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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The quality of law

With all the publicity and controversy surrounding the publication of the final Carter report, *The legislative process*, a report by the Select Committee on Modernisation of the House of Commons, was published with barely a ripple of media attention. Yet despite the less than catchy title, it sets out some welcome proposals to improve the quality and accessibility of legislation; aims which LAG supports (see June 2006 *Legal Action* 3).

The report follows a consultation exercise on the legislative process. One of the questions on which the committee sought evidence was how to improve public input to, and awareness of, proposed legislation. Other questions related to specific areas of the legislative process where change would improve scrutiny of a bill, through its pre-legislative and committee stages. Further questions related to timetabling issues. Technical though this sounds, the committee rightly sets the legislative process squarely in the public domain rather than in the procedural niceties of the House of Commons, commenting that 'An effective, democratic legislative process must be as open as possible.'

The committee makes a number of recommendations designed to improve the quality of legislation. Much of the report concerns the pre-legislative scrutiny stage, which is widely agreed to have improved the drafting of legislation. Currently, under this process, some but not all proposed legislation is published in draft form, and then referred to a committee which can take written and/or oral evidence from appropriate organisations and individuals. In the light of this information, a bill may be changed before starting its progress through parliament, and before the government is publicly committed to a particular position or wording.

The committee recommends that more legislation should be published in draft form and subject to pre-legislative scrutiny, that more members of the scrutiny committee are appointed to a subsequent standing committee to inform its discussion, and that these committees have increased powers to take further evidence. To clarify the process, it suggests that standing and special standing committees be renamed 'public bill committees' with individual committees being named after the bill to be considered by them. Other recommendations include permitting more bills to carry over from one year to the next, so that they do not fall simply for lack of parliamentary time, and allowing a more flexible timetable for debate.

LAG supports these and other proposals, which will make it easier for members of the public and interested parties to follow the progress of a bill through parliament, and enable them to have more input into it. Legislation that is rushed, poorly thought through or badly drafted simply creates problems further down the line either in terms of litigation or public concern. The Criminal Justice Act (CJA) 2003 is regularly cited as an example of badly drafted law. The Law Society, in its evidence to the committee, quoted Lord Justice Rose's comment that the CJA's 'provisions are not merely labyrinthine, they are manifestly inconsistent with each other and we have every sympathy with lay justices, their clerks and district judges who are having to grapple with them'. The Child Support Act 1991 is also given as an example of legislation which would have benefited from further consideration.

LAG is well aware of the burden on advisers and practitioners of complex, voluminous and badly drafted law. Although the report shows that the total number of Acts and Statutory Instruments has not increased over the past ten years – indeed, this seems to have dropped somewhat – it does show that the volume of legislation, in terms of the number of pages, has increased substantially. LAG's own books, covering the criminal justice system in particular, illustrate this point; they have become larger over the past few years to deal with the extent of legislative changes.

But at least professionals who deal with the consequences of lengthy and complex legislation have expertise and training to help them make sense of it all. Members of the public are likely to be baffled and confused as they try to track what has happened to a particular bill as it works its way through parliament, or understand its implications after it has entered the statute book.

Both finding out and understanding what the relevant law is are essential steps to gaining access to justice. Legislation must be available in a form that is clear and understandable, as well as easily accessible. The democratic contract consists of an offer as well as an acceptance, and the select committee's report is a move towards offering better legislation. On the acceptance side, the Public Legal Education and Support Task Force's plans for a national campaign for public legal education will help to raise the public's awareness of the many ways in which law may affect – and sometimes improve – their lives (see page 5 of this issue).

Access to Justice Alliance holds crisis meeting on Carter

Members and supporters of the Access to Justice Alliance held an emergency meeting in September to discuss the likely impact of the final Carter report and Community Legal Service (CLS) strategy on clients. Alison Hannah, LAG's director, pictured right, was one of a number of speakers at the meeting.

There was common agreement that the proposals to restructure legal aid will damage both the quality and supply of services for clients. The move to a fixed-price regime will cut costs to the point where many suppliers will discontinue legal aid services, and those remaining will not be able to provide a quality service for the fees proposed.

Many ideas were exchanged about how to increase the impact of the campaign against the proposals and develop it across the country. The alliance agreed that it will target the government and media to publicise the likely adverse consequences of the proposals. As a first step towards this aim, representatives from the alliance will give evidence to the Constitutional Affairs Committee's inquiry into the implementation of the Carter review.

For further information visit: www.accesstojusticealliance.org.uk or e-mail: accesstojustice2005@yahoo.co.uk.

Alison Hannah

news feature

MPs to be told of failings in detained asylum fast track system

Sarah Cutler, assistant director, Bail for Immigration Detainees (BID), writes:

The Home Office now locks up more asylum-seekers and migrants than ever before. Approximately 30,000 people per year are detained under Immigration Act powers without a time limit or a requirement for judicial sanction.

The expansion of administrative detention, and Home Secretary John Reid's hard line approach to removals, and his desire to speed up asylum processing times by using claimants' detention to fast track claims, makes the availability of quality legal advice and representation vital. Yet, such advice and representation remains out of reach for most detainees who, instead, rely on overstretched charities and a handful of committed legal representatives. This is causing intolerable suffering and injustice to many seeking refuge in the UK.

After years of pressure from detention campaigners and criticisms from HM Inspector of Prisons, the Legal Services Commission (LSC) conceded that there was a problem with access to advice for detainees. In December 2005, an LSC pilot project began to provide Detention Duty Advice (DDA). However, in BID's experience, DDA has so far failed to have a significant impact.

Detainees in the fast track are entitled to on-site legal representation from suppliers with a fast track contract. However, recent research by BID shows that asylum-seekers detained in order for their claims to be fast tracked at Harmondsworth Immigration Removal Centre are being set up to fail because the system is too high speed to give claimants a fair chance of success.[1] The research shows that more than half of the detainees in the sample being observed were left without legal representation in court at their appeals.

As a result, many detainees pay for poor quality advice that they cannot afford. This is a win-win situation for 'advisers' who prey on detainees' desperation; having done the bare minimum, or worse, unscrupulous representatives are shielded by the fact that most are too scared to complain. Many detainees find it impossible to gain alternative representation and most are removed from the UK.

To date, neither DDA nor the detained fast track process have been thoroughly monitored or evaluated. Yet, as part of a wider review of asylum and immigration legal aid, the LSC has proposed exclusive contracts for detention work, citing the fast track as a success. Within a shrinking legal aid budget for asylum and immigration, the LSC proposes to ring-fence £8.5m for detention contracts in 2007/08.[2]

BID is concerned that the LSC's proposals will not address the need for quality advice. Furthermore, BID is opposed to money being used to provide advice within an unnecessary and unjust detention regime, when it would be better spent on advice in the substantive asylum and immigration matter.

BID is organising a briefing meeting to provide MPs, peers and interested organisations with information about the fast track processing of asylum claims in detention, and how proposals to change legal aid will affect asylum-seekers and migrants, particularly those in detention. The briefing will take place on 18 October 2006 from 2 pm to 3 pm in the Wilson Room, Portcullis House, London SW1. For further information e-mail: info@biduk.org.

1 *Working against the clock: inadequacy and injustice in the fast track system*. Based on research by Bail for Immigration Detainees at Harmondsworth Immigration Removal Centre in March 2006 by Sharon Oakley and Katrina Crew. Edited by Anna Morvern and Sarah Cutler, BID, July 2006, is available at: www.biduk.org/pdf/Fast%20track/BIDFasttrackReportFINAL.pdf.

2 *Legal aid: a sustainable future* is available at: www.dca.gov.uk/consult/legal-aidsf/legal-aid-consultation2.pdf.

Working Families to hold 'Parents' rights at work' conference

A conference on the changes to parents' rights at work from April 2007 has been organised by Working Families, the UK's leading work-life balance organisation, in association with LAG. The event will take place on 31 October 2006 in London.

The Hon Mrs Justice Cox DBE and Frances O'Grady, deputy general secretary, Trades Union Congress, will deliver the keynote speeches on 'Your work and your life – achieving the balance for employers and employees' and 'The future for working families in the UK' respectively. The co-authors of LAG's new publication, *Maternity and parental rights: a guide to parents' legal rights at work*, will address various aspects of the regulatory reforms and their wide implications for both parents and their employers.

Working Families' chief executive, Sarah Jackson, said: 'We are pleased to be working with LAG on this crucial conference, which will set the employment law agenda as we look forward to 2007. Delegates will be able to discuss the important changes in parental rights that will come into force next April with the leading practitioners in the field.'

For further details about the conference, contact Ali Garfath, tel: 020 7253 7243 or e-mail: events@workingfamilies.org.uk. See the orders pages of this issue for further information about LAG books.

Public Legal Education and Support Task Force: an update

The Public Legal Education and Support Task Force, chaired by Professor Dame Hazel Genn, is to meet on 3 October to start work preparing and drafting its final report. Supported by the Department for Constitutional Affairs (DCA), the task force was set up to develop proposals for the promotion, co-ordination and improvement of public legal education. Its members, who are largely made up from the education, legal and advice professions, have met regularly since January 2006. The task force has commissioned research into existing initiatives and received presentations from a variety of organisations with relevant experience of public education projects, such as NHS Direct and the Financial Services Authority's project to increase financial literacy.

The task force's report will set out the need for, and benefits of, public legal education to provide people with awareness, knowledge and understanding of rights and legal issues. Public legal education enables people to develop their skills and confidence in dealing with problems, and to identify when they need help to do so.

The task force's report will also suggest appropriate target audiences, priorities and means of delivery, as part of its recommendations for a national strategy to develop awareness of these issues. It is expected that the task force's final report will be published in early 2007.

For further information visit: www.pleas.org.uk or e-mail: info@pleas.org.uk.

Heather Williams of Doughty Street Chambers has just been appointed Queen's Counsel. The award ceremony will take place in Westminster Hall in October 2006.

Carolyn Regan took up her post as the Legal Services Commission's new chief executive in September 2006. Previously she was chief executive of North East London Strategic Health Authority.

IN BRIEF

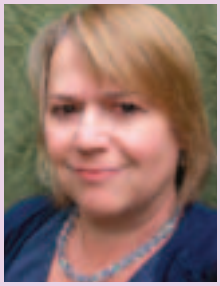
■ The Law Centres Federation's 2006 annual conference, 'Equality through justice', will be held on 10 and 11 November 2006 in Manchester. The keynote speaker will be Vera Baird QC, MP, minister for legal aid at the Department for Constitutional Affairs. For conference information contact Lynn, tel: 020 7255 9596 or e-mail: lynn@lawcentres.org.uk.

■ From 2 October 2006, defendants whose case is to be heard in the magistrates' court must pass both a means test and an interests of justice test to be eligible for legal aid. The means test will establish whether an applicant is financially eligible for legal aid: it considers income and expenses but capital is not included. The interests of justice test will decide whether an applicant should receive legal aid based on the merits of the case. The means test will be introduced for Crown Court cases at the end of 2007. An article about the details of the new scheme will be published in *Legal Action* shortly.

■ *Confidence and confidentiality: improving transparency and privacy in family courts* seeks views on the proposals that would mark a major change in the way family courts conduct their business. Copies of the consultation paper are available from Marie Del Pino, tel: 020 7210 8601 and at: www.dca.gov.uk/ consult/court transparencey1106/consultation1106.pdf. The consultation ends on 30 October 2006.

■ LAG is one of the many organisations that will be responding to the joint consultation paper, *Legal aid: a sustainable future*, issued by the Department for Constitutional Affairs (DCA) and Legal Services Commission (LSC). The paper sets out their proposals for reforming the system for procurement of legal aid, in the light of the final Carter report (see August 2006 *Legal Action* 6). It has three sections:
- dealing with proposals for criminal legal aid;
- covering civil, family and immigration and asylum; and
- relating to the development of a contracting regime.

The proposals would fundamentally change the procurement and structure of legal aid services and impact on all legal aid providers, including the not for profit sector. The consultation paper is available at: www.dca.gov.uk/consult/legal-aidsf/legal-aid-consultation2.pdf. The consultation ends on 12 October 2006.



Lucy Scott-Moncrieff, partner at Scott-Moncrieff, Harbour and Sinclair, describes a new project to create a Community Legal Advice Network (CLAN), following the Carter model, between inner London solicitors' firms and not for profit (NFP) agencies, covering civil, family and criminal defence work. The aim is to test out the model's practicability and, if it works, to provide a system that other organisations could adopt.

A starter CLAN

Introduction

If the Community Legal Service (CLS) had been developed in the same way as the NHS, an eligible client would be able to go to a CLS office as easily as to a GP's surgery and s/he would know that, once s/he got there and discussed his/her problem, either it would be dealt with there and then or arrangements would be made for him/her to see a more suitable person, either at the office or elsewhere in the CLS. Of course, the CLS solicitors would have much better contracts, and be much better paid, than legal aid lawyers are now, or are ever likely to be, but it is pretty clear that if we ever want to reach even the foothills of the sunlit uplands on which GPs currently frolic, we are going to have to become much more user-friendly (in the way GPs have been paid to become and we, for some years now, have been paid not to become).

Proposed reform

The reforms proposed in the final Carter report and the Department for Constitutional Affairs' and Legal Services Commission's joint consultation paper *Legal aid: a sustainable future* are clearly intended to move us towards the GP model in terms of the service provided, even if not in terms of the rewards available, and most of us would probably agree that the aim is a good one. However, as so many practitioners doubt that legal aid will survive the proposed reforms intended to achieve this goal, there is an urgent necessity for us to try and show, within existing constraints, how it could be done.

Compared with the old days, when any solicitor in private practice could do legal aid work, the current plans are painfully prescriptive, and the pain is made all the greater through having suffered the various half-baked attempts to reorganise legal aid over the past few years, which have resulted in a slump in cases taken on by Specialist Quality Mark (SQM) organisations and, indeed, in SQM organisations taking on cases.

However, that was then and this is now, and if we want to protect the service we love we cannot just keep on with the casework while gloomily fearing that the promised light at the end of the tunnel will turn out to be the spotlight of the local lamper out to get us; if post-Carter legal aid is to conform to our vision, we have to get stuck in and we have to be quick about it.

Starter CLAN in London

Networking

A number of legal aid organisations in inner London, solicitors' firms and NFPs, are currently working together to set up an inner London network, which will cover all areas of CLS contract and licenced work except some areas of family law, and which will attempt to ensure that anyone who becomes a client of a network member will have any other eligible civil legal aid problems dealt with, without having to shop around. The network will start to operate from November 2006.

When a member takes on a client, in addition to dealing with the presenting problem, it will be alert to any other legal problems that s/he may have (for example, someone with debt problems may have welfare benefits issues to sort out and someone whose child needs a statement of special educational needs may have community care entitlements), whether or not the organisation has the in-house expertise to deal with them.

Currently, some of the organisations spend a lot of time filtering requests for help; accepting some but rejecting many. Some of the cases that are being rejected are meritorious in legal aid terms but do not meet the organisations' criteria for acceptance, which have to be firmly policed if the organisations are not to become swamped. Others, for various reasons, have far wider acceptance criteria, and are merely limited by the amount that their case-workers can take on. We therefore envisage a process of triage, rather than a simple 'yes/no', which will aim to match meritorious cases with the organisations best able to deal with them.

ARCLIGHT/ALAMY

Solicitor Mr Khan working in a legal aid centre, Hull.

Unbundling

As part of this process, we are looking into the guidance given to CLS Direct advisers about when they should refer cases to SQM-holders, as this guidance will allow us to know when we should refer cases to CLS Direct, as being below the SQM threshold. We are also looking at unbundling; that is, identifying the bits of the work that clients can do for themselves. Poor people in cities are resourceful, as they have to be to survive on so little, and those who become clients of legal aid organisations also have the nous to realise that they have a solvable problem and the enterprise to get to a lawyer. These are people we can work with, as well as work for, and if the money is tight, as it certainly is, we must try and make sure that we focus on the bits that only we can do. So, for instance, we are looking at the possibility of inviting existing clients to fill out questionnaires, on their own or with the help of their friends/family/social worker/advice worker, if they have secondary legal problems that their existing firm cannot deal with. These questionnaires would then go to a member of the network that has the relevant expertise, where a fee-earner would decide if the case had merit or not, should be referred to CLS Direct or not, or should be taken on by the firm or offered to others in the network.

Joint working

We are also looking at the possibility of joint working, in the interests of clients and thrift. For instance, if a member is helping a vulnerable client with a welfare benefits problem, and another member is helping with a secondary community care problem, the case-workers may agree with the client that s/he will mainly have contact with the welfare benefits case-worker, who will earn a proportion of the community care fixed fee by liaising with the client during the case, and even taking initial instructions if the community care case-worker is satisfied that this can be done through an intermediary.

All members of the network will be SQM-holders, but there are real differences between us – there have to be as otherwise we could not complement each other. For instance, one member is a specialist criminal defence firm, which wishes to ensure that its clients' civil legal aid issues are identified and dealt with, while some of the members do not do much contract work and want to know that their certificated clients' non-certificated needs are being met. To balance this, at least one NFP member trains, manages and supervises volunteers (many of them taking, or having taken, the Legal Practice Course) and opportunities for these volunteers to do the contract work that is uneconomic for other members, and to be paid for doing it, would benefit the network and the volunteers, as well as the clients who would otherwise be unrepresented.

Running the network

The network is being set up by a company, formed for the purpose, and every member of the network will have a single voting share. Also, we are in discussion with the Law Society to see if it can help us to develop quality assurance standards, and with the Legal Aid Practitioners Group to see if it can act as an honest broker to reassure smaller firms that they will not be steam-rollered if they join the network.

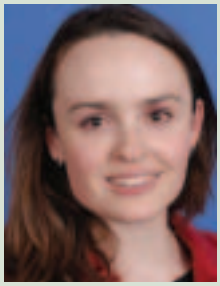
Future developments

If the network gets off the ground, we will be looking to open membership to other inner London firms that can provide a number of good references (until peer review is complete, reputation has to be our guide). Criminal defence firms will be very welcome, as anecdotal evidence suggests that many criminal defence clients have civil law issues and, of course, if they are detained there will be prison law issues to address. One possibility is that membership of the network will encourage criminal defence solicitors to extend their range, at least to cover prison law, secure in the knowledge that they have expert fellow members to look to if things get difficult.

If this works, we hope that practitioners in other parts of the country will want to join us and set up networks in their areas. If we had national coverage, we could advertise our network directly to eligible people (and to the MPs, social workers, advice workers and GPs who are trying to find legal assistance for them), in the comforting knowledge that we would not be killing off good small firms because they would be part of the network.

Ideally, before competitive tendering arrives, we will set up a network of networks that covers the whole country and which includes any good firm that wants to join. We will then be in a strong position to tender, without the threat of predatory organisations under-cutting us (because they will not have built up the client base) and we might even be able to negotiate for that delightful GP sweetener, a contribution to the capital costs of practice.

■ For further information contact Helen Jones at: hjones@scomo.com.



Kate Beattie, parliamentary legal officer at the Odysseus Trust, discusses how the Commission for Equality and Human Rights (CEHR) is likely to operate when officially up and running in October 2007.

Commission for Equality and Human Rights: looking forward to 2007

Introduction

For six long years after the Human Rights Act (HRA) 1998 came into force, there has been no statutory body charged with the promotion and protection of human rights in Britain. In a year's time, Britain will at last have such a body: the CEHR, created by the Equality Act (EA) 2006, is scheduled to be up and running in October 2007. The CEHR will bring together the existing equality commissions (the Equal Opportunities Commission, the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC)) and take a unified approach to enforcing equality legislation across all strands, adding age, sexual orientation and religion and belief discrimination to its brief.

There is a pressing need for a human rights commission in the UK. A recent survey conducted by YouGov for the DRC revealed that 70 per cent of the British population could not name any of their human rights.[1] Research indicates that the HRA has made little impact on public authorities and has not improved standards in public services.[2] There is clearly much to be done to improve awareness of human rights issues throughout society, one of the stated aims of incorporating the HRA into domestic law identified in *Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into UK law*, the 1996 Labour Party consultation document.

Background

The government was initially hesitant about the merits of creating a human rights commission, preferring to leave the matter for consideration by the parliamentary Joint Committee on Human Rights (JCHR).[3] (The JCHR took up the challenge in a vigorous fashion, producing no less than three reports on the topic, and two further reports on the Equality Bill as it went through parliament.[4]) The government's white paper, *Rights brought home: the Human Rights Bill*, stated that:[5]

> *The government's priority is implementation of its manifesto commitment to give further effect to the [European Convention on Human Rights ('the convention')] convention rights in domestic law so that people can enforce those rights in United Kingdom courts. Establishment of a new human rights commission is not central to that objective and does not need to form part of the current bill.*

Nine years on, this initial wariness seems unfortunate to say the least, as the HRA receives yet more politically expedient battering and scapegoating. In the absence of institutional support for the HRA, independent human rights organisations have made a valiant effort to dispel the myths surrounding the Act. But it is difficult for these groups to accomplish the enormous task of educating the public, politicians and the media, especially when they are often portrayed as part of a predictable 'civil liberties lobby', and when much of the opposition comes from the very government which introduced the HRA. It is heartening that despite recent attacks on the HRA, the YouGov poll also indicated that 62 per cent of respondents thought it was a good thing to have an Act to protect everyone's human rights in Britain: the CEHR must build on this by using its extensive powers under the EA in a creative and dynamic fashion.

Review of the HRA's implementation

The Department for Constitutional Affairs recently published a *Review of the implementation of the Human Rights Act* (DCA 38/06, July 2006) at the request of the Prime Minister,[6] following the inquiry report (by HM Chief Inspector of Probation) into the case of Anthony Rice who murdered Naomi Bryant in August 2005 following his release on licence. The review concluded that the HRA has been widely misunderstood by the public, and has sometimes been misapplied. The review also noted that a number of damaging myths about human rights have taken root in the popular imagination. While confirming the government's commitment to the convention and the HRA, the review ominously contemplated further legislation 'to ensure that public protection is given priority' by police, probation, parole and prison services. In relation to training, litigation and legal advice, the review also stressed the need 'to keep the convention rights within appropriate bounds' and 'the importance of the rights of the wider public'.

Given that the CEHR is intended to be the primary body charged with promoting and protecting human rights in the UK,

the review was remarkably silent about its role. The only substantive reference to the CEHR was in passing (the review also noted that the creation of the CEHR prompts, from its opponents, the allegation that human rights are a symptom of 'political correctness gone mad', p30). In the chapter on 'Possible solutions', the review observed that:

As this review has shown many of the difficulties do not lie within government but in the wider public sector. In this context, it is worth noting the forthcoming establishment of the Commission for Equality and Human Rights, due in October 2007, which will provide a further source of expertise on human rights. The commission will work to encourage a better understanding of how public authorities should deal with human rights and more generally encourage good practice in relation to human rights (p41, emphasis added).

Clearly the CEHR has a much more significant role to play than indicated in the review. It is odd that a report of this nature did not give greater emphasis to the CEHR, and it was possibly a wasted opportunity for the government to promote the new, independent body which will have substantial statutory powers in this area. (The government's emphasis on circumscribing convention rights and public safety raises the intriguing possibility of competing interventions in human rights cases, with the government arguing for a narrow interpretation of rights and the CEHR, in line with its statutory duties, arguing for an expansive interpretation.)

CEHR in progress

Preparations are well underway for the CEHR's commencement. Trevor Phillips, chair of the CRE and head of the current Equalities Review into the underlying causes of inequality, has been appointed chair of the new commission (despite previously opposing the very idea of the new body). Commissioners are currently being selected, with the Board expected to be in place by October 2006, and the search is underway for a chief executive of the organisation. The CEHR will cover England, Wales and Scotland and, following a location study, will have its headquarters in Manchester (a decision criticised widely, including by Trevor Phillips, on the ground that it will isolate the CEHR from the centre of government). The CEHR will also have a 'significant presence' in London and offices in Glasgow and Cardiff. The CEHR has a 'transition website' where a newsletter is freely available.[7]

The government's vision of the CEHR is of 'an independent influential champion whose purpose is to reduce inequality, eliminate discrimination, strengthen good relations between people and protect human rights'.[8] As set out in the EA, the CEHR will be under a general duty to exercise its functions with a view to encouraging and supporting the development of a society in which individual human rights, equality and the dignity and worth of each individual are respected (EA s3). The CEHR will also have specific duties relating to equality and diversity, human rights, and the promotion of good relations between the members of different groups in society (EA ss8–10). The CEHR's work will not be restricted to human rights as guaranteed by the HRA, but will encompass human rights guaranteed by other international human rights treaties and may extend beyond civil and political rights to cover economic, social and cultural rights.

The CEHR will be a non-departmental public body, in keeping with the existing equality commissions. This model was criticised by the JCHR, among others, amid concerns about the CEHR's proposed status, independence and structure. While adhering to this structure, amendments to the EA in the House of Lords have enhanced the CEHR's de facto independence. The EA now provides that the secretary of state will be under a duty to have regard to the desirability of ensuring that the CEHR is under as few constraints as reasonably possible in determining its activities, timetables and priorities (EA Sch 1 Part 4 para 42(3)). While the secretary of state has the power to direct the CEHR to produce a code of practice, this power may only be used in relation to additional or new statutes or regulations included within the CEHR's remit (such as a single equality Act). The EA also provides that the CEHR will have funding which is 'reasonably sufficient' for the purpose of enabling it to perform its functions (EA Sch 1 Part 3 para 38). The government is currently allowing for an annual budget of £70 million, and it will remain to be seen whether this is sufficient for the organisation's wide remit.

The CEHR will ultimately oversee a single equality Act, which the government is committed to enacting during the lifetime of this parliament. The Discrimination Law Review is working to simplify and modernise discrimination law, under the direction of the newly-formed Department for Local Government and Communities. Originally scheduled for release this summer, a green paper is now expected at the end of the year, causing concern among equality groups that the opportunity for radical reform may be missed. The CEHR will not operate effectively without a coherent legal framework which provides equal protection from unlawful discrimination to all. We should expect no less from the government that brought the CEHR into being.

CEHR's powers

The CEHR will have a range of powers including, but not limited to:

- monitoring the law and advising government about the effectiveness of equality and human rights enactments and about the likely effect of a proposed change of law (EA s11);
- monitoring progress towards the development of a society characterised by the protection of human rights and equality (EA s12);
- providing information and advice, education and training, and conducting research (EA s13);
- issuing of codes of practice (EA ss14–15);
- conducting inquiries into any matter relating to its duties (EA s16);
- conducting investigations and applying for injunctions to prevent breaches of equality law (EA ss20-26);
- providing legal assistance to individuals (EA ss28–29); and
- bringing and intervening in judicial review proceedings (EA s30).

1 YouGov survey, see: www.drc-gb.org/newsroom/news_releases/2006/70_per_cent_of_britons_don%e2%80%99t_k.aspx.
2 Institute for Public Policy Research, *Improving public services: using a human rights approach*, June 2005, p37, see: www.ippr.org/publicationsandreports/publication.asp?id=299.
3 See *Rights brought home: the Human Rights Bill*, Cm 3782, October 1997, chapter 3.
4 *The case for a human rights commission*, Sixth Report of Session 2002–2003, HL 67-I, HC 489-I, 19 March 2003; *Commission for Equality and Human Rights: structure, functions and powers*, Eleventh Report of Session 2003–2004, HL 78, HC 536, 5 May 2004; *Commission for Equality and Human Rights: the government's white paper*, Sixteenth Report of Session 2003–2004, HL 156, HC 998, 4 August 2004; *Equality Bill*, Sixteenth Report of Session 2004–2005, HL 98, HC 497, 31 March 2005; *Legislative scrutiny: Equality Bill*, Fourth Report of Session 2005–2006, HL 89, HC 766, 19 December 2005.
5 See note 3, para 3.8.
6 Available at: www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.
7 See the CEHR's website at: www.cehr.org.uk for more information.
8 See: www.cehr.org.uk/content/purpose.rhtm.

Police station law and practice update

Ed Cape continues his six-monthly series covering developments in law and policy affecting police station practice. He welcomes comments, and information about new developments and unreported cases.

POLICY AND LEGISLATION

PACE Codes of Practice

'Police station law and practice update' April 2006 *Legal Action* 10 reported that revised Police and Criminal Evidence Act (PACE) 1984 Codes of Practice A-F came into force on 1 January 2006, together with a new PACE Code G governing arrest. On 25 July 2006 PACE Code C was revised yet again and, on the same date, a new PACE Code H: *Code of practice in connection with the detention, treatment and questioning by police officers of persons under section 41 of, and Schedule 8 to, the Terrorism Act 2000* came into force (see the Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006 SI No 1938).[1] This coincided with the extension of the maximum period of detention without charge of a person detained under Terrorism Act (TA) 2000 s41 and Sch 8 from 14 to 28 days (see the Terrorism Act 2006 (Commencement No 2) Order 2006 SI No 1936).

All references to detention under TA 2000 s41 have been removed from Code C, and Code H applies solely to persons detained under this provision. The detention of a person who has been arrested for a specific terrorist offence, rather than under s41, continues to be governed by Code C. The creation of a new code was part of a deal done by the government in order to get the controversial provisions on extending pre-charge detention of terrorist suspects through a sceptical parliament. However, its provisions largely reflect Code C except:

- where a person is detained without charge beyond 14 days s/he must normally be transferred from the police station to prison accommodation;
- there are additional provisions regarding visiting rights and exercise, especially in the case of prolonged detention;
- there is specific provision regarding reading materials, including religious texts; and
- there is a requirement for a daily healthcare visit.

The decision to charge a terrorist suspect with a criminal offence continues to be governed by PACE s37 and Code C.

Although those arguing for a separate code were no doubt well-intentioned, it remains to be seen whether it was wise to separate the regulation of terrorist detentions from that relating to 'ordinary' crime.

Serious Organised Crime and Police Act 2005

The Serious Organised Crime and Police Act (SOCPA) 2005 permits the director general of the Serious Organised Crime Agency (SOCA) to designate a member of SOCA's staff as a person having the powers of a constable, Revenue and Customs officer and/or an immigration officer. Where a person is designated as having the powers of a constable, s/he has all the common law and statutory powers of a constable (SOCPA s46(2) and (9)), and PACE applies to him/her and the exercise of his/her powers as a result of Serious Organised Crime and Police Act 2005 (Application and Modification of Certain Enactments to Designated Staff of SOCA) Order 2006 SI No 987 article 3. For this purpose, PACE is subject to the modifications set out in Sch 1 of the Order, the most important of which are:

- references to 'police officer' and 'officer' are normally to be treated as references to a 'designated person' under SOCPA. One consequence of this is that SOCA-designated persons are governed by the PACE Codes of Practice when exercising their powers as police constables;
- where authorisation is required for a search under PACE s18, reference to an inspector is replaced by reference to a designated person of grade 3;
- references to 'police station', for example, in relation to fingerprinting (s27), volunteers (s29), and fingerprints and samples (s63) are to be treated as references to a 'SOCA office'; and
- 'SOCA office' means a place for the time being occupied by the Serious Organised Crime Agency.

ACPO guidance on deleting DNA and fingerprint records

The retention of fingerprints and samples, and data derived from them, is governed by PACE s64 which, broadly, provides that they do not have to be destroyed even if the person from whom they were taken is not charged or, having been charged, is acquitted. This was unsuccessfully challenged in *R (S) v Chief Constable of South Yorkshire*; *R (Marper) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196.

Following a decision of the Information Tribunal in an appeal brought under Data Protection Act 1998 s48(1),[2] the Association of Chief Police Officers (ACPO) has issued guidance to police forces on dealing with requests to delete entries on the Police National Computer, and destruction of the associated fingerprints or DNA samples.[3] This states that requests should be acceded to only in exceptional cases which 'will by definition be rare'. Examples given are where the original arrest or sampling was found to be unlawful, or where it is established beyond doubt that no offence had been committed. Requests for deletion and destruction should initially be refused, and the applicant told that the records and/or samples are lawfully held and will be retained unless s/he can establish an exceptional case. Decisions to accede to an application should only be made by the DNA and Fingerprint Retention Project (an ACPO body). So the message for lawyers advising clients is that persistence will be necessary.

Proceeds of crime

Proceeds of Crime Act 2002 Part 5 Chapter 3 provides powers to customs officers and police constables to search persons and property if they have reasonable grounds to suspect that the person is in possession of, or there is on the property, cash which is 'recoverable property' or is intended by any person for use in unlawful conduct, and to seize any cash found, provided that the amount is not less than the specified minimum.

When first enacted, the specified minimum was £10,000, but was subsequently reduced to £5,000. The Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006 SI No 1699 reduced it still further, to £1,000, as from 31 July 2006. See Home Office Circular 16/2006: *Proceeds of Crime Act 2002: reduction of cash seizure threshold to £1,000*.

Interpreters

The use of interpreters at police stations is governed by PACE Codes C and H s13, which provide that normally a person must not be interviewed in the absence of an interpreter if s/he has difficulty understanding English, the interviewer does not speak his/her language, or the person wants an interpreter present. A national agreement is in force which seeks to ensure that interpreters are normally drawn from recommended lists or, where they are not, that their competence is checked. The agreement also deals with other matters such as the safety of, and security checking of, interpreters.

Home Office Circular 17/2006: *Use of interpreters within the criminal justice system* has been issued pending the relaunch of the national agreement planned for 2007 'because of concerns about compliance with the guidance contained in the national agreement'. It also contains revised guidance on telephone interpreting. Normally, interpreting must not be carried out over the telephone unless 'it is not possible to secure the attendance of a face-to-face interpreter within a reasonable amount of time, and the matter is time-critical (ie, there is the risk that evidence will degrade)' (for example, in drink/driving cases). If telephone interpreting is used, the interpreter should be based in the UK and drawn from the National Register of Public Service Interpreters. Note that a defence lawyer should normally use a separate interpreter for the consultation with his/her client than the one used for the police interview.[4]

CASE-LAW

Stop and search and arrest

■ R (Gillan and another) v Commissioner of Police for the Metropolis and another

[2006] UKHL 12,
8 March 2006,
[2006] Crim LR 751

This case concerns the lawfulness and compatibility with the European Convention on Human Rights ('the convention') articles 5, 8, 10 and 11 of stop and search powers under TA 2000 ss44 and 45. These powers differ from the PACE powers of stop and search in that, provided authorisation has been granted by an assistant chief constable (or equivalent), they can be exercised without the officer having reasonable grounds for suspicion.[5] In fact, the two people stopped by police in this case were on their way to a demonstration against an arms fair in London in September 2003, one to join the protest and the other to film it. The House of Lords' decision confirms that of the Court of Appeal in the same case:[6]

- provided it is properly conducted, a 'short period of detention' for the purposes of a stop and search does not engage article 5 (right to liberty and security);
- the requirement that the authorising officer must consider designation of an area for the purposes of stop and search 'expedient for the prevention of acts of terrorism' (TA 2000 s44(3)) means that s/he must consider it likely that the powers would be of significant practical value and utility in seeking to prevent acts of terrorism; and
- in deciding whether to stop and search a particular person, an officer is not free to act arbitrarily; while apparent racial origin may attract an officer's attention, a further factor must be in his/her mind before deciding to stop someone.

Comment: The TA 2000 stop and search powers are of particular significance at present because of the dramatic increase in their use over the past 12 months or so, the extent to which they are disproportionately used in respect of people of Asian origin, and the low arrest rate. This decision does little, if anything, to satisfy those who are concerned about the growth of police powers, particularly those where discretion is so broad that it renders police use of the powers almost unaccountable.

Lord Bingham said that in exercising the powers, the police must not stop and search people who are 'obviously not terrorist suspects' but, having regard to the facts of the case, it is difficult to imagine who might come into this category. The decision also has implications for PACE stop and search powers since it follows other decisions in holding that relatively short periods of 'detention' do not engage article 5 of the convention. See the critical commentary on this aspect of the decision at [2006] *Crim LR* 755 (see also page 17 of this issue).

■ (1) Sekfali (2) Banamira (3) Ouham v Department of Public Prosecutions

[2006] EWHC 894 (Admin),
27 February 2006

Acting on information concerning an alleged offence of shoplifting, plain clothes police officers approached the three appellants in the street and showed them their warrant cards. The men looked at the cards and then ran away in different directions. They were subsequently apprehended. In evidence, the police said that they wanted to detain the men to ask them questions and to see if they matched the descriptions which had been given to the police by staff at the shop. The three were convicted of wilful obstruction of the police in the execution of their duty, contrary to Police Act 1996 s89(2). On appeal, the appellants argued that:

- since they had not been arrested, the law did not require them to remain and answer questions and they were, therefore, entitled to run away; and
- since the purpose of at least one of the officers was to question them and there being no power to detain a suspect for questioning without arrest, the officers were not acting in the execution of their duty.

It was held that while a citizen has no legal duty to assist the police, they are entitled to investigate a suspected offence by questioning, and to prevent that questioning by running away amounted to the offence of obstruction. The appellants, said Newman J, would have been entitled to remain silent and could have said that, as a result, they were intent on going on their way; had they done so and then left, this would not have amounted to obstruction. The police, of course, could have then decided to arrest them before they left.

Comment: So while a citizen does not have a legal duty to assist the police, s/he effectively does have a duty to wait around until the police decide whether they wish to arrest him/her. While, following *Rice v Connolly* [1966] 2 QB 414, remaining silent in the face of questioning would not amount to obstruction, taking a positive action such as running away does. Would the police have had the power to stop and search or arrest the men when they first approached them? Given the broad latitude given to the police in carrying out these powers, and specifically to the meaning of 'reasonable suspicion', it seems unlikely that the men could have succeeded in an action for wrongful arrest (see, for example, *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All ER 129).

PACE and Codes of Practice

■ Khan v HM Revenue and Customs

[2006] EWCA Civ 89,
23 February 2006

Where HM Revenue and Customs interview a person as part of an investigation into non-payment or underpayment of VAT under Value Added Tax Act 1994 s60 (which enables the imposition of a penalty equal to the amount of VAT evaded or sought to be evaded), while the investigation involves a criminal charge for the purposes of article 6 of the convention, the officers conducting the interview were not 'charged with the duty of investigating offences' as required by PACE s67(9) for the purposes of applying the PACE Codes, since they were investigating whether a civil penalty should be exacted.

Interview and caution

■ Sneyd v Director of Public Prosecutions

[2006] EWHC 560 (Admin), 24 February 2006

After leaving a public house car park, S was stopped by a police officer who asked him if he had been drinking. S replied that he had, and the police officer then asked him to undertake a roadside breath test, which proved positive.

At trial, the prosecution relied on the evidence of the police officer rather than on Intoximeter evidence. The accused argued, inter alia, that the initial question had been in breach of Code C since he should have been cautioned before being asked the question.

It was held that a police officer who suspected that a motorist had been drinking was not obliged to administer a caution until the motorist produced a breath specimen that exceeded the limit. Until that point, even though the motorist admitted that s/he had been drinking, the officer only had a mere suspicion that an offence had been committed. The positive test then gave rise to a reasonable suspicion.

■ R v Shillibier

[2006] EWCA Crim 793, 6 April 2006

In a murder investigation, the defendant was identified as a person to be traced, interviewed and eliminated (known as a TIE individual) as there was some evidence that he was the last person to have been seen in the company of the victim while she was still alive. He was subsequently interviewed without being properly cautioned. During questioning, the police officer formed the opinion that he was lying, and so he was then arrested on suspicion of murder.

At trial the prosecution sought to rely on the pre-arrest interview to demonstrate that the accused had lied. The accused sought to have evidence of the questioning excluded under PACE s78 on the ground that there had been a breach of Code C s10, in that there had been grounds to suspect him but that he had not been cautioned.

It was held that the police had conflicting statements about what had happened to the murder victim, and there was no certainty that the appellant was the unknown male who had been the last person to be seen with the victim. The fact that the police obtained a warrant to search his house did not prove he was a suspect. To obtain the warrant the police had to be satisfied that there was likely to be material 'of substantial value to the investigation', and thus the search was likely to prove or disprove involvement of any inhabitant of the house. Therefore, there was no breach of Code C but, even if there had been, in the circumstances it was not a serious and substantial breach; a form of caution had been used (which did not refer to inferences) and the declaration at the top of each page of the statement put the appellant on notice that he had to tell the truth.

Comment: These two cases follow the decision in *R v James* [1996] *Crim LR* 650 that while Code C para 10.1 simply refers to a caution being necessary where 'there are grounds to suspect' a person, it is implicit that it means 'reasonable grounds to suspect'. The purpose of the caution is to put a person on notice that what s/he says may be used in evidence and it would seem reasonable to argue that if, as a result of police suspicion, the person is at risk of what s/he says being used against him/her, s/he should be warned of this possibility. Code C has been revised a number of times since *James*, and there has been no suggestion from the Home Office that the word 'reasonable' should be inserted.

In *Shillibier* the police almost certainly would not have been criticised had they arrested him at the outset. So while reasonable suspicion for the purposes of arrest is given a meaning that provides a low threshold, reasonable suspicion for the purpose of bringing into play a protective provision is given a meaning that amounts to a high threshold. In this way, inserting a reasonable suspicion requirement by a judicial device gives maximum discretion to the police without providing adequate protection for the citizen.

■ R v Rehman

[2006] EWCA Crim 1900, 25 July 2006

R was stopped at an airport by a Customs officer and asked questions in response to which he confirmed that he had taken two suitcases to Pakistan and brought the same two cases back, and that he had not had any contact with drugs. Heroin was then found hidden in the lining of one of the suitcases.

At trial, R denied knowledge of the drugs and claimed that a friend had purchased that suitcase for him in Lahore because he could not fit all of his purchases in his own suitcase. R sought a voir dire in order to be able to question the Customs officer about whether she had reasonable grounds to suspect him before, or at an early stage of, questioning, and thus to argue for exclusion of his comments on the grounds that the caution and interview provisions of Code C had been breached.

It was held that, looking at the evidence of the conduct of the Customs officer as a whole, it gave rise to a justified apprehension that she may have had a reasonable suspicion. The judge, therefore, should have allowed a voir dire. However, this did not affect the safety of the conviction. Even if the voir dire had produced evidence of a breach of Code C, it would not have been so serious or so unfair that it would have required exclusion under PACE s78. The case was less compelling than *R v Senior and Senior* [2004] EWCA Crim 454, 4 March 2004; October 2004 *Legal Action* 16: the questioning was unremarkable and unoppressive.

Comment: In the past, the courts have frequently decided that evidence of questioning wrongly conducted, without a caution being administered, should be excluded. However, in this case and in *Shillibier,* we may be witnessing something of a shift in the judicial approach. Following *Senior*, the Customs officer in *Rehman* should have known that it was wrong to approach questioning in these circumstances without administering a caution, but what is the incentive to comply with Code C if the courts admit the evidence anyway?

Identification

■ B v Director of Public Prosecutions

[2006] EWHC 660 (Admin), 16 March 2006

The victim identified the accused when he was driven past in a police car. Police officers then approached the accused, and the victim was driven past again and once again identified him. The accused argued that the second identification should be excluded since it was a breach of Code D para 3.4 in that B was, by then, a known suspect.

The court held that there were not two identification procedures, but one continuous procedure divided into two parts. Police officers did not bring the accused to the attention of the victim. In fact, it was the other way round. The presence of the police officers with the accused on the second drive-by did not affect that identification.

Comment: Where the identity of the suspect is unknown, Code D para 3.2 permits the police to take a witness to a particular neighbourhood or place to see if s/he can identify the person s/he saw. However, para 3.2(d) provides that once there is sufficient information to justify the arrest of a particular person, s/he must be treated as a known suspect which, if s/he is available, will normally lead to a video identification under para 3.4. Given the way in which arrest powers are interpreted, once the victim in this case had identified the accused, there must have been grounds for arrest and the court appears to indulge in sophistry in describing the two street identifications as one continuous procedure. However, given the decision in *R v Popat* [1998] *Crim LR* 825, that where there has been a breach of Code

D, the evidence can nevertheless normally be admitted and left to the jury with a suitable warning about the breach, it may well have made little difference.

Silence

■ R v Shukla

[2006] EWCA Crim 797, 6 April 2006

The appellant, a general medical practitioner, was convicted of two counts of indecent assault on two young members of his staff. One of the grounds for appeal was that during the summing up, the judge had reminded the jury about discrepancies between what the accused had said in evidence and what he had said in the police interview in such a way as to invite it to draw an adverse inference, but without the protection of a full Criminal Justice and Public Order Act (CJPOA) 1994 s34 direction on inferences.

In dismissing this ground, the court distinguished between failure to mention facts in interview that were relied on at trial (in this case, evidence about events on a relevant day relating to the visit of a handyman and contact with a neighbour), and giving one account in interview and another at trial (in this case, in relation to the shortcomings of the complainants' work and their dismissal). In the former case, either a s34 direction had to be given or a direction not to draw an inference must be given in accordance with *R v McGarry* [1998] 3 All ER 805. However, in the latter case, s34 was not engaged even though the differing accounts could have an effect on the appellant's credibility.

Comment: This has the potential to cause considerable confusion about whether inferences may be drawn under CJPOA s34. It is quite clear that s34 is not confined to circumstances where an accused says nothing in a police interview. If the accused does say something in the interview, but not everything of relevance that s/he subsequently says in evidence, it will often be difficult to determine whether this should be treated as a failure to mention relevant facts, or is simply the provision of two different accounts of the same events.

■ R v Loizou

[2006] EWCA Crim 1719, 14 July 2006

L was convicted of one count of transferring criminal property contrary to Proceeds of Crime Act 2002 s327(1)(d). She had declined to answer questions in the police interviews, and in evidence she explained that her solicitor had advised her not to do so because there was nothing to connect her with money laundering. Following a ruling by the judge that she had waived privilege by putting forward the reason for the legal advice, the prosecution asked her in cross-examination whether she had told her solicitor any of the account that she had given in evidence. The prosecution subsequently alleged recent fabrication of her defence in order to tailor it to the facts alleged.

Finding that the judge had been correct in deciding that she had waived privilege, the court held that there is a distinction between a defendant having to reveal what had been said to a solicitor to rebut an allegation of recent fabrication (which does not waive privilege) and volunteering information about legal advice over and above simply stating that the refusal to answer questions had been as a result of legal advice (which does waive privilege).

Comment: This decision is in line with the previous decisions on waiver, including *R v Bowden* [1999] 2 Cr App R 176, and is a useful reminder of the dangers of disclosing the reasons for advice not to answer police questions. This applies to disclosing reasons in the police interview as much as it does to disclosing them in evidence. Counsel for the appellant argued that it was not fair for the prosecution to ask the question because they were not questioning whether she had been given such advice and, in any event, the advice was not dependent on what she had told her solicitor. However, the court said that this did not take into account the point derived from *R v Hoare and Pierce* [2004] EWCA Crim 784, 2 April 2004; October 2004 *Legal Action* 15, that the jury, having heard her evidence, would have no factual material on which to assess whether she had genuinely and reasonably relied on her solicitor's advice.

Police cautions and diversion

■ Jones v Whalley

[2006] UKHL 41, 26 July 2006

W was given a police caution for assault occasioning actual bodily harm on J. The caution included a statement that acceptance of the caution would mean that W would not have to go to court in respect of the offence. J subsequently initiated a private prosecution against W. The magistrates stayed the prosecution as an abuse of process, but this was overturned by the Divisional Court. It was held by the House of Lords that while the right of private prosecution survived, it would be an abuse of process for the prosecution to proceed in these circumstances. If J had grounds to impugn the decision to caution, he could apply for judicial review to quash the decision which, if successful, could be followed by a private prosecution.

Comment: Given the wide discretionary powers to caution, it would be difficult for a victim to judicially review such a decision successfully. The government's policy, of which the court was clearly mindful, is that more cases should be dealt with by diversionary mechanisms such as simple and conditional cautions. This policy could be frustrated if victims could bypass this by initiating their own prosecutions.

This decision contrasts with that in *Omar v Chief Constable of Bedfordshire Police* [2002] EWHC 3060 (Admin), 19 December 2002, which found that a public prosecution for an offence for which a person had been cautioned would not be an abuse of process. However, since similar public policy considerations apply, it may be that *Omar* is no longer good law. From the suspect's point of view, if s/he consents to a caution s/he can be fairly confident that a prosecution will not be initiated against him/her in respect of the same offence. While simple and conditional cautions require the consent of the suspect, reprimands and warnings do not, and could be imposed on a juvenile in circumstances where neither the suspect nor the victim are happy with this (see also page 19 of this issue).

■ R (Wyman) v Chief Constable of Hampshire Constabulary

[2006] EWHC 1904 (Admin), 24 July 2006

The claimant had received a police caution for sexual assault contrary to Sexual Offences Act 2003 s3. He challenged the caution on the grounds that:

- he had not made a clear and reliable admission to the alleged offence; and
- the formal caution was flawed on the face of the record because it misrepresented the circumstances of the alleged offence.

It was held that none of the claimant's comments in the police interview showed an admission that the complainant did not consent to the touching (which had taken place in the context of dancing in a nightclub), nor that the claimant did not reasonably believe that the complainant consented. In those circumstances, there was no clear and reliable admission to the alleged offence.

Comment: At the time the caution was administered, police cautions were governed by Home Office Circular 18/1994: *The cautioning of offenders*, which required that the person to be cautioned 'must admit the offence'. They are now governed by Home Office Circular 30/2005: *Cautioning of adult offenders*, which provides that in determining whether a caution is appropriate the police must consider whether the suspect has made a clear and reliable admission of the offence, which was the test applied by Mr Justice Silber in the current case. In addition, he

stated that the admission must relate to all the ingredients of the offence and, in order to assess whether this is the case, 'it is necessary to consider all the evidence of interviews with the person cautioned in order to determine if such an admission was made'.

Given the potential attractions of a caution, both to many suspects (because it potentially avoids prosecution) and to the police (because it counts as an offence brought to justice for the purpose of meeting targets), this case provides a useful reminder of the standard required in terms of admissions by the suspect. It is particularly important in the case of relevant sexual offences where the caution will result in the suspect being placed on the sex offenders' register, and in the case of reprimands and warnings which can be imposed on juveniles without their consent (see October 2005 *Legal Action* 10).

Note that a new Home Office Circular 14/2006: *The final warning scheme* has been issued that supplements the original guidance on the scheme, which was issued in November 2002. Annex D of the circular contains the ACPO youth offender case disposal gravity factor system, which is also useful when advising adults about cautions.[7] (See also page 19 of this issue.)

Juveniles

■ R (M) v Gateshead Council

[2006] EWCA Civ 221, 14 March 2006

PACE s38(6) provides that where a juvenile is to be kept in police detention following charge, s/he must normally be moved to local authority accommodation unless this is impracticable or, where the juvenile is at least 12 years old, no secure accommodation is available and keeping him/her in other local authority accommodation would not be adequate to protect the public from serious harm.

It was held in this case that where the police make a request under PACE s38(6), the duty to provide accommodation under Children Act (CA) 1989 s21(2)(b) is imposed on the local authority that receives the request, although the police have a discretion about which authority they approach. Taken together, the object of the two sections is that children should not be detained in police cells following charge if at all possible. Therefore, local authorities must have a reasonable system in place to enable them to respond to requests, including for secure accommodation. However, s21(2)(b) did not impose an absolute obligation to provide secure accommodation, and it was unrealistic to expect local authorities to be able to guarantee that they would provide secure accommodation whenever the police made such a request.

Comment: In the current case, the request for accommodation was made at 12.20 am, on the basis that the accused would be expected to appear in court at 10 am the same day. The court found that, in these circumstances, it was wholly impracticable for the local authority to consider providing secure accommodation, and it did not breach its duty under s21(2)(b) in failing to provide it. Code C Note for guidance 16D clearly implies that a local authority should be able to take a juvenile at short notice, and the objective of the two sets of provisions will be frustrated if resources are not made available to provide suitable accommodation. If this case is followed it will mean that most juveniles charged and denied bail, especially those who need to be kept in secure accommodation, are likely to be kept in police cells pending their court appearance.

1 See also Home Office Circular 23/2006: *Detention of terrorist suspects under section 41 of the Terrorism Act 2000*. Up to date versions of all the PACE Codes of Practice can be found in *Defending Suspects at Police Stations*, 5th edn, LAG, 2006.
2 See: *The Chief Constables of West Yorkshire, South Yorkshire and North Wales Police v The Information Commissioner*, 12 October 2005, available at: www.informationtribunal.gov.uk/our_decisions/documents/north_wales_police.pdf.
3 Exceptional case procedures for removal DNA, fingerprints and PNC records, 24 April 2006, available at: www.acpo.police.uk/asp/policies/Data/guidance%20for%20removal%20from%20database.doc.
4 See: *Defending Suspects at Police Stations*, note 1, p437.
5 See: Home Office Circular 22/2006, *Authorisations of stop and search powers under section 44 of the Terrorism Act,* which gives guidance on the authorisation process.
6 For an explanation and discussion of the Court of Appeal decision see April 2005 *Legal Action* 17.
7 Annex D is published as Appendix 3 in *Defending Suspects at Police Stations*, note 1.

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Police misconduct and the law

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

CASE-LAW

Misfeasance in a public office

■ **Watkins v Home Office and others**

[2006] UKHL 17,
29 March 2006,
[2006] 2 All ER 353

The claimant, a convicted prisoner, established at trial that prison officers had acted in bad faith in opening his legal correspondence. However, his action for misfeasance in a public office was dismissed because he was unable to show that he had suffered any damage as a result of this conduct. The Court of Appeal allowed his appeal. It held that where the misfeasance involved an interference with the claimant's constitutional rights, it was unnecessary to prove damage: [2004] EWCA Civ 966, 20 July 2004. It substituted a finding of nominal damages and remitted the case to the county court for an assessment of exemplary damages.

The House of Lords disagreed. The Court of Appeal's approach was inconsistent with established case-law and would create uncertainty and anomalous situations; proving material damage was always an essential ingredient of the tort of misfeasance and, therefore, the claim failed.

Comment: In one sense the House of Lords' decision may not represent a significant change for claimants in civil actions, as it had not been established that instances of police impropriety could come within the Court of Appeal's 'constitutional rights' exception. However, one new difficulty for claimants may arise from the definition of 'material damage' adopted by Lord Bingham (who gave the leading speech). He said that this covered 'financial loss or physical or mental injury' and excluded 'distress, injured feelings, indignation or annoyance'. Claimants may be faced with the contention that this constitutes an exhaustive definition of damage for the purposes of a claim in misfeasance. It should be borne in mind, though, that the parameters of the concept of 'damage' were not the focus of the appeal, and there was no specific consideration in the speeches of whether loss of liberty or damage to reputation might be sufficient.[1]

The House of Lords recognised that where a public official abused his/her powers but the claimant suffered no damage, an action under the Human Rights Act (HRA) 1998 might lie, albeit there would be no opportunity to receive exemplary damages, unlike in a claim for misfeasance.

Assault and misfeasance

■ **(1) Ashley (2) Ashley v Chief Constable of Sussex Police**

[2006] EWCA Civ 1085,
27 July 2006

This was an appeal by the claimants against summary judgment by Mrs Justice Dobbs arising out of the fatal shooting of James Ashley during an armed raid in 1998 (see October 2005 *Legal Action* 27 for a discussion of the first instance judgment). The points for the Court of Appeal to consider were as follows:

■ Where a defendant raises the defence of self-defence to a claim for assault and/or battery, does the claimant bear the burden of disproving that defence or does the defendant bear the burden of proving it?

The Court of Appeal found that the burden lies on the defendant to prove self-defence.

Comment: This is a useful decision especially as the line of authorities relied on place the burden on defendants to justify their use of force whenever trespass to the person is pleaded and not just in cases involving self-defence.

■ Where a defendant pleads self-defence on the basis of mistake what must the defendant prove?[2]

The claimants argued that the defendant must prove it was necessary to act in self-defence because the officer faced an attack, or an imminent risk of attack, from Mr Ashley in reality, ie, a wholly objective test. The defendant argued that it was sufficient to prove it was necessary to act in self-defence on the basis of the facts as the individual officer believed them to be, whether or not s/he was mistaken; or if, he was mistaken, whether or not it was a reasonable mistake, ie, a wholly subjective test.

The Court of Appeal decided on a combination of the objective and subjective in finding that a defendant need not prove there was an actual attack, or imminent risk of such an attack. Rather, it will be sufficient if the officer honestly but mistakenly believed there to be such a risk in his/her own mind.

However, the court also found that (unlike in criminal proceedings) there had to be reasonable grounds for that mistaken belief, having regard to all the surrounding circumstances. The degree of any force used must also be objectively reasonable in light of all the surrounding circumstances (Lady Justice Arden left open the question about whether the defendant should be required to prove that his/her action was proportionate in the sense of something more than reasonable).

Comment: The Court of Appeal was unanimous in allowing officers a certain amount of latitude to make an honest mistake in a 'heat of the moment' situation, but imposed a safeguard by requiring the defendant to prove that any mistaken belief was reasonable. Sir Anthony Clarke, Master of the Rolls, made clear that the existence or not of reasonable grounds for the mistaken belief will be relevant when assessing whether the belief was honestly held (Lady Justice Arden also left open the question about whether a defendant should be allowed to rely on a mistake which was made in the heat of the moment but was on the basis of an inaccurate prior briefing, as opposed to a factor that emerged during the heat of the moment, when considering whether acting in self-defence was necessary).

It is to be welcomed that the Master of the Rolls and Lady Justice Arden disagreed with Auld LJ by deciding that a trial for battery should proceed, despite the fact that there were no additional damages to be recovered on the facts, on the basis that it was in the public interest for the family to seek a declaration that the police were liable in battery for Mr Ashley's death. The Master of the Rolls was influenced by the fact that there had not been an inquest or a public inquiry, and disagreed with Auld LJ that a trial for battery would constitute an abuse given that the officer in question had been acquitted of criminal charges on the same facts. (This was a pre-HRA case, however, as Lady Justice Arden pointed out, Strasbourg also applied a combination of objective and subjective tests when considering the defence afforded under article 2(2) of the European Convention on

Human Rights ('the convention'). It is submitted that the police will have a higher standard to prove under article 2(2), which requires force to be not just necessary but 'absolutely' necessary. It is also noteworthy that the court ordered disclosure of two investigating officers' reports even though they were prepared before the implementation of the more permissive regime under the Police Reform Act 2002. It took into account the exceptional circumstances of the case and the fact that some of the reports were already in the public domain.)

■ Did the claimants have a real prospect of success in establishing misfeasance at trial regarding conduct by the police after the shooting, including allegedly releasing incorrect information to the press, obstructing an independent investigation, deliberately failing to involve the family and fabricating evidence?

The Court of Appeal disagreed with Mrs Justice Dobbs in finding that there was sufficient evidence of potential misfeasance to survive an application for summary judgment. However, the Master of the Rolls directed that what, if any, damages were payable if so, should be tried as a preliminary issue, at the same time as trying the issue of damages for the other surviving causes of action.

Comment: It is encouraging that the Court of Appeal took a more liberal view of what constituted potential misfeasance and its decision that the issue of loss should be dealt with as a preliminary issue was influenced by the recent decision in *Watkins* (see above) and the fact that a full liability trial of this issue was likely to be long and complex.

Harassment

■ Majrowski v Guy's and St Thomas' NHS Trust

[2006] UKHL 34,
12 July 2006,
[2006] 3 WLR 125

The House of Lords upheld the Court of Appeal's decision that the claimant could sue his employers under the Protection from Harassment Act (PHA) 1997 on the basis that they were vicariously liable for his manager bullying him at work: see [2005] QB 848. The implications of the Court of Appeal's decision for claims against the police under the PHA were discussed in October 2005 *Legal Action* 27.

Negligence

■ Home Office v Butchart

[2006] EWCA Civ 239,
15 March 2006,
[2006] 1 WLR 1155

The claimant was a psychiatrically vulnerable remand prisoner, who was placed by the prison authorities in a shared cell with an older prisoner who had known suicidal ideation. A few weeks later that prisoner committed suicide, and the claimant discovered his body. His claim was for psychiatric injury, caused by the cumulative effect of the stressful period spent together in the shared cell (during which his cellmate had expressed suicidal thoughts but pressured him not to tell the prison authorities); his feelings of guilt at failing to prevent the suicide, compounded by a prison officer's remark suggesting that he was to blame; and a subsequent brief incarceration with another suicidal prisoner shortly afterwards. He alleged liability in negligence on the basis that the prison authorities should have realised that the cell-sharing arrangement was wholly unsuitable, of their failure to monitor it and because of the post-suicide incidents referred to.

The defendant unsuccessfully applied to have the claim struck out on the basis that no duty of care was owed to the claimant as the control mechanisms derived from *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 applied, because his claim was, in essence, parasitic on the death of another and relied on the effect of that death on him. It was accepted that the claimant did not meet the test of a 'secondary victim' under those control mechanisms, but it was submitted that they were inapplicable. The Court of Appeal rejected the defendant's appeal. The relationship between the prison authorities and the claimant gave rise to a duty of care, which encompassed a duty to take reasonable steps to avoid him suffering psychiatric harm.

Comment: This decision is helpful in establishing that the duty of care owed by a custodian to a detainee extends beyond a duty to protect the latter's physical welfare to an obligation to take reasonable steps to protect him/her from psychiatric harm. This applies equally to the duty of care that the police owe to a person in their custody, although what amounts to reasonable steps will depend on the particular circumstances.

The court held that the control mechanisms developed in relation to claims brought by relatives and police officers for psychiatric trauma arising out of the Hillsborough stadium disaster had no application here, as the defendant custodian owed an independent duty of care to the claimant and the events relied on went significantly beyond the death of the cellmate itself.

However, a few days later a differently constituted Court of Appeal took a stricter approach in *French and others v Chief Constable of Sussex Police* [2006] EWCA Civ 312, 28 March 2006 (without, it seems, *Butchart* being cited to it). *French* concerned claims for psychiatric injury by police officers involved in events surrounding the shooting of James Ashley (see above). The officers alleged that their injury had been caused by corporate failures in the Sussex Police in relation to training and planning for incidents such as the one involving Ashley. The Court of Appeal held that their claims should be struck out since, although the defendant owed them independent duties of care stemming from their quasi-employment relationship, their claims for psychiatric injury were parasitic on the fact that Ashley had died and thus the *Frost* control mechanisms should be applied (which they were unable to satisfy).

Both decisions were probably influenced by the apparent underlying merits of the claims, including the fact that in *French* (in contrast to *Butchart*) the court also held that the alleged psychiatric injury was not reasonably foreseeable.

Enhanced criminal record certificates

Under the provisions of Police Act (PA) 1997 Part V, where an applicant seeks employment involving the regular care, training or charge of children, s/he will seek an enhanced criminal record certificate (ECRC) with a view to reassuring the potential employer. However, before the Home Secretary issues the ECRC, s/he will obtain information from chief police officers, who are under a duty to include material which 'might be relevant' for the purposes of the certificate. The breadth of discretion afforded to chief police officers was emphasised by the Court of Appeal in *X v Chief Constable of West Midlands* [2005] 1 WLR 65.[3] Where an applicant believes that information contained in a certificate is inaccurate, s/he may apply to the secretary of state for a new one.

■ R (L) v Commissioner of Police of the Metropolis; R (G) v Chief Constable of Staffordshire Police

[2006] EWHC 482 (Admin),
17 March 2006

■ R (B) v Secretary of State for the Home Department and Commissioner of Police of the Metropolis

[2006] EWHC 579 (Admin)

In the first case, L obtained an ECRC which stated that she had no convictions but that her son had been put on the child protection register under the category of neglect. G had obtained a certificate which referred to her acquittal for gross negligence manslaughter when a pupil was killed by a vehicle after wandering out of a special needs school where s/he was head teacher. Both claimants argued unsuccessfully that these matters

should not have been included in the certificates as they were not criminal convictions. Munby J held that evidence of neglect or negligence not amounting to a criminal offence could be relevant information for these purposes.

In the second case, the Home Secretary had declined B's application for an amended certificate, when he objected to inclusion of a reference to suspected sexual abuse of his daughter. Munby J refused his application for judicial review, holding that the Home Secretary was only required to determine whether the allegation made against the individual had been correctly recorded, not to evaluate whether the allegation had any foundation.

Comment: The decisions in these cases underscore the limited redress available to an applicant who finds that his/her ECRC contains unfair or otherwise objectionable material but at least provide some clarification on the respective roles of the Home Secretary and chief police officers. Munby J said that any complaint about the relevance of the material, for example, that the allegation was too flimsy and/or of such little relevance to the purposes for which the certificate was required, should be directed at the chief officer who provided that information. However, if the certificate was inaccurate in the sense that the contents were partial or misleading – the example given was a reference to a prosecution for rape without referring to the acquittal – the Home Secretary would have a responsibility to issue a new one.

Limitation

Limitation Act (LA) 1980 s11(1) provides for a period of three years for issuing an 'action for damages for negligence, nuisance or breach of duty', which is subject to discretionary extension. As a result of LA s2, claims concerning intentional torts are subject to a six-year limitation period and the courts do not have the equivalent discretion to extend it. In *Stubbings v Webb* [1993] AC 498, the House of Lords held that claims of sexual abuse came within s2 as they involved intentional assault. In *KR and others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and another* [2003] EWCA Civ 85, 12 February 2003; [2004] 2 All ER 716, the Court of Appeal held that victims of sexual abuse could not take advantage of the more generous limitation rule in s11 by framing their claims in negligence, for example, for permitting or failing to prevent the abuse. As the heart of the complaint was still an intentional assault, the six-year period in s2 was applicable.

■ A v Hoare; H v Suffolk CC and Secretary of State for Constitutional Affairs; X and Y v Wandsworth LBC

[2006] EWCA Civ 395,
12 April 2006

In these co-joined appeals, the Court of Appeal rejected arguments that *Stubbings* had been wrongly decided and/or that the scope of LA s11 should be re-evaluated in light of the obligation in HRA s3 to read legislation so far as possible in a way that is compatible with convention rights (in this case, article 6). Permission to appeal to the House of Lords has been given. The court said that as the claims were already statute barred as a result of s2 when the HRA came into force, this statute could not breathe new life into rights that had already been extinguished.

Comment: As the law currently stands, any action arising out of an intentional act, such as sexual assault, will be subject to the s2 six-year limitation period, even if the complaint is formulated as a want of care or breach of duty. This would apply, for example, to a claim that police negligently allowed an officer to abuse victims of crime.

If it is upheld by the House of Lords, it remains to be seen whether the court's ruling in relation to the HRA has a bearing on other issues of statutory construction arising under the LA. In July 2006, in *Campbell v Chief Constable of West Midlands* (HQ05X02881), the Master declined to strike out a claim for misfeasance brought more than six years after the acts relied on, where the claimant had been unable to sue before his conviction was eventually quashed on an out of time appeal, as the rule against collateral challenge (identified by the House of Lords in *Hunter v Chief Constable of West Midlands* [1982] AC 529) would have precluded him from doing so. The claimant argued that he was deprived of access to the courts if the six-year limitation period was applied in its full rigour and that s2 should be interpreted in light of article 6 of the convention.

Search warrants

■ Keegan v UK

App No 28867/03,
18 July 2006

The European Court of Human Rights (ECtHR) held that there was a breach of article 8 of the convention in circumstances where sufficient enquiries were not made before a search warrant was applied for by police officers.

In October 1999, the police wished to search a house where a suspect said he lived. Enquiries would easily have revealed that the suspect and his family had not lived in the property for a year and the occupants were the Keegan family. Nevertheless, a warrant was obtained to search the property on the ground that there was reasonable cause to believe that stolen cash was in the possession of the occupier. The police executed the warrant a few days later, entering the house by force early in the morning. In fact they discovered the Keegans in occupation and abandoned the search.

An action was brought for malicious procurement of a search warrant arguing that 'malice' should bear an expanded meaning which included circumstances where officers acted with reckless indifference to the legality of their conduct. The Court of Appeal rejected this argument (*Keegan v Chief Constable of Merseyside Police* [2003] 1 WLR 2187), reaffirming that malice required proof of an improper purpose and there was no evidence of that in the case.

However, in the ECtHR it was not disputed that the forcible entry by the police interfered with the applicants' right to respect for their home under article 8(1) of the convention. What remained to be determined was whether the interference was justified under article 8(2), namely whether it was 'necessary in a democratic society'. The court held that the interference could not be justified where it was based on 'a misconception which could, and should, have been avoided with proper precautions'. The court declined to agree that a limitation of actions for damages to cases of malice was necessary to protect the police in their vital functions of investigating crime. It noted that 'the fact that the police did not act maliciously is not decisive under the convention which is geared to protecting against abuse of power, however motivated or caused'. The applicants, who had suffered psychiatric reactions, were awarded a total of €15,000 (split between six family members).

Comment: With the HRA now in force, the case confirms the importance in domestic proceedings of the police justifying entries and searches as proportionate under article 8, and this includes taking steps to ensure that action is based on correct information. However, as the ECtHR commented: ' … this finding does not imply that any search, which turns out to be unsuccessful, would fail the proportionality test, only that a failure to take reasonable and available precautions may do so'.

Stop and search

■ R (Gillan and another) v Commissioner of Police for the Metropolis and another

[2006] UKHL 12,
8 March 2006,
[2006] 2 WLR 537

In August 2003, authorisations under Terrorism Act (TA) 2000 ss44 and 45 allowed

officers to stop and search members of the public, at random, for articles that could be used in connection with terrorism. There had been a succession of 28-day authorisations for London in the two years that the TA 2000 had been in force. Two claimants, a journalist and a demonstrator, were stopped and searched under the authorisation but nothing was found. They judicially reviewed the police and the Home Secretary in relation to the authorisations.

The House of Lords found that the use of the authorisations and their scope was justified given the threat of terrorist action in London, and were lawful as a matter of domestic law. It also decided that a person stopped and searched was not deprived of his/her liberty within the meaning of article 5(1) of the convention. Even if there had been a deprivation of liberty, there was, in effect, an obligation to submit to the search which meant the deprivation of liberty was justified for the purposes of article 5(1)(b). The court also found that at least a superficial search probably did not reach a level of intrusion high enough to constitute a breach of 'respect for private life' for the purposes of article 8(1), and even if it did then a proper exercise of the power to stop and search was proportionate within article 8(2) as being necessary in a democratic society given the great danger of terrorism.

Comment: Lord Bingham said at the start of his judgment that it was an 'old and cherished tradition of our country' that everyone should be free to go about their business confident that they will not be stopped and searched by the police unless there is reasonable suspicion that they have committed a criminal offence. However, in this case the Lords have confirmed that this is not an absolute rule. The findings on the article 5 and article 8 points would appear to apply to everyone who is stopped and searched by the police, whatever the power relied on.

Interestingly, the issue that caused the Lords the most concern was how 'random' searches, which, in practice, targeted those of Asian appearance more often, could not be discriminatory. The answer apparently is that ethnic appearance can be taken into account when deciding who to search so long as the selection relates to the 'perceived terrorist threat and not on grounds of racial discrimination'.

The case and the legislation have tightened the parameters of the citizen's right not to be subject to stop and search. And although the comments on race may provide a legal answer to the discrimination issue, it must be the case that in practice it will often be difficult to discern the real motive for any particular search (see also page 11 of this issue).

Article 2 of the convention

■ Van Colle v Chief Constable of Hertfordshire Police

[2006] EWHC 360 (QB),
10 March 2006,
[2006] 3 All ER 963

An employer was required to give evidence for the prosecution at the trial of a former employee. The employee threatened and eventually murdered his employer. The police were informed of the intimidation and should have been aware of it but took no action. The dead man's parents brought proceedings under the HRA for action incompatible with article 2 and article 8 of the convention.

Mrs Justice Cox reviewed the approach to be taken in cases claiming a breach of article 2. She recognised (as the ECtHR did in *Osman v UK* [2000] 29 EHRR 245) that there was a positive obligation in certain circumstances to take preventive, operational measures to protect an identified individual whose life was at risk as a result of the criminal acts of a third party, and there would be a breach if the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had, or ought to have had, knowledge.

However, where the risk to life had been created by the state authorities the 'real and immediate risk' test was too high. If there was a risk on the facts, then it was a real risk, and 'immediate' could just mean that the risk was present and continuing at the material time, depending on the circumstances. Each case would be fact-sensitive depending on the nature of the risk and the steps that could have been taken. On the facts of this case, the judge found that there was a real risk of harm about which the police were aware and that steps could have been taken to avoid it. The judge awarded £15,000 for the distress suffered by the deceased before his death and £35,000 to his relatives for their distress and grief.

Comment: This case is of particular interest for the apparently lower standard to be met where the risk to life has been created by state authorities. In this case, the murdered man was required to attend as a witness and was therefore entitled to a higher degree of protection from the police. It is submitted that the same would apply to those in custody at risk of harm from other inmates.

The case is also noteworthy for the rejection of the 'but for' test in deciding whether there should be an award of damages for an established breach of article 2. The judge was satisfied that the test should rather be whether action from the police 'could have a real prospect of altering the outcome or mitigating the harm'.

Damages

■ Manley v Commissioner of Police for the Metropolis

[2006] EWCA Civ 879,
28 June 2006

The Court of Appeal considered an appeal against damages in a case where £1,500 basic damages (and no aggravated or exemplary damages) had been awarded by a jury for malicious prosecution involving threats to kill a police officer and dangerous driving. The claimant had been in custody for five months before his trial. The findings of the jury meant that officers had lied at the criminal trial and also during the civil trial. The claimant was not of good character and had a number of convictions for violence. The bracket offered by the judge to the jury for malicious prosecution was £4,000–£5,000.

The Court of Appeal emphasised that, in summing up on damages, a judge must make it clear to a jury what they are compensating a claimant for. This would include explaining that damages for malicious prosecution were for loss of reputation, being put in danger of losing liberty and property, the risk of conviction (reflected in an award for injury to feelings), and actual pecuniary loss. Guidance should also be given on the effect that a claimant's bad character might have on an award of damages, but the jury should take into account (in the case of a person of bad character) the fact that there was a greater chance of the malicious prosecution succeeding and that the claimant risked a longer prison sentence as a result.

The court decided in the instant case that the award of £1,500 was one that no reasonable jury could have made and that a basic award of £4,000 should be substituted (although the court thought even this was on the low side).

The claimant had also been assaulted and sprayed with CS gas and, for the general humiliation he suffered, the Court of Appeal awarded the sum of £10,000 in aggravated damages but Waller LJ added this comment at paragraph 33: 'As will appear from my citation from *Thompson*, this is not a case for exemplary damages.' This reference was to a passage from *Thompson v Commissioner of Police* [1997] 2 All ER 762, which reads as follows:

The fact that the defendant is a chief officer of police also means that here exemplary damages should have a lesser role to play. Even if the use of civil proceedings to punish a defendant can in some circumstances be justified it is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrong doer, but his 'employer'.

Comment: This case is a useful example of the approach that should be taken in assessing basic and aggravated damages especially in malicious prosecution cases. Scrutiny has also been given to the comment from Waller LJ and whether it reopens the debate on whether exemplary damages should be available generally in police actions at all. However, the reference to *Thompson* in this case must be seen in the context of the actual award of considerable exemplary damages by the Court of Appeal in *Thompson* itself (a case involving not unusual allegations of assault and malicious prosecution), and the confirmation of awards of exemplary damages by the Court of Appeal in subsequent cases.[4] In addition, in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, Lord Nicholls emphasised the role that the availability of exemplary damages had played in 'buttressing civil liberties'. It is submitted that nothing in *Manley* affects the law on exemplary damages or the way it has been applied in the decade since *Thompson*.

Complaints

■ Scott v Chief Constable of South Yorkshire

[2006] EWCA Civ 598,
28 March 2006

The defendant confirmed pre-trial that the arresting officer had no disciplinary record. At trial, the claimant produced a letter from the Police Complaints Authority (PCA) recommending that the officer should receive advice in another case. The officer denied receiving any advice and the defendant produced a memorandum from his complaints department confirming that the complaint was unsubstantiated and making no mention of advice. The claimant subsequently lost his claim and raised with the Independent Police Complaints Commission (IPCC) that the defendant had not acted on the PCA's recommendation of advice. The IPCC disclosed a different memorandum from the defendant suggesting that the officer had been given advice. The claimant sought a fresh trial on the basis of the non-disclosure of this later memorandum by the defendant. The Court of Appeal rejected his appeal on the basis that there is no duty to disclose unsubstantiated complaints and there was no disciplinary record to disclose, given the complaint had not been referred for disciplinary hearing. Furthermore, even had the claimant been in possession of the whole of this information, his position would not have been significantly better than it was at trial.

Comment: That a defendant is not required to disclose an unsubstantiated complaint is uncontroversial, unless it can be argued that it constitutes evidence of similar fact (see *O'Brien v Commissioner of Police of South Wales* [2003] EWCA Civ 1085, 23 July 2003, discussed in October 2005 *Legal Action* 28). The more difficult question is what constitutes a 'substantiated' complaint. The claimant was understandably encouraged by a PCA letter stating that there was a realistic prospect that a tribunal would find the arresting officer had acted unlawfully and should receive advice. However, the court was right to point out that there is no mechanism by which the PCA/IPCC can substantiate a complaint or not. All it can do is direct misconduct proceedings, or recommend (note: not direct) a written warning or advice. This is despite the fact that PCA/IPCC letters sometimes refer to 'upholding' a complaint.

With regard to disclosure, it is submitted that the defendant must owe at least the same duty to disclose the categories of complaint outcomes in civil proceedings as it does in criminal proceedings.[5]

Cautions

■ R (Wyman) v Chief Constable of Hampshire Constabulary

[2006] EWHC 1904 (Admin),
24 July 2006

The claimant applied to quash a caution for sexual assault, inter alia, on the basis that he did not make a clear and reliable admission to the alleged offence. The defendant resisted the application contending that the claimant admitted all the elements of the offence in police interview. Mr Justice Silber found in favour of the claimant as the police interview did not contain an admission to key elements of the offence.

Comment: This judgment is a helpful reminder that the police must be sure that a suspect has made a clear, reliable and voluntary admission to each and every element of the alleged offence before a valid caution can be administered (see also page 13 of this issue).

■ Jones v Whalley

[2006] UKHL 41,
26 July 2006

Mr Whalley accepted a caution for assaulting Mr Jones. The terms of the caution stated that he would not have to go before a criminal court in connection with the matter. Mr Jones then launched a private criminal prosecution. The magistrates were satisfied that to allow the private prosecution to proceed in these circumstances would be an abuse of process and stayed the proceedings. A case was stated and the Divisional Court disagreed.

The House of Lords upheld the magistrates' decision identifying the abuse in question as the fairness of trying Mr Whalley at all in the circumstances. Lord Bingham, in the lead judgment, pointed out that it was open to Mr Jones to consider judicially reviewing the caution on the ground that it was induced by misrepresentation and, if successful, then initiate a private prosecution.

Comment: This appeal was allowed on the narrow ground that the appellant had received an express assurance from the police that he would not have to go before a criminal court in relation to the assault. The Lords felt unable to decide the broader point about whether it will always be an abuse to prosecute someone who has been cautioned, reprimanded or warned; given that a pre-condition for that process is a decision by the authorities that a criminal prosecution is not in the public interest. Lords Bingham, Rodger and Carswell tended towards that view as, otherwise, private prosecutions could undermine the purpose of cautions. However, Lords Brown and Mance felt such an approach could erode the important right to a private prosecution. It was agreed that further litigation and/or legislation would be necessary to decide the point. Until that time it is submitted that the police should make clear that a caution 'may not' preclude a private prosecution (see also page 13 of this issue).

False imprisonment

■ R (Karas and Miladinovic) v Secretary of State for the Home Department

[2006] EWHC 747 (Admin),
7 April 2006

The claimants were ethnic Serbs from Croatia. After a delay of three years, the Home Office faxed their solicitors between 4.16 pm and 4.22 pm on 11 October 2004 with a notice of refusal of leave to remain. No indication was provided that the applicants were to be removed imminently. However, unbeknown to the applicants or their solicitors, the Home Office had already put measures in place for removal. The applicants were detained at 8.30 pm that night, with a view to being removed at 7.45 am the following morning. Fortunately the applicants were able to contact their solicitor after hours for advice on how to halt their removal.

Munby J in a damning judgment held that, although the applicants had no viable claim to remain in the UK, their detention was unlawful, inter alia, as it was deliberately planned by the Home Office for a collateral and improper purpose, namely the spiriting away of the claimants from the jurisdiction before there was time for them to obtain and act on legal advice or apply to the court.

Comment: Mr Justice Munby expressed grave concern at the conduct of the Home Office in this case and noted that it was not an isolated example. He underlined that for detention to be lawful, it must be reasonable and proportionate, with all reasonable alternatives short of detention considered. Incidents of collateral purpose for detention in a police context might arise where an individual is detained apparently on lawful grounds but, in reality, in order to apply pressure on him/her to implicate another; and/or to mask wrongdoing or inaction by the authorities.

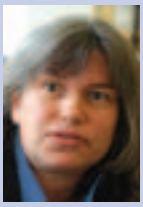
Home Office miscarriage of justice compensation scheme

On 19 April 2006, the then Home Secretary Charles Clarke announced a number of concerning changes to the scheme under which the government pays compensation for miscarriages of justice:

- the discretionary limb of the scheme has been abolished, except for those applications lodged before 19 April;
- the rates of pay at which the independent assessor is prepared to reimburse solicitors' costs have been reduced to Legal Help rates for all work undertaken after 19 April;
- the assessor is minded to make increased use of his discretion to have regard to an applicant's previous convictions and/or contributory conduct when assessing the non-pecuniary element of an award (the then Home Secretary also announced that he was considering introducing legislation to enable him to place an overall cap on awards and to reduce awards for pecuniary loss on the basis of previous convictions/contributory conduct).

A judicial review to these changes has been issued by Bindman & Partners on behalf of a number of specialist solicitors' firms. Three individual would-be applicants have also issued applications. A decision on permission is awaited. Please contact Tony Murphy for further information at: t.murphy@bindmans.com.

1 See the discussion of this topic in *Police misconduct: legal remedies*, John Harrison, Stephen Cragg and Heather Williams, 4th edn, LAG, April 2005, para 7.45.
2 The defendant's case was that the officer mistakenly thought Mr Ashley was armed and that there was an imminent risk that he might shoot him, despite the fact that Mr Ashley was unarmed and naked.
3 Discussed in *Police misconduct: legal remedies*, note 1, para 10.23.
4 Discussed in *Police misconduct: legal remedies*, note 1, pp514–520.
5 Ie, findings of guilt at misconduct tribunals, formal written warnings, adverse judicial findings, incomplete disciplinary proceedings, qualifying criminal convictions and cautions: Crown Prosecution Service *Disclosure manual*, chapter 18, available at: www.cps.gov.uk/legal/section20/chapter_a.html.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Age discrimination: the new law reviewed

On 1 October 2006, the Employment Equality (Age) Regulations (EE(A) Regs) 2006 SI No 1031 take effect, outlawing age discrimination in both the workplace and vocational training. The EE(A) Regs represent the final stage in the UK's implementation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (also known as the Framework Equality in Employment Directive (the FEED)).[1] Here, Susie Munro and Nony Ardill review the EE(A) Regs and explain why the National Council on Ageing (NCA) is challenging the legality of the new regulations.

Introduction

The FEED required member states to legislate against discrimination in employment and vocational training on the grounds of age, sexual orientation, religion or belief and disability by December 2003. The UK met this deadline in relation to the grounds of disability, religion or belief and sexual orientation, but applied to the European Commission for a three-year extension (the maximum permissible) in relation to age. In the meantime, workplace age discrimination has been the subject of a voluntary code

Justification of direct discrimination

One significant difference to note between the EE(A) Regs and previous discrimination legislation is that both direct and indirect age discrimination are potentially justifiable. In other legislation (the Sex Discrimination Act 1975, the Race Relations Act 1976, the Employment Equality (Sexual Orientation) Regulations 2003 SI No 1661 and the Employment Equality (Religion or Belief) Regulations 2003 SI No 1660), what would otherwise be direct discrimination is only permitted if it is a genuine occupational requirement. Direct age discrimination will be lawful if an employer can show that it is objectively justified, ie, a proportionate means of achieving a legitimate aim. This is the same test as that for justification of indirect discrimination. The draft version of the EE(A) Regs gave examples of what could be a proportionate means of achieving a legitimate aim, but these were removed from the final version of the regulations. Employers are, therefore, left a wide scope to argue that they have a legitimate aim and that their actions are objectively justified.

The guidance produced for employers by the Advisory, Conciliation and Arbitration Service entitled *Age and the workplace: putting the Employment Equality (Age) Regulations 2006 into practice*,[2] suggests that

legitimate aims might include:
- economic factors such as business needs and efficiency;
- the health, welfare and safety of the individual; and
- the particular training requirements of the job.

It remains to be seen how the objective justification test and, in particular, the use of 'business needs' as a legitimate aim will be interpreted, and how high the threshold will be set for employers to be able to justify direct discrimination.

Retirement of people over 65

The EE(A) Regs introduce a default retirement age of 65. The effect of this is to limit the protection afforded by the new law and to allow employers to retain mandatory retirement ages. Employers will still be able to force an employee to retire against his/her wishes, as long as s/he is over the age of 65 – or the normal retirement age for the position if this is higher – and providing the retirement is correct procedurally. Forced retirement of an employee under age 65 will be unlawful, unless it is objectively justified.

EE(A) Regs reg 7(4) provides an exception relating to the recruitment of people over the age of 65. It is lawful for employers to refuse to recruit people over 65 – or over the normal retirement age for the position if this is higher – on the ground of their age, and this will not have to be objectively justified. This exception is linked to the default retirement age in that, arguably, it would not make sense to require an employer to hire someone who it could then lawfully dismiss on the ground of retirement on six months' notice. The recruitment exception, therefore, emphasises the effect of the default retirement age in failing to extend the principle of equal treatment to those who have reached the age of 65.

The Employment Rights Act 1996 will be amended to add 'retirement' as a potentially fair reason for dismissal. Employment tribunals will accept that retirement was the reason for dismissal if the employer has followed the procedure set out in the EE(A) Regs. Employees must be given between six and 12 months' notice, in writing, of their retirement date and also of their right to request to continue working. (Note that there are special arrangements in the EE(A) Regs for employers to give notice of retirement to people who they wish to retire between 1 October 2006 and 1 April 2007.)

If an employee wishes to make a request to stay on s/he must do so, in writing, between three and six months before the intended date of retirement. S/he must also specify that it is a request made under the EE(A) Regs. The employee must state whether s/he wishes to continue working indefinitely, or for a stated period, or until a stated date. The employer must arrange a meeting to discuss the request, notify the employee of its decision and give him/her the right to an appeal meeting. There is no requirement for the employer to give reasons for its decision and so the 'duty to consider' the request is, in effect, only a procedural requirement.

Summary of changes under the EE(A) Regs

Some of the main changes to be introduced by the EE(A) Regs are:
- Direct and indirect age discrimination in employment and vocational training is unlawful, unless objectively justified or covered by an exception. Harassment, victimisation and instructions to discriminate on the ground of age are also unlawful (regs 3–6).
- A new retirement procedure is introduced. Employers are required to give employees between 12 and six months' notice of retirement. Employees have the right to request not to retire on the employer's intended date (reg 47 and Sch 6).
- A default retirement age of 65 is introduced. It will be unlawful for employers to force employees under this age to retire, unless this can be objectively justified (higher retirement ages are permitted) (reg 30).
- The upper age limits for entitlement to claim unfair dismissal (Sch 8 para 25) and statutory sick pay (Sch 8 para 17) are abolished, as are the upper and lower age limits for entitlement to statutory redundancy pay (Sch 8 paras 30–32). (But the age bands used in the calculation of statutory redundancy pay and the basic award for unfair dismissal will remain unchanged.)

Permitted discrimination

Exceptions to the non-discrimination principle under the EE(A) Regs, in addition to those covering the recruitment and retirement of people over 65, include:
- **Statutory authority** – acts which would otherwise amount to discrimination will not be unlawful if these are necessary to comply with existing legislation. For example, complying with age requirements for certain licenses.
- **National security** – acts necessary to safeguard national security will not be unlawful.
- **National Minimum Wage** (NMW) – employers can continue to pay workers at different rates, as long as they use the same age bands as those used for the NMW (16–17 year olds, 18–21 year olds and people aged 22 and over), and the younger workers are paid less than the adult rate of the NMW.
- **Benefits linked to length of service** – entitlement to employment benefits that is based on a worker's length of service (for example, additional annual leave entitlement after five years' service) could indirectly discriminate against younger workers. This type of benefit will be lawful if the length of service required is five years or less. If more than five years' service is required, the provision of the benefit will be lawful if the employer expects it to meet a business need, such as encouraging loyalty or motivation, or rewarding workers' experience.
- **Enhanced redundancy payments** – employers can calculate redundancy payments based on employees' length of service but which are more generous than the statutory minimum. The EE(A) Regs set out specific ways in which the calculation of the statutory payment can be enhanced. If an employer uses a different method, it would have to be objectively justified.
- **Provision of life assurance cover to retired workers** – employers can set a maximum age limit of 65, or the normal retirement age, for the provision of life assurance to workers who have retired early for health reasons.

Positive action

Positive action will be lawful to prevent or compensate for disadvantages experienced by people in a certain age group in two areas:
- affording access to training facilities; or
- encouraging people to take up employment opportunities.

Genuine occupational requirement

An employer can set an age requirement for a job if there is a genuine and determining requirement for the person who is doing the work to have a characteristic related to age, as long as the requirement is applied proportionately. As direct discrimination is potentially justifiable under the EE(A) Regs, it is arguable that the genuine occupational requirement exception is not necessary in relation to age. Employers will have two routes to establish that requirements linked to age are lawful: objective justification and genuine occupational requirement.

Vocational training

The EE(A) Regs cover vocational training as well as employment relationships. This includes all training 'which would help fit a person for any employment'. In addition, all

courses provided by institutions of further or higher education are covered: there is no requirement for the course to be of a kind which would 'fit a person for employment', and so there is no need to make a distinction between vocational and non-vocational courses in these institutions.

Vocational guidance services (careers information advice and guidance) are included in the definition of 'vocational training', as are assessments related to the award of professional or trade qualifications. Cases brought under EE(A) Regs reg 23 (ie, those against further or higher education institutions, except in their capacity as employers) must be brought in the county court (or sheriff court in Scotland), rather than at the employment tribunal.

Legal challenge to the EE(A) Regs

Regulations that implement an EU Directive are made as secondary legislation under powers contained in European Communities Act (ECA) 1972 s2(2). However, the regulations must give accurate effect to the obligations in the underlying Directive; if any aspects are inconsistent with it, they are beyond the powers given under the ECA. This can provide grounds for an application for judicial review asking the court to strike down the offending parts of the secondary legislation.

The manner in which the UK government has transposed the FEED provisions on age discrimination into domestic legislation has led to a number of criticisms, including by Age Concern (see August 2006 *Legal Action* 4). The EE(A) Regs are now the subject of an application for judicial review that challenges:

- the inclusion of a default retirement age;
- the procedures for appealing against forced retirement; and
- the wide scope of justification for direct discrimination on the ground of age.

The claimant is the NCA, which operates under the names Age Concern and Heyday (a new membership organisation for people over 50). The case is being brought in the public interest.

The grounds of the claim are as follows:

- In relation to direct discrimination, EE(A) Regs reg 3(1) is ultra vires the ECA because it provides a generalised test for justifying direct discrimination, which is identical to the test for indirect discrimination. In comparison, the FEED makes a clear distinction between the scope for justifying direct and indirect age discrimination and, on a proper construction, article 6 of the FEED expects member states to list specific and limited exceptions; it does not allow a general opportunity for employers to justify direct discrimination.
- EE(A) Regs reg 30, which covers the exception for retirement dismissals, is ultra vires the ECA because it discriminates directly on the ground of age and is not objectively and reasonably justified by a legitimate aim, as required by article 6 of the FEED. Even if the aim is legitimate, the means of achieving it is not proportionate.
- Article 10 of the FEED requires member states to put in place procedures for challenging breaches of the principle of equal treatment. These procedures must place the burden of proof on the respondant to show there has been no breach. However, article 10 is frustrated by EE(A) Regs reg 30, which provides no effective mechanism for assessing the merits of an employer's decision to force someone to retire – even if the decision has been taken in bad faith or for discriminatory reasons. Reg 30 is thus outside the powers conferred by the ECA.

In support of the NCA's case, the NCA points to the significant economic benefits to older people of allowing them to continue working and thus avoid poverty in later life, and the negative, discriminatory impact of having a mandatory retirement age, especially with regard to older people's self-identity, self-worth and social inclusion.

Conclusion

The EE(A) Regs are a welcome development and represent an important first step in combating age discrimination. In spite of certain shortcomings, the EE(A) Regs should deliver clear benefits to older workers, as well as to younger employees. Currently, the government's Discrimination Law Review is actively considering options for legislation against age discrimination in goods, facilities and services – as well as a positive duty on public authorities to promote age equality. It is hoped that a Single Equality Bill, which has been promised during the lifetime of this parliament, will incorporate these measures.

1 *Official Journal of the European Communities* L 303, 2.12.2000, pp16–22, available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_303/l_30320001202en00160022.pdf.
2 Available at: www.acas.org.uk/media/pdf/s/3/Age_and_the_Workplace.pdf.


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Recent developments in housing law

Nic Madge and **Jan Luba QC** 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

Possession proceedings in the county courts

County court statistics for the first six months of 2006 reveal that over 66,600 mortgage possession actions were started and over 70,500 claims were brought against tenants by social landlords: Department for Constitutional Affairs (DCA) news release 206/06, 4 August 2006. The increasing figures for mortgage possession claims might well represent the early tip of an iceberg of default. Research published by Citizens Advice on 13 September 2006 found 770,000 borrowers had missed one or more repayments within the past 12 months.[1]

As to rent arrears, the first impact of the new *Protocol for possesion claims based on rent arrears*, which takes effect on 2 October 2006, will be felt in the statistics for the final quarter of 2006: see Abimbola Badejo,'New era for possession claims', *Inside Housing*, 8 September 2006, p11.[2] It has been suggested that while the number of claims brought by social landlords has remained broadly static, there has been a significant increase in applications for eviction warrants: see Howard Springett, 'Tenants in trouble', *ROOF* September/October 2006, p24. The government's view that possession actions for rent arrears should only be used by social landlords as 'a last resort' is restated by the Department for Communities and Local Government (DCLG) in the *Guide on effective rent arrears management* (DCLG Housing Guide, August 2006), which sets out a range of alternatives.[3] The importance of achieving outcomes which avoid more 'tolerated trespassers' being created is stressed in *New procedures for postponed possession orders – avoiding unintended creation of tolerated trespassers* (DCLG, July 2006).[4]

Housing and anti-social behaviour

■ On 17 August 2006, the government published the new 'Respect standard for housing management'. The standard has no contractual or statutory force but social landlords are expected to sign up to it. The Audit Commission's review of tenancy and management inspection arrangements was launched on the same day and suggests that the standard may be useful as an inspection tool. The DCLG has published explanatory booklets about the new standard for both social landlords and members of the public: see DCLG news release 2006/0083.[5] In September 2006, the DCLG published a summary of the responses received in the consultation exercise on the draft standard.[6] The chief executive of the Housing Corporation has urged all social landlords to sign up to the standard: see Jon Rouse, 'A worthwhile commitment', *Inside Housing*, 18 August 2006, p14). The regulatory impact assessment, which was published with the new standard, indicates that the government will be launching a take-up campaign led by the DCLG and the Home Office's Respect Task Force to encourage landlords to sign-up.[7]

Advisers seeking to demonstrate that it is not reasonable to order possession in proceedings based on anti-social behaviour might be expected to draw the court's attention to shortcomings in any signed-up landlord's compliance with the standard. It may also prove a useful yardstick for Ombudsmen investigating complaints of inaction made against signed-up landlords by victims. In *Crime & prejudice. The support needs of victims of hate crime: a research report* (Victim Support, June 2006), victims 'complained about inflexible responses from generic service providers (particularly housing) who often pursued policies (such as moving the perpetrators) that were at odds with the wishes of the victim' (para 7.4).[8]

In parallel with the new standard, the government is continuing to promote Good Neighbour Agreements (GNAs) in which residents and social landlords agree standards of conduct. It has published the results of research on GNAs, summarised in DCLG Housing Research Summary Number 226, 2006, *Respect and housing management – using Good Neighbour Agreements* and issued a DCLG Practice Note, *Using Good Neighbour Agreements: emerging lessons from research* (August 2006).[9]

■ On 1 September 2006, the Crime and Disorder Act 1998 (Relevant Authorities and Relevant Persons) Order 2006 SI No 2137 came into force. It adds both the Environment Agency and Transport for London to the list of organisations that may apply for anti-social behaviour orders.

■ In August 2006, the Home Office published a substantially revised edition of *A guide to anti-social behaviour* orders to help those and other applicants.[10]

■ In the 12 months to March 2006, housing associations reported that they had obtained 758 Housing Act (HA) 1996 injunctions from the civil courts to restrain anti-social behaviour (unpublished Housing Corporation statistics, summer 2006). There has been a corresponding increase in the use of closure notices and orders under the Anti-social Behaviour Act 2003: over 500 properties have been closed.

Stock transfer

Lambeth London Borough Council recently transferred stock on its Clapham Park housing estate to a housing association. Before the transfer was complete, posters were erected in the area purporting to depict residents expressing enthusiasm for the change.

On 30 August 2006, the Advertising Standards Authority (ASA) issued an adjudication upholding complaints:

■ that the posters gave the misleading impression that the transfer had been fully secured when, in fact, the transfer had not then taken place; and

■ that those depicted on the posters were not actual residents, and the text used was not direct quotation from actual residents.

The posters were misleading and in breach of the ASA's code. The ASA told Clapham Park Homes (the transferee) not to repeat the exercise.

Race equality and housing

The Race Relations Code of Practice (Housing) (Appointed Day) Order 2006 SI No 2239 appoints 1 October 2006 as the date that the Commission for Racial Equality's new statutory *Code of practice on racial equality in housing* takes effect.[11] This revised Code replaces the two previous codes of practice relating to housing:

■ the *Code of practice in rented housing*, which was brought into operation, on 1 May 1991, by the Race Relations Code of Practice

(Rented Housing) Order 1991 SI No 227; and
■ the *Code of practice in non-rented (owner-occupied) housing*, which was brought into operation, on 18 June 1992, by the Race Relations Code of Practice (Non-Rented Housing) Order 1992 SI No 619.

The new Code may be relied on in any proceedings brought under the Race Relations Act 1976 issued after 1 October 2006 and contains much useful guidance and information on best practice.

Housing and the 'Well Being Power'

The *Formative evaluation of the take-up and implementation of the well being power: annual report 2006* (DCLG, July 2006) demonstrates that little use is being made of the 'Well Being Power' in Local Government Act 2000 s2 in housing cases.[12] A key finding is that understanding of the power is 'patchy at best'. A demonstration project in Wakefield did, however, show that the power could be readily used in the housing context (in that case to purchase houses on an estate in rapid decline in order to facilitate speedy site clearance and redevelopment).

Displaced from Lebanon

The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2006 SI No 2007 were laid and came into effect on 25 July 2006. They modify the normal eligibility rules for housing allocation and homelessness for some of those who came to England after fleeing the recent violence in Lebanon. On 25 July 2006, the DCLG sent a letter to all chief officers of housing authorities in England explaining the amendments.[13]

Homelessness

Homelessness statistics for April to June 2006 indicate that, in that period, local housing authorities in England:
■ issued decisions on 41,700 applications; and
■ accepted 19,430 applicants as being owed the main housing duty (HA 1996 s193).

Both figures represent the lowest numbers since the early 1980s: see DCLG statistical release, 11 September 2006.

The government claimed that the figures are the results of its homelessness prevention strategy (backed by £300m of funding): DCLG news release 2006/0092. To accompany the figures, the DCLG issued *Homelessness statistics September 2006 and introducing preventing homelessness: a strategy health check – policy briefing 16* and the full self-assessment toolkit, *Preventing homelessness: a strategy health check* to help local authorities review their homelessness strategies and establish how effective their services are in tackling and preventing homelessness.[14]

The figures for Northern Ireland indicate no let up in the increase in homelessness there. The number of applications grew from 17,362 in 2004/05 to 20,121 in 2005/06: see *Northern Ireland Housing Bulletin*, 1 January–31 March 2006, Department for Social Development.[15]

Housing Ombudsman

The *Housing Ombudsman Service annual report and accounts* for 2006 indicates not only a further increase in complaints received, but a change in the most common topics.[16] These are, in order of frequency:
■ the way a landlord handled a complaint about housing;
■ disrepair; and
■ anti-social behaviour.

The report also contains full digests of illustrative recent case investigations.

Youth homelessness

The Howard League for Penal Reform has published *Chaos, neglect and abuse: the duties of local authorities to provide children with suitable accommodation and support services* (September 2006).[17] The report suggests that local authorities are systematically failing to provide suitable accommodation and support for vulnerable children leaving custody, in breach of their statutory duties.

Service charges

The Housing (Service Charge Loans) Regulation 1992 (Housing Corporation, Circular 03/06, July 2006) sets out the arrangements under which housing association leaseholders may obtain loans to cover that part of their service charges attributable to major repairs.[18]

Sites for Travellers

On 24 August 2006, the Social Landlords (Permissible Additional Purposes) (England) Order 2006 SI No 1968 came into force. The Order enables the Housing Corporation to register as social landlords (and provide grant aid to) organisations that have as their objects the provision or management of sites for Gypsies and Travellers.

The Order contains a definition of '[G]ypsies and [T]ravellers' which is different from that used in planning legislation. The explanatory memorandum issued with the Order indicates that the government proposes to use its power under HA 2004 ss225–6 to make a further Order defining the term in the same way for the purposes of other housing functions.

ALLOCATION

■ R (Suratun Begum) v Newham LBC

CO/10226/05,
8 March 2006[19]

Where applicants for social housing are entitled to a reasonable preference under two or more of the categories mentioned in HA 1996 s167(2), Newham's allocation scheme places them in a multiple needs group (MTG) entitled to a direct allocation. That is subject to the caveat that if one of the preference factors is 'overcrowding', the MTG will only be triggered by 'non-permissible statutory overcrowding'.

The claimant qualified for reasonable preference on both medical and overcrowding grounds. The family had expanded, by natural growth, to a seven-person household in a two-bedroom flat. Newham refused MTG status as HA 1985 s328 provided that overcrowding by family growth could not create an offence, and was thus 'permissible' statutory overcrowding. Underhill J granted permission in a claim for judicial review because it was arguable 'whether it is legitimate … to rely on s328 in considering whether an applicant is suffering overcrowding for the purposes of the [allocation] scheme'. The claim was settled on the basis that the claimant would be admitted to the MTG and made a direct offer. Newham is understood to be reviewing its scheme in the light of the claim.

RENT CONTROL

Constitutionality of Maharashtran rent control legislation

■ Saraswat Co-op Bank Ltd v State of Maharashtra

Indian Supreme Court,
17 August 2006[20]

The Maharashtra Rent Control Act (MRCA) 1999 was enacted to 'unify, consolidate and amend the law relating to the control of rents and repairs of certain premises and of eviction and for encouraging the construction of new houses by assuring a fair return on the investment by landlords'. Section 3(1)(b) provides that the MRCA does not apply to 'premises let or sub-let to banks … limited companies … having a paid up share capital of [ten million] rupees … or more'. A number of companies challenged the constitutionality of s3(1)(b). They argued that when providing for the categorisation of different premises which were excluded from the protection of the MRCA, 'the Legislature had acted arbitrarily in discriminating between the different sets of premises and tenants'.

The Indian Supreme Court rejected the challenge. It found that s3(1)(b) was intra

vires the constitution. It held that 'so long as the classification … was based on an intelligible differentia and had a nexus with the object sought to be achieved by the statute, [it] would not offend the equality clause contained in Article 14 of the Constitution'. It was 'within the legislative competence of the state to enact laws for the protection of certain sections of society on the basis of economic criteria and so long as it does not result in unreasonable classification, it is for the Legislature to decide whom it should include or exclude from the application of such laws'. The decision to exclude from protection companies with a paid-up share capital of ten million rupees or more was 'in consonance with the object [of] the Act'. In order to achieve that object, a cut-off point has to be settled by the Legislature. The court was unable to accept the contention that the paid-up share capital of the company was not a fair indicator of a company's worth.

CLOSURE ORDERS

■ Chief Constable of Merseyside Police v Harrison

[2006] EWHC 1106 (Admin),
7 April 2006,
[2006] 3 WLR 171

Magistrates made a three-month closure order, under Anti-social Behaviour Act (ASBA) 2003 s2, in respect of premises occupied by Michelle Harrison, apparently because the premises had been used in connection with the production or supply of Class A drugs and that use was associated with the occurrence of disorder or serious nuisance. The magistrates had applied the civil standard of proof. Ms Harrison appealed. She contended that the criminal standard applied. HHJ Trigger, sitting with lay magistrates, allowed the appeal. The chief constable appealed by way of case stated.

The Administrative Court held that on an application for a closure order under ASBA s2, the civil standard of proof, namely the balance of probabilities, applies. (The position is different where an anti-social behaviour order is sought, in such circumstances the criminal standard applies: see *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, 17 October 2002; [2003] 1 AC 787.

■ R (Cleary) v Highbury Corner Magistrates' Court

[2006] EWHC 1869 (Admin),
26 July 2006,
(2006) Times 12 September

In a claim for judicial review of a magistrates' court's refusal to adjourn an application for a closure order under ASBA s2, the Administrative Court gave guidance on the fair conduct of such proceedings. It stated that the statutory intention is that applications for closure orders should be dealt with speedily and that the first hearing, which has to take place within 48 hours of the service of the closure notice, should be an effective hearing.

However, if the defendant wishes to contest the matter, it is difficult to suppose that the police can fairly oppose an adjournment of the first hearing. It would scarcely ever be possible to do so if the defendant has not been provided with the written evidence before the hearing itself. If the evidence which the police propose to adduce is not served by the time of the first hearing, or if it is not fully served, fairness requires that it should be served well in advance of the adjourned hearing. The police should disclose documents on which they rely and those that clearly and materially affect their case adversely or support the defendant's case.

LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT

■ Majorstake Ltd v Curtis

[2006] EWCA Civ 1171,
8 August 2006

Mr Curtis held a long lease of a flat in a block. He served a notice on his landlord under Leasehold Reform, Housing and Urban Development Act (LRHUDA) 1993 s42 claiming the right to acquire a new lease. The landlord served a counter-notice under LRHUDA s45 stating that it intended to redevelop the premises in which the flat was contained by combining that flat with the one beneath it. A judge held that this did not defeat Mr Curtis's claim because the part of the block which contained the two flats was not 'any premises in which the [tenant's] flat is contained' within LRHUDA s47(2)(b)(ii). The landlord appealed.

The Court of Appeal allowed the appeal (May LJ dissenting). '[P]remises in which the flat is contained' in LRHUDA s47(2)(b) can consist of two adjacent flats which are horizontally or vertically contiguous.

HOMELESSNESS

Strategies and reviews

■ London Borough of Lewisham

Information Commissioner's Office,
Decision Notice FS50092310,
7 August 2006

In February 2005, Lewisham Law Centre® asked the council to provide updated information on material originally published as part of the council's homelessness review (Homelessness Act 2002 ss1–4). Only part of the requested material was provided.

In July 2005, the Law Centre requested copies of the policies operated by the council's Housing Options Centre (formerly the Homeless Persons Unit). The council initially responded that it did not have time to identify all its policies. The council later said that its relevant guidance (on home visits and provision of temporary accommodation pending review) had not been codified into written policies or procedures. The Law Centre complained to the Information Commissioner's Office under the Freedom of Information Act (FIA) 2000.

Deputy Commissioner Smith upheld the complaint. The council had given no satisfactory explanation about why the material requested in February 2005 had not been disclosed. He rejected the council's argument (in relation to the July 2005 request) that because it did not have a codified set of procedures, it had no policies to disclose. The delay in dealing with the first request was a breach of FIA s10. The failure to respond to the second request was a breach of FIA s1(1). The council was given 35 days to comply with the steps relating to disclosure prescribed by the deputy commissioner.

Priority need

■ Robinson v Hammersmith & Fulham LBC

[2006] EWCA Civ 1122,
28 July 2006,
(2006) Times 5 September

The appellant was excluded from her parental home when aged 17. On 17 February 2005, she applied to the council for assistance under HA 1996 Part 7 (Homelessness). She was due to turn 18 on 11 March 2005. On 10 March 2005, the council told her, by telephone, that she did not have a priority need. This was confirmed in a written notice, with reasons, given on 11 March 2005. On 10 May 2005, the council upheld the decision on review. An appeal to the county court, under HA 1996 s204, was dismissed by HHJ Medawar QC.

The Court of Appeal allowed a second appeal. It held:

■ that the council's decision had been made on 10 March 2005;

■ that the decision had been unlawful because, on that date, the applicant was 17 (even if only one day short of 18). She was, therefore, in priority need under the Homelessness (Priority Need for Accommodation) (England) Order 2002 SI No

2051 article 3; and

■ that the review decision was wrong in law because even though the review took place after the applicant had reached 18, she should have had the benefit of what would have been a lawful decision on 10 March.

The judgments explain that family mediation cannot be used to justify a delay in enquiries or in notification of the decision on a homelessness application.

Suitable accommodation

■ Abdi v Wandsworth LBC

[2006] EWCA Civ 1099, 13 July 2006

Ms Abdi was owed the main housing duty by Wandsworth under HA 1996 s193. The council made an offer of accommodation from its allocation scheme, which was refused. The council asserted that the offer had been of suitable accommodation and ought reasonably to have been accepted. Ms Abdi sought a suitability review. She asserted that the house offered had an internal staircase and a back injury prevented her from using any stairs. The reviewing officer upheld the earlier decision, and HHJ Rose dismissed a HA 1996 s204 appeal against that decision.

Ms Abdi sought permission to bring a second appeal. She contended that there had been procedural unfairness because the original decision-maker had not put to her, for comment, a further letter from her GP (and a telephone conversation with him) on which reliance had been placed, and the reviewing officer had wrongly failed to treat the review as one which (in consequence of that omission) triggered Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2).

The Court of Appeal refused permission. The appeal raised only the question of whether, on the particular facts, there had been procedural fairness and that did not meet the threshold for a second appeal in Civil Procedure Rule 52.13. Moreover, the appeal had no real prospect of success. The broad issue was whether the claimant had known from the council what case she had to meet on the medical side, and she had known.

HOUSING AND COMMUNITY CARE

■ R (Ireneschild) v Lambeth LBC

CO/6469/2006, 8 September 2006

The claimant occupied a split-level council flat. Her disabilities caused her difficulties with mobility and stability. She sought a community care assessment to address her needs for more suitable accommodation. In April 2006, the council agreed to revise an earlier assessment but when it failed to do so the claimant sought judicial review. After issue of the claim, a further assessment was produced in August 2006.

Lloyd Jones J decided that the further assessment was unlawful because:

■ it had not been drawn up in accordance with relevant guidance;

■ relevant matters had been overlooked; and

■ there had been procedural unfairness in relying on a matter not disclosed to the claimant.

■ Hampshire CC v Supportways Community Services Ltd (No 2)

[2006] EWCA Civ 1170, 8 August 2006

The claimant company successfully established that Hampshire had not conducted an adequate review of its provision of housing-related support services, but was refused (on appeal) an order requiring a further review (see September 2006 *Legal Action* 15). The claimant then sought an inquiry as to damages for breach of its Supporting People contract. The Court of Appeal ordered such an inquiry, subject to a condition that the company first pay an amount on account of the costs that it had been ordered to pay in the litigation to date.

1 *GfK NOP survey on homeownership and debt*, September 2006, available at: www.citizensadvice.org.uk/poll_summary_home_ownership_and_debt.doc.
2 The Protocol is published as Annex E of the 42nd update – CPR Practice direction amendments available at: www.dca.gov.uk/civil/procrules_fin/pdf/frontmatter/2006_07_03_adv_notice_42nd_updates.pdf. The Protocol is also reproduced in *Defending possession proceedings*, Nic Madge, Derek McConnell, John Gallagher and Jan Luba QC, 6th edn, LAG, 2006, pp697–699, £48.
3 Available at: www.communities.gov.uk/pub/208/GuideonEffectiveRentArrearsManagement_id1502208.pdf.
4 Available at: www.communities.gov.uk/pub/894/NewproceduresforpostponedpossessionordersAvoidingunintendedcreationoftoleratedts_id1501894.pdf.
5 *Respect standard for housing management – a guide for landlords*, available at: www.communities.gov.uk/pub/193/RespectStandardforHousingManagementAGuideforLandlords_id1502193.pdf, and *Respect standard for housing management – a guide for the public*, available at: www.communities.gov.uk/pub/195/RespectStandardforHousingManagementAGuideforthePublic_id1502195.pdf.
6 *Respect standard for housing management consultation April 2006. Summary of responses, Sept 2006*, available at: www.communities.gov.uk/pub/863/SummaryofResponsestotheRespectStandardforHousingManagementConsultationApril2006_id1502863.pdf.
7 Available at: www.communities.gov.uk/pub/177/RespectStandardforHousingManagementRegulatoryImpactAssessment_id1502177.pdf.
8 Available at: www.victimsupport.org.uk.
9 *Respect and housing management – Using Good Neighbour Agreements*, available at: www.communities.gov.uk/pub/173/226ARespectandHousingManagementUsingGoodNeighbourAgreements_id1502173.pdf, and the DCLG Practice Note is available at: www.communities.gov.uk/pub/189/RespectandHousingManagementUsingGoodNeighbourAgreementsEmergingLessonsfromReseah_id1502189.pdf.
10 Available at: www.together.gov.uk/cagetfile.asp?rid=536.
11 Available at: www.cre.gov.uk.
12 Available at: www.communities.gov.uk/pub/802/FormativeEvaluationoftheTakeUpandImplementationoftheWellBeingPowerAnnualReport26_id1501802.pdf.
13 Available at: www.communities.gov.uk/ pub/882/TheAllocationofHousingandHomelessnessEligibilityEnglandAmendmentRegulations2006_id1501882.pdf
14 Available at: www.communities.gov.uk/pub/884/HomelessnessStatisticsSeptember2006andIntroducingPreventingHomelessnessaStrateg6_id1502884.pdf, and www.communities.gov.uk/pub/875/PreventingHomelessnessaStrategyHealthCheck_id1502875.pdf respectively.
15 Available at: www.dsdni.gov.uk/jan-mar_2006.pdf.
16 Available at: www.ihos.org.uk.
17 Available to order at: www.howardleague.org/index.php?id=7&backPID=8&tt_products=140, £15.
18 Available at: www.housingcorp.gov.uk.
19 Edward Fitzpatrick, barrister, London and Edwards Duthie Solicitors, London.
20 The judgment is available at: judis.nic.in/supremecourt/qrydisp.asp?tfnm=27948.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder. They are grateful to the colleagues at note 19 for supplying transcripts or notes of judgments.

Rent lawfully due in possession proceedings: the issues explained

For many housing lawyers and administrators, the Court of Appeal's judgment in *Harlow DC v Hall* [2006] EWCA Civ 156, 28 February 2006; April and May 2006 *Legal Action* 31 and 35, and the subsequent rapid evolution of the drafting of (what practitioners now call) 'postponed' possession orders is likely to be noted as one of the most significant decisions of recent years. Ian Loveland explains why *Hall* may be joined in that pantheon by the Court of Appeal's more recently decided (and soon to be appealed) decision in *White v Riverside Housing Association Ltd* [2005] EWCA Civ 1385, 6 December 2005.

Introduction

Riverside will perhaps serve to focus attention on a detail of housing law which seems often to be overlooked in the hurly-burly of county court possession lists. A crucial question that any defence lawyer ought to ask in respect of any tenancy which has existed for more than a few years is whether or not there is any lawful basis for whatever rent increases the landlord may have levied since the tenancy began. *Defending possession proceedings*, the leading practitioner guide on residential possession proceedings, makes the following observation:

[T]he rent claimed is not lawfully due if the landlord has failed to observe any contractual or statutory requirements as to notice of increase. Such requirements are strictly construed.[1]

That there is little appellate authority on the issue is, perhaps, explained by the fact that the point is both axiomatic and simple. (See, for example, *Clements and O'Boyle v Brent LBC* (1990) 29 January, Willesden County Court; March 1990 *Legal Action* 12.) It is likely that landlords will have sought to raise rents at least once a year. Every time they do so, they run the risk of, in prosaic terms, getting it wrong; with the result that not only will the rent increase for that year be irrecoverable, but also – especially in respect of assured tenancies – that an error in the past will also lend a similarly unlawful character to every rent rise that has been levied since.

From the landlord's perspective, this was the unhappy consequence that flowed from a policy decision taken by the Riverside Housing Association Ltd in 2000. Many of Riverside's tenancy agreements contained a clause permitting the rent to be raised, in accordance with a specified formula, with effect from 1 June each year. In 2000, Riverside decided to forgo any increase for the 2000/2001 year and, instead, to impose an increase from April 2001 and subsequent increases in April rather than in June. Riverside evidently did not appreciate that it was acting in breach of the tenancy agreements in doing this. The housing association took no steps to make agreements with the tenants concerned to alter the relevant clause of the agreements in issue, or to exercise the power it had reserved to itself in its (standard form) lease to vary the terms of the agreements.

When Mr and Mrs White were sued for possession on the basis of rent arrears in 2003, their primary line of defence was that any element of the rent which was levied after April 2001 as a rent increase was not lawfully due: the only sum that could be claimed was the pre-2001 figure. The Court of Appeal accepted, albeit reluctantly, the force of this argument (see especially paragraphs 40–42 of the judgment). The ratio of the judgment rests, in the strict sense, on whether or not the notion of time being of the essence of the contract applied to the date on which rent rises were levied. The court found in favour of Mr and Mrs White on this point. It also rejected Riverside's contentions:

- that the change in the rent variation date amounted (by implication) to the creation of a new tenancy agreement;
- that the couple had waived any entitlement to have the original date provisions respected; and, perhaps most significantly,
- that they were estopped from refusing to pay the increased rents.

The court's conclusion on the final point of Riverside's argument reiterated the oft-stated principle that estoppel can function only as a shield and not a sword. This meant that tenants who had paid the full rent could not now reclaim the difference because Riverside, as the defendant in such an action, could rely on estoppel. But when acting as the claimant, any estoppel could not provide Riverside with a cause of action.

The conclusion about the lawfulness of the rent increases made a modest difference to Mr and Mrs White's alleged indebtedness to the landlord. Riverside's concern was, no doubt, rather more systemic. If the couple's full rent was irrecoverable, there would be many other tenants in the same position and Riverside would face a gaping hole in its finances. Much as *Hall* produced the unexpected consequence that tens of thousands of tenants who were assumed by all sides to be subject to suspended possession orders have turned out to be trespassers, so it may also be that tens of thousands of possession order money judgments have been awarded on the basis of sums which were not lawfully due. Furthermore, ironically, there are, no doubt, many extant suspended possession orders granted on the basis of rent arrears which were not lawfully due.

The rest of this article examines the rent increase regimes which apply to assured tenancies, with a view to alerting landlords to the steps they need to take to make rent rises recoverable, and to alerting defence lawyers and advisers to the questions they ought to ask before accepting that the currently claimed level of rent on the claim form is, indeed, lawfully due.

Assured tenancies under Housing Act 1988 s13

The starting point for an analysis of assured tenancies is Housing Act (HA) 1988 s13:

Increases of rent under assured periodic tenancies

(1) This section applies to –

(a) a statutory periodic tenancy other than one which, by virtue of paragraph 11 or paragraph 12 in Part I of Schedule 1 to this Act, cannot for the time being be an assured tenancy; and

(b) any other periodic tenancy which is an assured tenancy, other than one in relation to which there is a provision, for the time being binding on the tenant, under which the rent for a particular period of the tenancy will or may

be greater than the rent for an earlier period.

HA 1988 s13 makes it clear that there are no explicit statutory constraints on a landlord's power to make whatever procedural and substantive arrangements it wishes – and to which the prospective tenant assents – with regard to rent rises, so long as such arrangements amount to a 'provision'. There may be a contrary to public policy argument to be made that any provision should include a period of notice to the tenant equivalent to the period of notice that the tenant is required to give to terminate the tenancy. The rationale for this would be that a provision requiring less or no notice would compel the tenant to incur a liability – if only for a brief period – to which s/he did not expressly consent when signing the lease. There is no appellate authority on the meaning of 'provision' in this context.

In 2002, the National Housing Federation advised its member associations that a provision required that both the time and manner, and the amount, of any rise be ascertainable from the terms of the lease.[2] On this view, a clause drafted in form (i) below would be a provision:

(i) The rent shall increase on the first Monday in April of each calendar year by a figure of 5 per cent above the rent charged for the previous year.

The burden of compliance placed on the landlord would be very limited. All that would be required would be a correct arithmetic calculation and an adjustment of the rent account on the correct date.

A clause drafted in form (ii) below would also be a provision, but one in which the landlord had set itself a harder task to discharge:

(ii) The rent shall increase on the first Monday in April of each calendar year by a figure of 5 per cent above the rent charged for the previous year. The landlord shall serve written notice of the increase on the tenant at least 28 days prior to any increase of rent coming into force.

The rod which the landlord has created for its own back in this situation is that the lawfulness of any rent increase is now, arguably, contingent on compliance not just with the date of increase per se and the arithmetic calculation, but also with the production and timely service of a notice which contains substantively correct information. A clause in form (iii) below would not be a provision under s13, as it gives no specific indication of the amount by which the rent might increase. A clause in form (iv) below would fail the provision test in respect of both the amount and the timing of the increase. That each form of clause might also be supplemented by an additional notice of increase provision would make no difference to that conclusion.

(iii) The landlord may increase the rent charged by an amount which the landlord considers reasonable. Any such increase of rent will be effective from the first Monday of April in each calendar year. [The landlord shall serve written notice of the increase on the tenant at least 28 days prior to any increase of rent coming into force.]

(iv) The landlord may at any time increase the rent charged by an amount which the landlord considers reasonable. [The landlord shall serve written notice of the increase on the tenant at least 28 days prior to any increase of rent coming into force.]

In circumstances where there is no provision to raise rents in the lease, the landlord is not prevented from increasing the rent. However, any lawful increase would have to comply with the requirements of HA 1988 s13. Those requirements are sufficiently arduous to make it clear that any landlord would be well advised to ensure that an appropriate provision is inserted into its tenancy agreements and, thereafter, respected to the letter.

The period before 11 February 2003

The terms of HA 1988 s13 were amended (and relaxed in the landlord's favour) by the Regulatory Reform (Assured Periodic Tenancies) (Rent Increases) Order (RR(APT)(RI) Order) 2003 SI No 259 with effect from 11 February 2003. Any non-provision rent increases levied before that date would, therefore, have to comply with the previously extant requirements. Before that date, HA 1988 s13(2)–(4) provided that:

(2) For the purpose of securing an increase in the rent under a tenancy to which this section applies, the landlord may serve on the tenant a notice in the prescribed form proposing a new rent to take effect at the beginning of a new period of the tenancy specified in the notice, being a period beginning not earlier than-

(a) the minimum period after the date of the service of the notice; and

(b) except in the case of a statutory periodic tenancy, the first anniversary of the date on which the first period of the tenancy began; and

(c) if the rent under the tenancy has previously been increased by virtue of a notice under this subsection or a determination under section 14 below, the first anniversary of the date on which the increased rent took effect.

(3) The minimum period referred to in subsection (2) above is-

(a) in the case of a yearly tenancy, six months;

(b) in the case of a tenancy where the period is less than a month, one month; and

(c) in any other case, a period equal to the period of the tenancy.

(4) Where a notice is served under subsection (2) above, a new rent specified in the notice shall take effect as mentioned in the notice unless, before the beginning of the new period specified in the notice,-

(a) the tenant by an application in the prescribed form refers the notice to a rent assessment committee; or

(b) the landlord and the tenant agree on a variation of the rent which is different from that proposed in the notice or agree that the rent should not be varied.

To put the matter in more accessible language, in order to comply with HA 1988 s13(2) in its original form, the landlord, in respect of a weekly periodic tenancy, had to do the following:

- Serve a notice in the prescribed form at least one month before the rent increase took effect (and, ideally, retain a copy of the notice and proof of service).
- Ensure that the increase did not take effect until the first anniversary of the previous increase (ie, a period of at least 52 weeks plus one day (two days in a leap year).
- Ensure that the increase took effect on the day which was at the beginning of a new period of the tenancy (ie, the effective date of increase, therefore, may have been 52 weeks plus several days after the previous increase).

So, if a tenant had a weekly tenancy commencing on a Monday, in respect of which the rent was lawfully raised on Monday 3 April 2000, the next rise could not have lawfully been levied on 3 April 2001. While that date would comply with the anniversary provision in HA 1988 s13(2), 3 April 2001 falls on a Tuesday and so that date would not comply with the 'new period of the tenancy' requirement. The first lawful date for the rent increase would thus have been 9 April 2001. In 2002, the first lawful date would have been 15 April.

For a weekly tenancy, a rent increase which was simply levied on an annual basis on the first Monday in any given month each year would, therefore, be unlawful, even if the terms of the notice conformed with HA 1988 s13. A good notice cannot save an increase

which is per se in contravention of the statutorily required time periods. Similarly, it seems that a rent increase which is levied in accordance with the s13 time limits, but which has been preceded by an invalid notice, may also be unlawful and, therefore, irrecoverable.

In addition to complying with the date rules in s13, a valid notice of rent increase must also be in the 'prescribed form'. The prescribed form under HA 1988 s13(2) was initially laid out in the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988 SI No 2203 and, thereafter, in the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997 SI No 194. The latter version of the prescribed form was altered as to layout. The only substantive change of any note was that the previous reference to 'rates' was replaced with a reference to 'council tax'.

The form reiterated the date rules in s13(2), and required that the landlord:

- identify the tenant (paragraph 1);
- the premises (paragraph 2);
- the date on which the rent is to rise (paragraph 3);
- the existing rent (paragraph 4);
- the new rent (paragraph 5); and
- the name and address of the landlord (paragraph 6).

Paragraphs 3–5 are the points where an error by the landlord is both most likely to occur and to have the most significant effect.

A trivial error in the notice, for example mis-spelling the tenant's name or address, may not be taken to render the notice invalid. The leading authority on the issue of the consequences that flow from a failure to comply with statutory requirements remains *London & Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876. It would, however, seem sensible to assume that an error about the date when the rent increase is to be levied, or about the old and/or new rent figures, is sufficiently serious to make the notice invalid.

If the landlord serves an invalid notice but the flaw is spotted quickly, no particularly serious adverse consequences need ensue. HA 1988 s13 does not limit the landlord to serving just one notice per year: the limitation is to one valid notice per year. As soon as a new and valid notice is served and the requisite gap between the notice and the rent increase has passed, a new rent can be levied. Moreover, the landlord could set this new increased rent at a level high enough to permit recoupment of any lost rent rise. Obviously, in subsequent years, any rent increase would have to take the later date of increase in the previous year as the anniversary for s13 purposes.

But the difficulties become more acute if the error is not spotted quickly, as the consequences of an error in year one will spill over into any subsequent years. The figure unlawfully claimed in year one will, no doubt, be the sum shown in paragraph 4 of the prescribed form served in year two, and the sum shown for the newly increased rent in paragraph 5 will have been calculated on the basis of that erroneous figure. This would mean that the year two notice would be invalid as, indeed, would all subsequent notices which are served until the original flaw is identified. If several years pass before the error is identified – as in *Riverside* – the difference between the total rent lawfully due and the amount actually paid is likely to place the tenant substantially in credit rather than put him/her in arrears.

It would seem proper for any defence in a long duration tenancy rent arrears case to put the claimant to strict proof regarding both the validity and the service of all s13 notices issued since the inception of the tenancy. It is entirely possible that many housing association and private sector landlords have traditionally taken an approach to the keeping of such records which is as cavalier as their approach to the content of notices and the implementation of rises. Furthermore, if the landlord is unable to prove the lawful nature of a rent increase levied in, say, 2001, it will most likely be unable to prove the validity of notices and increases produced in subsequent years. The result of that failure is that the rent lawfully due will have to be calculated on the basis of the last figure that can be shown to be lawfully charged, which may turn out to be the sum levied in the first year of the tenancy.

The period after 11 February 2003

HA 1988 s13 was amended with effect from February 2003 by the RR(APT)(RI) Order. The new rules apply to any notice served after 11 February 2003. The most significant change is that the anniversary rule in the former s13(2)(b) for weekly shortholds has been replaced (for most increases) by a 52-week rule. A rent rise levied on, for example, the first Monday in April of each year would comply with this requirement even though it would have fallen foul of the anniversary rule.

This is a simplification that many landlords will no doubt welcome. The complication which arises in the new s13 flows from legislators' recognition that a 52-week rule means that rent rises can be imposed on a less than annual basis. Evidently, to protect long-term tenants of the same landlord from this consequence, s13(3A) introduces a rule of magnificent opacity. The 52-week rule is replaced by a 53-week rule when s13(3B) applies:

(3B) This subsection applies where –

(a) the rent under the tenancy has been increased by virtue of a notice under this section or a determination under section 14 below on at least one occasion after the coming into force of the Regulatory Reform (Assured Periodic Tenancies) (Rent Increases) Order 2003; and

(b) the fifty-third week after the date on which the last such increase took effect begins more than six days before the anniversary of the date on which the first such increase took effect.

What this means, in more comprehensible terms, is that because the 52-week rule creates a shrinking rent year (ie, a day less than a year and two days less in a leap year), this shrinkage will be remedied for long-term tenants by requiring a 53-week rent year every fifth year (if two leap years fall within the period) or every sixth year (if one leap year falls within the period). But it would seem likely that many landlords will fall foul of this provision in the future by simply working on a constant 52-week year cycle.

Conclusion

Riverside is evidently to be considered by the House of Lords later this year. In the interim, many landlords may find that proving the rent arrears which they claim to be owed has become a much more exacting task.

1 Jan Luba QC, Nic Madge and Derek McConnell, 5th edn, LAG, 2002, p41. The 6th edn was published in September 2006.

2 *Rent increases: assured tenancies. Practice note for housing associations*, National Housing Federation, 2002, p20. The clause in Riverside's agreements was undoubtedly a 'provision' in this sense, as it specified both when the rent should rise and the formula by which any increase should be calculated.

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Legislation

CHILDREN

Statutory Paternity Pay and Statutory Adoption Pay (General) and the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) (Amendment) Regulations 2006 SI No 2236

These regulations amend the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations (the General Regs) 2002 SI No 2822 and the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations (the Weekly Rates Regs) 2002 SI No 2818 as follows:

- the General Regs reg 21 is amended and establishes that the adoption pay period is 39 consecutive weeks;
- a new reg 27A is inserted into the General Regs, providing that statutory adoption pay shall continue to be paid where an employee works for his/her employer for not more than 10 days within the adoption pay period; and
- a new reg 4 is substituted into the Weekly Rates Regs, and allows for payments of statutory adoption pay and statutory paternity pay for a week or part of a week to be rounded up to the next penny.

In force 1 October 2006.

DISCRIMINATION

Race Relations Act 1976 (General Statutory Duty) Order 2006 SI No 2470

This Order amends Race Relations Act (RRA) 1976 Sch 1A, which lists the persons and bodies who, as a result of RRA s71(1), are subject to the general duty to have due regard, when exercising their functions, to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups.

This Order omits from Sch 1A Parts 1–4 the entries for Scottish Homes, the Royal Fine Art Commission for Scotland, the Pensions Compensation Board and Bòrd na Gàidhlig (Alba). It adds a new Part 5, set out in the Schedule to this Order, which specifies other persons and bodies to which the general duty applies. In force 3 October 2006.

Race Relations Act 1976 (Statutory Duties) Order 2006 SI No 2471

This Order imposes certain specific duties on bodies that are subject to the general duty under Race Relations Act (RRA) 1976 s71(1) to have due regard, when exercising their functions, to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. The duties are imposed for the purpose of ensuring the better performance of the general duty under RRA s71(1). Under this Order:

- a body specified in the Schedule to this Order is required to publish a race equality scheme before 2 March 2007, showing how it intends to fulfil the general duty and its duties under this Order;
- bodies and persons specified in RRA Sch 1A Part 5, other than those specified in article 3(5) of this Order, are required to monitor, by reference to racial groups, the number of staff in post and the number of applicants for employment, training and promotion. Additional requirements apply where the body or person has at least 150 full-time equivalent staff. Arrangements for fulfilling the monitoring requirements must be in place by 2 March 2007;
- the Pensions Compensation Board is removed from the list of bodies excepted from the employment monitoring duties in the Race Relations Act 1976 (Statutory Duties) Order 2003 SI No 3006.

In force 3 October 2006.

EMPLOYMENT

Collective Redundancies (Amendment) Regulations 2006 SI No 2387

These regulations are made as a result of the European Court of Justice's judgment in *Junk v Kühnel* Case C-188/03, which concerned the interpretation of Council Directive 98/59/EC on the approximation of the laws of the member states relating to collective redundancies.

The regulations amend Trade Union and Labour Relations (Consolidation) Act 1992 s193 to provide that, in addition to the existing requirements of that section, an employer proposing collective redundancies must notify the secretary of state of its proposal before giving notice to an employee to terminate his/her contract of employment in respect of any of those dismissals. In force 1 October 2006.

Working Time (Amendment) (No 2) Regulations 2006 SI No 2389

These regulations amend the Working Time Regulations 1998 SI No 1833. They confirm, for the avoidance of doubt, that the definition of offshore work includes work performed in the British sector of the Continental Shelf (except in an area or part of an area of the Continental Shelf in which Northern Irish law applies), as well as that performed within the territorial waters of the UK adjacent to GB. In force 1 October 2006.

Transfer of Undertakings (Protection of Employment) (Consequential Amendments) Regulations 2006 SI No 2405

These regulations make amendments as a result of the coming into force of the Transfer of Undertakings (Protection of Employment) Regulations (TU(PE) Regs) 2006 SI No 246. The regulations replace references to the TU(PE) Regs 1981 SI No 1794 with the appropriate references to the TU(PE) Regs 2006 in:

- the Information and Consultation of Employees Regulations 2004 SI No 3426;
- the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI No 1861; and
- the ACAS Arbitration Scheme (Great Britain) Order 2004 SI No 753.

These regulations apply to GB only. To the extent that they implement Council Directive 2001/23/EC on the approximation of the law relating to business transfers, the regulations are made under European Communities Act 1972 s2(2). To the extent that they relate to the treatment of employees, and related matters, in relation to a service provision change (as defined in the TU(PE) Regs 2006) in circumstances other than those to which the Directive applies, the regulations are made under Employment Relations Act 1999 s38. In force 1 October 2006.

Employment Equality (Age) (Amendment) Regulations 2006 SI No 2408

These regulations amend the Employment Equality (Age) Regulations (EE(A) Regs) 2006 SI No 1031 which implement the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

These regulations postpone, until 1 December 2006, the date on which certain provisions of the EE(A) Regs shall come into force. These provisions are:

- reg 7 (applicants and employees) and reg 24 (relationships which have come to an end) (but only in so far as they relate to the payment of contributions to a pension scheme, admission to a pension scheme and arrangements which relate to the provision of benefits from a pension scheme);
- reg 11 (pension schemes); and
- Sch 2 (pension schemes).

In force 30 September 2006. See also page 20 of this issue.

HOUSING

Race Relations Code of Practice (Housing) (Appointed Day) Order 2006 SI No 2239

This Order appoints 1 October 2006 as the day on which the revised *Code of practice on racial equality in housing* will come into effect. This revised Code replaces the two previous Codes of Practice relating to housing:

- the *Code of practice in rented housing*, which was brought into operation on 1 May 1991 by the Race Relations Code of Practice (Rented Housing) Order 1991 SI No 227; and
- the *Code of practice in non-rented (owner-occupied) housing*, which was brought into operation on 18 June 1992 by the Race Relations Code of Practice (Non-Rented Housing) Order 1992 SI No 619. The revised Code consists of three separate parts that apply to England, Scotland and Wales respectively.

The Order also:

- revokes the rented housing and non-rented housing Orders; and
- provides that the revised Code will not apply to proceedings relating to any alleged act of unlawful discrimination committed before 1 October 2006. In such cases, the previous Codes will continue to apply.

In force 1 October 2006. See also page 23 of this issue.

Mobile Homes (Written Statement) (England) Regulations 2006 SI No 2275

These regulations replace, as

regards England only, the Mobile Homes (Written Statement) Regulations 1983 SI No 749, which are revoked to the extent that they apply to England.

Mobile Homes Act (MHA) 1983 s1(2) provides that, before an agreement to which MHA s1 applies is entered into, the owner of the site must give to the proposed occupier of the mobile home a written statement. Section 1 applies to all agreements under which a person is entitled to station a mobile home on a protected site and occupy it as his/her only or main residence. A protected site is defined in MHA s5(1).

MHA s1(2)(a)–(d) requires the written statement to:

- specify the names and addresses of the parties;
- include particulars of the land on which the proposed occupier is to be entitled to station the mobile home that are sufficient to identify that land;
- set out the express terms to be contained in the agreement; and
- set out the terms to be implied by MHA s2(1).

These regulations require the written statement to contain material, in addition to that required by MHA s1(2)(a)–(d), and to be in the form set out in the Schedule to the MHA. The Schedule consists of five Parts:

- Part 1 deals with the names and addresses of the parties and with particulars of the land, and certain express terms, namely the pitch fee, its review and additional charges;
- Part 2 contains information about the occupier's rights under the proposed agreement;
- Part 3 contains the terms to be implied by MHA s2(1) as set out in MHA Sch 1 Part 1 (as amended by Housing Act 2004 s207 and the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006 SI No 1755);
- Part 4 contains the supplementary provisions relevant to the site owner's approval of a proposed purchaser of the mobile home or the family member to whom the mobile home is to be given, as set out in MHA Sch 1 Part 3; and
- Part 5 is for any other express terms of the agreement. In force 1 October 2006.

LEGAL AID

Community Legal Service (Financial) (Amendment No 2) Regulations 2006 SI No 2363

These regulations amend the following:

- the Community Legal Service (Financial) Regulations 2000 SI No 516 as amended, which govern the financial aspects of the provision of services funded by the Legal Services Commission (LSC) in civil matters; and
- the definition of 'family proceedings' to include proceedings under the Civil Partnership Act 2004.

These regulations also increase the range of Legal Help available to those receiving certain benefits provided under the Immigration and Asylum Act 1999. They also transfer the power to disapply certain eligibility limits in relation to applications for funding of services at inquests to the LSC in limited circumstances. Also, the power to waive part or all of contributions that may be payable is transferred to the Lord Chancellor in limited circumstances. In force 2 October 2006.

Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2006 SI No 2364

This Order amends the Community Legal Service (Funding) (Counsel in Family Proceedings) Order (CLS(F)(CFP) Order) 2001 SI No 1077 as amended. The CLS(F)(CFP) Order governs the systems for the payment of graduated fees for counsel for work in family proceedings. The CLS(F)(CFP) Order also covers how and when claims for payment are to be made, and appeals and review of payments.

This Order changes the references to those within the Legal Services Commission (LSC) who are responsible for considering certain claims, applications and appeals under the CLS(F)(CFP) Order. The change is to reflect recent amendments to the LSC's Funding Code. In force 2 October 2006.

Community Legal Service (Funding) (Amendment) Order 2006 SI No 2366

This Order amends the Community Legal Service (Funding) Order (CLS(F) Order) 2000 SI No 627 as amended. The CLS(F) Order imposes conditions on the funding of services as part of the Community Legal Service, including by limiting the powers of the Legal Services Commission to pay remuneration under contract for the provision of funded services.

This Order adds an exception to the limitation, by including contracts for Community Legal Advice Centres and Community Legal Advice Networks, which provide advice and representation to the most deprived communities in debt, employment, community care, family, housing and welfare benefit matters. In force 2 October 2006.

PLANNING

Caravan Sites Act 1968 and Social Landlords (Permissible Additional Purposes) (England) Order 2006 (Definition of Caravan) (Amendment) (England) Order 2006 SI No 2374

This Order amends the definition of 'caravan' in Caravan Sites Act (CSA) 1968 s13(2) and the Social Landlords (Permissible Additional Purposes) (England) Order (SL(PAP)(E) Order) 2006 SI No 1968 article 3(3). CSA s13 (twin-unit caravans) excepts from the definition of caravan in Caravan Sites and Control of Development Act 1960 Part 1, twin-unit structures designed or adapted for human habitation whose dimensions do not exceed specified dimensions. The secretary of state has the power to make an order specifying different dimensions to those set out in the CSA.

SL(PAP)(E) Order article 3(3) (meaning of caravan) defines a 'caravan' for the purposes of SL(PAP)(E) Order article 2, which extends the permitted purposes or objects of registered social landlords to include the provision, construction, improvement or management of caravan sites for Gypsies and Travellers.

This Order, which applies to England only, substitutes dimensions that are larger than those set out in CSA s13(2) and SL(PAP)(E) Order article 3(3). In force 1 October 2006.

SOCIAL SECURITY

Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006 SI No 2379

These regulations amend the following:

- the Social Security (Overlapping Benefits) Regulations (SS(OB) Regs) 1979 SI No 597 by substituting a new reg 14(1) to provide for adjustments of all benefits at a rate of one-seventh of the appropriate weekly rate for each day of the week;
- the Statutory Maternity Pay (General) Regulations (SMP(G) Regs) 1986 SI No 1960 by substituting a new SMP(G) Regs reg 2 the effect of which is as follows:
  - a woman's maternity pay period will begin in accordance with a notice to her employer stating the day she expects its liability to pay her statutory maternity pay (SMP) to begin, if that day is 11 weeks or less before her expected week of confinement (EWC) and not later than the day after she gives birth;
  - the maternity pay period is 39 consecutive weeks;
  - a woman's maternity pay period will begin the day after she gives birth if that day is before the 11th week before her EWC or, if it is after the 12th week before her EWC, and she gives birth before the day specified in a notice to her employer stating the day she expects its liability to pay her SMP to begin;
  - a woman's maternity pay period will begin the day after her absence from work where she is absent because of pregnancy or confinement on a day four weeks or less before her EWC and before her actual confinement (if earlier);
  - a woman's maternity pay period will begin the day after she leaves her employment where she leaves 11 weeks or less before her EWC, before the start of the maternity pay period and before her actual confinement (if earlier);
  - a new reg 9A in the SMP(G) Regs provides that SMP shall be paid where a woman works for her employer for no more than 10 days within her maternity pay period;
  - a new SMP(G) Regs reg 28 allows payments of SMP for a week or part of a week to be rounded up to the next penny.
- the Social Security (Maternity Allowance) Regulations (SS(MA) Regs) 1987 SI No 416 by:
  - substituting a new reg 2(1)(a) to provide that a woman will be subject to disqualification from maternity allowance if she works as an employed or self-employed earner for more than ten days in the maternity allowance period; and
  - amending SS(MA) Regs reg 3(2A) to extend the maternity allowance period to 39 weeks and to allow the maternity allowance period to begin no earlier than the day a woman becomes entitled to maternity allowance and no later than the day after which she is confined in specified circumstances. In force 1 October 2006.

▶ Books

Actions against the police

Police Misconduct
legal remedies 4th edn
John Harrison/Stephen Cragg/ Heather Williams
April 2005 ♦ Pb 0 905099 91 5 ♦ 760pp ♦ £37

Community care

Community Care and the Law
3rd edn
Luke Clements
2004 ♦ Pb 1 903307 19 8 ♦ 758pp ♦ £37

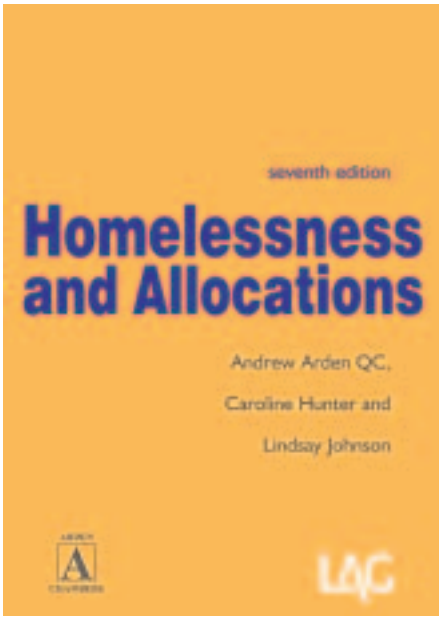
Crime

ASBOs
a practitioner's guide to defending Anti-social Behaviour Orders
Maya Sikand
Sept 2006 ♦ Pb 1 903307 41 4 ♦ 496pp ♦ £45

Defending Suspects at Police Stations 5th edn
Ed Cape
Sept 2006 ♦ Pb 1 903307 44 9 ♦ 1008pp ♦ £52

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

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



Identification
investigation, trial and scientific evidence
Paul Bogan
2004 ♦ Pb 1 903307 25 2 ♦ 502pp ♦ £37

Employment

Discrimination Law Handbook
2nd edn
COMING SOON
Camilla Palmer/Barbara Cohen/ Tess Gill/Karon Monaghan/ Gay Moon/Mary Stacey
Edited by Aileen McColgan
Dec 2006 ♦ Pb 1 903307 38 4 ♦ c900pp ♦ £55

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Declan O'Dempsey/Schona Jolly/ Andrew Harrop
Oct 2006 ♦ Pb 1 903307 48 1 ♦ c600pp ♦ £35

Maternity and Parental Rights
a guide to parents' legal rights at work
3rd edn
NEW
Camilla Palmer/Joanna Wade/ Alexandra Heron/Katie Wood
Sept 2006 ♦ Pb 1 903307 40 6 ♦ 850pp ♦ £35

Employment Law
an adviser's handbook 6th edn
Tamara Lewis
Oct 2005 ♦ Pb 1 903307 36 8 ♦ 804pp ♦ £28

Employment Tribunal Claims
tactics and precedents
TEMPORARILY OUT OF STOCK
Naomi Cunningham
March 2005 ♦ Pb 1 903307 33 3 ♦ 440pp ♦ £25

Employment Tribunal Procedure
3rd edn
Judge Jeremy McMullen QC/ Rebecca Tuck/Betsan Criddle
2004 ♦ Pb 1 903307 29 5 ♦ 758pp ♦ £37

Gypsy and Traveller law

Gypsy and Traveller Law
Edited by Marc Willers/Chris Johnson
2004 ♦ Pb 1 903307 26 0 ♦ 488pp ♦ £29

Housing

Homelessness and Allocations
7th edn
NEW
Andrew Arden QC/Caroline Hunter/ Lindsay Johnson
Sept 2006 ♦ Pb 1 903307 37 6 ♦ 880pp ♦ £45

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NEW
Nic Madge/Derek McConnell/ John Gallagher/Jan Luba QC
August 2006 ♦ Pb 1 903307 30 9 ♦ 840pp ♦ £48

Leasehold Disputes
a guide to Leasehold Valuation Tribunals
Francis Davey/Justin Bates
2004 ♦ Pb 1 903307 27 9 ♦ 256pp ♦ £20

Housing Law Casebook 3rd edn
Nic Madge
2003 ♦ Pb 1 903307 10 4 ♦ 1264pp ♦ £39

Quiet Enjoyment 6th edn
Andrew Arden QC/David Carter/ Andrew Dymond
2002 ♦ Pb 1 903307 14 7 ♦ 320pp ♦ £29

Housing and Human Rights Law
Christopher Baker/David Carter/ Caroline Hunter
2001 ♦ Pb 1 903307 05 8 ♦ 252pp ♦ £19

Repairs
tenants' rights 3rd edn
Jan Luba QC/Stephen Knafler
1999 ♦ Pb 0 905099 49 4 ♦ 420pp ♦ £29

Human rights

Human Rights Act Toolkit
Jenny Watson/Mitchell Woolf
2003 ♦ Pb 1 903307 15 5 ♦ 256pp ♦ £22

European Human Rights Law
Keir Starmer QC
1999 ♦ Pb 0 905099 77 X ♦ 960pp
★ *Reduced from £35 to £25*

Immigration and asylum

Support for Asylum-seekers
a guide to legal and welfare rights 2nd edn
Sue Willman/Stephen Knafler/ Stephen Pierce
2004 ♦ Pb 1 903307 24 4 ♦ 788pp ♦ £39

noticeboard

Conferences and courses

Legal Aid Practitioners Group (LAPG)
Annual conference 2006:
Mapping the post-Carter world
6 October 2006
9.45 am–5 pm
Cardiff
£175 + VAT LAPG members
£275 + VAT non-members
Speakers include:
Vera Baird QC, MP
Sir Michael Bichard
Katie Ghose
Dominic Grieve MP
Professor Richard Moorhead and Geoffrey Robertson QC
One-day conference on the future of legal aid
Contact: Kate Comyn
Tel: 020 7960 6068
E-mail: Kate@lapg.co.uk
www.lapg.co.uk

Public Law Project
Judicial review: trends and forecasts
12 October 2006
9.15 am–5 pm
London
£280 + VAT standard,
£190 + VAT discounted rate
A conference for practitioners on the latest information on judicial review case-law and trends.
Contact: Hannah Jones
E-mail: h.jones@publiclawproject.org.uk
www.publiclawproject.org.uk

National Association of Licensed Paralegals
Postgraduate diploma in paralegal practice
25 October 2006
London
£995
Twenty-week evening class course designed for law graduates who cannot obtain training contracts and/or afford the LPC, but who want to succeed as paralegals. The course covers: civil litigation, criminal practice, matrimonial and civil partnership disputes, conveyancing, succession and corporate/commercial work plus the legal skills of drafting, interviewing, negotiating and advocacy for paralegals.
Tel: 0117 927 7077
E-mail: PPC@national-paralegals.co.uk
www.nationalparalegals.com

JUSTICE/Sweet & Maxwell
The human rights law conference 2006: 8th annual conference
26 October 2006
London
£325 + VAT (10 per cent discount for JUSTICE members)
6 hours CPD
This annual human rights law conference has become the central forum for analysing changes under the Human Rights Act 1998.
Tel: 020 7393 7859
E-mail: conferences@sweetandmaxwell.co.uk
www. justice.org.uk

Working Families and LAG
Parents' rights at work: the 2007 agenda
31 October 2006
9 am–4.15 pm
London
£350 + VAT standard rate
£150 + VAT discounted rate
One-day conference which will give delegates a thorough understanding of the regulatory changes taking place to parents' rights at work, which will take effect from April 2007.
Contact: Ali Garfath
Tel: 020 7253 7243
E-mail: events@workingfamilies.org.uk
www.workingfamilies.org.uk

City University Law School and Arden Chambers
Current issues in housing law
3 November 2006
10.30 am–5 pm
London
£90
4 hours CPD (also approved for Chartered Institute of Housing training)
One-day conference examining recent developments in a number of important areas of housing law, aimed at barristers, solicitors, housing administrators and policy-makers.
Contact: Professor Ian Loveland
Tel: 020 7040 8302
E-mail: i.d.loveland@city.ac.uk
www.city.ac.uk/law

Lectures, seminars and meetings

JUSTICE
Annual lecture 2006: Politics and the law: constitutional balance or institutional confusion?
17 October 2006
6.30 pm
London
Free, but reservation essential
Speaker: Professor Jeffrey Jowell QC, Professor of Public Law, University College London
Conference chair: Lord Steyn
Tel: 020 7762 6422
E-mail: lectures@justice.org.uk
www.justice.org.uk

The Centre for the Study of Human Rights
Refugee solutions or solutions to refugeehood
17 October 2006
1.15 pm–2.30 pm
London
Free
Speaker: James C Hathaway

Human rights in the 21st century: the case of China
24 October 2006
6.30 pm–8 pm
London
Free
Speakers include: Brad Adams and Bruce Gilley

Field notes: human rights defenders speak
(In conjunction with Human Rights Watch UK)
6 November 2006
1.15 pm–2.30 pm
London
Free
Speakers: Omid Memarian and Beatrice Were
Tel: 020 7955 6428
E-mail: human.rights@lse.ac.uk
www.lse.ac.uk/humanrights

Constitutional and Administrative Law Bar Association
Introduction to judicial review
24 and 31 October, and then 7, 14 28 November and 5 December 2006
6.30 pm
London
£30 for the six seminars
6 hours CPD
E-mail: beverleylang@blackstonechambers.com

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