

THE DISCRIMINATION LAW ASSOCIATION

COMMENTS ON CRE DRAFT CODE OF GUIDANCE IN HOUSING

- 1) The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.
- 2) The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of some 400 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

General comments

- 3) We welcome the new draft Code. In general we consider the thrust of the practical guidance is apt and that it recognises how closely linked are general issues relating to good housing management and measures to combat discrimination. Where we have comments to make on specific guidance given they are mainly matters of detail.
- 4) If anything we feel that the draft Code is somewhat timid in its approach to controversial or unsettled questions. On several occasions, the Code seemed to us to miss the opportunity positively to promote good practice. For example, the section on mortgage lenders and insurance business says that there is no duty to carry out ethnic monitoring and suggests that this might be done in a very tentative way. We would have thought that a document of this kind should take the lead in positively recommending this as good practice.

- 5) We also felt that in dealing with rented housing the Code was almost entirely addressed to fairly large scale registered social landlords. Those bodies are already subject to a great deal of guidance from the Housing Corporation among others, much of which overlaps with or complements this guidance. We felt there was a risk that this guidance might be seen by smaller private providers as less relevant to them.
- 6) We do, though, have concerns about the way in which the material is presented. The draft Code is a daunting document and it is difficult to imagine any housing officers having the time to read it. Indeed, this does not seem to be envisaged. We note from the regulatory impact assessment that it is intended that implementation of the Code will be as follows: reading the Code – 1 person 3 hours, making any necessary adjustment to internal policies – 3 hours. Whether or not these are accurate estimates, the primary source of information about the Code seems not to be intended to be the Code itself, but whatever internal policies individual housing providers chose to put in place. This in turn raises questions as to whom the Code is addressed. The target audience for much of the text seems mainly to be policy makers. There is nothing wrong with this, and of course somebody must have responsibility for ensuring compliance throughout the organisation. We think though that there is a place for a simple authoritative guide to good practice addressed to those responsible for implementing good practice on the ground and that can operate as a reference point for them. This indeed is what the Code itself sets out to achieve in part at para 1.8.b – to provide practical guidance that will help organisations and individuals. It also seeks to give guidance to those affected by discrimination. It is in the nature of housing management that individuals at quite a low level in the organisation often exercise wide discretions, for example as to how and when works are carried out etc.
- 7) We note that there may be a summary of some of the main provisions of the Code [para 1.15] but this raises its own questions. The Code is a document published under statutory authority and the Courts must take account of it and any non compliance with it. What is to be the status of the summary?
- 8) With these points in mind we wonder whether it is appropriate to have a single Code dealing with rented and non-rented housing and the public and private sectors. We recognise that the boundaries are not watertight and we also recognise the advantages of having a single document rather than a series of papers that cross-refer to each other. However, we feel that the Code simply has too much ground to cover and there is a risk that some important messages will be lost in the detail. For example, most of the code deals with allocation of public housing or allocation by registered social landlords. However, guidance is also given to estate agents, mortgage and insurance providers and the providers of other housing services. There is a danger that these important points will never reach the target audience.

- 9) We think that consideration should be given to providing separate guidance for estate agents and mortgage lenders and for private (i.e. non RSL) landlords and letting agencies. We also consider that a simple practical guide should be produced for the benefit of housing officers and other front-line workers.
- 10) Our final comments on the manner in which the Code is set out are these:
 - a) The information is sometimes repetitive and this adds unnecessarily to the length. For example, each of the guidance sections deals with the legal position, areas of potential discrimination, and recommendations on good practice. However, the material in the areas of potential discrimination is often repeated in the recommendations section although equally often a question is posed there that is not answered later (for example complaints handling and harassment). The legal position largely repeats the earlier legal sections and sometimes the same examples are used. In addition, the same points (e.g. training and monitoring) are repeated for each of the 9 areas dealt with. We understand the problems in drafting a document of this kind but we have already expressed concern about its length.
 - b) We often found the use of examples only marginally helpful. The main problems are that:
 - i) They are obvious – e.g. example 44 – deliberately doing a worse job for Asian tenants - in which case why have examples?
 - ii) They do not illustrate a proposition in the text. Anyone with a background in discrimination law will know the point being made, but it is not always obvious.
 - iii) Some examples are posed more as discussion points than examples. No clear answer is given to the problem posed. It is clearly a good thing to stimulate discussion on these topics but the Code is not the place to do it. Examples are:
 - (1) No 2 – dealing with a Somali asylum seeker. The message is clearly given that he should not be refused a place because of the hostility of others but what should be done?
 - (2) No 48 – dealing with ‘supporting people’. If the Code intends to say that the operating principles of ‘supporting people’ are a model of good practice in including service users and responding to their needs then it should say so and refer to the relevant guidance or policy. It is not clear whether the operating principles set out in this example are intended to be principles actually operated by ‘supporting people’ or ones that the CRE suggests should be adopted.

Specific comments on the text

The law

- 11) By and large this is an accurate summary of the main legal provisions.
- 12) Para 2.6 – We feel this definition could be made clearer. The point is not that the comparison is hypothetical but that the other person is hypothetical. We doubt whether the gloss in this paragraph really adds anything to the quotation from the Act. A simple statement to the effect that there does not have to be an actual comparator may suffice. It is still unlawful discrimination if a person is treated less favourably than a person of another racial group would be treated in similar circumstances. The reference to “not identical but not too dissimilar” is unnecessary and confusing.
- 13) The discussion of direct discrimination does not include a discussion of what discrimination on racial grounds means. It does not explain the essentially causative nature of the test or that discrimination on racial grounds can cover conscious and unconscious discriminatory assumptions or can cover discrimination because of somebody else’s racial hostility. These come out from the examples (thus example 4 seems to make a point about unconscious discrimination) but these could be explained.
- 14) Example 2¹ is a difficult and testing one. It raises extremely challenging questions about segregation and how an authority should respond where a person may be vulnerable to racial abuse. Bearing in mind that the Code is intended to be applied by non-expert practitioners we are concerned that an example like this could actually expose vulnerable individuals to harassment. What is actually being suggested as the solution? A housing officer might think (particularly given para 2.9 about segregation) that they must place the asylum seeker in a hostile environment but take some steps to protect them. But what steps? They are very likely to be ineffective, so leaving the resident exposed to hostility in any event. Perhaps the discriminatory co-residents should be moved? Of course it is discrimination to treat somebody less favourably because of somebody else’s discriminatory hostility to them but this example needs more explanation if it is to be used.
- 15) We also felt that there should be some discussion of the relationship between religion and race discrimination. Religion may often be a synonym for racial discrimination and it may also raise its own specific issues about indirect discrimination in a housing context. Examples might include religious restrictions on borrowing money for interest. That might lead to an inability to pay rent and hence a decision about how arrears should be managed or, if eviction results, a decision about whether homelessness was intentional. Other examples might arise in the context

¹ “a local council would be discriminating directly if it refused to find a place in a hostel for a Somali refugee because it was afraid he would be harassed by the hostel’s white residents, and took no action to prevent such harassment”

of housing allocation. There are very occasional references elsewhere [e.g. para 3.29].

- 16) Para 2.8 – This paragraph is confusing. It refers directly to “persons from abroad”. This follows the language of various provisions successively excluding immigrants from benefits. We suggest something along these lines. “Individuals are protected from discrimination whatever their immigration status. Some statutory provisions prevent the allocation of housing or the grant of housing benefit or assistance to individuals with limited leave to be in the UK. Public housing providers are bound to apply these provisions. However, it would be unlawful discrimination if they were to assume that that people from abroad or people of a particular ethnic group were caught by them or if they targeted them to provide proof of their immigration status”.

Paras 2.11 – 2.22 – Indirect Discrimination

- 17) The Code is right to point out at para 2.16 that indirect discrimination because of colour and nationality would be likely to amount to discrimination on the ground of ethnic or national origin as well. The Code should make clear that providers should try to apply the spirit of the EC Directive in all cases. They should examine all their practices to see if they put anyone at a disadvantage on racial grounds rather than adopting an over technical approach. This would be more consistent with the practice guidance which does tend to adopt that approach.
- 18) Example 7² – We think the chances of justifying this are remote in the case of an organisation of any size and this example should say so.

Victimisation and harassment

- 19) Para 2.25: We suggest that sub-paragraph (a) should be re-cast as follows:

“he or she has been treated less favourably than others have been or would be treated in similar circumstances and ...”. The reference to “on racial grounds” is unnecessary as is the reference to the way the complainant would be treated. They have been treated less favourably – hence their complaint. The question is how somebody else would have been treated.

- 20) Para 2.28: We consider that this statement, while correct, should include something along the lines that providers should not readily assume that complaints of harassment are the result of oversensitivity and that they should treat all allegations seriously. It will very likely be harassment if conduct is repeated despite complaints from the person affected.

² Spreading information about vacant properties by words of mouth.

- 21) Example 13: We do not think the closing words are apt: i.e. that the tenant could argue that the landlord had not provided housing management on a “fair and equal basis”. That does not relate to the previous discussion about the Act. Failure to take this type of action might be direct discrimination – certain complainants “deserve” less, indirect discrimination – certain types of complaint are either insubstantial or untrue, victimisation – no action taken because the complaint is about discrimination, or harassment – creating a hostile environment.

Planning

- 22) Para 2.57 – There is a minor inaccuracy here. Travellers who have nowhere they can lawfully place their home are homeless not vulnerable to homelessness.
- 23) We welcome the reference here to meeting the special needs of Gypsies and other Travellers. This has now been the subject to ECtHR decisions [e.g. Connors v UK] and specific planning guidance. This could be an opportunity to make a point in the code about planning and housing policies being adaptable to meet the specific needs of some communities and that this might require some positive action.
- 24) Para 2.63 – There seems to be a missing “not” in the last line. Discrimination in these circumstances is excluded if the premises are small, and then subject to restrictions. The point addressed in para 2.63 relates to an extremely small group of sellers and in effect only covers sales by private treaty where there has been no advertisement. It may be better deleted altogether because it gives the impression that discrimination is permitted here whereas there are clearly more exceptions than the rule. The people covered by this provision are not a natural target audience for the code.
- 25) Para 2.64 is slightly inaccurate. It is unlawful to discriminate against someone by withholding consent or a licence. It is unlawful to subject someone to harassment in relation to such a licence or consent. In other words the harassment may be acts other than the withholding itself. The current text suggests that the harassment is the withholding.

Practical guidance:

- 26) Most this guidance is addressed in effect to large scale registered social landlords. There should be some explanation about how the principles could be applied to smaller scale letting agencies for example.

Sales and Lettings

- 27) We considered that the guidance in this section was somewhat abstract. For example, at paragraph 3.54 organisations are encouraged to review their eligibility criteria to ensure that they are not potentially discriminatory. But there is no guidance about what this means. Presumably what is meant here is mainly indirect discrimination. There should be some discussion of what kinds of provision might indirectly discriminate – for example local connection requirements involving lengthy local residence or family or employment connections or the need for a local referee.
- 28) 3.47 – Choice based lettings. The Code could give better practical advice about what could be done to remedy disadvantage here. The Code rightly places emphasis on ensuring that information reaches a wide section of the public by appropriate advertisements etc. But there may a range of other reasons why some applicants cannot effectively present their cases. They may have language difficulties or simply find it difficult to present their case effectively. The problems with choice based lettings are not only confined to the criteria used. People who are already socially excluded or vulnerable find it more difficult to bid effectively for a variety of reasons. Shelter’s recent work³ in the area has shown this to be especially true for the homeless, among whom minority applicants may already be over-represented. The Code should take a lead here in encouraging social landlords to take practical steps to help individuals in the bidding process.
- 29) The guidance says at para 3.55 that nomination arrangements should be assessed to make sure they do not discriminate – but there is little guidance about what this means. Examples should be given about what kind of arrangements might discriminate.

Lenders and insurers

- 30) We felt that this part of the Code was insufficiently searching in its recommendations. It seems to defer too greatly to individual commercial organisation.
- 31) Para 3.95 – The reference to “Any codes of practice that they follow”...is obscure. Lenders should be expected to demonstrate by appropriate internal guidance that they will not discriminate or tolerate discrimination. For example, this should be made clear on their publicity materials.
- 32) Para 3.97 – there should be more guidance on what might actually make criteria non-discriminatory. Some examples are given in examples 41 and 42 but other case of indirect discrimination might arise where, for example, the bank insists on particular types of identification, or insists on UK based guarantors or security in the United Kingdom. Of course, identification procedures must also be consistent with money laundering procedures but the guidance must make clear that anti-corruption measures such as these

³ A Question of Choice Good Practice and Issues in Choice based Letting – Shelter 2005.

must not be applied only to a section of applicants selected because of their race or assumed national or ethnic origins. .

- 33) Para 3.98 We consider that lenders and insurers should be positively encouraged to establish monitoring systems. The approach here is somewhat minimalist, starting as it does with the phrase: “lenders and insurers do not have to set up ethnic monitoring systems” and suggesting occasional customer surveys. There is no reason why these institutions, whose resources are at least as large as many RSLs should not be required to demonstrate effective equal opportunities practice through monitoring.

Tenancy and Housing Management

- 34) This is an important section which raises questions typical of those that arise in the county court where possession is sought. The section concentrates on repairs and rent arrears but housing management issues cover a wider range of matters. They include consents to transfer and exchange, works to common parts and action taken against tenants for a variety of reasons including breaches of tenancy conditions. Some of these points are covered in other sections.
- 35) The examples [43-5 and 47] present stark cases of prejudice where there cannot really be any doubt about the outcome. The important point to get across here is that discrimination in these areas can arise without any hostile intent towards the group concerned. There may not even be any stereotyping in any conventional sense. But if tenants find it difficult to communicate with their landlord, for example to complain about repairs, or are treated less seriously when they do - perhaps because they are less confident or fluent in English, then the outcome is the same – they get a poorer service on racial grounds. Guidance and training should be addressed to this.
- 36) Example 46 raises an issue about benefit entitlement. We do not agree that it is a helpful characterisation to refer to a housing body’s policies resulting in people from ethnic minorities being less aware of their entitlement. So put that might encourage a belief that as long as a housing provider had equal formal measures in place that would be sufficient. We think the emphasis here should be on positive steps that should be taken to ensure proper benefit uptake and to avoid rent arrears. This ought to be part of any sensible rent arrears policy in any event. Housing officers should be aware of the problems that some minority tenants may have in claiming benefits. They may not be aware of the benefits of they may find obtaining or filling the forms difficult. They may find it difficult to assemble the documentary proofs necessary. At an early stage a housing officer should consider what help might be given to the tenant to avoid matters escalating. Training should deal with this and should also address how difficult many people, particularly the elderly, find it to seek and accept help about benefits.

Harassment

- 37) Para 3.129 raises a number of questions about harassment policies but para 3.120 fails to give specific guidance. For example, the question is raised about how the organisation deals with complaints but no guidance is given about what form the support might take. It is sometimes difficult for tenants directly to approach their housing officers and organisations might favour a facility for making complaints of harassment outside the normal housing management channels. Publicity to tenants should make clear that information about harassment can be given in confidence.
- 38) We feel that this section should also have something to say about cases where minority tenants are the subject to allegations that they have been guilty of harassment or anti social behaviour. Housing bodies and the Courts should be reminded that complaints of nuisance may result from fear of or unfamiliarity with members of other ethnic groups.

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