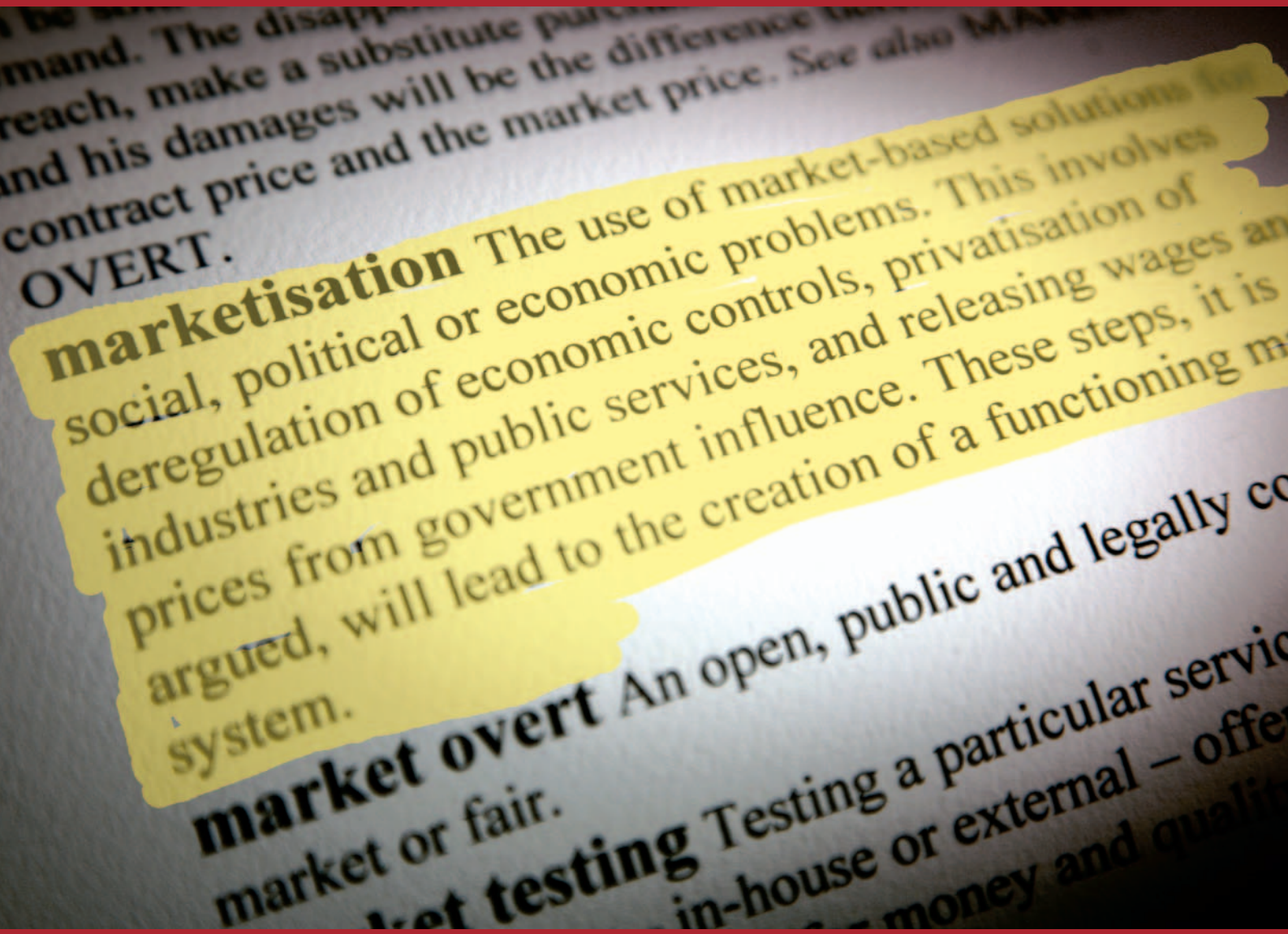

MARKETISATION OF LEGAL SERVICES

Evaluating the Public Defender Service

Small claims – big questions

Recent developments in housing law

Homelessness reviews: when can local authorities withdraw s184 decisions?

Community care law update – Part 1

Mental health law update

LAG

LAG

The purpose of the Legal Action Group 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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Market forces rule OK?

The Legal Services Bill, introduced in the House of Lords in November 2006, seems set to bring about a sea change in legal services. While introducing some welcome reforms in regulation and complaints handling, the bill also has worrying implications for clients' access to justice and legal aid firms (see July 2006 *Legal Action* 3 and 8).

The bill is the latest (and last) step of a journey that began in March 2001 with the Office of Fair Trading's report *Competition in professions*. Consumer groups were concerned at the restrictive practices and bewildering 'regulatory maze' of the legal profession. In July 2003, the Department for Constitutional Affairs (DCA) set up Sir David Clementi's review to investigate and make recommendations. His report of the review, which was published in December 2004, was followed in due course by the current Legal Services Bill. LAG supports many of the bill's proposals for the establishment of an independent complaints-handling body for the legal profession and reform of the regulatory framework. However, Part 5 of the bill goes beyond the Clementi recommendations by permitting external ownership and alternative business structures (ABS) for legal services, and it is these areas that LAG views with concern.

The argument for ABS is that opening up the legal services market will enable new entrants to provide such services differently – and sometimes better. The Legal Services Bill's regulatory impact assessment (RIA) sets out the benefits for change in the context of market opportunity. So, less regulation and restriction of who can provide legal services will allow the market to expand and develop, to work better through a wider range of structures and permit external ownership of businesses that offer legal, and other, services. Barriers to entry will be lowered and investment will grow. Economies of scale from integrated practices will permit firms to share good practice and innovation, provide better training for staff and more career opportunities for under-represented groups, such as black and ethnic minority lawyers. More comprehensive, one-stop services could be offered, particularly through banks and building societies, which, in turn, may mean that currently unprofitable legal services (for example, in rural areas) become financially viable and attractive.

There is little downside in this rosy picture of the future, except that the RIA states that 'inefficient suppliers on local high streets and in rural areas may be forced to close down under the pressure of greater competition from lower cost providers … This risk should be mitigated by the expected changes in the provision of legal services'. There is quite a lot riding on the words 'inefficient' and 'should' in this statement, and LAG does not accept that the risk should be so easily airbrushed out of the picture.

The introduction of ABS could have a serious, adverse impact on some users of legal services, and the proposed safeguards are by no means guaranteed to prevent this. LAG has joined with the Legal Aid Practitioners Group and the Solicitor Sole Practitioners Group to lobby against those aspects of the bill that are likely to damage access to justice.

If legal services are just one part of a business, lawyers may find their independence compromised as they come under pressure to support other business objectives, such as maximising profit for shareholders, or cross-selling other business services (financial services, for example), and conflicts of interest will arise. Client confidentiality may also be jeopardised as information provided to lawyers could leak to other areas of the business.

The government maintains that there are adequate safeguards in the bill to protect clients' interests, such as a requirement for a head of legal practice to ensure compliance with regulatory and professional requirements, and a 'fitness to own' test. However, these safeguards may prove ineffective in practice because of the strong economic pressure to look after the wider interests of the business rather than those of clients. A lapse in compliance standards is likely to come to light well after the event has taken place – and possibly too late for clients to have an adequate remedy; the mis-selling of financial services, such as pensions and endowment policies, is an example of how things could go wrong for ABS.

Once the legal services market is opened up, commercial interests will, inevitably, be paramount. New providers are likely to compete for the most profitable or commoditised areas of legal work, and to be unwilling to take on legal aid or unprofitable work. Clients with such cases may find fewer firms willing to take them on as the number of providers dwindles. Clients do not have a powerful voice or economic muscle, but their future under the new regime should not be left to chance. LAG favours the establishment of legal disciplinary partnerships (LDPs), as Clementi proposed. The effect of LDPs should be tested first before allowing external ownership and more radical structures for legal services. LAG urges strongly that ABS should not be permitted until and unless access to justice can be assured for everyone.

News 4–5
UK Borders Bill progress report/ Access to Justice Alliance plans week of action/**news feature:** LAG gives evidence on legal aid reform to MPs' committee/ Legal Aid Lawyer of the Year Awards 2007/ LSC consults on CDS reforms/E-petition calls on PM to scrap Carter reforms

Features 6–12
Legal services 6
Marketisation of legal services/ Dexter Whitfield

Legal services 9
Evaluating the Public Defender Service/Fiona Bawdon

Practice and procedure 11
Small claims – big questions/ Val Reid

Law & practice 13–33
Housing 13
Recent developments in housing law/Jan Luba QC and Nic Madge

Housing 20
Homelessness reviews: when can local authorities withdraw s184 decisions?/Ian Loveland

Community care 23
Community care law update – Part 1/Karen Ashton and Jean Gould

Mental health 29
Mental health law update/ Robert Robinson and Michael Konstam

Updater 34
LAG orders
Noticeboard

UK Borders Bill progress report

The UK Borders Bill is currently being considered by a Public Bill Committee. This process has replaced the standing committee procedure and differs in that the Public Bill Committee may consider written and oral evidence 'from officials and experts outside of parliament ... to give committee members more information on which to make their decisions'.

Among the bill's more significant provisions, it seeks:

- to introduce further, wide-ranging powers to immigration officers;
- to provide for biometric identity cards to be rolled out for those subject to immigration control;
- to allow for reporting and residence conditions to be imposed on anyone with limited leave to remain; and
- to introduce mandatory deportation for past or current prisoners convicted of specified offences (ie, those listed in the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 SI No 1910) or where they are subject to a custodial sentence of at least 12 months.

■ A briefing on the bill by the Immigration Law Practitioners' Association is available at: www.ilpa.org.uk.

Access to Justice Alliance plans week of action

The Access to Justice Alliance (AJA) is planning further moves in its campaign for properly resourced, high quality and sustainable legal aid services. Following a lively general debate on the future of legal aid in the House of Commons (see February 2007 *Legal Action* 4), the campaign now plans to hold a week of action from 14 to 18 May 2007, under the slogan: 'Justice – Access Denied'. Plans are underway for activities to take place in regions around the country, with a focus on county courts, to highlight the need for legal aid funding to enable people to enforce or defend their rights. Petitions and a postcard campaign are also planned, with clients and potential users of legal aid services expressing their support.

Alison Hannah

Alison Hannah, LAG's director (pictured), who has just become chair of the AJA, commented: 'The AJA has achieved a great deal so far in raising awareness of the need to defend legal aid. Everyone involved in these services should support the campaign and contact AJA members to take part.'

■ Further details about the AJA's week of action will be reported in future issues of *Legal Action*.

news feature

LAG gives evidence on legal aid reform to MPs' committee

Continuing its inquiry into legal aid reform, the House of Commons Constitutional Affairs Committee (CAC) has taken oral evidence from a variety of witnesses including Alison Hannah, LAG's director.

The initial evidence session, with Lord Carter and the Legal Services Commission (LSC), focused on the numbers of people assisted, the diversity of providers and whether competitive tendering can preserve an adequate supply of quality legal aid services. Lord Carter maintained that the reforms would cut the number of solicitors' offices, but doubted there would be fewer solicitors, believing that there is a 'very vibrant supplier base'. This was denied by the subsequent Law Society witnesses, who stressed the fragility of the supplier base, and the difficulty in maintaining it beyond an initial round of competitive tendering. They urged the need to pilot the changes through a staged approach (a view apparently supported by Carolyn Regan, chief executive of the LSC, who, in her evidence to the CAC, commented on the need to roll out the programme for change 'in a sensible phased approach'). The Bar Council stressed that price competitive tendering would drive down quality of services.

Professors Ed Cape and Judith Masson gave evidence with members of the senior judiciary. Professor Cape commented that a failure to pilot implementation of the Carter proposals is 'reckless because, apart from anything else, the changes that it makes will be irreversible'.

Sir Anthony Clarke, Master of the Rolls, expressed the concern of civil judges to maintain the level of access to justice, and urged caution over implementation of the reforms. While the changes proposed for criminal legal aid should go ahead, he suggested that those proposed for the civil side should be delayed until their impact is assessed. Lord Justice Thomas stressed the judiciary's interest in making the system work efficiently and favoured the move to fixed fees rather than hourly rates of payment. However, he was also concerned at the effect of price competition on quality of services. The impact of fixed fees on civil work, the numbers of people helped, piloting, the viability of second and subsequent bid rounds for competitive tendering, and peer review were all issues canvassed with not for profit organisations and private practitioners in later evidence sessions.

Alison Hannah gave evidence with Richard Jenner and Adam Griffith, both from the Advice Services Alliance. Their session was followed by testimony from specialists in mental health, family and care, and social welfare law. The general view of practitioners was that the reforms would damage services to clients by giving lawyers an incentive to focus on 'cheap and cheerful' cases rather than taking on more complex and lengthy cases or vulnerable clients, where costs would exceed the fixed fees and carry a risk of economic failure for the provider.

The CAC intends, subject to agreement, to publish the report of its inquiry into legal aid by the beginning of April 2007. The government is expected to give its response around six weeks later.

IN BRIEF

■ The Law Centres Federation (LCF), in partnership with Southwark Law Centre® and Southwark LGBT Network, has produced a DVD entitled 'Pride not prejudice', which focuses on discrimination and harassment at work on the ground of sexual orientation. 'Pride not prejudice' explains the Employment Equality (Sexual Orientation) Regulations 2003 SI No 1661, which were introduced in December 2003, and describes how they protect lesbian, gay and bisexual people in the workplace. The DVD also provides information on the options available to deal with discrimination and harassment.

As part of the LCF's 'Equality through justice' campaign, Law Centres across the country will continue to run training and awareness-raising activities around the sexual orientation, religion or belief and age employment equality legislation until the end of March 2007.

Some examples of the awareness-raising activities being undertaken by various Law Centres include:

■ Bury Law Centre's public information day in the main shopping mall in Bury;
■ South West London Law Centre's employment training seminars in six London boroughs for employers; and
■ Streetwise Community Law Centre's awareness-raising of the age regulations among front-line youth support staff through an e-mail bulletin, an e-mail question and answer service, and training.

For further information visit: www.lawcentres.org.uk. Free copies of the DVD are currently available from Savita Narain, tel: 020 7121 3320 or e-mail: savita@lawcentres.org.uk.

Legal Aid Lawyer of the Year Awards 2007

The Legal Aid Practitioners Group is calling for nominations for the fifth Legal Aid Lawyer of the Year (LALY) Awards, which celebrate the work of solicitors and barristers who have dedicated their careers to the service of some of the most vulnerable members of society.

Nominations are being sought in ten categories:

■ Mental health;
■ Immigration and asylum;
■ Young solicitor;
■ Barrister;
■ Family;
■ Criminal defence;
■ Young barrister;
■ Solicitors' organisation;
■ Social and welfare; and
■ Chambers of the year.

The panel of judges, chaired by Cherie Booth QC, will also be making an award for outstanding achievement. The deadline for nominations is 5 April 2007. The awards will be presented at a ceremony in London in June 2007.

■ For a nomination form, tel: 020 7960 6844 or visit: www.lapg.co.uk/docs/LALYNominForm.pdf.

LSC consults on CDS reforms

The Legal Services Commission (LSC) plans to consult on the expansion of the Duty Solicitor Call Centre (DSCC) and Criminal Defence Service (CDS) Direct in March 2007. This consultation will set out the principles behind the expansion and provide an overview of how the new system would operate. Under these proposals, however, all requests for publicly funded advice would go via DSCC from October 2007. CDS Direct would then provide telephone advice, in appropriate cases, before assigning a case to a private practice, if an attendance was required.

The LSC's 'illustrative' timetable for the consultation is set out below:

■ March 2007: consultation document published;
■ April 2007: consultation period ends;
■ May 2007: consultation outcome published; and
■ October 2007: expanded service potentially implemented.

While the consultation period is running, the LSC intends to continue with some stages of the CDS Direct tendering process. 'These steps will not bind us to the changes but are necessary to ensure that we are able to implement an expanded CDS Direct service from October 2007 if this is the outcome from the consultation.' The key dates in the CDS Direct tender timetable are:

■ 1 February 2007: invitation to submit and expression of interest was published;
■ 9 March 2007: closing date for submitting expressions of interest;
■ April 2007: short listing of applications completed and invitation to tenders published; and
■ May 2007: contracts with successful bidders signed.

Meanwhile, the LSC has published *Market stability measures: final response to the public consultation* on the proposals to amend the current duty solicitor arrangements from 1 April 2007. The *Market stability measures* consultation closed on 24 January 2007. Two key changes were proposed to the current system:

■ the introduction of a new method for allocating duty solicitor slots for police station and court duty work; and
■ changes to the current 'service requirements' for duty solicitor cases.

In addition, there were also proposals within the consultation paper to create a temporary moratorium on new contracts being awarded and to ensure that performance standards are enforced.

The final response to the consultation confirms that:

■ by 1 March 2007, the LSC will confirm in writing the number of slots to be allocated to firms for the period between 1 April 2007 and 1 October 2007;
■ slots will be allocated to firms, but with assigned named solicitors for the DSCC to contact; and
■ there will be no changes to the court duty solicitor slot allocation method. This may change from October 2007 depending on the outcome of the consultation paper *Police station reforms: boundaries, fixed fees and new working arrangements*. This consultation paper has just been published by the LSC. The LSC has also published a consultation paper entitled *Best value panel for very high cost cases*. (See page 34 of this issue for details of both these documents.)

E-petition calls on PM to scrap Carter reforms

An e-petition that calls on the Prime Minister to 'scrap Lord Carter's legal aid reforms' is being hosted on the Downing Street website. At the time of going to press, the petition had 1,183 signatories.

The e-petitions' system was launched in November 2006 by Downing Street, working in partnership with the charity mySociety, to enable anyone to address and deliver a petition directly to the Prime Minister.

■ The e-petition is available at: http://petitions.pm.gov.uk/scrap-carter/. The deadline for signatures is 22 January 2008.

In this article, Dexter Whitfield, research fellow at the European Services Strategy Unit, Sustainable Cities Research Institute, Northumbria University and author of *New Labour's attack on public services*,[1] provides an introduction to the marketisation of public services, looking at its ideological underpinning, the five methods of marketising services and its impact on legal services.

Marketisation of legal services

Ideological underpinning

A new language pervades the public sector: contestability, commissioning, competition, choice, personalisation and market mechanisms. This article examines the new competitive regime for legal services in the context of the government's strategy to marketise the criminal justice system and all public services.

The cost of legal aid has increased by 10 per cent in real terms since 1997, prisons by 30 per cent and probation by 70 per cent. But the forecast of savings from market 'reforms' is relatively small. Efficiency and cost cutting are being used to justify Labour's ideological commitment to competition and making markets.

The marketisation of public services is driven by neoliberalism, a conservative economic philosophy which has a number of components such as a belief in the superiority of markets, that competition drives down costs, that the private sector is more efficient and innovative than the public sector and that individual choice will improve the quality of services. It is also claimed that choice will reduce inequality because market forces are a more equalising mechanism than political voice, which the middle classes have traditionally used to benefit most from public services.

Five methods of marketising services

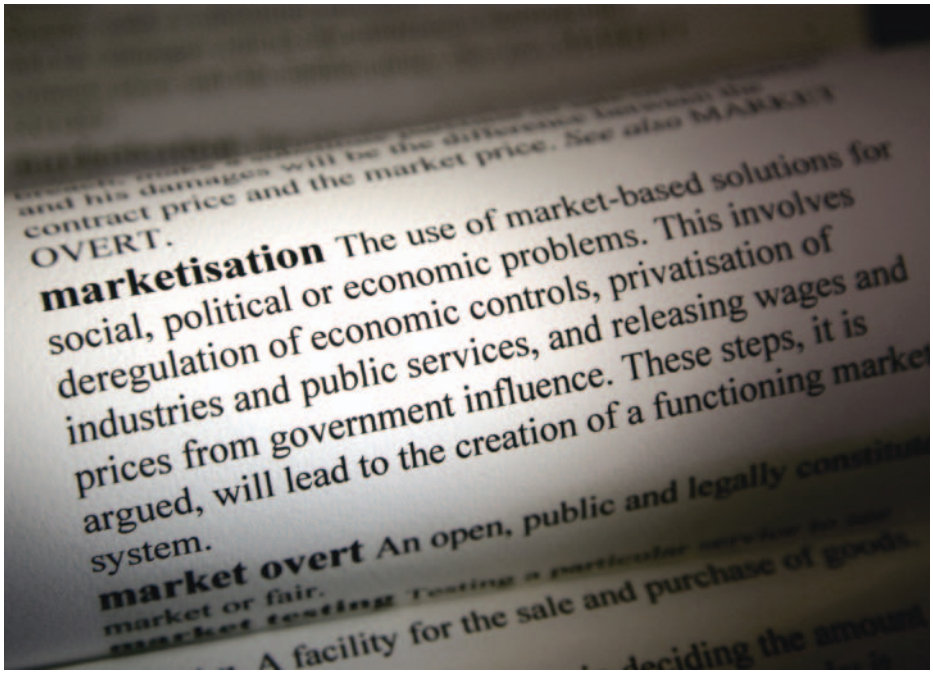
A five-part typology of methods is used to marketise public services, in particular the criminal justice system and legal services.[2] This covers the specification of services; the reorganisation of work so that it can be contracted; the introduction of market mechanisms in the financing, organisation and management of public bodies; treating service users as individual consumers and restructuring democratic accountability by transferring responsibility to new companies, boards and trusts; and, finally, embedding business interests in public policy-making. So how are these methods being applied in legal services and the criminal justice system?

'The marketisation of public services is driven by neoliberalism, a conservative economic philosophy which has a number of components such as a belief in the superiority of markets, that competition drives down costs, that the private sector is more efficient and innovative than the public sector and that individual choice will improve the quality of services.'

■ The commodifying or commercialising of services for competition requires the description, quality and operation of legal services to be changed so that they can be specified, priced and packaged in a contract to comply with the procurement process and the contracting system. The Home Office, the Department for Constitutional Affairs and justice agencies are increasingly outsourcing IT, support services and consultancy as well as prisoner escort services, electronic monitoring, managing accommodation projects for persistent offenders and services to prisons. Legal services are also being outsourced by local authorities, the NHS, government departments and other public bodies in strategic partnerships, framework agreements and through public-private partnership (PPP) advice.

The infrastructure is also being commodified as PPP/private finance initiative (PFI) projects are used for the renewal, replacement and provision of new police stations, courts, prisons, remand centres, hospitals, schools, transport links and other facilities. By December 2006 there were 50 signed PFI projects in the prison, police and court services accounting for £1,367m capital expenditure with many more at the planning and procurement stages. What were previously 'whole' systems or networks are divided into separate projects so that they can be privately financed and operated.

■ Commodifying or commercialising of labour involves reorganising the scope and content of work such as changes in job



JOANNE O'BRIEN

descriptions, responsibilities and staffing levels to match the specification of services. The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) and the Code of Practice on Workforce Matters in Public Sector Service Contracts afford a degree of protection to workers but also make it easier to transfer staff from one employer to another.

■ Neoliberalism also requires the reconfiguration of government into a commissioning role accompanied by the privatisation of assets and withdrawal from provision. Funding is designed to follow patients and pupils, national price tariffs (such as those in the NHS) set prices, new rules restrict access to investment to those authorities which accept privatisation, and competition between public bodies and between public and private providers is intensified.

The new legal services framework is intended to deregulate legal services, abolish anti-competitive rules and set up a new Legal Services Board with statutory powers. A new Office for Legal Complaints will deal with consumer complaints. In-house providers such as the Public Defender Service will have to compete in the market and the contract win-rate will determine its future viability.

The National Offender Management Service, the new contestability and competition regime for prisons and probation services, includes market-testing of all publicly managed prisons and ultimately offender management, the central supervisory function of the probation service.

■ Service users are treated as individual consumers. Services and functions are transferred to arms length companies, trusts and privately controlled companies. Democratic accountability and transparency is eroded as governance is shared by public and private interests with token user representation.

■ Business interests are increasingly embedded in the public sector through contracts, PFI projects, management consultants, representation on boards of arms length companies and trusts, and through greater involvement in the public policy-making process via trade and business associations. Business interests thus have a more powerful role in European, national, regional and local public policy-making, implementation and evaluation.

> 'The Carter Review refers to 'managed competition', 'sustainable markets' and 'price competition'. But markets are never static and are rarely manageable in the way forecast.'

'Best value' tendering of legal services

There is a dangerous assumption that branding competitive tendering as 'best value' will make the contracting process more acceptable or workable. It is essential that the bid evaluation process assesses quality and price at the same time, irrespective of earlier quality thresholds. The shortlisting of firms is usually via a suitability/capability/quality assessment followed by a combined quality/price assessment on a 70/30 or 50/50 basis.

Both the government's and expert services firm LECG's claim that 'competitive tendering is widely and successfully used in government … for procurement of products and services such as in health services support, road transport, construction, IT, consulting and many others' is simply a denial of the evidence.[3] The outsourcing of hospital cleaning has been a disaster with the government forced to spend over £60m on new systems thus eliminating most of the so called savings.[4] One hundred public sector IT projects outsourced to the private sector have had multi-million pound cost increases, delays and system failures.[5] Three out of 22 (14 per cent) strategic service delivery partnerships in local government have failed.[6]

There has been very little discussion about the transaction costs of a market system. The Legal Services Commission (LSC) will bear all the client costs of commissioning, the procurement process, the regulatory regime and managing the market. These costs normally vary between 5–10 per cent of the total cost of the service. Private firms must absorb the cost of bidding.

The notion that fewer, larger firms and greater transparency will produce better information is simplistic. As the client, the LSC will maintain commercial confidentiality and legal services firms will use the same process to maintain secrecy of bids as part of their market strategies.

The Carter Review refers to 'managed competition', 'sustainable markets' and 'price competition'. But markets are never static and are rarely manageable in the way forecast. Competitors respond to gains or losses of market power and seek to maximise profit by acquisition, gaming, potentially collusive bidding practices and exploiting regulatory loopholes.

Impact on legal services

The marketisation of legal services will have a profound effect on solicitors, service users and the criminal justice system:

The five methods of marketising services:

- The commodifying or commercialising of services for competition requires the description, quality and operation of legal services to be changed so that they can be specified, priced and packaged in a contract to comply with the procurement process and the contracting system.
- Commodifying or commercialising of labour involves reorganising the scope and content of work such as changes in job descriptions, responsibilities and staffing levels to match the specification of services.
- Neoliberalism also requires the reconfiguration of government into a commissioning role accompanied by the privatisation of assets and withdrawal from provision.
- Service users are treated as individual consumers.
- Business interests are increasingly embedded in the public sector through contracts, PFI projects, management consultants, representation on boards of arms length companies and trusts, and through greater involvement in the public policy-making process via trade and business associations.

- Gaming in legal services is likely to emerge. For example, maximising the number of cases which qualify for being withdrawn from the tendering process and to be treated as cost items. The 'parking' of difficult/complex/unprofitable cases for which time/resources cannot be predicted or are highly uncertain may also develop.
- Outsourcing of prison/court/police station escort transport has led to delays, with prisoners not being available at the planned time thus increasing waiting time. The government wants larger solicitors' firms but a mixed economy of private companies, social enterprises, community organisations and public sector provision for probation. This fragmentation of provision and responsibilities could make solicitors' work subject to other delays and costs.
- The introduction of market mechanisms in related services such as Jobcentre Plus, skills and employment training, physical and mental health services, drug and alcohol treatment and support is also likely to increase the level and severity of delays.
- Market forces are likely to result in changes in the quality of service. Cost pressures could lead to limiting case investigation, for example, in the time allocated to finding witnesses and obtaining statements. The imposition of commercial and contracting restrictions is almost certain to have negative consequences for civil cases in social, welfare, family and immigration matters.
- Increasing private sector ownership of the criminal justice infrastructure both through PPP projects for prisons, courts and remand centres and through new criminal justice centres will add to the fragmentation of the criminal justice system. The growth of a secondary market of investment funds owning and operating diverse portfolios of PPP facilities could also increase the likelihood of private sector provision of core services.[7]
- New types of firms could emerge to deliver legal services – they will be influenced by what happens in the probation/prison sector with the possible development of multi-service providers (private companies or social enterprises) running community-based probation programmes and legal services.
- A loss of accountability and transparency in the criminal justice system when it is increasingly delivered by a plethora of providers contracted by unaccountable boards and trusts mainstreaming commercial confidentiality.
- Claims that market mechanisms will improve access and quality, recruitment, training and secure long-term sustainability and profitability of legal services while also reducing costs are likely to be exposed as wishful thinking.

The government has embarked on a high-risk strategy. The ultimate impact will be felt most by the service users, particularly those from black and ethnic minorities, and the social justice/equality agenda.

1 *New Labour's attack on public services: Modernisation by marketisation? How the commissioning, choice, competition and contestability agenda threatens public services and the welfare state*, Dexter Whitfield, Spokesman Books, 2006, see: www.spokesmanbooks.com.
2 See note 1.
3 *Single purchaser market: the procurement of criminal defence services (CDS)*, LECG on behalf of the Law Society, December 2006, p9.
4 See note 1.
5 *Cost overruns, delays and terminations: 100 outsourced public sector ICT projects*, Research report no 2, European Services Strategy Unit, forthcoming 2007.
6 *North Tyneside: A commissioning council?*, UNISON Northern, European Services Strategy Unit, 2006.
7 *Financing infrastructure in the 21st century: The long term impact of public private partnerships in Britain and Australia*, Dexter Whitfield, Don Dunstan Foundation, Australian Institute for Social Research, University of Adelaide, Australia, 2007.

In April 2007 *Legal Action*, Jane Hickman and Sue Pearson will respond to this article and explore strategy and delivery in legal aid practice. In May 2007 *Legal Action*, Michael MacNeil will finish this series of articles by looking at notions of democratic accountability and the need to build a user's perspective at the strategic policy-making level.

Glossary

'Contestability' is achieved by the threat of other providers entering the market thus putting pressure on the existing provider to maintain quality and efficient services.

'Personalisation' is the design and funding of services built around the needs of individuals. For example, direct payments to care users who then purchase their own services.

'Gaming' is the tactics used by service providers to avoid or minimise service delivery to users who require a high level of resources, time and/or specialist support, or reclassifying treatment and level of service to maximise income.

Fiona Bawdon, freelance legal journalist, discusses the findings of the independent evaluation of the Public Defender Service (PDS) in England and Wales and the PDS annual report 2005/06,[1] both published in January 2007, and asks what the future holds for the PDS.

Evaluating the Public Defender Service

Findings of the report

After sitting on the report for over a year, the Legal Services Commission (LSC) has finally published the findings of the independent researchers who monitored the performance of the eight PDS offices during the first four years of the service's life. At over 350 pages, the findings are, as you would expect, complex and detailed. However, the LSC's interpretation of the findings is clear: the PDS has been a success. 'The Public Defender Service … provides a better quality of service than private practice according to independent research published today', it states unequivocally in the press release accompanying publication of the report.[2]

The LSC announcement makes scant mention of another of the researchers' key findings: that the PDS is hugely more expensive than private practice. At a time when practitioners are under pressure as never before to demonstrate value for money, the LSC's deafening silence on this crucial issue is seen as insulting and inappropriate.

One of the key aims for the pilot was to provide cost benchmarks for defence work. Surprising then that what the LSC fails to mention is that average case costs for the PDS were 40–90 per cent greater than private practice – a figure which would be far higher if the service's central and start-up costs (nearly £3.5m from 2001–2006) were added into the equation. Not unreasonably in the current financially straitened climate, practitioners question whether the £18.5m of legal aid money spent on the PDS (from launch to March 2006) might not have been better spent elsewhere.

Interestingly, the research findings turn on their head the assumptions that fuelled the launch of the PDS pilot in the first place: that a salaried service would be more cost-effective than private practice, but that there might be issues over quality.

The PDS pilot was the project of the then junior minister in the Lord Chancellor's Department, David Lock, who believed that a salaried service would be cheaper and prove that private firms – driven by the desire to make profits – were padding their bills by doing unnecessary work.

Such concerns as there were about a salaried service centred around whether quality could be maintained and whether its lawyers would have the robust independence of their counterparts in private practice. For example, a year after the service's launch, Law Society president David McIntosh dismissed PDS lawyers as 'superannuated civil servants', who lacked the drive of private practitioners to be 'constant year after year in servicing night calls'.

In the event, far from being cheaper but of lower quality, the PDS has turned out to be more expensive but, with certain caveats, better quality.

Higher quality, higher price

One person who was not surprised at the findings is Tony Edwards, the solicitor in private practice who has been PDS professional head (part-time) since its formation. From the outset, Tony Edwards told anyone who would listen that the PDS would not be able to compete with private practice on price – but he believed there would be other advantages. In 1988, he told an audience of legal aid lawyers that the best way to provide efficient, high-quality criminal defence was via salaried defenders, relieved of the burden of having to run a practice. 'To be able to do the job you love doing without having to worry about admin is a sheer joy,' he maintained.

Tony Edwards is delighted that the research findings appear to have laid to rest concerns that PDS lawyers would be a bunch of jobsworths, who failed to fight their client's corner. Instead, PDS lawyers appeared to give more robust and effective advice, in some situations at least. At the police station, researchers found 'a clear pattern in several of the areas of clients being advised to exercise their right to silence more often by PDS advisers than by those from private practice'. PDS police station clients were more likely than private practice clients not to be charged or summoned for a criminal offence.

PDS lawyers also did better overall on peer review of files. The researchers conclude: 'Perhaps the greatest strength of the PDS, in comparison with private practice, lies in its ability to present good information, well communicated to clients in well structured files.' They add, however, that this may be 'partly attributable to the extra time available' to PDS lawyers because of 'their smaller caseloads'.

Richard Miller, the director of the Legal Aid Practitioners Group, accepts that some PDS offices have been shown to do some

things better than some firms, but insists it has failed in its aim of providing quality benchmarks for criminal defence work.

These offices were supposed to be models of best practice. They should be measuring their performance against the best firms – not against the average for all firms in the area.

Variations in quality/ performance

The researchers found considerable variations in quality and performance between the eight PDS offices. PDS head Gaynor Ogden accepts this and is somewhat more measured in her interpretation of the findings than others at the LSC. 'The message I take from the research is that overall PDS quality was better – with some regional variations,' she says.

In 2005/06, the Birmingham office was assessed by external peer reviewers at only 'threshold competence' – the lowest quality level the LSC will accept. Some 40 per cent of Birmingham's files were 'below threshold competence' (the comparable figure for local private practice firms was 29 per cent). An appeal by Birmingham to raise its peer review rating was unsuccessful.

The pilot was touted as a genuine experiment, to test the viability of a PDS. Inevitably, given the level of money and resources it has poured into it, the LSC is not a neutral observer and takes a resolutely 'glass half full' approach to the PDS's performance.

The 2005/06 PDS annual report trumpets a 27 per cent increase in cases on the previous year, and the fact that the service as a whole exceeded its national target by 18 per cent. 'Half of our offices have exceeded their own individual office targets,' it says. Or, to put it another way (if you were taking a 'glass half empty' approach), half of its offices failed to meet their targets. Additionally, what the report omits to spell out is that these improvements are almost entirely down to the strong performances of just two offices: Cheltenham and Darlington.

Cheltenham and Darlington are the PDS's success stories. Both offices, which were opened in areas with shortages of existing suppliers, are thriving. They have consistently beaten their target number of cases; in Darlington's case, it opened nearly double its expected number of files last year. According to Gaynor Ogden, in the past year (since the end of the research), both offices have become 'profitable'. Other offices have, however, consistently struggled to drum up enough business to justify (in financial terms, at least) their existence.

Rob Brown, executive officer of the London Criminal Courts Solicitors' Association, believes the PDS offices are so far removed from the facilities and resources available to most private firms that its experience is all but irrelevant. 'If you are Bill Gates and you throw money at a research laboratory in Cambridge, of course it will do amazing things!' he says.

What now for the PDS?

Richard Moorhead, one of the researchers and professor at Cardiff Law School, says the key issue now is whether the PDS's higher quality would be sustainable at 'the lower costs achieved by private practice'. He believes there are grounds for optimism: 'There's some evidence to suggest they would cope well [with being busier]. They have good systems and case management.'

Gaynor Ogden accepts the trick now will be to maintain quality while continuing to drive up productivity and drive down costs. PDS fee-earners averaged 800 chargeable hours annually, compared with the 1,500–1,600 typical of private practice.

Clearly, there is still some way to go. Birmingham and Pontypridd have never met their target number of cases; Swansea fell only three cases short of its target number in 2005/06 – but only because the target was reduced to 550 from 700 the previous year. Running costs for each of these offices last year were well over £300,000.

Middlesbrough, whose annual running costs peaked at over £500,000 in 2002/03, was quietly closed last year and staff transferred to Darlington. In its final year of existence, it managed only 66 per cent of its target number of cases.

On publication of the research, legal aid minister Vera Baird QC, MP stated: 'Clearly, the PDS has a future.' At the moment, however, no one seems to know what that future will be. The LSC has talked vaguely about expanding the PDS into other areas of law or co-locating it with other criminal justice agencies to reduce costs. It set up a working group over a year ago to look into the future of the PDS but, at the time of going to press, nothing had been announced. Despite claims of the PDS's success, no one is expecting that the service will be expanded; more likely is that some of the less productive offices will be closed as uneconomic.

Adding to uncertainty over the future of the PDS are the looming Carter reforms and the introduction of competitive bidding. Any system where suppliers are competing for work on price is unlikely to smile favourably on the PDS. Gaynor Ogden suggests that some defence work may be ring-fenced for the PDS and exempt from price bidding; other sources within the PDS dismiss any such hopes as 'optimistic', adding: 'The Carter reform programme is the future; the PDS has to fit with Carter, not the other way around.'

The service is, however, likely to survive in some form; and not just because it would be too embarrassing for ministers and the LSC to pull the plug entirely. The Cheltenham and Darlington offices are clearly providing a much-needed service in their areas (although conceivably could be spun off as private firms). There could be merit (and savings to the legal aid fund) in PDS lawyers fulfilling niche functions within the system, such as being stationed to oversee proper procedure at identity parades. In the 2004/05 PDS annual report, the LSC describes it as the 'research and development section' of the criminal defence service; providing a test bed for new methods of working and initiatives like diversion and outreach programmes.

Another key function of the PDS, and one which may prove decisive in discussions about its continuance, is that it gives the LSC an 'escape clause': it provides a pool of defence lawyers which can be parachuted into areas where firms have pulled out leaving a shortage of supply.

Rodney Warren, director of the Criminal Law Solicitors' Association, agrees that it is useful for the LSC to have a means of filling gaps in supply but adds, dryly: 'It's just a pity that they've created a situation where they need this kind of resource.'

1 *Evaluation of the Public Defender Service in England and Wales*, Lee Bridges et al, 2007, available at: www.legalservices.gov.uk/docs/pds/Public_Defenders_Report_PDF Version6.pdf and *Public Defender Service annual report 2005/6: Resolutely focused on our clients*, Legal Services Commission, available at: www.legalservices.gov.uk/docs/pds/PDS_ap2006_final.pdf.
2 Available at: www.legalservices.gov.uk/press/press_release93.asp.

■ Parts of this article were first published in 'Rose-tinted view on the work of public defenders', *Times*, 23 January 2007.

The Department for Constitutional Affairs (DCA) recently published research into three pilot schemes offering mediation in small claims disputes. It claims that these mediation schemes are 'quicker, cheaper, less adversarial and provide a better outcome for the court user', and proposes to roll out the Manchester model to other court areas across the country during 2007/08.[1] In this article, Val Reid, ADR Policy Officer for the Advice Services Alliance, outlines some concerns.

Small claims – big questions

Background

In December 2006, the DCA published four research reports into three small claims mediation pilot schemes at Exeter, Manchester and Reading County Courts. Each pilot scheme used a slightly different model:

- In Exeter, solicitors who were also qualified as mediators offered free 30-minute mediation appointments to litigants referred by the district judges. An earlier study by Jill Enterkin and Mark Sefton evaluated this scheme during 2003/04, and a later study by Dr Sue Prince and Sophie Belcher covered 2005/06.[2]
- In Manchester, a full-time salaried mediation officer was available in court to give information and advice about mediation, and to provide free one-hour face-to-face mediations to small claims parties. After the start of the pilot period he began to offer telephone mediation as well; this proved very popular.[3]
- The Reading pilot focused on giving advice and information about the small claims process to unrepresented litigants, with a by-product of facilitating some settlement negotiations. The scheme has since been discontinued.[4]

The questions

Headline conclusions do seem to show that mediation is highly successful in resolving small claims, and that the process is popular with the parties. However, a more detailed reading of the research raises serious questions about whether '… too much emphasis is placed on expediting cases and too little on the safety of outcomes in terms of "justice" …'.[5]

There are a number of questions to be asked:

- Does small claims mediation work?
- Are the participants happy with it?
- Does it save time and money?
- Does it add value to the small claims process?
- Is this really mediation?
- Is the DCA policy justified?

Does small claims mediation work?

This depends on what is meant by 'work'. In Manchester, 86 per cent of mediations resulted in a settlement. In Exeter, the figure was between 65 and 69 per cent. There was also little or no problem with enforcement: in Manchester all the mediated settlements were complied with, and in the earlier research at Exeter, only 4 per cent of mediated cases required enforcement action, compared with 19 per cent in the control group of cases where a judicial order was made. However, a closer look at the research findings indicates that this is not necessarily the whole picture. Whether mediation 'works' depends on other factors as well.

Are the participants happy with it?

User satisfaction with the mediation service itself was good at the courts in Manchester and Exeter. The earlier research in Exeter, however, identifies and challenges an assumption that if settlement is reached, parties are satisfied. This is not necessarily true, for a number of reasons.

Getting what you came for

Claimants using mediation can expect to settle for significantly less than those going to court. In Manchester, cases settled at mediation for an average of half of the claim value. The earlier report at Exeter found that the mean value of mediated settlements was 63 per cent of the claim value, and where a judgment was issued it was 83 per cent. In both schemes, some claimants expressed disappointment at what they perceived as low settlements.

Feeling under pressure

A number of parties felt under pressure to settle – partly by the limited time available, partly by the implied threat of 'going to court', and partly by the mediator. In Exeter, in the 2003/04 study, a mediator referred to the mediation process as 'a 30 minute hustle'; one litigant in that pilot called it a 'mild form of bullying' and another 'a form of blackmail'. It is worth noting, though, that in Manchester some parties felt that pressure had a positive effect in reaching settlement.

The effects of ignorance

The Manchester research found that many parties' satisfaction with the mediation process was linked to relief at avoiding what they feared would be a daunting court hearing – but most had no actual experience of this. Other research suggests that the normal small claims process does seem to work well for litigants-in-person, and that parties are often surprised at the informality of small claims hearings.[6] Better information and advice about the

small claims process would help unrepresented parties make more realistic assessments about the best way to resolve their dispute, but this could be costly.

Does it save time and money?

Mediation was free to court users in these pilots, so it cost them no more and no less than a hearing. If there are savings to be made, they must be for the courts. But this requires closer analysis.

How many small claims cases were settled through mediation?

During the Manchester pilot, 27 per cent of the small claims cases at the court were referred to the mediation officer, 41 per cent of these cases went on to mediation, and 86 per cent of these settled. This actually means that fewer than 10 per cent of all the small claims cases at Manchester were resolved through mediation. In addition, the settlement rate for telephone mediations was unreliable for much of the pilot, due to irregularities in recording when a telephone call became a 'mediation' (in effect, only when it resulted in a settlement).

How much judicial time was actually saved?

All the studies used a fairly crude analysis of judicial time savings. The Manchester researcher estimated that 172 hours of judicial time were saved over 12 months, but readily admits that this is a 'broad-brush' figure created by simply adding up the time allocated to cases which settled at mediation. Her rough estimate does not allow for cases which might not have led to a hearing anyway, or for judicial time spent on allocating cases to mediation or granting consent orders where an agreement was reached. The earlier Exeter report concluded, on the same 'broad-brush' basis, that 216 judicial hours had been saved in a year, but also stated that it was hard to say how much of this was a 'true' saving, given that just over half of non-mediated cases in the control sample did not result in a hearing either. Neither report takes the cost of the mediators into account.

Does it add value to the small claims process?

One of the claims made for mediation is that it can offer creative settlements that are not available through court orders – apologies, changes in policies and procedures and donations to charity. However, in both the Manchester and Exeter pilots, there was little evidence of this. In Manchester, for example, only 12 per cent of mediated settlements included an outcome that could not have been ordered by the court, and several parties felt that the focus was on compromise and bartering rather than achieving a win/win solution.

Is this really mediation?

Small claims mediation runs the risk of falling between two stools. It does not appear to meet some of the key criteria for mediation such as voluntariness and neutrality, nor does it meet the users' expectations of a legal process.

Voluntary or compulsory?

A key element of mediation is its voluntary nature, and the judgment in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, 11 May 2004 stressed that mediation should not be a compulsory part of the court process. But compulsion can be a matter of perception. In the earlier Exeter report, although the scheme was nominally a voluntary one, interviews reveal a worrying lack of clarity: two-thirds of the participants felt they had no choice, as they thought the judges might penalise them if they refused to try mediation. In addition, at least three of the ten mediators in the scheme were unclear about just how voluntary it was. Following the report, changes were made to the scheme to make it more apparent to the parties that it was voluntary; however, the 2005/06 research still found confusion about this.

What is the role of the mediator?

Another key principle of mediation is the neutrality of the mediator. In both pilots, researchers questioned whether the mediators appeared impartial. In the earlier Exeter report there was evidence that the mediators sometimes slipped into their familiar role as solicitors and gave advice to the parties or negotiated on their behalf. The researchers also found a competitive element among the Exeter mediators, who saw failure to achieve a settlement as a slight on their reputation. James Rustidge, the mediation officer in the Manchester scheme, has claimed that his past experience with the CID 'may have something to do with his attitude and success'.[7] As the Manchester researcher comments: 'If parties perceive that [the mediation officer's] job is to obtain mediated settlements, it might affect their perception of his impartiality.'

Is this justice?

In the earlier Exeter report, some of the parties felt aggrieved that no legal arguments were accepted in mediation, and that often the mediators did not seem to know anything about their case. They felt that it was not 'fair' if rights and wrongs were not taken into account. The researchers make the point that 'the streamlined nature of these proceedings and their lack of internal checks leave litigants with little or no recourse to challenge, appeal or simply complain about procedures or outcomes'.

Is the DCA policy justified?

These research reports do not really provide adequate evidence to support the DCA's enthusiastic plans to roll out the Manchester small claims mediation model throughout the court system. They also raise a serious question about whether such court-based settlement negotiations should really be called mediation. Some claimants may be happy to settle for less in order to benefit from a quicker procedure with fewer enforcement problems, but this is not what is traditionally meant by the mediation process. There needs to be much greater clarity about what is being offered, and enough information and advice for parties to make an informed decision about what they are choosing, and why. The researchers recommend changes to the process that would improve transparency and accountability, and provide greater safeguards for parties using an unfamiliar and unscrutinised process. More advice and better protection for participants could make these schemes a valuable alternative to court, but they might cost more, not less, than the present small claims procedure.

1 See: www.dca.gov.uk/civil/adr/.
2 *An evaluation of the Exeter small claims mediation scheme*, DCA research series 10/06, Jill Enterkin and Mark Sefton, December 2006, p86, available at: www.dca.gov.uk/research/2006/10_2006.htm. See also *An evaluation of the small claims dispute resolution pilot at Exeter County Court*, Dr Sue Prince and Sophie Belcher, September 2006, available at: www.dca.gov.uk/civil/adr/small-claims-exeter-full.pdf.
3 *Evaluation of the small claims mediation service at Manchester County Court*, Margaret Doyle, September 2006, available at: www.dca.gov.uk/civil/adr/small-claims-manchester.pdf.
4 *Evaluation of the small claims support service pilot at Reading County Court*, Craigforth, September 2006, available at: www.dca.gov.uk/civil/adr/small-claims-reading.pdf.
5 See *An evaluation of the Exeter small claims mediation scheme* at note 2.
6 *Monitoring the rise of the small claims limit: Litigants' experiences of different forms of adjudication*, LCD research series 1/97, John Baldwin, 1997, available at: www.dca.gov.uk/research/1997/197esfr.htm.
7 'Smooth talker', *Law Society Gazette*, 11 January 2007, p26.

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 and lower courts relevant to housing. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Homelessness

■ In January 2007, the government and the Housing Corporation jointly launched a new action team to drive policy on tackling homelessness in London. The team will be based in the corporation's London field office promoting good practice among London's local authorities and housing associations: Housing Corporation news release 06/2007, 24 January 2007.

■ Later this year, the Scottish Executive will bring forward policies on the relaxation or abolition of the 'local connection' rules in Scotland's homelessness legislation following the recent conclusion of a consultation exercise on the proposals set out in *Modifying local connection provisions in homelessness legislation*.[1]

■ In January 2007, the Wales Audit Office published *Tackling homelessness in Wales: a review of the effectiveness of the national homelessness strategy* containing its analysis of progress in implementation of the strategy for homelessness services in Wales and its recommendations for continued improvement.[2]

■ In January 2007, Communities and Local Government (CLG) published *Framework for planning and commissioning of services related to health needs of people who are homeless or living in temporary or insecure accommodation*.[3] The framework is intended to involve local housing authorities, social services, primary care trusts and other health authorities, mental health and community trusts, Supporting People teams, drug and alcohol teams, prison health services and the voluntary sector in joint planning to improve the access of homeless people to local health services, and to promote joint commissioning of these services where appropriate.

Housing allocation

■ On 15 January 2007, the government issued a consultation draft of a new statutory code of guidance on allocation of social housing by way of choice-based lettings.[4] Responses to *Allocation of accommodation: choice based lettings. Code of guidance for local housing authorities* are sought by 10 April 2007. The final guidance will be issued under Housing Act (HA) 1996 s169.

■ From 20 January 2007, the government abandoned its 'moveUK' initiative designed to enable applicants to access available social and private sector rented property across the country. The Homes Mobility Scheme has also ended. Both the LAWN Mobility and Seaside and Country Homes schemes have been suspended.

Disability and housing

On 18 January 2007, the government launched a consultation paper on the future of disabled facilities grants (presently funded to the extent of £126m in 2007/2008) made under Housing Grants, Construction and Regeneration Act 1996 ss19–24.[5] Responses to the paper, *Disabled facilities grant programme: the government's proposals to improve programme delivery*, are sought by 13 April 2007.

Housing and regeneration

In January 2007, the government announced that it would establish a new agency – Communities England – to take forward work on housing and regeneration previously handled by the Housing Corporation and English Partnerships and with an annual budget of over £4bn. See CLG news release 2007/0005, 17 January 2007.

Housing and freedom of information

On 3 January 2007, the Information Commissioner upheld a complaint against *Braintree DC* reference FS50066606 that it had wrongly failed to meet the complainant's request for a list of all council houses and flats in its area.[6] The commissioner decided that there was no substance in the council's grounds for refusal under the Freedom of Information Act 2000 ss38 and 40. He directed that the information be provided within 35 days.

Private rented housing

In December 2006, the Welsh Assembly government published *Providing the solution – improving the private rented sector as an option for resolving housing need in Wales*.[7] The study (commissioned from Shelter Cymru) explores the barriers that low-income households experience when accessing private rented accommodation. The research goes on to investigate the ability of the private rented sector to provide and manage housing for low-income households.

Anti-social behaviour

■ On 15 January 2007, Sir David Normington KCB, the permanent secretary at the Home Office, and Louise Casey, head of the Respect Task Force, gave oral evidence to the Public Accounts Committee on the progress (or otherwise) of the government's strategy for tackling anti-social behaviour.[8]

■ On the same day, the government published Housing research summary 232, 2006: *Priority review of the uptake by social landlords of legislative powers to tackle anti-social behaviour*.[9] The report considers the ability (or otherwise) of social landlords to handle legal tools to control anti-social behaviour.

■ On 22 January 2007, another wave of anti-social behaviour material was issued from the government's Respect Task Force including:
– *The Respect handbook – a guide for local services*;[10]
– new statistics on injunctions, possession orders and demotion orders;[11] and
– a list of 40 local authorities allocated an additional £6m for parenting classes (see Respect news release, 22 January 2007).

Housing advice

In January 2007, Shelter published *The advice gap: a study of barriers to housing advice for people from black and minority ethnic communities*.[12] The report reveals that many people from black and minority ethnic communities face major barriers when accessing housing advice.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1 of Protocol No 1

■ Hutten-Czapska v Poland

App No 35014/97,
19 June 2006,
[2006] ECHR 628

Mrs Hutten-Czapska owned a house and a plot of land in Gdynia, which had previously belonged to her parents. During the Second World War, the house was appropriated by the Nazis and subsequently occupied by soldiers

of the Red Army. Later, it was taken over by the housing department of the Gdynia City Council.

In 1946, the house became subject to the so-called 'state management of housing matters' and rent control provisions which restricted drastically the amount of rent chargeable. In 1975, the Mayor of Gdynia issued a decision that allowed the head of the city council's housing department to exchange the flat he was leasing in another building under a special lease scheme for the ground-floor flat in the applicant's house. Also in 1975, the head of the city council's local management and environment office ordered that the house should become subject to state management. In the 1990s, Mrs Hutten-Czapska tried to have that decision declared null and void but succeeded only in obtaining a ruling declaring that it had been issued contrary to the law.

In 1990, the Mayor of Gdynia issued a decision restoring the management of the house to Mrs Hutten-Czapska, although it was still occupied by tenants. In the 1990s claims for possession against the tenants were dismissed. The rent control provisions did not change significantly after the end of communist rule in 1989. Indeed, by the 1990s the state-controlled rent, which also applied to privately owned buildings, covered merely 30 per cent of the actual cost of maintenance of buildings.

In the European Court of Human Rights (ECtHR), Mrs Hutten-Czapska alleged that the implementation of laws imposing restrictions in rent increases and the termination of leases amounted to a violation of article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention').

The Grand Chamber of the ECtHR noted that although Mrs Hutten-Czapska could not exercise her right of use in terms of physical possession as the house had been occupied by tenants, and that her rights in respect of letting the flats, including her rights to receive rent and terminate leases, had been subject to a number of statutory limitations, she had never lost her right to sell her property. Nor had the authorities applied any measures resulting in the transfer of her ownership. In the Grand Chamber's judgment, those issues concerned the degree of the state's interference, and not its nature. The aim of all the measures taken was to subject the applicant's house to continued tenancies, and not to take it away from her permanently. They could not be considered a formal, or even de facto, expropriation but constituted a means of state control of the use of her property. Accordingly, the case should be examined under article 1 of Protocol No 1 para 2.

It is for national authorities to make the initial assessment about the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property, and, in doing so, they enjoy a wide margin of appreciation. The Grand Chamber accepted that the interference respected the principle of lawfulness. It also agreed that the rent-control scheme in Poland originated in the continued shortage of dwellings, the low supply of flats for rent on the lease market and the high costs of acquiring a flat. It was implemented with a view to securing the social protection of tenants and ensuring the gradual transition from state-controlled rent to a fully negotiated contractual rent during the fundamental reform of the country following the collapse of the communist regime. The ECtHR accepted that in the social and economic circumstances of the case, the impugned legislation had a legitimate aim in the general interest, as required by the second paragraph of article 1 of Protocol No 1. However, after noting that the rent which Mrs Hutten-Czapska received was extremely low, the ECtHR held that the legislation 'impaired the very essence of her right of property' and individual landlords had been 'deprived even of the slightest substance of their property rights'. Their 'right to derive profit from property, ... an important element of the right of property ha[d] been destroyed and ... the[ir] right to dispose of one's property ha[d] been stripped of its substance'. The legislation 'unduly restricted [Mrs Hutten-Czapska's] property rights and placed a disproportionate burden on her, which [could] not be justified in terms of the legitimate aim pursued by the authorities in implementing the relevant remedial housing legislation'.

The ECtHR accordingly found that there had been a violation of article 1 of Protocol No 1. The court reserved the question of compensation for pecuniary damage because it was not ready for decision, but made an award for non-pecuniary damage of €30,000.

■ Ghigo v Malta

App No 31122/05,
26 September 2006,
[2006] ECHR 808

Before 1973 Mr Ghigo bought a house in Malta, which he had planned to use as a home for himself and his family. In purchasing the house, he incurred debts. Later, he was given another house. He then changed his plans. He decided to move to the new house and wanted to sell the former house to pay off his debts. However, in 1984, the new house was seized by the government under a requisition order issued by the director of social housing under the Maltese Housing Act. Mr Ghigo introduced claims in the Civil Court (First Hall) alleging violation of article 1 of Protocol No 1 and breach of his right to the enjoyment of his property. His claim was dismissed by the Civil Court and his subsequent appeal rejected by the Constitutional Court. He applied to the ECtHR.

The ECtHR noted that by requisitioning and assigning his property to others, the government prevented Mr Ghigo from exercising his right to use the property as the house had been occupied by tenants. Also, his rights to receive a market rent and terminate leases had been substantially affected. However, Mr Ghigo never lost his right to sell his property, nor had the authorities applied any measures resulting in the transfer of his ownership of the property. It followed that the interference was not a formal, or even de facto, expropriation, but constituted a means of state control of the use of property and that the case should be examined under article 1 of Protocol No 1 para 2. It was not disputed that the requisition of the house had been carried out in accordance with the provisions of the Maltese Housing Act. It was, therefore, 'lawful' within the meaning of article 1 of Protocol No 1. Having regard to the wide margin of appreciation available to the legislature in implementing social and economic policies, the ECtHR accepted the government's argument that the requisition and rent control were aimed at ensuring the just distribution and use of housing resources in a country where land available for construction could not meet the demand, and with a view to securing the social protection of tenants and preventing homelessness, as well as at protecting the dignity of poorly-off tenants. The legislation, therefore, had a legitimate aim in the general interest. However, the rent received by Mr Ghigo – less than €5 per month – was extremely low and could hardly be seen as fair compensation for the use of a house. The court was not convinced that the interests of landlords, 'including their entitlement to derive profits from their property' were met by restricting the rent to this level. The ECtHR found that, having regard to the extremely low rent fixed by the land valuation officer, and to the fact that the applicant's premises had been requisitioned for more than 22 years, a disproportionate and excessive burden had been imposed on Mr Ghigo. He had been requested to bear most of the social and financial costs of supplying housing accommodation to the family living in the house. There was, accordingly, a violation of article 1 of Protocol No 1. The ECtHR reserved the question of compensation for pecuniary damage and/or non-pecuniary damage because it was not ready for decision.

■ Edwards v Malta

App No 17647/04,
24 October 2006,
[2006] ECHR 887

Mr Edwards was the trustee of four tenements and a neighbouring field. At various times between 1941 and 1976, the Maltese government made requisition orders or amended requisition orders relating to the tenements in order to house homeless people. In 1996, Mr Edwards instituted proceedings before the Civil Court (First Hall) against the director of social accommodation. He alleged that the latest requisition order had been issued as a result of an abuse of power and was therefore null and void. Mr Edwards also claimed an infringement of his right to the enjoyment of his property as guaranteed by article 1 of Protocol No 1 because the requisition order had not been made in accordance with the public interest. He also maintained that he had not received adequate and appropriate compensation. His claim was dismissed by the Civil Court and his subsequent appeal rejected by the Constitutional Court. Mr Edwards complained about the requisition of both the tenements and the adjacent field to the ECtHR, invoking article 1 of Protocol No 1.

The ECtHR held that the tenements and field were possessions within the meaning of article 1 of Protocol No 1 even though Mr Edwards was only a trustee. He had been acting as the owner of the premises without disturbance and receiving rent for more than 30 years. It also held that, by requisitioning and assigning the use of his property to others, Mr Edwards had been prevented from enjoying his property. His rights to receive a market rent and terminate leases had been affected substantially.

However, Mr Edwards never lost his right to sell his property, nor had the authorities applied any measures resulting in the transfer of his title. The measures taken by the authorities were aimed at subjecting his tenement and field to a continuing tenancy and not at taking them away from him permanently. Therefore, the interference complained of could not be considered a formal, or even de facto, expropriation, but constituted a means of state control of the use of property. It followed that the case should be examined under article 1 of Protocol No 1 para 2. It was not disputed that the requisition of the tenements was carried out in accordance with the provisions of the Maltese Housing Act. The measure was, therefore, 'lawful' within the meaning of article 1 of Protocol No 1. The ECtHR accepted the government's argument that the requisition and rent control were aimed at ensuring the just distribution and use of housing resources in a country where land available for construction could not meet the demand. These measures, implemented with a view to securing the social protection of tenants, were also aimed at preventing homelessness, as well as at protecting the dignity of poorly-off tenants. The legislation, therefore, had a legitimate aim in the general interest, as required by article 1 of Protocol No 1 para 2.

However, having regard to the extremely low amount of rent, to the fact that the applicant's premises had been requisitioned for more than 30 years, and to other restrictions of landlords' rights, the ECtHR found that a disproportionate and excessive burden had been imposed on Mr Edwards. He had been requested to bear most of the social and financial costs of supplying housing accommodation to the family that was renting one of the tenements. It followed that the Maltese state had failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's right of property. There was, accordingly, a violation of article 1 of Protocol No 1. The ECtHR reserved the question of compensation for pecuniary damage and/or non-pecuniary damage because it was not ready for decision.

■ Radanović v Croatia

App No 9056/02,
21 December 2006

Mrs Radanović was the owner of a flat in Karlovac. She lived there until October 1991, when she left to join her son in Germany. In September 1995, the Temporary Takeover and Managing of Certain Property Act ('the Takeover Act') became law. It provided that property belonging to persons who had left Croatia after October 1990 was to be taken into the care of, and controlled by, the state. It also authorised local authorities (takeover commissions) temporarily to accommodate other persons in such property.

In September 1996, Mrs Radanović brought a civil action in the Karlovac Municipal Court against people who were occupying her flat, seeking their eviction. In August 1998, the Act on Termination of the Takeover Act ('the Termination Act') became law. The Termination Act provided that those persons whose property had, during their absence from Croatia, been given for accommodation of others had to apply for repossession of their property with the competent local authorities, ie, the housing commissions.

In March 2000, the Municipal Court declared Mrs Radanović's action inadmissible for lack of jurisdiction. It found that instead of bringing a civil action, she should have applied for repossession of her property to the competent housing commission, as provided by the Termination Act. In October 2000, the housing commission set aside the takeover commission's decision to allow other people the right to use the applicant's property and ordered them to vacate. In June 2001, the housing commission issued a warrant ordering the occupants to vacate the flat within 15 days, but then took no action against them. In December 2003, the occupants delivered the flat to the relevant ministry. In January 2004, Mrs Radanović repossessed the flat. However, she found that it had been looted and rendered uninhabitable.

The ECtHR found that there had indisputably been an interference with Mrs Radanović's right to property as her flat was allocated for use to another person and she was unable to use it for a prolonged period of time. It noted further that she was not deprived of her title and so the interference complained of constituted a control of use of property within the meaning of article 1 of Protocol No 1 para 2. Assuming that the interference complained of was lawful and in the general interest, the ECtHR had to consider whether it struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, and whether it imposed a disproportionate and excessive burden on the applicant. The ECtHR recognised that the Croatian authorities faced an exceptionally difficult task in having to balance the rights of owners against those of temporary occupants in the context of the return of refugees and displaced persons, as this involved dealing with socially sensitive issues. Those authorities had to secure the protection of property and social rights. The ECtHR, therefore, accepted that a wide margin of appreciation should be accorded to the state. However, in this case, Mrs Radanović was forced to bear the burden of providing the temporary occupant with a place to stay for more than six years. This burden should have been borne by the state. Notwithstanding the state's margin of appreciation, the ECtHR considered that the Croatian authorities failed to strike the requisite fair balance between the general interest of the community and the protection of Mrs Radanović's right to property. As a result, she had to bear an excessive individual burden. The interference with her right to property could not be considered proportionate to the legitimate aim pursued. There was, accordingly, a breach of article 1 of Protocol No 1. The ECtHR also concluded that Mrs Radanović had no effective remedy for the protection of her convention right to property and that there

had been a breach of article 13 of the convention. The ECtHR awarded €6,000 on account of the loss of rent and €2,500 in respect of non-pecuniary damage.

Article 1 of Protocol No 1 and article 6

■ Kunić v Croatia

App No 22344/02,
11 January 2007

Mr Kunić and his family lived in a property in Krnjak, comprising a house and restaurant. Mr Kunić's father owned the property; he died in 1992. In January 1999, Mr Kunić was declared his father's legal heir. In August 1995, the Kunić family left for Bosnia and Herzegovina. In September 1995, the Takeover Act became law. It provided that property situated in the previously occupied territories, and belonging to persons who had left Croatia, was to be taken into the care of, and controlled by, the state. The Act also authorised takeover commissions to entrust such property for temporary use by third persons.

In 1996, the takeover commission entitled a certain 'VP' to use the property temporarily, with a view to running the restaurant. In 1997 and 1998, Mr Kunić requested repossession of the property. The takeover commission replied that it had made no decision and had no competence to decide the request. In August 1998, the Termination Act became law. It provided that those persons whose property had, during their absence from Croatia, been given for accommodation of others had to apply for repossession of their property with the competent local authorities. Mr Kunić made such an application immediately. In October 1999, the housing commission set aside the takeover commission's 1996 decision. VP appealed. In February 2001, his appeal was dismissed and he was ordered to vacate the house. VP did not do so, and in March 2001 the housing commission brought an action in the Karlovac Municipal Court seeking his eviction. In February 2002, the court gave judgment accepting the housing commission's claim and ordering VP to vacate the premises. In March 2002, VP appealed. In March 2003, the Karlovac County Court dismissed the appeal and upheld the first instance judgment, which thereby became final. In March 2003, VP lodged an appeal on points of law. It was declared inadmissible, but in May 2003 VP brought the issue of the admissibility of his appeal on points of law to the Supreme Court. By the time of judgment in the ECtHR, it appeared that the Supreme Court had not given its decision. However, in December 2003 the bailiff evicted VP and Mr Kunić repossessed his property. Mr Kunić applied to the ECtHR alleging breaches of article 6(1) and article 1 of Protocol No 1 of the convention.

The ECtHR noted that the execution of a judgment must be regarded as an integral part of the 'hearing' for the purposes of article 6 of the convention (*Hornsby v Greece*, App No 18357/91, 19 March 1997). It also reiterated that the reasonableness of the length of proceedings must be assessed with reference to the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute (*Cocchiarella v Italy* App No 64886/01, 29 March 2006; *Frydlender v France* App No 30979/96, 27 June 2000). The ECtHR noted that it took more than six years for the domestic authorities to give and enforce a final decision in a case of undeniable importance for Mr Kunić, which was of no particular complexity. It held that the length of the proceedings was excessive and failed to meet the 'reasonable time' requirement. There was, accordingly, a breach of article 6(1) of the convention.

With regard to article 1 of Protocol No 1, there was indisputably an interference with Mr Kunić's right to property as his house was allocated for use to another person and he was unable to use it for a prolonged period of time. However, he was not deprived of his title, and so the interference complained of constituted a control of use of property within the meaning of article 1 of Protocol No 1 para 2. In the ECtHR's view, the inordinate length of proceedings also had a direct impact on Mr Kunić's right to peaceful enjoyment of his possessions for over six years. That delay imposed an excessive individual burden on Mr Kunić and, therefore, upset the fair balance that had to be struck between his right to peaceful enjoyment of his possessions and the general interest involved. There was, accordingly, a breach of article 1 of Protocol No 1. The ECtHR awarded €16,000 on account of loss of rent and €2,500 for non-pecuniary damage.

Article 8

■ Novoseletskiy v Ukraine

App No 47148/99,
22 May 2005

In June 1995, Mr Novoseletskiy was granted indefinite authorisation to occupy and use a two-room flat by his employer, the Melitopol State Teacher Training Institute. In August 1995, he resigned from the institute and went to live in Vladimir, Russia to prepare his doctoral thesis. In October 1995, the institute annulled its June decision and granted authorisation to occupy and use the flat to T, another of its employees. In November 1995, T, accompanied by four witnesses, entered the flat. They noted that the flat was empty and made a statement to that effect. According to Mr Novoseletskiy, his possessions were removed or stolen from the flat. In February 1996, Mr Novoseletskiy filed a civil claim against the institute with the Melitopol City Court. He claimed compensation for pecuniary and non-pecuniary damage and sought to assert his right to free use of the flat in question. The institute, in turn, lodged an application to have that right withdrawn from him. In May 1996, the institute annulled its October 1995 decision. It found that the decision had been unlawful and restored Mr Novoseletskiy's rights to the flat.

On 27 June 1996, the Melitopol City Court dismissed Mr Novoseletskiy's claim and granted the institute's application. It found that, in accordance with the legislation in force and his employment contract, Mr Novoseletskiy had forfeited his right to use the flat after taking up permanent residence elsewhere. The court also noted that the flat had been empty when it was entered. However, Mr Novoseletskiy's appeal was partially successful; it was held that he had the right to free use of the flat because his absence was only temporary, but his claim for damages was dismissed.

There were delays in enforcement of the order. In March 2001, Mr Novoseletskiy and the court bailiff certified that the flat was empty, and unfit for human habitation and needed substantial repairs before it could be used. Among many other things, the sanitary fittings and electrical wiring had been seriously damaged, the sink and surrounding pipes had been removed, making it impossible to use any running water, and the contents of the sewage pipes emptied into the flat, creating a powerful stench. Furthermore, T refused to hand over the keys to the flat to the court bailiff. In February 2004, Mr Novoseletskiy complained that since March 2001 he had been unable to live in the flat owing to its deplorable state and that there had been a breach of article 8 of the convention.

The ECtHR noted that although article 8 is primarily intended to protect the individual against arbitrary interference by public authorities, it may also entail the adoption of measures to secure article 8 rights by public authorities even in the sphere of relations between individuals (*López Ostra v Spain* App No 16798/90, 9 December 1994 and *Surugiu v Romania* App No 48995/99, 20 April 2004). A fair balance has to be struck between the competing interests of the individual and the community as a whole.

The ECtHR did not consider that the legal complexity of the case was such as to

warrant proceedings comprising three hearings and lasting three years, particularly in view of what was at stake in terms of the applicant's private and family life. Furthermore, the ECtHR was particularly struck by the rejection of Mr Novoseletskiy's claim for damages, on the ground that the law made no provision for compensation in respect of non-pecuniary damage in landlord-tenant disputes. It held that the Ukrainian courts had not acquitted themselves fully of the tasks incumbent on them as part of the positive duty of the state under article 8. The ECtHR also noted that the institute was a state-owned, higher-education establishment which had power, subject to the Ukrainian Housing Code and state supervision, to allocate flats. The institute therefore performed 'public duties' assigned to it by law and under the supervision of the authorities, with the result that it could be considered a 'governmental organisation'. The ECtHR, therefore, rejected the government's arguments seeking to deny any state liability for the acts and omissions of the institute. In view of the judicial decisions and the conduct of the relevant authorities, the ECtHR found that the state had not discharged itself of its positive obligation to restore and protect Mr Novoseletskiy's effective enjoyment of his right to respect for his home and his private and family life. Accordingly, there was a violation of article 8 of the convention.

■ Birmingham City Council v Doherty

[2006] EWCA Civ 1739,
21 December 2006

The defendant was a Traveller. From 1987, he and his family occupied a site as their home under a licence agreement with Birmingham City Council. In March 2004, the council served notice to quit, which expired in May 2004. The council began possession proceedings, asserting that the family's occupation was not protected under any relevant legislation, that possession was required to carry out essential improvements, and that the site would then be managed as temporary accommodation for Travellers coming to the city. It was said that the family's presence on the site 'deterred' other Travellers from going there, that it was 'severely under-utilised' and that this caused unauthorised encampments elsewhere in the city. The defendant accepted that he had no enforceable right to remain under English property law, but relied on the protection of article 8 of the convention, claiming that the grant of summary possession would not be reasonable or proportionate. In December 2004, HHJ McKenna gave summary judgment for the council, and made an order for possession. The defendant appealed.

The Court of Appeal dismissed the appeal. After referring to *Harrow LBC v Qazi* [2003] UKHL 43, 31 July 2003; [2004] 1 AC 983, and *Connors v UK* (2005) 40 EHRR 9 189, ECtHR, the Court of Appeal carried out a detailed and helpful analysis of the speeches in *Kay v Lambeth LBC* and *Leeds City Council v Price* [2006] UKHL 10, 8 March 2006; [2006] 2 AC 465. The Court of Appeal noted that all the law lords 'seem to have accepted it as settled law under *Wandsworth* [*LBC v Winder* [1985] AC 461, HL] that "conventional" judicial review grounds can be raised by way of defence to possession proceedings in the county court'. However:

> *[t]here are only two possible 'gateways' … for a successful defence to summary judgment in such cases: (a) a seriously arguable challenge under article 8 to the law under which the possession order is made, but only where it is possible (with the interpretative aids of the Human Rights Act [HRA]) to adapt the domestic law to make it more compliant; (b) a seriously arguable challenge on conventional judicial review grounds … to the authority's decision to recover possession.* (paras 26–40)

The Court of Appeal accepted the council's submission in *Doherty* that gateway (a) was closed because the authority's claim to possession was in accordance with a statutory scheme, which, whether compatible or not with the convention, had to be applied by the county court as it stood. The court rejected the defendant's contention that the authority's claim to possession depended on its common law rights, not on any statutory entitlement. The Court of Appeal distinguished *Connors* on the basis that the council's decision in *Doherty* depended not on a factual allegation of nuisance or misconduct, or 'the bald ground that the family were trespassers', but on an administrative judgment about the appropriate use of its land in the public interest. The Court of Appeal reached the clear and unanimous conclusion that the judge was right to make an order for possession.

SECURE TENANCIES

Anti-social behaviour

■ Sheffield City Council v Shaw

[2006] EWCA Civ 1671,
15 November 2006;
[2007] EWCA Civ 42,
12 January 2007

Mr Shaw was a secure tenant, aged about 65. In 2000, he became obsessed with a 12-year-old girl living in the same neighbourhood. For many years, he stalked her, pestered her, threw cigarettes at her and touched her. In 2002, he was found guilty in Sheffield Magistrates' Court of harassing the girl. The magistrates made a restraining order prohibiting Mr Shaw from contacting her directly or indirectly for five years. In 2003, he was again found guilty of harassing the girl and breaching the terms of the restraining order. He was sentenced to four months' imprisonment. Later that year, he was again found guilty of the same offences and sentenced to 14 months' imprisonment. In August 2004, he was convicted at Sheffield Crown Court of the same offences and sentenced to two years' imprisonment.

In April 2005, Sheffield issued proceedings claiming possession based on breach of a covenant against harassment in Mr Shaw's tenancy agreement and seeking an anti-social behaviour order (ASBO); an interim ASBO was made. When the claim was tried, Mr Shaw was in custody on remand facing a charge of breach of the interim ASBO.

At trial of the possession claim, Mr Shaw's probation officer said that she was still greatly concerned that his behaviour would continue and that, in her professional opinion, she believed that the situation was so bad that there was no reasonable alternative to turning Mr Shaw out of his house. HHJ Moore found that the defendant was in breach of the covenant in his tenancy agreement, but, after considering the question of reasonableness, made an indefinite suspended possession order and an ASBO excluding the defendant from a particular part of Sheffield.

The council's appeal was dismissed. There is no general principle that where the harassment of neighbours is such that the fear and tension cannot be dispelled, an immediate possession order must be made. That is simply a possible judgment to take depending on the facts of the case. Judging sincerity is the province of the trial judge. Mr Shaw's potential homelessness was not the judge's sole consideration. There were various other considerations in his judgment, primarily the optimism shown that Mr Shaw was capable of reform.

In this case, the previous opportunistic apology by the defendant to the police, and the fact that he had denied all or most of the historic allegations at the hearing, did not compel the conclusion that the judge's assessment for the future had to have been wrong. Although the defendant might have shown no more than embryonic remorse and had failed, for many years, to understand the effect of his conduct, these facts did not preclude the assessment that proper psychiatric help could help him to mend his ways. In that regard, the judge had not misunderstood the evidence of the probation

officer. Although she had expressed reservations about whether he would continue his unacceptable behaviour, she had said that Mr Shaw was capable of reform, and had been prepared to back that judgment in her proposals to the sentencing judge. It was, moreover, a matter of fact that the girl no longer lived close to the defendant. It followed that the order had not been made outside the judge's discretion, and was not plainly wrong. The judge had made no error of law.

■ Sheffield City Council v Fletcher

High Court, Chancery Division, 12 January 2007

Ms Fletcher had been a secure tenant since 2001. She lived in the premises with a number of children. As a result of complaints about noise and verbal abuse by a neighbour, the council wrote letters, served a notice seeking possession and began possession proceedings. Ms Fletcher did not attend the hearing and a forthwith possession order was made. She later applied to set aside the order on the ground that the trial had taken place in her absence and, in the alternative, she applied for postponement or a stay on the possession order. The evidence placed before the judge contained no expression of remorse, stated that none of the incidents had happened and that if they had they were not as serious as alleged.

The judge found that Ms Fletcher had no reasonable prospect of success of defending the claim if the order were to be set aside and that the overwhelming likelihood was that even if she had given evidence the same order would have been made. He dismissed the application, but she appealed. On appeal, the council argued that the High Court did not have jurisdiction to entertain any application under HA 1985 s85(1), because s110 conferred exclusive jurisdiction under s85 on the county court.

Lewison J rejected that contention. Although s110 confers jurisdiction on the county court in relation to matters arising under HA 1985 Part 4, it does not oust the jurisdiction of the High Court. However, he dismissed Ms Fletcher's appeal. When considering whether to postpone or suspend a possession order that had been obtained on the basis of anti-social behaviour, the court was required to take into account the effect that a continuation of that behaviour would, or might, have on neighbours. That required the court to look to the future (*Manchester City Council v Higgins* [2005] EWCA Civ 1423, 24 November 2005; [2006] 1 All ER 841).

The judge had not erred in principle or reached a decision which was outside his ambit. Past, unheeded warnings tell against a suspension of the possession order. Furthermore, the evidence put before the judge showed no expression of remorse or any assurances for the future. Although the defendant had children, there was nothing about them to which the judge ought to have paid special attention. The fact that the defendant had lived in the area for 16 years was of little weight because of the seriousness of the allegations of anti-social behaviour. Although there had been no previous proceedings against the defendant, the judge had been entitled to form the view that, in light of the degree of anti-social behaviour, an immediate order had been inevitable.

OCCUPIERS LACKING SECURITY

Possession orders

■ Boyland and Sons Ltd v Rand

[2006] EWCA Civ 1860, 20 December 2006, (2007) Times 18 January

The defendant Travellers moved onto a site owned by the claimants without permission. They were, accordingly, trespassers. Subsequently, a possession order was made. The defendants' application to postpone the date for possession was refused. They appealed, contending that although previous authorities stated that trespassers could not be given time to vacate by the court unless the landowner agreed, different considerations applied under HA 1980 s89. The application was dismissed and the defendants appealed.

The Court of Appeal refused permission to appeal. Section 89 does not create a free-standing power to postpone the date of possession. The purpose of s89 is to provide a statutory time limit to the extent of courts' common law discretion to postpone possession. Section 89 was not intended to grant squatters' rights which they did not have previously. Although this is a decision on permission, and therefore not otherwise citable under the *Practice Direction (Citation of Authorities)* 2001 [2001] 1 WLR 1001, the Court of Appeal made an express statement under para 6.1 of the Practice Direction that the decision is capable of being cited.

HOMELESSNESS

Performing Part 7 duties

■ R (Aweys and others) v Birmingham City Council

[2007] EWHC 52 (Admin), 26 January 2007

The claimants applied to Birmingham as homeless people. The council accepted that it owed them the main duty (HA 1996 s193) because although the claimants had accommodation, it was not reasonable for them to continue to occupy it (HA 1996 ss175 and 177).

The council told the claimants to remain in their present homes until they were made an offer under its allocation scheme. It placed them in Band B of that scheme (for homeless households not currently in temporary accommodation). The council reserved Band A for those homeless applicants to whom it had provided temporary accommodation.

Allowing a claim for judicial review, Collins J held that the council's handling of both the homelessness applications and its allocation scheme was unlawful because:

■ it followed from the council's finding that it was 'not reasonable to continue to occupy' that the existing accommodation was also not capable of being 'suitable' (as required by HA 1996 s206) and, accordingly, the claimants could not be required to continue occupying it in performance of the council's s193 duty;

■ the council had to secure suitable accommodation for those in respect of whom the s193 duty had been accepted. If the council proposed to seek release from that duty by an eventual offer under its allocation scheme, it meanwhile had to provide suitable temporary accommodation;

■ people in Band A had – because the council had secured it – 'suitable' accommodation. It was irrational to place them higher than the claimants who were in accommodation that the council considered unreasonable for continued occupation; and

■ in any event, those who had been required by the council to remain in their present accommodation as 'homeless at home' were in 'temporary accommodation' which was being provided (in the widest sense) by the council. As a result, they should have been in Band A.

A claim for damages for breach of article 8 of the convention in respect of two claimants was adjourned with directions.

Intentional homelessness

■ Houghton v Sheffield City Council

[2006] EWCA Civ 1799, 7 December 2006

The claimant had been occupying insecure accommodation provided by the council under HA 1996 Part 7. His rent was paid by housing benefit (HB) with a shortfall of £13 per week payable directly by the claimant. In early 2004, he was given notice to quit for arrears of rent of over £800 after his HB had stopped. By the date of hearing of the council's possession claim, HB had been restored and backdated leaving only £13 arrears. The county court adjourned the claim

for four months. HB was paid throughout that period leaving just over £7 arrears at the end of it. However, the council then restored the claim and obtained, and then executed, a possession order.

On the claimant's further Part 7 application, the council decided that he had become intentionally homeless because his failure to co-operate with the HB department had caused the interruption of benefit leading to his arrears and eviction. That was upheld on review but, on appeal, HHJ Moore varied the decision to one that the claimant was not intentionally homeless. He described the council's decision as 'bizarre'.

The Court of Appeal refused the council's application for permission to appeal on the ground that it did not meet the Civil Procedure Rule 52.13 threshold. Moreover, May LJ said that the judge was 'entitled, in my judgment, to conclude on the facts of this case that a decision that he was intentionally homeless when his tenancy was terminated when there was no, or virtually no, arrears of rent and when he must have co-operated with the housing department was bizarre' (para 25).

HOUSING AND COMMUNITY CARE

■ R (N) v Lambeth LBC

[2006] EWHC 3427 (Admin), 20 December 2006

The claimant was a failed asylum-seeker from Uganda who was chronically ill. Having exhausted the UK legal process, she applied to the ECtHR asserting that, given the lack of medical facilities in Uganda, her return would infringe her article 3 convention rights. The Acting President of the Strasbourg Court issued an article 39 Direction requesting the UK government not to remove the claimant until after a specified date.

Lambeth had been supporting the claimant under the 'interim provisions' scheme made by the Immigration and Asylum Act (IAA) 1999. It discontinued support after a reassessment found that the claimant did not qualify for assistance under National Assistance Act (NAA) 1948 s21. Lambeth had applied its general criteria for qualification for social services assistance and its assessment made repeated reference to the prospect of the claimant receiving 'hard cases support' under IAA s4.

Walker J quashed the assessment. He held that:

■ the council had been wrong to assess the question of assistance for the claimant through its general eligibility criteria. Instead, it should have made an assessment of her need for care and attention based on the correct approach to NAA s21;

■ the council might more sensibly have addressed first whether the claimant's convention rights would be infringed by a refusal of support (as she was a failed asylum-seeker) since that was the only statutory basis on which she could be provided with assistance (see Nationality, Immigration and Asylum Act 1999 Sch 3);

■ on that question: 'I for my part find it difficult to see how the defendant could have properly arrived at a conclusion that sleeping on the streets in the case of this claimant, a person who is acknowledged to be suffering from a chronic illness, which if not medicated in the appropriate way will lead to terrible consequences, could be regarded as a person who can be refused support without any breach of her convention rights' (para 84); and

■ the council had possibly been wrong to rely on the potential availability of hard cases support without continuing its own support until such an application had been made: 'Without expressing any concluded view on the point, it does seem to me unsatisfactory to rely upon an ability to apply for assistance under section 4 and then to make no provision for what should happen during the period that is going to be necessary for such an application to be made' (para 77).

■ R (Johnson) v Havering LBC

[2007] EWCA Civ 26, 30 January 2007, (2007) Times 2 February

The claimants were elderly, infirm and accommodated by the council in four residential homes under its duty under NAA s21. The council resolved to invite a private sector operator to take on, operate and expand two of the homes. Once the residents of the other two homes had been re-accommodated, those two would be closed and sold off.

The claimants sought judicial review on the basis that the transfer of the homes into the private sector would deprive the residents of the effective protection of their human rights which they would retain (owing to HRA s6) if the homes remained with the council. Both the Secretary of State for Constitutional Affairs and the Disability Rights Commission (DRC) were given leave to intervene. The central issue was whether the new private owner-operators of the homes would be 'public authorities' for the purposes of HRA s6(3)(b) because their functions would be 'functions of a public nature'.

Despite the submissions of the claimants, the secretary of state and the DRC that the new owners would be undertaking such functions, Forbes J held (see [2006] EWHC 1714 (Admin), 11 July 2006; September 2006 *Legal Action* 15) that he was bound by authority to hold that they would not be 'public authorities' for HRA purposes. *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37, 26 June 2003; [2004] 1 AC 546 had not overruled the cases of *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, 27 April 2001; [2002] QB 48 or *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, 21 March 2002; [2002] 2 All ER 936.

Although the result was that the new owners and operators would be beyond the scope of the HRA, it did not follow that the claimants' convention rights were diminished. They were still available and enforceable (if that became necessary) against the council. The claimants appealed.

The Court of Appeal held that it was also bound by the decisions in *Donoghue* and *Leonard Cheshire* and dismissed the appeal. It granted leave to appeal to the House of Lords.

■ R (Lindley) v Tameside MBC

[2006] EWCA Civ 1665, 15 November 2006

The claimant was a disabled man requiring 24-hour personal care. Tameside resolved to close the residential care home where he lived and to transfer the residents to a new facility. The claimant sought judicial review of that decision on a number of grounds, including failure to consult. That initial claim was later abandoned and replaced with a claim that the council had failed to meet a 'legitimate expectation' that the claimant would transfer to live in the new facility.

Hodge J held (see [2006] EWHC 2296 (Admin), 21 September 2006; November 2006 *Legal Action* 33) that:

■ the facts demonstrated no enforceable legitimate expectation; and

■ even if such an expectation had arisen, it would be wrong to enforce it as the claimant's needs could no longer be met at the new facility.

The Court of Appeal refused permission to appeal. Neuberger LJ said even if it had been possible to raise an arguable criticism of Hodge J's first holding, the second one was unassailable.

1 The consultation closed on 19 January 2007. A copy of the paper is available at: www.scotland.gov.uk/Resource/Doc/149706/0039870.pdf.
2 Available at: www.wao.gov.uk/assets/englishdocuments/Homeless_report_eng_web.pdf.
3 Available at: www.communities.gov.uk/pub/739/Frameworkforplanningandcommissioningofservicesrelatedtohealthneedsofhomelesspeoe_id1505739.pdf.
4 Available at: www.communities.gov.uk/pub/571/AllocationofAccommodationChoiceBased

LettingsCodeofGuidanceforLocalHousingAuthors_id1505571.pdf.

5 Available at: www.communities.gov.uk/pub/650/DisabledFacilitiesGrantProgrammeTheGovernments proposalstoimproveprogrammedelivey_id1505650.pdf.

6 Available at: www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50066606.pdf.

7 Available at: http://new.wales.gov.uk/docrepos/40382/sjr/research/providingthesolutione?lang=en.

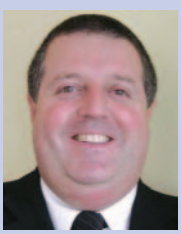
8 Available at: www.publications.parliament.uk/pa/cm200607/cmselect/cmpubacc/uc246-i/uc24602.htm.

9 Available at: www.communities.gov.uk/pub/452/232Priorityreviewoftheuptakebysociallandlordsof legislativepowerstotackleantisocr_id1505452.pdf.

10 Available at: www.respect.gov.uk/uploaded Files/Members_site/Document_Library/About_Respect/Respect%20Handbook%20FINAL.pdf.

11 *Tools and powers to tackle anti-social behaviour* is available at: www.respect.gov.uk/uploadedFiles/Members_site/Articles/Resources/Research_and_statistics/CDRP%20survey%20results%20Jan%2007.pdf.

12 Available at: http://england.shelter.org.uk/files/seealsodocs/25736/Advice%20Gap%20Full%20Report%20BME.pdf.



Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder.

Homelessness reviews: when can local authorities withdraw s184 decisions?

The Court of Appeal's recent judgment in *Deugi v Tower Hamlets LBC* [2006] EWCA Civ 159, 7 March 2006; [2006] HLR 28 has fired a warning shot across the bows of councils which assume that they can invariably respond to challenges to Housing Act (HA) 1996 s184 decisions, which they accept to have been unlawful, by withdrawing the initial finding and beginning the decision-making process all over again. Ian Loveland suggests here that the practice is unlawful in most situations.

Introduction

The scenario is a familiar one to legal advisers acting for homeless applicants. Weeks, perhaps months, after the initial application was made, the local authority produces a s184 decision unfavourable to the applicant, on the basis that s/he is not homeless, or not in priority need, or is homeless intentionally. A HA 1996 s202 request is lodged, weeks pass, and then shortly before the eight-week deadline the council responds either by withdrawing the s184 decision without making a s202 decision, or invoking s202 to the same end, and informing the applicant that the decision-making process will be started afresh.

For some applicants, this may be an acceptable result, most obviously if they have no accommodation, and the local authority recognises its obligation under HA 1996 s188 to provide interim housing during s184 enquiries. For other applicants, however, the result may be thoroughly unwelcome because of the substantial delay and uncertainty which it entails for the eventual resolution of the claim. Many more weeks may pass before a 'second' s184 decision is made. If that is unfavourable, another s202 review may be requested. Six or seven further weeks may go by, only for the council once again to decide that the s184 decision should be withdrawn and a third investigation begun.

The suspicion flitting across the minds of advisers in that situation is that the local authority is adopting a deliberate policy of delay, hoping that applicants will become sufficiently disheartened by the perpetual stalling of their applications that they will give up altogether or take their application to another authority.

It is difficult to see that there could be any basis to doubt that a local authority and an applicant can lawfully agree that a s184 decision should be revoked and remade. Furthermore, it is undoubtedly lawful for a council unilaterally to withdraw a s184 decision in circumstances where that decision had:

- been resolved in the applicant's favour; and
- subsequent events reveal that favourable decision to have been reached as a result of fraud or a fundamental mistake of fact which would have led to an unfavourable decision had it been known to the council when the s184 decision was made. *Crawley BC v B* [2000] EWCA Civ 50, 22 February 2000; (2000) 32 HLR 636 and *Porteous v West Dorset DC* [2004] EWCA Civ 244, 4 March 2004; [2004] HLR 30 provide obvious support for that proposition.

But neither *Porteous* nor *B* held that a local authority has an automatic right unilaterally to withdraw all s184 decisions. Two analytical issues arise here. The first is whether councils can simply withdraw s184 decisions without making a s202 decision. The second is whether a s202 decision can be used to withdraw the s184 decision rather than to reach a reasoned conclusion about the applicant's entitlements.

Not using s202 at all

A rule that a council presented with a s202 request has an automatic right, in all circumstances, to withdraw a s184 decision rather than make a s202 decision would undermine the purpose, inherent in the ss202–204 regime, that disputed matters in a s184 decision be resolved according to a

two stage, and temporally specific, timetable. In particular, such a rule would compromise an applicant's eventual right of access to a court.

Stage one is the s202 review, which – absent contrary agreement between the parties – must occur within 11 weeks (a maximum of three weeks for the request from the applicant (s202(3)) and then of, usually, eight weeks for the s202 decision to be made (Allocation of Housing and Homelessness (Review Procedures) Regulations (AHH(RP) Regs) 1999 SI No 71 reg 9)) of the s184 decision if questions arise about homelessness and/or priority need and/or intentional homelessness. Stage two is the s204 appeal to the county court, which must be applied for by the appellant within 21 days of receiving the s202 notice. (The parties cannot by agreement extend that period.)

To put the matter in a slightly different way, the statutory scheme provides that an applicant who has received a s184 decision with which s/he does not agree should not be – in a temporal sense – more than 14 weeks away from bringing his/her application before the county court. Indeed, if s/he acts promptly on receiving a s184 and s202 decision, s/he may bring his/her claim before the court in no more than eight weeks plus two days after receiving the s184 decision.

The s202 procedure was introduced at a relatively late stage of the HA 1996's parliamentary passage, but there are firm indications in the statements of the sponsoring minister in each House that the purpose of s202 is to provide a quick resolution of the applicant's claim.[1] There is no indication in the parliamentary materials that the government or either House anticipated that the s202 procedure could be placed in abeyance by withdrawing the s184 decision.

If a council may always 'revoke and remake' a s184 decision rather than make a s202 decision, that statutory purpose is placed in jeopardy for the following reasons:

- Although parliament has attached specific timetables to the s202 and s204 processes, there is no explicit time limit set in respect of a s184 decision. While the *Homelessness code of guidance for local authorities* (Department for Communities and Local Government, July 2006, p60 para 6.16) sets a 33-day target for making s184 decisions, it is not inconceivable that several months might elapse before a new s184 decision is made.
- Even if a 'second' s184 decision is made promptly, if the decision remains unfavourable to the applicant, and s/he makes an immediate 'second' request for a s202 review, s/he may have to wait some eight weeks for a s202 decision to be made. Moreover, seven or so weeks later, the council might simply withdraw the 'second' s184 decision, and announce that it proposes to make a 'third' s184 decision; whereupon the cycle of delay begins all over again, and the statutorily prescribed 'two stage' pre-court process becomes a 'three or four or many more stage' pre-court process.

Nor can 'revoking and remaking' be justified on the basis that there is some significant qualitative difference between the powers of the s202 and s184 decision-makers. A s202 decision-maker has jurisdiction over all matters of fact and law relating to the application, and moreover is required to make his/her decision in the light of facts and principles of law existing when s/he makes his/her decision rather than those existing at the time that the s184 decision was made. This point was made perfectly clear by the House of Lords' judgment in *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57, 1 November 2001; [2002] HLR 7 (especially per Lord Slynn at para 25):

> *… I find nothing in the statutory language which requires the review to be confined to the date of the initial application or determination. The natural meaning of the language in section 184(2) in requiring the local housing authority to inquire whether the applicant 'has' a local connection is that they should consider that at the date of the review decision. It is to be remembered that the process is an administrative one at this stage and there can be no justification for the final administrative decision of the reviewing officer to be limited to the circumstances existing at the date of the initial decision.*

The correct view would seem to be that whether a council can 'revoke and remake' a s184 decision rather than proceed to a s202 review when requested to do so is dependent on the facts of the case. In *B*, Buxton LJ at (2000) 32 HLR 645 said:

> *The application of the jurisprudence of public law to the process of decision-making in homelessness cases does not, therefore, necessarily lead to the conclusion that a decision, once taken, cannot be revisited … The question for the court in an appeal under section 204 should rather be whether the whole circumstances of the case are such as to justify any, and if so what, relief in public law.*

In considering this statement in *Deugi*, May LJ reached the following conclusion at para 31:

> *I would accept that there are circumstances in which a local housing authority may revisit decisions in homelessness cases. They can obviously do so upon a statutory review under section 202 of the 1996 Act. The extent to which they can do so by non-statutory review may be debatable, as may be the question whether a non-statutory review resulting in a changed decision constitutes withdrawal of the original decision.*

It is however very difficult to envisage a situation in which 'the whole circumstances of the case' should point towards the conclusion that a decision which is unfavourable to an applicant could simply be withdrawn and remade against the applicant's wishes. Any new facts can just as readily be assessed at the s202 stage as in a repeat of the s184 decision. It may be that a council has fewer s202 decision-makers than s184 decision-makers, a point which will be especially germane if the local authority uses a panel of elected members to consider s202 reviews. But given that the council has eight weeks to complete a s202 review, a plea of inadequate administrative resources is unlikely to be compelling. A s202 review would seem the proper way to proceed in most circumstances.

Using s202 to withdraw s184 decisions

May LJ's observation in *Deugi* that local authorities may 'revisit' s184 decisions through s202 raises the obvious question of whether 'revisitation' can lead simply to withdrawal of s184 decisions. The objection to that proposition is that it would create a situation in which the applicant was subject to possibly prolonged delay in having his/her application resolved and in bringing his/her claim before the county court.

Section 202's text characterises the process as a 'review' of the initial decision. This is unfortunate language, as it is redolent of 'judicial review', a jurisdiction in which the reviewer (ie, the High Court) will quash a decision and remit it for de novo consideration to the decision-maker. But 'review' in that sense is clearly not what s202 is about. This point was made by the sponsoring minister in the House of Lords: 'The clause establishes a new responsibility on local authorities to establish a procedure for reviewing decisions that they make in discharge of their duties under the homelessness legislation. It is a form of internal appeals procedure' (Lord Mackay at HL Debates col 868, 25 June 1996).

There is no indication in s202's legislative history that the sponsoring government or the enacting parliament anticipated that s202

could be used simply to withdraw s184 decisions. This is hardly surprising, as giving councils such a power would directly contradict the government's repeatedly stated concern during the bill's passage that s202 decisions should produce prompt resolution of the claim. That there is no indication in the text of s202 nor in the AHH(RP) Regs that the s202 jurisdiction extends to withdrawing decisions under review is presumably because the legislative purpose underlying s202 was to provide for a revisitation and replication of the s184 decision, subject to more rigorous requirements relating to time limits, the identity of the decision-maker, and the nature of the procedure followed than those that apply to the s184 process.

This assumption would seem to be confirmed both by the aforementioned judgment of the House of Lords in *Mohamed* and by the House of Lords' conclusions in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, 13 February 2003; [2003] 1 All ER 731, especially in the judgments of Lord Bingham at paras 9–10 and of Lord Millett at para 96, where Lord Millett observed that the s202 jurisdiction was created so that a local authority can 'determine the extent of its own statutory obligations', subject to subsequent appeal to the county court.

In a substantive jurisdictional sense, s202 decisions may alter or confirm the decision reached at the s184 stage, but the s202 decision-maker cannot reach a decision that was not within the range of possible responses open to the council at the s184 stage. The simple withdrawal of a s184 decision by a s202 decision-maker is tantamount to a quashing of the s184 decision in a judicial review sense. In effect, this would produce a s184 decision in which the local authority declines to 'determine the extent of its own statutory obligations'. A local authority is not entitled under s184 to refuse to determine its obligations unless it is dealing with a reapplication that is factually identical to a previously decided application: see *R v Harrow LBC ex p Fahia* [1998] UKHL 29, 23 July 1998; [1998] 1 WLR 1396; (1998) 30 HLR 1124 and *Rikha Begum v Tower Hamlets LBC* [2005] EWCA Civ 340, 23 March 2005; [2005] HLR 34. It would seem quite odd that a council should be able to achieve that result through s202.

If a local authority considers that a s184 decision was incorrect, the proper course for it to adopt on receiving a s202 request is surely to make a reasoned decision on the relevant substantive issues within the eight-week time period. There is strong Court of Appeal support for this proposition in *Robinson v Hammersmith and Fulham LBC* [2006] EWCA Civ 1122, 28 July 2006,[2] *Deugi* (per May LJ at paras 29–34) and *R (Slaiman) v Richmond upon Thames LBC* [2006] EWHC 329 (Admin), 9 February 2006 (per Hughes J at paras 28–30).

In both *Robinson* and *Deugi*, some stress was placed on the point that allowing the councils to withdraw their s184 decisions would deprive the applicants of a benefit (being in priority need) to which they would not be entitled if a new s184 decision was made (Ms Robinson would have been over 18 and Mrs Deugi's formerly dependent child would no longer have been dependent). However, it seems wholly plausible to argue that prompt resolution of an applicant's claim is in itself a 'benefit' – both intrinsically and instrumentally; a benefit of which the applicant would necessarily be deprived if the s184 decision was simply withdrawn. For that reason alone, a s202 decision which does not 'determine the extent of [the council's] statutory obligations' is open to challenge in s204 proceedings.

Conclusion: county courts' power to vary ss184/202 decisions

Applicants' advisers should not be deterred from this course by suggestions from the council that any s204 appeal would be pointless or academic, on the basis that all the county court could do is quash the s184 or s202 decision and remit it to the local authority to be made again. That argument is persuasive in circumstances where the challenge is on grounds of procedural unfairness or substantive irrationality and there are several alternative substantive decisions which the council could lawfully make. But the argument has no force where the challenge is on a substantive ground and there is only one substantive conclusion that the authority could lawfully reach.

Before 1996, the High Court had no de jure power in judicial review proceedings to vary a council's homelessness decision. But the practical outcome of quashing a decision on the basis of irrationality would often be that the authority must remake the decision and find that the applicant is indeed homeless, or in priority need, or not homeless intentionally. The county court's jurisdiction under s204 is similar to judicial review in many respects. In one sense it is a weaker jurisdiction, in that the county court has no power equivalent to a mandatory order. The county court cannot, for example, order a local authority to make a s184 or s202 decision.[3] In another sense it is a stronger jurisdiction, since s204 contains an express power to vary the ss184/202 decision under consideration.

The Court of Appeal in *B* (per Chadwick LJ at (2000) 32 HLR 645) confirmed that it is entirely appropriate for a county court to vary a council's decision if there is only one substantive decision on the point in issue which the authority could have lawfully reached: 'I would accept that, if [the] material had shown that the only decision as to its duty to provide accommodation or assistance that the council, acting rationally, could reach was that the duty was that imposed by section 193(2) of the Act, the judge could properly have pre-empted further consideration by making an order to that effect.'

The Court of Appeal's judgment in *Crossley v City of Westminster* [2006] EWCA Civ 140, 23 February 2006 (per Sedley LJ at paras 23–24) goes further, and indicates that if the county court is satisfied that a decision about priority need is irrational, it should vary the authority's decision rather than remit it for renewed consideration (a conclusion which further underlines the need for prompt resolution of HA 1996 Part VII claims).

A more difficult issue arises if the ss184/202 decision did not reach an issue that is essential to determining the applicant's entitlement. A council which has concluded that an applicant is not in priority need is not under any obligation to have addressed the question of intentional homelessness (see *B*). Perhaps surprisingly, the Court of Appeal has held that this does not automatically preclude the county court from reaching its own conclusion about intentionality in the context of a s204 challenge to those issues which the authority did address. The point is best put by May LJ in *Deugi* at para 36: 'The question for the judge was whether there was any real prospect that Tower Hamlets, acting rationally and with the benefit of further enquiry, might have been satisfied that Mrs Deugi was intentionally homeless.'

This may be a difficult test for the applicant to surmount, especially if – and the issue is not settled in *Deugi* – the burden of proof lies on the applicant rather than the authority. But from the perspective of ensuring a speedy determination of the applicant's claim, this is a judicial practice which has much to commend it.

1 See House of Commons Standing Committee G, 1995/1996 session, 26 March 1996, Mr Curry at cols 815 and 817: '… [I]n the light of the review procedure … People want an early decision so they know where they stand … [The review] should operate relatively quickly and informally, with a user-friendly approach … The procedure that we have set out is designed to work rapidly and informally'. Also see HL Debates, col 436, 19 June 1996, Lord Mackay at col 436: 'We want authorities to conduct reviews as speedily as possible'.

2 Per Waller LJ at para 32: ' … If the original

decision was unlawful which for the reasons I have already given it was, the review decision-maker should have so held and made a decision that would have restored to the appellant the rights she would have had if the decision had been lawful.'

3 The first scenario, however, falls outside s204 and is by default amenable to challenge via judicial review. The adverse – for an applicant – implications of the second scenario are ameliorated by the county court's power to review a s184 decision.

Community care law update – Part 1

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Karen Ashton and **Jean Gould** continue their twice-yearly series of updates on community care law. A lot has been happening in the community care field since the last update in June 2006, and, for this reason, 'Community care law update' will be published in two parts. Part 1 will cover the NHS, mental capacity, adult protection and amendments to both the social services' and NHS's complaints procedures. Part 2 will be published in May 2007 *Legal Action* and will cover human rights developments, care standards and give a general update on relevant case-law. The authors welcome details of cases and contributions from readers.

The National Health Service

National Health Service Act 2006

Most of the key health legislation made since 1977, including the National Health Service Act (NHSA) 1977, has been consolidated into three Acts: the NHSA 2006, the NHS(Wales)A 2006 and the NHS(Consequential Provisions)A 2006. Each Act will come into effect on 1 March 2007.

NHS reorganisation

In the last few months, there has been a further structural reorganisation of the NHS in England. Strategic health authorities (SHAs) were reduced from 28 to 10 on 1 July 2006 and primary care trusts (PCTs) from 303 to 152 on 1 October 2006.[1]

There are transfer and transitional provisions in the Strategic Health Authorities (Establishment and Abolition) (England) Order 2006 SI No 1408 and the Primary Care Trusts (Establishment and Dissolution) (England) Order 2006 SI No 2072. These regulations include provision for continuity in the exercise of SHAs' and PCTs' functions (see articles 8 and 7 respectively).

One consequence of these provisions is that some new SHAs have been operating with more than one set of eligibility criteria for continuing NHS healthcare. This has been addressed by modifications to the Continuing Care (National Health Service Responsibilities) Directions 2004.[2] In general terms, until a new SHA adopts one new set of criteria, each new PCT must use the eligibility criteria of its old SHA. If there is more than one old SHA for that PCT, then the new PCT must agree with its new SHA which set of criteria will be used. There are also transitional provisions relating to the appointment of panel chairs and the establishment of panel lists.

NHS services and public consultation

There are a number of statutory requirements to involve the public in the planning of NHS services. In summary, the current position is as follows:

■ Section 15 of the National Health Service Reform and Health Care Professions Act 2002 requires the secretary of state to establish a patients' forum for each NHS trust and PCT. Members are appointed by the Commission for Patient and Public Involvement in Health. The functions of a patients' forum include obtaining the views of patients and carers about the range and operation of services and reporting back to the trust, and monitoring how effectively the trust has carried out its consultation functions (see below).

Section 11 of the Health and Social Care Act (HSCA) 2001 requires all SHAs, PCTs, and NHS trusts to make arrangements for public consultation on:

(a) the planning of the provision of those services;

(b) the development and consideration of proposals for changes in the way those services are provided; and

c) decisions to be made by that body affecting the operation of those services.

■ Section 7 of the HSCA requires the overview and scrutiny committees of local authorities to review and scrutinise matters relating to the health service in their area and to report and make recommendations. The

Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Amendment Regulations 2004 SI No 1427 set out the details of this requirement. In brief summary, the requirement is triggered where the NHS body has, under consideration, a proposal for a substantial development of the health service in the area of a local authority or a substantial variation in the provision of such a service.

In *A stronger local voice: a framework for creating a stronger local voice in the development of health and social care services. A document for information and comment*, the Department of Health (DoH) consulted on proposals for change which, it says, will improve public involvement in NHS planning.[3] The consultation ended on 7 September 2006. The government's response was published on 11 December 2006.[4] The proposed changes include:

- replacing patients' forums with independent local involvement networks (LINks), established by the local social services authority, which will cover areas rather than be tied to a specific organisation;
- encouraging overview and scrutiny committees to focus on commissioners of services; and
- clarifying the requirements of HSCA s11, which will be made more explicit and impose a new duty to respond on commissioners.

The new LINks are being trialled in seven localities on what are termed 'adopter' sites. The necessary legislative changes will be introduced as soon as parliamentary time allows.

Case-law

Duty to consult

The HSCA s11 statutory duty to consult was relied on in the recent challenge to North East Derbyshire PCT's decision to negotiate with an American-based healthcare provider, United Health Europe Limited (UHE Ltd), as the preferred bidder to provide GP services.

■ R (Smith) v North East Derbyshire Primary Care Trust and others

[2006] EWCA Civ 1291, 23 August 2006

At first instance ([2006] EWHC 1338 (Admin), 15 June 2006), the PCT argued that HSCA s11 did not apply to the decision to negotiate with UHE Ltd, or, if it did, adequate consultation had, in fact, taken place. Mr Justice Collins disagreed, but refused to quash the decision on the grounds that the claimant, Mrs Smith, a patient in the area, should have raised the matter through the patients' forum before resorting to judicial review proceedings, and, in any event, her representations would probably have made no difference. The claimant appealed.

The Court of Appeal examined in some detail the functions and powers of a patients' forum; the court concluded that it could not act as an alternative remedy in this case. A patients' forum had no power to decide whether s11 applied to the case or to require the PCT to reverse its decision. The Court of Appeal also held that it was not sufficient to say that the outcome would 'probably' have been the same had consultation taken place. The defendants had to show that the outcome would inevitably have been the same and, as they could not, the decision should be quashed.

Payment of interest in continuing NHS healthcare

■ R ((William Kemp) (a patient, by Derek Kemp, his litigation friend)) v (1) Denbighshire Local Health Board and (2) Powys Local Health Board

[2006] EWHC 1339 (Admin), 9 June 2006

This is the first case to consider the amount of interest payable where a patient succeeds in a retrospective claim of eligibility for continuing NHS healthcare. The first decision was covered in detail in 'Community care law update', June 2006 *Legal Action* 22. Langstaff J asked for further written submissions on the relationship between interest properly payable and the benefits position.

In outline, attendance allowance and the care component of disability living allowance are not payable to hospital in-patients and those whose care is fully funded by the NHS. But the Department for Work and Pensions (DWP) currently has a written policy of not recovering the benefits windfall that arises when a patient receives continuing NHS healthcare retrospectively. NHS bodies in England and Wales have argued that interest on the recovered costs of care should only be payable at the retail price index rate and not at the (higher) special account rate usually awarded in the county court.

In his first judgment, Langstaff J accepted provisionally that this achieved the compensatory element required by Supreme Court Act 1981 s35A. However, he has now amended that view, holding instead that justice, in the individual case, is better served by an award of interest at the special account rate. This is partly based on the uncertainty of relying on the DWP's policy remaining in place and partly on an acceptance (obiter) of the argument that 'where the focus of the court's attention is upon requiring a defendant to pay back that which has been unlawfully gained, the defendant should not be credited with money which the payee has received from a third party'.

The authors understand that the DoH will issue guidance shortly setting out the principles for financial restitution, including interest for both retrospective and ongoing cases.

Mental capacity

Update on the Mental Capacity Act 2005

Following a written ministerial statement in December 2006, the DoH has set out the commencement timetable for England.[5]

The Department of Health will introduce the Independent Mental Capacity Advocate (IMCA) service on 1 April 2007. Other essential parts of the Act – such as the principles, assessing capacity and determining best interests – will be introduced at the same time, solely for the purpose of supporting the IMCA service. The MCA Code of Practice will also be available in April ... The criminal offence of ill treatment or wilful neglect of a person lacking capacity will be introduced from April 2007. The other parts of the Act will be implemented in October 2007.

Mental Capacity Act (MCA) ss30–41, which deal with research and the IMCA service, are subject to separate implementation in Wales. In December 2006, the Welsh Assembly's Minister for Health and Social Services announced that the commencement of these sections will be postponed until October 2007. Otherwise the commencement provisions are common to both jurisdictions.

Over the last six to 12 months, there has been considerable activity within the Department for Constitutional Affairs (DCA) to finalise preparations for the implementation of the MCA. The main areas of activity have been as follows:

MCA code of practice

MCA s42 requires the Lord Chancellor to make a code of practice and requires certain groups to have regard to the code. A draft was issued for consultation in March 2006.[6] The final version has not yet been published for implementation in April 2007.

Independent Mental Capacity Advocate service

In summary, the MCA requires that an IMCA be appointed and consulted when one of three types of decision is to be made on behalf of a person who does not have sufficient capacity to make that choice him/herself. Those types of decision are to provide, or to withhold or withdraw, serious medical treatment, or to provide accommodation by either an NHS body or a social services authority, for a minimum period.

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations (the General Regs) 2006 SI No 1832 will fill in the details about the IMCA's service. The General Regs will come into effect on 1 April 2007, save insofar as they needed to be in force earlier for preparation work and so came into force on 1 November 2006. There has been consultation on similar provisions in Wales, but the relevant regulations have not yet been made. The General Regs include the following provisions:

- 'Serious medical treatment' is defined and relies on the nature of the costs and benefits to the patient instead of specifying types of treatment (reg 4).
- An IMCA cannot be appointed unless s/he meets the 'appointment requirements' which deal with experience, training and independence (reg 5).
- The General Regs also expand on the IMCA's functions and turn some powers into duties (reg 6). These include the requirement that the IMCA prepares a report for the NHS body or local authority which instructed him/her; this may include any submissions s/he wishes to make (reg 6(6) and (7)).
- The IMCA has the same rights to challenge the decision as s/he would have done had s/he been engaged in caring for the incapacitated person or interested in his/her welfare (reg 7). Presumably, this means that s/he can make applications to the court. The explanatory memorandum to the General Regs says: 'Additional funding has been made available to meet the cost of complex cases including disputed cases as well as the situation where an IMCA takes a case to court' (para 5.11). (See below for more information about the availability of legal aid.)

In MCA s41, the secretary of state and Welsh Assembly have been given power to expand the role of IMCAs. The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006 SI No 2883 do just that. The regulations permit an NHS body or a local authority to appoint an IMCA if it is satisfied that it would be of particular benefit to the incapacitated person to be represented in one of two additional situations:

- In a review of a residential placement of the type described above, where there is no other appropriate person to consult in determining what is in the incapacitated person's best interests; and
- Where protective measures are proposed, or have been taken, under the protection of vulnerable adults (POVA) scheme (which local authorities operate under statutory guidance) following an allegation of abuse or neglect.

The DoH has issued guidance to local social services authorities on training staff on the implications of the MCA, in general, and on the implementation of the IMCA service.[7] Additional resources are being made available.

Lasting powers of attorney

Following consultation, the DCA has decided that separate forms are to be used for financial (property and affairs) and personal welfare lasting powers of attorney.[8] So, if a person wishes to appoint someone to make both kinds of decisions, even if s/he wishes to appoint the same individual, separate forms will have to be completed.

Court of Protection: rules, fees and legal aid

MCA s45 establishes a new Court of Protection. The DCA's consultation on draft court rules closed on 6 October 2006 and a report on the responses was published on 6 February.[9] Some of the key issues raised in the consultation paper were as follows:

- Although the current Court of Protection operates mainly in London, the new Court of Protection may have various hearing venues around the country.
- There is an emphasis on using all alternatives to try and resolve disputes before using the court including:
  – involving an advocate;
  – getting a second opinion;
  – holding a formal or informal case conference;
  – using the informal or formal complaints process; and
  – participating in mediation or other forms of alternative dispute resolution.
- Those wishing to apply to the Court of Protection will have to seek permission to do so unless they fall into one of the specified groups (see MCA s50), ie:
  – a person who is said to lack capacity;
  – a donor or appointee under a lasting power of attorney;
  – a court-appointed deputy; or
  – a person named in an existing court order to which the application relates.

There has also been consultation on fees for the Court of Protection and the Office of the Public Guardian, but neither a summary of responses nor a DCA response has yet been published.[10]

A 'notice of limited consultation' was issued on 30 November 2006 on the topic of legal aid and the Court of Protection.[11] The consultation closed on 2 February 2007. It proposes that certain cases will be brought within scope using the special authorisation procedure in Access to Justice Act 1999 s6(8). The proposed criteria for funding are:

1. The proceedings are of overwhelming importance to the person whose health and welfare is the subject of the proceedings [; and]

2. The court has ordered or is likely to order an oral hearing at which it will be necessary for the applicant for funding to be legally represented.

The paper refers to the existing guidance on the meaning of 'overwhelming importance' in the Legal Services Commission's funding code. This stresses an exceptional importance beyond any monetary value of the case because it concerns 'life, liberty or physical safety of the client or his or her family, or a roof over their heads'. The consultation note advises of the intention to include issues of serious medical treatment and the right to marry in this list, but only in incapacity cases. This limited extension seems to be inconsistent with an earlier statement in the paper, which suggests that cases raising serious welfare issues, such as where a person should live and which 'institution' would best meet his/her needs, would be included where the case was particularly legally or factually complex.

The consultation paper suggests that the proposals would mean a small increase in the number of cases funded. This is surprising given that the proposals are clearly more restrictive than existing funding for 'best interests' cases in the High Court.

Filling the Bournewood gap

The DoH consulted on what should be done to respond to the criticisms of the European Court of Human Rights in the 'Bournewood' case (*HL v UK* App No 45508/99, 5 October 2004).[12] The problem identified was the lack of procedural protections for people who lack capacity to consent to care arrangements which, in effect, deprive them of their liberty. Following consultation, the DoH published its proposals entitled *Bournewood briefing* sheet.[13] These proposals will be incorporated into the MCA by amendments introduced in the new Mental Health Bill (see page 29 of this issue). The DoH has published its most up to date summary of the proposals: *The Mental Health Bill 2006: Briefing sheets on key policy areas*.[14]

Whenever a hospital or care home identifies that a person who lacks capacity is (or is at risk of) being deprived of his/her liberty, it must seek authorisation for the deprivation from the 'supervisory body'. The supervisory body for patients in hospital is the relevant PCT and for a person in a care home, it is the relevant local authority. In the absence of such authority, or an order from the Court of Protection, 'it will be unlawful to deprive someone of liberty under the [MCA]'. (The briefing sheet suggests that deprivation

of liberty will be rare in other settings, but where it occurs the authority of the Court if Protection should be sought.)

On receiving a request for authorisation of deprivation of liberty, the supervisory body must obtain the following assessments:

- An age assessment to establish that the person concerned is over 18;
- A mental health assessment to establish that s/he is suffering from a disorder or disability of the mind.
- A mental capacity assessment to establish that s/he lacks capacity to consent to the care arrangements.
- An eligibility assessment to establish that s/he is or should be subject to the Mental Health Act (MHA) 1983.
- A best interests assessment to consider whether the deprivation of liberty is a necessary and proportionate response in his/her best interests.
- A 'no refusals' assessment to ensure that the authorisation does not conflict with a valid decision by a donee of a lasting power of attorney or a deputy appointed by the Court of Protection, and is not for the purpose of treatment which would conflict with an advance directive.

Regulations may set out who can carry out the various assessments.

The best interests assessor must comply with the obligation to consult with various parties as set out in MCA s4(7), and may put conditions on the authority, for example family contact conditions. The maximum period of authorisation will be 12 months and, on expiry, the care home or hospital must apply again. If authority is given, the best interests assessor will recommend that someone be appointed to look after the individual's interests, ie, his/her representative. A review can be requested by the person concerned or his/her representative at any point, or, in fact, by the hospital or care home if circumstances change. The person concerned or his/her representative will be able to appeal a decision to grant an authority to the Court of Protection. Legal aid will be available subject to a means and merits test. A draft 'illustrative' code of practice has been published by the DoH.[15] It will be included in the MCA code of practice when finalised. (See also page 31 of this issue.)

Case-law

■ In the matter of DE (an adult patient) and in the matter of the inherent jurisdiction of the High Court and in the matter of a claim under section 7 of the Human Rights Act 1998 and JE v (1) DE (by his litigation friend the Official Solicitor) (2) Surrey CC (3) EW

[2006] EWHC 3459 (Fam), 29 December 2006

This case concerned a dispute over the transfer of DE, by the council, from one residential home to another. DE's wife, the claimant, JE, sought a number of declarations, including that it was in his best interests to return to the matrimonial home, that he was unlawfully detained and that there was unlawful/unjustifiable interference with the couple's article 8 rights (right to respect for private and family life) under the European Convention on Human Rights ('the convention'). The Official Solicitor claimed, on DE's behalf, that he had been unlawfully detained and sought damages for breach of his article 5 rights (right to liberty and security).

The purpose of the preliminary hearing was to establish whether DE had, as a matter of fact, been deprived of his liberty at any time since September 2005 and whether he still was. The judgment provides a useful summary of the developing case-law, from which the following principles emerge:

- There are both objective and subjective elements.
- It is possible to be deprived of liberty within the meaning of the convention without being imprisoned for the purposes of the tort of false imprisonment.
- The difference between deprivation of, and restriction on, liberty is one of degree and intensity, not of nature or substance.
- The cases are fact-sensitive: the type, duration, effects and manner all need to be examined.
- The decision in *Nielson v Denmark* (1988) 11 EHRR 175, which found no deprivation of liberty, is not applicable in a case concerning an incapacitated adult because it turns more narrowly on the ambit of parental authority.
- Whether the person is, in fact, free to leave is determinative and may be tested by deciding whether those who manage the individual exercise complete and effective control over his/her care and movements. Whether the person is locked in is relevant but not determinative.
- Whether or not the individual is detained in her/his best interests does not answer the question regarding whether there is a deprivation of liberty.
- A person can only consent to confinement if s/he has capacity, in which case consent may be inferred from the lack of objections; but that same inference cannot be made if the person lacks capacity.
- The fact that a person may have given him/herself up to be taken into detention does not mean that s/he has consented to the detention. This is so whether or not the person has capacity.
- Compliance and not attempting to leave are not determinative.

Munby J held that DE had been, and continued to be, deprived of his liberty because he was not free to leave. He was completely under the control of Surrey because it decided where he could live, and both whether he could leave or live with his wife. Surrey argued that DE was free to leave both in fact and law, but the contemporaneous records strongly suggested otherwise, and that was the understanding of DE and his wife. Munby J dismissed the representations about the legal position and, for instance, the limited extent of police powers in reality as 'ex post facto legal sophistry':

It is quite plain that [Surrey CC's] purpose in repeatedly making it clear … that the police would and should be called was to prevent DE being removed … A person can be as effectively 'deprived of his liberty' by the misuse or misrepresentation of even non-existent authority as by locked doors and physical barriers. (See page 33 of this issue)

■ B Borough Council v (1) Mrs S (2) Mr S (by the Official Solicitor)

[2006] EWHC 2584 (Fam), 23 October 2006

The wife of a 90-year-old man, who lacked capacity, disputed the lawfulness of the local authority's conduct in obtaining an injunction without notice in best interests' proceedings. The case concerned where Mr S should live and whether his contact with his wife should be supervised. It sets out principles to be applied in such cases.

Charles J held that, on the facts of the particular case, the application without notice had been justified because the concern that Mrs S might remove her husband in advance of the court hearing was a reasonable one. However, this was an exception and, in general, applications should be on notice. He also stressed the need for particularised, balanced and fair evidence including, if possible, independent evidence in such cases.

Adult protection

Legislation

The Safeguarding Vulnerable Groups Act (SVGA) 2006 is designed to produce a more

consistent, thorough and preventative system of monitoring and controlling the employment of care workers who may pose a risk to vulnerable adults and children in the health and care sectors. As yet, there is no commencement date for the SVGA.

The SVGA establishes an Independent Barring Board (IBB) with responsibility for maintaining both a children's and adults' barred list and making decisions about whether a care worker should be included in either or both lists. Inclusion will be automatic where individuals have been cautioned or convicted of specified offences, and discretionary for inappropriate behaviour and future risk of harm. In the case of discretionary decisions to bar, there will be a right for individual care workers to request a review by the IBB and a subsequent right of appeal to the Care Standards Tribunal against inclusion. The SVGA will replace the existing POVA scheme and Protection of Children Act 1999.

Case-law

The SVGA received royal assent on 8 November 2006 and, ironically, on 16 November 2006 the Administrative Court held that Part VII of the Care Standards Act (CSA) 2000, which deals with the remedies for care workers placed provisionally on the POVA list, was incompatible with both article 6(1) of the convention (right to a fair hearing) and article 8.

■ R (Wright and others) v (1) Secretary of State for Health and (2) Secretary of State for Education and Skills

[2006] EWHC 2886 (Admin), 16 November 2006

Four claimants, supported by the Royal College of Nursing, succeeded in arguing that the procedures for dealing with provisional listing were unfair and disproportionate. Provisional listing leads inevitably to the termination of employment and makes alternative employment in the sector highly unlikely.

Stanley Burnton J concluded that:

■ Not all cases were, on their facts, urgent as evidenced by the time taken by the secretary of state provisionally to list these individuals. In such cases care workers should be given an opportunity to be heard.

■ No reason was shown for treating care workers differently from other regulated health professionals for whom independent judicial scrutiny is available. While there was a need for provisions for urgent action in advance of a full investigation, this could be achieved by way of a provisional suspension.

■ The CSA precludes access to a tribunal for nine months. The timescale is inflexible and, in many cases, too long; this denies workers their right to 'a fair and public hearing within a reasonable time' (article 6(1) of the convention).

■ Suspension from work would not, in general, engage article 8 of the convention. In this case it does because the indication that the person constitutes a risk to vulnerable adults is calculated to interfere with relationships with both colleagues and clients. For the reasons set out above, the interference was disproportionate.

The judgment makes no reference to the

Summary of procedure and the timescale for social services complaints

Complaint (C) received within a year of event	→	If both parties agree, can go straight to formal investigation, otherwise
	Local resolution should be concluded within 10 working days Can be extended to 20 days if necessary*	Complaints manager (CM) to inform C of right to go to stage two if 20 days have elapsed without a response
	↓	
C remains dissatisfied	Within 20 working days	
	↓	
	C to request formal investigation	CM to appoint an investigating officer and agree complaint and desired outcome with C (CM can appoint an independent person where there are significant concerns about the vulnerability of C)
	→	
	Investigation should be completed within 25 working days of receipt Can be extended with reasons agreed with the CM to 65 working days Adjudicating officer 'usually' invites C to a meeting, before or after writing adjudication on investigation	
C remains dissatisfied	↓	
	Within 20 working days of receipt of decision	
	↓	
	C to request independent review panel	CM to convene panel
	→	
	Within 30 working days of receipt of request	
	↓	
	Panel to meet	
	↓	
	Within 5 working days	
	↓	
	Panel to decide and record recommendations and notify C and local authority (LA)	
	↓	
	Within 15 working days	
	↓	
	If panel finds complaint not adequately dealt with, LA to notify C of the action it proposes to take in response to recommendations made	

* NB: This shorter timescale is set out in *Learning from complaints*. The LASSC(E) Regs refer to 20 days or as soon as reasonably practicable.

SVGA, but it seems likely that the criticisms made of the existing system can be met through regulations to be made under that Act. Access to effective remedies for abuse and neglect in the care sector is already woefully inadequate for many vulnerable adults and their families. Obviously, a balance must be struck between the rights of vulnerable individuals and those of their care workers, but it is to be hoped that the potential for a more proactive system of protection in the SVGA is not diminished or lost in the process.

Complaints procedures

Social services

The Local Authority Social Services Complaints (England) Regulations (LASSC(E) Regs) 2006 SI No 1681 came into force on 1 September 2006. Guidance entitled, *Learning from complaints: social services complaints procedure for adults* has also been published.[16] The changes are not as far-reaching as expected, in particular the Commission for Social Care Inspection will not be taking over statutory responsibility for the third or independent review stage of the procedure. The most significant changes are as follows:

- The introduction of a requirement that a complaint must be made within one year of the event complained about, unless it would be unreasonable to expect the complaint to have been made earlier than it was and provided that it is still possible to consider the complaint effectively and fairly.
- The LASSC(E) Regs make a number of changes to the old time limits (see flow chart on page 27 of this issue), including introducing a time limit for responding at the informal stage one, in default of which a request for a stage two investigation can be made.
- The review panel must now have at least two independent members. Officers of the council (or their spouse/civil partner) can no longer be part of the panel; one council member can be on the panel, but not as the chairperson.
- A complaints manager must be appointed and, at the investigation stage, should ensure the appointment of an investigating officer to report in writing for adjudication by a senior manager.
- If the complaint includes elements that relate to an NHS body, the local authority must, within ten working days of receiving the complaint, ask the complainant whether s/he wishes details to be forwarded to the NHS. If so, the local authority must forward the complaint as soon as reasonably practicable. If the complaint relates solely to an NHS body, the timescale is five working days.
- The LASSC(E) Regs require co-operation between both bodies. In particular:
  – to provide relevant information;
  – to attend meetings concerning the complaint; and
  – to seek to agree which body should take the lead in dealing with the complainant.

NHS

The NHS complaints procedure has been amended, by the National Health Service (Complaints) Amendment Regulations (NHS(C)A Regs) 2006 SI No 2084, to ensure that this is a reciprocal process. The NHS(C)A Regs also introduce other miscellaneous amendments including to various time limits. The time given to the NHS body for its response to a complaint following investigation has been extended from 20 to 25 working days, and the time limit for requesting investigation by the Healthcare Commission from two to six months.

Guidance entitled *Supporting staff, improving services – guidance to support implementation of the: National Health Service (Complaints) Amendment Regulations 2006 (SI 2006 No 2084)* has been issued by the DoH on the implementation of the new provisions.[17] *Supporting staff* envisages that the NHS body will have a local complaints protocol which will deal with co-ordination, including identifying the lead body. The complaints manager of the lead body is instructed that s/he must, where possible, co-ordinate a single reply.

The guidance also advises that where a complaint involves services provided by a body other than the local social services authority (for example, a matter relating to detention under the MHA) the NHS body that receives the complaint should advise complainants which matters fall under which procedure, even though there is no such requirement in the NHS(C)A Regs.

1 Details of the new SHAs and the new PCTs for which they are responsible can be found at: www.dh.gov.uk.
2 *Continuing Care (National Health Service Responsibilities) Directions 2004* is available at: www.dh.gov.uk/assetRoot/04/07/46/90/04074690.PDF.
3 Available at: www.dh.gov.uk/assetRoot/04/13/70/41/04137041.pdf.
4 *Government response to 'A stronger local voice'* is available at: www.dh.gov.uk/assetRoot/04/14/16/76/04141676.pdf.
5 Visit: www.dh.gov.uk.
6 *Mental Capacity Act 2005: draft code of practice* is available at: www.dca.gov.uk/consult/codepractise/draftcode0506.pdf. The consultation paper, *Mental Capacity Act code of practice*, is available at: www.dca.gov.uk/consult/codepractise/consultation0506.pdf. The consultation ended on 2 June 2006. *Mental Capacity Act code of practice. Response to consultation*, which includes the DCA's response to the consultation, is available at: www.dca.gov.uk/consult/codepractise/responses.pdf.
7 *The Mental Capacity Act and the independent mental capacity advocate (IMCA) service*, LAC 2006 (15) is available at: www.dh.gov.uk/assetRoot/04/14/03/24/04140324.pdf.
8 The consultation paper *Lasting powers of attorney – forms and guidance* is available at: www.dca.gov.uk/consult/powerattorney/lpa_consult_full.pdf. The consultation closed on 14 April 2006. The response to the consultation is available at: www.dca.gov.uk/consult/powerattorney/lpa_response0106.pdf.
9 *Draft court rules: Mental Capacity Act 2005 Court of Protection Rules* is available at: www.dca.gov.uk/consult/mentalcapacity/consultation1006.pdf and *Draft court rules: Mental Capacity Act 2005 Court of Protection Rules. Response to consultation* is available at: www.dca.gov.uk/consult/mentalcapacity/response1006.pdf.
10 *Court of Protection and Office of the Public Guardian fees* is available at: www.dca.gov.uk/consult/court-protection-rules/cp2306.pdf. The consultation closed on 29 November 2006.
11 *Notice of limited consultation exercise on proposed authorisation by the Lord Chancellor on bringing certain cases in the Court of Protection within the scope of legal aid funding* is available at: www.dca.gov.uk/consult/court-protection-cases/cp2606.pdf.
12 *"Bournewood" consultation. The approach to be taken in response to the judgment of the European Court of Human Rights in the "Bournewood" case* is available at: www.dh.gov.uk/assetRoot/04/10/86/41/04108641.pdf.
13 Available at: www.dh.gov.uk/assetRoot/04/13/68/45/04136845.pdf.
14 Available at: www.dh.gov.uk.
15 *The Bournewood safeguards: draft illustrative code of practice* is available at: www.dh.gov.uk.
16 Available at: www.dh.gov.uk/assetRoot/04/13/91/39/04139139.pdf.
17 Available at: www.dh.gov.uk/assetRoot/04/13/88/17/04138817.pdf.

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Mental health law update

Robert Robinson and **Michael Konstam** report on recent case-law and other developments in mental health law. Readers are invited to submit summaries of significant unreported cases.

POLICY AND LEGISLATION

Mental Health Bill

As expected, the government introduced the Mental Health Bill 2006 into parliament on 16 November 2006. The bill amends the Mental Health Act (MHA) 1983 and introduces 'Bournewood' safeguards through amendments to the Mental Capacity Act (MCA) 2005. The bill contains the provisions set out in the last 'Mental health law update', August 2006 *Legal Action* 26 and readers are referred to that article.

There are five main areas of the MHA which will be affected if the bill becomes law:

- There will be a new broad definition of mental disorder and most exclusions will be removed.
- The 'treatability' test will be replaced by an 'appropriate treatment' test.
- The roles of approved social worker (ASW) and responsible medical officer (RMO) will be replaced by new roles, which will be open to a wider range of professionals.
- The provisions for displacing and appointing nearest relatives will be amended to give patients the right to use the county court system to remove their nearest relative.
- Supervised community treatment will be created through the introduction of a new community treatment order (CTO) for certain patients.

The Bournewood provisions are discussed separately below.

Definition of mental disorder and exclusions (clauses 1–3)

Clause 1 of the bill changes the definition of mental disorder and removes the separate classifications of mental illness, mental impairment, severe mental impairment and psychopathic disorder. The new definition of mental disorder will simply be 'any disorder or disability of the mind'. In clause 2, the bill introduces a special provision to ensure that learning disability will only be treated as a mental disorder if it is associated with abnormally aggressive or seriously irresponsible conduct. This preserves the current treatment under the MHA. Learning disability will be defined as 'a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning'.

Clause 3 provides for the retention of a drug and alcohol exclusion. Dependence on alcohol or drugs will therefore continue not to be considered as a mental disorder. However, the exclusion has been reworded to make it clear that people who are dependent on alcohol or drugs will not be excluded if they also suffer from another mental disorder even if that other disorder is related to alcohol or drug use. Finally, the exclusions relating to 'promiscuity or other immoral conduct' and 'sexual deviancy' will be abolished.

New 'appropriate treatment' test (clauses 4–6)

The MHA currently provides that in certain circumstances, namely mental impairment and psychopathic disorder, a person can only be detained for treatment if the proposed treatment is likely to 'alleviate or prevent a deterioration' in the patient's condition. This requirement, known as the 'treatability test', will be replaced by a requirement that 'appropriate medical treatment is available' for the patient concerned. The new test will apply to detentions under MHA s3 and relevant criminal justice provisions, to supervised community treatment, and to the criteria for renewal and discharge of detention.

The appropriate treatment test also replaces the treatability test where a certificate from a second opinion appointed doctor (SOAD) is required under MHA ss57 and 58. In their current form, these sections require the SOAD to certify that treatment should be given 'having regard to the likelihood of the treatment alleviating or preventing a deterioration of the patient's condition'. Under the proposals, the SOAD would have to certify that it is appropriate for the treatment to be given. Clause 6 adds a new subsection (3) to the supplementary provisions for MHA Part 4 (in s64) which explains what it means for treatment to be appropriate for the purposes of Part 4. The new test will only be met if medical treatment is available to the patient which is appropriate taking account of the nature and degree of the patient's mental disorder and all other circumstances of the case. Paragraph 39 of the explanatory note to the bill makes clear that the test requires that appropriate treatment is actually available, not just in theory. Because of the change to the definition of mental disorder the appropriate treatment test will apply to people with all former classifications of mental disorder as opposed only to those with mental impairment and psychopathic disorder.

The main focus of this change is likely to be those people with a diagnosis of personality disorder. There will no longer be a need to show that the personality disorder is treatable, merely that appropriate treatment is available. The courts currently define 'treatment' widely in order to justify detention, so this amendment may not, in practice, result in a significant increase in detention. However, there has been much criticism of this proposal on the fundamental ground that a person should not be in hospital if there is no effective form of treatment for the mental disorder in question.

Changes in professional roles (clauses 8–20)

The bill proposes to widen the range of professionals entitled to exercise certain functions under the MHA. Specifically, the role of the ASW will be changed to that of approved mental health professional (AMHP) and the RMO will be replaced by a responsible clinician. This will be a clinician approved as being capable of fulfilling the responsibilities of the responsible clinician role.

People other than doctors, for example, social workers, nurses, occupational therapists and psychologists, will be eligible to become approved clinicians. Since the responsible clinician is essentially the approved clinician with overall responsibility for his/her case, s/he will not necessarily be a medical practitioner, unlike the RMO.

Certain functions under the MHA will still require the input of a doctor. The wording of ss2 and 3, for instance, will remain unaltered so that medical recommendations for detention under these sections will still have to be made by two 'registered medical practitioners'. Other functions, which are currently exercisable by a medical practitioner, will be able to be performed by the approved clinician. For example, clause 8 will amend MHA s5(2) to provide that the holding power can be used by the 'registered

medical practitioner or approved clinician in charge of the treatment'. Other matters for which clinicians other than doctors could be responsible include leave of absence under s17, initiating CTOs and recalling a 'community patient' back to hospital, renewing civil detention under s20, discharging patients under s23, and restricting discharge by a nearest relative under s25.

Under MHA s114, a local social services authority is required to appoint a sufficient number of ASWs to carry out key functions. These functions include making applications for compulsory admission or guardianship. If amended, any references to the ASW will be changed to refer to the AMHP who will take on functions of the ASW, including making applications for compulsory admission under Part 2 of the Act. A wider group of professionals, for example nurses, occupational therapists and psychologists, will potentially be eligible for approval as AMHPs although local authorities will continue to be responsible for approving AMHPs under the reworded s114. This will inevitably result in a more medical approach to the application of the MHA and particularly with regard to assessments for admission under ss2 and 3 where the independence of the ASW has traditionally been so important.

Nearest relatives (clauses 21–24)

The government has decided not to introduce provisions for a 'nominated person' to replace that of 'nearest relative'. Under clause 24 of the bill, a person's nearest relative will continue to be appointed in accordance with the provisions of MHA s26, although civil partners are inserted into the list defining relatives and afforded the same status as husband and wife. Under clause 21 of the bill, MHA s29(2) is to be amended so that the patient is included in the list of people who may apply for the displacement of a nearest relative. In addition, s29(3) will be widened to allow for displacement of a nearest relative on the ground that s/he is 'not a suitable person to act as such'.

This proposal will offer patients some possibility of nominating a nearest relative of their choosing but they will have to go through the county court system. This is costly and for many vulnerable people can be inaccessible. Patients would still be reliant on the court to agree with their view. They would have to apply to the county court on the ground that the person who would otherwise be considered to be the nearest relative is 'not a suitable person'. In the application, the patient can nominate another nearest relative and that person can then be made the acting nearest relative unless the court finds the person to be unsuitable or decides not to displace the current nearest relative. This is very different from the provisions in the 2004 draft bill, which provided for patients to have the right to choose a nominated person. Clause 22 will amend MHA s30 so that there is a new right for the patient to apply to discharge or vary an order appointing an acting nearest relative. The clause also provides that a nearest relative displaced under the new 'unsuitable' ground will be able to apply to discharge such an order, but only having first obtained leave of the court.

Community treatment orders (clauses 25–29)

Sections 25A–25J of the MHA, which relate to 'supervised discharge', are to be removed by clause 29 of the bill. They will be replaced by new provisions for supervised community treatment for patients who have been discharged from compulsory treatment in hospital to ensure that they comply with treatment under clause 25. These will be contained in new ss17A–17G which make provision for a CTO to be imposed in certain circumstances (s17A(1)) and define a person subject to a CTO as a 'community patient' (s17A(6)). An application will be made to the hospital managers by the responsible clinician with a supporting recommendation by an AMHP. A CTO will only be available where the 'relevant criteria' are met, as set out in the new s17A(5). The proposed s17B provides that a CTO shall specify conditions to which the patient is to be subject under the order. Under s17E, there will be power for a community patient to be recalled to hospital in certain circumstances, including where the patient does not comply with any condition to make him/herself available for examination.

Other changes

Definition of 'medical treatment' (clause 7)

The definition of 'medical treatment' in MHA s145 will be amended so that it covers, in the words of para 49 of the explanatory note, 'medical treatment in its normal sense as well as the other forms of treatment mentioned'. 'Psychological intervention' is specified in the new definition and the explanatory note lists cognitive therapy, behaviour therapy and counselling as examples.

Mental health review tribunals (clauses 30–31)

Clause 30 amends MHA s68 so that the duty of hospital managers to refer cases to the mental health review tribunal (MHRT) applies to community patients and also to people who are still subject to s2 at the point of referral (that is, people who continue to be detained for assessment while nearest relative displacement proceedings are taking place). Under the amended section, managers will be required to refer the patient at six months from their 'applicable day'. This is the day on which the patient was first detained, whether under ss2 or 3, or the day on which the patient was detained in hospital following a transfer from guardianship. A new s68A will contain a power for the 'appropriate national authority', either the Secretary of State for Health or Welsh ministers, to reduce the period in s68 for automatic MHRT referrals to take place.

Restricted patients (clauses 33–34)

Clause 33 will amend MHA s41(1) so that time-limited restriction orders imposed on mentally disordered offenders who pose a risk to the public can no longer be made by the courts. In practice, most restriction orders are made without limit of time.

Progress through parliament

The bill is now in the report stage in the House of Lords. It has not yet been debated in the House of Commons. No voting has taken place yet. It is expected that the bill will be enacted by October 2007 and come into force in April 2008.

Briefing sheets

On 17 November 2006, the Department of Health published a series of revised briefing sheets on the main changes effected by the bill.[1]

Revised MHA code of practice

There will be a revised code of practice amending the March 1999 edition. This will incorporate any new provisions of the bill which are enacted. The code will include provisions explaining the relationship between the MHA and the MCA and will be updated to reflect changes in practice and policy since the last edition. It will also reflect changes brought about by case-law since then. A draft code of practice was published on 17 November 2006. Consultation is currently taking place with a view to laying the final version before parliament in October 2007, depending on the progress of the bill.[2]

Mental Capacity Act 2005

The MCA was due to come into force on 1 April 2007. However, the main parts of the MCA, relating to the new Court of Protection and Public Guardian, will not now come into force until October 2007. The parts of the MCA dealing with independent mental capacity advocates and criminal offences relating to ill treatment of incapacitated patients will still come into force on 1 April

2007. It is expected that the Bournewood provisions contained in the Mental Health Bill will, if enacted, come into force in April 2008.

The consultation on the draft code of practice ended on 2 June 2006 and a summary of the responses was published on 29 September 2006.[3] A revised draft of the code is being prepared. It was intended that the final version would be available by the beginning of 2007 with a view to it being laid before parliament in time for the original MCA implementation date of 1 April 2007. Publication of the final version has now been delayed but is expected shortly and should be available in time for the new MCA implementation date of October 2007. The code will need to be revised to include the Bournewood provisions when they are enacted. (See also page 24 of this issue.)

Bournewood provisions

The Mental Health Bill also contains provisions designed to close the 'Bournewood gap' following the decision of the European Court of Human Rights (ECtHR) in *HL v UK* App No 45508/99, 5 October 2004, which declared that it was unlawful for incapacitated but informal patients to be effectively detained without the protection afforded by the MHA to formally sectioned patients. The new provisions will be brought in by amendment to the MCA and are expected to be implemented in April 2008. The bill sets out safeguards for patients who suffer from a disorder or disability of mind, lack the capacity to give consent to arrangements made for their care and are deprived of their liberty otherwise than under the MHA.

Whenever a hospital or care home identifies that a person who lacks capacity is being, or risks being, deprived of his/her liberty, it must apply to the 'supervisory body' for authorisation. This will be either the local authority or the primary care trust. The supervisory body must obtain six assessments:

- An age assessment that the patient is over 18.
- A mental health assessment that the patient is suffering from a mental disorder.
- A mental capacity assessment that the patient lacks the capacity to decide whether to be admitted to or remain in the hospital or care home.
- An eligibility assessment (a patient will be eligible unless s/he is detained under the MHA or subject to a conflicting requirement under the MHA such as a guardianship order or conditional discharge or unless the application is to enable mental health treatment in hospital and the patient objects).
- A best interests assessment that it is in the best interests of the patient to be subject to the authorisation, that it is necessary to prevent harm and that it is proportionate.
- A no refusals requirement that the authorisation does not conflict with a valid decision by a donee of a lasting power of attorney or a deputy appointed by the Court of Protection and is not for the purpose of giving treatment which would conflict with a valid and applicable advance decision made by the patient.[4]

If any assessment concludes that the patient does not meet the criteria for an authorisation to be issued, the supervisory body must turn down the request for authorisation. If the authorisation is for detention to enable life-sustaining treatment or treatment believed to be necessary to prevent a serious deterioration in the patient's condition, and there is a question about whether it may lawfully be granted, it will not be unlawful to detain the patient while a decision is sought from the Court of Protection.

The duration of any authorisation will be assessed on a case by case basis. The maximum period will be 12 months but it is expected that authorisations will be for shorter periods in most cases.

If all the assessments conclude that the patient meets the criteria for an authorisation to be issued, the supervisory body must grant the request. An authorisation may be reviewed if the hospital or care home requests a review or the patient or his/her representative requests a review.

A draft illustrative code of practice on the Bournewood safeguards was published in December 2006 and comments are invited by June 2007.[5] (See also page 25 of this issue.)

New Court of Protection and Public Guardian

The MCA creates a framework within which to provide both empowerment and proper protection for people aged 16 and over who cannot take all decisions for themselves (in rare instances it will also apply to those under 16). It provides the framework for deciding whether people have the mental capacity to make decisions for themselves and for making decisions on behalf of people who lack the mental capacity to make such decisions.

The MCA establishes a new Court of Protection with a new jurisdiction to deal with decision-making for adults who lack capacity. The new court will be able to make decisions, as the current court can, about 'property and affairs' (the term used to refer to financial decisions) but also about 'personal welfare matters'. The court will also have the power to make a declaration about whether or not a person has capacity to make a particular decision or in relation to a particular matter. The procedures of the new court will be set out in rules of court and practice directions made under the authority of the Lord Chief Justice with the agreement of the Lord Chancellor.

The new court will be a Superior Court of Record with a president at its head. The President of the Family Division has been appointed as President Designate, the Chancellor of the Chancery Division has been appointed Vice President Designate and the Master of the current Court of Protection has been appointed Senior Judge Designate. The number of judges will increase significantly with different cases being heard by High Court, circuit and district judges depending on sensitivity, complexity and urgency. It will have hearing venues in a handful of key locations in England and Wales (not just London and Preston) with a central administration (Registry) in London.

The MCA also establishes a new statutory office-holder called the Public Guardian with a range of statutory functions set out in the Act. The Public Guardian will be supported by the Office of the Public Guardian, an executive agency of the Department for Constitutional Affairs.

The Public Guardian will be appointed by the Lord Chancellor. Richard Brook (formerly chief executive of Mind) has been appointed as the Public Guardian Designate and as chief executive of the current Public Guardianship Office. He will take up the role of Public Guardian from October 2007 when the current Public Guardianship Office will cease to exist. The functions of the Public Guardian include establishing and maintaining registers of lasting powers of attorney and Court of Protection orders appointing deputies. The Public Guardian also has the responsibility of supervising deputies and ensuring that the people chosen to take decisions on behalf of those who lack capacity discharge their duties properly and act in the best interests of the person lacking capacity. The Public Guardian may refer matters to the Court of Protection where there are concerns that attorneys or deputies are not acting appropriately.

The Public Guardian will publish an annual report and accounts for each year. A Public Guardian Board will scrutinise and review the Public Guardian's work and make recommendations.

A consultation paper on the Court of Protection Rules was published on 17 July 2006 and ended on 6 October 2006. The results were published on 6 February 2007.[6] A consultation paper on the fee structure for the Court of Protection and Office of the Public Guardian was published on 7 September 2006 and ended on 29 November 2006. No responses have been published to date.[7] (See also page 25 of this issue.)

CASE-LAW

Home Secretary's power of recall

■ R (MM) v Secretary of State for the Home Department and Five Boroughs NHS Trust (interested party)

[2006] EWHC 3056 (Admin), 23 November 2006

This case concerns the correct legal test for the exercise of the Home Secretary's power to recall a conditionally discharged patient to hospital. The power is to be found in MHA s42(3): 'The secretary of state may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged … by warrant recall the patient to such hospital as may be specified in the warrant'.

The facts were that MM was originally made subject to a restricted hospital order, under MHA ss37 and 41, and admitted to hospital in 1996. He was diagnosed as suffering from paranoid schizophrenia and treated with antipsychotic medication. Between June 1997 and September 2006 he was conditionally discharged and subsequently recalled to hospital on five separate occasions. MM had most recently been discharged by the MHRT on 4 September 2006. The conditions included the following:

(b) to abstain from illicit drugs;
(c) to submit to regular drug screening.

These conditions were imposed because the tribunal accepted medical evidence that illicit drug use carried the risk for MM of precipitating a relapse of psychosis.

Following his discharge MM used illicit drugs and tested positive for cannabis and amphetamines. After consulting his psychiatric and social supervisors, both of whom agreed with the decision, the Home Office recalled MM on 19 September 2006. There was at that time no evidence that he had experienced a deterioration in his mental health since being conditionally discharged two weeks previously.

In his judgment, Mitting J considered two separate issues which the claimant contended vitiated the recall decision. First, that there was no up-to-date medical evidence, which, it was argued, was a necessary precondition for the lawful exercise of the Home Secretary's power to recall a patient to detention in hospital. The 1994 report of the European Commission of Human Rights in *Kay v UK* (1998) 40 BMLR 20 established the principle that the conditions required by article 5 of the European Convention on Human Rights ('the convention') for detention on the ground of mental disorder, as stated in the case of *Winterwerp v The Netherlands* (1979) 2 EHRR 387, apply equally to the recall of a conditionally discharged patient. In Kay's case the absence of up-to-date medical evidence that he was suffering from a mental disorder rendered the recall unlawful under article 5. Mitting J distinguished MM's case because 'in contrast with the case in *Kay*, there never has been any doubt here that MM suffers from a mental condition which, if untreated or unmanaged, does create a risk of serious harm to himself or others'. While the judge accepted that the Home Secretary needs to be in possession of medical evidence which justifies the decision to recall, that evidence 'need not be a report freshly prepared upon the precise conditions recently obtaining'. Where, as in MM's case, 'there is abundant medical evidence to the effect that [he] suffers from paranoid schizophrenia and that his condition is likely to deteriorate imminently and significantly if he takes illicit drugs, then that evidence suffices to justify recall unless there is good reason for believing that it is no longer currently valid'.

The second issue concerned the correct legal test to be applied by the Home Secretary when considering whether to recall a patient to hospital. On MM's behalf, it was argued that the medical evidence on which the Home Secretary relied needed to show some deterioration in the patient's mental state, necessitating inpatient treatment. Evidence of such deterioration was particularly important in circumstances such as these where recall followed so soon after a discharge by the MHRT. Mitting J did not accept that there was any requirement for evidence of deterioration in the patient's mental state. He stated the legal test to be applied by the Home Secretary as follows:

If, on the basis of medical evidence and other information which the secretary of state has, he reasonably reaches the opinion that deterioration in the mental condition of the patient is likely to occur in the near future unless he is recalled to hospital, and that such deterioration would put the health and safety of the patient or others at risk, he is entitled to order recall.

The judge found on the facts of MM's case, given the established relationship between illicit drug use and deterioration of mental state, that the test 'was abundantly satisfied'. The judge gave leave to appeal on the general issue of the correct legal test for recall.

Staying a MHRT's order for discharge and re-sectioning after discharge

■ R (Care Principles Limited) v Mental Health Review Tribunal, AL and Bartlett

[2006] EWHC 3194 (Admin), 24 November 2006

AL was detained under MHA s2. He applied to the MHRT and was discharged at a hearing on 30 October 2006, with the order to take effect on 3 November 2006.

The hospital, owned and managed by Care Principles Limited, sought judicial review of the decision on the ground that the tribunal had erred in law. The permission application was listed for hearing on 2 November when an interim order was made staying the decision of the tribunal to discharge AL. The effect of the stay was that AL continued to be detained under s2.

Before the expiry of AL's detention under s2, which would otherwise have come to an end on 9 November, an application was made by an ASW for his detention under s3. This was accepted by the hospital and, accordingly, AL was detained under s3. He applied for judicial review of that detention which he alleged was unlawful in the absence of relevant new information which had not been considered by the tribunal when it ordered AL's discharge the previous week.

Collins J found against the hospital in its application for judicial review of the tribunal's decision. The allegation was that the tribunal's conclusion, that AL was entitled to be discharged, did not accord with its findings of fact. Collins J emphasised that the MHRT has expertise in mental disorder, and specifically that one of its members is a psychiatrist. He held that it was clear from the tribunal's written reasons that it had considered the evidence of those who were opposed to AL's discharge but it was 'implicit in the decision' that it had to some extent accepted instead AL's own evidence in reaching its conclusion. It was entitled to do so: 'That is what the mental health review tribunal is there to do, and it does sometimes reach decisions which do not accord with the views of the hospital psychiatrists or the social worker or whoever.'

The judge went on to comment adversely on the interim order staying the tribunal's discharge decision. The application for a stay had been made without notice to the other parties and was heard out of hours. Collins J referred to the judgment of the Court of Appeal in *R (H) v Ashworth Hospital Authority* [2002] EWCA Civ 923, 28 June 2002; [2003] 1 WLR 127 where Dyson LJ said that:

… the court should usually refuse to grant a stay unless satisfied that there is a strong,

and not merely an arguable, case that the tribunal's decision was unlawful. Even in such a case the court should not grant a stay in the absence of cogent evidence of risk and dangerousness.

Collins J found that, in AL's case, the hospital had failed to show, in making its application for a stay, that it had a strong case for judicial review of the tribunal's decision or to put forward cogent evidence of risk or dangerousness that could have justified the grant of a stay.

In relation to AL's challenge to his detention under s3, Collins J applied the test which was stated by Lord Bingham in *R (von Brandenburg) v East London and City Mental Health NHS Trust* [2003] UKHL 58, 13 November 2003; [2003] 3 WLR 1265: 'An ASW may not lawfully apply for the admission of a patient whose discharge has been ordered by the decision of a mental health review tribunal of which the ASW is aware unless the ASW has formed the reasonable and bona fide opinion that he has information not known to the tribunal which puts a significantly different complexion on the case as compared with that which was before the tribunal.' Collins J held that this requires an ASW who makes a fresh application following a tribunal discharge to point to the relevant new information when applying to the hospital managers for the patient's detention. He said that this is necessary because they, not the ASW, are responsible for the patient's detention: 'If they are aware, as they were here, of the existence of the tribunal decision, it requires a critical consideration of the justification for the detention which was contrary to the decision of the tribunal.' To be able to do this they need to be told of the new information on which the ASW relies.

In this case they did not ask and were not told about the new information. Accordingly, Collins J found that 'the combination of the social worker and the hospital managers reached a decision which they should not have reached upon the material that was before them'. AL's detention under s3 was therefore unlawful 'having regard to the decision of the tribunal'.

Deprivation of liberty and mental incapacity

■ In the matter of DE (an adult patient) and in the matter of the inherent jurisdiction of the High Court and in the matter of a claim under section 7 of the Human Rights Act 1998 and JE v (1) DE (by his litigant friend the Official Solicitor) (2) Surrey CC (3) EW

[2006] EWHC 3459 (Fam), 29 December 2006

This is the first judgment, since the ECtHR's decision in *HL v UK*, in which the domestic courts have applied article 5 of the convention to a mentally incapacitated adult.

The case concerns DE, aged 76, who has since September 2005 lived in a residential care home provided by Surrey. He suffers from dementia, is disorientated and needs help with all the activities of daily living. Although the issue of capacity was not determined in these proceedings, Munby J commented that 'the available evidence strongly suggests that DE lacks the capacity to decide where he should live'. However, 'he is able to express his wishes and feelings with some clarity and force'.

DE was placed in residential care after his wife was no longer able to look after him at home. Once in the care home he never tried to get out, although he consistently expressed the wish to return to live with his wife at the matrimonial home. He was not locked in the home but was able to go out accompanied by staff or by his daughter. Surrey considered it was not safe for DE to return to live at the matrimonial home and made it clear that it would not allow him to do so. His wife brought proceedings in which it was alleged that DE was being unlawfully deprived of his liberty. The only question adjudicated by Munby J was: 'Has DE at any (and if so at what) time or times since 4 September 2005 been and is DE now being deprived of his liberty by SCC?'

In the course of his judgment Munby J extensively reviewed the ECtHR's case-law on deprivation of liberty of 'persons of unsound mind'. The conclusion he reached was that a person is deprived of his/her liberty for the purpose of article 5 if three elements are present:

- an objective element of a person's confinement in a particular restricted space for a not negligible period;
- a subjective element, namely that the person has not validly consented to the confinement in question; and
- the deprivation of liberty must be imputable to the state.

In relation to the objective element, Munby J concluded that the key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the person exercise complete and effective control over his/her care and movements. In DE's case, the evidence showed that Surrey's intention was to prevent DE leaving the care home and returning to the matrimonial home. He was therefore not free to leave the home but was under the complete and effective control of Surrey. That this control was being exerted in DE's own interests was irrelevant to the question of whether or not he was being deprived of his liberty.

As regards the subjective element, a person may give a valid consent to his/her confinement – with the consequence that it does not deprive the person of his/her liberty – only if s/he has capacity to do so. In DE's case, he clearly had not consented, but even if he had not been asking to return home 'the fact that the person may have given himself up to be taken into detention does not mean that he has consented to his detention'.

Comment: The judgment is relevant to the many thousands of people who lack capacity and are being cared for in residential care homes or psychiatric hospitals under the common law doctrine of necessity. If they are not free to leave and are thus being deprived of their liberty, the effect of the judgment in *HL v UK* is that their detention is unlawful because the common law doctrine of necessity does not satisfy the 'in accordance with a procedure prescribed by law' requirement in article 5(1) of the convention.

1 Available at: www.dh.gov.uk.
2 The draft code is available at: www.dh.gov.uk.
3 Available at: www.dca.gov.uk/consult/codepractise/codeofpractice.htm.
4 Department of Health, *Mental Health Bill: Bournewood safeguards*, 17 November 2006, available at: www.dh.gov.uk/assetRoot/04/14/05/17/04140517.pdf.
5 Further details on the proposals and the code are available at: www.dh.gov.uk.
6 Available at: www.dca.gov.uk/consult/mentalcapacity/response1006.pdf.
7 Details are available at: www.dca.gov.uk/consult/mentalcapacity/courtprotection.htm and www.dca.gov.uk/consult/court-protection-rules/cp2306.htm.

Robert Robinson is a solicitor with Scott-Moncrieff, Harbour and Sinclair, London. Michael Konstam is a barrister in Mind's Legal Unit.

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Legislation

CONSUMER CREDIT

Consumer Credit Act 2006 (Commencement No 2 and Transitional Provisions and Savings) Order 2007 SI No 123

The following provisions of the Consumer Credit Act (CCA) 2006, which amend the CCA 1974, came into force on 31 January 2007:

- Office of Fair Trading to prepare information sheets on arrears and default (s8);
- a transitional provision (s69(1) insofar as it relates to Sch 3 para 5); and
- a transitional provision relating to s8 (Sch 3 para 5).

The provisions of the CCA 2006 which come into force on 6 April 2007 include:

- the definition of individual (s1);
- repeal of CCA 1974 s127(3)–(5) (enforcement orders in cases of infringement) (s15);
- unfair relationships between creditors and debtors (s19);
- powers of court in relation to unfair relationships (s20);
- interpretation of CCA 1974 ss140A (unfair relationships between creditors and debtors) and 140B (powers of court in relation to unfair relationships) (s21);
- further provision relating to unfair relationships and repeal of CCA 1974 ss137–140 (extortionate credit bargains) (s22);
- transitional provision and savings (s69(1) insofar as it relates to Sch 3 paras 11 and 14–16);
- saving relating to repeal of CCA 1974 s127(3)–(5) (enforcement orders relating to improperly executed agreements) (Sch 3 para 11);
- transitional provision relating to CCA 1974 s140B (powers of court in relation to unfair relationships) (Sch 3 para 14);
- saving relating to repeal of CCA 1974 ss137–140 (Sch 3 para 15);
- transitional provision relating to ss140B and 140C (interpretation of ss140A and 140B) (Sch 3 para 16).

CRIMINAL LAW

Police and Justice Act 2006 (Commencement No 1, Transitional and Saving Provisions) (Amendment) Order 2007 SI No 29

This Order, which came into force on 15 January 2007, amends the Police and Justice Act 2006 (Commencement No 1, Transitional and Saving Provisions) Order 2006 SI No 3364 to provide for the commencement on 15 January 2007 of the additional consequential amendments set out in Police and Justice Act 2006 Sch 14 paras 9, 10 and 62.

EMPLOYMENT

Employment Act 2002 (Amendment of Schedules 3, 4 and 5) Order 2007 SI No 30

This Order amends Employment Act (EA) 2002 Schs 3, 4 and 5 and comes into force on 6 April 2007.

EA Part 3 provides for statutory dispute resolution procedures which are set out in EA Sch 2. There are procedures for both dismissal and disciplinary proceedings and grievance issues. These procedures apply to the jurisdictions which are listed in EA Sch 3 and 4.

In addition, EA s31 requires an employment tribunal (ET) to vary a compensatory award in certain circumstances in the case of the jurisdictions listed in EA Sch 3.

EA s32 precludes the presentation in certain circumstances of a case arising under a jurisdiction listed in EA Sch 4.

EA s38 requires an ET to award compensation in certain cases arising under the jurisdictions listed in EA Sch 5.

This Order adds to the jurisdictions listed in EA Schs 3, 4 and 5 those provisions which are referred to in article 3 of the Order. The Order contains transitional provisions so that the dismissal and disciplinary procedures only apply where the employer first contemplated taking action after the Order comes into force and the grievance procedure only applies where the grievance occurs after the Order comes into force unless the grievance is a continuing matter and the employee has raised it with his/her employer or has presented a complaint to the ET before that date.

IMMIGRATION

Immigration, Asylum and Nationality Act 2006 (Commencement No 4) Order 2007 SI No 182

This Order brought into force, on 31 January 2007, Immigration, Asylum and Nationality Act 2006 ss50(1) and (2) (procedure), 51 (fees) and 52(1)–(6) (fees: supplemental).

MENTAL HEALTH

Mental Capacity Act 2005 (Appropriate Body) (England) (Amendment) Regulations 2006 SI No 3474

These amending regulations are made under Mental Capacity Act (MCA) 2005 s30(4) and amend the Mental Capacity Act 2005 (Appropriate Body) (England) Regulations (the Appropriate Body Regs) 2006 SI No 2810. The Appropriate Body Regs define 'appropriate body' for the purposes of MCA ss30–32. MCA s30(1) provides that certain research carried out on or in relation to a person without capacity is unlawful unless it is carried out as part of a project which is approved by an appropriate body and satisfies further requirements specified in the MCA. The Appropriate Body Regs were to come into force on 1 February 2007 for the purpose of enabling applications for ethical approval of research to be made and decided under the MCA, and on 1 April 2007 for all other purposes.

Reg 2 of these amending regulations substitutes in the Appropriate Body Regs new dates for their coming into force. As a result, the Appropriate Body Regs will now come into force on 1 July 2007 for the purpose of enabling applications for ethical approval to be made and decided, and on 1 October 2007 for all other purposes. In force 31 January 2007.

Consultations

Police station reforms: boundaries, fixed fees and new working arrangements

This paper sets out the LSC's proposals for police station and duty solicitor schemes to pave the way for the introduction of best value tendering on the basis of fixed fees for all categories of criminal work outside very high cost cases. The paper puts forward the following options:

- for the redrawing of boundary areas in which work will be based;
- for fixed fees for police station work within those boundaries;
- for changes to eligibility for contracts; and
- for new working arrangements for the delivery of police station and magistrates' courts solicitor work.

The consultation period will close on 10 April 2007. The LSC will publish a response to the consultation in June 2007 and implement the new scheme in October 2007. The LSC intends to run a series of workshops for legal services providers during the consultation period. The consultation paper is available at: www.legalservices.gov.uk/docs/criminal_consultations/Main_paper_CVR.pdf.

Best value panel for very high cost cases

This document sets out the detail of how the LSC plans to deliver the first specialist panel of experienced criminal defence lawyers who will tender the rates for very high cost cases (VHCCs). The current proposal is that panel applications will open on 28 May 2007 and close on 20 July 2007. The documents covered by the consultation are:

- VHCC consultation document;
- draft VHCC contract highlighting the proposed changes;
- best value protocol for VHCCs; and
- draft information for applicants.

This consultation will close at 5 pm on 23 March 2007. The consultation paper is available at: www.legalservices.gov.uk/criminal/docs_for_consultation/very_high_cost_case_panel.asp. The LSC intends to publish a response to this consultation on 20 April 2007.

Regulation of enforcement agents

The main proposals of this consultation are the options for the future regulation of enforcement agents. The Security Industry Authority (SIA) was seen as an existing licensing body that might be suitable for the regulation of this sector. The government is now consulting on this, as a preferred option, together with other options set out in this document.

Three options are explored:

- option one: no change;
- option two: the creation of a new regulator, the Enforcement Services Commission; and
- option three: regulation by the SIA.

The consultation ends on 25 April 2007. The consultation paper is available at: www.dca.gov.uk/consult/enforce_agt/cp0207.pdf. A paper summarising the responses to this consultation will be published in summer 2007.

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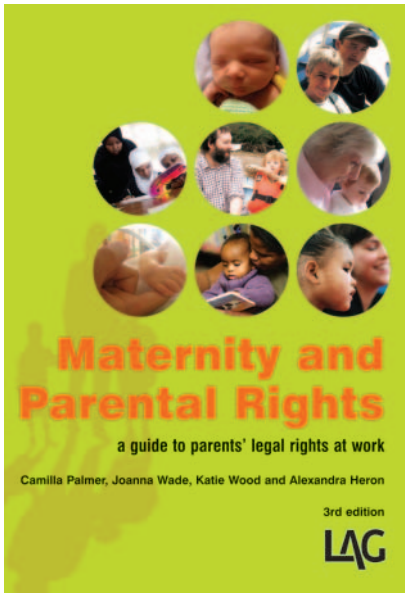

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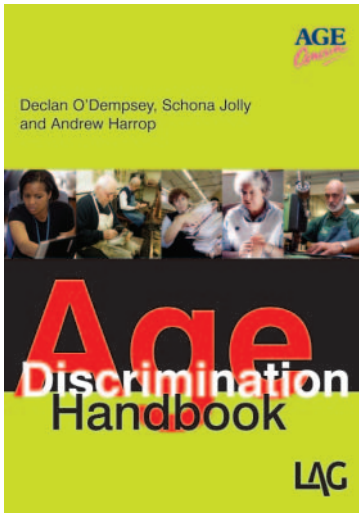

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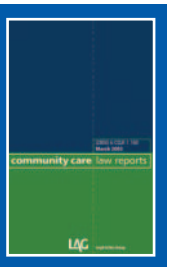

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Conferences and courses

Young Solicitors Group
National Young Solicitors Group: Annual forum
10 March 2007
London
'Our profession, our future' is the theme of the 2007 annual forum.
E-mail: matthewclaxson@lawrencehamblin.com
www.ysg.org/diary.asp

Lime Legal
Homelessness and lettings law and practice conference 2007
27 March 2007
9.30 am–5 pm
London
£295 + VAT (third and subsequent delegates half price – see booking form)
5 hours, 30 minutes CPD
This conference is for everyone involved in homelessness and the allocation of social housing. Topics include:
■ 'prevention' and the other key policy issues;
■ the threshold questions: latest developments;
■ performing the duties: what is happening?
■ handling reviews and appeals;
■ lettings update;
■ the new draft code of guidance on CBLs and lettings policy overview;
■ ask the experts.
Speakers: Jan Luba QC (barrister), Kelvin Rutledge (barrister), Andy Gale (specialist adviser, Homelessness Team, Communities and Local Government (CLG)), John Littlemore (chief housing officer, Maidstone BC), Bob Lawrence (specialist adviser, CLG), Frances Walker (senior policy adviser, CLG).
Tel: 01249 701555
E-mail: info@limelegal.co.uk
www.limelegal.co.uk

Social housing law and practice conference 2007
30 March 2007
10 am–5 pm
London
£295 + VAT (third and subsequent delegates half price – see booking form)
5 hours, 20 minutes CPD
This annual conference addresses all the major recent developments in social housing law and practice:
■ housing management: transfers, exchanges, joint tenancy problems, tolerated trespassers;
■ possession claims;
■ regulation;
■ anti-social behaviour: effective management and action;
■ duties to vulnerable tenants;
■ what is on the horizon?
■ ask the experts.
Speakers: Jan Luba QC (barrister), Bill Pitt (Home Office Respect Academy expert practitioner and head of the Nuisance Strategy Group at Manchester City Council), Bethan Harris (barrister), John Bryant (policy leader in the Neighbourhoods and Sustainability Team of the National Housing Federation).
Tel: 01249 701555
E-mail: info@limelegal.co.uk
www.limelegal.co.uk

Lectures, seminars and meetings

Law Society – Law Management Section (LMS)
LMS regional legal services reforms seminars 2007
6 March 2007 (Cardiff)
7 March 2007 (London)
13 March 2007 (Manchester)
14 March 2007 (Birmingham)
5 pm–7.30 pm
£60 + VAT members,
£80 + VAT non-members
2 hours CPD
These regional seminars will explore various aspects of the legal services reforms and developments following the release of the Legal Services Bill. Topics include:
■ the Legal Services Board (likely approach to regulation, cost implications);
■ the Office for Legal Complaints (changes in complaints handling, the expectations of firms' own systems, cost implications (the alleged polluter pays));
■ Alternative Business Structures (the options for different models, the opportunities of outside investment, the dangers of new entrants to legal services, structuring and financing competitive law firms).
Speaker: Simon Young (solicitor, consultant, trainer and author within the legal profession).
Tel: 020 7316 5707
E-mail: lawmanagementsection@lawsociety.org.uk
www.lms.lawsociety.org.uk

Centre for the Study of Human Rights
Negotiating justice: human rights and peace agreements – London launch of the report for the International Council on Human Rights Policy
14 March 2007
1.15 pm–2.30 pm
London
Free
www.lse.ac.uk/Depts/human-rights

Advice Services Alliance Advicenow
Third Tuesday seminar
20 March 2007
5 pm–6.30 pm
London
John Seargeant from the Public Legal Education and Support (PLEAS) Task Force will discuss its work and findings. The PLEAS Task Force is an independent body set up to develop proposals for how to promote and improve public legal education in our society today. It began work in January 2006 to develop and promote the case for a national strategy for public legal education and support.
E-mail: theresa.harris@advicenow.org.uk
www.advicenow.org.uk/thirdtuesday

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Please forward CV and covering letter by 13 April 2007 to:
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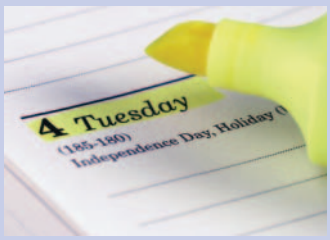
April: 5 March
May: 9 April
June: 7 May
July: 11 June
August: 9 July
September: 13 August



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