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BRIEFING PAPER

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Disabled adaptations in leasehold flats & common parts

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Contents:

Contents

Summary

This Library paper provides an outline of the legal position of long leaseholders in blocks of flats in England and Wales who require adaptations to enable access into and around their homes. Section 3 of the paper specifically covers issues with securing disabled adaptations in the common parts of residential buildings, such as stairways.

Research in this area has established that disabled people face problems in finding adequate housing and that this acts as a major barrier to independent living. The English Housing Survey 2014-15 data showed that around 1.9 million households contained someone with a long-term limiting disability. 81% of households that required adaptations said that their home was suitable for their needs. The 2014-15 survey recorded an improvement on the number of households requiring an adaptation who had had them installed since 2011-12.

The *Disability Discrimination Act 2005* made it easier for long leaseholders to obtain a landlord's (freeholder's) consent to carry out adaptations to the internal areas of let premises. These provisions were carried over into the *Equality Act 2010*. There remained a problem with securing adaptations to the common parts of residential dwellings, such as doors and stairways. A Review Group on Common Parts was set up in 2005 which made several recommendations in relation to commons parts, one recommendation was that the "Government should develop (and consult on) legislation for England and Wales which would ensure that when requested by a lessee to make a disability-related adjustment to the common parts of let residential premises, the landlord would be under a duty to make the adjustment where that is reasonable."

Subsequently, the *Equality Act 2010* provided for a new requirement for disability-related alterations to the physical features of the common parts of let residential premises, or premises owned on a commonhold basis. However, the provisions (in section 36 and Schedule 4 to the 2010 Act) have not been brought into force (but see below).

The Coalition Government included the provisions in its 'red tape challenge' and delayed implementation pending the Scottish Government's experience with implementing the parallel devolved provision in section 37. Regulations to implement section 37 have not been made so this learning process has not taken place.

The House of Lords Select Committee on the Equality Act 2010 and Disability investigated the Act's impact on disabled people over 2015-16 and called for the immediate implementation of section 36 and Schedule 4. In response, the 2015 Government said that the Government Equalities Office would review the question of the commencement of the common parts provisions. The expectation was that the review would be concluded by the end of 2017 – the 2015 Government said the decision would be reported to the Women and Equalities Committee. The Government's response to the Committee's inquiry on Building for Equality: Disability and the Built Environment was published on 15 March 2018. The Government confirmed that section 36 and Schedule 4 would be brought into force.

The Equalities and Human Rights Commission (EHRC) is conducting an inquiry into housing for disabled people. The deadline for submitting evidence was 18 April 2017.

1. Gaining the landlord's consent to adaptations

1.1 The lease agreement: absolute and qualified covenants

When the owner of a leasehold flat needs to make adaptations to that property they must first consider the provisions contained in the lease. A lease may contain a covenant against alterations or improvements in an absolute form or, more usually, in a qualified form; namely, "not to make any alterations to the demised premises without the landlord's consent."

In the case of an **absolute covenant**, no alterations can be made unless the landlord consents, even though the alterations may improve the premises. A **qualified covenant** against alterations will require the landlord's consent. In this case, if the alterations amount to improvements then section 19(2) of the *Landlord and Tenant Act 1927* applies. Section 19(2) provides that the landlord's consent to improvements shall not be unreasonably withheld. The section also provides that the landlord may require a sum of money for any diminution in the value of the premises, or of any neighbouring premises belonging to the landlord, or require an undertaking from the tenant to reinstate the premises at the end of the term as a condition for granting consent. The relevant part of section 19(2) is reproduced below:

> … this proviso[1] does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

In deciding whether an alteration is an improvement or not, and so within the scope of section 19(2), the court must consider the issue from the tenant's point of view. Tenants can apply to the courts for a declaration that a landlord's consent has been unreasonably withheld, or for a ruling on any sum required by the landlord as security for the alterations.

If the lease contains an **absolute covenant** against alterations section 19(2) of the 1927 Act does not apply. In these cases landlords are able to withhold consent to alterations without having to establish that there are reasonable grounds for doing so.

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[1] The requirement not to unreasonably withhold consent.

Section 19(2) does not cover proposed improvements/adaptations to parts of premises that are not comprised in the lease, i.e. communal areas such as stairways. These areas do not usually constitute part of the dwelling-house that form part of the lease agreement. Consequently a leaseholder in this position may not carry out adaptations to those areas in the absence of the freeholder's consent.

Problems associated with obtaining a landlord's consent to carrying out adaptation works were acknowledged in the 1999 report of the Disability Rights Task Force, From Exclusion to Inclusion:

> Overcoming Physical Barriers to Premises
>
> 46. We felt that it would be unreasonable to expect those disposing of premises to have to make and meet the cost of physical adjustments for disabled people. However, living in suitable housing is fundamental to people's enjoyment of life. We felt that disabled people should not have to rely on the goodwill of those disposing of premises to make reasonable physical adjustments necessary for them to live comfortably. We believe, therefore, that landlords and managing agents etc. should not be allowed to withhold consent unreasonably for a disabled tenant to make physical adaptations to premises.
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> 47. It is important that further work is done to determine what would and would not be reasonable in these circumstances and what rights the owner of the premises has to expect the premises to be returned to the state in which they were let. Requiring full reinstatement of the premises by the tenant on his departure would make this new right meaningless in many cases because of the costs involved. However, there is clearly a fear that adaptations for disabled people will make the premises less attractive for future lessees and purchasers and this fear needs to be addressed.
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> **Recommendation 6.27: There should be no duty on those disposing of premises to make adjustments to the physical features of the premises. However, in civil rights legislation, they should not be allowed to withhold consent unreasonably for a disabled person making changes to the physical features of the premises. There should be a wide consultation on the factors in determining when it would be reasonable and unreasonable for a landlord to withhold consent, with the aim of achieving the right balance between the rights of the owner of the premises and the disabled person.**
>
> **Recommendation 6.28: The Government should do more to raise awareness amongst owners of premises of the benefits of physical adaptations that increase accessibility for disabled people.[2]**

The debate over the issue of consent continued on publication of the *Draft Disability Discrimination Bill in 2003*.

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2 Disability Rights Taskforce, From Exclusion to Inclusion, 1999

1.2 The Draft Disability Discrimination Bill: debate over consent

The *Draft Disability Discrimination Bill* was published on 3 December 2003 and was the subject of pre-legislative scrutiny.[3] The draft Bill did not take forward the recommendations of the Task Force in respect of landlords withholding consent for adaptation works. The Government's reasoning was that this was already covered by the *Landlord and Tenant Act 1927* (LTA) and other legislation. The Disability Rights Commission expressed its regret over the Government's decision not to implement the Task Force's recommendation in relation to consent for alterations:

> Our one concern is that the Government has not implemented the Task Force recommendation that landlords should not be allowed to withhold consent unreasonably for a disabled person making changes to the physical features of the premises. The DRC believes that existing legislation does not provide an adequate framework for protecting disabled people's rights and hopes that this issue will receive due attention during the scrutiny process.[4]

The Joint Committee on the *Draft Disability Discrimination Bill* considered the issue of landlords withholding consent to physical alterations to premises. The Committee's report on the draft Bill summarised witnesses' criticisms of the decision to rely on the 1927 Act to protect disabled people:

- The LTA is general in application and is not framed in the context of disability anti-discrimination legislation.
- The LTA only covers current lettings and therefore does not provide a right to reasonable adjustments on prospective lettings.
- It only extends to the "demised" premises under the lease and does not cover the common parts of a building or management committees. Alterations to the exterior of a building, such as the installation of a grab rail or a ramp would not be included.
- It is currently unclear to landlords and tenants when it would be reasonable to refuse or grant consent to the making of alterations.
- It favours the landlord as the onus is on the tenant to show that the landlord unreasonably withheld consent. The Law Society submitted that in many cases it has proved difficult to get legal evidence of this.
- The DRC does not have any power to issue Codes of Practice under landlord and tenant law.
- The DRC does not have the power to bring cases on behalf of disabled people under landlord and tenant law.
- The LTA does not extend to Scotland.[5]

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3 Cm 6058-1

4 *The Draft Disability Discrimination Bill: Initial Briefing by the Disability Rights Commission,* 3 December 2003

5 HC 352-I & HL Paper 82-I 2003-04

The Committee concluded that the means of redress for a disabled tenant whose lease contains an absolute covenant against making alterations is "undoubtedly onerous":

> First, the tenant would if necessary have to use the draft bill provisions in order to get the absolute covenant declared "unreasonable". The Explanatory Notes to the draft bill suggest that this *may* (not will) be granted. Then, the tenant would, if necessary, proceed under section 19(2) of the LTA.[6]

The Committee recommended that a specific provision prohibiting a landlord from unreasonably withholding consent to the making of appropriate physical alterations in respect of a disabled person should be included in the final Bill.[7]

Witnesses to the Committee were particularly critical of the 1927 Act's provisions on the grounds that they do not apply to communal areas. The then Minister for Disabled People, Maria Eagle, argued that the Disability Rights Task Force did not propose an extension to cover communal areas:

> We have considered common parts when drafting this Bill, even though no proposals were made by the DRTF, and therefore coverage of this area was not part of our manifesto commitment or our commitments towards inclusion. We do not believe tenants should be able to make adjustments to areas over which they have very limited rights.[8]

The Committee concluded:

> Despite the position taken by the Government, the Committee considers that provisions allowing reasonable alterations to communal areas are necessary to ensure that disabled people can enjoy the fundamental right of access to their property. As with other alterations under the draft bill, the test of reasonableness would apply to alterations made to communal areas. It is important to note that an alteration that would be reasonable in respect of demised premises would not necessarily be a reasonable one to make for a communal area. Accordingly, **the Committee recommends that the full bill includes a specific provision prohibiting controllers of premises from unreasonably withholding consent to the making of reasonable adjustments to communal areas.** [9]

The then Government published its response to the Committee's recommendations on 15 July 2004.[10] The Government rejected the call to include a specific provision prohibiting a landlord from unreasonably withholding consent to the making of appropriate physical alterations in respect of a disabled person on the grounds that this was adequately covered by other legislation:

> All council tenants and Rent Act tenants in England and Wales have the right under the Housing Acts 1980 and 1985 to make improvements to the rented premises with the consent of the

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6 Ibid., para 317
7 Ibid., para 321
8 Ibid., para 324
9 Ibid., para 325
10 The Government's response to the Report of the Joint Committee on the Draft Disability Discrimination Bill, DWP, 15 July 2004

> landlord – which cannot be withheld unreasonably. So do tenants of local authorities and registered social landlords in Scotland under the Housing (Scotland) Act 2001. Other types of tenants in England and Wales generally have this right too – either because the lease expressly says that the landlord may not withhold consent unreasonably, or by virtue of the Landlord and Tenant Act 1927 (legislation to cover this issue is planned in Scotland). We believe that this offers sufficient protection for disabled people who wish to make alterations to their rented accommodation.[11]

The Government also rejected the call to include a specific provision prohibiting controllers of premises from unreasonably withholding consent to the making of reasonable adjustments to communal areas:

> We are not convinced that tenants should be able to make adjustments to common parts over which they have only limited rights or that a controller of premises should be required to allow a tenant to make changes to common parts.
>
> We believe that seeking to cover common or communal parts of premises in this way would pose quite severe problems on which we have not consulted and which involve complex interactions between a range of people with legal responsibilities and rights in connection with common parts.[12]

Section 2 of this paper shows that the Labour Government shifted its position somewhat as the 2005 Act progressed through Parliament.

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11 Ibid., recommendation 56
12 Ibid., recommendation 57

2. The 1995 and 2005 Disability Discrimination Acts

Sections 22-24 of the *Disability Discrimination Act 1995* (DDA) prohibited the unjustified less favourable treatment of disabled people by persons managing or disposing of premises. However, the Act did not impose a duty on landlords to make reasonable adjustments to the physical features of premises. The 1995 Act was amended by the 2005 Act. As the 2005 Act progressed through Parliament amendments were moved with a view to making it easier for long leaseholders to carry out disabled adaptations in blocks of flats. The impact of the 2005 Act's provisions in respect of let premises (including properties owned on a long leasehold basis) is explained in sections 2.1- 2.3 below.

2.1 Changing policies, practices or procedures & reasonable adjustments

Section 13 of the *Disability Discrimination Act 2005*, with effect from 4 December 2006, inserted new sections 24A to 24L into Part 3 of the 1995 DDA to require a landlord or manager to take reasonable steps to change a policy, practice or procedure which made it impossible or unreasonably difficult for a disabled person to take a letting, or to enjoy the premises, or use a benefit or facility conferred with the lease.

To illustrate how these provisions might operate, the Explanatory Notes to the Act suggested that a landlord or manager (where it is reasonable to do so) might be obliged to "allow a tenant who has mobility difficulties to leave his rubbish in another place if he cannot access the designated place". Alternatively, a landlord or manager might be obliged to "change or waive a term of the letting which forbade any alterations to the premises, so as to allow a disabled tenant to make alterations needed by reason of his disability with the consent of the landlord". If the terms of the letting *were* modified to permit an alteration with the landlord's consent, then the provisions of section 49G (inserted by section 16 of the 2005 Act) would apply (see section 2.3 below). Landlords were also required to take reasonable steps to provide an auxiliary aid or service in some circumstances. The provision of an auxiliary aid might arise where the prospective tenant is hearing impaired, for example, necessitating the provision of a clip-on receiver that vibrates when the doorbell rings.

The *Disability Discrimination (Premises) Regulations 2006* (SI 2006/887) set out the circumstances in which it was reasonable for a landlord to have to modify or waive a term in a lease prohibiting the making of alterations to a let dwelling-house where that term made it impossible or unreasonably difficult for a disabled person to enjoy the premises.

Nothing in section 13 required landlords or managers to make any alterations to the physical features of premises, and no duty to take steps under these provisions arose unless the landlord/manager was requested to do so by the tenant or prospective tenant. In addition, the

provisions did not apply to premises that were, or had at any time been, the principal or only home of the landlord or manager.

These provisions have been re-included in the *Equality Act 2010* (Part 13 sections 189 and 190).

2.2 Local authority landlords/freeholders

Section 2 of the 2005 Act inserted into Part 3 of the 1995 DDA a section that made it unlawful for public authorities to discriminate in the carrying out of any of their functions not already covered by the DDA. Public authorities are under a duty to make 'reasonable adjustments' where a function is carried out "and for a reason related to the disabled person's disability, the outcome of the carrying-out of the function is very much less favourable for him than it is or would be for others to whom the reason does or would not apply." There is no duty on landlords to make physical adjustments to let premises but councils may find that section 2 has a bearing on the way they conduct their landlord function in relation to disabled leaseholders and tenants.

The public sector equality duty is provided for in Part 11 of the *Equality Act 2010*.

2.3 Consent not to be unreasonably withheld

Section 16 of the 2005 Act, which applied to leases of residential property not already covered by the *Housing Acts* of 1980 and 1985[13] or the *Rent Act 1977,*[14] inserted a new Part 5B into the 1995 DDA. The aim of Part 5B was to ensure that where a lease entitles a tenant[15] to make improvements with a landlord's consent, landlords will not be able to unreasonably withhold consent if a tenant wants to make a disability-related alteration to residential premises. These duties are now contained in sections 189 and 190 of the *Equality Act 2010*.

At Third Reading in the Lords Baroness Hollis described the three things that section 16 (improvements to dwelling houses) was intended to do:

> First, we are ensuring that the right of a disabled tenant to make adaptations which the landlord may not unreasonably refuse is analogous to the rights that non-disabled tenants currently have. Secondly, we are extending those to the tenants of all landlords, not just socially rented housing and Rent Act tenants—in other words, to assured shorthold tenancies. Thirdly, we are bringing the Disability Rights Commission into play. At the moment, the DRC cannot provide help or guidance to tenants or landlords. We believe this is necessary.
>
> In future, the DRC will be able to provide a conciliation service in relation to disputes about disability-related improvements, whether they arise under new Section 49(g) or in any other context—for example, under existing housing and landlord tenant legislation. They will issue a code of practice. They will assist tenants in any legal proceedings where the issue is whether it was

[13] Secure council and housing association tenancies.
[14] Protected or statutory tenancies.
[15] This includes long leaseholders.

> unreasonable for a landlord to withhold consent to a tenant carrying out a disability-related improvement, or similar matters.[16]

[Note that the Disability Rights Commission was subsumed into the Equality and Human Rights Commission (EHRC)].

In deciding whether or not it is reasonable for a landlord to refuse a disabled adaptation, the Baroness said that the scale of the landlord's operation would be a relevant factor.[17]

Where a lease contains an absolute prohibition against alterations, a tenant who wishes to make a disability-related alteration still has to invoke the 'reasonable adjustment' duties in sections 189 and 190 of the *Equality Act 2010* to seek a change in the terms of the letting. Once this is achieved, they are then in a position to make the physical adaptations to the property.[18] Landlords may make conditions about improving the specification for works and reinstatement of the property.

Baroness Hollis also addressed the issue of what might be considered reasonable in relation to adaptations to rented premises:

> Finally, what counts as reasonableness? This is an objective and not a subjective test. What might be considered reasonable in relation to rented premises? What, for example, would happen if the landlord thought that an improvement might make it more difficult to rent out a property in future? That is the "minor niggle/major consideration" issue that we discussed before.
>
> That would be relevant when deciding the reasonableness of giving consent. But, of course, the landlord would have to be sure and be able to demonstrate that the improvement would genuinely make it more difficult to rent out the property again. Many improvements for disabled people—double-glazing, better lighting, central heating—might actually improve the property and the landlord would have absolutely no ground for refusing consent under those circumstances, I would guess.
>
> A landlord might make it a condition of giving his consent that the tenant has to reinstate the premises when he leaves and the landlord might ask for a security deposit to cover reinstatement costs. But we know that many people using disabled facilities grants to make alterations are elderly and on low incomes. If the tenant is unable to pay a reasonable deposit that the landlord requests, or is unable to provide realistic guarantees that the improvements will be reinstated, where it is legitimate for the landlord to believe that the property has become less attractive for the rental market, then it may not be unreasonable for the landlord to refuse his consent to the improvements. So the reinstatement issue becomes part of the test of reasonableness, which I believe applies across the employment area and the like.
>
> As I said earlier, the DRC will be preparing guidance in a statutory code of practice on reasonableness, which will have to be taken into account in court cases where relevant. The DRC is aware of that and will consult fully. The code will also have to be approved by the Secretary of State and laid before Parliament.[19]

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16 HL Deb 28 February 2005 c76
17 HL Deb 28 February 2005 c76
18 Ibid.
19 Ibid.

Section 49H of the 2005 Act provided for the Equality and Human Rights Commission (previously the DRC) to make arrangements to provide conciliation services in relation to a dispute of any description concerning the question of whether it is reasonable for a landlord to withhold his/her consent to the making of a relevant improvement to a dwelling house. This provision has been re-included in the *Equality Act 2010*.

3. Adaptations to common parts

3.1 The Review Group on Common Parts 2005

Disabled people can experience particular difficulties in securing a landlord's consent to carrying out adaptations in the communal areas of blocks of flats, such as stairways. This issue attracted a lot of attention as the 2005 DDA progressed through Parliament. On Report in the House of Lords Baroness Hollis explained how the then Government intended to take this issue forward:

> … However, I am equally persuaded that we cannot just bank our responsibilities, walk away from it, say that it is complicated and hope that somehow something will happen. As a result, since our last discussions in Committee, we are taking it forward. The DRC has already been invited and has agreed to be a member of a review group. The group's chairman has already been appointed. A senior civil servant from the DWP, who is here today listening to this debate, will head that working party to see how to progress this. Referring to the question asked by the noble Lord, Lord Oakeshott, it will involve members from the Office of the Deputy Prime Minister, the Department for Constitutional Affairs, and the Department for Health. I will see whether we should include the Department for Education. Members from the Scottish Executive have already been appointed also.
>
> The group will investigate the need and evidence for change; for example, the number of disabled people affected by inaccessible common parts, the effect on their lives and the nature of alterations needed. It will identify options for change, assess the regulatory costs and benefits of the options identified, and engage with the tangle of hugely complex legal issues surrounding land law. We expect the chairman to report no later than the end of the year with specific recommendations for resolving those issues. If primary legislation is recommended, that report will include recommendations as to possible legislative vehicles.[20]

Anne McGuire, then Minister for Disabled People, reported on the outcome of the review group in a written statement on 1 February 2006:

> The Review Group on Common Parts was set up, during the passage of the Disability Discrimination Bill, which gained Royal Assent in April 2005, because of concerns expressed by Members of the other place that some disabled people could become confined to their homes if the common parts of the premises could not be adapted to meet their needs.
>
> The Review Group was asked to investigate the need and evidence for change in relation to alterations to the common parts of let residential premises and to make recommendations to the Minister for Disabled People (Anne McGuire) and the Minister for Housing and Planning (Yvette Cooper).
>
> The Review Group has considered a wide range of evidence including: a review of landlord and tenant and housing legislation,

[20] HL Deb 3 February 2005 cc442-3

> information on the experience of disabled people, research concerning the attitudes of tenants, lessees and landlords to adjustments to common parts and a range of surveys and statistical reports.
>
> It has come to the conclusion that while there is evidence of good practice by some landlords, there is also evidence of unmet need for adjustments to common parts to assist disabled people. Therefore, it has concluded that a problem does exist and has made a series of detailed recommendations in its report, entitled "A review of the current position in relation to adjustments to the common parts of let residential premises, and recommendation for change", 23 December 2005. The Government are now considering the detail of the report and its recommendations. The report has been placed in the Library.[21]

The report: A review of the current position in relation to adjustments to the common parts of let residential premises, and recommendation for change, was published in December 2005. The Review Group made seventeen recommendations:

Recommendation 1: That the Government should significantly increase Disabled Facilities Grant funding.

Recommendation 2: That the Government should provide guidance on the making of adjustments to physical features of common parts.

Recommendation 3: That the Government should investigate whether it can stimulate the use of Alternative Dispute Resolution in common parts disputes.

Recommendation 4: That through public consultation the Government should establish whether new primary legislation is required and seek views on our specific proposals.

Recommendation 5: That the Government should develop (and consult on) legislation for England and Wales which would ensure that when requested by a lessee to make a disability-related adjustment to the common parts of let residential premises, the landlord would be under a duty to make the adjustment where that is reasonable.

Recommendation 6: That when it consults on the proposed new duty the Government should, in particular, seek views on whether the proposal achieves the right balance and provides suitable protection for the landlord, the disabled person and any other affected lessees or other persons with an interest (for example a superior landlord, where the landlord is himself a lessee).

Recommendation 7: That when it consults on our proposed new duty, the Government should seek views on whether any sectors or tenures need to be treated differently.

Recommendation 8: That the Government should consider what rights of redress for the new duty would be suitable, and which would be the most appropriate forum for hearing disputes.

Recommendation 9: That the Disability Rights Commission's powers to provide a conciliation service should be extended to include disputes

[21] HC Deb 1 February 2006 WS17

about the new duty; and that the Government should consider whether the remit of any of the existing statutory Alternative Dispute Resolution mechanisms (e.g. the Independent Housing Ombudsman) should be extended.

Recommendation 10: That the Scottish Executive should be invited to apply the concepts of our proposed new duty to the position in Scotland with a view to considering any legislative changes that might be necessary to ensure broad equivalence across Great Britain.

Recommendation 11: That the Government should consider when developing our proposal whether any resulting legislation should also require the making of access improvements to the common parts when refurbishments are undertaken.

Recommendation 12: That when the Code for Sustainable Buildings is revised (following consultation),the Government should ensure that suitable references are made to improving the accessibility of common parts of premises in new builds and when undertaking refurbishments.

Recommendation 13: That the Government should investigate whether guidance or instructions on improving the accessibility of common parts in new builds could be given on a regional basis e.g. by the Regional Housing Boards.

Recommendation 14: That the Government should consider whether there should be an exemption from the proposed duty for small premises and seek views on it when consulting on the new duty.

Recommendation 15: That the Government should consult on the principles which should apply to determining the ownership of any disability-related adjustments to the common parts.

Recommendation 16: That the costs of maintenance for an adjustment should fall on the landlord and so be capable of being passed by the landlord to all lessees. But that where maintenance costs are high, the landlord should be able to pass on to the lessee who requested the adjustment all the maintenance costs.

Recommendation 17: That the Government should develop a model contract which would record the terms of any agreement between the landlord and lessee.

Anne McGuire issued an initial response to the report on 13 July 2006 in which she addressed the five non-legislative recommendations; namely, 1, 2, 3, 12 and 13. She announced increased funding for Disabled Facilities Grants[22] and advised that as part of the review of these grants consideration was being given to an increased role for regional housing boards in the provision of accessible housing and adaptations. She said that guidance would be prepared on making alterations to common parts which would include reference to alternative dispute resolution procedures. She also said that consideration would be given to including guidance in the code for

[22] For more information see Library briefing paper 3011. DFG funding is now part of the Better Care Fund.

sustainable homes (England) on the accessibility of common parts of premises for new build properties.[23]

On the recommendations with legislative implications she said:

> We are continuing to consider the complexities of the legislative recommendations including with the devolved administrations and will issue a further response as that work develops.[24]

In June 2007 DCLG published the Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain. Chapter 13 of this consultation paper set out proposals to improve access to, and use of, premises for disabled people, including access to common parts of dwellings:

> Subject to the views expressed in response to this consultation, we propose that:
>
> Where a disabled person finds it impossible or unreasonably difficult to use the common parts of their let residential premises, the landlord should be under a duty to make a disability-related alteration to the common parts, where reasonable, and at the disabled person's expense (including any reasonable maintenance costs).[25]

The consultation period closed on 4 September 2007. In June 2008 the then Government published Framework for a Fairer Future – The Equality Bill in which it said that a detailed paper on the content of the Equality Bill, including the Government's response to consultation on Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, would be published "shortly."[26]

3.2 The Equality Act 2010

Part 4 of this Act replaced provisions in the 1995 DDA (as amended) which made it unlawful to discriminate against, harass or victimise a person when disposing of (for example, by selling or letting) or managing premises.

Part 13 replaced provisions in the 1995 DDA (which apply only in England and Wales) to enable certain disabled tenants or occupiers of rented residential premises to seek consent to make a disability-related improvement to their homes where the lease requires the landlord's consent before such alterations can be made (see section 2.3 of this paper).

Section 36 replaced some existing provisions in the 1995 DDA in relation to reasonable adjustments to premises. Section 36, together with Schedule 4 to the Act, also provided for a new requirement for disability-related alterations to the physical features of the common parts of let residential premises, or premises owned on a commonhold basis. However, these provisions have never been brought into force (section 36 (1)(d), (5) and (6)). The Coalition Government said it was reviewing the Equality Act as part of its Red Tape Challenge initiative

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23 HC Deb 13 July 2006 cc79-80WS
24 Ibid.
25 Paragraph 13.2, p158
26 Cm 7431, chapter 6

with a view to identifying any improvements in the light of, amongst other things, potential burdens on business. Evidence submitted to the House of Lords Select Committee on the Equality Act 2010 and Disability by the 2015 Government said:

> On section 36 the previous Government delayed implementation of the provision until Scottish Government experience in implementing section 37 (adjustment to common parts in Scotland) was available.[27]

Section 37 is in force in Scotland but has no effect as Regulations have not been made to put it into practice.

If brought into force these provisions would enable disabled people to request disability related alterations to physical features in common areas. They set out a process to be followed by the person responsible for the common parts (who is either a landlord or, in the case of commonhold land, the commonhold association) if a disabled tenant or someone on their behalf requests an adjustment (i.e. it is not an anticipatory duty). The process includes a consultation exercise with others affected (e.g. other residents) which must be carried out within a reasonable period of the request being made. If the responsible person decides to make an adjustment to avoid disadvantage to a disabled person, a written agreement must be entered into between them setting out their rights and responsibilities.

Schedule 4 would make it unlawful for a controller or responsible person to victimise a disabled tenant because costs had been incurred in making/approving a reasonable adjustment. Where an adjustment involved the common parts of dwellings the landlord would be able to charge the tenant for the cost of the alteration. The explanatory notes to the Act provide the following example:

> A landlord is asked by a disabled tenant to install a ramp to give her easier access to the communal entrance door. The landlord must consult all people he thinks would be affected by the ramp and, if he believes that it is reasonable to provide it, he must enter into a written agreement with the disabled person setting out matters such as responsibility for payment for the ramp. The landlord can insist the tenant pays for the cost of making the alteration.[28]

The Impact Assessment on the Act (Annex H) estimated that there would be increased demand for Disabled Facilities Grants to carry out adjustments to commons parts resulting in around 8,000 being paid at a cost of up to £27m. It was expected, by reducing the number of disabled people who are "prisoners in their own homes" that annual home care savings of around £15m would accrue to local authorities, while a reduction in the number of people entering residential care was estimated as resulting in potential savings of up to £25m:

> Adjustments to Common Parts - Assumes half (50%) of those with inaccessible common parts will be aware of the legislation (29,000); assumes half of those who request changes to common parts will request Government Funding (around 14,000); and

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27 HL Paper 117, 24 March 2016, para 237 ((EQD0121)

28 Explanatory notes para 773

assumes 40% of applications would not proceed so 8,000 grants paid.

Home Care Savings - Assumes that of the total number of disabled people making adjustments to their common parts and also receiving Council funded home care (20% of 29,000) half of those will no longer require home care.

Residential Care Savings - Assumes a reduction in the number of people entering residential care of between 1 and 5%.[29]

The EHRC has published guidance on the implications of the 2010 Act for service users. Your rights to equality from businesses providing goods, facilities or services to the public. Information on adaptations to let premises can be found on pages 28-30.

3.3 Williams v Richmond Court (Swansea) Ltd 2006

This case is informative in terms of challenging landlords who refuse consent to adaptations in communal areas.

The case concerned a long lessee, Mrs Williams, who lived on the third floor of a block of flats. She experienced mobility problems and needed a stair-lift in the communal area. Her landlords refused installation of the lift despite the fact that they would have incurred no expense. Mrs Williams claimed that the refusal of consent amounted to discrimination. The defendants contended that they had done nothing to interfere with her right to use the stairs and had done nothing to her detriment. They said they had merely failed to confer a benefit which was not covenanted in her lease, and that the problem was caused by nature rather than any action on their part.

Mrs Williams issued proceedings. The defendants applied for summary judgement. District Judge Evans refused the application and determined a preliminary issue, namely, whether the defendants' refusal of consent to the installation at the claimants' expense constituted discrimination within section 22(3) of the 1995 DDA (as amended) – he found in favour of Mrs Williams. A circuit judge dismissed the defendants' appeal.

The Court of Appeal allowed the defendants' second appeal. The sole issue concerned whether the defendants had discriminated against Mrs Williams as a disabled person. None of the reasons for refusing consent (other tenants voting against it, aesthetics, cost of repair and inconvenience to residents as a whole) related to her disability.

The Court of Appeal held that the District Judge had failed to carry out a two-stage test: first, to identify the relevant act or omission on the part of the defendants; and second, to identify the relevant act or omission, if any, towards relevant comparators. It was held that the defendants had not treated the claimant less favourably than they had treated or would have treated anyone else within the meaning of

[29] Impact Assessment on the 2010 Act, Annex H

section 24(1) of the 1995 DDA. Thus the Court of Appeal granted summary judgement to the defendants.[30]

3.4 Committee on the Equality Act 2010 and Disability (2016)

The House of Lords Select Committee on the Equality Act 2010 and Disability investigated the Act's impact on disabled people over 2015-16 and concluded "that the Government is failing in its duty of care to disabled people."[31] The Committee received submissions from a number of organisations who were critical of the failure to commence section 36 and Schedule 4 to the 2010 Act:

> The failure to commence these provisions was criticised by the Equality and Human Rights Commission, the Discrimination Law Association, the Disability Law Service, University of Leeds, Disability Rights UK, and the Law Centres Network.[32]

The Committee dismissed the Government's argument that implementation should be delayed pending the impact of provisions in Scotland:

> Even if Scottish Regulations were made, the duties imposed would be different: section 36 would impose in England a duty on landlords to make reasonable adjustments, while section 37 in Scotland would entitle both a disabled owner and a disabled tenant to make 'relevant' adjustments (to be defined in Regulations), but would not impose a duty on anyone. Further, as Justin Bates points out:
>
> "Scotland is not that helpful to look at: one, they do not have leasehold land in the way that England and Wales do, so the underlying legal structure will not be the same; two, the draft regulations … come at it from a slightly different perspective as to whose consent you would need and how it would work, primarily because they do not have leasehold land. You will not be able to transpose the Scottish experience to the English one anyway, so it does not work as a reason not to do this."[33]

The Committee was also unconvinced by arguments about the potential cost and "red tape" linked with implementation "especially given that the cost of any adjustment would fall to the leaseholder or tenant and not the landlord."[34] The 2015 Government told the Committee that the Government Equalities Office would review the question of the commencement of the common parts provisions.[35] The Committee saw no basis for a further review:

> We do not understand why yet another review is needed of the commencement of the provisions dealing with alterations to common parts. There is no justification for further delay. They must be brought into force forthwith.[36]

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30 *[2006] EWCA Civ 1719*, 14 December 2006 (Legal Action, February 2007 p30)
31 Lords Committee on the Equality Act 2010 and Disability, March 2016
32 HL Paper 117, 24 March 2016, para 236
33 Ibid., para 240
34 Ibid., para 241
35 Ibid., para 243
36 Ibid., para 244

The Government response to the Committee's report was published in July 2016. On the commencement of section 36, the 2015 Government said:

> The Government acknowledges the Committee's frustration on this point and as a general point we certainly agree that landlords should seek to co-operate with reasonable requests by disabled tenants to make adjustments to hallways, foyers etc. The Government is concerned that the consequences of implementing the remainder of section 36, and any supplementary regulations are unclear. The Coalition Government delayed commencement of the common parts provision pending Scottish Government experience with implementing the parallel devolved provision in section 37, but in the event the Scottish Government have not yet done that, so this has not provided any lessons for roll-out of the provision in England and Wales. Although requests for reasonable adjustments to common parts are in the first instance matters between disabled tenants and their landlords, these have implications for wider Government policy on the provision and funding of care for disabled people, as funding to support such changes is a charge on the Department of Health-administered Better Care Fund (BCF) which supports local authority health and social care services. The review of section 36 therefore needs to take account of the impact on private landlords, any consequences for landlords' willingness to let premises to disabled tenants, and the implications of additional calls on the BCF for the existing but very different types of support which that Fund currently provides such as health care, dementia services and housing support for older people. The Government will inform the Women and Equalities Select Committee once the review is complete and a decision on commencement of the provision is reached.[37]

The Committee's report was debated on 6 September 2016. Baroness Williams of Trafford gave the Government's response to calls to bring section 36 into force:

> We are conscious that a small number of those sections of the Act that have not been commenced are of particular relevance to disabled people. Accordingly, we are currently reviewing the position on Section 36—even though the noble Baroness might sigh at that response. The duty to make reasonable adjustments to common parts, as our response to the committee makes clear, is a complex issue, but the Government hope to conclude the review by the end of this year, and I am sure I will be taken to task if that does not happen. We will of course report our decision to the Women and Equalities Committee.[38]

Government announces section 36 will be brought into force

The Women and Equalities Committee published a report on Building for Equality: Disability and the Built Environment on 25 April 2017. The Government's response was published on 15 March 2018, in it the Government announced that section 36 and Schedule 4 would be brought into force:

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37 Cm 9283, July 2016, pp16-17
38 HL Deb 6 September 2016 c1010

> The Government Equalities Office, Ministry of Housing, Communities and Local Government and the Department of Health and Social Care have been closely engaged on this review. In light of this work, Government intends to commence Section 36, subject to Parliamentary passage of any regulations, should these prove necessary. Further work on identifying and assessing any additional burdens on local authorities is first required, after which an announcement on timing of the commencement will be made.[39]

3.5 Equality and Human Rights Commission inquiry 2016-17

In December 2016 the EHRC launched an inquiry into housing for disabled people. The inquiry is looking at "whether the availability of accessible and adaptable housing, and the support services around it, is fulfilling disabled people's rights to live independently."[40] The inquiry covers England, Scotland and Wales. The call for evidence closed on 17 May 2017. The inquiry is expected to report its findings in "early 2018".[41]

39 Ministry of Housing, Communities and Local Government, Disability and the built environment: government response to select committee report, 15 March 2018
40 EHRC, Inquiry into housing for disabled people [accessed 6 June 2017]
41 Inquiry into housing for disabled people, [accessed 19 March 2018]

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